
(2016) 02 GUJ CK 0010
In the Gujarat High Court

Case No : Special Civil Application No. 9169 of 2007

Hitendra Laxmichand Soni

APPELLANT

Vs

Shaikh & Company

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Citation : (2016) 3 GLR 1892 : (2016) LIC 3523 : (2017) 1 SCT 22

Hon'ble Judges : Mr. K.M. Thaker, J.

Bench : Single Bench

Advocate : Mr. Doshi for Mr. S.P. Majmudar, Advocates, for the Appellant; Mr. Yogen N. Pandya, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.(Oral)—Heard Mr. Doshi, learned advocate for Mr. Majumdar learned advocate for the petitioner and Mr. Pawar, learned advocate for the respondent.

2. In this petition, the petitioner has brought under challenge order dated 6.2.2007 passed by learned labour Court, Ahmedabad whereby the learned labour Court rejected the Recovery Application filed by present petitioner by invoking provisions under Section 33(C-2) of the Industrial Disputes Act, 1947 [hereinafter referred to as the "Act"].

3. So far as the factual background is concerned it has emerged from the record of present petition that the petitioner herein filed an application under Section 33(C-2) of the Act and raised claim/demand for sum of Rs. 2,65,500/- against present respondent. The said application was registered as Recovery Application No. 378 of 2006.

3.1 Upon receipt of the notice from the learned Court with regard to the proceedings of the said recovery application, the original opponent in the application (i.e. present respondent) filed application Exh.7 and raised preliminary objection against maintainability of the said recovery application

wherein original opponent contended, inter alia, that the claimant does not have any pre-existing right in respect of the amount demanded in the recovery application and that therefore the application is not maintainable.

3.2. The respondent herein (i.e. original opponent in recovery application) also opposed maintainability of the application on the ground that it was filed after inordinate delay of 17 years and that therefore, the application should not be entertained.

3.3. Original opponent in said recovery application opposed maintainability of the application on the ground that applicant is not and was never its workman and actually father of the applicant was its workman and the person who filed the application (the applicant for sake of convenience) was never employed by it and that therefore, he had no right in law to file the recovery application against the respondent.

3.4. The respondent also opposed the application and claim made by the applicant on merits and asserted in the reply before the learned Labour Court that the respondent did not owe any amount to the claimant - applicant and the application was filed with malafide intention of unjustifiably extracting amount from the respondent. The respondent also denied that the workman i.e. father of the applicant was entitled for salary for overtime at the rate of 4 hours of overtime work every day and it was also denied that the applicant's father was retrenched.

3.5. The learned Labour Court adjudicated the recovery application and vide order dated 6.2.2007, the learned Labour Court rejected the application. The petitioner - applicant is aggrieved by the said order dated 6.2.2007. Hence present petition.

3.6. Learned advocate for the petitioner assailed the order dated 6.2.2007 and submitted that the learned Labour Court committed error in allowing the application Exh.7 preferred by the employer whereby the employer raised preliminary objection against maintainability of the recovery application. Learned advocate for the petitioner submitted that the learned Labour Court erred in accepting the employer's contention that the learned Labour Court can entertain recovery application in respect of only pre-existing right. So as to support his submission, learned advocate for the petitioner relied on the decision by Hon'ble Apex Court in case of The Central Bank of India Ltd. v. P.S. Rajagopalan etc. [AIR 1964 SC 743] and the decision in case of Rameshwar Manjhi (Deceased) through his son Lakhiram Manjhi v. Management of Sangramgarh Colliery & Ors. [AIR 1994 SC 1176].

4. So far as the factual backdrop is concerned, it has emerged from the record that the applicant alleged that his father was illegally retrenched and that at the time of illegal retrenchment his dues - such as difference of minimum wage, overtime wage leave salary, gratuity were not paid.

4.1 On the other hand, the respondent claimed that the workman i.e. father of the applicant had tendered resignation and left the service. It was also claimed that when the workman (i.e. the applicant's father) tendered resignation, all dues were paid to him and the respondent did not owe any amount to the workman and any amount payable in law was not outstanding at the relevant time. The respondent also claimed that at the relevant time, only three persons, including the owner, were working in the establishment and that the claims raised by the applicant were unsustainable.

5. In present case, the respondent has filed affidavit and opposed the petition. In the reply affidavit, it is reiterated that the workman i.e. the applicant's father had tendered resignation on 3.11.1988 and when he was relieved on account of resignation all dues were paid to the applicant's father. The respondent also denied that the applicant's father was working with the establishment since 1963. The respondents also claimed that the applicant's father died on 16.1.1989 whereas the applicant (son of the deceased employee) filed the recovery application in 2006.

5.1 It is not in dispute that during his lifetime, the petitioner's father i.e. the workman had not raised any claim and had not filed any application.

5.2 Along-with the affidavit, the respondent's have placed on record a photocopy of the document dated 3.11.1988 purportedly the resignation allegedly submitted by the applicant's father. The said document reflects, prima facie, that the applicant's father had tendered resignation on the ground of ill-health. The said document also reflects the remark that the resignation was accepted in presence of witness, who have put their signatures.

5.3 Along-with the affidavit, the respondents have also placed on record of this petition a document dated 3.11.1988 under which the applicant's father declared that all dues were paid and he had no claim against the establishment and any amount was not due or outstanding.

6. The applicant - petitioner has controverted the said reply affidavit by filing rejoinder. The applicant - petitioner has disputed the respondent's claim that his father had tendered resignation.

7. Before proceeding further, it would be appropriate to take into account the claims which the applicant placed before the learned Labour Court by virtue of recovery application No.378 of 2006. In the said recovery application, the applicant - petitioner raised below mentioned claims:-

Sr. No.

