
(1974) 04 RAJ CK 0005

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1594 of 1969

Maresh Chandra Sharma

APPELLANT

Vs

State of Rajasthan an Another

RESPONDENT

Date of Decision : 05-04-1974

Acts Referred:

Constitution of India, 1950 — Article 16, 226
Employees Compensation Act, 1923 — Section 17
Industrial Disputes Act, 1947 — Section 2, 25
Payment of Wages Act, 1936 — Section 23, 25F, 25FFF, 25G

Citation : (1974) RLW 338 : (1974) WLN 564

Hon'ble Judges : D.P. Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.P. Gupta, J.—The petitioner is a diploma holder in Civil Engineering and was appointed as an Engineering Subordinate in a temporary capacity in the Irrigation Department of the State Government by an order dated December 13, 1966 issued by the Superintending Engineer. Irrigation, Udaipur. One of the terms of his appointment as mentioned to the aforesaid order dated December 13, 1966 was that the service of the petitioner was terminable on one month's notice on either side. It was also mentioned therein that the appointment of the petitioner was for a period of six months or till persons selected by the Rajasthan public Service Commission or surplus bands would become available, whichever was earlier. The petitioner joined as Engineering Subordinate in pursuance of the aforesaid order of appointment on December 27, 1966 and was posted in the Panchayat Samiti, Bheosrodgarh. The petitioner has submitted that although he has worked for more than a year on the aforesaid post, his services were terminated by the order of the Chief Engineers Irrigation dated January 17, 1968 u/s 23A of the Rajasthan Service Rules The petitioner has further submitted that he was relieved from his post in the forenoon of February 1, 1963. The petitioners case is that he WJS a workman within the meaning of Clause (s) of

Section 2 of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). His grievance is that he was not paid any retrenchment compensation as envisaged u/s 25F of the Act. He has also made a grievance that persons junior to him in the category of Engineering Subordinates have been retained in service, while the services of the petitioner have been retrenched and as such the provisions of Section 25G of the Act have been violated and the normal principle of "last come first go" has not been followed. The petitioner has, therefore, prayed that the order of termination of his services Ex. 2 dated January 17, 1968 be quashed.

2. The respondents have contested the writ petition and they have submitted that one month's notice pay has already been paid to the petitioner in accordance with the provisions of Section 23A of the Rajasthan Service Rules. They denied the claim of the petitioner that he was a workman within the meaning of Section 2(s) of the Act and have also joined issue on the question that the Irrigation Department of the State Government was an Industry. The respondents have submitted that the provisions of the Act are not attracted to the case of the petitioner as he was not a workman and his services have been properly terminated in accordance with the Rajasthan Service Rules. They have also taken the stand that the petitioner submitted an application for re-appointment on the post of Engineering Subordinate and he was directed to get his name registered with the Man Power Cell in the General Administrative Department of the State Government and to furnish his registration number, but he did not comply. They have further stated that the petitioner was appointed as a work-charged Supervisor on Famine Relief Works in Dungarpur district by the order dated May 30, 1969 but he did not join and as such the petitioner cannot maintain the present writ petition as he must be deemed to have waived his rights, if any. The stand of the respondents is that the present case was of simple termination in accordance with the terms and conditions of service and is not a case of retrenchment. In the alternative the respondents have submitted that the petitioner should have taken recourse to the remedies available under the Act, if he at all considered that his services were retrenched and he was entitled to the benefit of the provisions of the Act. As regards the objection of the petitioner that persons junior to him have been retained in services while his services were terminated by the order Ex 2 the respondents have stated in their reply that the services of Surendra Kumar Mangro and Dhillaram, in respect of whom the petitioner has made a grievance in the writ petition were also terminated by the very order of the Chief Engineer dated January 17, 1968 (Ex 2) by which the petitioner's services were terminated and as such the petitioner can have no grievance on that account. As regards Nasib Ali Khan it has been submitted by the respondents that he joined the post of Engineering Subordinate on December 26, 1966. The respondents have, therefore, submitted that the petitioner has no case whatsoever and the writ petition should be dismissed.

