

(2008) 02 GUJ CK 0008
In the Gujarat High Court

Case No : Civil Application For Orders No. 11809 of 2007 in Special Civil
Application No. 13590 of 2007

Chemical Mazdoor Panchayat

APPELLANT

Vs

Krishak Bharti Co-Operative Ltd. and Others

RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Constitution of India, 1950 — Article 136, 14, 226
Industrial Disputes Act, 1947 — Section 12, 16B, 17B, 2
Industrial Employment (Standing Orders) Act, 1946 — Section 10A
Labour Contract Rules, 1992 — Rule 25

Citation : (2008) 02 GUJ CK 0008

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

Bench : Single Bench

Advocate : N.R. Shahani, for the Appellant; Mihir Thakore and Manish R. Bhatt
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 workmen and learned senior advocate Mr. Mihir Thakore with learned advocate Mr. Manish R. Bhatt appearing on behalf of opponent.

2. The Civil Application is filed with a prayer to direct the original petitioner to pay the workmen at Annexure "X Colly." a minimum wages as applicable on 10th April 2007 as revised from time to time within a period of ten days from the order of this Court subject to whatever condition that may be imposed by this Court. This wages may be directed to be paid every month.

3. The affidavit as required u/s 17B is filed by individual employees concerned whose names are mentioned in Civil Application. The affidavit-in-reply is filed by respondent No. 1 dated 21st November 2007. The affidavit-in-reply on behalf of respondent No. 1 is also filed Mr. Nirodkumar Sahoo, Senior Manager (P & A) dated 13th October 2007. The affidavit-in-rejoinder is filed by applicant

Dhaneshar son of Haradhan Balvantray dated 11th December 2007. Thereafter, individual affidavit-in-rejoinder by each workmen were filed on 23rd January 2008 at Surat. These are the pleadings between the parties claiming the benefit u/s 17B of the Industrial Disputes Act, 1947 during the pendency of petition as referred above.

4. The Industrial Tribunal, Surat has decided the reference being Reference (IT) No. 8 of 1995 on 10th April 2007 granting the relief in favour of applicants. According to Tribunal, the relationship as an employer and employees is established between 299 workers with petitioner Krishak Bharati Co-operative Ltd., and dispute between them is satisfied Section 2(k) and reference made for adjudication is a legal and tenable and maintainable reference, for which, Tribunal has jurisdiction to decide it. On 12th June 1994, the lockout was declared by Krishak Bharti Co-operative Ltd., is held to be illegal, unreasonable, unjust and improper. Because of aforesaid unjust lockout w.e.f. 12th June 1994, the settlement arrived at between the parties in presence of Deputy Labour Commissioner on 18th June 1994 is to be implemented but not implemented by the Company. Therefore, that has been held illegal and unjust. Therefore, on 12th June 1994 with continuity of service, according to original status of the workmen, they are entitled the reinstatement in service with all benefits as mentioned in Direction No. 5 similarly, in Direction No. 6 also, the Tribunal has passed an order while rejecting the demand made by the applicant for double rate payment and Tribunal has also directed a settlement arrived at in the presence of Deputy Labour Commissioner dated 17th June 1994 is held to be legal and valid and contrary to that, Tribunal has directed the Company to reinstate the workmen in service.

5. In view of directions issued by Industrial Tribunal, Surat granting reinstatement in favour of present applicants workmen, this Court has passed an order on 31st May 2007 which is quoted as under:

1. Heard Mr. M.R. Bhatt, learned advocate for the petitioner, who invited attention of the Court to page 136- terms of reference. He also invited attention of the Court to the relevant part of the award, particularly the operative part of the award and order para 75. On the face of it, the award exceeds the terms of reference.

2. Heard learned advocate Mr. N.R. Shahani, who is appearing on caveat for respondent No. 1. His submission is that he is appearing only on caveat. When he is asked to explain, he explained that, he does not have the papers of the Tribunal. He submitted that it is not possible for him to get the papers within a day or two. He further opines and asserts that the Court cannot call for the record and proceedings within a day or two. He then says that nothing is going to happen within a day or two. The matter can wait till reopening of the Court.