Particulars

Amount in Rs.

1

Difference of salary as per the minimum wages and special allowance.

22,000/-

2

Salary for overtime work.

34,000/-

3

Salary towards weekly off.

26,000/-

4

Bonus (for five years)

7,500/-

5

Leave salary.

32,000/-

6

Retrenchment compensation.

72,000/-

7

Gratuity.

72,000/-

7.1. In the application, the applicant also claimed that his father had worked for 25 years with the establishment and the salary last drawn was at the rate of Rs.1,250/- p.m.

8. On examination of the application, it comes out that the applicant did not make out even prima facie case with regard to the claim towards bonus or salary at the rate of minimum wages and/or overtime and/or retrenchment compensation and/or gratuity.

8.1. The applicant did not even claim in the application that at the relevant time (i.e. when his father was employed and when he was relieved), 20 or more persons (or even 10 persons) were employed in the establishment and/or that at the relevant time, what was the rate of minimum wages and/or what was the base for claiming that his father had worked for 4 hours overtime every day for many years.

8.2. Without making out even a prima facie case and/or without supporting the claim with any credible document, the applicant filed the said application about 17 years after his father's death.

8.3. It was in this background that the respondent, in addition to their written statement, filed an application Exh.7 raising objection against maintainability of the application and requested the learned Labour Court to dismiss the application.

9. After considering rival contentions, the learned Labour Court allowed the employer's application Exh.7 and dismissed the Recovery Application No.378 of 2006. The learned Labour Court held that the applicant failed to establish his pre-existing right and that therefore the application was not maintainable. The learned Labour Court also found that the application was filed after inordinate delay and that therefore also, it was not maintainable.

10. In present case, certain undisputed facts have emerged which are:

(a) the concerned workman died in 16.1.1989;

(b) the son of the deceased filed Recovery Application in 2006 i.e. after 17 years;

(c) during his lifetime, the workman himself had not raised any demand or any claim and had not filed any application seeking any "dues" or had not taken out any proceedings raising any demand/dispute and not claimed any amount in respect of the heads/items mentioned in the said recovery application any benefit, as unpaid dues.

(d) until the workman died in January 1989 he had not filed Recovery Application under Section 33(C-2) or any application under the provisions of Gratuity Act and/or under Provident Fund Act and/or Bombay Shops and Establishment Act and/or Minimum Wages Act and it was for the first time in 2006 that his son filed the said recovery application and claimed diverse amounts under different heads;

(e) it is also not in dispute that along with the application the applicant i.e. son of the deceased did not place on record any document or any other material, even to prima facie demonstrate that his father had not tendered resignation and his father's service did not come to an end on account of resignation but his father's service was terminated by way of retrenchment;

(f) before the applicant file the recovery application, the Court of competent jurisdiction had not adjudicated the dispute related to alleged retrenchment and not held that the service of applicant's father came to an end by way of retrenchment and that the retrenchment was illegal;

(g) The claim for overtime wages was not only raised about 17 years after death of the workman but the said claim was raised for entire tenure of the workman's service i.e. for span of 25 years, however, any material was not placed on record to even prima facie support the claim that during the said entire period of 25 years the workman (i.e. father of the applicant) had worked overtime for 4 hours everyday.

11. Plain reading of the application brings out that it is bereft of even primary and basic details required for adjudication of such claim.

12. Besides this, when the provisions under Minimum Wages Act and Payment of Gratuity Act and Employees Provident Fund and Miscellaneous Provisions Act and Bonus Act are taken in to account then it comes out that under the said law specific and separate forum for adjudicating the claim arising in light of the provisions under the said law are created and provided for and that therefore, in view of such provisions a claim - application for Gratuity or Bonus or Minimum Wages, or Provident Fund would lie before the special authority/forum created under the special statute.

13. In this background, the learned labour Court considered the opponent's preliminary objection against maintainability of the recovery application and the learned labour Court also considered that the application was not filed for any crystallized claim and/or pre-adjudicated right and/or pre-existing right. The learned labour Court held that in absence of any pre-adjudicated right and/or pre-existing right recovery application under Section 33(C-2) of the Act would not be maintainable and the labour Court cannot pass any direction in respect of the claim for which there is pre-adjudicating and/or pre-existing right and crystallized claim.

14. The applicant has challenged the said decision on the ground that it is not necessary that the recovery application can be entertained only in respect of pre-existing right and any disputed claim cannot be adjudicated and decided by the labour Court in recovery application under Section 33(C-2) of the Act. However, while challenging the impugned order passed by learned labour Court the applicant overlooks the fact that in present case, the application was not filed by the workman but by the workman's son and that the application was filed after inordinate delay of about 18 years after the concerned workman died and in face of the fact that during his life time, the workman himself had not raised dispute/claim.

15. In this view of the matter, it would be appropriate to consider, at the outset, the scope of application under Section 33(C-2) and the scope of said provision and scope of Court's jurisdiction while entertaining recovery application under said provision. While entertaining, adjudicating and deciding an application filed under Section 33(C-2):-

(a) the learned Labour Court can consider claim which can be computed in terms of money but the right must be crystallized and should arise from and in the course of "employer-and-employee" relationship. The right should exist as "crystallized right".

(b) While acting under Section 33(C-2), the labour court cannot entertain and adjudicate a claim which is not based on existing right i.e. a claim which is required to be adjudicated upon and converted into right.

(c) While entertaining and deciding an application under Section 33(C-2), the labour court cannot act as, or cannot exercise jurisdiction of, a labour Court or an industrial tribunal under Section 10 of the Act and it cannot usurp the jurisdiction of and function of the labour Court or industrial tribunal acting under Section 10 of the Act.