3. The first and the foremost question which requires consideration in this case is as to whether the petitioner is a workman within the meaning of Section 2(s) of

the Act and his services have been retrenched so as to entitle him to receive the benefits envisaged u/s 25F of the Act. It would be useful at this stage to consider the relevant provisions of the Act. Sub-clause (s) of Section 2 of the Act is under:

2 (s) "Workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, Supervisory, technical or clerical work for Hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment had led to that dispute, but does not include any such person--

(i) who is subject to the Army Act, 1950 (46 of 1950), or the Air Force Act, 1950 (45 of 1950), or the Navy (Discipline) Act, 1934 (34 of 1934); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative Capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the, powers vested in him, functions mainly of a managerial nature.

4. Thus to come within the ambit of "workman" for the purposes of the Act, the person should be employed in any industry for hire or reward, but should not be employed mainly in a managerial or administrative capacity or if employed in a supervisory capacity he should not draw wages exceeding Rs. 500/- per month.

5. There is no dispute between the parties that the petitioner was employed by the State Government for hire or reward and he was not working mainly in a managerial or administrative capacity but that he was employed in a supervisory capacity and did draw not wages exceeding Rs. 500/- per month. However, the main dispute between the parties is on the question as to whether the petitioner was employed in any industry. Learned Counsel for the petitioner urged that the Irrigation Department of the State Government was an "industry" within the meaning of Clause (j) of Section 2 of the Act while the learned Additional Advocate General, on behalf of the respondents, strenuously submitted that the said department was not an industry. "Industry" has been defined in Sub-clause (j) of Section 2 of the Act as:

"Industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workman."

Learned Counsel for the petitioner also sought to derive support for his argument from the definition of "public utility services" given in Clause (n) of Section 2 of

the Act, which includes amongst others any industry which supplies power, light or water to the public. He has also submitted that this Court in *Viney Kumar Majoo v. State* 1968 RLW 325 held that an Engineering Subordinate is a workman. However, the learned Additional Advocate General submits that in this case the question as to whether the Irrigation Department of the State is an industry as defined in the Act requires examination. His grievance is that in the writ petition the petitioner has simply stated that he was a workman and was entitled to retrenchment compensation on account of the termination of his services but has not submitted that the Irrigation department of the State Government was an "industry" and an Engineering Subordinate employed therein was a workman. The petitioner's learned Counsel urged that it was not necessary to give details of the functions and duties performed by an Engineering Subordinate in the Irrigation department inasmuch as the petitioner referred to the aforesaid decision in *Viney Kumar Majoo's* case 1968 RLW 325 in para 7 of the writ petition and on the basis thereof he asserted that the petitioner was a "workman" within the meaning of Section 2(s) of the Act. Learned Counsel for the petitioner also relied upon the decision of this Court in *State of Rajasthan v. The Industrial Tribunal, Rajasthan* 1970 RLW 137, wherein it was held that the survey and Investigation department of the State Government was an "industry" within the meaning of the provisions of Section 2(j) of the Act. But it has been argued by the Additional Advocate General that the aforesaid decision relied upon a judgment of the Supreme Court in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, which was however not followed in subsequent cases by the Supreme Court and his submission is that in latter cases their Lordships of the Supreme Court have given & re-thinking to the matter.

