

(2011) 05 GUJ CK 0127

In the Gujarat High Court

Case No : Special Civil Application No. 4258 of 2011

Medical Officer

APPELLANT

Vs

Dashrathsinh Gajubha Zala

RESPONDENT

Date of Decision : 10-05-2011

Acts Referred:

Bombay Shops and Establishments Act, 1948 — Section 24, 24(1), 24(2), 24(3), 31(1)
Constitution of India, 1950 — Article 227
Gujarat Minimum Wages Rules, 1961 — Rule 23, 24
Industrial Disputes Act, 1947 — Section 18, 2, 2(11), 2(15), 2(19)
Minimum Wages Act, 1948 — Section 2
Payment of Gratuity Act, 1972 — Section 2

Citation : (2011) 05 GUJ CK 0127

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Dipak C. Raval, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. Dipak C. Raval for Petitioner. He submitted that Respondent was appointed as daily wagger driver in Primary Health Center when there was additional work available. Respondent workman was relieved from work as work was not available. Therefore, Respondent raised an industrial dispute under machinery of Industrial Disputes Act, 1947 which was referred to for adjudication to Labour Court, Surendranagar, registered as Reference (LCS) No. 24 of 2004. Statement of claim was filed by workman against which written statement was filed by Petitioner wherein it was stated that appointment of Respondent was casual in nature and Respondent was not appointed through any selection procedure and Respondent also not supplied his consent letter to work as and when work was available. Labour Court, Surendranagar passed award on 24th March, 2010 and granted reinstatement. According to learned advocate Mr. Raval for Petitioner, Medical Officer, Primary Health Center, Surendranagar is not having any authority to appoint or terminate

any person and award itself is passed without joining necessary parties and, therefore, award is challenged in present petition. Petitioner has annexed award passed by labour Court, Surendranagar page 10 Annexure A dated 24.3.2010. Labour Court has granted relief of reinstatement in favour of Respondent as daily wager driver, to original post without back wages of interim period with costs of Rs. 500.00. Annexure B page 17 is copy of statement of claim produced by Petitioner along with present petition, according to which, Respondent workman was working as driver in establishment of Petitioner since last two years and was receiving daily wage of Rs. 85.20 ps. According to workman, his presence was being marked in muster roll and salary was being paid while obtaining signature in pay register and was not provided pay slip, identity card etc. According to workman, he has completed 240 days continuous service in each year when he was working with Petitioner. His service was terminated on 26th June, 2002 and thereafter, new driver has been engaged by Petitioner. According to workman, at present, Petitioner is having vehicle and recruiting fresh driver but on that occasion, no offer of re-employment has been made by Petitioner to Respondent workman. Demand notice was served by Respondent workman to Petitioner but no reply was given by Petitioner, therefore, according to workman, his services were terminated by Petitioner establishment in breach of Section 25F, 25G and 25H of ID Act, 1947.

2. Against that, written statement was filed by Petitioner which is annexed at Annexure B colly to this petition by Petitioner. According to stand taken by Petitioner before labour Court that they are functioning subject to the rules and regulations of Government and instructions received from Government from time to time and in view of such function, whoever needy patients comes for primary treatment, they are provided treatment without taking any charge whatsoever and as per requirement of patients, even medicines are also being provided, free of charge. It was also submitted by Petitioner establishment before labour Court that their establishment is run from grant of Government and therein, only persons selected by District Panchayat Service Selection Board are being recruited and without following any such procedure, Respondent workman was appointed as daily wager. Respondent workman was intermittently working as daily wager driver as and when there is necessity. His work was not continuous and jeep which was being driven by workman is at present not in working condition and, therefore, in such circumstances, question of reinstating workman in service is not arising. Industrial Disputes Act is not applicable to Petitioner establishment, therefore, workman is not entitled to get any relief from labour Court. It was also case of Petitioner before labour Court that Petitioner is not having jurisdiction or power to appoint any person without following process of recruitment rules and, therefore, reference is required to be dismissed. One defence is raised by Petitioner that one offer was made by Petitioner establishment that if Respondent workman is willing to perform duties as daily wager driver and makes demand to that effect in writing before Petitioner, then, first preference will be given to Petitioner. Learned Advocate Mr. Dipak C. Raval

for Petitioner submitted that in response to aforesaid offer made by Petitioner, no consent letter was given or supplied by Respondent workman to Petitioner and in case after receiving such consent letter from workman, Petitioner was prepared to provide work to Respondent workman. Thereafter, certified copy of award is placed on record. Except that, no other documents have been annexed by Petitioner in present petition.

3. Learned Advocate Mr. Raval for Petitioner raised contention before this Court that in such circumstances, labour Court ought not to have granted relief to a daily wager driver whose services were terminated for want of work and vehicle which was entrusted to Respondent workman was not in working condition and workman was not recruited after following due process of recruitment rules. Then, he relied upon decision of apex Court in case of Incharge Officer and Another Vs. Shankar Shetty, and submitted that labour Court ought to have awarded lumpsum compensation in lieu of reinstatement as daily wager driver. Learned Advocate Mr. Raval for Petitioner emphasized that offer made by Petitioner in written statement was not accepted by workman and, therefore, now, reinstatement ought not to have been granted by labour Court. According to his submission, this Primary Health Center is run by Surendranagar District Panchayat on the basis of grant received from State Government and therefore, Petitioner establishment, Primary Health Center is not having any legal entity but it is depending upon grant received from either Surendranagar District Panchayat or from State Government and, therefore, labour Court ought not to have granted relief of reinstatement in favour of Respondent workman. Except that, no other submission is made by learned advocate Mr. Raval before this Court and no other decision has been cited by him before this Court.

4. I have considered submissions made by learned advocate Mr. Raval before this Court. I have also perused impugned award made by labour Court, Surendranagar. Industrial dispute has been referred to for adjudication by appropriate Government on 23rd April, 2004. Statement of claim was filed by workman at Exh. 5 and his service was terminated on 26th June, 2002 and before that, he remained in continuous service with Petitioner establishment as daily wager driver and completed continuous service of 240 days in a year. According to workman, after his termination, new driver has been appointed on daily wage basis by Petitioner and thereby Petitioner establishment committed breach of Section 25H of ID Act, 1947 since no offer was made by Petitioner to Respondent workman at that occasion for such work. Written statement was filed by Petitioner before labour Court at Exh. 6 where similar contentions have been raised by Petitioner as discussed above by this Court. Before labour Court, vide list Exh. 11, Petitioner establishment has produced three document, Exh. 12, details of muster of Respondent workman while working as daily wager driver from June, 2000 to June, 2002 produced on record. Exh. 13 produced by Petitioner before labour Court is circular of Government dated 10.2.2006 to stop recruitment of part time employees. Exh. 14 produced by Petitioner before labour Court is circular of District Panchayat dated 31.5.2006 to stop recruitment of part

