

(2020) 07 GUJ CK 0009

In the Gujarat High Court

Case No : R/Letters Patent Appeal No. 335, 336 Of 2020 In R/Special Civil Application No. 13900, 13902 Of 2017, Civil Application (For Interim Relief) No. 1 Of 2020

Junagadh Municipal Corporation

APPELLANT

Vs

Dipakbhai Pratapbhai Karamata

RESPONDENT

Date of Decision : 13-07-2020

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Industrial Disputes, Act, 1947 — Section 2(oo), 2(oo)(a), 2(oo)(b), 2(oo)(c), 2(oo)(bb), 25F, 25G, 25H

Citation : (2020) 07 GUJ CK 0009

Hon'ble Judges : Vikram Nath, CJ; J.B. Pardiwala, J

Bench : Division Bench

Advocate : HS Munshaw, TR Mishra

Final Decision : Dismissed/Disposed Of

Judgement

J.B. Pardiwala, J

1. As the issues raised in both the captioned appeals are the same those were taken up for hearing analogously and are being disposed of by this

common judgment and order.

2. For the sake of convenience, the Letters Patent Appeal No.335 of 2020 is treated as the lead appeal.

3. This appeal under Clause 15 of the Letters Patent is at the instance of the original petitioner and is directed against the judgment and order passed

by a learned Single Judge of this Court dated 07.08.2019 in the Special Civil Application No.13902 of 2017 by which the learned Single Judge rejected

the petition and thereby affirmed the award passed by the Labour Court in favour of the respondent No.1 workman herein.

4. The facts giving rise to this appeal may be summarized as under:

4.1 The respondent No.1 herein was in employment of the Junagadh Municipal Corporation i.e. the appellant herein w.e.f. 24.03.2005 as a daily

wager. The workman came to be relieved from the employment w.e.f. 15.11.2007.

4.2 The sudden termination of the workman from service gave rise to the Reference (T) No.1 of 2009 before the Labour Court, Junagadh under the provisions of the Industrial Disputes Act, 1947 (for short, 'Act, 1947').

4.3 The Labour Court, Junagadh partly allowed the Reference in favour of the workman and directed that the workman be reinstated in service without back-wages.

4.4 The appellant herein being dissatisfied with the judgment and award dated 06.05.2017 passed by the Labour Court, Junagadh in the Reference referred to above came before this Court challenging the award by filing the Special Civil Application No.13902 of 2017.

4.5 The Special Civil Application No.13902 of 2017 came to be heard by a learned Single Judge of this Court and vide judgment and order dated 07.08.2019 rejected the petition being devoid of merit.

4.6 While rejecting the petition, the learned Single Judge observed as under:

6. Learned advocate for the petitioner submitted that Labour Court has erred in not appreciating that the respondent no.1 workman has not

produced any documentary evidence to show that he was in employment and worked for 240 days in preceding 12 months and therefore, he was not

entitled to any relief. He further submitted that respondent no.1 workman was offered work in response to his application for a time bound period vide

order dated 24th March, 2005 and considering the administrative exigencies, respondent no.1 workman was issued further office orders on 3rd

January, 2006, 18th January, 2007 and 8th May 2007. He further submitted that it is apparent that respondent no.1 was employed in response to his

application on temporary, ad hoc and time bound basis with fixed remuneration considering administrative exigencies and therefore, the provisions of

section 2(oo)(bb) of the Industrial Disputes, Act, 1947 (the ID Act for short) were attracted in facts of the case. He further submitted that

though above facts were brought on record by way of producing necessary documents/appointment orders, other record and affidavit in lieu of

examination of chief of an officer of the corporation, Labour Court allowed the reference brushing aside such evidence on record. He further

submitted that Labour Court has erred in holding that provisions of section 25F of the ID act were breached. He further submitted that even otherwise

delay of two years in filing the reference after so-called termination itself shows that it was a case of abandonment of service. He further submitted

that He further submitted that the impugned award of reinstatement would adversely affect the administration and public exchequer as the

appointment order was offered in view of the then prevailing administrative circumstances.

7. On the other hand, learned advocate Mr. T.R. Mishra appearing for the respondent no.1 workman relying upon the affidavit in reply submitted that

ground of delay raised in this petition was not raised before the Labour Court by the petitioner and therefore, it is not open for the petitioner to raise

such a contention in this petition. It is submitted that petitioner and other employees had filed Complaint(ID) No. 7/2007 before the Labour Court with

a prayer not to terminate the services of the workmen and the Labour court was pleased to direct to maintain status-quo with regard to service

condition of the workmen till 20th November, 2007. It is submitted that after filing of the said application, the petitioner management compelled the

workmen to withdraw the said application. It is submitted that since the petitioner and other workman did not withdraw the said application, their

services came to be terminated while those who withdrew the application, their services were regularized by the petitioner-Corporation as permanent

employees. It is further submitted that on perusal of the seniority list, it is apparent that there are several employees who are appointed immediately

after the termination of respondent no.1 workman and they have been made permanent and are working with the petitioner corporation. The attention

of the Court was invited to seniority list at Annexure-2 which shows that persons from serial no. 74 to 89 are the employees who are appointed in the

years 2007, 2008, 2009 and 2011. It was therefore, submitted that petitioner corporation has committed breach of provisions of sections 25G and 25H

of the Act.

