

**(2010) 03 BOM CK 0016**

**In the Bombay High Court**

**Case No :** Civil Application No. 75 of 2010 in Writ Petition No's. 1399 and 2613 of 2008

Kirloskar Pneumatic Kamgar Sangh

APPELLANT

Vs

Kirloskar Pneumatic Co. Limited

RESPONDENT

**Date of Decision :** 12-03-2010

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 17B

**Citation :** (2010) 6 BomCR 292 : (2011) 1 LLJ 622

**Hon'ble Judges :** Vazifdar S.J., J

**Bench :** Single Bench

**Advocate :** N.A. Kulkarni, in C.A. No. 75/2010 in W.P. No. 1399/2008 and W.P. No. 2613/ 2008, for the Appellant; J.P. Cama, Sr. Cou. Advocate and Mahesh Londhe, i.b., Sanjay Udeshi and Co. in C.A. No. 75/2010 in W.P. Nos. 1399 and 2613/2008, for the Respondent

**Final Decision :** Allowed

## Judgement

Vazifdar S.J., J.—The Respondent-Union has filed the Civil Application u/s 17B of the Industrial Disputes Act, 1947 (ID Act) in respect of six workmen.

2. The Petitioner terminated the services of the workmen on 28th January, 2002, by retrenching them. The Respondent-Union raised a Reference before the Industrial Tribunal at Pune. The Industrial Tribunal, by an Award dated 13th December, 2007, allowed the Reference and directed the Petitioner to reinstate the members of the union with continuity of service, but without back wages.

3. The above writ petition was filed on 16th February, 2008. By an order dated 3rd March, 2008, Rule was issued and Rule on interim relief was made returnable after two weeks. By an order dated 21st January, 2009, the award was stayed pending the hearing of the writ petition.

4. It is in these circumstances that the Union has filed the above Civil Application u/s 17B of the Industrial Disputes Act, 1947, in respect of six workers, each of

whom has filed an affidavit in-support thereof. The application of each workman would have to be considered separately on merits. It is necessary, however, to preface a consideration thereof by dealing with the questions of law raised by Mr. J.P. Cama, the learned Senior Counsel appearing on behalf of the Petitioner i.e. the Respondent to the Civil Application.

5. Section 17B reads thus:

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

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

6. Mr. Cama firstly submitted that in support of his application u/s 17B, the employee must aver in the original/first affidavit in support of his application not only that he has not been, nor is presently, gainfully employed but that he had sought employment, but did not get any employment. He submitted that the employee must in this initial affidavit itself furnish particulars of where he sought employment and how he had managed to survive during the period prior to the date of the application. Mr. Cama further submitted that bald averments to this effect are not sufficient and facts necessary to substantiate the same must also be pleaded.

7. A plain reading of Section 17B militates against Mr. Cama's submission. The section makes it obligatory on the employer to pay the workman the said wages "...if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect...". Thus the affidavit merely requires an averment "to that effect" meaning thereby to the effect that he "had not been employed in any establishment during such period". The section requires nothing more. To accept Mr. Cama's submission would be adding to the words of and the requirements stipulated by the Legislature which is impermissible.

8. I am supported in this view by the judgment of a Division Bench of this Court in *Oriental Containers Ltd. Bombay Vs. Engineering Workers Association and Others*, , where it was held:

17. Now we deal with Notice of Motion No. 208 of 1995 in Writ Petition No. 2473 of 1994 taken out by the workmen-members of Respondent No. 1-union. The 27 workmen who have been reinstated in service under the Award of the Labour Court have filed affidavits that they were not working in any establishment during the period from the date of their dismissal till the date of filing the affidavits in this Court. Section 17B of the I.D. Act requires a workmen to file an affidavit before the High Court or the Supreme Court where the employer has preferred any proceedings against the Award of reinstatement of the workman that he "had not been employed in any establishment" during the pendency of such proceedings. Once such an affidavit has been filed by the workman, he has discharged the onus on him. By virtue of the provisions of Section 17B, the burden of proof men shifts to the employer. It is then for the employer to satisfy the High Court or the Supreme Court that the workman, in fact, had been employed and he had been receiving adequate remuneration during such period or part thereof. If the employer succeeds in satisfying the Court in that behalf, the Court then shall order that the wages contemplated by this section shall not be payable by the employer to the workman for the period of the pendency of the proceedings before the Court or part thereof. In the instant case, the workmen have discharged the burden of proof cast upon them. The employer has not placed any material before this Court that the workmen had been receiving adequate remuneration during this period. The employer has referred to a report of some detective agency but has not filed an affidavit stating that the report has been accepted to be correct. The report of the detective agency is not, per se any evidence. Evidence has to be led in proof thereof and no evidence has been led in the instant case and no reliance can be placed upon the report of the detective agency as is sought to be contended. The employer has successfully succeeded in preventing the workmen from getting the benefit of the benevolent provisions contained in Section 17B of the I.D. Act.

9. The error in Mr. Cama's submission arises on account of confusing the cause of action with the evidence in support thereof. The averments required by the section constitute the cause of action entitling the workman to the said wages. The initial burden placed on the workman is discharged by him upon filing such an affidavit. The additional factual averments referred to by Mr. Cama relate to the proof of such averments. Upon the workman filing such an affidavit, the statute itself, viz. the proviso to Section 17B, shifts the burden to the Petitioner to establish the facts necessary to defeat the application. It is only if the Petitioner/management denies the averment or produces or is able to indicate evidence to the contrary that it would be necessary for the workman by further affidavits to establish his case/rebut the Petitioner's contentions.

