

(2008) 02 GUJ CK 0085

In the Gujarat High Court

Case No : Civil Application For Orders No. 15422 of 2007 in Special Civil
Application No. 3797 of 2006

Bipin V. Patel

APPELLANT

Vs

Parry Engineering and Export Ltd.

RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Constitution of India, 1950 — Article 136, 14, 226
Industrial Disputes Act, 1947 — Section 16B, 17B, 2, 33A
Industrial Employment (Standing Orders) Act, 1946 — Section 10A

Citation : (2008) 2 GLR 973

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : N.R. Shahani, for the Appellant; Kiran C. Raval, for Respondent 1,
for the Respondent

Final Decision : Allowed

Judgement

H.K. Rathod, J.—Heard learned advocate Mr. N.R. Shahani appearing on behalf of applicant "workman and learned advocate Mr. Kiran C. Raval appearing on behalf of opponent" employer.

2. In main Special Civil Application, the petitioner has challenged the order passed by Labour Court, Bharuch in Complaint No. 1 of 2004 dated 31st December 2005, wherein, Labour Court, Bharuch has granted reinstatement while setting aside the transfer order at Palej to the applicant within a period of 30 days from the date of receiving the copy of the award. This reinstatement order, initially, granted by this Court in favour of applicant by order dated 1st May 2006 which is quoted as under:

1. Heard the learned advocate Mr. K.C. Raval on behalf of petitioner and learned advocate Mr. Shahani appearing on behalf of the respondent.

2. In the present petition, petitioner challenged the award passed by the Labour

Court No. 1, Bharuch in Complaint No. 1 of 2004 dated 31.12.2005. The Labour Court has set aside the transfer order dated 7.1.2004 issued by the petitioner against the respondent transferring him from Palej Factory to Delhi Warehouse. The respondent workman has initially in Complaint No. 1 of 2004 filed interim relief application praying the stay against the transfer order dated 7.1.2004. That interim relief application was rejected by the Labour Court. The respondent workman has challenged the interim order of Labour Court rejecting the interim application in Special Civil Application No. 9044 of 2004. This Court issued rule and granted interim relief in terms of paragraph 11(E). That interim order challenged by the petitioner before Letters Patent Appeal Bench which has dismissed by the Letters Patent Appeal Bench filed by the petitioner. Against which, petitioner approached to the Hon"ble Supreme Court by filing SLP which has been also dismissed while observing that it is at interim stage and main disputes should have to be decided within a period of three months. Accordingly, ultimately, Labour Court, Bharuch has decided the complaint No. 1 of 2004 u/s 33A on 31.12.2005.

3. I have heard both the learned advocates for the respective parties. I have considered the submissions made by both the learned advocates. The decision of the Labour Court based on various factors which requires detail hearing.

4. Therefore, Rule. Learned advocate Mr. Shahani waives service of notice of rule on behalf of the respondent.

5. Looking to a transfer of respondent from Palej Factory to Delhi Warehouse, being a Class-III worker is involved in this petition. Therefore, workman who has not reported at the transfer place and challenged the transfer order means he must remain without wages of interim period and suffered hardship in interim period.

6. Therefore, after considering the reasoning given by the Labour Court, Bharuch and hardship which faced by respondent, the order dated 31st December 2005 passed by the Labour Court in Complaint No. 1 of 2004 is stayed on condition that petitioner shall have to reinstate the respondent workman in his original post at Palej Factory within a period of 15 days from today. If this condition is not complied by the petitioner then interim stay granted by this Court will stand automatically cancelled. This interim order has been passed by this Court subject to final out come of this petition. The said interim order is passed without prejudice the rights and contentions of both the parties.

3. Thereafter, applicant was allowed to work at Palej for a period of about one and half month. In between, order dated 1st May 2006 challenged by original petitioner before Letters Patent Appeal Bench, wherein, the Letters Patent Appeal was dismissed, against which, petitioner approached the Apex Court and Apex Court has stayed the order passed by this Court on 1st May 2006 by order dated 8th October 2007 while issuing notice to workman. Ultimately, the Apex Court has remanded the matter back to this Court by order dated 8th October 2007

which is quoted as under:

This SLP is directed against an order dated 14th of June, 2006 passed by the Division Bench of the High Court of Gujarat at Ahmedabad in LPA No. 841 of 2006 affirming the order dated 1st of May, 2006 passed by a learned Single Judge of the High Court in Civil Application No. 3797 of 2006. The High Court by the order dated 1st of May, 2006 had stayed an order dated 31st December, 2005 passed by the Labour Court on condition that the petitioner shall have to reinstate the respondent workman in his original post at Palej Factory within a period of 15 days from that date and if this condition was not complied with by the petitioner, the interim stay granted by this Court will stand automatically cancelled. An appeal against this interim order was filed which was dismissed by the Division Bench on a finding that the Letters Patent Appeal was not maintainable. In fact by the order of the Madras High Court, the order of transfer of the respondent from Gujarat to Delhi was stayed. It is not in dispute that the respondent has been working under the petitioner as a Class III employee. Since this SLP has been filed against the interim order, we do not find any ground at this stage to interfere with the same. The SLP is therefore dismissed. We, however, request the High Court to decide and dispose of the writ petition within a period of three months from the date of supply of a copy of this order to the High Court without granting any unnecessary adjournment to either of the parties. In the Special Leave Petition, notice was issued by this Court on 7th of August, 2006 by which Para 6 of the order dated 1st May, 2006 passed by the High Court was stayed. We, therefore, make it clear that the interim order granted by this Court shall continue till the disposal of the writ petition.

Subject to the above observations, SLP stands rejected. There will be no order as to costs.

4. The SLP filed by petitioner company is dismissed and Apex Court has directed this Court to decide and disposed of the writ petition within a period of three months from the date of receiving the copy of the order to the High Court without granting any unnecessary adjournment to either of the parties. Ultimately, Apex Court has continued the interim order granted earlier till the disposal of the writ petition.

5. Thereafter, present Civil Application is filed by applicant claiming the benefits u/s 17B of the Industrial Disputes Act, 1947. The following averments are made by applicant by filing the separate affidavit which is at Page 23. The same is quoted as under:

The applicant original respondent workman, do hereby take oath and state on solemn affirmation as under:

1. I say that I am not employed, in any establishment, for any remuneration after the date of order/judgment of Labour Court in my favour which was passed on 31/12/2005. I am not receiving any income, at all. I am staying at Koliyad village, 5 kilometers from Palej Factory of respondent and was coming to work on

cycle. I am staying with my father and he supporting me and I am also not married, therefore, there is no family.

2. I have already stated this in Para 5 at Page 5 of the Civil Application and I am filing this affidavit to meet the objection raised by employer. In Para 8 (which is on Page 21) of the paper book of this Civil Application.

6. Against that, affidavit-in-reply is filed by respondent" original petitioner, where, Para 3 and Para 4 are quoted as under:

3. As regards paragraph 1 of the affidavit under reply, I say and submit that while it is true that the applicant is not employed in any establishment, it is not true that he is not receiving any income. As a matter of fact, the applicant possesses fertile agricultural land in excess of 10 vighas wherein he is taking the crops of sugarcane and cotton and is deriving more than Rs. 1,00,000/- per annum from the agricultural produce. As a matter of fact, this probably is the reason for the applicant not to leave his village and report for duties at the place of his transfer. In any case, through hired man-power, the applicant is occupied in faring and is supporting himself and his parents.

4. It is further respectfully submitted that Section 17B would come in play only if there is termination of service by the employer and the award of reinstatement has been passed by the Labour Court. In the present case, the applicant was very much offered employment with the opponent company only and he has voluntarily relinquished his right to employment by not obeying the lawful order of transfer which was passed in accordance with the terms and conditions contained in his appointment order. The proceedings were initiated by the applicant before the Labour Court at Bharuch by way of complaint u/s 33A of the Industrial Disputes Act, 1947. The learned Labour Court has quashed the order of transfer which is under challenge in the main petition. In this view of the matter, since the applicant was offered employment in the industrial establishment of the opponent which he has accepted. It is now not open to the applicant to make any grievance about his forced unemployment. The legal effect of the quashing of the order of transfer would be to the effect that the applicant would continue his posting at Palej Factory. However, while this Hon"ble Court passed a direction to that effect the Hon"ble Supreme Court has stayed the said direction. In this view of the matter also, Section 17B wages are legally not payable to the applicant.

7. According to petitioner, the workman possesses fertile agricultural land about ten vighas and he is getting annual income and also upto some extent, merits have been mentioned in Para 4.

8. Learned advocate Mr. K.C. Raval has raised legal contention against the application filed by applicant workman. These legal contentions are quoted as under:

3. It is respectfully submitted that Section 17B benefit of the Industrial Disputes

Act is claimed by the applicant @ Rs. 3260/- per month w.e.f. 31-12-2005. The applicant has also prayed that the date of final hearing may be fixed within 10 days after compliance of the above prayer of Section 17B benefit. It is pertinent to point out here that this Hon''ble Court had passed order dated 1-5-2006 in Special Civil Application No. 3797 of 2006. Paragraph 6 of the aforesaid order is as follows:

Therefore, after considering the reasoning given by the Labour Court, Bharuch and hardship which faced by respondent, the order dated 31st December 2005 passed by the Labour Court in Complaint No. 1 of 2004 is stayed on condition that petitioner shall have to reinstate the respondent workman in his original post at Palej Factory within a period of 15 days from today. If this condition is not complied by the petitioner then interim stay granted by this Court will stand automatically cancelled. This interim order has been passed by this Court subject to final outcome of this petition. The said interim order is passed without prejudice the rights and contentions of both the parties.

4. Being aggrieved by the aforesaid order of this Hon''ble Court, the opponent had filed LPA No. 841 of 2006 and upon dismissal of the same, the opponent has filed Special Leave to Appeal (Civil) No. 12408 of 2006. The Hon''ble Supreme Court while ordering issuance of notice on 7-8-2006 had stayed the condition imposed by this Hon''ble Court in paragraph 6 of the impugned judgment. It is pertinent to point out here that the applicant never claimed Section 17B benefit when the matter was pending before the Hon''ble Supreme Court even up to the time of final disposal of the SLP on 8-10-2007. The Hon''ble Supreme Court by the order dated 8.10.2007 has directed this Hon''ble Court to finally hear Special Civil Application No. 3797 of 2006 within a period of 3 months. The Hon''ble Supreme Court also continued the stay of paragraph 6 of the impugned order of this Hon''ble Court till the disposal of the writ petition. The order does not speak of stay of reinstatement of the applicant subject to compliance of Section 17B of the Industrial Disputes Act, 1947. Now that the entire matter is to be finally heard and decided within a short period of 3 months, the present civil application is absolutely unwarranted and hence the same deserves to be dismissed or rejected on this ground alone.