8. Having considered the rival submissions and taking into consideration the impugned judgment and award passed by the Labour Court, it emerges that

Labour Court after taking into consideration oral and documentary evidence has given finding of fact that the petitioner has illegally terminated the service of the respondent no.1 workman and there is breach of provisions of sections 25F, 25G and 25H of the Act. Labour Court has taken into consideration the written statement filed by the petitioner at Exh.11, claim statement of the respondent workman at Exh.4, deposition by way of affidavit of the respondent workman at Exh.16 and cross examination made by the advocate of the petitioner wherein it is denied by respondent no.1 workman that he has not worked for 240 days. It is also submitted by respondent no.1 workman in support of his deposition that various work orders which are given by the petitioner are on record from Exh. 21 to Exh.25. The Labour Court has further held that though the documents were sought from the respondent workman as per application Exh.11 and in spite of order being passed by the Labour Court for production of documents, such documents were not produced. Labour Court further observed that vouchers from 24th March 2005 to 15th November, 2007 show that respondent - workman is paid his daily wages. Witness of the petitioner has also admitted in his cross examination at Exh.19 that work which the respondent workman was discharging was still continued and the respondent workman was working with the petitioner from 2005 to 2007. The Labour Court has therefore, come to the conclusion that respondent workman has discharged duties for 240 days from 2005 to 2007 till his services were terminated. It has also come on record that service of respondent workman was not taken through any contractor but the office orders were issued by the petitioner and when respondent workman has discharged duties for more than 240 days as per the provisions of section 25F of the Act, his services could not have been terminated without payment of notice and notice pay or retrenchment compensation. It has also been found by the Labour Court that the petitioner has continued to employ the workmen for the work which was discharged by the respondent workman and as such there is breach of section 25G and 25H of the Act.

9. In view of the aforesaid findings of fact given by the Labour Court, it cannot be said that there is any infirmity in the impugned judgment and award requiring interference by this Court while exercising powers under Article 227 of the Constitution of India.

10. Petition is therefore, devoid of any merit and same is dismissed accordingly. No order as to costs. Rule is discharged.â??

5. Thus the learned Single Judge having not found any jurisdictional infirmity in the award passed by the Labour Court nor any error of law apparent

on the face of the record affirmed the award of the Labour Court and rejected the petition. The learned Single Judge recorded a finding that the

workman was illegally terminated from the service of the appellant in breach of the provisions of the Section 25F, 25G and 25H respectively of the

Act, 1947. The learned Single Judge having gone through the entire record and proceedings of the case, recorded a finding of fact that the workman

had discharged duties for 240 days between 2005 and 2007 i.e. till the time his services were terminated. The learned Single Judge also took notice of

the fact that the service of the workman was not taken through any contract, but the office orders were being issued by the appellant herein and when

the workman had discharged duties for more than 240 days in accordance with the provisions of Section 25F of the Act, 1947 his services could not

have been terminated without issue of notice and notice pay or retrenchment compensation. The learned Single Judge also recorded a finding that the

appellant has continued to employ the workmen for the work which was being discharged by the respondent workman herein and the breach of the

provisions of Section 25G and 25H respectively of the Act, 1947 was apparent.

5.1 While rejecting the petition preferred by the appellant herein the learned Single Judge has very specifically observed in para 9 of the impugned

judgment and order that there being no infirmity in the judgment and award of the Labour Court, his Lordship would not like to interfere in exercise of

its supervisory jurisdiction under Article 227 of the Constitution of India. The observations made by the learned Single Judge as contained in para 9 of

the impugned judgment and order indicate that although the petition preferred by the appellant herein is under Articles 226 and 227 of the Constitution

of India, yet in substance the same was one under Article 227 of the Constitution of India invoking the supervisory jurisdiction of the High Court under

Article 227 of the Constitution of India.

5.2 The appellant being dissatisfied with the judgment and order passed by the learned Single Judge rejecting the petition is here before this Court with

the present appeal. Submissions on behalf of the Appellant

6. Mr. H.S.Munshaw, the learned counsel appearing for the appellant vehemently submitted that the learned Single Judge committed a serious error in rejecting the petition holding that the termination of the workman was in breach of the provisions of Section 25F, 25G and 25H respectively of the Act, 1947. Mr. Munshaw would submit that the respondent was appointed purely on temporary basis and the appointment orders were being passed time to time with specific terms and conditions. In such circumstances, according to Mr. Munshaw, the case on hand is squarely covered within the provisions of Section 2(o)(bb) of the Act, 1947 and the provisions of Section 25F of the Act would not be attracted in any manner.

6.1 Mr. Munshaw vehemently submitted that the learned Single Judge failed to appreciate an important question of fact that no recruitment procedure was ever undertaken at the time of the appointment of the respondent No.1 and the appointment was purely contractual and on temporary basis as per the availability of the work. He would argue that the employment offered to the respondent No.1 was not on any permanent or sanctioned post.

6.2 It is pointed out by Mr. Munshaw that the respondent No.1 was offered work in the encroachment branch of the appellant w.e.f. 24.03.2005 on the basis of administrative exigencies and the respondent No.1 worked on the strength of various appointment orders up to 15.11.2007. It is argued by Mr. Munshaw that the respondent No.1 was not entitled to continue in employment as his appointment was time bound depending upon the availability of the work and funds.