10. Particulars furnish evidence. There may be cases where no evidence is required. For instance, if the Petitioner/ management does not deny the averments to this effect, there is no warrant for dismissing the application u/s 17B merely on the ground that the affidavit-in-support of the application does not contain the particulars.

11. If despite the matter being put in issue by the management and the worker being called upon to furnish particulars, the worker fails to provide the particulars of his efforts to seek employment, it would be another matter. The Court could then, with justification, draw an adverse inference to the effect that the workman had, in fact, made no efforts to seek gainful employment. The necessity for furnishing particulars in such a case is clear. It enables the management to ascertain the truth of the averment that efforts were made to seek gainful employment. If particulars in this regard are not furnished, the management would be deprived the opportunity and the ability of disproving the averment. In a given situation on the basis of the affidavit in support itself the application could be rejected or allowed only in part. If for instance the affidavit discloses that the workman was employed for a certain period of time, he must also disclose the particulars of the employment including the specific period and the remuneration received. An adverse inference on his failure to furnish particulars despite being required to do so would be justified. However, once the ingredients of Section 17B are averred, without the same being put in issue by the Petitioner/management or in the absence of any other apparent circumstances which warrant the veracity of the same being doubted, the application must be granted.

12. Similarly, the manner in and the means by which the workman survived upto the date of the application is a question of fact in relation to the veracity of the Petitioner's averment that he has not been in gainful employment. It is not a mandatory ingredient of an affidavit filed in support of an application u/s 17B. The absence of an averment in this regard does not affect the maintainability of an application u/s 17B. The ability of the workman for having survived upto the date of the application u/s 17B is but one of the factors to be taken into consideration while testing the veracity of the workman's assertion that he has not been in gainful employment.

13. Mr. Cama went to the extent of contending that the workman must aver and prove how without employment, he manages his lifestyle, such as educating his children, providing necessities such as clothing, food and medical assistance.

14. If Mr. Cama's submission is accepted, a workman must aver particulars for every conceivable fact, situation or circumstance which relates to the possibility of his having sought or been in employment and to the remuneration in respect thereof. There would be innumerable such facts. The section on a plain reading does not require it. Why then must a workman not be required to aver and prove that he does not own a vehicle or if he has one, how he manages to maintain it. Why must he not aver and prove that he does not travel or if he does, how he manages to pay the expenses for the same.

15. A difference of crucial importance must be noted. Whereas Section 17B merely requires the workman to file an affidavit of the nature stipulated therein the proviso thereto denies him the benefit thereof only if it is "proved" to the satisfaction of the Court that he had been employed and was receiving adequate

remuneration during the relevant period. To accept Mr. Cama's submission would reverse the legislative intent in and the scheme of Section 17B.

16-(A) In support of his submissions, Mr. Cama relied upon the judgment of a Division Bench of this Court in U.P. State Bridge Corporation Limited Vs. Maharashtra General Kamgar Union, . The Division Bench considered several judgments most of which were in respect of a claim for back wages and not u/s 17B. Mr. Cama submitted that the principles therein have been applied by the Division Bench to an application u/s 17B. Paragraphs 11, 16 and 18 of the judgment relied upon by Mr. Cama as constituting the ratio, read as under

11. Section 17B requires that during the pendency of the proceedings before the High Court or Supreme Court, as the case may be, a liability is created upon the employer to pay the workman the full wages drawn by him inclusive of other allowances, but only if the workman had not been employed in any other establishment during such period and an affidavit by such workman had been filed to that effect in such Court. Thus, first is a matter of fact known to the workman which is within his personal knowledge while the latter is the requirement of "aw. The workman employed in any establishment would not be entitled to the benefit of. interim protection during the proceeding before the High Court or the Supreme Court, as the case may be. Thus, the onus is placed upon the workman to comply with the statutory provisions of which the Court must be satisfied before it directs the employer to make the payment of the required wages. There is definite onus upon the workman which is clear from the language of the legislature. But the onus is a primary onus which stands discharged the moment the workman complied with the requirement of the provisions, unless the Management or employer claims and discharges onus by definite evidence as required by the proviso to Section 17B. Even, the normal Rule is equally applicable to the proceedings before the Industrial or the Labour Court, namely the extent of burden of proof and requirement of proof is to be construed liberally. Undoubtedly, the provisions of Section 17B imply an obligation on the Court and give a statutory protection to the workman. The direction of the Court would be issued only where an affidavit in terms of Section 17B has been filed. That apparently is the intention of the Legislature.

16. In the light of the judgments that we have noted above, there can be no doubt that the onus for seeking statutory interim protection is upon the workman and where Management claims benefit of the proviso of Section 17B, the onus is upon the Management. The onus on the workman is a very limited one and once an affidavit as contemplated under the provisions of Section 17B is filed and the Court is satisfied that the workman was not employed in any establishment during the relevant period, direction for payment of wages u/s 17B would be issued. Such an affidavit filed by the workman has to be true and correct description of facts as per the requirements of law. It is expected that the workman would make a definite and correct averment in the affidavit in regard to his non-employment and would show that he could not be employed despite his

efforts. It will be for the workman to state categorically that he was not gainfully employed and was not in self-gainful employment which dependent on the facts and circumstances of the case would be a consideration before the Court to pass a directive for payment of wages and determination of such wages even at the interim stage."