6. The earliest case on the point which requires to be noticed is *D.N. Banerji Vs. P.R. Mukherjee and Others*, . There the question raised was as to whether a Municipality was an "industry" and a person employed as a Sanitary Inspector therein was a "workman" within the meaning of the Act. Their Lordships of the Supreme Court observed in that case that in the ordinary or non-technical sense, industry means an undertaking where capital and labour co-operate with each other for the purpose of producing wealth in the shape of goods, machines, tools etc., and for making profits. However, the Supreme Court pointed out that the limited concept of what an industry meant in early times must now yield place to an enormously wider concept so as to take in various and varied forms of industry. Legislation has to keep pace with the march of times and the new situations caused by the process of social "evolution" have to be provided for. However, it was observed that every activity in which the relationship of employer and employee exists or arises, does not result in an industry. But non-profit making undertakings are included in (the concept of industry, even if there is no private enterprise. Their Lordships also referred to the definition of "public utility service" contained in Sub-clause (n) of Section 2 of the Act and observed that it was very relevant and important in the interpretation of the word

"industry" as employed in the Act. Their Lordships held that if the public utility service such as railways, telephones and the supply of power, light water to be the public is carried on by a Corporation like the Municipality, instead of by private companies or business corporations, it does not cases to be an industry and the only fact that there is nothing like the investment of any capital or the existence of a profit earning motive does not constitute a necessary element in the modern concept of industry. Their Lordships further made the following significant observations:

There is a necessary element of distinction between the supply of power and light to the inhabitants of a Municipality and the running of charitable hospitals and dispensaries for the aid of the poor. In ordinary parlance, the former might be regarded as an industry but not the latter. The very idea underlying the entrustment of such duties or functions to local bodies is not to take them out of the sphere of industry but to secure the substitution of public authorities in the place of private employers and to eliminate the motive of profit-making as far as possible. The levy of taxes for maintenance of the services of sanitation and conservancy or the supply of light and water is a method adopted and devised to make up for the absence of capital. The undertaking or the service will still remain within the ambit of what we understand by an industry though it is carried on with the aid of taxation, and no immediate material gain by way of profit is envisaged.

7. In *Baroda Borough Municipality Vs. Its Workmen*, where the workmen were employees of the Electricity Department of a Municipality, their Lordships of the Supreme Court re-affirmed their earlier decision in *D.N. Banerji Vs. P.R. Mukherjee and Others*, and observed as follows:

it is now finally settled by the decision of this Court in *D.M. Banerjee v. P.R. Mukerjee (A)* (supra) that a municipal undertaking of the nature we have under consideration here is an industry" within the meaning of the definition of that word in Section 2(j) of the Industrial Disputes Act, 1947 and that the expression "industrial dispute" in that Act includes disputes between municipalities and their employers in branches of work that can be regarded as analogous to the carrying on of a trade or business.

However, in the case of *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, the Supreme Court applied the test as to whether an activity of a like nature would be an undertaking if it is carried on by a private citizen or a group of private citizens. By applying the aforesaid test a hospital was also held to be an industry.

8. In *The Corporation of the City of Nagpur Vs. Its Employees*, the Supreme Court while dealing with the case of an employee of Nagpur Corporation distinguished between the regal functions and the municipal functions performed by the Corporation. It was observed that the regal functions described as primary and inalienable functions of State, though statutorily delegated to a corporation,

are necessarily excluded from the purview of the definition if industry and that the service, which, if rendered by an individual or a private person would be an industry, would equally be an industry if performed by a corporation. However, one of the tests applied in that case also was as to whether the service could be performed by an individual or firm for remuneration.

9. All the aforesaid cases were considered by the Supreme Court again in the *Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club*, and the decisions given in the cases of *D.N. Banerji Vs. P.R. Mukherjee and Others*, and *The Corporation of the City of Nagpur Vs. Its Employees*, were approved and it was observed that those two cases laid down tint for an activity to be an industry it is not necessary that it must be carried on by private enterprise or must be commercial or result in profit. It is sufficient if the activity is analogous to the carrying on of a trade or business and involves cooperation between employer and employees. This result is reached by extending the meaning of "undertaking" to cover adventures which may not be strictly trade or business but are very similar to them. The activity of the Municipality was considered to be covered by the term "undertaking" in the definition of "industry" in Section 2(j) of the Act, but the test laid down in the case of *The Corporation of the City of Nagpur Vs. Its Employees*, was not accepted. The Supreme Court made the following observations:

The expansion of Governmental or municipal activity in fields of productive industry is a feature of all developing welfare States. This is considered necessary because it leads to welfare without exploitation of workmen and makes the production of material goods and services cheaper by eliminating profits. Government and local authorities act as individuals do and the policy of the Act is to put Government and local authorities on a par with private individuals. But Government cannot be regarded as an employer within the Act if the operations are governmental or administrative in character. The local authorities also cannot be regarded as industry unless they produce material goods or render material services and do not share by delegation in governmental functions or functions incidental thereto. There is no essential difference between educational institutions run by municipalities and those run by universities. And yet a distinction is sought to be made on the dichotomy of regal and municipal functions. Therefore, the word "undertaking" must be defined as "any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade". This is the test laid down in *Banerji's* case, and followed in the *Baroda Borough Municipality* case. Its extension in the *Corporation* case was unfortunate and contradicted the earlier case.

10. Hidayatullah J., as he then was, in the aforesaid case recounted the principles so far settled as under:

Every human activity in which enters tie relationship of employers & employees is not necessarily creative of an industry. Personal services rendered by domestic

and other servants, administrative services of public officials, service in aid of occupations of professional men, such as doctors and lawyers, etc., employment of teachers and so on may result in relationship in which there are employers on the one side and employees on the other but they must be excluded because they do not come within the denotation of the term "industry". Primarily, therefore, industrial disputes occur when the operation undertaken rests upon cooperation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the co-operation is to produce material services.

11. In *Cricket Club of India Vs. Bombay Labour Union and Another*, the question whether the Cricket Club of India, Bombay was an "industry" within the meaning of Section 2(j) of the Act, their Lordships of the Supreme Court accepted the tests laid down in the case of *Madras Gymkhana Club Employees' Union* AIR 1968 SC 554 and held that the Cricket Club of India was an "industry" and it was a self-service club of its members.

12. In the *N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras*, the question which arose for consideration before the Supreme Court was as to whether the Safdar Jung Hospital, New Delhi was an "industry" and in this case their Lordships clearly laid down what was meant by "material services". It was held in the aforesaid case that material services are not services which depend wholly or largely upon the contribution of professional knowledge, skill or dexterity for the production of a result. Such services being given individually and by individuals are services no doubt but are not material services. Even an establishment where many such persons operate cannot be said to convert their professional services into material services. Material services involve an activity carried on through co-operation between employers and employees to provide the community with the use of something such as electric power, water, transportation, mail delivery, telephones and the like. In providing these services there may be employment of trained men and even professional men, but the emphasis is not on what these men do but upon the productivity of a service organised as an industry and commercially valuable. Thus the services of professional men involving benefit to individuals, according to their needs, such as doctors, teachers, lawyers, solicitors etc., are easily distinguishable from an activity such as transport service. The latter is of a commercial character in which something is brought into existence quite apart from the benefit to particular individuals. It is the production of this something which is described as the production of material services.

13. The Supreme Court in this case over-ruled its earlier decision in the *State of Bombay and Ors. v. The Hospital Mazdoor Sabha and Ors.* 1970 RLW 137 and it was observed that the test as to whether such activity could be carried on by private individuals or groups of individuals could not be considered as the right test to be applied for determining as to whether a particular activity was an "industry" or not within the meaning of the Act While referring to the definition

of "public utility service" in Section 2(n) of the Act it was observed that the named services in that definition answered the test of industries run on commercial lines to produce something which the community can use and that such services were brought into existence in a commercial way and were analogous to business in which material goods are produced and distributed for consumption.

14. In *Vizagapatnam Dock Labour Board v. Stevedores Association, Vishakhapatnam and Ors.* AIR 1970 SC 1628 their Lordships considered the question as to whether the Stevedores Association, Vishakhapatnam, whose function was to supply workmen to registered employers could be considered as an "industry" under the Act. It was held that applying the principles laid down in *Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club*, the Board was not an "industry".