(d) There is substantive and material difference between "money had" and "might have" and that therefore, it is not permissible to labour court acting under Section 33(C-2) to receive a claim and adjudicate the claimant's "entitlement" or to determine the "base of the claim".

(e) The labour court acting under Section 33(C-2) cannot first undertake the process to decide claimant's "entitlement" or "base of the claim" and, then, set down the matter for computing and quantifying the amount payable towards such claim. The jurisdiction and function to decide "entitlement" and "base for the claim" is of labour court or industrial tribunal under Section 10 of the Act.

(f) When the entitlement for the claim and base of the claim are adjudicated, then, for the purpose of implementation of such claim or for deciding and removing any ambiguity and/or for quantifying the money value of the adjudicated right, the Court can entertain the application under said section and in that process, the learned Labour Court can decide incidental issues.

(g) The power of the labour court acting under Section 33(C-2) is akin to the power of executing court i.e. to interpret the decree for the purpose of execution.

16. In this context, it would be appropriate to take into account the observations by Hon''ble Apex Court in certain decided cases.

(a) In the case of *Municipal Corporation of Delhi v. Ganesh Razak & Anr.* [(1995) 1 SCC 235] wherein Hon''ble Apex Court observed and held that:-

"9. Another decision on the point is *Bombay Gas Co. Ltd. v. Gopal Bhiva* AIR 1964 SC 752 wherein also Gajendragadkar, J., (as he then was) speaking for the Bench, referring to the above Constitution Bench decision, stated that the proceedings contemplated by Section 33-C(2) are analogous to execution proceedings and the Labour Court, like the Executing Court in the execution proceedings governed by the Code of Civil Procedure, would be competent to interpret the award on which the claim is based. It is obvious that the power of the Executing Court is only to implement the adjudication already made by a decree and not to adjudicate a disputed claim which requires adjudication for its enforcement in the form of decree. The Executing Court, after the decree has been passed, is however competent to interpret the decree for the purpose of its implementation. This position was settled by the above Constitution Bench decision and has been the consistent view of this Court ever since then.

8. Since proceedings under Section 33-C(2) are analogous to execution proceedings and the Labour Court called upon to compute in terms of money the benefit claimed by a workman is in such cases in the position of an Executing

Court, the Labour Court like the Executing Court in execution proceedings governed by the Code of Civil Procedure, is competent under Section 33-C(2) to interpret the award or settlement where the benefit is claimed under such award or settlement and it would be open to it to consider the plea of nullity where the award is made without jurisdiction." After stating the propositions, the decision proceeds to state as under: (SCR p. 144) "It is clear that the right to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer."

11. In *Central Inland Water Transport Corpn. Ltd. v. Workmen* 1975 (4) SCC 348 it was held with reference to the earlier decisions that a proceeding under Section 33-C(2) being in the nature of an execution proceeding, it would appear that an investigation of the alleged right of re-employment is outside its scope and the Labour Court exercising power under Section 33-C(2) of the Act cannot arrogate to itself the functions of adjudication of the dispute relating to the claim of re-employment. Distinction between proceedings in a suit and execution proceedings thereafter was pointed out. It was indicated that the plaintiff's right to relief against the defendant involves an investigation which can be done only in a suit and once the defendant's liability had been adjudicated in the suit, the working out of such liability with a view to give 4 (1974) 4 SCC 696: 1974 SCC (L&S) 421 : (1975) 1 SCR 153 241 relief is the function of an execution proceeding. This distinction is clearly brought out in that decision as under: (SCR p. 159 : SCC pp. 701-02) "In a suit, a claim for relief made by the plaintiff against the defendant involves an investigation directed to the determination of -

(i) the plaintiff's right to relief;

(ii) the corresponding liability of the defendant, including, whether the defendant is, at all, liable or not; and

(iii) the extent of the defendant's liability, if any. The working out of such liability with a view to give relief is generally regarded as the function of an execution proceeding. Determination No. (iii) referred to above, that is to say, the extent of the defendant's liability may sometimes be left over for determination in execution proceedings. But that is not the case with the determinations under heads (i) and (ii). They are normally regarded as the functions of a suit and not an execution proceeding. Since a proceeding under Section 33-C(2) is in the nature of an execution proceeding it should follow that an investigation of the nature of determinations (i) and (ii) above is, normally, outside its scope. It is true that in a proceeding under Section 33-C(2), as in an execution proceeding, it may be necessary to determine the identity of the person by whom or against whom the claim is made if there is a challenge on that score. But that is merely "Incidental". To call determinations (i) and (ii) "Incidental" to an execution proceeding would be a perversion, because execution proceedings in which the extent of liability is worked out are just consequential upon the determinations (i) and (ii) and represent the last stage in a process leading to final relief.

Therefore, when a claim is made before the Labour Court under Section 33 - C(2) that court must clearly understand the limitations under which it is to function. It cannot arrogate to itself the functions-say of an Industrial Tribunal which alone is entitled to make adjudications in the nature of determinations (i) and (ii) referred to above, or proceed to compute the benefit by dubbing the former as "Incidental" to its main business of computation. In such cases, determinations (i) and (ii) are not "Incidental" to the computation....The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33-C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognised by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33- C(2) like that of the Executing Court's power to interpret the decree for the purpose of its execution."

