

(1967) 04 BOM CK 0001

In the Bombay High Court

Case No : Special Civil Application No. 812 of 1966

Chhotabhai Jethabhai Patel

APPELLANT

Vs

Industrial Court, Nagpur

RESPONDENT

Date of Decision : 12-04-1967

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 42(4), 78
Constitution of India, 1950 — Article 227

Citation : (1968) MhLj 377 : (1967) MhLj 40

Hon'ble Judges : N.L. Abhyankar, J;D.B. Padhye, J

Bench : Division Bench

Judgement

Abhyankar, J.—This is a petition under Art. 227 of the Constitution filed by Chhotabhai Jethabhai a bidi merchant. Respondent 3. Nathu Janu Ukey, was employed as a zal counting munshi in the petitioner's factory at Bhandara. The petitioner contended that respondent 3 had committed acts of misconduct, gross negligence of duty, insubordination and similar offences. A chargesheet was, therefore, framed against him on 13 May, 1965 and he was given notice to show cause in respect of these charges. Respondent 3 filed a written statement. He was informed that an enquiry would be held on 15 May, 1965 at Bhandara. At the enquiry the enquiry officer ordered proceeding to be taken against respondent 3; he put questions to him and recorded his answers, and on considering those statement he held that the charges were proved and respondent 3 was dismissed by the order of dismissal to be effective from 1 August, 1965.

2. Respondent 3 filed an application challenging the order of dismissal before the labour court at Nagpur under S. 78 of the Bombay Industrial Relations Act, 1946. The application was filed on or about 5 August, 1965. Respondent 3 raised several contentions in this application. He complained that the chargesheet was not proper, that the present head office had no authority to deal with the case of respondent 3 under the standing orders, that no evidence was led and was filed on behalf of the employer, that the finding is based only on the statement made by respondent 3 who was subject to cross-examination, that respondent 3 was

forced to append his signature to the paper without reading it over to him.

3. In this written statement the petitioner traversed several allegations and supported the order. The labour court after a thorough enquiry held that the findings of the enquiry officer were perverse, that the order of dismissal was passed by a person not authorized to exercise the power, that the dismissal was illegal and therefore the labour court directed that respondent 3 should be reinstated and that all the back-wages should be paid to him from the date of dismissal to the date of the order.

4. Against this order the petitioner preferred an appeal to the State industrial court. Among other grounds, the petitioner contended in ground 3 that respondent 3 had failed to comply with the provision of law by not making an application to the petitioner under S. 42(4) of the Bombay Industrial Relation Act which was a condition precedent to the making of an application by the worker to the labour court, and the order of the labour court was liable to be set aside on this ground.

5. The State industrial court upheld the order of the labour court. As regard challenge to the jurisdiction of the labour court based on the provision of S. 42(4) of the Bombay Industrial Relations Act, the appellate Court held that the challenge involved a question of fact whether or not the respondent has complied with the provision of S. 42(4) of the Act. The Court held that there is no material on record to justify the presumption that the respondent had not complied with the provisions of S. 42(4) and the challenge to the jurisdiction based on this objection was not tenable. As the objection raised, according to the State industrial tribunal, a mixed question of fact and law, the Court declined to interfere with the order of the labour court. In the result, the appeal failed and the order of the labour court was confirmed.

6. The petitioner challenges the order of the labour court as well as the State industrial court, but the only contention pressed before us was the one relating to S. 42(4) of the Bombay Industrial Relations Act. No arguments were addressed to us as regards the finding of the labour court that the order of dismissal was illegal or that the direction for reinstatement and payment of back-wages to respondent 3 was bad on any other ground. We are, therefore, required to determine a narrow questions of law arising in the case and that question is where an employed claims reinstatement and payment of back-wages and the labour court finds that the order of dismissal, discharge, removal or retrenchment from service made by the employer was vitiated on account of any of the three Cls. (i), (ii) and (iii) of S. 78(1)D of the Bombay Industrial Relations Act, whether the labour court acts without jurisdiction if the employee concerned approaches that court for the relief of reinstatement and payment of back-wages without complying with the provisions of S. 42(4) of the Bombay Industrial Relations Act.

7. In resisting the contentions it is urged on behalf of respondent 3 that the right

and remedy given under S. 78(1)D of the Bombay Industrial Relations Act is an independent remedy providing a complete code for its enforcement and is not controlled either by the provisions of S. 78(1)A(a)(i) or 42(4) of the Bombay Industrial Relations Act.