15. In *The Bombay Panjrapole, Bhuleshwar Vs. The Workmen and Another*, the matter as to whether the Bombay Panjrapole, Bhuleshwar was an "industry" was considered and their Lordships held that the institute by adopting the policy of keeping cattle not merely for their own sake but with an eye to serve human beings, by making large quantity of good milk available to them and by getting an income which would augment its resources certainly carried on business and the absence of a profit motive is not material. The activity of the Panjrapole was, therefore, held to be an "industry".

16. In *the Management of The Federation of Indian Chambers of Commerce and Industry Vs. Their Workman, Shri R. K. Mittal*, it was observed that in *Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club*, all the previous case law on the subject was reviewed and the tests so far established were recounted, which I have already extracted above. In this case their Lordships of the Supreme Court followed the criterion laid down in *Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club*, and observed that "in our view the [inch pin of the definition of industry is to ascertain the systematic activity which the organisation is discharging namely whether it partakes the nature of a businesses or trade, or is an undertaking or manufacture or calling of employers. If it is that and there is co operation of the employer and the employee resulting in the production of material services, it is an industry notwithstanding that its objects are charitable or that it does not make profit or even where profits are made, they are not distributed among the members." Applying these principles it was held that *Federation of Indian Chamber of Commerce and Industry* was an "industry" within the meaning of Section 2(j) of the Act. Their Lordships held that the Federation carried on systematic activities to assist its members and other businessmen and industrialists and even the non-members, in taking up their cases and solving their difficulties and in obtaining concessions and facilities for them from the Government and these activities are business activities and as such the Federation rendered material services to businessmen, traders and

industrialists.

17. The Gujarat High Court also considered the Law on the subject in *Dhari Gram Panchayat v. Shri Brahad Saurashtra Safai Kendar Mandol, Rajkot* (1971) 1 LLJ 508 and held that an organised activity offering service to the community would fall within the definition of the word "industry".

18. A review of all the aforesaid cases on the subject, leads to the conclusion that before the work engaged in can be described as an industry, it must bear the definite character of "trade" or "business" or "manufacture" or "calling" or it must be capable of being described as an undertaking in material goods or material services. How far the employers, the ambit of industry", under the force of the second part, takes in the different kinds of activity of the employees mentioned therein Of course, the second part standing alone cannot define what is "industry" and in either case the activity, whether the enterprise of the employees is to be considered in relation to its being a business, trade, undertaking, manufacture or calling or the employment, calling or avocation of the workmen, his reference to their rendering services of productive nature on behalf of the employers. Thus, an enterprise, which is an undertaking analogous to trade or business, resulting in rendering material services to the community, would certainly be an industry" within the meaning of Section 2(j) of the Act. The Irrigation Department of the State Government which is engaged in constructing dams, canals, tanks, etc. and distributing and supplying water for irrigation purposes, is rendering material services to the community at large or a part thereof with the help of its employees and is, therefore, an "undertaking" which comes within the definition of "industry" under the Act. The State Government may not be providing irrigation facilities to the community with profit motive but that would not make any difference as the undertaking is analogous to trade or business, because the irrigation facilities are provided on payment of certain charges. It is essentially a business activity, though the motive might be general welfare of the people.

19. In *State of Rajasthan v. Industrial Tribunal, Rajasthan* 1970 RLW 137 Tyagi, J. held Irrigation Department of the State Government as an "industry", although one of the tests applied in that case, based on the decision of the Supreme Court in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, namely that the operations carried on by the Irrigation Department could be carried out by some private individuals, is no longer valid as it was expressly disapproved by the Supreme Court in *Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club*, and *N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras*, cases, yet the same conclusion would be arrived at also by applying the well accepted tests. In view of the aforesaid discussion, I have no hesitation in holding that the Irrigation Department of the State Government is an "industry" within the meaning of the Act. The same conclusion was arrived at by the Madhya Pradesh High Court when it held in *M.P. Irrigation Karamchhari Sangh v. State of Madhya*

Pradesh and Anr. (1972) LLJ 374 that the Chambal Hydel Irrigation Project of the State of Madhya Pradesh was an "industry" within the meaning of the Act.