(emphasis supplied)

(b) In the decision in case of Chief Superintendent, Government Livestock Farm, Hissar v. Ramesh Kumar [C.A.No.684 of 1993 dated March 19, 1996], wherein Hon"ble Apex Court observed that:-

"(2) We are unable to appreciate how the application of the respondent could be entertained under Section 33-C (2) of the Act. The remedy of Section 33-C (2) is available only in those cases where there is no dispute about entitlement of the workman. The remedy of Section 33-C (2) cannot be invoked in a case where the entitlement is disputed. In the instant case, the entitlement of the respondent to regular scale was disputed by the appellant and, therefore, it was not a case in which the remedy of Section 33-C (2) could be invoked. The proper course for the respondent was to have his entitlement to regular scale determined by a competent court or tribunal and in the event of non- payment of the amount payable to him as per his entitlement under such determination he could invoke the remedy under Section 33-C (2)."

(emphasis supplied)

Thus, even in cases where proper and applicable pay scale is disputed then in such cases application under Section 33(C-2) cannot be entertained and the entitlement can be decided by competent jurisdiction.

(c) In the decision in case of State Bank of Bikaner & Jaipur v. R.L. Khandelwal [1968 (1) LLJ 589], Hon"ble Apex Court considered below mentioned facts:-

"2. The respondent, on 2nd April, 1964, presented an application under Section 33C(2) of the Industrial Disputes Act, 1947 (14 of 1947) (hereinafter referred to as "the Act"), claiming that he was entitled to the special allowance prescribed by the Sastry Award on the ground that he had been wrongly reverted on 3rd February, 1956, to do clerical work and by that order, he could not be deprived of

his right to receive the supervisory allowance. This application came up before the Central Government Labour Court, Rajasthan, at Jaipur which allowed it and directed payment of the supervisory allowance to the respondent by the appellant. The appellant has now come up by special leave to this court.

3. The claim of the respondent to the supervisory allowance was contested on behalf of the appellant on three different grounds. Two of the grounds related to the jurisdiction of the Labour Court to entertain the application under Section 33C(2) of the Act and to the plea that the respondent had dis-entitled himself to the claim because of laches and delay inasmuch as the application was filed in 1964 when the claim related to a period which began on 3rd February, 1956. These two grounds were, however, not argued before us, because, on behalf of the appellant, reliance was placed primarily on the third ground on which we consider that the appeal must be allowed. This ground urged was that, during the period for which the respondent was claiming the supervisory allowance, he was not, in fact, either holding a post or working in a post involving work of supervisory nature and, consequently, under the Sastry Award he was not entitled to claim the special allowance."

In light of said facts and having regard to the nature of the claim of the claimant in the said decision, Hon"ble Apex Court observed that:-

"5. The scope of the function and powers of a Labour Court, when dealing with an application under Section 33C(2) of the Act, has been laid down by this court in several cases..... These decisions make it clear that a workman cannot put forward a claim in an application under Section 33C(2) in respect of a matter which is not based on an existing right and which can be appropriately the subject-matter of an industrial dispute only requiring reference under Section 10 of the Act. The question whether his reversion was wrongful or rightful, or whether it should be set aside, is not a matter within the jurisdiction of a Labour Court dealing with an application under Section 33C(2). The vacation of such an order can only be sought by raising an industrial dispute and having it decided in accordance with the other provisions of the Act. A Labour Court, acting under Section 33C(2), has to decide the application on the basis that, in fact, the respondent was, during the relevant period, doing routine clerical work and was not employed on supervisory duties. The justification or validity of the order of reversion dated 3rd February, 1956, could not be gone into by the Labour Court in this proceeding under Section 33C(2). The Labour Court had to proceed on the basis that the order of 3rd February, 1956, was effective and did result in the respondent ceasing to work in the supervisory capacity and being employed on routine clerical work."

(emphasis supplied)

Likewise, the question as to whether the service of the workman was actually discontinued and that it was done by way of retrenchment and whether the retrenchment was legal or not, cannot be considered and decided by learned

Labour Court acting under Section 33(C-2) of the Act.

(d) In the decision in case of U.P. Electric Supply Co. Ltd. v. R.K. Shukla [1969 (2) LLJ 728], Hon"ble Apex Court considered the claim by 56 workmen for retrenchment compensation and salary in lieu of notice and also for compensation for accumulated earned leave not enjoyed by them till 16/09/1964. The said claim was allowed by the learned Labour Court who awarded to each workmen retrenchment compensation which was opposed by the company before Hon"ble Apex Court mainly on two grounds i.e. (i) that the Labour Court was incompetent to entertain and decide the applications for awarding retrenchment compensation; and (ii) that the workmen were, in fact, not retrenched. In the said decision, Hon"ble Apex Court, after considering the decision in case of Central Bank of India v. Rajgopalan observed and held that:-

"14. The decision in the Central Bank of India v. P.S. Rajagopalan and Others(1), to which we have already referred, makes it clear that all disputes relating to claims which may be computed in terms of money are not necessarily within the terms of Section 33C(2). Again in Chief Mining Engineer, East India Coal Co. Ltd. v. Rameshwar and Others (2) Shelat, J., observed :

"..... that the right to the benefit which is sought to be computed under Section 33C(2) must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer. Since the scope of sub-section (2) is wider than that of sub-section (1) and the sub- section is not confined to cases arising under an award, settlement or under the provisions of Ch. V-A, there is no reason to hold that a benefit provided for under a statute or a scheme made thereunder, without -there being anything contrary under such statute or section 33C(2) cannot fall within sub-section (2).

That judgment clearly indicates that in order that a claim may be adjudicated upon under Section 33C(2), there must be an existing right and the right must arise under an award, settlement or under the provisions of Ch. V-A, or it must be a benefit provided by a statute or a scheme made thereunder and there must be nothing. contrary under such statute o r Section 33C(2). But the possibility of a mere claim arising under Ch. V-A is not envisaged by the Court in that case as conferring jurisdiction upon the Labour Court to decide matters which are essentially within the jurisdiction of the Industrial Tribunal.