5. It is respectfully submitted that this Hon''ble Court in a matter reported in 2003 (3) GLH 189 has taken the following view in paragraph 8 of the judgment:

There is no doubt that the legislature has placed the provisions of Section 17B on the statute book with a definite purpose and those provision are to be followed to achieve that object when the circumstances of the case so warrant. But then, this Court is required to consider as to in the facts and circumstances of the present case any order u/s 17B is warranted at this stge, i.e. when the Court is taking up final hearing of the case. In the humble opinion of this Court, the answer is "no". The reason is simple. The object of Section 17B gathered from any interpretation of the provision is only to see that the employer does not deprive a workman of the fruits of an order of reinstatement, which is ordered

after a full-fledged adjudication, by filing an appeal and by obtaining an injunction. This provision is placed on the statute book because of an unhappy situation prevailing in the courts that the appeals take longer time to get heard and disposed of. The provision can never be pressed into service when the Courts is able to take up final hearing on the matter, more so, in the facts of this case. It may be reiterated even at the cost of repetition that after the awards were passed on 13-7-2001, the workman have not taken any steps to enforce their rights. In February 2003, the matters are admitted by this Court for examining the legality and validity of the judgment and award and taking into consideration the facts of the case, the court made (Rule returnable on 20th March 2003). At this stage, Civil Application are filed praying for direction to comply Section 17B and though the Court is taking up final hearing of the matters, it is insisted that first the orders be passed in the Civil Application, which is not warranted.-

Since the facts of the present case are more or less similar to the one, the ratio of the aforesaid judgment will squarely apply to the present case and therefore also the present civil application is liable to be dismissed.

6. It is further respectfully submitted that the applicant was never dismissed from service but by way of complaint u/s 33A of the Industrial Disputes Act, 1947, he has challenged his transfer and had thereby opted for unemployment rather than gainful employment at the establishment where he was transferred. Paying any benefit even before determination about the correctness of the allegations of the applicant which would render the order of transfer unjustified and unlawful, will certainly amount to paying a premium to an erring employee who has not obeyed the lawful order of his employer. The present application is liable to be dismissed on this ground also.

7. It is further respectfully submitted that the Hon''ble Supreme Court has not made any mention of payment of 17-B wages to the applicant and any direction of the same may be construed as a modification by this Hon''ble Court of the order of the Hon''ble Supreme Court which will neither be prudent nor proper. In this view of the matter also the present civil application is liable to be rejected.

8. It is further respectfully submitted that the applicant has not filed an affidavit of unemployment as contemplated by Section 17B. Even if such an affidavit is filed the opponent will certainly have the rights to verify the contents thereof and controvert the same in due course. The final hearing of Special Civil Application No. 3797 of 2006 cannot be permitted to be stalled on such ground when the specific direction of the Hon''ble Supreme Court is to undertake the final hearing and decide the same within 3 months without granting any unnecessary adjournment to either of the parties. The prayer 7 (B) cannot be granted on this ground alone.

9. Learned advocate Mr. K.C. Raval raising the contentions in light of the averments made in the reply that main matter is to be decided first, then, the whole controversy between the parties comes to an end and there is no question

of granting benefit of Section 17B of the Industrial Disputes Act, 1947. He also submitted that before the Apex Court, matter was pending, but, no claim is made before the Apex Court by the workman u/s 17B of the Industrial Disputes Act, 1947. Therefore, according to him, workman is not entitled the benefit of Section 17B of the Industrial Disputes Act, 1947.

10. I have considered the submissions made by both the learned advocates appearing on behalf of respective parties and I have also perused the averments made in application, individual affidavit of the workman and two replies are filed by petitioner company. I have failed to understand the challenge made by company without any substance. The pendency remained with this Court and trial Court almost cases relate to ego and dependent upon vindictive nature of the concerned person. A small issue has been highlighted just to deny a legal right to the person, for which, he is, otherwise, entitled to it. Such type of approach is seen by this Court from petitioner. A small matter went up to Apex Court remained pending, then, again, come back to this Court with a direction to disposed of within three months. The stay granted by Apex Court is still remained continue till the matter is finally decided by this Court which stay remains continue against the relief of reinstatement granted by Labour Court, Bharuch and directed by this Court on 1st May 2006. In guise of early hearing, such benefit cannot be denied to workman. It is very easy to argue or make submission to decide the main matter as early as possible, but, it is very difficult for this Court to take up the matter finally, which are of the year of 2007 or 2006, when number of old matters are in queue which are relating to dismissal, discharge, termination and retiral benefits. However, because of direction given by Apex Court, main matter is fixed for final hearing in the month of April 2008. After receiving the order from Apex Court, applicant has filed application u/s 17B, therefore, there is delay in deciding the matter finally. The mandate of Section 17B suggests that benefit of Section 17B can be denied to the workman by the employer if employer is having a sufficient proof that workman is employed in any establishment and receiving adequate remuneration, then, this Court can deny the benefit of Section 17B of the Industrial Disputes Act, 1947. Otherwise, this Court has no jurisdiction to deny the benefit which is otherwise legally available to the workman concerned. The averments made in this affidavit by petitioner about the agricultural land and having income from the land cannot consider to be a gainful employment as this Court has considered the question of gainful employment in case of University Granth Nirman Board v. Udesinh Togaji Solanki reported in 2003 (1) GLH 626. This decision is approved by Division Bench of this Court (Coram : R.K. Abichandani and D.H. Waghela, JJ.) in case of Bhanalal Khimjibhai Solanki v. Deputy Executive Engineer reported in (2005) 8 GHJ 41 and thereafter, approved by another Division Bench of this Court (Coram : R.S. Garg and Ravi R. Tripathi, JJ.) in case of Cyanides and Chemicals Company Vs. Mansingh Mangalram Varma, and this Court has made it clear that so far relating to the section or meaning of Section 17B, the benefit cannot be denied, unless, the employment of the workman in any establishment and

receiving adequate remuneration from the establishment is proved. The present petitioner company has not placed on record any evidence to that effect that workman is employed in any establishment and receiving adequate remuneration from establishment.

11. This Court (Coram : H.K. Rathod, J.) has, very recently, in brief, on 4th February 2007, considered the question of benefit of Section 17B of the Industrial Disputes Act, 1947 in case of Chemical Mazdoor Panchayat v. Krishak Bharti Co-Operative Ltd. and Ors. In Civil Application No. 11809 of 2007 in Special Civil Application No. 13590 of 2007. Therefore, the relevant observations are quoted as under:

12. I have considered the submissions made by both the learned advocates appearing on behalf of respective parties and I have also perused the award passed by Industrial Tribunal, Surat. The Industrial Tribunal has directed the reinstatement of the concerned workmen, for that, there is no dispute between the parties. Whether Tribunal has jurisdiction to issue such direction or not and whether such kind of award is nullity or not is to be the question which can be examined by the Court at the time of final hearing. The benefit of Section 17B being a statutory mandate must have to be paid to the workmen if condition incorporated in Section 17B is satisfied by the workmen. This question has been examined in detail by Apex Court in case of Dena Bank v. Kiritkumar T. Patel reported in 1997(2) GLH 946 : AIR 1998 SC 511. Thereafter, the Apex Court has also been examined the same question in case of Regional Authority, Dena Bank and Anr. v. Ghanshyam reported in 2001 AIR SCW 2150.

13. These aforesaid two decisions are on the subject where Apex Court has considered the object of Section 17B of the Industrial Disputes Act, 1947 and also considered that being a statutory mandate, High Court cannot deny the benefit to the concerned employee if condition is satisfied by the workman.

14. Relevant observations as regards the object of Section 17B of the Industrial Disputes Act, 1947 made by the Apex Court in para 22 of the aforesaid decision are reproduced as under:

As indicated earlier, Section 17B has been enacted by Parliament with a view to give relief to a workman who has been ordered to be reinstated under the award of a Labour Court or the Industrial Tribunal during the pendency of proceedings in which the said award is under challenge before the High Court or the Supreme Court. The object underlying the provision is to relieve to a certain extent the hardship that is caused to the workman due to delay in the implementation of the award. The payment which is required to be made by the employer to the workman is in the nature of subsistence allowance which would not be refundable or recoverable from the workman even if the award is set aside by the High Court or this Court. Since the payment is of such a character, the Parliament thought it proper to limit to the extent of the wages which were drawn by the workman when he was in service and when his services were

terminated and, therefore, used the words "full wages last drawn". To read words to mean wages which would have been drawn by the workman if he had continued in service if the order terminating his services had not passed since it has been set aside by the award of the Labour Court or Industrial Tribunal would result in so enlarging the benefit as to comprehend the relief that has been granted under the award is not refundable or recoverable in the event of the award being set aside it would result in the employer being required to give effect to the award during the pendency of the proceedings challenging the award before the High Court or the Supreme Court without his being able to recover the said amount in the event of the award being set aside. We are unable to construe the provisions contained in Section 17B to cast such a burden on the employer. In our opinion, therefore, the words "full wages last drawn" must be given their plain and material meaning and they cannot be given the extended meaning as given by the Karnataka High Court in Vishveswaraya Iron and Steel Ltd. (supra) or the Bombay High Court in Carona Sahu Co. Ltd. (supra).

15. In para 24 of the judgment, the Hon'ble apex court has also observed as under:

As regards the powers of the High Court and the Supreme Court under Articles 226 and 136 of the Constitution, it may be stated that Section 17-B, by conferring a right on the workman to be paid the amount of full wages last drawn by him during the pendency of the proceedings involving challenge to the award of the Labour Court, Industrial Tribunal or National Tribunal in the High Court or the Supreme Court which amounts is not refundable or recoverable in the event of the award being set aside, does not in any way preclude the High Court or the Supreme Court to pass order directing payment of a higher amount to the workman if such higher amount is considered necessary in the interest of justice. Such a direction would be dehors the provisions contained in Section 17B and while giving the direction the Court may also give the direction regarding refund or recovery of the excess amount in the event of the award being set aside. But we are unable to agree with the view of the Bombay High Court in Elpro International Ltd. (supra) that in exercise of the power under Articles 226 and 136 of the Constitution an order can be passed denying the workman the benefit granted u/s 17B. The conferment of such a right u/s 17B cannot be regarded as a restriction on the powers of the High Court or the Supreme Court under Articles 226 and 136 of the Constitution.

16. The object of Section 17B of the Industrial Disputes Act, 1947 and the jurisdiction of the High Court has been considered by the apex court in case of Ch. Saraiah Vs. Executive Engineer, Panchayat Raj Department and Another, Relevant observations made in para 3 are reproduced as under:

3. Having examined the provisions of Section 17B of the Industrial Disputes Act, we are of the considered view that the Court has no jurisdiction to direct non-compliance with the same when the condition precedent for passing an order in terms of Section 17B of the Act is satisfied, and this being the legislative

mandate, the Division Bench of the High Court committed serious error in interfering with the direction of the learned Single Judge. We accordingly set aside the impugned order passed by the Division Bench and direct that the order of the learned Single Judge requiring compliance with Section 17B of the Industrial Disputes Act shall be complied with by the employer. The appeal is accordingly allowed. There shall be no order as to costs.

17. Similarly, Punjab and Haryana High Court has also examined and considered the object of Section 17B of the Industrial Disputes Act, 1947 in case of M/s. Hans Raj Mahajan and Sons (P) Ltd. Vs. Presiding Officer, Labour Court, Jalandhar, The observations made by the Punjab & Haryana High Court in para 6 are reproduced as under:

6. While reading the above said section, it is clear that the amount is to be paid for the period of pendency of the proceedings. It does not say that the application has to be decided during the pendency of the writ petition. No other interpretation is, therefore, possible so far as this question is concerned. Even if any other interpretation was possible, then also Industrial Disputes Act being a benevolent legislation, the interpretation in favour of the workman has to be accepted.