(B) The judgment upto this point merely sets out the requirements of Section 17B. It does not refer to the further ingredients of the affidavit to be filed by the workman mentioned by Mr. Cama.

(C) Mr. Cama submitted that this is evident from what the Division Bench went on to hold, which is as follows

18. ...In the present case, affidavit had been filed by the workman clearly stating that an award had been made by the Labour Court, Thane on 21st September, 2005 and also as. required u/s 17B of the Industrial Disputes Act the workman declared that he was not gainfully employed in any other establishment since the date of the award and even from the date of his termination. Identical affidavits have been filed on behalf of the workmen. It was expected that these affidavits should have been more elaborate and definite in their content. As already discussed, the intention of the legislature to provide statutory interim protection is dependent upon workman not being employed in any establishments and his filing of an affidavit to that effect. To that extent, provision of Section 17B would have to receive a liberal construction as the protection to the workman is dependent upon his gainful employment including self-gainful employment. No doubt, no format has been provided under the Act or under the Rules framed thereunder but still this affidavit should be true and correct declaration of the required facts. It will be unfair to restrict the affidavit in its contents. It may not help to further the intent of legislature. If a workman during the relevant period was gainfully employed, he would not be entitled to the benefit of Section 17B. "employed in any establishment during such period" is an expression of wider magnitude and scope. If the workman was not employed or self-employed, then alone, the provisions of Section 17B would operate. To give it a technical or restricted meaning and treat an affidavit as complete disclosure of correct facts by merely saying that he was not employed in any establishment, would not be substantive and sufficient compliance of Section 17B. In the present case, the affidavit was filed only stating that the workman was not employed with any establishment since the date of making the award and also was not gainfully employed in any establishment since wrongful termination of service. Filing of such affidavit may not be construed as a sufficient compliance of the statutory requirements but in the present case, Management opted to file a vague reply affidavit giving no particulars. It had made no definite allegation in regard to the workman being employed in any establishment or engaged gainfully even in self-employment. It produced on record not even an iota of evidence to show that the affidavit filed by the workman was factually incorrect and Management was entitled to the benefit of the exception made out by Section 17B of the Act. The

learned Single Judge while accepting these affidavits of workman as compliance of Section 17B of the Act also held that the application could not be dismissed because the workman does not disclose in his affidavit as to how he subsists. May be, in view of vague plea taken by the Management, such a finding may not call for interference but it will be difficult to accept the same as a general proposition of law. The affidavit of workman essentially must state that the workman was not employed with any establishment during the relevant period and was not gainfully employed including self-employment during the same period. The purpose of filing of an affidavit is to grant statutory interim protection to the workman and to avoid hardship resulting from non payment of wages. The onus is on the workman and he must discharge such onus by filing affidavit in definite terms and disclosing the correct facts. Whenever and wherever the Management places before the Court apparent material to show the employment in an establishment or gainful self-employment of the workman during the relevant period then the workman will also be expected to show that his affidavit was correct and the question as to how he subsisted during that period would also become relevant. However, in the present case, vague stand was taken by the Management and the Management having failed to discharge its own onus and opted to take vague stand in terms of proviso to Section 17B, cannot claim any benefit and find fault in the order impugned in the present appeals.

17(A) I do not read the judgment as holding that if the particulars have not been furnished in the initial affidavit, the application u/s 17B must ipso facto, and for that reason alone, be rejected. This is established beyond doubt by the fact that had that been so the Division Bench would have rejected the application in that case for admittedly there the affidavit did not disclose the said particulars. The only averment there in this regard was

6. AS required under 17B of the Industrial Disputes Act, I hereby declare and say that I am not gainfully employed in any establishment since the date of making the Award. I hasten to add that I was not gainfully employed in any establishment since the wrongful termination of service by the Respondent original Petitioner.

(B) The erroneous impression that there is an inconsistency in the judgment arises on account of picking out sentences and reading them in isolation instead of reading the judgment as a whole. The judgment read as a whole by no stretch of imagination holds that an application u/s 17B must be dismissed if it merely avers the requirement of the section and not the other ingredients suggested by Mr. Cama.

(C) Whether or not the Court ought to accept the averments in such an affidavit would depend upon the facts of the case. This is precisely what the Division Bench did by upholding the order of the learned Single Judge allowing the application though the only averment in this regard was as set out above. The Division Bench examined all the pleadings in coming to the conclusion. In other

words, it did not reject the application on the ground that the affidavit in support of the application did not contain the averments indicated by Mr. Cama. These particulars can always, therefore, be furnished by filing further affidavits if required. If the Petitioner for instance says nothing about the averments and there is nothing on record that militates against the same, a dismissal of the application would not be warranted.