8. Section 78(1)D has been introduced for the first time in the Bombay Industrial Relations Act, 1946, by S. 31 of the Maharashtra Act 22 of 1965. This Maharashtra Act 22 of 1965, which came into force in the whole of the State of Maharashtra from 1 May, 1965, made various amendments to the Bombay Industrial Relations Act, 1946, which was in force in areas other than Vidarbha in the Maharashtra State till 1 May, 1965. The preamble to Act 22 of 1965 shows that the Act made various amendments or additions and alterations to the Bombay Industrial Relations Act, 1946, because it was considered expedient to extend the Bombay Industrial Relations Act, 1946, as amended, throughout the State of Maharashtra and to repeal the corresponding laws in force in other parts of the State of Maharashtra, such as Vidarbha. Actually, the only other statute operating was the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, which was in force in the Vidarbha region of Maharashtra. The Maharashtra Act 22 of 1965 amended the Bombay Industrial Relations Act and brought it in force in this region. In other words, this piece of legislation was undertaken by the State of Maharashtra legislature to provide for a uniform law governing the relations between the employees and employers in the matter of industrial disputes and industrial adjudication and all other cognate and relevant matters. We must remember this background when interpreting the various provisions of the Bombay Industrial Relations Act, 1946, as amended and which is operating from 1 May, 1965 in the whole of Maharashtra.

9. The Legislative Assembly Bill No. 66 of 1964 is the genesis of the Maharashtra Act 22 of 1965. Section 31 of that Bill recommended addition of a new paragraph in Sub section (1) of S. 78 of the Bombay Industrial Relations Act, 1946, and with reference to this paragraph and other changes recommended in S. 78(1) of the Act the statement of objects and reasons indicated that the new Clause D was added to S. 78(1) of the Bombay Industrial Relations Act, in order to enlarge the powers of the labour court, to require an employer to reinstate an employee with full back-wages payable to him and compensation not exceeding Rs. 1,500, and possibility of getting suitable employment more than six months prior to the action if such action is out of non-compliance with any standing order applicable to the employee. It will be seen that the third ground, namely, that the order of dismissal, discharge, removal or retrenchment, termination of service or suspension of an employee being found otherwise not proper or illegal was not in the original draft Bill but was added to the statute when the Act was finally passed. It will thus be seen that Clause D of S. 78(1) enables the labour court to require the employer to reinstate the employee either forthwith or by a specified date and requires that the employer shall pay back-wages from the date of termination of service or suspension, and ending on the date on which the labour court ordered reinstatement or the date of

reinstatement whichever is later. Several contingencies have been enumerated to enable the labour courts to exercise its power and these contingencies are that the order of dismissal discharge, removal, termination of service or suspension of an employee is made under one or the other of the following circumstances.

(1) That the order was passed more than six months after the default or misconduct come to the notice of the employer.

(2) That the order was in contravention of the provision of any law,

(3) That the order was in contravention of any standing order in force applicable to such employee.

(4) That the order was otherwise improper.

(5) That the order was otherwise illegal.

10. There was no similar power both to order reinstatement as well as payment of back-wages in the labour court prior to the introduction of Clause D. to S. 78(1) of the Bombay Industrial Relations Act, 1946. It is true, by judicial interpretation a power was claimed in the labour court to order reinstatement of an employee who is dismissed or discharged or whose services are terminate if a dispute arises regarding property or legality of such an order passed by an employer acting or purporting to act under the standing orders. In other words, if the order was not made under standing orders but was otherwise illegal or improper or against the provision of any law, or for default or misconduct more than six months prior to the date of such order, it does not appear that the labour court had any power to give relief to such an employee under the Bombay Industrial Relations Act as it existed prior to its amendment by Maharashtra Act. 22 of 1965. A reference was made to a Division Bench decision of this Court in Lalbhai Tricumlal Mills v. Din (V. M.) and others 1956 I L.L.J. 557. In that case the real issue seems to be one of jurisdiction of appropriate labour court. What seems to have been contended on behalf of the petitioner employer was that the labour court at Bombay was not the appropriate tribunal to take cognizance of the illegal dismissal, but it was the labour court at Ahmedabad, and this was so because, according to the petitioner, it was to the labour court at Ahmedabad that the employee concerned had made an application under S. 42(4) of the Act. The issue that arises before this Court, namely, the ambit of requirement of either S. 42(4) or read with S. 78(1)A(a)(i) was not adjudicable in that case. We rely on it only for the purpose of showing that the labour court under S. 78(1)A(a)(i) of the Bombay Industrial Relations Act could take cognizance of the order of dismissal of an employee under the standing orders, and that before approaching the labour court the employee had to make an application to his employer as per proviso to S. 42(4) of the Bombay Industrial Relations Act.