18. Madras High Court has also considered this aspect in case of Krishna Ramanujam V. Vs. Pandian Roadways Corporation Ltd. and Another, Relevant observations made by the Madras High Court in para 2 are reproduced as under:

In this appeal, we are concerned with the rejection of his application filed u/s 17B of the Act. The learned Judge has not assigned any reason for dismissing the said petition. Admittedly, against the dismissal of the approval petition, the management has preferred the writ petition before this Court and obtained stay. In such a circumstances, if the management wants to keep the writ petition and interim order to continue necessarily they have to comply with Section 17B of the Act. No doubt, as directed, the management has deposited Rs. 2,04,000 towards back wages and the appellant/workman was also permitted to draw the monthly interest. In view of the pendency of the writ petition and also of the fact the interim order staying the operation of the order passed by the Industrial Tribunal is in force, we are of the view that the appellant/workman is entitled to avail the benefit of Section 17B of the Act. According to the learned Counsel for the workman, from the date of writ petition till date the arrears comes to Rs. 61,172. No doubt, learned Counsel appearing for the first respondent/management by stating that the writ petition is of the year 1994 and that similar writ petitions are being taken up by this Court for final disposal, requested necessary direction for taking up of the main writ petition for final disposal, instead of passing any order u/s 17B. In this regard, learned Counsel appearing for the workman has brought to our notice a recent pronouncement of the Supreme Court reported in Workmen represented by Workmen Represented by Hindustan V.O. Corpn. Ltd. Vs. Hindustan Vegetable Oils Corporation Ltd. and Others, wherein their Lordships have observed that 17-B applications should be

disposed of with great promptitude and before the disposal of the writ petition. If a petition is filed u/s 17B, it should be disposed of first and expeditiously and the same cannot be tagged alongwith the main writ petition. Though the writ appeal is kept pending for more than six years, considering the object of bringing the provision of 17-B under the Statute is to alleviate the hardship of the workman quickly, we hereby direct the first respondent management to pay a sum of Rs. 61,172.00 by way of a demand draft in favour of the appellant herein, namely, V. Krishna Ramanujam within a period of eight weeks from the date of receipt of a copy of this Order. It is made clear that the said payment is without prejudice to the claim made in the writ petition. The first respondent management is further directed to continue to pay the last drawn wages namely Rs. 746/- to the workman commencing from the month of August, 2001 on or before 5th of succeeding month till the disposal of the main petition. Writ appeal is allowed. No costs.

19. This question has also been considered by the Delhi High Court in case of Hindustan Carbide Private Ltd. and National Capital Territory of Delhi and Ors. reported in 2002 I LLJ 268. Relevant observations made in para 3 of the said decision are reproduced as under:

3. With respect to my learned brother, I am unable to agree with the reason for declining relief u/s 17B of the Act. This is the section which has to be adverted to. All that the Section contemplates is the existence of an award directing reinstatement of any workman, the initiation of any proceedings against such award in the High Court or in the Supreme Court, and the workman being unemployed. The Supreme Court has clarified that payments made pursuant to Section 17B of the Act are not recoverable even in the event of the acceptance of the writ petition. These payments are in the nature of subsistence allowance. The payments also have no nexus with the amount awarded by the Labour Court; they are independent thereof. Hence even if the award is stayed, it would have no bearing on the Order to be passed u/s 17B of the Act. In granting a stay of the execution of the Award, the payment of its monetary component, and the reinstatement of the workman get postponed. Distress proceedings are held in abeyance. Where the award is assailed, the Court is to consider the grant of last drawn wages u/s 17B of the Act. The rationale and reasoning behind this section is that the workman should be frustrated and emasculated by the filing of the writ petitions challenging the awards which are expected by the Legislature to have attained finality. The right to appeal does not exist and it would be inappropriate to convert writ jurisdiction to appellate jurisdiction. It is also recognised that because of their pecuniary power, Managements are indefatigable in litigations whereas the workmen can be crippled by it.

20. Thereafter, the Apex Court (Coram: S.C. Agrawal and V.N. Khare, JJ.) has decided this issue in case of Dena Bank v. Kiritkumar T. Patel reported in AIR 1998 SC 511. Therefore, the relevant Para 7, and 15 are quoted as under:

7. It would be convenient at this stage to set out the provisions contained in

Section 17B of the Act which reads as under:

Section 17B. Payment of full wages to workman pending proceeding in higher courts. Where in any case a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceeding in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be." The objects and reasons for enacting the said provisions were as follows:

When Labour Courts pass award of reinstatement, these are often contested by an employer in the Supreme Court or High Courts. It was felt that the delay in the implementation of the award cause hardship to the workman concerned. It was, therefore, proposed to provide the payment of the wages last drawn by the workman concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court or High Courts.

It would thus appear that the object underlying the enacting of the provisions contained in Section 17B is to give relief to the workman in whose favour an award of reinstatement has been passed by the Labour Court and the said award is under challenge in the High Court or this Court. The said relief has been given with a view to relieve the hardship that would be caused to a workman on account of delay in implementation of the award as a result of the pendency of the proceedings in the High Court or this Court. The question for consideration is: what is the extent to which such relief has been granted to a workman under this provision? The objects and reason do not indicate an answer to this question and its answer has to be found in the provisions of the enactment. Since the expression "full wages last drawn" in Section 17B has been construed by the various High Courts in the decisions referred to above we would briefly refer to the same.

15. In *Elpro International Ltd. v. K.B. Joshi*, the Division Bench of the Bombay High Court was dealing with the challenge to the validity of the provisions in Section 17B on the ground that the same are vague and arbitrary inasmuch as no provision is made as to what would happen to the amount paid if ultimately the employer succeeds and the award is quashed and set aside and are therefore, violative of Article 14 of the Constitution. It was also urged that the said provisions encroach upon the powers of the High Court and this Court under

Articles 226 and 136 of the Constitution. The High Court has rejected both the contention. It was held that the absence of a provisions as to what would happen to the amount paid u/s 17B if ultimately the employer succeeds in the litigation does not make the section either vague or arbitrary because what is to be paid u/s 17B is in the nature of subsistence allowance that is payable u/s 10A of the Industrial Employment [Standing Orders] Act, 1946 which is neither refundable nor recoverable irrespective of the result of the enquiry. As regards challenge on the ground of encroachment upon the powers of the High Court under Article 226 and this Court under Article 136 of the Constitution, the High Court was of the view that Section 17B only guarantees to the workman the payment of wages by the employer during the pendency of the proceedings before the High Court or the Supreme Court and that too subject to the conditions laid down by the said section and the proviso, irrespective of the result of the proceedings and it also imposes an obligation upon the workman concerned to file an affidavit before the Court stating that he has not been employed in any establishment during the pendency of the proceedings and it also absolves the employer of his obligation to pay such wages if he is able to prove to the satisfaction of the Court that the workman had been otherwise and had been receiving adequate remuneration. The High Court has observed that Section 17B nowhere lays down that in extreme cases it is demonstrated that award passed is either without jurisdiction or is otherwise a nullity or grossly erroneous or perverse, the High Court or the Supreme Court is deterred from exercising its powers under Articles 226 and 136 of the Constitution. On that view the High Court held that Section 17B does not in any way encroach upon or override the powers of the High Court under Article 226 and this Court Article 136 of the Constitution.

21. After considering the various judgments of the Apex Court and this Court, this Court (Coram: H.K. Rathod, J.) has also considered the said issue in case of University Granth Nirman Board v. Udesinh Togaji Solanki reported in 2003 (1) GLH 626. The relevant observations are made in Para 18 which is quoted as under:

18. In view of these observations made by the Apex Court and various High Courts as referred to above, meaning of "Gainful Employment" is required to be clarified. What is the meaning of gainful employment as normally used in the High Courts, looking to the bare reading of Section 17B of the I.D. Act, it is very clear that the workman is entitled to last drawn full wages inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court, meaning thereby, such employee must not have been employed with any establishment. Similarly, in proviso also, it is made clear that such workman had been employed and had been receiving adequate remuneration during such period or part thereof. It also suggests that the workman should have employed and receiving adequate remuneration but not any such amount by employment must be getting adequate remuneration means salary or "wages" from the employer. Therefore, if

the workman during the pendency of the petition where reinstatement has been stayed by this Court and thereafter if the workman is doing any labour work, miscellaneous work and thereby receiving any income from any source, namely agricultural income, interest part or any other activities wherein the workman is getting some amount without being employed in any establishment and not receiving any remuneration from the employer, then such amount that may be received by the workman during such period which is not received by him on the basis of the employment in any establishment or as remuneration from the employer, then said amount which has been received by the workman doing any miscellaneous work, such as labour work, interest amount and income from the agricultural field or any other activities wherein the workman is getting some amount even by way of rent, that cannot be considered to be gainful employment of the workman concerned because Section 17B is very clear that employer shall have to prove that the workman is employed in any establishment and receiving "adequate remuneration" from the employer. If this fact is not established by the employer before this Court, then other amount except the adequate remuneration out of employment received by the workman but any other amount received by using his personal skill or experience that cannot be considered to be the gainful employment. Therefore, even in facts of this case, the allegations against the workman that he is driving auto rickshaw registered in his name. Even if the workman is driving the auto rickshaw and getting some amount by way of fare from the passengers, looking to Section 17B of the Act, according to my opinion, such amount that may be received by the workman by driving the auto rickshaw, cannot be said to be gainful employment as per the meaning of Section 17B of the I.D. Act, 1947. Therefore, the meaning of gainful employment requires to be understood in light of the provisions and language used in Section 17B of the I.D. Act, 1947. The language is very clear that if the workman is employed in any establishment during such period and receiving adequate remuneration during any such period and the part thereof, while remaining in employment then that amount can be taken into consideration for deciding application u/s 17B of the I.D. Act. The other amount that may be earned by using personal skill by doing labour and miscellaneous work or by receiving some amount in the form of interest, such amount and the like amount from rent income of the properties that may be received by the workman during such interregnum period pending petition before the High Court can not be said to be an emoluments generated from the employment nor the same can be termed as adequate remuneration from the employment and therefore, such amount cannot be said to be gainful employment and the same requires to be excluded from the definition of "gainful employment" because ultimately during pendency of the petition, the workman and his family is required to be survived and for that, they should have to do some miscellaneous work so that they may receive some amount and by that they can maintain the family and therefore that cannot be termed as gainful employment and this is not the object of the Section 17B of the I.D. Act. The object of Section 17B of the Act is clear that the workman may not get a double benefit being the employee in any other

establishment and receiving adequate remuneration from the employer and even though claiming last drawn wages from the old employer and that is how Section 17B of the Act has been enacted with a clear object that if the workman remains unemployed during such period, then workman is entitled to last drawn wages inclusive of maintenance allowance admissible to him under any rule. Therefore, unemployment means not employee of any establishment that does not mean that not to receive any amount during such period. Thus, both these things are entirely different and both have to be separately required to be understood while deciding the application u/s 17B of the I.D. Act.

22. The Rajasthan High Court has also decided the issue in case of Maharaja Shree Umaid Mills Ltd. v. Judge, Labour Court and Ors. reported in 2006 I CLR 269. The relevant Para 10 and 11 are quoted as under:

10. The learned counsel for the petitioner has admitted that after 8.8.1995, the respondent No. 2 was running a vegetable shop in Pali for some time and, thereafter, he shared running a tea stall near Railway Station, Pali, therefore, the respondent No. 2 is not entitled to get benefit of provisions of Section 17B of the Act of 1947.