18. Mr. Kulkarni, the learned Counsel appearing on behalf of Union/applicants, relied upon the following observations of a Division Bench of this Court in (Taranjit Singh I. Bagga v. MSRTC) 2008(4) Bom.C.R. 330 : 2008(6) L.J. 37, which is as under:

8. Learned Advocate Shri. Mehadia for the Respondent submitted that the law has undergone change and unless the employee pleads and proves that he was not gainfully employed, he would not be entitled to back wages automatically upon reinstatement. As the Apex Court has observed time and again, the question of entitlement to back wages would depend on the facts and circumstances of each case, and there can be no straitjacket formula. The Court cannot be oblivious to the fact that an employee, whose services were terminated wrongly, has not only to fight for his survival by getting such odd jobs as he can, but has also to fight a battle for getting himself reinstated in service. The courts cannot be oblivious to the fact that such legal adventure is costly and would eat up a large chunk of whatever meagre income that the employee may be able to make by getting any odd job. At the same time, no Court can be oblivious to the grim reality of unemployment pervading all stratas of the society. Therefore, we would not be in a position to conclude that the moment a person is sacked he can find alternate means of his wherewithal. In this situation, it would be unjust to insist upon a technical requirement of pleading and proof of absence of gainful employment by an employee who is wrongfully dismissed.

The judgment was delivered on 11.4.2008 after the judgment of the Division Bench which was delivered on 17.1.2008. The judgment of the Division Bench is binding on me. Moreover, it is in relation to back wages alone and, therefore, has no relevance on the question of pleadings in relation to a case u/s 17B. Section 17B in terms requires "an affidavit by such workman" being filed.

19. Mr. Cama submitted that the term "gainful employment" includes self-employment.

20-(A) Mr. Kulkarni, however, relied upon the judgment of a learned Single Judge of the Delhi High Court in (Taj Services Limited v. Industrial Tribunal - I and Ors.) 2000(I) L.L.J 198 where it was held that as per Section 17B the workman is required to file an affidavit to the effect that he has not been "employed in any establishment" which indicates that what is required to be proved by the employer is that the workman had been employed in any establishment and had been receiving adequate remuneration from such employment. It was held that being employed for remuneration in an establishment means employment under

another employer. This is different from running one's own business or trade in order to remain alive to see the end of the litigation. The learned Judge accepted the contention that the workmen there could not be denied the benefit of Section 17B on the ground that they were running their own business and were receiving profit from such business. The judgment has been followed by a learned Single Judge of this Court in 2003 (4) ALLMR 152 (Bom.) , by stating thus:

14. I am fortified in the above view by the decision of the Delhi High Court in *Taj Services Limited v. Industrial Tribunal-I and Ors.* (supra), wherein it was held that

Even in the case of Respondent Nos. 2, 4 and 10 the allegation is that they are running their own business but the said allegation is denied by the learned Counsel for the Respondents. According to the learned Counsel for the Respondents, even if the workman runs some petty business for the survival of himself and his family, it will not disentitle the workman for the benefits u/s 17B of the Industrial Disputes Act. The learned Counsel for the Respondents also contended that the proviso to Section 17B of the Industrial Disputes Act would be attracted only in the case of employment under another employer and receiving adequate remuneration. In find force in the contention of the learned Counsel. As per Section 17B the workman is required to file an affidavit to the effect that he had not been "employed in any establishment". Hence under the proviso to Section 17B of the Industrial Disputes Act what is required to be proved by the employer is that the workman had been employed in any establishment and had been receiving adequate remuneration from such employment. Being employed for remuneration in an establishment means employment under another employer. It is different from running one's own business or trade in order to remain alive to see the ends of the litigation.

On similar lines the assistance without monetary consideration rendered to the business of family members cannot be said to be an employment under any other employer (B)(i) The judgment is, however, contrary to the judgment of the Division Bench of this Court in *U.P. State Bridge Corporation Limited Vs. Maharashtra General Kamgar Union*, . In paragraph 16 of the judgment, the Division Bench held that it will be for the workman to state categorically that he was not gainfully employed "and was not in self-employment...". Mr. Cama's submission is, therefore, supported by the judgment of this Court. I am bound by the judgment of the Division Bench of this Court.

(ii) A learned Single Judge of this Court by an order and judgment dated 17th August, 1992 in the case of *Sylvester and Co. Vs. Their workman thro" Transport and Dock Workers" Union and Another*, in Writ Petition No. 3131 of 1991 also considered income from self-employment to be a relevant consideration while considering an application u/s 17B.

21. Following the judgments of this Court, and especially that of the Division Bench of this Court, it must be held that the term "employed in any establishment" includes gainful self-employment.

22. For the same reasons, Mr. Cama's submission that income from self-employment in agricultural pursuits is liable to be considered remuneration within the ambit of that term in the proviso to Section 17B is also well founded. It is also supported by the judgment of the Supreme Court in *North East Karnataka Road Transport Corporation Vs. M. Nagangouda*, , at page 768, where the Supreme Court held:

14. It was sought to be urged that after coming to a finding on the basis of the evidence of the Respondent himself that during the period of termination of his services, he was engaged in agriculture and that he was receiving certain amounts therefrom, it was not open to the Labour Court to observe that "gainful employment" would not include such income from agriculture. It was urged that income from any source, whether from employment in an establishment or from self-employment, would have to be treated as income for the purposes of deciding whether the Respondent would be entitled to receive full back wages. It was urged that both the Tribunal and the High Court erred in taking a view to the contrary and the orders passed on the basis thereof were liable to be set aside.