11. Inasmuch as the principle argument in this case is founded on the provisions of S. 42(4) of the Bombay Industrial Relations Act and the addition made to S. 78 of the Act, it is necessary to understand the scheme of Chap VIII in which the

sections find place. Section 42 is as follows :

"42. (1) Any employer intending to effect any change in respect of an industrial matter specified in Sch. II shall give notice of such intention in the prescribed form to the representative of employees. He shall send a copy of such notice to the chief conciliator, the conciliator for the industry concerned for the local area, the Registrar, the labour officer and such other person as may be prescribed. He shall also affix a copy of such notice at a conspicuous place on the premises where the employees affected by the changes are employed for work and at such other places as may be directed by the Chief Conciliator in any particular case.

(2) An employee desiring a change in respect of an industrial matter not specified in Sch. I or III shall give notice in the prescribed form to the employer through the representative of employer, who shall forward a copy of the notice to the chief conciliator, the conciliator for industry concerned for the local area, The Registrar, the labour officer and such other person as may be prescribed.

(3) When no settlement is arrived at in any conciliation proceeding in regard to any industrial dispute which has arisen in consequence of a notice relating to any change given under Sub-section (1) or (2), no fresh notice with regard to the same change or a change similar in all material particular shall be given before the expiry of two months from the date of the completion of the proceeding within the meaning of S. 63. If, at any time after the expiry of the said period of two months, any employer or employee again desires the same changes or a change similar in all material particulars, he shall give fresh notice in the manner provided in Sub-section (1) or (2), as the case may be.

(4) Any employee or a representative union desiring a change in respect of

(i) any order passed by the employer under standing orders, or

(ii) any industrial matter arising out of the application or interpretation of standing orders, or

(iii) an industrial matter specified in Sch. III [except item (5) thereof], shall make an application to the labour court and as respects charge desired in any industrial matter in item (5) of Sch. III to the industrial court :

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

12. We may observe that there is a slight change effected in S. 42(4) by Maharashtra Act 22 of 1965, and that change in Sub-section (4) which now requires an employee desiring a change in respect of item (5) in Sch. III to make an application to the industrial court and not to the court as previously permissible. According to Sri Phadke, the learned counsel for the petitioner, in substance the complaint of respondent 3 raises a dispute falling under Clause (a)

(i) of Para. A of Sub-section (1) of S. 78. But such a dispute cannot be deemed to arise until respondent 3 had made an application as required by the proviso to Sub-sec (4) of S. 42 to the employer requesting for a change. The change requested is a change in respect of the order of the employer under the standing order which in this case would mean the order of dismissal of respondent 3 under the standing orders applicable to respondent 3. The argument is that inasmuch as the petitioner had passed the impugned order dismissing the employee, acting or purporting to act under the standing orders, and inasmuch as the propriety or the legality of that order is challenged, the case of respondent 3 is covered by S. 78(1)A(a)(i), and therefore must attract the condition precedent for exercise of any right of seeking a change in that order as per proviso to Sub-section (4) of S. 42 of the Bombay Industrial Relations Act, 1964.

13. In fact, the learned counsel's contention could not have been wider so far as the impact of S. 78(1)A vis-a-vis the new Para. D to S. 78(1) is concerned. According to him, whenever an order of dismissal, discharge, removal, termination of service or suspension of an employee has come to be passed by an employer, it is ordinarily referable to a standing order. But the ground of attacking the order of dismissal, discharge, etc., may be one of the several of the grounds enumerated in the new Para. D of S. 78(1); the source of authority for passing such an order is the standing orders, and if the order is referable to the standing orders, it must be held to be an order passed under S. 78(i)A(a)(i) and if a dispute arises in respect of such order, the requirements of S. 42(4) and the proviso must be complied with. In this connexion our attention was invited to S. 78 of the Act. Under the definition a dispute falling in Para. A of Sub-section (1) shall be deemed to have arisen if within the period prescribed under the proviso to S. 42(4) no agreement is arrived at in respect of the order, matter or change referred to in the said provision.

14. Now, it will be seen that Sub-sec (i) of S. 78 enumerates various and different powers of a labour court under several paragraphs indicated by capital letters. Under Para. A the labour court has however to decide a dispute. Under Para. B the labour court is empowered to try offences punishable under the Act and also to order payment of compensation as provided for or determine compensation or its payment. Under Para. C the labour court is empowered to require an employer to withdraw any change held to be illegal or to withdraw temporarily any change, the legality of which is a matter of issue in any proceeding pending final decision, or to require the employer by a mandatory order to provide any change provided such a matter was in issue before the Court. A new Para. D is added to S. 78(1) and that paragraph requires the employer to reinstate an employee and also to pay any backwages for the period between the date of termination of his services and order of reinstatement or actual reinstatement whichever is later.