6.3 In the last, Mr. Munshaw submitted that the respondent No.1 has not adduced any documentary evidence to establish that he was in employment and had worked for 240 days in preceding 12 months.

6.4 In support of his aforesaid submissions, Mr. Munshaw has placed reliance on the following two decisions of the Supreme Court:

[1] M.D., Karnataka Handloom Dev. Corpn. Ltd. vs. Mahadeva Laxman Raval [(2006)13 SCC 15].

[2] The Haryana State Agricultural Marketing Board vs. Subhash Chand and Ors. [(2006)2 SCC 794].

6.5 Both the aforesaid decisions have been relied by Mr. Munshaw to fortify his submission that once the case is covered within the provisions of Section 2(o)(bb), the question of applicability of Section 25G of the Act, 1947

does not arise. In other words, if a workman is appointed on contract basis for doing seasonal work, the termination of contract of such a workman does not amount to retrenchment and thus does not attract compliance of Section 25F of the Act, 1947.

6.6 In such circumstances referred to above, Mr. Munshaw prays that there being merit in his appeal, the same be allowed and the impugned

judgment and order of the learned Single Judge be quashed and set aside. Mr. Munshaw prays that the Special Civil Application No.13902 of 2017 be

allowed and the judgment and award passed by the Labour Court may be quashed and set aside.

Submissions on behalf of respondent No.1 "workman

7. On the other hand, Mr. T.R.Mishra, the learned counsel appearing for the respondent No.1 has vehemently opposed both the appeals. According to

Mr. Mishra, no error much less any error of law could be said to have been committed by the learned Single Judge in rejecting the petition preferred

by the appellant herein. Mr. Mishra would submit that the principal argument canvassed on behalf of the appellant as regards the applicability of

Section 2(oo)(bb) of the Act, 1947 is without any merit. This contention as regards the applicability of Section 2(oo)(bb) of the Act, 1947 as raised by

the learned counsel appearing for the appellant is without any foundation. Mr. Mishra pointed out that such a contention was never raised before the

Labour Court. In fact, according to Mr. Mishra there is not a whisper about the applicability of Section 2(oo)(bb) of the Act, 1947 in the written

statement filed by the appellant herein before the Labour court. It is argued by Mr. Mishra that this contention was raised for the first time before the

learned Single Judge.

7.1 Mr. Mishra would submit that the argument canvassed on behalf of the appellant before the learned Single Judge that as the services of the

respondent workman stood terminated by efflux of time without there being any order of termination, the case of the respondent workman would be

covered under Section 2(oo)(bb) of the Act, 1947 was rightly turned down by the learned Single Judge.

7.2 Mr. Mishra vehemently submitted that the case on hand is one of unfair labour practice adopted by the appellant. According to Mr. Mishra, it is a

clear case of victimization and abuse of powers and in such circumstances the

provisions of Section 2(oo)(bb) have been rightly held not applicable to the present case by the learned Single Judge.

7.3 Mr. Mishra, would submit that having regard to the materials on record, the learned Single Judge rightly declined to disturb the award passed by

the Labour Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.

7.4 Mr. Mishra would submit that in view of the observations made by the learned Single Judge as contained in para 9 of the impugned judgment and

order, this appeal in fact would not be maintainable under Clause 15 of the Letters Patent Act.

7.5 Mr. Mishra, invited our attention to something very disturbing. Mr. Mishra invited our attention to the averments made in the affidavit in reply filed

by the workman in the main matter i.e. the Special Civil Application No.13902 of 2017. The relevant averments upon which reliance is placed by Mr.

Mishra read thus:

â??2. I say that the petitioner has raised a contention in the petition that there is delay of 2 years in raising the present dispute. In this connection I

respectfully submit that the said ground is absolutely misconceived and misleading the Honâ??ble Court. I say that the said ground of delay is not

raised by the petitioner in the Labour Court and therefore, it is not open for the petitioner to raise this contention for the first time in High Court and

therefore, present petition is required to be dismissed on this short ground alone. I say that I and other employee have approached the Honâ??ble

Labour Court by filing Complaint (ID) No.7/2007 and the Honâ??ble Labour Court passed Order below Exh.5 in the aforesaid application, whereby

the respondent was directed to maintain status quo with regard to the service condition till 20-11-2007. A copy of the application together with the

order passed by Labour Court, Junagadh, is annexed marked Annexure`1â?? to this affidavit. I say that in the said application there were 7

employees who have approached the Labour Court with a prayer not to terminate the services of the workmen. In the said application the first

workman is namely; Joshi Virendra Labhshanker, workman at Sr. No.2 is Karmata Dipakbhai Pratapbhai, at Sr. No.3, Joshi Mehulkumar

Mayankbhai, Sr. No.4, Mori Nathabhai Punabhai, Sr. No.5, Lila Chetanbhai Jivabhai, Sr. No.6, Pandya Narendra Balkrishnabhai and Sr. No.7 is Joshi