17. On the said question, we are unable to accept the reasoning of the Labour Court that the income received by the Respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self-employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated, the end use being the same. Since the Respondent was earning some amount from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the Respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment".

23. This, however, is subject to several vital qualifications and clarifications some of which I will refer to while dealing with Mr. Cama's further submissions. The nature of the self-employment is relevant.

24. Mr. Cama submitted that a workman would be disentitled to the benefit of Section 17B even if he was self-employed in a venture which, in any event, would yield him an income even if the workman did not work there. I do not agree.

25. It is not any employment or any remuneration that disentitles a workman to relief u/s 17B. The remuneration which disentitles the workman to relief u/s 17B must be in respect of employment obtained on account, as a result or in lieu of or due to his being kept out of that employment which is the subject matter of the proceedings.

26. Income earned by a workman which he would have earned in any event is not relevant. He may attend to the work not because his efforts would yield an increased income, but to prevent idleness, to keep himself occupied or even

otherwise. Such a situation may arise where he has a share of the profits in a family business without working in such business. Such occupation would not be gainful self-occupation disentitling the workman to wages u/s 17B.

27. The term "employed" in Section 17B obviously means gainful employment and not non-remunerative employment. A workman engaged in social service for instance cannot be considered to be in gainful self-employment for he receives no remuneration for the same. A workman is disentitled to the benefit of Section 17B only if he receives remuneration in respect of his employment.

28. The point appears so clear to me that it requires no analysis or explanation. If reasons are at all required, we need go no further than the proviso to Section 17B which requires the employer if he desires to deny the workman payment under the section to establish "...that such workman had been employed and had been receiving adequate remuneration...." Thus the workman having been employed is not sufficient. To deny him wages u/s 17B it must also be established that he was receiving adequate remuneration in respect of such employment.

29. On a parity of reasoning, if a person merely attends to and even works in a venture which, in any event, would yield him the income, it would not disentitle him to the benefit of Section 17B for this work by him does not result in any remuneration which he would not otherwise have received.

30. I would go a step further. If the workman could have legitimately derived income from gainful self-employment, even while he was in employment outside his hours of duty, there would be no warrant for denying him the relief u/s 17B on the ground of his receiving such remuneration for he would, in any event, have earned this income even if his services were not illegally terminated and he continued to work for the employer. For instance, a workman may earn money by giving tuitions after working hours. To hold otherwise, would allow the employer the benefit of the workman's extra labour.

31. However, if such employment would not have been permissible if he was in employment, it cannot enure to the workman's benefit in the application. I, therefore, used the word "legitimately" in the previous paragraph consciously. Thus, if the nature of the self-employment is such that it could not have been engaged in by the workman if he had continued to work for the employer it would be a relevant factor disentitling him to the relief u/s 17B. For then, the gain from self-employment is clearly in lieu of the gain from employment of the workman with the employer from whom he seeks relief u/s 17B.

32. Thus, even if the workman worked in such a venture and his efforts yielded him any remuneration it would not disentitle him to the benefit of Section 17B if he would have received such remuneration as a result of his work if he was still in employment.

33. The relevance of agricultural income from self employment must also be

determined accordingly. It would also depend upon the facts of the case. The mere fact that an employee owns or has an interest in agricultural property either himself or jointly with others, which yields an agricultural income, would not by itself disentitle him to the benefits of Section 17B. a even during the workman's employment. The income would supplement his remuneration from his employment.

34. If during his unemployment the workman works on such agricultural property, it would not per se disentitle him to the benefit of Section 17B. If, for instance, the agricultural income would have been generated irrespective of his having worked thereon, he would be entitled to the full benefit of Section 17B. It is only if his labour actually contributed to the generation of income that the workman would be disentitled to the benefit u/s 17B to the extent of such income coming to him or to his share. As in the case of any other business, a workman during his unemployment may, to prevent idleness or otherwise work on the agricultural property. He may help the members of the family with whom he jointly owns the property. His labour may or may not yield an income/ further income. It is only that part of the income generated from the agricultural property directly attributable to the workman's labour and coming to his share that could be considered remuneration within the ambit of the proviso to Section 17B.

35. There is a further qualification to what I have said in the previous paragraph. As in any other employment even if the workman's labour generates or enhances the agricultural income, he would not be disentitled to the benefit of Section 17B if he could legitimately have done this work even during his employment with the Petitioner.

36. Mr. Cama submitted that if a person can survive with an amount less than what he is entitled to u/s 17B, the Court must grant only that amount.

37. There is nothing in Section 17B that justifies this interpretation. The computation of the amounts on such an interpretation would be fraught with difficulties and uncertainties. What is survival ? At what level of income can a person survive ? What are the needs and requirements which must be considered while determining the adequacy of an amount necessary for surviving ? These are purely hypothetical questions. The concept of an amount adequate to survive is purely relative. It would be virtually impossible for the Court to arrive at a reasonable figure. The entire approach would be speculative and arbitrary. It would prolong the proceedings defeating the very purpose of Section 17B.