15. According to the learned counsel, whenever jurisdiction of the labour court is invoked under S. 78(1), it must be by an application, and if application is

required to be made by invoking the jurisdiction of the labour court at the instance of an employee, then, according to the petitioner, such an application is not tenable unless the employee or the representative union on his behalf has approached the employer with a request for a change. How the employer is to be approached with a request for a change is provided in rule 53 of the rules framed under the Bombay Industrial Relations Act. The application for approaching the employer with a request for change is to be made in writing. Rule 53 itself provided a period of six months (now three months) for making an application for change in respect of orders passed under standing orders. It appears that there is no period of limitation fixed for an application if the change is of other categories, namely, in respect of an industrial matter arising out of the application specified in Sch. III, other than item (5). Section 79 makes a special provision in respect of disputes falling under Clause (a) of Para. A of Sub-section (1) of S. 78. According to the petitioners Para. D which is added by Maharashtra Act 22 of 1965 does not curtail the controlling position of S. 68(1) A, and therefore, even if an application is for relief of reinstatement and payment of back-wages under Para. D of S. 78(1), the procedure must be by an application to the labour court, and if the application is to be made in writing to the labour court, the condition precedent for making such an application is approach to the employer with a request for a change in the order passed by him.

16. In our opinion, the restrictions of S. 78(1)A(a)(i) cannot control the procedure or powers of the labour court independently conferred for the first time on the labour court by Maharashtra Act 22 of 1985. It may be pointed out during the course of arguments that even though S. 78(1)A(a)(i) refers to disputes regarding propriety or legality of an order passed by an employer acting or purporting to act under standing orders, the ambit of enquiry and the power to grant relief, invested in the labour court under the new Para. D covered a much wider field. It could not be reasonably contended that if an order of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee is made by an employer because

(a) it was for a fault or misconduct of an employee which came to the notice of the employer within six months prior to the date of the order, or

(b) the order was in contravention of any law,

(c) the order was otherwise improper, and

(d) the order was otherwise as illegal,

in any of the above cases there was no power in the labour court to give relief unless it could be shown that the order was referable to standing orders, or was purported to have been passed under the standing orders. The legislature has added a new Para. D to S. 78(1) to give additional powers to the labour court in respect of certain matters of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee. A labour court is now empowered to order reinstatement and payment of back wages if it finds that the

employee is dismissed, discharged, removed, retrenched, terminated from service, or is under suspension for one or the other of the acts enumerated in Para. D, Sub-cl. (i), (ii) and (iii). Each of the paragraphs of Ss. 78(1)A, 78(1)B, 78(1)C, 78(1)D speak of distinct and different powers vested in the labour court. It may be that in the absence of any specific provision, dismissal of an employee could be considered by the labour court as a change, and if that was a change, then a request for revoking the order of dismissal might amount to a change in respect of an order passed by the employer under the standing orders. If it was really intended that the procedure to be followed by an employee in challenging the order of dismissal discharge, removal, retrenchment, termination of service or suspension under one of the other of the circumstances enumerated in the new Para. D should be controlled by the procedure in S. 78(1)A, there is no reason why it should not have appeared as an addition to that paragraph. Instead, the legislature has thought fit to make a separate provision to invest a distinct and additional power in the labour court to give relief of reinstatement and payment of back-wages to an employee dismissed, discharged, removed from service if such dismissal, etc., is found to be contrary to the provisions of any law or otherwise improperly made or is for the fault or misconduct committed by the employee which came to the notice of the employer six months prior to the date of such dismissal and also in contravention of the standing orders. There is no doubt, therefore, that the ambit of enquiry under Para. D is much wider, coupled with express powers given to labour court to order reinstatement and payment of lack-wages.