20. Once the conclusion is arrived at that the Irrigation Department is an "industry" there is no difficulty in holding that the petitioner was a "workman" within the meaning of Section 2(s) of the Act, as it is not in dispute in the present case that he was employed in the Irrigation Department in a Supervisory capacity as an Engineering Subordinate and that the wages drawn by him did not exceed Rs. 500/ per month. The objection of the learned Additional Advocate General on this score that the petitioner has not given the details of the work done by him in his capacity as an Engineering Subordinate for establishing the fact that he was a "workman", cannot be sustained for the petitioner has referred in the writ petition to the case of Viney Kumar Majoo 1968 RLW 325 decided by this Court, which was also a case of an Engineering Subordinate. In that case Kan Singh, J. considered a Standing Order issued by the State Government, defining the duties performed by an Engineering Subordinate or Overseer and came to the conclusion that a person employed in that capacity was undoubtedly a "workman" as defined in Section 2(s) of the Act, looking to the nature of the duties performed by him. The petitioner having referred to the aforesaid decision was not required to repeat in detail the function and duties performed by an Engineering Subordinate. I agree with the view taken by Kan Singh J. in Viney Kumar Majoo's case 1968 RLW 325. Of course, the other aspect of the matter as to whether the Irrigation Department was an "industry" as defined in Section 2(j) of the Act was not considered in that case and that aspect of the matter has been considered by me above at great length, in the light of the various decisions of the Supreme Court on the subject.

21. Now in the instant case, the services of the petitioner were sought to be terminated by the impugned order and although he had served in the Irrigation Department of the State as an Engineering Subordinate for more than one year, yet he was not given 15 days' notice or compensation equivalent to 15 days average pay as required by Section 25F of the Act. The Supreme Court has held in National Iron and Steel Company Ltd. and Ors. v. State of West Bengal and Anr. (1967) II LLJ 28 that it is incumbent on the employer to pay the workman retrenchment compensation at the time when he was asked to go and not later. In the present case, the impugned order of termination of the service of the petitioner, being in contravention of the provisions of Section 25F of the Act, is invalid and void.

22. The learned Additional Advocate General also faintly suggested that the Irrigation Department was not the employer of the petitioner within the meaning of the Act. "Employer" has been defined in Section 2(g) of the Act as under:

2 (g) "Employer" means:

(1) In relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority

prescribed in this behalf or where no authority is prescribed, the Head of the Department:

(2) in relation to an industry carried on by or on behalf of a local authority, the Chief Executive officer of that authority.

23. Now by any stretch of imagination it cannot be argued that the Irrigation Department, of which the petitioner was an employee was not run by or under the authority of the State Government. The argument of the learned Additional Advocate General on this score is that the petitioner was posted in the Panchayat Samiti, Bhensrodgarh by the order of his appointment (Ex 1). I may observe in this respect that it is not the case of the State Government, that, the petitioner was not appointed by the State Government. Moreover, it is also apparent that his services were also terminated by the order of the Chief Engineer of the Irrigation Department of the State Government (Ex 2). As the petitioner was appointed by an officer of the State Government and his services were also terminated by an officer of the State Government it does not lie with the State Government to contend that the petitioner was not its employee. If the petitioner was not their employee, what business had the State Government to terminate his services? It was not at all material that the State Government after appointing the petitioner in its Irrigation Department, posted him in a Panchayat Samiti but merely because of such posting he did not cease to be an employee of the State Government.