11. In my considered opinion, this argument carries no weight. For the purpose of Section 17B of the Act of 1947, the employment must be as an employee in an establishment and it would not cover a case where the workman carried on some private activity to make a living, because carrying on such an activity by the workman cannot be regarded as being employed in any establishment. Since, as per the case of the petitioner, the respondent was running a vegetable shop and thereafter started running a tea stall, therefore, his employment cannot be regarded as being employed in any establishment and this argument raised by the petitioner stands rejected.

23. This Court (Coram: R.S. Garg and Ravi R. Tripathi, JJ.) has also decided the same in case of Cyanides and Chemicals Company Vs. Mansingh Mangalram Varma, The relevant observations are made in Para 11, 12, 14 and 15 which are quoted as under:

11. To employ somebody would mean to give work to some one and pay them for it. It would also mean to keep the person occupied. An employee would be a person who is employed for wages or salary. When the law says that the wages are to be paid to the workman, if he has not been employed in any establishment, then the only consideration before the Court would be whether such person has been given some work in some establishment, i.e. he has been employed by the establishment or employer for wages or salary.

12. It is to be noted that the words workman had not been employed in any establishment have been used in a particular context and they would indicate that these have been used in the sense of a relationship brought about by express or implied contract of service in which the employee renders service for which he is engaged by the employer and the latter agrees to pay him in cash or

kind as agreed between them or relationship of command and obedience. The essential condition of a person being employed within the phrase would mean that he should be employed to do the work with someone else and that there should be, in other words an employment of his by the employer and that there should be, a relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus, so employed, the wages u/s 17B will have to be paid.

14. The learned Single Judge, in our considered opinion, was justified in observing that the appellant failed to prove that the respondent was employed with some establishment and he was getting adequate remuneration.

15. We would also agree that the observations made in the judgment in the matter of University Granth Nirman Board (supra) that the words adequate remuneration on being employed in an establishment would mean receipt of salary or wages from an employer and what workman earns to maintain his body, soul or family by doing miscellaneous work would not be coming within the sweep of "employment with an establishment.

24. The High Court of Chhattisgarh has also made observation in case of State of Chhattisgarh and Ors. v. Labour Court and Ors. reported in 2007 Lab. I.C. 1682. The relevant observations are made in Para 12 and 13 which are quoted as under:

12. Thus, it is clear from the meaning of the word Spending, i.e. during the pendency of the proceedings?, as employed in Section 17B of the Act, 1947 that stay of the award would not change the nature and scope of Section 17B of the Act, 1947. The condition is payment of last wages drawn during pendency of any proceedings against an award of reinstatement in a High Court or the Supreme Court. The required condition is, firstly, there should be an award for reinstatement of a workman, secondly, the proceedings should be pending in the High Court or the Supreme Court and thirdly, there should be an affidavit by such workman to that effect in such Court. Where the High Court or the Supreme Court is satisfied that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, payment of no wages can be ordered for such period or part, as the case may be.

13. Thus, the inescapable conclusion from the cases cited (supra) is that denial of benefits, as granted to the workman u/s 17B of the Act, 1947, would defeat the spirit of the enactment. The section in effect has codified the rights of the workmen to get their wages which they could not get in time because of long drawn out process caused by the methods employed by the management. Thus, the section mandates the Court to award wages if the conditions in the section are satisfied. It is ordered accordingly.

25. In case of Rajeshbhai Jayantilal Zakhariya v. Child Development Programme Officer reported in 2007 Lab. I.C. 1514, this Court (Coram: H.K. Rathod, J.) has observed the said issue. The relevant Para 16 to 19 are quoted as under:

16. Looking to the objects and reasons for enacting said provisions in the Statute Book, it appears that it was felt by the legislature that the delay in the implementation of the award causes hardship to the workman concerned, legislature, therefore, proposed to provide the payment of full wages last drawn by the workman concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court or High Courts. Apex court considered and interpreted the words "full wages last drawn in the said decision to which ultimately the workman was entitled as defined in Clause (rr) of Section 2 of the ID Act, 1947. It is also considered by the apex Court that Parliament has used the words "full wages last drawn" indicated wages they were actually paid and not the amount payable, meaning thereby, whatever amount of wages as per the award may not be paid but full wages drawn by the workman shall have to be paid by the employer during the pendency of proceedings before the High Court or Supreme Court. This amount is non refundable and not recoverable in the event of setting aside of the award and it is not in any way precluding High Court or Supreme Court to pass order directing payment of the higher amount to workman if such higher amount is considered proper in the interest of justice. Therefore, in view of these observations made by the apex court and also considering the objects and reasons of inserting provisions of Section 17B in the Statute Book, according to my opinion, workman is entitled for full wages last drawn by him of Rs. 4250.00 as per Voucher of March, 1999 for 30 days as the wages u/s 17B of the ID Act, 1947.

17. In The Management of M/s. Praga Tools Ltd. And The Chairman cum Presiding Officer an Anr. reported in 1996 LLJ 748, Section 17B of the ID Act, 1947 has been interpreted by the Division Bench of Andhra Pradesh High Court. It has been observed as under in para 4, 5 and 6 of the Judgment:

4. The above, in our opinion, answers the second and the third contention in full and we are in respectful agreement with the above view. When Section 17B creates a liability upon the employer and conversely a right in the workman to pay and receive wages last drawn by him inclusive of any maintenance allowance admissible to him under any rule during the period of pendency of the proceedings in the Court with the exception that if during this period or any part thereof he was gainfully employed elsewhere, he would not be entitled to such wages for the period of gainful employment, the Court has unfettered power under Article 226 of the Constitution to grant stay of the final adjudication i.e. The award. But this power cannot be used to destroy the statutory right granted to a workman u/s 17B of the Act i.e. A right pendente lite which has been recognized to remove the hardship and to protect the interest of workman. The workman cannot be left uncared to suffer a total deprivation of wages merely because the employer has chosen and accordingly initiated a proceeding under Article 226 or 136 of the Constitution. We have good reasons to hold that the expression "wages last drawn by him cannot mean the quantum of money received by the workman last from the employer before he was discharged or dismissed from service. The Act carries a definition of "wages" to mean All

remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled be payable to a workman in respect of his employment, or of work done in such employment, and includes

(i) Such allowances (including dearness allowance) as the workman is for the time being entitled to

(ii) the value of any house accommodation, of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grain or other articles.

(iii) and travelling concession.

Any commission payable on the promotion of sales or business or both; but does not include (a) any bonus; (b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service. "See Section 2(rr) of the Industrial Disputes Act). According to this "wages" is a comprehensive expression for all remuneration capable of being expressed in terms of money and payable to a workman in respect of his employment if the terms of employment expressed or implied were fulfilled. The expression "full wages last drawn by him thus must mean the wages which were last payable to the workman and will pick up with the non payment from the last drawn until for the reason of suspension of the award of reinstatement, he is entitled to draw. Logically this can only mean that on such suspension of the award of reinstatement, the employee shall receive full wages payable on the date of suspension of the award of reinstatement. Even proceeding on the footing that full wages last drawn? must mean the pay packet which the employee had received last from the employer the words "inclusive of any maintenance allowance admissible to him under any rule of the workman" are only additional or supplementary payment to him as allowances including the dearness allowance etc., which are included in the definition of wages must form part of the wages draw by him. If this is extended to the rule of revision of scales of pay and wages and the factors which are taken into account, increase in wages for the reasons of revision of pay and allowances must be included in the quantum of money payable to the workman. If this is not accepted and the pay and allowances are kept at the level of the last pay packet of the employee, the increase in dearness allowance which is merged at one stage in the revised scale of pay and new rate of dearness allowance added upon the revised scale of pay and must continue to add to the wages last drawn by the workman. This logically will come almost on par with the current rate of wages paid to the employee or workman of the grade of the workman whose award of reinstatement is sought to be suspended. We have, however, a Division Bench judgment of the Karnataka High Court, in the case of M/s Visveswaraya Iron and Steel Co. Ltd. Vs. M.

Chandrappa and another, While not accepting the contention that revised scale of pay will have to be payable, it is stated.

Hence we are of the view that the content of the words "full wages last drawn" would take into their fold the wages drawn on the date of termination of the services plus yearly increment and the DA to be worked out till the date of the award and that sum has to be paid to the workman during the pendency of the proceeding before this Court. We would like to make it clear that the wages that would be worked out upto the date of the award shall have to be paid during the pendency of the proceedings before this court in the event of the award is stayed, without reference to revision of wages if any during the pendency of proceedings before this Court.

Bombay High Court's view in the case of Carona Sahu Co. Ltd. Vs. Abdul Karim Munafkhan and Others, however is similar to the view taken by us in these words;

The Parliament had introduced Section 17B of the Act with the object that the workman is not deprived of wages which he is entitled to draw in case the award directing reinstatement is implemented. The workman is deprived of the wages payable in pursuance of the award only because of pendency of the proceedings. The award directing reinstatement and continuity of service makes it clear that the dismissal of the employee was illegal and in the eyes of law the workman continued in service and consequently the workman was entitled also to payment of backwages. The determination of the backwages is only on the basis of what was the workman would have drawn during the period commencing from the date of dismissal and till the date of reinstatement and the quantum of backwages includes all the permissible increases during that interregnums. The expression "full wages last drawn" in our judgment means the full wages which the workman was entitled to draw in pursuance of the award and the implementation of which is suspended during the pendency of the proceedings. The submission of Shri Bhaktal, that the expression "last drawn" suggests that the workman is entitled only to that amount which was received by him at the time of dismissal, cannot be accepted. Though the word "drawn" connotes past tense, it is obvious that the proper construction of the section is that the workman is entitled to the full wages which the workman would have been entitled to draw but for the pendency in this court.

5. We are in respectful agreement with the view expressed by Bombay High Court. We conclude accordingly that the learned Single Judge has committed no error.

6. There is hardly any reason for us to detain our conclusions for answering the argument that the court cannot take into account the date of the award and should order, if at all, payment in lieu of reinstatement, from the date the award becomes executable. Date of award shall always be the date when the award becomes enforceable and if backwages are not granted and only reinstatement is

ordered, the reinstatement shall take place only when the award is enforced and it can be enforced only from the date it is made enforceable.