17. It will thus be seen that the whole argument is founded on a supposition that the power to decide a dispute regarding the propriety or legality of an order passed by an employer, acting or purporting to act under the standing orders, necessarily covers adjudication of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee made by the employer in contravention of the provisions of the standing orders. Whether or not this was so under the unamended provisions of S. 78(1)A(a)(i), we are clear that there are specific powers to deal with contingencies which are now expressly vested in the labour court under Para. D, and it is not permissible to import by implication powers of the labour court dealing with a matter under S. 78(1)A(a)(i) merely to require that an employee must also comply with the provisions of S. 42(4) and its proviso of the Bombay Industrial Relations Act. We prefer to construe the effect of introduction of now Para. D to S. 78(1) as creating an additional jurisdiction in the labour court to entertain applications challenging dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee made by employees under one or the other of the circumstances enumerated in Cls. (i) to (iii) of Para. D, and that power is coupled with a further power to grant reinstatement and back-wages if it is found that the order is illegal or improper either because it contravenes any law or any standing order or is otherwise found to be illegal or improper. A power to find dismissal or discharge as improper is a much wider power than the power to adjudicate a

dispute regarding the propriety or illegality of the order passed by an employer acting or purporting to act under the standing orders.

18. There are numerous instances where an undertaking or an industry may not have standing orders, and yet the termination of service may be against the provision of law or may be otherwise improper or illegal. A vested right is given to the employee to challenge his dismissal, discharge, suspension, etc., if it was for a fault or misconduct committed by the employee more than six months prior to the date of the order. This is a new ground which has been made available to the employee to challenge an order of dismissal, discharge, etc. The legislature thought fit to make a provision indicating as to when a dispute shall be deemed to arise, and that fictional deeming of a dispute to have arisen is provided for in the explanation. Under the explanation, read with S. 42(4) proviso, a dispute is said to arise if the employer is finally approached by the employee in the prescribed manner and no agreement is arrived at during the period prescribed. Which is a fortnight from the date of presentation of the request in writing by the employee to the employer. On the other hand, the ambit of jurisdiction of the labour court under the new Para. D is not fettered by any such requirement regarding such disputes. If the employer has taken his action, which so far as the employee is concerned puts an end to the relationship between himself and his employer on account of the order of dismissal, discharge, removal, termination of service, etc., the legislature seems to have thought fit to provide a direct remedy to such an employee to approach the labour court and challenge his dismissal, discharge, etc.

19. It is urged that every request for relief to the labour court must commence by an application, though there is no specific provision in Para D that an employees shall make an application. The very wording of the paragraph shows that the labour court is required to record a finding whether the order of dismissal, discharge, removal, etc., is in contravention of the provision of law or standing order, or is otherwise illegal or irregular, etc. This postulates enquiry and finding and it is only after a finding in favour of the employee is recorded that the labour court is empowered to give consequential relief of reinstatement and payment of backwages. Paragraphs B and C of S. 78(1) also enumerate some of the powers of the labour court. In neither of those paragraphs is there any reference to an application being made and yet it is not conceivable that powers under either Para. B or Para. C could be exercised by the labour court without proceeding having been commenced before it by an application. It may be a complaint as mentioned in Para. B or it may be an application under Para. C. Nothing therefore turns on whether or not there is an express provision for making of an application in Para. D.

20. Even Para. A does not speak of an application. But so far as Para. A of S. 78(1) is concerned, it is related back to Sub-section (4) of S. 42. It will be observed that the three categories in which the application to the labour court is provided in S. 78(1)A(a) are precisely the categories referred to in S. 42(4) of

the Act, and Sub-section (4) of S. 42 in turn states that the application in one or the other of the matters falling the employee shall make an application to the labour court. But the requirement of making an application to the labour court seems to have been expressly made in Sub-section (4) of S. 42 because of what follows in the proviso. Under the proviso a duty is cost on an employee as well as the representative union to approach the employer with a request for change. It is only when no agreement is arrived at during the period prescribed that an application is permissible to be made to the labour court, raising a dispute regarding any of the matters mentioned in S. 78(1)A(a)(i), 78(1)A(a)(ii) and 78(i)A(a)(iii). In none of the further paragraphs it seems to be necessary to follow this procedure. We are not prepared to held that merely because S. 78(1)A(a) speaks of propriety or legality of an order passed by an employer acting or purporting to act under standing orders, the same restriction should be read in working out the rights under new Para. D added by the Maharashtra Act 22 of 1965. In this context, it is relevant to see the legislative history of this provision.