15. The legislative intention disclosed by section 33 C (1) and 33 -C (2) is fairly clear. Under section 33- C(1) where any money is due to a workman from an employer under a settlement or an award or under the provisions of Ch. V-A, the workman himself, or any other person authorised by him in writing in that behalf, may make an application to the appropriate Government to recover of the money due to him. Where the workman who is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money, applies in that behalf, the Labour Court may under section 33-C(2) decide the

questions arising as to the amount of money due or as to the amount at which such benefit shall be computed. Section 33- C(2) is wider than section 33C(1). Matters which do not fall within the terms of section 33C(1) may, if the workman is shown to be entitled to receive the benefits, fall within the terms of section 33C(2). If the liability arises from an award, settlement or under the provisions of Ch. V-A, or by virtue of a statute or a scheme made thereunder, mere denial by the employer may not be sufficient to negative the claim under section 33- C(2) before the Labour Court. Where however the right to retrenchment compensation which is the foundation of the claim is itself a matter which is exclusively within the competence of the Industrial Tribunal to be adjudicated upon a reference, it would be straining the language of section 33C(2) to hold that the question whether there has been retrenchment may be decided by the, Labour Court. The power of the Labour Court is to compute the compensation claimed to be payable to the workmen on the footing that there has been retrenchment of the workmen. Where retrenchment is conceded, and the only matter in dispute is that by virtue of section 25 FF no liability to pay compensation has arisen the Labour Court will be competent to decide the question. In such a case the question is one of computation and not of determination, of the conditions precedent to the accrual of liability. Where, however, the dispute is whether workmen have been retrenched and computation of the amount is subsidiary or incidental, in our judgment, the Labour Court will have no authority to trespass upon the powers of the Tribunal with which it is statutorily invested....."

(emphasis supplied)

(e) In the decision in case of State of U.P. & Anr. v. Brijpal Singh [(2005) 8 SCC 58], Hon''ble Apex Court observed, inter alia, that:-

"10. It is well settled that the workman can proceed under Section 33C(2) only after the Tribunal has adjudicated on a complaint under Section 33A or on a reference under Section 10 that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman. This Court in the case of Punjab Beverages Pvt. Ltd. v. Suresh Chand, (1978) 2 SCC 144 held that a proceeding under Section 33C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. Proceeding further, this Court held that the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer."It is not competent to the Labour Court exercising jurisdiction under Section 33C(2) to arrogate to itself the functions of an industrial tribunal and entertain a claim which is not based on an existing right but which may appropriately be made the

subject matter of an industrial dispute in a reference under Section 10 of the Act."

11. In the case of *State Bank of India v. Ram Chandra Dubey & Ors.*, (2001) 1 SCC 73, this Court held as under:

"8. The principles enunciated in the decisions referred by either side can be summed up as follows:

Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under Section 33-C(2) of the Act. The benefit sought to be enforced under Section 33-C(2) of the Act is necessarily a pre-existing benefit or one flowing from a preexisting right. The difference between a preexisting right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33C(2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not granted necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made.....

13.Thereafter, the Labour Court, in the instant case, cannot arrogate to itself the functions of an Industrial Tribunal and entertain the claim made by the respondent herein which is not based on an existing right but which may appropriately be made the subject matter of an industrial dispute in a reference under Section 10 of the I.D. Act. Therefore, the Labour Court has no jurisdiction to adjudicate the claim made by the respondent herein under Section 33C(2) of the I.D. Act in an undetermined claim and until such adjudication is made by the appropriate forum, the respondent-workman cannot ask the Labour Court in an application under Section 33C(2) of the I.D. Act to disregard his dismissal as wrongful and on that basis to compute his wages. It is, therefore, impossible for us to accept the arguments of Mrs. Shymala Pappu that the respondent-workman can file application under Section 33C(2) for determination and payment of wages on the basis that he continues to be in service pursuant to the said order passed by the High Court in Writ Petition No. 15172 of 1987 dated 28.10.1987....."

(emphasis supplied)

16.1. In light of above quoted observations, it becomes clear that present

petitioner's application would entail and require adjudication of several issues/ disputes e.g. whether Payment of Gratuity Act and/or Payment of Bonus Act were applicable to the establishment where the applicant's father was employed and whether he was an employee within the meaning of the term under Gratuity Act and whether he was eligible and entitled for said benefit (i.e. the issues which - on proper evidence - can be decided by Controlling Authority under the Act) and that such issues cannot be adjudicated and decided by the Court acting under Section 33(C-2) of the Act.

16.2. Besides this, there is substantive dispute as to the cause on account of which, and the mode by which, the service of applicant's father came to an end i.e. on account of resignation or by way of retrenchment and also about legality of alleged termination. These disputed question cannot be adjudicated and decided by the Court under Section 33(C-2) of the Act. The adjudication power necessary for deciding such issues is not conferred on the Court under Section 33(C-2) of the Act.

17. Now, it is relevant to take into account the fact that the application was filed 17 years after the death of the workman (i.e. his father).

17.1 It is true that the Section 33(C-2) does not prescribe time limit for filing application. It is also true that in absence of provision prescribing time limit Court cannot read such limitation into the Section and where any period of limitation is not prescribed, claim can be raised at any time and can not be rejected only on ground of delay i.e. on the ground that it is rendered time-barred.