Also see the judgments in the same subject as under:

1. Sasikala Kumari S. And Privathoor Service Cooperative Bank Ltd. and Ors. reported in 2006 I LLJ Ker 811.
2. Municipal Committee, Mohindergarh v. Presiding Officer, Labour Court, Gurgaon and Anr. 2002 Lab IC 203.
3. Visveswaraya Iron and Steel Co. Ltd. And M. Chandrappa and Anr. 1993 II LLJ 198 (Karn
4. Shri Paramjit Singh Ahuja Vs. Presiding officer Labour Court-VI and others,
5. Sandhya Baul v. Director of Panchayat and Anr. 2006 I CLR 299.
6. Executive Engineer v. Ashokbhai J. Desai 2004 5 GHJ (246).
7. Secretary, Department of Canteen Management and Krishna Kumar Saxena 2001 I LLJ 896 (Raj
8. Krishna Ramanujam v. And Pandian Roadways Corporation Ltd. And Anr. 2002 I LLJ Mad 109.
9. RK Nigam v. Swadeshi Cotton Mills and Anr. 2004 SCC (L & S) 195.
10. Narendra Kumar and Others Vs. Management of Taj Services Ltd. and Another,
11. Ram Dhan And Judge, Labour Court No. 2 Jaipur and Ors. 2003 II LLJ Raj 959.
12. Hindustan Carbide Pvt. Ltd. And Government of NCT of Delhi and Ors. 2002 II LLJ 166 Del
13. Indra Perfumery Co. through Sudershab Oberoi And Presiding Officer and Ors. 2004 II LLJ Delhi 413.
18. As regards the contention of Mr. Hathi that the workman is not entitled for the wages u/s 17B of the ID Act, 1947 because he is engaged by one retired Mamlatdar Naginbhai as a driver and earning Rs. 600.00 p.m. for such contention, this court is of the view that the bald averments without any positive proof thereof cannot disentitle the workman from claiming wages u/s 17B of the ID Act, 1947. Petitioner is required to establish this fact by producing and proving cogent and convincing evidence to that effect to the satisfaction of this Court. So, in absence of any positive proof thereof, mere averments made in the reply are not enough, unless the affidavit of said Naginbhai is produced, court cannot consider the same. Respondent has denied that he is employed in any establishment and it is also denied that he is getting adequate remuneration. Even if it is assumed that what is contended by Mr. Hathi is correct, then also,

required to be considered that merely because workman is engaged and/or receiving some amount, say Rs.600.00 as alleged by Mr. Hathi, by doing some petty miscellaneous work, whether it can be considered to be gainful employment in any establishment, looking to the words "gainfully employed in any establishment employed in Section 17B of the ID Act, 1947? Whether it can be considered to be the adequate remuneration as per the language of Section 17B of the ID Act, 1947? There is purpose behind employing the words gainfully employed in any establishment and "adequate remuneration in Section 17B of the ID Act, 1947. It gives powers to the Court while deciding an application u/s 17B of the Act that if the court is satisfied that the workman is not receiving adequate remuneration by doing the work or if the workman is not employed in any establishment, then, court can ignore such things while considering the application u/s 17B of the ID Act, 1947, and court can pass appropriate order granting full wages last drawn by the workman from the employer. SO, according to my opinion, even if it is believed that the workman is doing driving work and earning Rs.600.00 p.m. from such work as contended by Mr. Hathi, according to my opinion, it is necessary for workman to do the same for survival of his own and his family in these hard days when prices of every essential commodities are going up day by day and the amount of Rs. 600.00 in these days can never considered to be the adequate remuneration or amount, therefore, that contention cannot be considered on two ground, one that there is no positive proof thereof and another is that even if positive proof is there, it cannot be construed as an employment in any establishment and second, remuneration of Rs. 600.00 cannot be considered as adequate remuneration. Therefore, according to my opinion, if such miscellaneous work is done by workman for maintaining himself and his family while keeping body and soul together and not to starve during this interim period, that cannot be considered to be gainful employment of the workman. This aspect has been considered by the apex court in case of Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others, , the Apex Court has observed in Para.21 as under:

21. It was next contended on behalf of the appellant that reinstatement with full back wages be awarded to him. Mr. P.K. Jain, learned counsel for the employer countered urging that there is evidence to show that the appellant was gainfully employed since the termination of service and therefore he was not entitled to back-wages. In support of this submission Mr. Jain pointed out that the appellant in his cross-examination has admitted that during his forced absence from employment since the date of termination of his service, he was maintaining his family by helping his father-in-law Tara Chand who owns a coal-depot, and that he and the members of his family lived with his father-in-law and that he had no alternative source of maintenance. If this is gainful employment, the employer can contend that the dismissed employee in order to keep his body and soul together had taken to begging and that would as well be a gainful employment. The gross perversity with which the employer had approached this case had left us stunned. If the employer after an utterly unsustainable termination order of

service wants to deny back wages on the ground that the appellant and the members of his family were staying with the father-in-law of the appellant as there was no alternative source of maintenance and during this period appellant was helping his father-in-law Tara Chand who had a coal depot, it cannot be said that the appellant was gainfully employed. This was the only evidence in support of the submission that during his forced absence from service he was gainfully employed. This cannot be said to be gainful employment so as to reject the claim for back wages. There is no evidence on the record to show that the appellant was gainfully employed during the period of his absence from service. Therefore, the appellant would be entitled to full back wages and all consequential benefits.

This Court (Coram: Jayant Patel,J.) had occasion to consider the term "full wages last drawn" in case of TJ Shukla v. Sr. Supdt. of RMS reported in 2004 (1) GLH 672. This Court observed as under in para 7 of the judgment:

7. Mr. Mehta, appearing for the original petitioner submitted inter alia that the prior to the raising of the dispute under the ID Act, the workman was even otherwise being offered work not for a continuous period but only for few days in a month as and when there was work, and he submitted that on an average, the workman was offered work for 10 to 11 days in a month, and accordingly the wages as per the requirement of Section 17B are calculated, keeping in mind the minimum wages prescribed for each day, and payment is made accordingly. He also submitted that since the reinstatement is made on the basis of availability of the work, the engagement is continued and whenever work is available, the services of the applicant is used as an Outsider Extra Departmental Agent and he is being paid minimum wages accordingly. Since the original engagement was also for 10 to 11 days on an average basis, and at present since the work is offered for 13 to 14 days and payment is made accordingly, in the submission of Mr. Mehta, reinstatement is accordingly effected and therefore, there is no question of paying further more wages as per Section 17B, and in any event, as per his submission, there is compliance to Section 17B since the backwages are already paid.

Section 17B of the Industrial Act reads as under:

Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall

order that no wages shall be payable under this section for such period or part, as the case may be.

The language used by the legislature is "full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule". Therefore, if the petitioner has calculated the wages drawn by the workman at the relevant point of time, lastly drawn on the basis of work being offered to him keeping in view the number of days of engagement, it cannot be validly contended by the workman that calculation must be for the full month period, i.e. 30 days, and not on the basis of the work being offered to him prior to his reinstatement. So far which was being offered to him prior to his reinstatement. So far concerned, the calculation has been made on the basis of minimum wages but since the number of days are considered by the original petitioner on the basis of work was being offered at the relevant point of time prior to termination, the amount is reduced, and, therefore, even if the contention of Mr. Pathak is accepted that for compliance of Section 17B, minimum wages are required to be paid, then also if the petitioner has made payment by considering the average number of days for which the work was being offered in a month, it can be said that full wages last drawn is paid and it cannot be said that there is any breach of the provisions of Section 17B of the Act.

This Court has not examined and interpreted term full wages last drawn in the decision but this court has examined the facts in light of term "full wages last drawn". This Court has considered that since the number of days are considered by the original petitioner on the basis of work which was being offered at the relevant point of time prior to termination, the amount is reduced, therefore, it cannot be validly contended by the workman that the calculation that it must be full month period namely thirty days and not on the basis of work being offered to him prior to his reinstatement. It was a case of daily wager as extra departmental male man and work was being assigned to him or his services were taken when regular work was not available or there were some exigencies of work, therefore, facts of this case are not the facts of the case on hand because in present facts, workman had worked even 30 days as a driver. He was not engaged as and when the work was required. However, in aforesaid reported decision, this court has not decided the issue while interpreting term "full wages last drawn". So, there is no ratio laid down by this court in aforesaid decision in case of T.J. Shukla v. Sr. Supdt. of RMS (Supra).

8. Recently, Division Bench of this Court has also examined issue in light of the provisions in Section 17B of the ID Act, 1947 in case of Cyanides and Chemicals Company Vs. Mansingh Mangalram Varma, . In said decision, Division Bench has considered judgment of learned Single Judge of this Court in case of University Granth Nirman Board Vs. Udesinh Togaji Solanki, in para 4. Relevant observations made by the Division Bench of this Court in para 8, 9, 11, 12, 13 and 15 are reproduced as under:

8. From the above provision of law it would clearly appear when proceedings are

initiated before the High Court or Supreme Court by any employer in a matter where the Labour Court, Tribunal or National Tribunal has awarded reinstatement, then the employer shall be liable to pay to such workman during the period of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period. The moment the workman files an affidavit that the said workman had not been employed in any establishment during such period, then liability of the employer crops up.

9. From the proviso appended to Section 17B of the Act, it would again appear that the benefits flowing from the main part of Section 17B of the Act can be denied, if it is proved to the satisfaction of the High Court or Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof. A conjoint reading of the main Section and the proviso would make it clear that the question of the self employment would not be material for the purposes of Section 17B of the Act. The language employed in the Section says that the workman who informs the Court that he had not been employed in any establishment then the wages cannot be denied. The wages can be denied if the High Court or the Supreme Court is satisfied that the workman is employed and had been receiving adequate remuneration.

[Emphasis supplied]

10. xxx

11. To employ somebody would mean to give work to some one and pay them for it. It would also mean to keep the person occupied. An employee would be a person who is employed for wages or salary. When the law says that the wages are to be paid to the workman, if he has not been employed in any establishment, then the only consideration before the Court would be whether such person has been given some work in some establishment, i.e. he has been employed by the establishment or employer for wages or salary.

12. It is to be noted that the words workman had not been employed in any establishment have been used in a particular context and they would indicate that these have been used in the sense of a relationship brought about by express or implied contract of service in which the employee renders service for which he is engaged by the employer and the latter agrees to pay him in cash or kind as agreed between them or relationship of command and obedience. The essential condition of a person being employed within the phrase would mean that he should be employed to do the work with someone else and that there should be, in other words an employment of his by the employer and that there should be, a relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus, so employed, the wages u/s 17B will have to be paid.

13. It is to be noted that in the present matter the workman made a statement before the Court that the moment he is reinstated he was ready and willing to join. If that is so it would lead to only irresistible conclusion that what he was earning in his self-employment was less than what he could have received on his reinstatement.

14. Xxx

15. We would also agree that the observations made in the judgment in the matter of University Granth Nirman Board (supra) that the words adequate remuneration on being employed in an establishment would mean receipt of salary or wages from an employer and what workman earns to maintain his body, soul or family by doing miscellaneous work would not be coming within the sweep of "employment with an establishment.

19. Therefore, in view of the facts of this case, even if some miscellaneous work is done by workman, same cannot be considered as gainful employment and remuneration earned therefrom cannot be considered as adequate remuneration. Therefore, that contention raised by Mr. Hathi is rejected.

26. The Jaipur Bench of Rajasthan High Court has also made observations regarding Section 17B in case of Gram Panchayat, Manoharpur v. Ashok Kumar Sharma reported in 2007 III CLR 202. The relevant observations are made in Para 5 to 7 which are quoted as under:

5. The Supreme Court while deciding the issue of back wages has considered the term "gainfully employed" in the case of Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others, according to which if the workman during the intervening period stayed with his father in law as there was no alternative source of earning and during this period, was helping his father in law who has coal depot. In the said case, the Supreme Court was considering the term "not gainfully employed" for the purpose of awarding back wages and has held that assisting in the business of father in law would not amount to the term "gainfully employed" and has further observed that if this is taken to be gainful employment, then the employee in order to keep his body and soul together had taken to begging and that would as well be a gainful employment. Para 21 of the judgment reads as under:

21. It was next contended on behalf of the appellant that reinstatement with full back wages be awarded to him. Mr. PK Jain, learned counsel for the employer countered urging that there is evidence to show that the appellant was gainfully employed since the termination of service and therefore he was not entitled to back wages. In support of this submission of Mr. Jain pointed out that the appellant in his cross examination has admitted that during his forced absence from employment since the date of termination of his service, he was maintaining his family by helping father in law. Tara Chand who owns a coal depot, and that he and the members of his family lived with his father in law and that he had no alternative source of maintenance. If this is gainful employment,

the employer can contend that the dismissed employee in order to keep his body and soul together, had taken to begging and that would as well be a gainful employment. The gross perversity with which the employer had approached this case has left us stunned. If the employer has after an utterly unsustainable termination order of service wants to deny back wages on the ground that the appellant and the members of his family were staying with the father in law of the appellant as there was no alternative source of maintenance and during this period appellant was helping his father in law Tara Chand who had a coal depot, it cannot be said that the appellant was gainfully employed. This was the only evidence in support of the submission that during his forced absence from service he was gainfully employed. This cannot be said to be gainful employment so as to reject the claim for back wages. There is no evidence on the record to show that the appellant was gainfully employed during the period of his absence from service. Therefore, the appellant would be entitled to full back wages and all consequential benefits.