21. We have already pointed out that the amendments effected in the Bombay Industrial Relations Act, 1946, by Maharashtra Act 22 of 1965 were largely made to bring out a uniform piece of legislation for adjudication and settlement of industrial disputes in the whole of the State of Maharashtra. Section 123A repeals the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, which was the principal State legislation governing relations between the employees and the employers in the industries in Vidarbha region Under S. 16 of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, an express right was conferred on any employee working in an industry to make an application within six months from the date of his dismissal or discharge, to the Labour Commissioner. On receipt of such an application, if the Labour Commissioner found that the dismissal or discharge was in contravention of any provisions of the Act or in contravention of standing orders made or sanctioned under the Act, and was more than six months prior to the date of discharge or removal, the Labour Commissioner was empowered to order that the employee may be reinstated or he may be given compensation and in addition, to order payment of back-wages. No similar provision appeared to exist in express form in the Bombay Industrial Relations Act, 1946. Inasmuch as this valuable right which was available to the workers under the Central Provinces and Berar Act was required to be preserved in appropriate form, it seems to us Para. D was specifically added to S. 78(1) of the Bombay Industrial Relations Act. Now, there was no such restriction on an employee under S. 16 of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, that such an employee must first approach the employer with a request to make change, or in other words, to withdraw the order of dismissal, discharge, retrenchment or suspension. In our opinion, therefore, it is unlikely that while incorporating a provision in the Bombay Industrial Relations Act in the form of Para. D to S. 78(1) of the Act, the legislature could have intended that the same right which was now made

available to the employees in the whole of the State of Maharashtra, should be fettered by the requirements of S. 42(4) and its proviso. The legislature has conferred a new right to the employee in the areas of the State of Maharashtra other than Vidarbha region and has preserved the rights of the employee in the Vidarbha region in the Act by incorporating Para. D in S. 78(1) of the Bombay Industrial Relations Act. Which was amended in 1965. If the legislative intent is to be gathered from requirements of conditions to be satisfied by an employee who has been given a right to challenge his dismissal, discharge, etc. in Para D, we do not find any implication in the amendment or in the manner in which the new Para. D is added to S. 78(1) that it was intended to be controlled by the provisions of S. 78(1)A or by S. 42(4) of the Bombay Industrial Relations Act.

22. It is true that Sub-section (4) of S. 42 enjoins that an employee or a representative union on his behalf, desiring a change, has to make an application to the labour court, and if the application is under Clause (a)(ii) of Para. A of S. 78(1), then that application is to be preceded by action prescribed in the proviso to Sub-section (4) of S. 42. Even assuming that an order of dismissal under standing orders would fall for adjudication of any dispute under S. 78(1)A(a)(i), it cannot be disputed that several kinds of orders other than orders of dismissal or discharge came to be passed under standing orders, and thus the ambit of enquiry and the nature of disputes when the dispute arose out of orders under standing orders, is very wide. But so far as Para. D is concerned, the legislature is making a special provision only for orders of dismissal, discharge, removal, etc., though also under standing orders as well as similar orders which are challengeable as improper relief. Thus there is a special provision made by the legislature for reinstatement or payment of back wages, if they have lost their service on account of the order of dismissal, discharge, etc., under the circumstances described in Para. D. For the purposes of giving speedy relief in respect of such employees, in our opinion, the legislature has provided a direct remedy by way of approach to the labour court, and the labour court has been specifically empowered to give relief of reinstatement and payment of back-wages which were not expressly provided for until an amendment was effected in 1966. Thus, the scheme of Chap. XII and, especially S. 78, would suggest that by addition of Para. D an additional power is created in the labour court and specific remedy is provided to the employee which is not conditioned by the provisions of S. 42(4) of the Bombay Industrial Relations Act, 1946. The object of creating an additional power necessarily implies duty to exercise the power when the tribunal is approached with a grievance which squarely falls within the ambit of the provisions of Para. D.

23. But it is urged, the moment it is found that even for a relief which can be granted under Para. D by the labour court, the occasion for demanding such a relief is order of dismissal under a standing order, the provisions of Sub-section (4) of S. 42 are immediately attracted, and if S. 42(4) controlled applications for challenge to an order of dismissal under a standing order, the further requirement of the proviso must be complied with. We are unable to accept this

contention. It is not disputed that under the scheme of Sub-section (4) of S. 42, an employee or a representative union desiring a change is allowed to make an application in respect of orders passed by an employer under the standing orders. A large variety of orders can be conceived under standing orders, including an order of dismissal under the appropriate provisions of the standing orders.