All these submissions of Mr. Shahani, learned advocate, are indicative that he is not ready to go on with the matter.

3. Interim relief in terms of para 16[c]

6. This Court has stayed an award in question which includes the stay of reinstatement of concerned workman.

7. The Company original petitioner has filed affidavit-in-reply by one Balakrishna Nair, Deputy Manager and another by Nirodkumar Sahoo, Senior Manager (P&A). The company is disputing the application filed by applicants workmen. In affidavit filed by company dated 21st November 2007, the details have been given about gainful employment of the applicants, which is quoted as under:

Sr. Name Residence Work No. 1. Rabindra Bhartiya Jetty Colony Bhattpur Chock (Vehicle painting) 2. Bhaskar Samantaray Jetty Colony Shop in Mora 3. Jagmohan Sahoo Kawas Micro Finance Agent, Kavas Patia 4. Nabkishor Behra Jetty Shop in Jetty Colony 5. Narendra Sahoo Mora Working in L&T as contract labour 6. Haribandhu Pradhan Kawas Indian Oil Co. 7. Navaghan Pradhan Jetty Kribhco T/Ship (Colour) 8. Laxmidhar Pradhan Jetty L&T - Contract Labour 9. Trinath Biswal Jetty ONGC Town Ship working with contractor Mr. Nilesh Patel 10. Manguli Samantaray Jetty Ichhapore (Mistry) 11. Santha Chand Tad Jetty Cycle Shop (Jetty Colony) 12. Bikram Patr Jetty Kribhco T/Ship (Colour) 13. Ram Sevak Yadav Jetty Reliance 14. Bhaskar Sundaray Jetty Vegetable Shop 15. Buryodhan Baliyarsingh Jetty Reliance 16. Bhikari Samantaray Jetty IOC (Colour) 17. Dharmaswar Samantaray Jetty Baroda 18. Prabakar Majhi Jetty ONGC (Colour)

8. Against the aforesaid details, an individual affidavit-in-rejoinder is filed by applicant workman denying the facts which have been stated by employer in his aforesaid reply. Therefore, question is that whether applicants are entitled the benefit of Section 17B of the Industrial Disputes Act, 1947 or not.

9. Learned senior advocate Mr. Thakore submitted that Tribunal has committed a gross error and passed the award beyond the terms of reference. That being a jurisdictional error committed by Industrial Tribunal. He also submitted that actually, there is no relationship with applicant workman with the respondent company because workers are working with the labour contractor and not the employees of company. He also submitted that one reference is pending with the Tribunal whether workers are directly an employee of the company or not being a reference No. 44 of 1994 before the Industrial Tribunal, Surat. He further submitted that Labour Commissioner has decided under Rule 25(v)(ii) of Labour Contract Rules on 15th February 1992 and come to conclusion that working employees are not performing the similar kind of work as performed by permanent employee of company. This order passed by Labour Commissioner is not challenged by Union or workman thereafter. The settlement arrived at between the parties and award made on 2nd October 1992 and Tribunal has upheld this award on 21st April 2003. Therefore, he also submitted that the Industrial Tribunal has committed gross error in coming to conclusion that there is a relationship as employer and employee is established between the applicants

workmen and company when learned senior advocate Mr. Thakore submitted that they were employees of contractor. The reference No. 44 of 1994 is pending whether these workmen are direct employees of the company or not.