Devangbhai Prafulbhai. I say that after filing the aforesaid application, the petitioner management compelled the workmen to withdraw the said application. I myself, Dipakbhai Pratapbhai Karmata and other my college Mehulkumar Mansukhlal Joshi did not withdraw the said application and therefore, despite the interim relief granted by the labour court, our services were terminated and other those employees involved in the said application who have withdrawn said application, their services have been regularized by the petitioner Municipal Corporation and at present they are working in the petitioner municipal corporation as permanent employees. I say that Nathabhai Punabhai and Lila Chetanbhai Jivabhai who were working with me and they were appointed on the same date on which I was appointed, they are made permanent and they are working with the petitioner employer. Thus, the petitioner municipal corporation has adopted pick and choose method and granted the benefit of regularization to all those employees who have succumbed to the pressure of the petitioner municipal corporation and withdraw their demand. I say that myself did not withdraw the said matter and therefore, my services came to be terminated and thereafter the labour court has finally rejected the said application filed by me being Complaint (ID) No.7/2007. After rejection of the same, I immediately raised industrial dispute, therefore, there is no delay in raising the said dispute. This aspect has not been discussed by the petitioner in the petition and therefore, the petition is misconceived and requires to be dismissed on this short ground. I say that I am also annexing a copy of the Seniority List which has been given by the petitioner Corporation under Right To Information Act and a copy of the same is annexed marked Annexure '2â?? to this affidavit. I say that if the Honâ??ble Court is kind enough to peruse the said Seniority List, there are several employees who are appointed immediately after my termination and they have been made permanent and they are working with the municipal corporation and therefore, this is a case of breach of mandatory provisions of Sec.25(G) & (H) of the Industrial Disputes Act. I say that one employee Shri Bharat S. Dodia, who is appointed on 6-9-2011 and he has been made permanent and at present he is working with the petitioner Corporation. I say that said Shri Dodia is appointed as Daban Nirikshak. I say that similarly, immediately after my termination, the workman Shri Virat J. Thaker was appointed and he was also performing the same work which I was performing but the Nagar

Palika while granting the benefit of regularization, given him the status of Computer Operator, he is performing the same work which I was

performing. I say that I am graduate having passed Examination of Bachelor of Arts. I say that similarly one other employee namely; Ketan

Madhavraj Davda, he was appointed immediately after my termination and he has been made permanent and the status is given as Computer

Operator though he is performing same work which I was performing before my termination and therefore, Nagar Palika has replaced me by

appointing another set of daily-wager and subsequently he has been granted benefit of regularization. I say that similarly one other employee namely;

Ashok G. Nagar was appointed on 5-2-2005 and he has been made permanent. I say that similarly one employee Shri Rajesh D. Faldu, who was

appointed immediately after my termination and he has been given status of Junior Clerk. I say that one other employee namely; Manoj C. Rapapara,

who is Standard XII pass, he has appointed as Junior Clerk on 1-3-2005 and he has been made permanent and at present he is working as permanent

employee in the petitioner Corporation. I say that there are several employees who have been appointed immediately after my termination and have

been made permanent and at present they are working on permanent, sanctioned, vacant post. I have the attention of the Honâ??ble Court on the

aforesaid Seniority List the persons from Sr. No.74 to 89 are the employees who are appointed in the year 2007, 2008, 2009 and 2011 and have been

made permanent. I say that these are the employees who are appointed immediately after my termination. The municipal Corporation has not given

me the opportunity of re-employment. Thus, there is clear-cut breach of mandatory provisions of Sec.25(H) of the Industrial Disputes Act and

therefore, the Labour Court has rightly appreciated the fact and rightly passed Award which does not suffer from any infirmity or illegality and

therefore, present petition is required to be dismissed with costs.â??

7.6 Mr. Mishra, the learned counsel appearing for the respondent â?? workman submitted that the whole idea in inviting the attention of this Court to

the aforesaid averments made in the affidavit in reply is to demonstrate the highhandedness on the part of the appellant. In other words, according to

Mr. Mishra, the aforesaid averments would indicate victimisation of his client by none other than a civic body.

7.7 Mr. Mishra, in support of his aforementioned submissions has placed reliance on the decision of the Supreme Court in the case of Bhuvnesh Kumar

Dwivedi vs. Hindalco Industries Ltd. [AIR 2014 SC 2258].

7.8 In such circumstances referred to above, Mr. Mishra prays that there being no merit in both the appeals those be dismissed with costs.

Analysis

8. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our

consideration is whether the learned Single Judge committed any error in passing the impugned judgment and order.

8.1 It is settled position of law that the High Court can interfere with an award passed by the Labour Court only on the procedure level and in cases

where the decision of the Labour Court has been arrived at in gross violation of the legal principles. The High Court may be justified to interfere with

the factual aspects placed before the Labour Court only when it is convinced that the Labour Court has made patent mistakes in admitting the

evidence illegally or has made grave errors in law in coming to the conclusion on facts. The High Court granting contrary reliefs under Articles 226 or

227 of the Constitution of India may amount to exceeding its jurisdiction conferred upon it. The learned Single Judge rightly kept this position of law in

mind while deciding the main matter.

8.2 We have gone through the written statement filed by the appellant herein before the Labour Court. No plea was made by the appellant in its

written statement filed before the Labour Court with regard to the provisions of Section 2(oo)(bb) of the Act, 1947. Nonetheless this legal ground

without any factual foundation was pressed into operation before the learned Single Judge. The same has been addressed by the learned single Judge

by rejecting the said contention by assigning its own cogent reasons.