time employees. Workman was examined at Exh. 9 and he was cross examined by advocate for Petitioner establishment. At Exh. 15 before labour Court, affidavit in form of evidence was filed by witness for Petitioner Shri Mohitbhai Padamchand Gandhi, Medical Officer who was cross examined by advocate for workman. Thereafter, matter was heard by labour Court and considering pleadings and documents produced by both parties, in paragraph 8, issues have been framed by labour Court and answer is given in said paragraph by labour Court. Labour Court has considered that Respondent workman has worked with Petitioner establishment for about two years as daily wager driver and as he was daily wager, therefore, his services were terminated by Petitioner establishment because he was daily wager driver and Respondent workman was receiving daily wage of Rs. 85.20 ps. Contention was raised by Petitioner establishment before labour Court that Respondent workman has not been selected through District Panchayat Service Selection Board after interview and jeep which he was driving is not in working condition, therefore, question of reinstating him in service is not arising. Considering this contention raised on behalf of Petitioner establishment, labour Court has considered oral evidence of Respondent workman at Exh. 9 where it was stated by him in his cross examination that he remained in service upto 1.6.2002 and thereafter, as vehicle had not been in working condition, he was retrenched. While considering this, labour Court also considered statement made by witness for Petitioner establishment at Exh. 15 where in cross examination, it was stated by him that there are two vehicles in establishment and in respect of vehicle which is in running condition, regular appointment has not been made and as and when driver required, person having knowledge of driving is being engaged. Further, it has been stated by said witness on behalf of Petitioner that for want of contact of Respondent workman, he has not been called as driver. In light of such contention raised by Petitioner establishment, labour Court has considered that complaint was made by Respondent workman before Assistant Labour Commissioner on 24.2.2002 and prior to that, on 18.1.2002, demand was made by him for reinstating him in service as has been alleged in letter of complaint and therefore, it cannot be believed that Respondent workman could not be contacted. Thereafter, labour Court has considered statement at Exh. 12 showing details of days on which workman has performed duties and as per that statement at Exh. 12, workman has completed 240 days service including weekly off, public holidays within 12 months preceding date of termination and as per Section 2(s) of ID Act, 1947, even rojamdar employee also can be considered as workman and termination of service of Respondent workman is retrenchment as per Section 2(oo) of ID Act, 1947 and as workman has worked for more than 240 days within 12 months preceding date of termination, as per Section 25F of ID Act, 1947, workman is entitled to have notice or notice pay in lieu thereof and retrenchment compensation but workman has not been served with any notice and was not given notice pay in lieu thereof as well as retrenchment compensation also not paid to him and thereby Petitioner has committed breach of Section 25F of ID Act, 1947. Thereafter, labour Court has considered that after termination of

service of Respondent workman, no any workman or employee has been appointed by way of permanent appointment and has recruited other driver as daily wager and thus it is clear that work which was being performed by Respondent workman has not been stopped and subsequently appointment has been made and therefore, there is breach of Section 25F of ID Act, 1947. It is necessary to note that being independent provisions of Section 25H of ID Act, 1947, as and when in same category if new employee is recruited or engaged by employer, at that occasion, at relevant time, it is legal obligation upon employer to first offer re-employment to workman whose service has earlier been terminated but that has not been done by Petitioner and that has also not been proved by Petitioner before labour Court and, therefore, labour Court has come to conclusion that there is breach of Section 25F and 25H of ID Act, 1947 and therefore, as per such observations, labour Court has held that service of Respondent workman was illegally terminated in breach of provisions of ID Act, 1947 and accordingly answered issue No. 1 in affirmative, as per decision of apex Court in case of Mohan Lal Vs. Management of Bharat Electronics Ltd.,

5. Before labour Court, on behalf of Petitioner establishment, one decision of Apex Court in case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, was cited. Labour Court has distinguished said decision of Uma Devi (supra) on ground that this decision is not applicable in facts of this case because there is no demand made by workman to make him permanent and, therefore, aforesaid decision of apex Court in case of Uma Devi is not applicable to facts of present case. Labour Court has observed that looking to facts and circumstances of case, at present there is need of daily wager driver and in such circumstances also, said decision is not applicable as it is not in consonance with facts of this case and at present also, Petitioner is taking service of daily wager driver and, therefore, Respondent workman should be given such opportunity and, it has been held by labour Court that workman is entitled for getting relief of reinstatement. For denying back wages of interim period, labour Court has considered decision of apex Court reported in Ram Ahsrey Singh and Another Vs. Ram Bux Singh and Others, Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) and Others Vs. Abdul Kareem, : 2005 (6) SCC 36 in case of APSRTC v. Abdul Karim AIR 2005 SCW 6042 in case of UPSRTC v. Mahendranath Tiwari and Anr. and AIR 2005 SCW 6314 in case of U.P. State Branch Ware Corporation v. Uday Narayan Pandya and considering principles laid down in aforesaid decisions of Hon''ble apex Court, labour Court has held that workman is not becoming automatically entitled to receive back wages but that aspect has to be determined by exercising discretion after taking into consideration facts and circumstances of each case and not mechanically. Considering facts and circumstances of case and principles laid down by apex Court in aforesaid decision, labour Court has denied full back wages of interim period and answered issue No. 2 partly in affirmative and made award of reinstatement on original post of rojamdar driver without back wages for interim period with costs of Rs. 500.00 to be paid to workman by Petitioner establishment which is under

challenge in this petition.

6. Question of law which has been raised by learned advocate Mr. Dipak C. Raval on behalf of Petitioner is that Respondent is not covered by Section 25F of ID Act, 1947 because he was daily wager. This aspect has been considered by apex Court in case of Rattan Singh v. Union of India, (1997) 11 SCC 396 wherein apex Court has considered applicability of Section 25F and 25B of ID Act and held that it is applicable to termination of even a daily rated workman who had continuously served for requisite statutory minimum period in a year. Relevant paragraph 3 of said decision is quoted as under:

3. We find merit in the said submission of Shri Ashri. From the dates mentioned in the judgment of the first appellate Court dated 22.1.1985, it appears that the Appellant had continuously worked for more than 240 days in a year. Since he was a workman, he was entitled to the protection of Section 25F of the Act and the said protection could not be denied to him on the ground that he was a daily rated worker. It is not the case of the Respondents that the provisions of Section 25F of the Act were complied with while terminating the services of the Appellants. In these circumstances, the termination of services of the Appellant cannot be upheld and has to be set aside. The services of the Appellant were terminated in the year 1976. Nearly 20 years have elapsed since then. In these circumstances, we are not inclined to direct reinstatement of the Appellant. But having regard to the facts and circumstances of the case, we direct that a consolidated sum of Rs. 25,000 be paid to the Appellant in lieu of compensation for back wages as well as reinstatement. This amount is being paid in full and final settlement of all the claims of the Appellant. The said amount shall be paid within two months. The appeal is disposed of accordingly. No costs.

7. In case of Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others, apex Court has come to conclusion that every department of Government cannot be considered as industry and dispensing with services of persons engaged on daily wages in a Government Department therefore is not a retrenchment. Word retrenchment has been interpreted. Relevant observations made in para 3 of said decision are quoted as under:

3. The admitted position is that the Petitioner No. 1 came to be appointed as Assistant, Petitioner No. 2 as Driver and Petitioner Nos. 3 to 5 as Peons on different dates, viz., on August 1, 1988, November 10, 1989, May 31, 1987 and April 22, 1992. They were appointed in the Co-operative Training Institute, Deoghar by its Principal. They are admittedly daily wage employees. Their services came to be terminated by the Principal. Calling that termination in question, they filed a writ petition in the High Court. The main grievance of the Petitioners before us is that termination of their services is in violation of Section 25F of the Industrial Disputes Act, 1947. The question for consideration, therefore, is: whether the Petitioners can be said to have been "retrenched" within the meaning of Section 25F of the Industrial Disputes Act? Every Department of the Government cannot be treated to be "industry". When the

appointments are regulated by the statutory rules, the concept of "industry" to that extent stands excluded. Admittedly, they were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They are temporary employees working on daily wages. Under these circumstances, their disengagement from service cannot be construed to be a retrenchment under the Industrial Disputes Act. The concept of "retrenchment", therefore, cannot be stretched to such an extent as to cover these employees. The learned Counsel for the Petitioners seeks to contend that in the High Court, the Petitioners did not contend that it is a case of retrenchment but termination of their services is arbitrary. Since they are only daily-wage employees and have no right to the posts, their disengagement is not arbitrary.