10. Learned senior advocate Mr. Thakore relied upon two decisions of Division Bench of Jharkhand High Court i.e. (i) Bharat Coking Coal Ltd. v. Their Workmen represented by the Bharat Coking Coal Ltd. Vs. Their Workmen represented by the Secretary Bihar Colliery Kamgar Union and Another, and (ii) Employers, Management of Bhuli Township Administration of B.C.C. Ltd. v. P.O., Central Government Industrial Tribunal II and Another reported in 2004 II LLJ 554. Relying upon the aforesaid two decisions of Jharkhand High Court, learned senior advocate Mr. Thakore submitted that High Court can deny the benefit u/s 17B to the workman during the pendency of petition. Both the decisions, on which learned senior advocate Mr. Thakore relied upon, are altogether based on different facts; one is in respect to regularisation where the reinstatement direction was not there and another is in respect to dispute about relationship between employer and employee and that was not established. Therefore, the High Court of Jharkhand come to conclusion in Para 13 that In a case involving regularisation, Section 17B is not applicable. In second case also, the High Court of Jharkhand come to conclusion in Para 7 that It is clear from the terms of the reference and the nature of the Award passed by the Tribunal that it is not a case of reinstatement. It is case where workmen claimed that they were not the employees" of an independent contractor or of an intermediary and they were to be treated as regular employees of the Management.S Therefore, the Hon'ble Division Bench of Jharkhand High Court has come to conclusion that in such circumstances, it is a clear that it is not an award of reinstatement, therefore, Section 17B is not attracted.

11. Learned senior advocate Mr. Thakore also relied upon the decision of Full Bench of Madras High Court in case of Godrej and Boyce Manufacturing Co. Ltd., Madras Vs. Principal Labour Court, Madras and Another, Learned senior advocate Mr. Thakore relied upon Para 12 which is quoted as under:

12. Before we conclude and answer the reference, we feel constrained to observe that any challenge to the award on the ground that it is without jurisdiction or is otherwise a nullity shall ordinarily meet the ends of justice. The workman, who shall be waiting for the implementation of the award during the pendency of the proceedings, however, shall receive only the wages at the rate last paid for the period of the pendency of the proceeding in the Court. It is not a burden of any serious consequence upon the employer, but will be a deprivation of a sort which may cause havoc to the workman and his family. If we proceed on the footing that the Court's power to make the final order includes the power to make an interim order, then we may say, the power will extend to suspending the liability of the employer u/s 17B of the Act and accordingly the right of the workman to receive wages pendente lite. But, this will be possible in the rarest of the rare cases. Otherwise, it will defeat the very purpose for which this section has been

introduced in the Act. There shall be any number of employers/managements, who shall successfully contrive petitions and proceedings challenging the award on some such grounds as the award being without jurisdiction or a nullity. Courts cannot afford to be manipulated and allow the management/employer to use the interim order as a weapon to avoid such a statutory liability. Some error of fact or even some error any interim order. If, however, the error is such that goes to the root of the jurisdiction of the Tribunal and the Court has got sufficient materials to ignore the effect of Section 17B of the Act, the Court may decline to order payment of the wages pendente lite. The Bombay High Court in the case of Elpro International Ltd. v. K.B. Joshi and Ors. (supra), has indicated this caution in the words, in Para 8 (p.215) that:

...Extreme cases where it is demonstrated that the award passed is either without jurisdiction or is otherwise a nullity....

the Court can decline to make an order in terms of Section 17B of the Act. The words S or grossly erroneous or perverse in that judgment and in the judgment of the Division Bench of this Court in Chitram and Company (supra), have to be understood only to mean illustratively when the Court may treat the award a nullity u/s 12. The aforesaid para suggests that extreme cases where it is demonstrated that the award passed is either without jurisdiction or is otherwise a nullity, being the rarest of the rare case, where, High Court can deny the benefit of 17B to the concerned workman. Therefore, according to submissions of learned senior advocate Mr. Thakore, this award may be considered to be the rarest of the rare case as, apparently, it is without jurisdiction of Tribunal as decided beyond the scope of relationship between the employer and employee which is not established. Therefore, this Court may not exercise the powers to grant the benefit of Section 17B in favour of applicants workmen.