24. The next submission made by the learned Additional Advocate General is that the present was a case of termination simpliciter in accordance with the service conditions of the petitioner and it was not a case of retrenchment at all. Section 2(oo) of the Act defines "retrenchment" as under:

2 (oo). "Retrenchment" means the termination by the employer of the service of a workman for punishment inflicted by way of disciplinary action, but does not include:

(a) voluntary retirement of the workman; or

(b) retrenchment 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

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

25. I may mention here that in paras 5 and 6 of the writ petition the petitioner came with a definite case that he was retrenched along with two others, but this fact was not denied in the reply. On the other hand it was submitted by the respondents in their reply that the matter regarding retrenchment benefit may be examined by the Law Department for its applicability. The respondents also relied upon a circular dated 26th August, 1967 which directed the Administrative Department that while making fresh appointments, the "retrenched employees" who were appointed on or before October 1, 1968 should be given preference

and the respondents further asserted in their reply that as the petitioner was appointed after October 1, 1966 i.e. on December 27, 1966, he was not entitled to such preference. This averment also goes to show that the respondents did not seriously contest the case of the petitioner that he was retrenched. Further by the order Ex. 2 the services of 39 persons including the petitioner were terminated and it is not the case of the State Government that the whole sale termination of the services of such a large number of persons employed on the post of Engineering Subordinates was made by way of simple termination.

26. It was also suggested by the learned Additional Advocate General that the case of the petitioner was not covered by Section 25F of the Act but by Section 25F of the Act. I may at once observe that no case of bonafide closure of the activities of the Irrigation Department of the State has been pleaded or made out on behalf of the respondents. Moreover the procedure prescribed in Section 25F of the Act was not followed in the present case and as such the said provision cannot be made applicable.

27. Another submission made by learned Additional Advocate General on behalf of the respondents is that the petitioner was offered an alternative post of work-charged supervisor by the order dated May 30, 1969 but he did not join and although his services were terminated by the order dated January 17, 1968 (Ex. 2) with effect from January 31, 1968 and payment of one month's emoluments to terms of Section 23A of the Rajasthan Service Rules was duly made and was accepted by him, yet the petitioner filed the present writ petition on October 29, 1969. It has been urged by the learned Additional Advocate General that by his conduct the petitioner was estopped from challenging the order of his termination (Ex. 2) and that the principles of waiver and acquiescence were applicable to the facts of the present case. Learned Additional Advocate General relied upon *Andhra Laundry (Proprietor, R.A. Masilamani) Vs. Additional Labour Court and Others*, . But that case was in respect of payment of closure compensation payable u/s 25FFF of the Act and is distinguishable from the present case which relates to the payment of retrenchment compensation. As a matter of fact, Venkatadri J. of the Madras High Court himself, while deciding the aforesaid case, clarified the matter by making the following observations at page 360:

There seems to be a difference in the wording of the sections between retrenchment compensation and closure compensation. In the case of retrenchment, the parties cannot waive payment of compensation or notice; but it appears that the parties can, in the case of closure compensation, contract themselves out of the statute. This can be seen by looking into the provisions of some analogous statutes, where specific provision has been made that the parties cannot contract themselves out of the statute. For instance, in the Minimum Wages Act, Section 25 provides that any contract or agreement relinquishing or reducing the employee's right to a minimum rate of wages is null and void. Similarly Section 23 of the Payment of Wages Act provides that

any contract or agreement whereby an employed person relinquishes any right conferred by that Act is null and void in so far as it purports to deprive him of such right. Section 17 of the Workmen's Compensation Act provides that any contract or agreement entered into by a workman with his employer relinquishing any right of compensation from the employer for the personal injury arising out of or in the course of employment is null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under the Act. Again in the Payment of Bonus Act, Section 10A says that every employer shall be bound to pay to every employee in an accounting year the minimum bonus whether there are profits in the accounting year or not. But in the Industrial Disputes Act, as far as closure compensation is concerned, there appears to be no provision preventing the parties from contracting out of the statute.