8. Considering aforesaid decision of apex Court in case of Himanshu Kumar Vidyarthi (supra), Petitioner establishment is not Government Department and District Panchayat is covered by definition of industry and Respondent workman was not appointed against any post but Respondent workman herein was appointed as daily wager driver and after his termination, work is available and in respect of vehicle which is in running condition as admitted by witness for Petitioner, regularly selected driver has not been appointed and therefore, they are taking work of driver through person having knowledge of driving as and when required and thus work is still available and after termination of Respondent, new daily wager driver has been engaged by Petitioner establishment and, therefore, in light of these facts of case before hand, decision of apex Court in case of Himanshu Kumar Vidyarthi is not applicable.

9. Recently, Division Bench of this Court has examined question that in case of daily wager, while calculating 240 days, whether weekly off and public and festival holidays are required to be included or not. The answer given by Division Bench is in negative after considering decision of Apex Court reported in Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, and decision of this Court reported in 2006 (3) GLR 2432 . This little bit create confusion and legal complication which legal aspect required further detailed examination for legal clarification of ratio laid down by apex Court in Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, where no distinction made between daily wager and temporary employee. Both type of employees are entitled for statutory weekly off and public holiday under provisions of Minimum Wages Rules and Bombay Shops and Establishments Act and also real interpretation of Section 25B(1) and (2) of ID Act, 1947. Hence this Court has considered recent decision of Division Bench of this Court in case of Ranjit Natvarlal Chauhan v. Morbi Nagar Palika reported in (2011) 26 GHJ (482) Division Bench of this Court has examined question that in calculation of 240 days continuous service as required u/s 25B(1) and (2) of ID Act, 1947, whether public holidays and weekly off are to be included or not. Relevant observations made by Division Bench of this Court while considering decision of this Court in

case of *Shihor Nagarpalika v. Natvarlal Maganlal Trivedi* 2006 (3) GLR 2432 ; *Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation*, and observed as under:

The first aspect is about the findings recorded by the Labour Court for completion of 240 days in the preceding year prior to the termination. The evidence on record has been accepted by the Labour Court which shows that even as per the Labour Court, the evidence was to the effect that the workman had worked for 215 days. But, in view of the above referred two decisions, one of this Court in the case of *Shihor Nagarpalika* (supra) and another of the Apex Court in the case of *Workmen of American Express International Banking Corporation* (supra), the weekly holidays and other holidays are to be added and the Labour Court has concluded that the workman had worked for 240 days.

We may first consider the decision of the Apex Court in the case of *Workmen of American Express International Banking Corporation* (supra). In the facts of the said case, at para 2, it has been specifically mentioned that the workman had joined the service of the American Express International Banking Corporation as Typist in temporary capacity and was employed as such with a number of short breaks till his services were terminated. The pertinent aspect is that the person had joined service as Typist-Clerk in temporary capacity and it was not the case of engagement of and any person as daily wager like in the present case. It is in those facts and circumstances of the case that the person had worked in service in temporary capacity, the observations were made by the Apex Court. Thereby, it cannot be said that even if a person is engaged as daily wager, and he had worked for a particular number of days, while counting the total actual working, the weekly holidays are to be added. If such is considered, the very distinction of a person engaged on temporary basis and a person engaged as daily wager would be lost. In the case of an engagement of a person as daily wager, the person is to be paid calculating his wage on daily basis whereas in case of a person who is engaged on temporary post, he can be considered as an employee on monthly basis and his engagement can also be considered as on monthly basis.

It appears that in the case of *Shihor Nagarpalika* (supra), the aforesaid distinction about the status of the person as daily wager and the working by a person on a temporary post has not been considered. In our view, if a person is engaged as a daily wager, he cannot be put at par with the person who has been engaged or who has been worked on temporary basis for a particular span. It appears that in the decision of this Court in the case of *Shihor Nagarpalika* (supra), the correct effect of decision of the Apex Court and the distinction between the daily wager and the person engaged on temporary post has not been considered. Therefore, we find that the view taken in *Shihor Nagarpalika* (supra) by the learned Single Judge of this Court is not correct view. In the case of the daily wager, if one has to claim the benefit of Section 25F of the Act, it will

be required for him to prove that he had actually worked continuously for a period of 240 days and while counting 240 days, the weekly holidays which are available to the permanent employees or in a regular set up or to employee appointed on temporary post cannot be considered while computing 240 days. Same situation will prevail for exclusion of the public holidays in case of daily wager unlike the persons appointed on temporary basis.

Under the above circumstances, we find that the Labour Court has wrongly relied upon the aforesaid both the decisions and has wrongly added weekly holidays and public holidays for computing 240 days of service for the purpose of considering the question of breach of Section 25F of the Act. It is true that the learned Single Judge in the impugned order could have considered the another decision of this Court in the case of Shihor Nagarpalika (supra), however, the learned Counsel for the Appellant has not been able to show before this Court that the aforesaid decision was brought to the notice of the learned Single Judge at the time when the petition was heard. In any event, when we find that the view taken by this Court in the case of Shihor Nagarpalika (supra) is not by correct interpretation and the effect of the decision of the Apex Court in the case of Workmen of American Express International Banking Corporation (supra), nothing much would turn on the merits of the present appeal since the workman concerned in the present case was appointed on daily wages as a daily rated workman.

If the aforesaid period of weekly holidays and public holidays are excluded in counting 240 days of service, it appears that even as per the finding recorded by the Labour Court, it would come to 215 days, which will be less than 240 days.

Under the circumstances, it can be said that the findings recorded by the Labour Court that the workman had completed 240 days was perverse to the record and the same could not be sustained.

As regards the alleged breach of Sections 25G and 25H of the Act is concerned, it appears that the view taken by the learned Single Judge in the impugned order that if the person has not completed 240 days of service, there will not be any question of following the procedure u/s 25G and 25H of the Act is not supported by the recent decision of the Apex Court in the case of Harjinder Singh Vs. Punjab State Warehousing Corporation, but the matter does not end there. Even if the contention of the learned Counsel is considered for the sake of examination on the aspect of alleged breach of Sections 25G and 25H of the Act, it appears that the Labour Court has not accepted the contention of the Appellant for the alleged breach of Section 25G of the Act and therefore, such finding not being in favour of the Appellant, it would not be open to the Appellant to take the benefit of the alleged breach of Section 25G of the Act. Even otherwise also, the award shows that as per the Labour Court, the workman did not discharge the burden of giving details satisfactorily of the juniors who were retained in service to claim the benefit of Section 25G of the Act.