38. Moreover, the requirements change from time to time depending on various uncertain factors and contingencies. Assume, for instance, a case where a Court for some reason comes to the conclusion that a given amount of money is adequate for a person to survive and, therefore, reduces the last-drawn wages while computing the amount u/s 17B and thereafter the workman faces a medical emergency. If Mr. Cama's submission is to be accepted, a workman will

have to make multiple applications depending on the change in circumstances which are bound to arise on a frequent basis.

39. In the circumstances, the subjective opinion on the question of what amount is adequate for a person to survive is wholly irrelevant while computing the amount u/s 17B. The expression "adequate remuneration" must therefore mean an amount equal to or more than the last drawn wages.

40. Mr. Cama submitted that relief u/s 17B must be denied if the workman has any source of remuneration adequate to meet his requirements.

41. I have little, if any, hesitation in rejecting this submission. Section 17B contains no such limitation. It does not remotely indicate such deductions. It, in fact, militates against the same. The proviso to Section 17B clearly denies the workman the relief only if he is employed and receives adequate remuneration. The remuneration, therefore, is with respect to such employment and not from any other source. A workman's independent source of income not arising from any employment can never be a relevant factor for denying him wages u/s 17B. This is clear from the words "such workman had been employed and had been receiving adequate remuneration." It is not the receipt of remuneration per se but the receipt of remuneration from employment that disentitles a workman to wages u/s 17B.

42. Mr. Cama submitted that relief u/s 17B may be granted only from the date on which the Court stays the order granting reinstatement.

43. A Division Bench of this Court in (Bombay Film Laboratories Put. Ltd. v. L.G. Vasule and Ors.) 1994(2) C.L.R. 413 held that a plain reading of the provisions of Section 17B makes it clear that the Court has power to direct payment of wages only for the period when the enforcement of the award of reinstatement is stayed and that it is not open for the Court to direct payment from the date of the award.

44. Following the judgment, a learned Single Judge of this Court in the case of Hindustan Petroleum v. D.N. Vidhate 2003 (5) Bom.C.R. 482, held that the question of ordering the payment of back wages from a date prior to the date of stay granted by the Court to the impugned award, cannot arise.

The judgment of a learned Single Judge of this Court in *Sylvester & Co. v. Their Workmen and Anr.* in so far as it holds, "As far as Section 17B benefit is concerned, it has to be from the date of filing of the petition", has thus been impliedly overruled.

45. I sent for the Statement of Objects and Reasons which state:

(vi) It is observed that when Labour Courts pass awards of reinstatement, these are often contested by an employer in the Supreme Court and High Courts. The delay in the implementation of the award causes hardship to the workmen concerned. It is, therefore, proposed to provide for payment of wages last drawn

by the workmen concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court or the High Courts.

Thus, the intention was clearly to provide the relief "from the date of award". Though the judgments have not noted the same, it would make no difference so far as this Court is concerned. I am bound by the judgments despite the fact that the Statement of Objects and Reasons state that the relief is to be granted "from the date of the award".

46. In the circumstances, it must be held that the liability to pay the amounts u/s 17B is limited to the period from the day on which the enforcement of the award of reinstatement is stayed. In the present case, although the award was passed on 13th March, 2007 and the writ petition was filed on 14th March, 2008, the stay in respect of the reinstatement was granted on 21st January, 2009. Thus, the Petitioners' liability to pay the amount under this Order will be for the period 21st January 2009, onwards.

47. The Division Bench in Bombay Films Laboratories Ltd., observed that a plain reading of the provision of Section 17B made this position clear. Irrespective of the consequences, I am bound by the judgment. I find it necessary to note however that although this appears at first blush to prejudice the workman it in fact does not. The mere filing of a writ petition against an award does not operate as a stay of its implementation. This can only be by an order of the Court. To hold otherwise would entitle an employee to obtain a stay against reinstatement by paying only the amounts u/s 17B merely by filing a writ petition. The petition could remain on the file of the Court for a considerable length of time for innumerable reasons such as for removal of objections and applications regarding such objections without it even being served on the workman. The workman would in such cases, learn about the filing of the writ petition only when he seeks to enforce the award. This would be highly prejudicial to the workman for no fault of his.

48. The logical sequiter then is that the Petitioner/employer is bound and liable to pay the full wages as if the Respondent/workman had been reinstated from the date of the award upto the date of the stay. It can hardly be suggested otherwise with any seriousness. A view to the contrary would entitle an employee to pay the workman nothing for the period from the date of the award to the date of the order staying the operation thereof. As I have indicated earlier, this period can be considerably prolonged by a Petitioner by means only too well known to anyone with any experience of the Court's procedure such as by filing the petition after considerable delay and/or keeping the same under objections. Service of proceedings itself can take a considerably long time.

49. In the present case, the Petitioner is bound and liable to comply with the award and pay the full wages of each of the said workmen from the date of the award i.e. 13th December, 2007 till the date of the stay order dated 21st January, 2009. The Petitioner shall do so on or before 3rd of May, 2010, failing

which, it would be open to the Respondents to adopt appropriate proceedings including for contempt.