28. However, learned Counsel for the petitioner argued in this respect that as this Court decided in Viney Kumar Majoo's case 1968 RLW 325 that the retrenchment of the petitioner in that case was invalid because of the non-compliance of the conditions envisaged in Section 25F of the Act, petitioner hoped that the respondents would retrace their steps and would recall the impugned order of termination of his services, which was similar to that passed in Viney Kumar Majoo's case 1968 RLW 325 and it was in this expectation that the petitioner waited, but as the respondents did not set aside his retrenchment he had to approach this Court. In my view if the petitioner did not join the post of a work-charged Engineering Subordinate offered to him by the respondents it cannot be inferred therefrom that the petitioner has waived or that he is estopped from challenging the impugned order of termination of his service. On the other hand, from the aforesaid conduct of the petitioner it appears that he was firm in his stand that the injustice done to him, on account of the order of termination of his services should be rectified. Moreover, it has not been disclosed by the respondents as to for what period (the post of work charged supervisor offered to the petitioner by them was going to last in as much as it was a temporary assignment relating to Famine Relief Works and for ought one knows, might be of a very short duration. The petitioner's grievance could not have been satisfied by such an offer.

29. It has been held by their Lordships of the Supreme Court in Workmen of Subong Tea Estate Vs. The Outgoing Management of Subong Tea Estate and Another, that even the acceptance of retrenchment compensation by the concerned workmen should not be held to create a bar against them from taking proceedings to challenge the invalidity of retrenchment, because if Section 25F is not complied with there can be little doubt that the retrenchment is invalid. The petitioner was, therefore, justified in filing the present writ petition for the redress of his grievance and it could not be rejected for the aforesaid technical pleas.

30. Lastly it was argued by the learned Additional Advocate General that the

petitioner had an alternative remedy under the Act which he should have pursued and according to him the present writ petition should be dismissed on this ground. In *N. Sundaramony v The State Bank of India Kuzhithurai Branch* (1973) IILLJ51 it has been held that where the breach of the provisions or Section 25F of the Act is found the impugned order is void in law and a writ petition is a proper remedy. Moreover, no such objection regarding the existence or an alternative remedy was raised by the respondents in their reply to the writ Petition. As mentioned above, the writ petition was filed on October 29, 1969 and has been pending in this Court for the last four years. In my opinion, the objection regarding the existence of an alternative remedy cannot be entertained at the far end of the arguments, when the matter has been heard fully on merits. There is no doubt that the existence of an alternative remedy is an important consideration for the exercise of the discretion of this Court under Article 226 of the Constitution, but the mere existence of an alternative remedy does not bar the jurisdiction of this Court. As I have found that the order Ex 2 is patently erroneous on its very face and is void inasmuch as the provisions of Section 25F of the Act have been completely ignored and the petitioner, though a workman" within the meaning of the Act, has not been paid any retrenchment compensation as envisaged under the aforesaid provision at the time of the termination of his services, the order of termination of his service, Ex 2 cannot be allowed to stand.

31. I may also refer to the ground urged by the learned Counsel for the petitioner namely, that the order of his termination was also hit by the provision of Section 25G of the Act as also by Article 16 of the Constitution inasmuch as persons junior to him have been retained in service while his services have been terminated by the impugned order Ex 2. In this connection, the reply given by the learned Additional Advocate General appears to be well founded that the services of two of the persons complained of, namely Surendra Kumar and Dhillal Lam were terminated by the very same order Ex. 2 and that the third person Nasib Ali Khan, having joined the service on December 26, 1966 was senior to the petitioner. Thus the aforesaid contention raised on behalf of the petitioner that persons junior to him were retained in service at the time when his services were terminated by the order Ex 2 has no substance and there is thus no breach of the provisions of Section 25G of the Act or of Article 16 of the Constitution in this respect.

32. However, in view of the conclusion I have arrived at that the impugned order Ex 2 was per se illegal and void because of non compliance of the provisions of Section 25F of the Act, I allow the writ petition and quash the order of the Chief Engineer, Irrigation Department, Rajasthan dated January 17, 1968 (Ex 2) so far as the termination of the petitioner's service is concerned. The petitioner will get his costs from the respondents. Let an appropriate writ be issued.