Concerning to the finding recorded by the Labour Court for the alleged breach of Section 25H of the Act, we find that the approach of the Labour Court cannot be countenanced. The examination of the facts of the present case further shows that there was no evidence on record before the Labour Court by giving the names of the person who were offered employment after termination of the workman in question. Mere allegation that the employer had made new recruitment, in our view cannot be said to be a sufficient discharge of burden by the workman. It is required for the workman to state on oath with the details of the persons who have been offered employment by way of fresh recruitment or juniors to him. It is only after that burden is discharged by the workman, the burden would shift to the employer to disprove the said fact. There was no evidence before the Labour Court except the bare statement of the workman that after his termination new recruitment was made. Under these circumstances, we find that when the workman had not discharged the burden, which was required to be proved by him for taking benefit of Section 25H of the Act, the finding recorded by the Labour Court could be said as perverse to the record of the case. Under the circumstances, the said part of the award cannot be sustained in the eye of law.

In view of the aforesaid observations for the alleged breach of Section 25H of the Act, we find that even if the contention of the learned Counsel for the Appellant is considered and examined on merits, the same would not lead us to maintain the finding of the Labour Court of alleged breach of Section 25H of the Act even if the matter is considered on the premise that for invoking the Section 25H of the Act, it is not necessary that the workman concerned should have worked for 240 days in service. Hence we find that no useful purpose would be served in examining the said contention further on the aspects of approach of the learned Single Judge for the alleged breach of Section 25H of the Act.

10. Considering aforesaid decision of Division Bench of this Court, view taken by this Court in case of *Shihor Nagar Palika Through Chief Officer v. Natvarlal Maganlal Trivedi*, reported in 2006(3) GLR 2432 is required to be considered which has been considered by Division Bench of this Court in decision as referred to above. In case of *Sihor Nagar Palika (supra)*, this Court has held that weekly off, public holidays and festival holidays are required to be taken into account while counting days of continuous service as discussed in para 10 of judgment which is quoted as under:

10. I have considered the reasonings given by the Labour Court as well as submissions made by both the learned advocates appearing on behalf of the respective parties. On three grounds, the termination has been rightly set aside by the Labour Court.

(i) In written statement, Petitioner has made clear statement that if the workmen are prepared to work on the same terms and conditions, Petitioner is prepared to reinstate them on job in same terms and conditions. Therefore, Petitioner was prepared to reinstate the workmen when dispute was raised by the workmen

against the termination;

(ii) Except five workmen, rest of have completed 240 days continuous service and same has been proved before the Labour Court. In respect to five workmen, those who were not able to prove 240 days continue service, the record which was produced by the workmen was only for a period of twelve months preceding twelve months from the date of termination, but rest of the record was not produced by the Petitioner. In respect to five workmen, those who have not completed 240 days, the decision of Apex Court in case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, is required to be taken into account and if calculating the weekly off, public holidays and festival holidays for a period of twelve months which covered to complete 240 days.

(iii) There is a clear finding given by the Labour Court in Para 14 that Petitioner has violated Section 25H of the Industrial Disputes Act, 1947. In violation of mandatory provisions of Section 25H is also give right to the workmen of reinstatement. This being an independent right has been given to the workmen. Irrespective of the fact that whether workmen had completed 240 days service or not? Therefore, on these three counts, Labour Court has rightly granted reinstatement with continuity of service.

11. It is the contention raised by learned advocate Mr. Dipak C. Raval for Petitioner that Respondent workman was appointed as daily wager driver de-hors recruitment rules, therefore, according to him, termination is valid. This aspect has been considered by this Court in Sihor Nagar Palika (supra) in para 16, 17 and 18 which are quoted as under:

16. This aspect has been examined by the Apex Court in reported decision in case of Vikramaditya Pandey v. Industrial Tribunal and Anr. reported in AIR 2001 SCW 310. The relevant para 6 is quoted as under:

Para 6: We have carefully considered the respective contentions made on behalf of the parties. It is not in dispute that the Award passed by the Tribunal was not challenged by the Bank. The Tribunal as well as the High Court have concurrently found that the case of the Appellant was one of retrenchment and that the Appellant was working between the period 4-12-1981 to 19-7-1985 with small motivated breaks and that in any case he worked for more than 240 days in a year before termination of services. The Tribunal in para 5 of its Award has stated thus:

It is however evident that he worked for much more than 240 days in an year before his service ceased. It is also clear that breaks were given and ad hoc appointment made every time for 90 days or less. This was evidently done to stick to the letter of the law regarding the authority of the bank in regard to making appointments only for limited periods in ad hoc or temporary arrangement, as specified in the service Regulations, 1975. It is however, clear that services of the workman were needed as the work was available but a

continuing temporary appointment was not made even though under Regulation 5(iii) of the Service Regulations such longer term stop-gap appointment (and not only for 90 days) can be made with prior approval of the competent authority (the Board). It would thus, appear that attempt was made confirm to the letter of law and not its spirit in so far as provisions regarding retrenchment under the Industrial Disputes Act go.

The only issue before the High Court was whether the Appellant was entitled to reinstatement in service with back wages, once the termination of his services had been held to be illegal and more so when the same was not challenged. Ordinarily, once the termination of service of an employee is held to be wrongful or illegal the normal relief of reinstatement with full back wages shall be available to an employee; it is open to the employer to specifically plead and establish that there were special circumstances which warranted either non-reinstatement or non-payment of back wages. In this case we do not find any such pleading of special circumstances either before the Tribunal or before the High Court. Since Regulation 103 of the Regulations is referred to in the order of the Tribunal as well as in the High Court and it has bearing in deciding the controversy, the focus is needed on it. It reads:

103. The provisions of these regulations to the extent of their inconsistency with any of the provisions of the Industrial Disputes Act, 1947, U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962, Workmen's Compensation Act, 1923 and any other Labour Laws for the time being in force, if applicable to any Co-operative Society or class of Co-operative societies, shall be deemed to be inoperative.

By plain reading of the said Regulation it is clear that in case of inconsistency between the Regulations and the provisions of the Industrial Disputes Act, 1947, the State Act, the Workmen's Compensation Act, 1923 and any other labour laws for the time being in force, if applicable to any co-operative society or class of co-operative societies, to that extent Regulations shall be deemed to be inoperative. In other words, the inconsistent provisions contained in the Regulations shall be inoperative, not the provisions of the other statutes mentioned in the Regulation 103. The Tribunal in this regard correctly understood the Regulation but wrongly refused the relief on the ground that no reinstatement can be ordered on a regular employment in view of the provisions contained in the said Regulation. But the High Court read the Regulation otherwise and plainly misunderstood it in saying that if there is any inconsistency between the Regulations and the Industrial Disputes Act, 1947 and other labour laws for the time being in force the Regulations will prevail and the Industrial Disputes Act, 1947 and other labour laws shall be deemed to be inoperative. This misreading and wrong approach of the High Court resulted in wrong conclusion. In the view it took as to Regulation 103 the High Court proceeded to State that even if there was retrenchment in view of Regulation 5 of the Regulations the Labour Court was not competent to direct reinstatement of the Appellant who

was not recruited in terms of Regulation 5 because the Labour Court had to act within the ambit of law having regard to the Regulations by which the workman was governed. In this view the High Court declined relief to the Appellant which in our view cannot be sustained. The Tribunal felt difficulty in ordering reinstatement as the Appellant was not a regular employee. The Appellant ought to have been ordered to be reinstated in service once it was found that his services were illegally terminated in the post he was holding including its nature. Thus in our opinion both the Tribunal as well as the High Court were not right and justified on facts and in law in refusing the relief of reinstatement of the Appellant in service with back wages. But, however, having regard to the facts and circumstances of the case and taking note of the fact that the order of termination dates back to 19-7-1985 we think it just and appropriate in the interest of justice to grant back wages only to the extent of 50%.