24. Thus, the order passed by an employer under a standing order is a genus and an order of dismissal under the standing order may be a species. Even though, therefore, Sub-section (4) S. 42 makes a proviso requiring an employee desiring a change in respect of an order passed by the employer understanding orders to make an application, and further requiring that prior to making such an application the employee should approach his employer as prescribed by the proviso, we are unable to hold that so far as relief in respect of order of dismissal, etc., provided for in Para. D is concerned, such order of dismissal though passed under the standing order, is governed by the provisions of S. 42(4). We have already pointed out that Para. D of S. 78(1) is an independent provision, and if this is so, it must also be held that so far as challenge to order of dismissal, discharge, etc., passed under the standing order is concerned, they are also excluded from the operation of Sub-section (4) of S. 42. But it has been contended that the legislature was fully aware of other provisions in the Act like S. 42(4), when various amendments were effected including addition of Para. D to S. 78(1). Section 42(4) itself has been slightly amended by making a separate provision for an application by an employee desiring a change in respect of an industrial matter covered by item (5) in Sch. C. Whereas previously such an application could be made to the labour court, the amendment provides that such an application henceforward would lie to the industrial court. The legislature did not think it fit or necessary to effect any other change in Sub-section (4) of S. 42. Sub-section (4) of S. 42 as it originally stood before Para. D was added to S. 78(1), necessarily controlled the procedure required to be undertaken in respect of disputes referred to in S. 78(1)A(a) of the Act. If the legislature had intended that the same procedure prescribed by Sub-section (4) of S. 42 should also be followed in respect of orders of dismissal, discharge, retrenchment, termination of service or suspension of an employee when such an order comes to be passed under a standing order, no good reason is shown why adjudication and relief in respect of such orders made by an employer under a standing order have been included in Para. D along with similar orders in respect of which relief can be granted if other conditions enumerated in Para. D are satisfied. The very fact that the legislature did not think it necessary to make any amendment of S. 42(4) which previously governed only Para A of S. 78(1) of the Act, would show that the scheme of S. 42(4) was not intended to be altered by addition of Para. D to S. 78(1) of the Bombay Industrial Relations Act. We have already pointed out that Para. D represents a separate and self-contained scheme investing the labour court with additional powers to give relief to an employee in the matter of reinstatement and payment of back wages if it finds that such employee is

dismissed, discharged, removed retrenched, or suspended on one of the enumerated grounds. This is a special provision, and if in making such a special provision it is also intended to include relief in respect of order of dismissal, discharge, etc., passed under a standing order, we do not see why only in respect of that species of order the requirement of S. 42(4) and its proviso should be attracted. Section 42(4), so far as orders passed by the employer under a standing order and challenge to the order of dismissal or discharge, etc., by the employee are concerned, is a general provision, but so far as challenge to orders of dismissal, discharge, removal, albeit under standing orders is concerned. Para. D represents a special provision. Therefore, we are unable to hold that in respect of orders of dismissal under standing orders the worker is hampered by the pre-conditions of S. 42(4) and the proviso before he can get relief, when an application is made under S. 78(1)D of the Bombay Industrial Relations Act.

25. There is yet another contention raised on behalf of the petitioner which remains now to be considered and disposed of. It is urged that powers under Para. D can be exercised only in respect of an employee because it is dismissal, discharge, removal, retrenchment, suspension of an "employee," that furnishes occasion for adjudication and relief by a labour court. What is urged is that unless it is proved that for grant of such a relief a person is an "employee" within the meaning of the Bombay Industrial Relations Act, 1946, no application is tenable. Our attention was invited to the definition of "employee" in the Bombay Industrial Relations Act, in S. 2(13). That definition is as follows :

"(13) "employee" means any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes -

(a) a person employed by a contractor to do any work for him in the execution of a contract and an employer within the meaning of Sub cl, (e) of Clause (14) :

(b) a person who has been dismissed, discharged or retrenched or whose services have been terminated from employment on account of any dispute relating to charge in respect of which a notice is given or an application made under S. 42 whether before or after his dismissal, discharge, retrenchment or, as the case may be, termination from employment; but does not include -

(i) a person employed primarily in a managerial, administrative, supervisory or technical capacity drawing basic pay (excluding allowances) exceeding five hundred and fifty rupees per month;

(ii) any other person or class of persons employed in the same capacity as these specified in Clause (1) above irrespective of the amount on the pay drawn by such persons which the State Government may, by notification in the official gazette, specify in this behalf;".

26. According to the learned counsel for the petitioner Clause (a) of the definition clause is the governing clause of the definition. Unless, therefore, it is shown that the claimant is an employee who was a person who has been dismissed,

discharged, or retrenched, or whose services have been terminated on account of any change in respect of which notice is given or an application is made under S. 42, an ex-employee, merely because he was dismissed, discharged or retrenched, cannot make an application for relief under Para. D of S. 78(1) of the Act.