50. This brings me to a consideration of the application of each of the said workmen on merits.

Re: Nitin Narayan Kodre:

51. This workman stated in his affidavit that after the termination of his services, he tried to secure employment but did not succeed in doing so and that he is presently unemployed. He further stated that he owns agricultural land admeasuring about 5 acres jointly with his parents and brothers and, as a result of the cultivation, he earns a sum of Rs. 1000/- per month depending upon the rains. In his rejoinder he stated that he cultivates about 1.25 acres of this land. He stated that as he lives in a joint family, he manages to maintain himself and his family from the said earnings and is also assisted by his brothers and his father. He further added in the rejoinder that his wife also does some household work and earns a sum of Rs. 300/- to Rs. 500/- per month thereby.

52. I am not inclined to deduct even this sum of Rs. 1,000/- per month admittedly earned by him as a result of the cultivation of the land of only 1.25 acres. There is nothing to suggest that without his working on the land, he would not have earned the amount of Rs. 1,000/-. He would obviously have earned the same as his share of the income from this agricultural land.

53. A workman's spouses' earnings are totally irrelevant while considering an application u/s 17B. The spouse's earnings cannot be a ground for denying or even reducing wages u/s 17B. There is nothing u/s 17B, which even remotely suggests anything to the contrary.

54. There is nothing unusual or unnatural about an unemployed person being supported by the other members of the joint family especially by his parents and brothers.

55. In paragraph 18(2) of the affidavit in reply, the Petitioner has alleged that it has gathered information that this workman is engaged in the business of building material supplies; that he is working with Soham Industries of one Sandeep Kodre; that he resides in a bungalow comprising of a ground and two upper floors; that the Petitioner is informed that this workman earns income from two shops given by him on rent and that "his earnings are more than adequate remuneration from aforesaid employment and the large agricultural land of the family.

56. In the affidavit in rejoinder, the workman has denied that he is engaged in the business of "building material supplier." I see no reason to accept the Petitioner's case in this regard. There are no particulars furnished by the Petitioner regarding the same. There is no evidence in this regard either.

57. In the affidavit in rejoinder, this workman has further denied that he was

working with Soham Industries and has stated that the same belongs to his elder brother Sandeep Kodre and his partner one Hemant Udhawant. He has stated that he has nothing to do with the said business.

58. I see no reason to reject this workman's case in this regard either. The Petitioner has not furnished any evidence to support its contention regarding this workman earning any amount from the said firm.

59. As regards the bungalow, this workman has stated that the same belongs to his father and he only resides therein. There is no evidence to prove that this workman has a share in the said bungalow. Further, even assuming he did, it would make no difference. A workman cannot be denied wages because he owns property.

60. This workman has in his rejoinder denied that he earns any income from the said two shops as alleged by the Petitioner. He denies having given the same out on rent. Despite the same, the Petitioner has adduced no evidence to establish its contention. A party cannot prove the negative. It was for the Petitioner to adduce evidence to establish this contention. Further, even assuming that this workman did earn income as alleged, it would make no difference for the reasons I have already stated earlier. The Petitioner is not entitled to take advantage of a workman's independent source of income in denying its liability u/s 17B.

61. In the circumstances, this workman is entitled to the full benefit u/s 17B.

Re: Kiran Kondibe Belhekar

62. This workman has stated in his affidavit that after the termination of his services, he tried to secure alternate employment but without success. He stated that he is presently unemployed; that he was cultivating land admeasuring about half an acre jointly owned by him with his parents and his brothers; that he earns a sum of Rs. 800/ - per month from cultivation depending on the rains and that he manages to maintain his family and himself on such earnings and on the earnings of his brothers as they are part of a joint family.

63. In paragraph 18(3), the Petitioner has alleged that this workman earns adequate income as he does the business of an estate agent. The Petitioner has furnished no particulars whatsoever in this regard despite the workman's rejoinder denying the same. The Petitioner has not mentioned the source of such information. I see no reason, therefore, to accept the Petitioner's case or to reject the Respondent's case.

64. In the circumstances, this workman is entitled to the full benefit u/s 17B.

Re: Appasso Annaso Mane

65. The Petitioner has not filed any affidavit in reply to this workman's affidavit in support of the application. This workman has also averred that after the termination of his services, he tried to secure alternate employment but without success and that he is presently unemployed. He admitted that he was

cultivating land admeasuring two acres jointly owned by him with his parents and brothers and that he earns a sum of about Rs. 600/- to Rs. 800/- from such cultivation depending upon the rains. He has stated that he manages to maintain himself, his brothers and his mother from these earnings as they constitute a joint family. He has further stated that his wife earns a sum of Rs. 200/- to Rs. 300/- per month by doing household work.

66. This workman has thus satisfied the requirements of Section 17B. There is no denial to these allegations. The question of this workman furnishing details and particulars of his attempts to secure employment, do not arise as the Petitioner has not even denied the same. This is even more significant in view of the fact that the Petitioner has filed the affidavits in reply to the affidavits of four other workmen.

67. In the circumstances, this workman is entitled to the full benefit u/s 17B.

Re: Aslam Rajubhai Sanadi.

68. There is no affidavit in reply to the Petitioner's affidavit in support of the application. This workman has also stated that after the termination of his services, he tried securing an alternate employment but without success and that he is presently unemployed. He admits that he earns a sum of Rs. 2,000/- per month by selling Chinese goods. He has stated that he manages to maintain himself and his family by these earnings as well as with the earnings of his wife, who works in a factory.