8.3 As Mr. Munshaw has laid much emphasis on Section 2(oo)(bb) of the Act, 1947, we propose to say something in this regard. Section 2(oo) of the

Act, 1947 read with clause (bb) thereto reads as under:

`2 (oo) `retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a

punishment inflicted by way of disciplinary action, but does not include -

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman

concerned contains a stipulation in that behalf or;

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman

concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;'

(c) termination of the service of a workman on the ground of continued ill-health;

8.4 The Apex Court in a catena of decisions had interpreted this provision to mean that the termination of service of an employer for any reason

whatsoever which was covered by any of the exclusion clauses [(a), (b) and (c)] in the aforesaid definition would amount to 'retrenchment'. The path

breaking decision of the Supreme Court on this point is rendered in the matter of the State Bank of India v. Shri N. Sundara Money, reported in 1976

AIR 1111. Interpreting Section 2 (oo) as it stood prior to 18th August, 1984 in the light of its relevant exclusion clauses, late Justice Krishna Iyer

speaking for the Bench in the aforesaid decision has made the following pertinent observations in para-8 of the report.

â??For any reason whatsoever very wide and almost admitting of no exemption ... to retrench is to cut down. You cannot retrench without trenching

or cutting. Section 2 (oo) is the master of the situation and the Court cannot truncate its amplitude.â??

8.5 In paragraph 9, it has been observed that, â??A break-down of Section 2(oo) unmistakably expands the semantics of retrenchment.

'Termination... for any reason whatsoever' are the key words. Whatever the reason, every termination spells retrenchment. So the sole question is-has

the employee's service been terminated? Verbal apparel apart, the substance is decisive. A termination takes place where a term expires either by the

active step of the master of the running out of the stipulated term. To protect the weak against the strong this policy of comprehensive definition has

been effectuated. Termination embraces not merely the act of termination by the employer, but the fact of termination howsoever produced.â??

8.6 The aforesaid decision in the case of State Bank of India (supra) has been followed by the Supreme Court in many of its later decisions. We may

refer to some of those decisions here.

[i] Hindustal Steel v. Labour Court AIR (1977) SC 31;

[ii] Santosh Gupta v. S.B of Patiala AIR (1980) SC 1219;

[iii] Management of K.S.R.T.C v. M. Borsinha AIR (1988) SC 1320

[iv] Mohanlal v. Management, Bharat Electronics Ltd AIR (1981) SC 1253.

8.7 In view of this constant trend of the decisions of the Supreme Court interpreting the then existing provisions of the term 'retrenchment' as found in

Section 2 (oo), the legislature intervened by enacting further exclusive clause, in the form of clause (bb). It, therefore, becomes obvious that the

Legislature wanted to remedy the difficulty which was found in the then existing exclusion of Clause (a), (b) and (c) in Section 2 (oo) and that is

precisely the reason why the substantive provision excluding from the operation of the term 'retrenchment' those occasions which were covered by

clause (bb) was enacted.

9. The definition of 'retrenchment' under Section 2(oo) and exception provided under Section 2(oo)(bb) came up for consideration before the Hon'ble

Supreme Court in the judgment reported in M. Venugopal v. L.I.C. of India, A. P. and Anr. [(1994)1-LLJ-597], and the Supreme Court has stated the

legal position, thus in para 9, which reads as under at p. 600 of LLJ:

â??9. ... This Court from time to time held, that the definition of ""retrenchment"" being very wide and comprehensive in nature shall cover, within its

ambit, termination of service in any manner and for any reason, otherwise than as a punishment inflicted by - way of disciplinary action. The result

was that even discharge simpliciter was held to fall within the purview of the definition of ""retrenchment"". State Bank of India

v. N. Sundara Money, Santosh Gupta v. State Bank of Patiala. Now with introduction of one more exception to Section 2(oo), under Clause (bb) the

Legislature has excluded from the purview of ""retrenchment""; (i) termination of the service of the workman as a result of the non-renewal of the

contract of employment between the employer and the workman concerned on its expiry;

(ii) such contract being terminated under a stipulation in that behalf contained in contract of employment. It need not be impressed that if in the

contract of employment no such stipulation is provided or prescribed, then such contract shall not be covered by Clause (bb) of Section 2(oo)

9.1 A Division Bench of the Allahabad High Court, in its judgment reported in *Shailendra Nath Shukla and Ors. v. Vice-Chancellor, Allahabad*

University and Ors., 1987 L.I.C. 1607 examined the position as to in what cases, Section 2(oo)(bb) can be applied and stated the legal position as

under in para. 5:

5. ... Terminations which are included in it are those which are brought about either because of non-renewal of contract or because of expiry of time

stipulated in agreement. The meaning is plain and simple. But in a society with so wide gap where bargaining power of employee is nil who is exposed

to exploitation, the nature of employment cannot be judged on the letter issued by the employer but on the nature of duties performed. For instance

workers employed for doing a particular job which may be for more than 240 days can be said to be covered by this clause as their engagement

comes to an end because of completion of work. Similarly a workman employed for a stipulated period or completion of work whichever may be

earlier may be covered in this clause. But if contractual employment is resorted to as mechanism to frustrate the claim of employee to become regular

or permanent against a job which continues or the nature of duties is such that the colour of contractual engagement is given to take it out from the

principal clause then such agreements shall have to be tested on anvil of fairness and bona fide. An agreement for arm twisting or to perpetuate the

policy of hire and fire cannot be deemed to be included in Clause (bb). Because if it is left to employer not to renew contract whenever he likes

irrespective of any circumstance then the protection afforded to a workman by treating every termination of service as retrenchment shall be rendered

nugatory. It has to be confined to those limited cases where either the work or post ceases to exist or job comes to an end or the agreement for a

specific period was bona fide. It cannot be extended to such cases where the job continues and the employee's work is also satisfactory but periodical

renewals are made to avoid regular status to the employees. That would be unfair labour practice. (See: *H.D.Singh v. Reserve Bank of India.*)

9.2 In another Division Bench judgment of the Orissa High Court, reported in *Chairman-cum-Managing Director, Orissa Road Transport Company*

Limited v. Ramesh Chandra Gouda and Anr. 1994-II-LLJ-1127, where again, while interpreting Section 2(oo), the Division Bench has stated as under

in para 3 at p. 1129:

3.... It is hence the general intention of the Legislature that all types of termination of services are to be covered by 'retrenchment' except the events

excepted in Sub- clauses (a) to (c). It is well known that exceptions to a general provision are to receive a rigorous interpretation and only govern

specifically the situations covered by them and no further. An exception cannot be permitted to frustrate the general provisions of the Act in this case

to treat any termination of services are retrenchment except what is strictly excepted

9.3 In another Division Bench judgment of the Punjab and Haryana High Court reported in Bhikku Ram v. Presiding Officer Industrial-cum-Labour

Court, Rohtak, 1996-III-LLJ (Suppl)-1126, the Division Bench has explained the legal position as under at p. 1143:

35. ... If the employer resists the claim of the workman and invokes Section 2(oo)(bb), burden lies on the employer to show that though the employee

has worked for 240 days in twelve months prior to termination of his service, such termination of service cannot be treated as retrenchment because it

is in accordance with the terms of the contract of employment or on account of non- renewal of the contract of employment... only a bona fide

exercise of right by an employer to terminate the service in terms of the contract of employment or for non- renewal of the contract will be covered

by Clause (bb). If the Court finds that the exercise of rights by the employer is not bona fide or the employer has adopted the methodology of fixed

term employment as a conduct or mechanism to frustrate the rights of the workman, the termination of the service will not be covered by the

exception contained in Clause (bb). Instead the action of the employer will have to be treated as an act of unfair labour practice, as specified in the

Fifth Schedule of the Act.

...In all other cases, termination of service will be treated as retrenchment unless they are covered by other exceptions I set out hereinabove.

9.4 In yet another Division Bench judgment of the Orissa High Court, reported in Chakradhar Tripathy v. State of Orissa and Ors., 1992 L.I.C. 1813

in a concurring judgment, the Hon'ble Chief Justice B.L. Hansaria as he then was,

has stated the position as under in paras. 19 and 20:

19. It has been stated in the leading judgment that by taking resort to 'colourable' contracts, the protection of Section 25-F cannot be allowed to be frustrated. I think this statement of law takes care of the apprehension of Shri Nanda.

20. There may be other cases also, these cannot be categories as observed by my learned Sister. All that I would like to emphasise is that the Courts would remove the veil in such cases and see the reality of the matter.

9.5 A learned single Judge of the Madhya Pradesh High Court, in his judgment reported in Madhya Pradesh Bank Karmachari Sangh (M.P.) v.

Syndicate Bank and Anr., 1997-III-LLJ (Suppl)-536 after considering the various judgments of the Supreme Court as well as other High Courts, has

concluded as under in para. 18 at p. 543:

18. From the decisions noted above, it becomes apparent:

[i] that the provisions of section 2(oo)(bb) are to be construed benevolently in favour of the workman;

[ii] that if the workman is allowed to continue in service by making periodic appointments from time to time, then it can be said that the case would not fall under Section 2(oo)(bb);

[iii] that the provisions of Section 2(oo)(bb) are not to be interpreted in the manner which may stifle the main provision;

[iv] that if the workman continues in service, the non renewal of the contract can be deemed as mala fide and it may amount to be a fraud on statute;

[v] that there would be wrong presumption of non- applicability of Section 2(oo) (bb) where the work is of continuous nature and there is nothing on

record that the work for which a workman has been appointed had come to an end.

9.6 His Lordship Mr. Justice Srikrishna, as he then was, has interpreted Clause (bb) of Section 2(oo) in the following words, in the judgment reported

in Alexander Yesudas Maikel v. Perfect Coil Seals and I.R.P. and Ors., 1996-I-LLJ-533 (Bom) at p. 535:

Â ""5. In any event, one cannot lose sight of the fact that Clause (bb) has itself been restrictively interpreted and judicial consensus appears to be

that, if the post 4 continues and the work continues, Clause (bb) cannot be said to operate as a charter for unscrupulous employers to jettison their

workmen.