13. Except the above submissions, learned senior advocate Mr. Thakore has not made any submission before this Court.

14. Learned advocate Mr. N.R. Shahani appearing on behalf of workmen submitted that High Court has no jurisdiction to deny the benefit to the workmen if condition incorporated in Section 17B is satisfied by the workmen. He submitted that considering the Full Bench decision of Madras High Court and thereafter, Apex Court has also considered the same aspect and held that even in case of without jurisdiction or nullity, benefit of Section 17B cannot be denied, because, it is non-refundable amount and therefore, the same cannot be denied if condition incorporated in Section 17B is satisfied by the workmen. Therefore, he submitted that workmen are entitled the benefits of Section 17B as individual rejoinder is filed by the workmen and whatever the details given by company are vague and which cannot consider to be a gainful in respect to employment. Therefore, he submitted that direction may be issue to company to pay last drawn wages to workmen within some reasonable time.

15. 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.

16. 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. It is necessary to note the reference answered by Hon"ble Full Bench of Madras High Court in Para 13 in aforesaid decision is relevant, therefore, the same is quoted as under:

13. We thus answer the reference as follows:

(1) Section 17B of the Act does not in any manner impair or interfere with the powers of the High Court under Article 226 of the Constitution of India and the Court still possesses the discretion to go into the question and award a lesser amount than the exact quantum of last drawn wages. The court shall, however, honour the statute and if the three conditions, namely:

(1) the Labour Court directed reinstatement of the workman;

(2) the employer preferred proceedings against the award of reinstatement in the Court; and

(3) the workman had not been employed in any establishment during the pendency of the proceedings are satisfied, the Court shall exercise its power under Art.226 of the Constitution of India to order that the employer would pay to the workman during the period of pendency of the proceedings in the Court, full wages last drawn by him inclusive of any maintenance allowance admissible to him under any rule. This, however, will be subject to the workman filing an affidavit that he had not been gainfully employed during such period. In case he is found gainfully employed in any other establishment, the Court shall accordingly order for no wages to be paid for such period of gainful employment or less wages to be paid, depending upon the nature of the gainful employment.

(2) The Court may make a different order and depart from the above rule only in extreme cases where it is demonstrated that the award is passed either without jurisdiction or is otherwise a nullity. The Court, however, shall be slow and

cautious in accepting such allegations of the employer and except in the rarest of the rare cases, it shall implement the law and grant to the workman wages at the rate last drawn by him inclusive of any maintenance allowance admissible to him under any rule except for the period during which he is found to have been gainfully employed elsewhere.

17. Therefore, according to my opinion, if condition incorporated u/s 17B is satisfied, this Court has no discretionary power to deny the benefit to the workman. Therefore, the contentions raised by learned senior advocate Mr. Thakore cannot be accepted and this is not the award in question which at least covered by the rarest of the rare case. No doubt, this exception of the rarest of the rare case is not followed by the Apex Court, but, it is being a decision of Madras High Court, this Court is considering only on the legal aspect, because, the Bombay High Court judgment, which relied by Madras High Court is subsequently, in Dena Bank case reported in 1997 (2) GLH 946, the Apex Court has overruled. Hence, view of Madras High Court is impliedly overruled by Apex Court in Dena Bank (supra). The view of Bombay High Court relied by Madras High Court being similar view against that Bombay High Court decision is overruled, where, the virus was examined, wherein, also, the same arguments are made in that case, Tribunal has passed the award without jurisdiction or in case, nullity, whether benefit of Section 17B can be denied or not. The Apex Court has held that it cannot deny because while considering the application u/s 17B, the merits of the award is totally irrelevant. Whether award is ultimately set aside or not, but, benefit u/s 17B cannot be denied if conditions are satisfied by the workmen. I am with respect not agreeable with this formula of the rarest of the rare case, because, that has also discussed that it means or understood only illustratively when the Court may treat the award a nullity, otherwise, not. But, in case, when ultimately, award is set aside, even though, workers are entitled the benefit of Section 17B from the day till the date of award is set aside. Therefore, this theory has not been matched with the ultimate object of Section 17B of the Industrial Disputes Act, 1947 and contrary to decision of Apex Court given in Dena Bank (supra).