17. Recently, the Apex Court has observed in case of Nagar Maha Palika (Now Municipal Corporation v. State of U.P. and Ors., reported in AIR 2006 SCW 2497, as under:

The termination was in violation of Section 6N. The Respondent cannot be said to have been appointed on temporary basis pursuant to the said GO dated 19.12.1985 or such appointments cannot be said to be were made for a fixed tenure within the meaning of the provisions of Sub-clause (bb) of Clause (oo) of Section 2. But the appointment of Respondents have been made in violation of the provisions of the Adhiniyam. An appointment made in violation of the provisions of Adhiniyam is void. The same however although would not mean that the provisions of the Industrial Disputes Act are not required to be taken into consideration for the purpose of determination of the question as to whether the termination of workmen from service is legal or not but the same should have to be considered to be an important factor in the matter of grant of relief.

18. The Apex Court has observed that appointments made by authority in violation of Act and Rules governing such appointment is void. Though same would not mean that provisions of Industrial Disputes Act, 1947 were not required to be taken into consideration for determination of question whether termination is legal or not but same should have to be considered to be an important factor in the mater of grant of relief.

12. In case of H.D. Singh and Reserve Bank of India and Ors., reported in 1985 (51) FLR 495 the phrase "for any reason" occurring in Section 2(oo) of ID Act, 1947 has been considered by apex Court. Therefore, relevant observations made by apex Court in para 7, 8 and 12 are quoted as under:

7. It is clear from the pleadings and from the documents noted above how the Respondent-bank managed to get rid of the Appellant. The disclosures made in the confidential circular make our task easy in holding that the Bank was determined to adopt methods to terminate the services of the employees like the Appellant. The Appellant was not told that he would be struck off the rolls if he

passed the matriculation. He was not given any order in writing either refusing work or informing him that his name would be struck off the rolls. The case of the bank is that he was orally informed that his name has been struck off. Striking off the name of a workman from the rolls by the employer amounts to "termination of service" and such termination is retrenchment within the meaning of Section 2(oo) of the Act if effected in violation of the mandatory provision contained in Section 25F, and is invalid. In this case the facts need only to be stated to hold that the Petitioner's name had been struck off the list contrary to the mandate contained in Section 25F. This Court has held in *Delhi Cloth and General Mills Ltd. Vs. Shambhu Nath Mukherji and Others*, that striking off the name from the rolls by the management is retrenchment within the meaning of Section 2(oo) of the Act. While reading Sections 25F, 25B and Section 2(oo), Krishna Iyer, J. in *The State Bank of India Vs. Shri N. Sundara Money*, has observed that the words "for any reason whatsoever" occurring in Section 2(oo) are very wide and almost admitting of no exception. It was made clear that a comprehensive definition has to be effected to protect the weak against the strong in construing the ambit of the words contained in Section 2(oo). Pithily he observed that "without further ado, we reach the conclusion that if the workman swims into the harbour of Section 25F, he cannot be retrenched without payment, at the time of retrenchment, compensation computed as prescribed therein read with Section 25B(2).

8. That takes us to the question whether the Appellant had qualified himself to sustain his claim to the benefits of Section 25F. The Appellant, as we will presently see, has given the number of days on which he worked, in his claim statement. The first Respondent-bank arranged posting Tikka Mazdoors, like the Appellant; in such a manner that they were denied the benefits of the Industrial Disputes Act. Since the first Respondent-bank disputed the fact that the Appellant had worked for sufficient number of days to entitle, him to claim remedies under the Act, we think it necessary to refer to the facts as disclosed in the records. The Advocate who appeared for the Appellant before the Tribunal, Shri R.N. Srivastava, has filed an affidavit in this Court stating that he had filed written arguments before the Tribunal explaining the mistake committed by the Bank in the computation made by it of the number of working days of the Appellant. From this affidavit it is seen that the first Respondent-bank put forward a case that the attendance register for the month of July, 1976 had been destroyed and that Sundays and other holidays were not taken into account in computing the number of days that the Appellant worked. We have also a supplementary affidavit filed by the Appellant himself which throws further light about the number of days that he worked. In this affidavit, it is seen that he worked for 4 days in 1974, 154 days from January 1975 to December 1975 and 105 days from January 1976 to July 1976. The Appellant was denied work from July 1976. His affidavit shows that he had worked for 202 days from July 1975 to July 1976. According to him, if we add 52 Sundays and 17 holidays, the total number of days on which he worked comes to 271 days. The Appellant charged

the Bank with having tampered with the records. To contradict the Appellant's case; the first Respondent-bank did not produce its records. The Appellant wanted the relevant records to be filed but they were not produced. Grounds 18 to 20 of the SLP make mention of this plea of the Appellant. These grounds are met by the first Respondent-bank in their counter-affidavit filed in this Court by stating that "when the matter was before the Industrial Tribunal, the registers in question were filed in another case before the Industrial Tribunal-cum-Labour Court and produced in that Court. However, I submit that now the attendance register has been destroyed but the payment registers are available with the Respondent-bank as proof of the number of days on which the Appellant worked." In the absence of any evidence to the contrary, we have necessarily to draw the inference that the Appellant's case that he had worked for more than 240 days from July, 1975 to July, 1976, is true.

12. We thought it necessary to refer to the factual details in the case only to show our concern at the manner in which the employer in this case, the Reserve Bank of India, who should set a model for other employers being a prestigious institution, behaved towards its employees. It must have been his helpless condition and object poverty that forced the Appellant to accept a job on Rs. 3 per day. Still see how he has been treated. We will not be far from truth if we say that the Bank has deliberately indulged in unhealthy labour practice by rotating employees like the Appellant to deny them benefits under the Industrial Law. It has disturbed us to find that the Appellant was denied job because he has become better qualified. Perhaps the Reserve Bank of India and its officers are not aware of the grave unemployment problem facing the youth of this country and also not aware of the fact that graduates, both boys and girls, sweep our roads and post-graduates in hundreds, if not in thousands, apply for the posts of peons. It has been our sad experience to find employers trying to stifle the efforts of employees in their legitimate claims seeking benefits under the Industrial Law by tiring them out in adjudication proceedings raising technical and hyper-technical pleas, Industrial adjudication in bona fide claims have been dragged on by employers for years together on such pleas. It would always be desirable for employers to meet the case of the employees squarely on merits and get them adjudicated quickly. This would help industrial peace. It is too late in the day for this Court to alert the employers that their attempt should be to evolve a contented labour. We do not forget at the same time the fact that it is necessary for the labour also to reciprocate to prevent industrial unrest. In this case, for example, the Bank should have treated the Appellant as a regular hand in List II. Instead, the Bank has, by adopting dubious methods, invited from us, remarks which we would have normally avoided.