17.2 It is also true that, ordinarily, in respect of the matters where any time limit is not prescribed by the legislature, any outer limit to take out proceedings cannot be fixed by the Court nor any thumb - rule can be applied. However, absence of any provision prescribing limit would not confer absolute right in favour of the applicant/plaintiff to come out with a stale claim after inordinate delay (as happened in present case where the applicant initiated proceedings after about 17 years) without offering any explanation with regard to the cause for delay and without making out sufficient cause. The applicant or the plaintiff is, where the proceedings are initiated after inordinate or unreasonable delay, obliged to explain the period of delay and cannot be absolved from such obligation. A litigant cannot absolve himself from explaining the cause for delay in initiating the proceedings and cannot expect that unreasonably or inordinately delayed claim and belated application may be maintained and entertained even if satisfactory explanation for delay/cause for such delay is not offered. In cases where any explanation is not offered for taking out the proceedings after inordinate delay, the Court may decline to entertain the proceedings with regard to stale claim.

17.3. So far as factual aspect of present petition is concerned, it is noticed from the memo of the petition that there is no response with regard to the inordinate

delay and the petitioner has not offered any explanation as to the cause for delay. Equity helps the vigilant and does not help those who are indolent. Likewise law too, will not bail out those who remain negligent or indifferent in respect of their claim or suddenly wake-up and take recourse to the remedy provided by law but do not care to explain the delay. The law would also frown upon those who misuse the remedy and liberal provision for unreasonable or unjustified or unsubstantiated claim.

17.4. Unless the Court is satisfied, in light of material on record, that there were compelling reasons and/or circumstances which prevented the applicant from invoking the remedy and that the delay is satisfactorily explained, the Court may refuse to entertain such application. In this context, it would not be out of place to take into account observations by the Court in the case of *Employees State Insurance Corporation v. Natvarlal Amrutlal Shah* [1996 (3) GLR 835] in which case also, the application was filed and claim was raised after delay of almost 17 years. In the said case the Court observed, *inter alia*, that:-

"10.There cannot be any quarrel with the proposition of law that any proceedings in respect of which no period of limitation has been fixed, such proceedings can be raised at any time and such claims cannot be rejected on the ground that they have become time-barred. Nevertheless, the question remains that even such claims for which there is no prescribed period of limitation are required to be filed within a reasonable time or not and as to whether the time in approaching the Court has to be reasonably explained or not. In such cases, where no period of limitation is prescribed there cannot be any upper limit or lower limit and no formula of universal application can be laid down as to after what period the claim should not be entertained or up to what period it should be entertained, but the party filing claim after long delay cannot be absolved from the obligation of explaining delay and the cases in which it is found that the delay has been reasonably explained, the claim can certainly be entertained. No period of limitation has been prescribed with reference to the proceedings under Article 226 of the Constitution of India also but the requirement to explain the time taken in approaching the Court has been insisted and applied throughout. In AIR 1964 SC 1006 (*State of Madhya Pradesh and Anr. v. Bhailal Bhai*) the Supreme Court has taken the view that whereas three years", period has been prescribed for the remedy under the common law, the period of three years should be taken as reasonable period for approaching the Court under Article 226 of the Constitution of India. But in the latter decision the Supreme Court has taken the view that in such cases no upper limit or no lower limit can be fixed and the question of delay in each and every case has to be decided on its own facts, when the period of limitation has not fixed. It was only by keeping this end in view that the time was granted to the petitioner to file an affidavit even at this stage to explain the delay for filing the claim for the period of 1973 to 1986 in the year 1990 and because it was stated that this matter was identical to some other matters which have been decided. The plea that the party has no knowledge of law can't be entertained and it goes without saying that pleading

no knowledge of law is no ground to explain the delay and the saying goes that ignorance of law is no excuse. Thus, this decision also does not lay down any such proposition of law that the case where no limitation is prescribed the party can approach or initiate proceedings under Section 33-C(2) of the I. D. Act at any time without explaining the delay. The decision of Andhra Pradesh High Court is only an authority for the limited purpose of maintainability of application under Section 33-C(2) of the I. D. Act even in respect of those claims which have become time-barred either under Payment of Wages Act or under the Minimum Wages Act. Thus, no party can absolve itself of the obligation of giving an explanation seeking to explain inordinate delay. In the facts of the present case, no explanation worth the name was given for delay of 17 years and even in this affidavit which has been filed today the deponent has made a bald statement that he is not much educated and had no knowledge of law. In my opinion, the long delay of 17 years can't be taken to be explained on this basis. The proceedings under Section 33-C(2) of the I. D. Act initiated in the year 1990 in respect of the overtime work for the period 1973 to 1986, therefore, should not have been entertained by the Labour Court merely because the Limitation Act is not applicable, unless it could come to the conclusion on the materials placed before it that the delay had been reasonably explained. The claim should have been, therefore, rejected in the facts of this case...."

It emerges from the above quoted observations that though the said Section 33(C-2) does not prescribe any limitation for filing an application, however, an application for stale claim which is filed after inordinate delay and without offering any explanation as regards the delay and without making out sufficient cause and without offering satisfactory explanation cause for such inordinate delay does not deserve to be entertained.

17.5 In present case, the foregoing discussion has also brought out that the petitioner has taken out the proceedings in respect of such claim which can neither be said to be claim based on any existing right or crystallized right. Most of the claims are such which require adjudication by competent Court and not the Court acting under Section 33(c)(2) can entertain the proceedings.

17.6 In view of such facts of the case, it cannot be said that the learned Labour Court committed any error in rejecting the Recovery Application No.378 of 2006 filed by present petitioner i.e. son of the deceased employee.

18. This leaves behind the issue related to maintainability of the application under Section 33(C-2) filed by heir or legal representative of the workman i.e. by a non-workman.