6. Supreme Court has also deprecated the practice of the employers to contend that the dismissed employee in order to keep his body and soul together had taken to begging and that would be gainful employment.

7. This Court in *Management, Hindustan Machine Tools Ltd. v. Judge, Labour Court and Anr.* (1992 (1) L L J 494) has also considered an identical issue that mere carrying of activity to make both ends meet will not disentitle the workman to get benefit of Section 17B of the Act. IN this case, the workman was running a tea stall. The court has also considered the issue of "establishment" Para 7 of the judgment reads as under:

7. I find force in the contention of the learned counsel for the petitioner that in the application u/s 17B and affidavit filed in support thereof, it has been stated that respondent No. 2 is not employed in any "Industrial Establishment". The requirement of the section is that the workman has to stated that he is not gainfully employed in any "Establishment". However, in the rejoinder-affidavit, it has been clearly stated that he is not employed in any tea shop, nor is running the same and earning Rs.150/- per month and further, that he does not pay any rent, as alleged by the petitioner, regarding the premises in which tea shop is running. It may therefore, be said that even though initially the requirement of Section 17B is not satisfied, the subsequent affidavit has made the matters clear. The contention of the learned counsel for the petitioner is that since the respondent No. 2 is earning Rs. 150/- per day from a tea shop he does not deserve to be given any payment under the provisions of Section 17B of the I.D. Act. This contention is not tenable on two grounds. Firstly, as provided in proviso to Section 17B of the I.D. Act, it has to be proved by the petitioner to the satisfaction of this Court that the workman has been employed and has been receiving adequate remuneration during any such period or part thereof. In this case, there is an affidavit against affidavit. There is no reason why the affidavit of respondent No. 2 should be discarded and affidavit filed on behalf of the

petitioner should be accepted. The petitioner could have obtained certified copy from the concerned department to show that the licence of tea shop is in whose name and could have also obtained information from the landlord as to who pays the rent to him, therefore, there are no documents in support of the bald allegation made in reply to the application, in support of which, an affidavit has been filed. Apart from this I am clear in my mind that what is required under the provisions of Section 17B of the I.D. Act is that the workman had not been employed in any establishment. Therefore, what is required is that the workman should be employed from which he receives adequate remuneration to disentitle him to receive any favourable order under provisions of Section 17B of the Act. Secondly, what is emphasised in this Section is that the workman should be employed but if he is carrying on some work to make his both ends meet and fill the belly of his family it will not disentitle him to get the payment as provided u/s 16B of the I.D. Act. It may be mentioned that this Section is a beneficial piece of Legislation which has been enacted for the benefit of the workman to see that they do not suffer on account of stay of award, which has been passed in his favour by the Labour Court. The litigation is a time consuming process and the workman cannot be made to suffer for years till the writ petition filed by the employer is disposed of finally. With a view to surmount this difficulty, the provisions of Section 17B were added to the I.D. Act with clear intention to give relief to the workman during the pendency of litigation in the High Court/ Supreme Court. To bring about the balance of justice, proviso to this has been added, which also authorises the Court not to make payment, if it is satisfied that the workman has been employed and receiving adequate remuneration. If such satisfaction is not there, the order of payment should more or less follow automatically as provided in the section itself. The learned counsel for the petitioner has placed reliance on *S. Raju v. George Oakes Ltd.* 1998 (1) WLN 127). This was a case in which the management obtained interim stay of the award and the employee filed miscellaneous petition to vacate the stay and in an affidavit also claimed the monthly salary and allowances till disposal of the writ petition. The High Court while ordering interim stay to be absolute directed that he should be paid Rs. 22,000.00 within four weeks. The petitioner again filed an application u/s 17B for payment of monthly wages during the pendency of the writ petition. It was held that while considering his petition to vacate the stay order, his claim to monthly wages u/s 17B had also been considered and only thereafter, the sum of Rs. 22,000.00 was directed to be paid to him. Therefore, the workman cannot again claim that he should also be paid monthly wages till disposal of the writ petition. This authority evidently, is of no help to the petitioner. I am also fortified in my opinion by a decision of this Court in *Krishi Upaj Mandi Samity, Dholpur v. State of Rajasthan and tow others* D.B. Civil Writ Petition No. 1081/81 decided on September 23, 1987 in which also, it was held that the employment must be as an employee in an establishment and it would not cover a case where the workman carried on some private activity to make a living, because carrying on such activity by the workman cannot be regarded as being employed in any establishment. In the present case, in reply to the

application filed in Para No. 4, it has been mentioned that the respondent No. 2, is employed in a tea shop, whereas in the affidavit filed in support of the application, it is mentioned that he is personally running the tea shop and earning Rs. 150.00 per day from the same. This shows that he has filed an affidavit in support of the reply on behalf of the petitioner that the respondent No. 2 is not employed anywhere.

27. The Hon''ble Division Bench of Madhya Pradesh High Court has, in case of Secretary General, Family Planning Association, Mumbai and Ors. v. Sunil Kumar Shrivastava and Anr. reported in 2007 III CLR 391, observed the same in Para 6 to 8, which are quoted as under:

6. We have perused the award dated December 1, 2004 passed by the Labour Court, Bhopal, in the present case and we find that the Labour Court has relied upon the Division Bench Judgment on this Court in Mahila Samiti, Tikamgarh v. State of Madhya Pradesh and Ors. 1993 III LLJ (Suppl.) 468 (M.P.) and come to the conclusion that the Family Planning Association of India is an industry to which the provisions of the Act are applicable. Hence, the finding in the award of the Labour Court that the Family Planning Association of India is an industry to which the provisions of the Act are applicable, prima facie, appears to be well-founded.

7. Even if this Court comes to the conclusion in the writ appeal that this finding of the Labour Court that the Family Planning Association of India was not an industry to which the provisions of the Act could be made applicable, the respondent/ Workman would still be entitled to the benefit of the provisions of Section 17B of the Act. In Dena Bank v. Kiritkumar T. Patel (supra), the Supreme Court has held that the workman is entitled to the benefit of Section 17B of the Act during the pendency of the writ petition under Article 226 of the Constitution of India before the Court and the High Court in exercise of power under Article 226 of the Constitution of India cannot pass an order denying the workman the benefit granted u/s 17B of the Act during the pendency of the writ petition. A similar view has been taken in C.M. Sarajah v. E.E. Panchayat Raj Department and Anr. (supra) and it has been held there in that the High Court has no jurisdiction under Article 226 of the Constitution to direct non-compliance of the provisions of Section 17B of the Act.

8. All that has been held in Regional Authority, Dena Bank and Anr. v. Ghanshyam (supra), cited by Mr. Shobhit Aditya, the learned counsel appearing for the appellants, is that the High Court under Article 226 of the Constitution of India is not precluded from passing the appropriate interlocutory order having regard to the facts and circumstances in the interest of justice. This view has been taken on the basis of the earlier decision of the Supreme Court in Dena Bank v. Kiritkumar T. Patel (supra), wherein it has been held that the High Court while exercising the power under Article 226 of the Constitution to pass an order directing payment of a higher amount to the workman if such higher amount is

considered necessary in the interest of justice and such a direction would be dehors the provisions of Section 17B of the Act and while giving the direction the Court may also give directions regarding refund or recovery of the excess amount in the event of the award being set aside. The excess amount here would mean the amount in excess of what is payable by the employer to the workman in terms of Section 17B of the Act.

28. After considering the various decisions of various High Courts and Apex Court, this Court (Coram : H.K. Rathod, J.) has decided the said issue in Civil Application No. 8335 of 2006 in Special Civil Application No. 12880 of 2000 in case of Arvindkumar Keshavlal Chhag v. District Panchayat and Anr. reported in 2007 (2) GLR 1142. The relevant Para 11, 12 and 13 are quoted as under:

11. I have considered the submissions made by both the learned advocates appearing on behalf of the respective parties. It is a settled principle of law laid down by the Apex Court in case of Dena Bank v. Kiritkumar T. Patel and in case of AIR 1998 511 (SC) and Regional Authority, Dena Bank and Another Vs. Ghanshyam, The question has been examined that benefit of Section 17B of the Industrial Disputes Act, 1947 is a mandatory provision must have to be complied by the employer, if employer wants stay against the reinstatement. This Court has granted stay on 5th September 2001 on condition to comply the provisions of Section 17B of the Industrial Disputes Act, 1947. This order dated 5.9.2001 is not challenged by petitioner to higher forum. Knowing fully well obtaining the orders from this Court with open eyes by petitioner being a State Authority that stay has been granted on condition, even though, that condition has been ignored and stay granted by this Court has been enjoyed by public authority and workman remained without wages put him into starvation. This is not the mandate and meaning of Section 17B of the Industrial Disputes Act, 1947. The amount which will be paid to the workman under the provisions as non-refundable, non-recoverable have a subsistence allowance to be paid by the employer to the workman after getting stay against reinstatement. While considering the application u/s 17B, merits is not required to be considered by the Court as per decision of Rajasthan High Court in case of Ram Dhan v. Judge, Labour Court No. 2, Jaipur and Ors. reported in 2003(II) LLJ 959 DB. It is a duty of the High Court to decide first the application u/s 17B of the Industrial Disputes Act, 1947 even in case award of reinstatement is subsequently set aside by the High Court, workman is entitled to full wages last drawn from date of award till the date of award is set aside which amount is non-refundable and non-recoverable from the respondent-workman. Now. Petitioner wants to deny the benefit which is available legally in favour of the workman by making submission that they are prepared to deposit the amount. They are showing grace that they are prepared to pay from 2004 as if that payment is made by petitioner showing sympathy or grace in favour of the workman. There is no grace or sympathy requires by workman from the petitioner employer because of the mandatory provisions enacted by legislation which required to be complied by the employer and therefore, respondent workman is entitled the benefit of Section 17B of the

Industrial Disputes Act, 1947 when there is no counter filed by the petitioner employer against the affidavit dated 22nd January 2001. The workman is remained without work. Not employed any establishment. Not receiving any adequate remuneration. Therefore, he is entitled for full monthly wages last drawn received by him from the employer.