13. Recently, in case of *Ranjit Natvarlal Chauhan v. Morbi Nagar Palika* reported in [2011] 26 GHJ (482) Division Bench of this Court has considered decision of apex Court in case of *Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation*, distinguishing facts on ground that in case of *Workmen of American*

Express International Banking Corporation (supra), workmen were appointed in temporary capacity, on such ground, case of daily wager has been distinguished by Division Bench of this Court holding that temporary employees are entitled for weekly off, public holidays and festival holidays but daily wagers are not entitled for such benefit and therefore, decision of Hon"ble Supreme Court in case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, has been distinguished by Division Bench of this Court in above referred decision. In view of that, para 4, 5, 6 of decision of apex Court in case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, are required to be considered. Therefore, para 4,5 and 6 of said decision are quoted as under:

4. The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as social welfare legislation and Human Rights" legislation are not to be put in procrustean beds or shrunk to Liliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its mis-application must be recognised and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes. (We have borrowed the words from Lord Wilberforce's opinion in *Prenn v. Simmonds* 1971 (3) All ER 237). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations. In one of the cases cited before us, that is, *Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court*, we had occasion to say, "Semantic luxuries are misplaced in the interpretation of "bread and butter" statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions."

5. Section 25F of the Industrial Disputes Act is plainly intended to give relief to retrenched workmen. The qualification for relief u/s 25F is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service has been defined and explained in Section 25B of the Industrial Disputes Act. In the present case, the provision which is of relevance is S. 25B(2)(a)(ii) which to the extent that it concerns us, provides that a workman who is not in continuous service for a period of one year shall be deemed to be in continuous service for a period of one year if the workman during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than 240 days. The expression which we are required to construe is "actually worked under the employer. This expression, according to us, cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during

which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders, etc. The learned Counsel for the Management would urge that only those days which are mentioned in the Explanation to Section 25B(2) should be taken into account for the purpose of calculating the number of days on which the workman had actually worked though he had not so worked and no other days. We do not think that we are entitled to so constrain the construction of the expression "actually worked under the employer". The explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision. If the expression "actually worked under the employer" is capable of comprehending the days during which the workman was in employment and was paid wages - and we see no impediment to so construe the expression - there is no reason why the expression should be limited by the explanation. To give it any other meaning then what we have done would bring the object of Section 25F very close to frustration. It is not necessary to give examples of how Section 25F may be frustrated as they are too obvious to be stated.

6. The leading authority on which reliance was placed by the learned Counsel for the Management was *Lalappa Lingappa and Others Vs. Laxmi Vishnu Textile Mills Ltd.*, We may straightway say that the present question whether Sundays and paid holidays should be taken into account for the purpose of reckoning the number of days on which an employee actually worked, never arose there. The claim was under the Payment of Gratuity Act. All permanent employees of the employer claimed that they were entitled to payment of gratuity for the entire period of their service, that is, in respect of every year during which they were in permanent employment irrespective of the fact whether they had, actually worked for 240 days in a year or not. The question there was not how the 240 days were to be reckoned; the question was not whether Sundays and paid holidays were to be included in reckoning the number, of days on which the workmen actually worked; but the question was whether a workman could be said to have been actually employed for 240 days by the mere fact that he was in service for the whole year whether or not he actually worked for 240 days. On the language employed in Section 2(c) of the Payment of Gratuity Act, the Court came to the conclusion that the expression "actually employed" occurring in Explanation I meant, the same thing as the expression "actually worked" occurring in Explanation II and that as the workmen concerned had not actually worked for 240 days or more in the year they were not entitled to payment of gratuity for that year. The further question, as to what was meant by the expression "actually worked" was not considered as apparently it did not arise for consideration. Therefore, the question whether Sundays and other paid holidays should be taken into account for the purpose of reckoning the total number of days on which the workmen could be said to have actually worked was not considered in that case. The other cases cited before us do not appear to have any bearing on the question at issue before us.

14. In aforesaid decision, apex Court has interpreted Section 25B Sub-section (1) and (2) of ID Act, 1947 which is required to be considered that workman shall be considered to be in continuous service. Therefore, Section 25B(1) and (2) of ID Act, 1947 is quoted as under:

Section 25B. Definition of continuous service: For the purposes of this Chapter,-

a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of Clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer -(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation - For the purposes of Clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 920 of 1946), or under the Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

15. Thus, Section 25B is giving definition of continuous service. Bare perusal of

aforesaid Section 25B(1) suggests that for purposes of this Chapter, a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman. Thus, as per Section 25B of ID Act, 1947, a workman shall be said to be in continuous service for a period if he is, for that period, having uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of workman. Therefore, interruptions in service on account of sickness or authorized leave or an accident or a strike which is not illegal or a lock out or a cessation of work which is not due to any fault on part of workman have to be ignored while considering continuous service as defined u/s 25B(1) of ID Act, 1947. Bare reading of Section 25B(1) of ID Act, 1947 suggests that if workman establish before labour Court that he has remained in continuous service of one year as per Section 25B(1) of ID Act, 1947 and his service was not interrupted, then, question of completion of 240 days does not arise. In this case, Respondent workman has established before labour Court that he has remained in continuous service for a period of one year as per documents produced by Petitioner establishment Exh. 12 from June, 2000 to June, 2002, workman was working as daily wager driver throughout for aforesaid period of two years and in between, his service was not terminated or interrupted for aforesaid reasons, therefore, in this case, workman has established continuous service as defined u/s 25B(1) of ID Act, 1947 and therefore, completion of 240 days within 12 months preceding date of termination is not required to be established independently by Respondent workman as decided by this Court in case of Moti Ceramic Industries Vs. Jivuben Rupabhai, However, considering even Section 25B, if weekly off and public holidays are included, then, workman has established 240 days continuous service as per provisions of ID Act, 1947 and in view of that, contentions raised by learned advocate Mr. Dipak C. Raval on behalf of Petitioner cannot be accepted and recent decision of Division Bench of this Court as referred to has not considered Section 25B(1) and (2) of ID Act, 1947 while drawing distinction and holding that daily wager is not entitled for weekly off and public holidays but temporary employees are entitled for it, because, daily wager is not receiving monthly wages and temporary employee receiving monthly wages. Such distinction has no meaning because even a daily wager, if he remains in continuous service of six days, then, he is entitled for weekly off as per statutory provisions made under rules of Minimum Wages Act, 1948 is applicable to Petitioner establishment being a scheduled employment covered by Schedule u/s 2(g) and Part-1. Employment in any Local Authority is covered by Minimum Wages Act, 1948. District Panchayat, Surendranagar is Local Authority and Petitioner establishment, Primary Health Center being part of Local Authority namely Surendranagar District Panchayat, is covered by provisions of Minimum Wages Act, 1948. Petitioner establishment is covered by Scheduled Employment