18. The identical question has been examined by this Court in case of Bhikhabhai Tapubhai v. State of Gujarat in Civil Application No. 12941 of 2001 in Special Civil Application No. 3925 of 2001 (Coram : H.K. Rathod, J.). The relevant observations made by this Court are quoted as under:

I have heard the learned advocate Ms. Shah on behalf of the original respondent workman and the learned Government Pleader Mr. Oza for the original petition. The main contention of the petitioner is that since the Forest Department is not an industry, the labour court is having no jurisdiction to examine the legality and validity of the order of termination. Therefore, the award of the labour court is without jurisdiction. This question is pending before this Court and till this date, the main special civil application is pending and no decision has yet been taken and, therefore, the award in question has been stayed by this Court. It is the

contention raised by Mr. Oza that since the award has been made by the labour court without jurisdiction, there is no question of making payment of wages to the workman u/s 17B of the Industrial Disputes Act. This aspect has been examined by the apex court in case of *Dena Bank v. Kiritkumar T. Patel* reported in 1997 (2) GLH 946. In case of *Dena Bank (supra)*, the apex court has considered the earlier decision of the Bombay High Court in case of *Elpro International Ltd. v. K.B. Joshi and Ors.* reported in 1987 Lab. I.C. 1468 wherein the question was examined that if the award is without jurisdiction, provisions of Section 17B will not apply and ultimately, after considering the decision of the Bombay High court in case of *Elpro International Ltd. v. K.B. Joshi and Ors.* 1987 Lab. I.C. 1468, the apex court has observed as under in the decision:

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 Arts. 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.

...

Relevant observations as regards 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).

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 17B, 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.

Similar question has earlier been examined by this Court in case of State of Gujarat v. Shankarbhai K. Parmar reported in 2001 (3) G.L.H.461 . In the said matter also, the contention was raised by the petitioner that the award of the labour court deserves to be set aside for want of jurisdiction. This Court, after referring to the decisions reported in Workmen Represented by Hindustan V.O. Corpn. Ltd. Vs. Hindustan Vegetable Oils Corporation Ltd. and Others, (para-8), has observed as under:

Whether the Award of the Labour Court deserves to be set aside or not or whether the same is without jurisdiction or not, can be decided only at the time of final hearing and not at this stage. In view of the clear mandate of the aforesaid provision Section 17B of the Act, the petitioner is bound to follow the said provisions especially when reinstatement is stayed by this Court.(Para 4)

In view of what is stated above, therefore, the interim relief granted earlier is confirmed on the same terms on which it was granted earlier and the petitioner is directed to comply with the provisions of Section 17B of the Act from the date of the order of the Labour Court and during the pendency of this petition, the Department should continue to comply with the same. The respondent workman has filed an affidavit, copy of which has been given to the learned AGP, stating

that he is not gainfully employed. Since the first order is as back as of 15.12.2000, it is high time that the Department should comply with the said provision forthwith. (Para 6)

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 C.M. Saraiah and E.E. Panchayat Raj Department and Another reported in 2000 1 LLJ 23. 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.

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.

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 Hindustan V.O. Corporation Ltd. v. Hindustan Vegetable Oils Corporation 2000-II-LLJ-792 wherein their Lordships have observed that 17B 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.

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.

19. This Court had made observations regarding the said issue in case of *Medhasan Gram Panchayat v. Pandya Kanchanben Shankerlal* reported in 1998 (2) GLH 600. The relevant Head Note-B of the said judgment is quoted as under:

B. Industrial Disputes Act, 1947 Section 17B For the purpose of the claim of wages to be paid to the person in whose favour award is passed, validity or legality of award is not to be considered.