9.7 In another judgment reported in Deputy Director of Health Services, Nashik v. Lalabai Rajdhar Paturkar 1996-III-LLJ (Suppl)-602 (Bom) the

very same learned Judge has explained the position as under in para. 8, at p. 606:

8. ...It will at once be seen that, just as there are no words of limitation in the main body of the definition, equally, there are no words of limitation in

the exception Clause (bb). As long as either of the two contingencies contemplated by the clause is fulfilled, the situation would not amount to

'retrenchment' within the main body of the definition in Section 2(oo). However, by a series of judgments of our High Court and of other High Courts

import of the words used and the amplitude of this have been whittled down and the judicial consensus on the construction of this clause appears to be

that the sweep of Clause (bb) of Section 2(oo) cannot be extended to such cases where the job continues and the employee work is also satisfactory,

and yet periodical renewals are made to avoid regular status to the employee, where the circumstances indicate that the letter of appointment is a

camouflage to circumvent the provisions of the Industrial Disputes Act or the benefit of permanency on workers who have worked continuously for a

period of more than 240 days.

9.8 The Supreme Court in S.M.Nilajkar and Ors. v.

Telecom District Manager, Karnataka [(2003)2-LLJ-359], has set out the necessary ingredients to be satisfied for the application of Section 2(oo)(bb)

in the following words in para 13 at p. 364 of LLJ:

13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of Sub-clause (bb)

subject to the following conditions being satisfied:

[i] that the workman was employed in a project or scheme of temporary duration;

[ii] the employment was on a contract, and not as a daily- wager simpliciter which provided inter alia that the employment shall come to an end on the

expiry of the scheme or project;

[iii] the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract; and

[iv] the workman ought to have been apprised or made aware of the abovesaid

terms by the employer at the commencement of employment.

9.9 Further in para 14, the Supreme Court made it clear that at p. 364 of LLJ:

14.... To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid

ingredients so as to attract the applicability of Sub-clause (bb) abovesaid

9.10 In the aforesaid context, we may refer to and rely upon a Division Bench decision of this High Court in the case of Surat Mahila Nagrik Sahakari

Bank Ltd. vs. Mamtaben Mahendrabhai Joshi [(2001)2 GLR 1248]. The relevant observations read thus:

18. Considering the view of the Apex Court and the various High Courts, Section 2 (oo)(bb) cannot be resorted to when employer has exercised

power in a malafide, arbitrary and abused/misused the power with a view to see that the workman may not be entitled to the benefit and protection

available under Sec. 25-F of the I.D Act. However, merely because employer has a right to terminate the service of an employee by satisfying the

three conditions enunciated under Sec. 25-F of the Act the same cannot give him an unrestricted right. It is the duty of the employer to establish the

fact that such termination is justified in the circumstances of the case. So, without justification of such termination, even in case of complying the

provisions of Sec. 25_F such termination is bad, malafide, arbitrary and amounts to unfair labour practice. It is clear that Sec. 25-F has given no

positive and unregulated right of retrenchment to the employer. They impose condition precedent before making retrenchment. It is noteworthy that

the language of section 25-F is couched in a negative form. The section does not expressly provide that on compliance of the three conditions referred

to in the section, the employer shall have an unrestricted right to retrench the workman. The unjustified retrenchment seems to have been effected

more in furtherance of a plan to get good reductance of elements deemed undesirable The language of this Sec. 25-F is significant. The termination of

service in colourable exercise of power or a result of victimization or unfair labour practice or caprice should be prevented as otherwise some of the

fundamental rights and principles which have been noticed above would be violated. Arbitrary conduct or unnecessary harshness on the part of the

employer, judged by the normal standard of a reasonable man may be cogent evidence of victimization or unfair labour practice. It is open for the

employee to question the 'retrenchment' even in case of compliance of Sec. 25 F of the Industrial Disputes Act on the ground of want of benefit or victimization or unfair labour practice or caprice or unnecessary harshness of the employer. Therefore, in such circumstances, the employer shall have to satisfy the Court that there is a compliance of Sec. 25-F of the I.D. Act, 1947 and also to satisfy that there is no malafide, arbitrariness, unnecessary harshness, unfair labour practice or victimization while terminating the service of the workman, and in such cases, the Labour Court shall have to consider these aspects also, while adjudicating the Industrial dispute against the termination of workman. Mere compliance of Sec. 25-F cannot prove or held that termination is bona fide and genuine. Now, in view of the above observations, the facts of the present case are required to be considered.â??

9.10 The above referred to decisions on the interpretation of Section 2(oo)(bb) explain the legal position to the effect that a claim of an employer on a term based employee providing for automatic termination whether within the terms fixed or on expiry of the said term, cannot be taken for granted to sustain the order 2 of termination. On a plain reading of Section 2(oo)(bb), it is quite clear that such term based employment would fall outside the scope of 'retrenchment' so long as the requirement of such fixed period of employment was bona fide required by the employer. It was therefore, repeatedly pointed out that such excepted categories required a rigorous test rather than accepting the plea of employer on its face value or otherwise it would cause serious prejudice to an employee, who can be taken for a ride by unscrupulous employers by contending that the term of employment was for specific period though as a matter of fact such period of employment lasted quite for a long spell. In other words even though the requirement of employment was perennial by adopting the methodology of employing a person for a specific period as many a times, an unscrupulous employer can always resort to abusing the provision contained in Section 2(oo)(bb) to thwart the other statutory protection available to an employee under Section 2(oo), namely, in the case of a 'retrenchment' vis-a-vis the consequential" benefits contained under Section 25-F of the Industrial Disputes Act.