as per Schedule as referred to above and according to Gujarat Minimum Wages, Rules, 1961, Rule 24 provides/suggests number of hours of work which shall constitute a normal working day. Number of hours which shall constitute a normal working day shall be 9 hours in case of an adult and 4-1/2 hours in case of a child. Rule 23 thereof provides weekly day of rest which is available to daily wager if he has been working in scheduled employment in respect of which minimum rate of wages have been fixed under Act shall be allowed day of rest every week as referred to as rest day which shall ordinarily be a Sunday but employer may fix any other day of week as rest day for any employee or class of employees in that scheduled employment. Provided that employee has worked in scheduled employment under same employer for a continuous period of not less than six days. Under Minimum Wages Act, 1948, definition of employee has been given in Section 2(i). As per Section 2(i) of Minimum Wages Act, 1948, employee means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates or wages have been fixed; and includes an out worker to whom any articles or materials are given out by another person, to be made up. Therefore, considering Section 2(i) of said Act, any person employed for hire or reward to do any work, skilled or unskilled, manual or clerical in a scheduled employment in respect of which minimum rates or wages have been fixed is an employee within Minimum Wages Act, 1948 which includes daily wager also and it is not necessary that he must be a permanent employee. Word any used at the commencement of this definition of employee also suggests that it includes daily wager. Therefore, in aforesaid definition, there is no distinction between permanent employee and daily wager or temporary employee. District Panchayat is local authority. Petitioner PHC being part of Local Authority, is also considered to be local authority covered by Scheduled Employment and Minimum Wages fixed by State Government are applicable to local authority and accordingly, Respondent workman is covered by definition of employee u/s 2(i) and if he is allowed to work continuously for a period of six days, then, one rest day means rest day is statutorily available being weekly off to such employee and, therefore, while calculating or counting 240 days continuous service, actual weekly off after completion of six days for continuous service is also part of continuous service rendered by employee, therefore, weekly off must have to be considered being statutory weekly off available to employee and in respect of workman who has not been able to establish completion of actual 240 days within 12 months preceding date of termination, if he is able to establish that he has remained in continuous service of one year within meaning of Section 25B(1) of ID Act, 1947, then, he is getting protection of Section 25F of ID Act, 1947. This aspect is very much relevant for interpreting Section 25B(1) and (2) of ID Act, 1947.

16. It is also necessary to note that statutory weekly off is also available when Bombay Shops and Establishments Act, 1948 is applicable to such establishment. As per Section 2(6) of said Act, employee means a person wholly or principally employed, whether directly or through any agency and whether for wages or

other consideration, or in connection with any establishment; and includes an apprentice but does not include a member of the employer's family. So, considering definition of employee given u/s 2(6) of said Act, Respondent herein is covered by said definition. As per Section 2(15)(iii) of said Act, local authority means a district panchayat constituted under Gujarat Panchayats Act, 1993 (Gujarat 6 of 1962). Therefore, Petitioner PHC is run and managed by District Panchayat, Surendranagar and Petitioner PHC is also covered by definition of local authority as defined u/s 2(15)(iii) of said Act. Then Bombay Shops and Establishments Act, 1948 is also applicable to Petitioner establishment. As per Section 2(7), employer means a person owning or having ultimate control over affairs of an establishment. As per Section 2(31) of said Act, week means period of seven days beginning at midnight of Saturday. As per Section 2(19) of said Act, period of work means time during which an employee is at the disposal of employer. As per Section 2(11) of said Act, holiday means a day on which an establishment shall remain closed or on which an employee shall be given a holiday under provisions of said Act. Every shops and establishments shall remain closed on one day of week. Section 18 of said Act provides for holidays in a week in shops and commercial establishments. Every shop and commercial establishment shall remain closed on one day of week. Section 24 thereof provides for holidays in a week. Every employee shall be given at least one day in a week as a holiday as proviso thereto provides that nothing in said Sub-section shall apply to an employee whose total period of employment in any week is less than six days. Sub-section (2) of Section 24 of said Act provides that it shall not be lawful for an employer to call an employee at, or for an employee to go to, his residential hotel, restaurant or eating house or any other place for any work in connection with business of his residential hotel, restaurant or eating house on a day on which such employee has a holiday. Sub-section (3) of said Section 24 provides that no deduction shall be made from wages of any employee in a residential hotel, restaurant or eating house on account of any holiday given to him under Sub-section (1). If an employee is employed on a daily wages, he shall none the less be paid his daily wage for holiday. Thus, as per Sub-section (3) of Section 24 of Bombay Shops and Establishments Act, 1948 also, it is clear that even a daily wagger is entitled for holiday in a week if he has worked for a period of six days in a week. Section 34 of Act provides for daily hours of work for young persons. Sub-section (1) thereof provides that notwithstanding anything contained in this Act, no young person shall be required or allowed to work whether as an employee or otherwise, in any establishment for more than six hours in any day and Sub-section (2) thereof provides that no young person shall be required or allowed to work whether as an employee or otherwise, shall be required or allowed to perform such work as may be declared by State Government by notification in Official Gazette, to be work involving danger to life, health or morals. As per Section 31(1) thereof, every employee in a theatre or other place of public amusement or entertainment shall be given at least one day in a week as a holiday. In short, Petitioner establishment is covered by definition of local authority because it is

run and managed by District Panchayat Surendranagar and Bombay Shops and Establishments Act, 1948 is applicable to Petitioner establishment and after completion of continuous work of six days, one day statutory holiday is available to an employee as given holiday and for that, employee is entitled for it with wages and if statutory holiday with wages is available under Minimum Wages Rules and Bombay Shops and Establishments Act, then, that day of holiday must have to be counted and included while calculating and counting 240 days continuous service u/s 25B(1) and (2) of ID Act. Even Sub-section (3) of Section 31 of Bombay Shops and Establishment Act also provides that if an employee is employed on daily wage, he shall nonetheless be paid his daily wage for the holiday given to him which means that even daily wage employees are also entitled for such holidays in a week. The law is not distinguishing that particular class of workman only would be entitled for such benefit of public holidays and festival holidays. Even Section 2(s) of ID Act, 1947 which is defining workman is also not drawing any such line of distinction. This aspect has lost sight by Hon''ble Division Bench of this Court while considering and holding that decision of this Court in case of Sihor Nagarpalika v. Natvarlal Maganlal Trivedi 2006 (3) GLR 2432 is not deciding correct law. Decision of Hon''ble apex Court in case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, has also not been properly considered by Hon''ble Division Bench of this Court because in that decision, Hon''ble apex Court has considered Section 25B(1) and (2) of ID Act, 1947 and on that basis, weekly off being statutorily are available to workman under provisions of various labour laws and they are required to be included while calculating 240 days continuous service. But in case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, there is no such distinction drawn by Hon''ble Supreme Court as understood by Hon''ble Division Bench of this Court that daily wagger employee is not entitled for weekly off and only temporary employees are entitled for weekly off. This distinction was not there in decision of apex Court in case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, and even Section 2(s) of workman which is giving definition of workman is also not drawing any such distinction. Hence, such distinction which has been made out by Hon''ble Division Bench of this Court was not the issue examined by Hon''ble Supreme Court in case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation,

17. It is necessary to note that for claiming protection of Section 25F of ID Act, 1947, it is not necessary for an employee to establish 240 days continuous service u/s 25B(2) of ID Act if employee is able to satisfy conditions incorporated in Section 25B(1) of ID Act and proves continuous service within meaning of Section 25B(1) of ID Act that he remained in service of one year continuously and during that period, his service has not been interrupted by employer because

of any fault on his part, in such eventuality, such workman is entitled for benefit of Section 25F of ID Act, 1947 irrespective of fact that he has not completed 240 days continuous service within 12 months preceding date of termination but he remained in service continuously for a period of one year and his service has not been interrupted by employer during one year period and there was no interruption in service due to any fault on his part. In case before hand, learned Advocate Mr. Raval for Petitioner has not been able to point out that there was any interruption in service of Respondent workman due to any fault on his part and he cannot be considered to be in continuous service within meaning of Section 25B(1) of ID Act, 1947. Even before Labour Court also, no any evidence to that effect was produced by Petitioner. Therefore, contentions raised by learned advocate Mr. Dipak Raval to that effect cannot be accepted and same are, therefore, rejected.