12. The decision of this Court as referred above reported in 2003(3) G.L.H. 189 is not applicable to the facts of this case. Here, this Court is not prepared to hear the matter finally. In that reported decision, Court was prepared to hear the matter finally. There is no provision made in Section 17B of the Industrial Disputes Act, 1947 that within how much time, the respondent workman is required to file application before the High Court. There is no provision and there is no decision on that the workman should have to be filed application within how much time. The Limitation Act is not applicable to proceeding under Industrial Disputes Act, 1947. Section 17B suggests that during the pendency of petition, workman is entitled the wages u/s 17B of the Industrial Disputes Act, 1947. The view taken by the Division Bench of Delhi High Court reported in that Section 17B wages will apply from date of award not from date of petition and not from date of affidavit and not from date of order passed by this Court. Therefore, the decision which has been relied by learned advocate Mr. Hathi wherein the conduct of the workman is totally irrelevant while exercising the jurisdiction u/s 17B. The only conduct is relevant that workman is not employed any establishment and not gainfully employed which has been taken into account by this Court on the basis of affidavit dated 22.1.2001. It is really a relevant conduct and no other conduct is required to be taken into account by this Court for denial the benefit of Section 17B to the workman, therefore, this decision is not applicable to the facts of this case and not also helpful to the petitioner. The relevant observations made in Para 2, 3, 4, 5 and 8 in case of Navin Fluorine Industries v. B.M. Shah reported in 2003(3) G.L.H. 189 which are quoted as under:

2. In the present case, the workmen, in whose favour the orders of reinstatement were passed, kept quite in the matters and waited for the employer to file an appeal. The matters remained pending at the admission stage in the High Court for two long years. It is only after the matters are admitted and order of stay is granted that the employees approached the Court insisting that now, an order under Section 17B of the Act be passed and then and then only, final hearing be taken up. This practice is required to be deprecated in as strong words as possible. In the present case, the judgment and awards is dated 19.7.2001. The petitions are filed on 27.8.2001. The learned advocate for the respondents has not put forth the details of the steps taken by the respondents-workmen for getting the order of reinstatement implemented during these two years. Now that when the Court has admitted the matters, after taking into consideration the error apparent, committed by the learned Judge of the Labour Court, Surat in coming to the conclusion that the respondents were the workmen, and the order granting interim relief was passed reserving the liberty

to the workmen to file an application/affidavit u/s 17B of the Act, insistence on the part of employees is not bona fide.

3. The learned advocate for the respondents next relied upon a judgment in the matter of Management of Praga Tools Ltd. v. The Chairman-cum-Presiding Officer and Anr. reported in 1996 (1) LLJ 748. The learned advocate contended that the Division Bench of the High Court of Andhra Pradesh has laid down that, "Power under Article 226 cannot be exercised so as to destroy rights u/s 17B - Wages last drawn cannot mean quantum of money received by workman at time of discharge or dismissal - workman will be entitled to receive full wages payable on date of suspension of award of reinstatement....

4. In the present case, there is no question of destroying the rights of the workmen, conferred on them u/s 17B. The only question, which arises for consideration of this Court, is as to whether when the respondents were not vigilant enough to pray for relief u/s 17B for long two years, and now when the matters are fixed for final hearing, can they be allowed to insist for entertaining the application u/s 17B first in point of time and only thereafter, to proceed with the final hearing of the main matter. In the humble opinion of this Court, this decision has no application to the facts of the present case. The learned advocate further relied upon a judgment of this Court (Coram: H.K. Rathod, J.) in Civil Application No. 8363 of 2002 with Civil Application No. 8271 of 2001 in Special Civil Application No. 5617 of 2001 decided on 11.3.2003. In para-17 of the said judgment, the learned Judge has considered various decisions along with a decision of Karnataka High Court in the matter of Hind Plastic Industries Vs. Labour Court and Others, The learned Judge relied upon para-3 of the aforesaid judgment, which reads as under:

3. It is too late in the day to contend that the burden is on the workman or the dismissed employee who has obtained the award in his favour to prove that he was not gainfully employed since his dismissal/suspension etc., till the award was made in his favour. Section 17B is a beneficial piece of legislation intended to benefit the workman who shall not suffer the stay of award in his favour by the Labour Court, Tribunal or the Board as the case may be. If the High Court or the Supreme Court tends to grant stay of such an award made by the Court, Tribunal or the Board, it is a duty cast upon the High Courts and the Supreme Court to ensure that during pendency of the litigation before it, either the concerned High Court or the Supreme Court ensures payment of last wages drawn by the workman employee. The benefit of legislation therefore must flow in favour of the workman. The proviso to the section becomes operative by the employer satisfying the Court concerned that the workman had been employed and had been receiving adequate remuneration during any such period or part thereof. The Court concerned must direct that wages shall not be paid by the employer to the workman for the period. In all other case, the payment of last drawn wages during the pendency of the proceedings in the High Court must automatically follow on the affidavit of the workman. Such last wages drawn, the section

makes it clear, shall include the maintenance allowance admissible under any rule applicable to the workman subject to only that an Affidavit must be filed by the workman to that effect.

We therefore, see no justification to interfere with the learned Single Judge's order. Appeal rejected.

...

5. So far as the principles of law are concerned, there cannot be any quarrel on the same. The intention of the legislature is more than clear in putting the provision of Section 17B on the statute book. The question is if in a given case, the Court is able to take up final hearing of the matter, is it necessary that before taking up final hearing, an order for compliance of Section 17B be made on an application filed for the purpose. As is discussed hereinabove, the object of Section 17B is to see that during pendency of appeal before higher forum against an order of reinstatement issued by the competent court, after first adjudication, the workman is not left high and dry. The legislature never wanted that even if the Court is able to take up final hearing of the matter, the same should be postponed till the application for compliance of Section 17B is made and an order for compliance of Section 17B is passed against the employer.

In the present case, the workmen had chosen to sleep over their rights. After the judgment and awards dated 19.7.2001, no action is taken till filing of the present Civil Applications for compliance of Section 17B. In view of that, this Court has no hesitation in holding that the workmen deliberately did not take any steps for implementation of their rights, which are created in their favour by the awards dated 19th July, 2001, which can only be with a view to take undue advantage of the provisions of Section 17B.

8. There is no doubt that the legislature has placed the provisions of Section 17B on the statute book with a definite purpose and those provisions are to be followed to achieve that object when the circumstances of the case so warrant. But then, this Court is required to consider as to in the facts and circumstances of the present case any order u/s 17B is warranted at this stage i.e. when the Court is taking up final hearing of the case. In the humble opinion of this Court, the answer is "no". The reason is simple. The object of Section 17B gathered from any interpretation of the provisions is only to see that the employer does not deprive a workman of the fruits of an order of reinstatement, which is ordered after a full fledged adjudication, by filing an appeal and by obtaining an injunction. This provision is placed on the statute book because of an unhappy situation prevailing in the courts that the appeals take longer time to get heard and disposed of. The provision can never be pressed into service when the Court is able to take up final hearing of the matter, more so, in the facts of this case. It may be reiterated even at the cost of repetition that after the awards were passed on 13.7.2001, the workmen have not taken any steps to enforce their rights. In February-2003, the matters are admitted by this Court for examining

the legality and validity of the judgment and award and taking into consideration the facts of the case, the Court made "Rule returnable on 20th March, 2003". At this stage, Civil Applications are filed praying for directions to comply Section 17B and though the Court is taking up final hearing of the matters, it is insisted that first the orders be passed in the Civil Applications, which is not warranted.

The said decision is based on facts and no ratio laid down to the question.

13. The submissions made by learned advocate Mr. P.V. Hathi, it amounts to denial of Section 17B wages to the respondent workman. This Court cannot deny wages u/s 17B of the Industrial Disputes Act, 1947 to the respondent workman unless employer proved by cogent evidence that workman is employed any establishment and receiving adequate remuneration. When "Rule" is issued by this Court and granted the stay on condition to comply the provisions of Section 17B the Act, 1947, at that occasion, no objection is raised by the petitioner before this Court that they are not agreed to this condition. The burden upon the petitioner to comply the provision of Section 17B of the Act, 1947 in favour of respondent workman, because petitioner has obtained stay on condition. If condition is not complied then naturally, interim relief stands to be vacated. There is no necessity for the workman to file application u/s 17B of the Act, 1947 because Section 17B requires affidavit from workman that he is unemployed and not gainfully employed and not receiving any adequate remuneration. In pursuance to order passed by this Court in main petition on 22.12.2000, affidavit as required u/s 17B has filed by the workman on 22nd January 2001 which is place on record. The copy of the said affidavit of the workman received by the petitioner's advocate on the same day as endorsement is made on affidavit. From 22nd January 2001, no counter is filed by the petitioner against affidavit of workman. No payment is made which is necessary to be made by the petitioner to the workman u/s 17B of the Act, 1947 because workman has filed affidavit. The payment is required to be made as per order passed by this Court on 5th September 2001 from date of award. None payment u/s 17B of the Act, 1947 to the workman remained continued under the guise of fixing the matter for final hearing up to the 31st August 2006. Meanwhile, workman has filed application claiming the benefit u/s 17B of the Act, but, this Court has fixed the matter for final hearing. Similarly, petitioner has also filed application for fixing the date of final hearing or to allow the petitioner to deposit the amount of Section 17B before this Court, however, this Court has disposed of both the Civil Applications filed by respective parties and fixed the matter for final hearing, but, unfortunately, matter has not been taken up by this Court for final hearing. Then, matter remained pending awaiting final hearing. Therefore, in such circumstances, the respondent workman who is without job and not employed and not gainfully employed anywhere, filed the present Civil Application with two fold prayers, one is to fix the matter for final hearing for which this Court is not prepared to fix the matter for final hearing on the ground that many old matters of having similar nature are in queue, therefore, in light of these facts, this Court has considered the second alternative prayer for granting the benefit of Section

17B of the Act, 1947 in favour of respondent workman. The petitioner employer has not proved by any cogent evidence the gainful employment of respondent workman. Merely, averments in application have no meaning against the affidavit of workman. The workman should not have to file affidavit each month unless petitioner employer placed on record the reliable material to justify the facts that workman is employed in any establishment or gainfully employed receiving adequate remuneration. Therefore, in such circumstances, when fixing the date for final hearing is not possible then alternative prayer is required to be granted. There is no provision in Section 17B which requires specified time limit for filing application u/s 17B of the Act, 1947. Looking to the facts on record, according to my opinion, there is no need to file application u/s 17B of the Act, 1947 by the respondent workman because he has already complied condition to file affidavit of unemployment for getting benefit u/s 17B of the Act, 1947 on 22nd January 2001. This Court cannot deny the benefits of Section 17B to the respondent workman wherein he satisfied the condition of filing affidavit before this Court in response to conditional order passed by this Court on 5th September 2001, It is necessary for this Court first to decide the question of Section 17B before deciding the main petition because wages u/s 17B of the Act, 1947 is a subsistence allowance to maintain the family, otherwise, family of workman will put in starvation which amounts to denial reasonable opportunity to the respondent workman by this Court. It is also not necessary that workman should have to file affidavit each month. Once the affidavit is filed unless and until by counter affidavit placing cogent material on record by petitioner employer that affidavit of workman must have to be taken into account by this Court for granting benefits u/s 17B of the Act, 1947. This Court cannot insist first final hearing of the petition and because of the delay in filing application to deny legitimate, legal, statutory benefits u/s 17B to the respondent workman. In this case, application filed by respondent workman because of the fact that petitioner employer has not implemented conditional order passed by this Court on 5th September 2001. It is also necessary to note that before conditional order passed by this Court, affidavit u/s 17B has already filed by the respondent workman before this Court. In this case, respondent ? workman is also prepared for final hearing because prayer is made in present Civil Application, but, Court is not able to take up the matter for final hearing. This Court, while deciding the application or prayer, made in Civil Application while granting the benefit of Section 17B cannot examine the merits of the main petition. Irrespective of the merits whatever be good case of employer, workman is entitled being a statutory, legal benefits from employer u/s 17B of the Act, 1947. Such benefits cannot be denied by this Court if ingredients of Section 17B is satisfied by the respondent-workman. The petitioner employer has obtained order of stay against the reinstatement then it is their duty to comply the provision of Section 17B of the Act, 1947 provided workman has filed affidavit of unemployment or not gainfully employed. In this case, workman has already filed affidavit u/s 17B before this Court. The copy thereof has been served to the petitioner-employer. The object of Section 17B is to mitigate the hardship in favour of workman while