18.1 So as to consider the said contention, it would be appropriate to take into account the said Section and the language of the provision which would explain the nature and extent and scope of said Section. The said Section 33-C reads thus:-

"33C. Recovery of money due from an employer.- (1) Where any money is due to

a workman from an employer under a settlement or an award or under the provisions of [Chapter VA or Chapter VB] the workman himself or any other person authorised by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrears of land revenue:

Provided that every such application shall be made within one year

Provided further that any such application may be entertained after the expiry

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government [within a period not exceeding three months]:

[Provided that].

(3)

(4)

(5)"

18.2. The sub-section (1) of Section 33-C(2) specifically provides that an application under said sub-section can be filed by the "workman" himself or by "any other person authorised by him in writing" or in case of death of the workman, the application can be filed "by his assignee or his heirs".

18.3. It is pertinent that such provision is conspicuously absent in sub-section (2) of Section 33-C, which provides, inter alia, that any "workman" who is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money can file an application under said section if any question arises as to the money due as to the amount at which such benefit should be computed and such question may be decided by the Labour Court.

18.4. The said sub-section (2) of Section 33-C does not provide, in similar manner as subsection (1) does, that application can be filed by "any other person authorised" by the workman in writing. The sub-section (2) does not, in manner similar to sub-section (1), provide that in case of death of the workman, the application can be filed by "his assignee or his heirs".

18.5. Such provision is consciously eliminated or dropped or taken out from sub-section(2) though expressly provided in sub-section (1).

18.6. The fact that such provision is considered necessary and expressly provided under one subsection [i.e. sub-section (1)] and immediately dropped or taken-out from succeeding sub-section [i.e. sub-section (2)] of same section viz. Section 33(C-2) of the Act, emphasis the fact that the right to submit application by "any person authorised by workman" or by "assignee or heirs" of workman is not to be treated, or considered, as implied provision/implied ordinary civil right.

18.7 In this context, it would not be out of place to also refer to the Rule-62(2) of the Central Rules which prescribes, inter alia, that where any workman or group of workmen is entitled to receive from the employer any money or any benefit capable of computed in terms of money, the workman or group of workmen may apply in Form K-3. Similarly, the provision under Rule 67 of Industrial Dispute (Gujarat) Rules, 1961 also throw light on the issue on hand. The said Rule 67 (which is similar to Rule 62(2) of Central Rules) provide, inter alia, that:-

"67. Application for recovery of dues. (1) Where any workmen is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the workmen concerned may apply to the specified Labour Court in Form XX-B for the determination of the amount at which such benefit should be computed.

(emphasis supplied)

(3) Where the Labour Court has determined the amount of the benefit under sub-rule (2), the workmen concerned, may apply in Form XX-C for the recovery of the money due to him."

(emphasis supplied)

18.8 Thus, according to said provision, it is the "workman" who can file application under subsection (2) of Section 33(C) and therefore also, it would neither be just or proper or permissible to read or add something in said sub-section (2) which the legislature has not provided or rather has consciously taken out, dropped and eliminated after having provided for under sub-section (1) of same Section.

18.9. So as to submit and maintain an application under sub-section (2) of Section 33-C, the applicant must be a "workman" as defined under Section 2(s) of the Act and such claim application cannot be filed by a non-workman, i.e. heirs or assignees or legal representatives of the workman or any person authorised by the workman.

18.10. It is true that ordinarily, all cause of action (except those which may die upon death of the person) would survive and would be available to the heirs of the deceased workman.

18.11. On the same analogy, the cause of action created in favour of the workman would, ordinarily and in normal circumstances, survive to the heirs and

the workman's death would not deprive the heirs or legal representatives to continue the claim.

18.12. The cause of action or cause of the dispute of this nature may survive to the heirs or legal representatives of the deceased workmen, however, that can be prosecuted before any other court or forum, however, the remedy under sub-section (2) of Section 33(C) will not be available to non-workman and non-workman cannot invoke said remedy and in absence of any express provision in the Act, the Labour Court cannot confer unto itself and cannot usurp such power and it can not read such power into sub-section (2) of Section 33-C so as to entertained recovery application by heirs or legal representatives of the deceased workman.

18.13. However, here the question is not about right, or survival of right, after the death of workman but the issue is about remedy. The question in present case is (a) whether the remedy under Section 33(C-2) would be available to non-workman; and (b) whether the heirs/legal representatives of a workman (who had not raised any claim and had not filed application under Section 33(C-2) of the Act for any claim during his life time) can for first time file an application under said Section.

18.14. It is pertinent that the remedy under Section 33-C is special remedy created under Special Act viz. Industrial Disputes Act, 1947 and that therefore, the said remedy can be invoked and exercised only in the manner and to the extent prescribed by said section and only by those persons who, according to the said provision, are entitled to invoke it i.e. only by those persons who are specifically and expressly permitted by the said section. A special remedy cannot be invoked and/or exercised or availed in any manner other than prescribed by the provision or by any person other than the person who are permitted - authorised by the provision.

18.15. Now, so far as application under Section 33(C-2) and more particularly application by heirs or assignee or legal representative of workman i.e. by non-workman is concerned, it cannot be overlooked that while submission of application by non-workman is specifically and expressly provided under sub-section (1) of Section 33-C, it is, with equal clarity and expressly eliminated from (and not provided) immediately succeeding sub-section i.e. sub-section (2) of Section 33-C.

18.16. In this circumstance, if the normal and ordinary principle of survival of cause of action after the death of the person is to be applied in case of Section 33-C(2), then, the Court will have to add, and read a provision similar to the provision under sub-section (1), into the subsequent provision viz. into the sub-section (2) also and that too by ignoring the fact that the legislature has consciously dropped and eliminated the said provision in respect of sub-section (2).