The respondent has filed Civil Application No. 1321 of 1998 u/s 17B of Industrial Dispute act, the petitioner has filed 10947/95 some time in December 1995 but the office objections were removed in January 1996. The petitioner has obtained stay for the implementation and execution of award. As there was award in favour of the respondent and as employer has preferred this writ petition before this Court to challenge the award the petitioner is liable to pay wages u/s 17B of Industrial Disputes Act, 1947 during claim of wages to be paid to the petition. For the purpose of the claim of wages to be paid to the person in whose favour the award is passed the validity or the legality is not be considered. The liability to pay the wages is till the date of decision of the writ petition. No discretion lies with the Court for ordering payment u/s 17B of Industrial Disputes Act. The liability of the employer to pay u/s 17B arises as soon as the employee satisfactorily proves that employee had no employment in any establishment during that period. In the recent case of *Dena Bank v. Kiritkumar T. Patel* AIR 1998 SC 511, the Apex Court has considered the provisions of Section 17B and its implications and has laid down following principles.

Section 17B 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 the challenge to the award of the Labour Court, Industrial Tribunal or the National Tribunal with the High Court or the Supreme Court which amount is not refundable or recoverable in the event of award being set aside, does not in any way preclude the High Court or Supreme Court to pass on order directing the payment of Higher amount to the workmen if such higher amount is considered necessary in the interest of the justice. Such direction would be dehors the provisions of Section 17B and while giving such direction, the Court may also give directions regarding the recovery of excess amount in the event of award being set aside. But we are unable to agree with the view of the Bombay High Court in *Elpro International Ltd.* (1987 Lab. I.C. 1468) that in exercise of powers under Articles 226 and 136 of the Constitution an order can be passed denying the workmen the benefit granted u/s 17B. The right of workmen 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. (Para 10)

20. Thereafter, this 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, 15 and 22 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 is 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 provision 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.

22. As regards the powers of the High Court and the Supreme Court under Article 226 and 136 of the Constitution it may be stated that Section 17B, by conferring a right on the workman to be paid the amount of full wages last drawn of the Labour Court, Industrial Tribunal or National Tribunal in the High Court or the Supreme Court which amount 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 an 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 directions 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 Article 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 Article 226 and 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 Sworkman 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 Chhattsgarh 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. Sduring 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 and 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 back wages 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 ILLJ 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. R.K. 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 Delhi.

13. Indra Perfumery CO. through Sudershab Oberoi And Presiding Officer and Ors. 2004 II LLJ Delhi .

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 TJ 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, 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.

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 Sadequate 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. 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 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 disentitled 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 (Mad. 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 Ors.* 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 u/s 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 (I) 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. The Apex Court in case of *Niranjan Cinema v. Prakash Chandra Dubey and Anr.* reported in 2007 (13) Scale 760 has considered the question of gainful employment.

30. 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 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 in fact 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 person 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.

31. 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 working place and without giving any detail about income and against that, a denial by individual employees, therefore, there is no satisfactorily evidence made available by the company before this Court in respect to the income of the concerned employees. Therefore, gainful employment is not proved by the company and there is nothing on record to prove gainful employment of the workmen concerned 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 workmen and on the basis of this affidavit, this Court is not satisfied in respect to the contentions raised by company that workmen are gainful employed. Therefore, workmen are entitled the benefit of Section 17B of the Industrial Disputes Act, 1947 as they remained unemployed and not gainful employed elsewhere and workmen are not employed any establishment and not receiving any adequate remuneration from any establishment. Therefore, they are entitled the benefit of Section 17B of the Industrial Disputes Act, 1947.

32. 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 senior advocate Mr. Thakore cannot be accepted. The view taken by Apex Court (supra) is overruled by Apex Court in case of Dena Bank (supra). The Madras Full Bench decision relied upon by learned advocate Mr. Thakore based on judgment of Apex Court which is subsequently, overruled by Apex Court. Therefore, impliedly, view taken by Full Bench of Madras High Court is impliedly overruled. The Section 17B is an individual 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 without award set aside, even, subsequently, workmen are entitled the benefit of 17B from the date of award till the date of setting a

side 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 senior advocate Mr. Thakore are rejected.