proceedings pending before this Court, this payment is compulsory and necessary otherwise delay the matter by employer challenged to higher forum and ultimately, harass to the workman and create a situation that ultimately, workman will put in starvation with his family, so, workman may surrender to the condition or terms of employer. This position may not arise that is how statutory safeguard and protection of full wages last drawn is given by statutory mandatory provision by the legislation. So, workman can maintain the family and to contest the proceedings before higher forum. This being an object for enacting the section and if this Court will not pass order of granting benefit u/s 17B of the Act in favour of respondent workman then it amounts to frustrate the object of Section 17B and this Court is failing in his discharging the duties which amounts to miscarriage of justice. Petitioner employer should not have to be given the benefit of such technical plea which is contrary to mandatory provisions of section 17B of the Act, 1947. The amount of full wages last drawn if it is paid to the workman that amount is subsistence allowance which is not recoverable and refundable. Therefore, the skill of petitioner employer delaying payment by one pretext or another pretext or in guise of fixing the matter for final hearing or to show eagerness for final hearing cannot be entertained by this Court unless the payment will be made by petitioner-employer as per this order to the respondent workman. Therefore, main Special Civil Application should not be hear for final hearing unless and until the order passed by this Court today is not fully complied by petitioner employer. Therefore, the decision of this Court (Coram: Justice Ravi R. Tripathi) as referred above is not applicable to the facts of this case.

29. Recently, on 23rd October 2007, this Court (Coram: S.R. Brahmbhatt, J.) has observed in Civil Application No. 6403 of 2007 in Special Civil Application No. 669 of 2007 in case of M.J. Patel Vs. Tata Chemicals Ltd., The relevant observations are made in Para 7 to 10 which are quoted as under:

7. This Court has heard learned counsel for the parties at length. Enough opportunity was afforded to the employer to make good its case for denying the wages last drawn to the applicant. The provision of Section 17B deserves to be borne in mind while examining the rival contentions of the parties. The statutory mandate is in favour of the workman against whom the proceedings are filed either in the high court or in the Apex Court challenging the award and order of reinstatement that he is to be paid full wages last drawn by him. Further an exception is made by providing that where it is proved to the satisfaction of the high court or the Apex Court that such workman had been employed and had been receiving adequate remuneration till any such period or part thereof, the court shall order that no wages shall be payable under the section for such period or part thereof as the case may be.

8. The company has mainly resisted this application on relying upon the applicant's engagement in trade union activities and alleged act for conducting the cases of workers and that the applicant is receiving remuneration. The

applicant has categorically denied this averment of the company and submitted that the company has merely produced only affidavits from sponsored people and they cannot be therefore made basis for denying the benefit of Section 17B of the ID Act. The company has further relied upon the applicant's trading in shares and stocks indicating that he is receiving sizeable income from these activities and therefore he cannot be given benefit of Section 17B of the ID Act. The applicant has in his affidavit in rejoinder and the further affidavit pointed out that the company has failed in adducing any cogent evidence to establish that the applicant was in receipt of remuneration for rendering his services to fellow workers in conducting their cases.

8.1 This Court is of the view that the affidavits relied upon by the company which are sole basis for making allegation cannot be said to be acceptable evidences proving beyond doubt that the applicant has in fact been in receipt of remuneration for conducting the cases. The applicant's averment in respect of this submission deserves to be noted as it is emerging from the records the case of one Shri Hathiya was pertaining to the year 1999 and that was over since long and in that case also except the affidavit nothing more is adduced by the company which could be said to be an evidence leading to the conclusion that the applicant was in receipt of remuneration. The payment towards union activities in the account of union by the members and others involved in the activity cannot be said to be payment to the applicant so as to classify the same to be remuneration in any sense.

8.2 Moreover, it also deserves to be noted that the incident referred to in the affidavit of Smt. Sakinaben Khamiza the workman applicant has stated that he had never appeared or the case was never been filed by the union as alleged in the affidavit and he had called upon the company to make their allegation good to which the company has not given any reply. These facts would go to show that except the affidavits of some persons out of which at least two have been said to be not relevant and/or not correct, the court cannot come to the conclusion that the company is producing sufficient evidence to indicate that the applicant is in receipt of remuneration for rendering his services. On the other hand, the applicant's say that he being the President of the union was duty bound to appear and conduct the cases of fellow workers go to show that the say of the applicant cannot be disbelieved so as to deny him the benefit of Section 17B of the ID Act.

9. The applicant has explained about the position of quarter which is infact allotted to the union and which is between therefore the union and the applicant with regard to usage of the quarter. The contention with regard to the applicant's engaging in share trading activity deserves to be examined in light of the provisions of Section 17B and the voluntary statement produced by the applicant of his Demat Account. The trading in shares as it appears from the statement of the Demat Account do not indicate that the applicant is in fact trading in shares on a regular basis so as to term him to be a Sperson trading in

shares?. The transactions recorded in the Demat Account do not go to show that the applicant had been regularly in the business of trading of shares etc. The earning out of his investment in the shares cannot be termed to be remuneration except it is established that the applicant's earning out of trading in shares is on account of his engagement on regular basis and share trading is his regular activity occupying his time, energy and skill. In other words, the income earned on the investment of shares and by its selling on occasional basis cannot be in any way classified to be remuneration as contained u/s 17B of the ID Act and therefore this Court is of the view that the plea of the company deserves to be rejected on this count also.

10. The reliance placed by Mr. Patel upon the decisions in the cases of North East Karnataka Road Transport Corporation (supra) and Shah Alpesh Dineshchandra (supra) are of no avail to the company as in the instant case neither the applicant could be said to be employed in an establishment nor can he be said to be self employed person receiving adequate remuneration or income so as to deny him the benefit of provisions of Section 17B. As against this, the authorities relied upon by Mr. Mankad in support of his case are squarely applicable to the facts and circumstances of the present case and therefore the application deserves to be allowed.

30. Therefore, considering the law laid down by two decisions in case of Dena Bank as referred above, according to my opinion, the workers are entitled the benefit of Section 17B of the Industrial Disputes Act, 1947. The opponent original petitioner has not produced any evidence of gainful employment of any of the workmen. Merely, giving details about agricultural land and without giving any details about income and against that, a denial by applicant, therefore, there is no satisfactorily evidence made available by the company before this Court in respect to the income of the applicant. Therefore, gainful employment is not proved by the company and there is nothing on record to prove gainful employment of the applicant and whatever the details given by company in affidavit as referred above, the same cannot consider to be a sufficient and concrete evidence of income of the applicant and on the basis of this affidavit, this Court is not satisfied in respect to the contentions raised by company that applicant is gainful employed. Therefore, applicant is entitled the benefit of Section 17B of the Industrial Disputes Act, 1947 as he remained unemployed and not gainful employed elsewhere and applicant is not employed any establishment and not receiving any adequate remuneration from any establishment. Therefore, applicant is entitled the benefit of Section 17B of the Industrial Disputes Act, 1947.

31. In view of above observations made by this Court after considering the various judgments on the subject including the Apex Court, the contentions raised by learned advocate Mr. K.C. Raval cannot be accepted. The Section 17B is an independent Section. Nothing to do with having connection with ultimate result of petition. An employer may have good case on merits and prima facie

established that award is nullity, even though, benefit of 17B if condition is satisfied must have to be granted by High Court and High Court has no jurisdiction to deny such legal benefit to the workman. The very object of Section 17B suggests that irrespective of the result of the petition, workmen are entitled subsistence allowance when reinstatement is stayed by this Court. This provision is made just to discourage the litigation by employer against the award to higher forum and workmen met to sufferer without any means of livelihood. Therefore, the award is nullity or in case of no jurisdiction, workmen are entitled the benefit u/s 17B of the Industrial Disputes Act, 1947. While considering the application u/s 17B of the Industrial Disputes Act, 1947, High Court cannot examine any kind of good merits which may have the employer and in case when award is set aside, even, subsequently, workmen are entitled the benefit of 17B from the date of award till the date of setting aside the award by High Court. This being a non-refundable amount which suggests no connection with ultimate result of petition. Therefore, contentions raised by learned advocate Mr. K.C. Raval are rejected.

32. Recently, the Apex Court has considered the question of gainful employment in case of *Niranjan Cinema v. Prakash Chandra Dubey and Anr.* reported in 2007 (13) Scale 760. The Apex Court has considered that whether self employment is gainfully or not while considering the question of backwages of interim period and not under the provisions of Section 17B of the Industrial Disputes Act, 1947. In case of backwages of interim period, Court has discretion to consider income from any source but in Section 17B considering the language used, it requires employment in establishment and receiving adequate remuneration.

33. The view taken by Apex Court in case of *North East Karnataka Road Transport Corporation Vs. M. Nagangouda*, is where agricultural income being a self-employment is considered to be a gainfully employment so far it relates to decide it the question of backwages of interim period. The aforesaid decision is considered in subsequent decision in case of *Niranjan Cinema (supra)*, where, Apex Court has considered that self-employment is gainful employment or not, the earnings from the betel shop were not sufficient to make both ends meet in absence of earning from betel shop, the Apex Court has granted 50% amount of backwages. Similarly, in this case, merely referring the agricultural land by the petitioner company, exact, there is no proof of income in respect to some bare estimate mentioned in the affidavit, this Court cannot consider the gainful employment of applicant workman. The petitioner has not produced any satisfactory and concrete evidence on record that applicant is employed in establishment and receiving adequate remuneration or particular income with proof from agriculture land.

34. Therefore, according to my opinion, the workman is entitled the benefit of Section 17B of the Industrial Disputes Act, 1947 as reinstatement is stayed by Apex Court till the matter is decided by this Court. Once, the reinstatement is stayed, proceedings are pending before the High Court or Apex Court, the benefit is available to the employee if he remained unemployed during the interim

period. In the present case before this Court, petitioner company is not satisfactorily proved the gainful employment of the workman by producing the concrete evidence on record to the satisfaction of this Court, therefore, according to my opinion, workman is entitled it.

35. Therefore, it is directed to petitioner company to pay last drawn wages to the applicant workman w.e.f. 31st December 2005 to 31st January 2008, except for the period from 15th May 2005 to 30th June 2005 for which he was reinstated, within a period of one month from the date of receiving the copy of the said order and thereafter, it is further directed to petitioner company to pay last drawn wages regularly to the applicant workman till the matter is finally decided by this Court.

36. Accordingly, present Civil Application is allowed with no order as to costs.