69. I am not inclined to adjust the amount of Rs. 2,000/- per month. A fluctuating income itself is not irrelevant to Section 17B. However, the term "remuneration" therein cannot include sporadic, occasional earnings with no indication of a possibility of the recurrence thereof. This is clear from the context in which the term "remuneration" is used. The remuneration must be from employment-self-employment or employment with another. Thus, income even on account of daily wages would be remuneration if it is established that the workman was employed on daily wages on a reasonably consistent basis. However, an occasional income on account of a stray or an odd job with no indication of the same continuing or even of the same expected to continue on any basis cannot deprive a workman of the benefit of Section 17B. Otherwise, the mere fact that some remuneration is received would disentitle a workman from the benefit thereof, defeating the entire purpose of Section 17B. Even such amounts may, at the highest, be deducted from the total benefit if it is of any significance but cannot deprive the grant of the benefit altogether. In this workman's case, the occasional income of Rs. 2,000/- cannot be considered to be of any significance considering the overall effect of the relief.

70. In the circumstances, this workman is entitled to the full benefit u/s 17B.

Re: Anil Mahadev Patole

71. This workman has stated that after the termination of his services, he tried

to secure alternate employment but without success and that he is presently unemployed. He admits cultivating land admeasuring one acres and 5 gunthas jointly owned by him with his parents and brothers. He earns a sum of Rs. 500/- to Rs. 700/- per month thereby depending upon the rains. He stated that he manages to maintain himself and his family by such earnings with the assistance of his brothers and his mother and from the amount of Rs. 200/- to Rs. 300/- per month earned by his wife who does some household work.

72. In paragraph 18(4) of the affidavit in reply, the Petitioner states that according to the information gather by it, this workman deals in shares. No particulars or evidence is furnished in this regard. Even the source of information is not stated. It is difficult, therefore, to accept this allegation. In his affidavit in rejoinder, the workman has stated that he had invested in certain shares from the retrenchment compensation and his provident fund received by him and his past savings. Despite the same, even the source of such information is not disclosed by the Petitioner. I have held earlier that a workman's income from his investment is not a relevant factor to deny him wages u/s 17B. The same does not constitute remuneration from any employment.

73. Despite his denial in his rejoinder, the Petitioner has not produced any evidence or even the source of information in support of its allegations in the reply that the workman owns the agricultural lands bearing the survey numbers stated therein and earns Rs. 9,000/- per month.

74. In the circumstances, this workman is entitled to the full benefit u/s 17B.

Re: Shashikant Mahadeo Mathpati

75. This workman has stated in his affidavit that after the termination of his services, he tried to secure alternate employment but without success and that he is presently unemployed. He admitted working as an LIC agent from July 2008 but stated that he earned an aggregate sum of only Rs. 1,400/- towards commission during the entire year.

76. The Petitioner in paragraph 18(1) of the affidavit in reply alleged that this workman is gainfully employed in M/s. Trends Engineers Limited at Pune and was doing the business of distributing "bittle leaves" and earns about Rs. 9,000/- to Rs. 10,000/-per month.

77. In the affidavit in rejoinder, the workman stated that as he earned only Rs. 1,400/- during the entire year and had not achieved the target, his licence as an Insurance Agent was cancelled by the LIC. He admitted having worked as a temporary employee with Tata Motors for three months from 3.7.2005 to 3.10.2005 and annexed the appointment order and the pay slips. He denied being gainfully employed by M/s. Trends Engineers Limited at Pune or that he was earning a sum of Rs. 9,000/- to Rs. 10,000/- per month. Despite the same, the Petitioner made no attempts to establish this workman's employment with M/s. Trends Engineers Limited. The Petitioner could have obtained the necessary

information but chose not to do so. I am, therefore, inclined to accept the workman's case.

78. In the circumstances, this workman is entitled to the full benefit u/s 17B.

79. Mr. Cama submitted that the Labour Court had itself found that the said workmen had been gainfully employed and, therefore, denied them back wages. He submitted that this Court therefore ought, for the same reasons, to reject the present application u/s 17B.

80. The order/award is under review by this Court. Even assuming that the finding is upheld, it does not establish that for the period relevant u/s 17B, the said workers have been gainfully employed. The mere reliance of the observations of the Labour Court cannot establish that these workers have been in gainful employment during the relevant period.

81. Lastly, Mr. Cama submitted that the affidavits were false and that the same is evidenced by the fact that several averments in the affidavits are the same.

82. It is difficult to accept the submission. There is nothing unusual about the facts stated by them. It is more than just probable that these facts apply to each of them. I find nothing unusual about the fact that many of their wives do household work and earn a meagre living thereby. Nor do I find anything unusual about the fact that many of them have a share in agricultural property. These are workers who come from the rural area to this city for jobs. They retain their interest along with the other members of the family in agricultural plots. There is nothing unusual or unnatural about the same. Thus, merely because some of the facts pertaining to some of these workmen are common, it does not indicate that their affidavits are false.

83. The entire approach on the part of the Petitioner has been to sit back, produce no evidence and make no effort to establish that these workers have been in gainful self employment and to rest content by merely trying to pick holes in their affidavits.

84. In the circumstances, the Civil Application is allowed as prayed in respect of each of the workmen. The Petitioner shall pay costs fixed at Rs. 2,000/- to each of the workmen.