33. This aspect, recently, has been considered by Division Bench of this Court (R.M. Doshit and K.M. Thaker, JJ.) in Letters Patent Appeal No. 809 of 2006 in Special Civil Application No. 10344 of 1999 dated 24th January 2008. The relevant observations are quoted as under:

Mr. Rathod has submitted that the learned Single Judge has erred in holding that the workman had given up his right to last drawn wages u/s 17B of the Act. He has submitted that Section 17B of the Act confers a right upon the workman in favour of whom the order of reinstatement is made and such order is stayed by the higher forum. Neither the workman had specifically agreed to give up his claim u/s 17B of the Act nor was there a tacit understanding. He has submitted that in view of the statement made on oath, which has not been countered by the Corporation, pending the writ petition the workman was entitled to the wages last drawn by him.

Mr. Raval has contested the Appeal. He has submitted that it was the workman who did not conduct the matter before the learned Single Judge for more than five years. It was at his instance that the matter was referred to Lok Adalat. The fact that the workman did not press for hearing of the said application in itself indicates that the workman was gainfully employed. He, therefore, is not entitled to the benefit u/s 17B of the Act pending the writ petition.

In support of his submission Mr. Raval has relied upon the judgment of this Court in the matter of Navin Fluorine Industries v. B.M Shah 2003 (3) GLH 189. In the above matter, the learned Single Judge rejected the request of the workman not to hear the writ petition against the award of the Labour Court until the application for benefit u/s 17B of the Act was heard and decided. We do agree with the learned Single Judge that no workman has a right to avoid hearing of the main writ petition under the guise that the application made u/s 17B of the Act is not heard or finally decided. However, the said judgment shall have no applicability to the facts of the present case. In the present case, the claim is limited for grant of benefit u/s 17B of the Act from the date the application was made till the main petition was heard and finally decided.

We are unable to accept the contention raised by Mr. Raval. There is nothing on record to suggest that the workman had given up his right to claim last drawn wages pending the writ petition. In absence of express statement made on behalf of the workman and the fact that the Civil Application was kept pending all along, we are of the opinion that the workman did not forgo his right to claim benefit u/s 17B of the Act. Nor did the workman forfeit such right merely because the matter was adjourned time and again. Such a claim cannot be rejected on the ground that the hearing of the Civil Application was not pressed at the relevant time.

In above view of the matter, the Appeal is allowed to the extent that the appellant workman will be entitled to wages last drawn by him from the date he made affidavit of his unemployment before this Court till 6th July, 2005, the date of the impugned judgment. Such wages shall be calculated and paid to the workman on or before 30th April, 2008. In the event, the respondent-Corporation fails to pay wages as directed hereinabove, the Corporation shall be liable to pay interest on the amount of such wages @ 6% per annum from the date of this order till the date of payment. Challenge to the rest of the order of the learned Single Judge stands rejected as not pressed.

34. In the result, the present application is allowed with a direction to petitioner company to pay last drawn wages inclusive of any maintenance allowance to the workmen, whose names are mentioned at Annexure "X Colly.", if it is available as per service rules from the date of award 10th April 2007 till 31st January 2008 within a period of one month from the date of receiving the copy of the said order.

35. It is further directed to petitioner company to pay last drawn wages regularly as required u/s 17B of the Industrial Disputes Act, 1947 to the concerned employees whose names are mentioned at Annexure "X Colly." till the main matter is finally decided by this Court.

36. Learned senior advocate Mr. Thakore requested this Court that number of workmen are involved and burden is also there upon the petitioner company, therefore, the main petition may be heard finally as early as possible.

37. Learned advocate Mr. N.R. Shahani has no objection for the request made by learned senior advocate Mr. Thakore for fixing the main matter finally.

38. Therefore, considering the request made by learned senior advocate Mr. Thakore, the main matter being Special Civil Application No. 13590 of 2007 shall be placed for final hearing in the 3rd Week of April 2008. Registry is directed to notify the main matter accordingly.

39. Learned advocate Mr. Shahani seeks leave to place on record the individual affidavit-in-rejoinder of Mr. Narendra Sahoo and Haribandhu Pradhan. Permission, as prayed for, is granted. The copy thereof is to be served to learned advocate Mr. M.R. Bhatt representing the petitioner company.