27. In this connexion reliance was placed on another Division Bench decision of this Court in *Laxman Ganbeji v. State Industrial Court, Nagpur* [Special Civil Applications Nos. 345 and 575 of 1966, decided by Paranjpe and Bal. JJ., on 11 March, 1967 (Unrep.)]. One of the questions raised in that case was the interpretation of the definition clause of the term "employee" in S. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947. The definition in S. 2(10) of the Central Provinces Act is as follows :

"(10) "employee" means any person employed by an employer to do any skilled or unskilled manual or clerical work for contract or hire or reward in any industry and includes an employee dismissed, discharged, or removed on account of any industrial dispute."

28. The case arose out of an application by one Laxman who was served with a notice terminating his services in exercise of a contractual option and the contention that appears to have been raised was that Laxman was not an employee who was dismissed, discharged, or removed on account of any industrial dispute. Accepting this contention the Division Bench observed as follows :

"A plain reading of the definition of the term "employee" in S. 2(1) as it now stands, shows that the only category of persons who, though not in actual employment at the date of the application, is included within that term is of persons who are ex-employees and were dismissed, discharged or removed on account of any industrial dispute. The disputes must proceed the dismissal, discharge or removal and the dismissal, discharge or removal must be the result of such dispute :"

29. Even a cursory comparison of the two definitions would show that they are not in *pari materia* and no assistance, in our opinion, can be derived by the petitioner in relying on the decision in that case.

30. It is necessary to scrutinise the definition in S. 2(13) of the Bombay Industrial Relations Act before the contention can be accepted in the form it is raised. According to the learned counsel for the petitioner even under the provisions of Para. D of S. 78(1) of the Act a labour court will be powerless to order reinstatement and payment of back-wages on account of the dismissal, discharge, etc., which is found to be in contravention of a standing order, unless such a person has been dismissed from employment on account of any dispute relating to a change in respect of which notice is given or an application is made under S. 42. It was also contended that the earlier part of the definition which defines an "employee" meaning any person employed to do skilled work or for

hire or reward is to be ignored and the words which follow, namely, "and includes" are to be construed as words of limitation rather than words of extension of the definition. We are unable to accept this construction either. Moreover, the definition given in S. 2(13) cannot be rigidly applied if it is repugnant to the context or subject.

31. Now, the subject of Para D of S. 78(1) is empowering a labour court to give relief of reinstatement and payment of back wages to an employee who has been dismissed, discharged, or whose services have been terminated or suspended for one or the other of the causes given in that paragraph. We fail to see how such an employee could have satisfied the definition in Clause (b) of S. 2(13) in order to get relief under Para. D of S. 78(1). That definition postulates a dismissal on account of a dispute relating to a change in respect of which a notice is given or on account of a change or on account of any dispute relating to any change in respect of which an application is made under S. 42. In other words, the dismissal, etc., must follow a dispute and that dispute must arise on account of a notice relating to a change having been given or an application having been made under S. 42 relating to such a change. Surely a dismissal order may be made not only on account of a dispute having arisen, but even in other circumstances. It could hardly have been intended by the legislature (if we are to accept the interpretation put on the definition clause on behalf of the petitioner) that almost no employee will be entitled to get relief unless such an employee is first dismissed, retrenched, or his services have been terminated and such a dismissal, discharge, or retrenchment or termination is on account of a dispute relating to a change in respect of which a notice is given or an application is made under S. 42. We are satisfied that no such startling result was contemplated or intended by the legislature in adding Clause (b) to the definition section, as including an employee in the general definition earlier given in the opening part of S. 2(13). Even the definition section is to be so construed as to be reconciled with the scheme and provisions of the Act and not as to bridge the benefits of the Act in the case of persons who otherwise are employees but who cannot satisfy the test of being an employee within the meaning of the artificial definition in Clause (b) of S. 2(13). If the contention is taken to its extreme logic, it would mean that the provisions of the Act are not available to any employee unless he satisfies the condition of Clause 2(13) of the Act. We are unable to hold that such was the intention of the legislature or that the word "employee" in Para. D of S. 78(1) should be construed with reference to this definition. Such a construction would be wholly repugnant to the subject or context for which provision is made in Para. D of S. 78(1) and we must reject this contention.

32. There is an allegation in the return filed on behalf of Nathu (respondent 3) that he had approached the employer before making an application to the labour court. It is not necessary that any enquiry should be made into that averment now as we have come to the conclusion that so far as the working out of the rights under Para. D of S. 78(1) of the Bombay Industrial Relations Act, 1946, is

concerned, it is not necessary for an employee first to approach an employer or to follow the procedure under S. 42(4) and its proviso of the Act.

33. Thus, the result is that the petition fails and is dismissed with costs.