Therefore, when such extraordinary circumstances are brought out in the matter of employment and termination is resorted to by taking umbrage

under Section 2(oo)(bb) of the Industrial Disputes Act, in the interest of justice, we are of the view that a close scrutiny of the real position will have to be necessarily made to rule out the possibility of any injustice being caused to an employee. It cannot be lost sight of that Section 2(oo)(bb) is specifically meant to cover only such employment which would be needed for an employer for a specific period alone and beyond which the requirement will not be there and even on such occasions, the employer should not be put into an unnecessary predicament of facing the other consequences that would normally occur while resorting to retrenchment. The benefit of the said exception will have to be strictly restricted to such specific situations alone and the same cannot be allowed to be misused or abused by the employers even in regard to cases where the nature and requirement of employment is perennial.

Â 10. We shall now look into two decisions relied upon by Mr. Munshaw in support of his submissions.

10.1 In M.D., Karnataka Handloom Dev. Corpn. Ltd. (supra) the Supreme Court observed that if a workman is appointed on contractual basis for doing seasonal work, the termination of contract of such a workman would not amount to retrenchment and Section 25F of the Act, 1947 will have no application. In the said case, the respondent was appointed for various spells on fixed periods on fixed honorarium as an expert weaver to train the weavers in an unorganized sector. The respondent was appointed on contract basis for a period of 200 days only on a fixed pay of Rs.400 p.m with a stipulation that the contract of the appointment would automatically expire on 201st day. Having regard to the facts of the said case the Supreme Court observed as under:

â??9. A careful perusal of the terms and conditions of appointment would go to show that the respondent is not a worker but employed on contract basis on a time bound specific scheme assigned as weaving trainer. However, the learned Judges of the Division Bench committed a factual error in holding that the above letter of appointment does not show that employment was not a contract which stipulated that it comes to an end with the expiry of project or scheme nor is it the case of the Corporation that the respondent was made aware of any such stipulation even at the commencement of the employment. The High Court has failed to notice that the

respondent was engaged on contract basis and had been assigned to train weavers who were lagging in weaving skills in the weaving potential development area working on time specific short term scheme sponsored by the Corporation. We are, therefore, of the opinion that the respondent is not a worker for the purposes of Section 25F of the I.D. Act but employed on contract basis only. The High Court also has not properly appreciated the judgment relied on in "S.M.Nilajkar and Ors. v. Telecom District Manager, Karnataka, (2003) 4 SCC 27. As the respondent was engaged as trainer for a specific period under the scheme and was paid a stipend of Rs.1,000/- p.m. from the date of his appointment and, therefore, Section 2(oo) of the Act is not attracted soon after the expiry of the specific period the respondent's service was discontinued and so it is not a retrenchment as defined under Section 2(oo) of the I.D. Act. On the other hand, the case of the Corporation before the learned Single Judge and also before the Division Bench was that the respondent was not a workman in the employment of the appellant and that he was a weaver in the area as another weaver in the area and was getting certain concessions from the Corporation."

10.2 Thus, having regard to the terms of the contract and other materials on record, the Supreme Court recorded a finding of fact that the respondent was not a worker for the purpose of Section 25F of the Act, 1947, but employed on contractual basis for doing a seasonal work. This decision in our opinion is not helpful to the appellant in any manner more particularly having regard to the facts of the case on hand.

10.3 In the The Haryana State Agricultural Marketing Board (supra) the respondent was appointed on contractual basis as an Arrival Record Clerk.

The said appointments were made only during the paddy seasons. Having regard to the terms and conditions of service, the Supreme Court observed as under:

"8. It is the contention of the appellant that the respondent was appointed during the 'wheat season' or the 'paddy season'. It is also not in dispute that the appellant is a statutory body constituted under the Punjab and Haryana Agriculture Produce Marketing Board Act. In terms of the provisions of the said Act, indisputably, regulations are framed by the Board laying down terms and conditions of services of the employees working in the Market Committees. A bare perusal of the offer of appointment clearly goes to

show that the appointments were made on contract basis. It was not a case where a workman was continuously appointed with artificial gap of 1 day only. Indisputably, the respondent had been re-employed after termination of his services on contract basis after a consideration period (s).

11. This decision also in our opinion is of no avail to the appellant. The work was being taken only during the paddy seasons.

12. In the case on hand four findings of fact recorded by the Labour Court and affirmed by the learned Single Judge clinches the issue:

[1] The respondent " workman discharged his duties for the period between 2005 and 2007.

[2] The respondent " workman worked for more than 240 days till his services were terminated.

[3] The appellant continued to employ other workmen for the work which was being performed by the respondent " workman herein and such

action on the part of the appellant was in breach of Section 25G and 25H respectively of the Act, 1947.

[4] The respondent workmen established by leading cogent evidence before the Labour Court that the nature of work was perennial, his engagement only being temporary.

13. In the overall view of the matter, we have reached to the conclusion that the learned Single Judge could not be said to have committed any error

much less any error of law in rejecting the petition warranting any interference at our end in this two appeals.

14. In view of the aforesaid discussion, both the appeals fail and are hereby dismissed. The connected Civil Applications also stand disposed of.