18.17. The very fact that necessary provision is specifically included in sub-

section (1) and in the immediately following sub-section (of same section) i.e. from sub-section (2) the provision is eliminated and is not included in sub-section (2) speaks about and indicates the intention of legislature and clarifies, abundantly, that the legislature did not intend to allow applications under sub-section (2) of Section 33-C, by non-workman. It is pertinent that what is expressly provided under sub-section (1) is expressly taken-out, dropped and eliminated in and form the following or subsequent sub-section (1). In light of apparent difference between the said two subsections, it comes out clearly that maintainability of applications under sub-section (2) of Section 33-C by "any person" (i.e. by person (3) other than the concerned "workman") is neither provided for nor contemplated. In this view of the matter, the Court cannot read into sub-section (2) provision similar to sub-section (1).

18.18. It follows from foregoing discussion that in view of the specific distinction between subsection (1) and sub-section (2) which is eloquent and loud an application under sub-section (2) of Section 33-C can be made by "workman" and not by "non-workman" and an application under Section 33(C-2) by heirs or assignee or legal representative of workmen or by "any person authorised by workman" i.e. an application made/submitted by a "non-workman" is not maintainable and cannot be entertained by learned Labour Court under said sub-section (2). However, where the application is filed by the workman before his death and the proceeding is already pending at the time of death of the workman, can be continued and can be prosecuted by his heirs or legal representatives after the death of the workman - applicant, subject to other applicable limitations, laws, Rules, etc. In present case, it is not necessary to elaborate on this issue because the concerned workman did not file claim application under Section 33-C(2) for any claim during his lifetime and present application was not filed by concerned workman. Further, on examination of the claim and the application, it has emerged that it is bereft of even primary details required for entertaining any claim. The application appears to be sheer misuse of the provision and the remedy. Even otherwise, such stale claim in respect of which the delay is not explained and/or satisfactory explanation is not offered and the claim which is wholly unsubstantiated and is not in respect of "existing" and/or "adjudicated" and/or "crystallized", right did not deserve to be entertained. For this reason also, the application is rightly not entertained by the learned Labour Court.

18.19. The learned Labour Court has not committed any error in rejecting the application. The order impugned in this petition, though for different reasons, does not warrant interference. There is no reason or justification to disturb and set aside impugned order.

19. Before concluding, I must refer to the decisions which learned counsel for the petitioner referred to. So far as the decision in case of Central Bank of India (supra) is concerned, the said decision, in the facts of present case, do not render any assistance. Further, in light of the observations in the subsequent

decisions viz. in case of Municipal Corporation of Delhi (supra) and in the decision in case of State Bank of Bikaner and Jaipura (supra) and in case of U.P. Electric Supply Co. Ltd. (supra) and in the decision in case of Brijpal Singh (supra) wherein Hon''ble Apex Court considered the decision in case of Central Bank of India it becomes clear that the power and authority of learned Court under Section 33(C-2) does not include and does not take in its fold type of claims raised by the applicant - petitioner in his recovery application No.378 of 2006. Likewise, the decision in case of Rajeshwar Manjhi (deceased) through his son Lakhiram Manji (supra) also does not render any assistance to the petitioner in present case because the central issue in the cited decision was about abatement of the proceeding on death of the workman. Thus, the issue in the said case was related to the proceedings which was already instituted by the workman himself and was pending at the time of workman's death. In the said decision, the proceedings were originally initiated by the workman himself and the son of the workman had, subsequently only continued to prosecute the said proceedings after the death of his father.

19.1. Thus, the said decision addressed the issue as to whether heirs can continue pending proceedings or the proceeding pending (at the time of death of workman) would abate on the death of applicant workman. Therefore, the said decision also does not render any assistance to the petitioner because in present case, the workman himself had not initiated the said recovery proceedings during his life time and the son of the workman filed the application about 17 years after his father's death.

19.2. At this stage, it would be profitable to also take into account the decision by Division Bench in case of Bank of Baroda v. The Workmen [(1979) 2 LLJ 57]. A reference of the said decision is found in above mentioned decision in case of Lakhiram Manji. In the said decision in case of Bank of Baroda, the Hon''ble Division Bench has held that pending proceedings do not abate on death of the workman. In that context, it is pertinent to note that the issue arose before Hon''ble Division Bench with regard to reference proceedings under Section 2(A) of the Act (and not an application under Section 33(C-2) of the Act). Further, even in the said decision, the issue before the Court was whether heirs or legal representatives can continue the proceedings after death of the workman or not. In the said case also, the proceedings were already initiated by the workman and at the time of his death, the proceedings i.e. reference under Section 2(A) of the Act was pending. In light of such fact, the question arose as to whether the heirs can continue the pending proceedings or not and the Division Bench held that the proceedings pending at the time of death of the workmen can be continued by the heirs. In none of the said cases, the proceedings were sought to be initiated for the first time by the heirs after death of the workman and that too, after unreasonable delay and in face of the fact that the workman himself had not raised any claim during his life time.

19.3. The facts of present case, are distinctly, substantially and materially

different from the facts in the cited decision i.e. in case of Lakhiram Manji and that therefore, the said decision also does not any assistance to the petitioner.

19.4. When the decision dismissing Recovery Application dated 6.2.2007 is considered in light of the aspects mentioned herein above, then the Court is persuaded and inclined and also convinced to hold that present petition against the decision rejecting such recovery application, though on different grounds, does not deserve to be entertained.

20. Therefore the petition is hereby rejected. Rule is discharged.