18. In case of Prathma Bank v. Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Pandu Nagar, Kanpur reported in 2002 II LLJ 1000 this aspect has been examined by Allahabad High Court as discussed in para 3 and 4. The relevant para 3 and 4 of said decision of Allahabad High Court are quoted as under:

3. It is this part of the award, which is challenged by the employer inter alia on the ground that in paragraph 7 of the award the date of engagement in the second spell i.e. July 23, 1989 i.e. date of termination April 22, 1988, is not disputed by either side. The Industrial Tribunal-cum-Labour Court has also referred that it is admitted that between these two dates the total working days come to 275 days. The workman has contended that the Labour Court came to the conclusion that between two dates, namely the date of engagement and the date of termination, the total working days come to 275 days. The employer has not given the number of days in their statement. In the written statement filed by the workman, the workman has stated that he has worked for 275 days. The witness of the employer Shri S.K. Chandra has stated that the workman has worked 207 days during the aforesaid two dates. This fact has been sought to be corrected belated from the payment vouchers Ext.W-1 to Ext. W-15. Respondent No. 1, the Labour Court came to the conclusion that even without entering into the disputed fact, on the basis of admitted facts, the management version of 207 days working counted by employer is excluding the holidays. The Respondent No. 1 relied upon the decision in the case of H.P. Singh v. Reserve Bank of India 1985 (51) FLR 494 (SC), in which it has been held that the Sunday and other Holidays are to be included within the definition of continuous service as defined u/s 25B(2), read with Section 25(1) of the Industrial Disputes Act, 1947, therefore, the contention of the employer was rightly rejected by the Labour Court that the Respondent - workman had worked only 207 days thus the finding arrived at by the Labour Court that the Respondent - workman has worked more than 240 days, cannot be assailed and therefore, is to be accepted.

4. The next contention of the learned Counsel for the Petitioner is that in view of

the decision reported in Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others, since the workmen in the aforesaid cases were daily wagers, their services stand terminated in terms of contract of employment, thus the ground that they are not covered by the definition of retrenchment as defined after 1984 amendment of Industrial Disputes Act, 1947, cannot be accepted. In the case of U.P. State Sugar Corporation Ltd. v. Om Prakash Upadhyaya, 2002 I LLJ 241 (SC) the Apex Court dealing with the daily wagers, opined that once the Labour Court comes to the conclusion that the workman has worked for more than 240 days in the preceding year and Labour Court having come to the conclusion that the termination is without complying with the provision of Section 25F or Section 6-N of U.P. Industrial Disputes Act, 1947, this makes the termination per se illegal, then, the workman would be entitled for back wages and reinstatement from the date of termination itself.

19. Learned Advocate Mr. Dipak C. Raval has placed reliance upon apex Court decision in case of Incharge Officer and Another Vs. Shankar Shetty, where apex Court has considered fact that Respondent was engaged as daily wager in 1978, Respondent therein worked intermittently for seven years, upto his retrenchment which was about 25 years back and in such case, relief of reinstatement cannot be justified and considering aforesaid facts only, apex Court has granted compensation to workman in lieu of reinstatement and back wages. Now, looking to facts of this case, service of present Respondent workman was terminated as daily wager driver on 26th June, 2002 and he remained in continuous service as daily wager driver from June, 2000 to June, 2002 and dispute has been referred to for adjudication before labour Court on 23.4.2004 and labour Court passed award on 24th March, 2010. Therefore, it is not oldest case of about 25 years as has been considered by apex Court in case of Shankar Shetty (supra). It is also necessary to note that in written statement filed by Petitioner before labour Court, nowhere such contention has been raised by Petitioner establishment that instead of granting reinstatement, he should be paid reasonable amount of compensation. For that, there must be pleading and evidence is necessary. Not only that but this contention was also not raised by Petitioner before labour Court at the time of argument that in lieu of reinstatement, some compensation may be given to Respondent workman. Therefore, now for the first time, Petitioner cannot be permitted to raise such contention before this Court.

20. As regards contention raised by learned advocate Mr. Raval on behalf of Petitioner that Respondent workman was not appointed after following recruitment rules and he is not legally entitled for right of reinstatement. In case of daily wager, whether any recruitment rules have been framed by employer or not, for that, there is no any pleading made by Petitioner before labour Court in its written statement and that has also not been emphasized by Petitioner before labour Court at the time of hearing. However, this aspect has been considered by apex Court in case of Director, Fisheries Terminal Division v. Bhikhubhai Meghajibhai Chavda AIR 2010 SCW 542. Relevant para 12 and 13 of decision of apex Court are quoted as under:

12. The perusal of all these details clearly shows that the Appellant alone was singled out and discriminated. We have already noted the specific finding of the Labour Court that the Appellant had fulfilled 240 days in a calendar year before the order of termination. The Appellant has also highlighted that he is the sole bread earner of his family and his family consists of his old mother, wife and two minor sons and a minor daughter. The above-mentioned chart also shows that identical awards passed in the case of Mast Ram, Rajesh, Paramjit and Amarjit was upheld by the High Court and the award in favour of the Appellant alone was quashed by the High Court in the second round of litigation. Though, it was contended that the initial appointment of the Appellant was contrary to the recruitment rules and constitutional scheme of employment, admittedly, the said objection was not raised by the Department either before the Labour Court or before the High Court at the first instance. It was only for the first time that they raised the said issue before the High Court when the matter was remitted to it that too the same was raised only during the arguments. In such circumstances, the High Court ought not to have interfered with the factual finding rendered by the Labour Court and in view of the different treatment to other similarly placed workmen the Department ought not to have challenged the order of the Labour Court. In addition to the above infirmities, the Appellant has also pointed out that one Gurbax Singh who was engaged subsequent to the Appellant on casual basis has challenged his termination order, which was quashed by the Labour Court; interestingly the Department did not challenge the award of the Labour Court by filing writ petition. It was also highlighted by the Appellant that on the basis of the award, Gurbax Singh was not only taken back in service but his services were regularized w.e.f. 01.07.2004.

13. The next contention of the learned Counsel for the Appellant is that the Respondent had not worked for 240 days during the preceding twelve months on daily wages and, therefore, the Respondent cannot claim any protection under the provisions of Industrial Disputes Act, 1947. The case of the Respondent before the labour Court was that as he had completed working for more than 240 days in a year, the purported order of retrenchment is illegal, as conditions precedent as contained in Section 25F of the Industrial Disputes Act, 1947 were not complied with.

21. In view of aforesaid observations made by apex Court and considering facts of this case, here also, Respondent workman has not prayed for regularization of his service and to make him permanent in establishment but he was merely seeking restoration of his status of daily wagger driver and nothing more than that was sought by him before labour Court. Therefore, contentions raised by learned advocate Mr. Raval for Petitioner cannot be accepted and same are accordingly rejected.

22. Daily wagger is also covered by definition of workman u/s 2(s) of ID Act, 1947 which starts with word any person and not excluding daily wagger. Condition Precedent to retrench workman u/s 25F of ID Act, 1947 is squarely applicable to

facts of this case which has not been followed by Petitioner and it has been violated by Petitioner and it being condition precedent, non compliance thereof has rendered such termination void, ab initio. As per evidence of witness for Petitioner itself, work of daily wager driver is available because in respect of vehicle which is in working condition, appointment of regular driver has not been made and new daily wager driver has been engaged by Petitioner as stated by Petitioner's witness at Exh. 15 and at that time, before engaging fresh daily wager driver, Respondent was not offered work by Petitioner then Section 25H of ID Act, 1947 is also violated by Petitioner.

23. In case of Anoop Sharma v. Executive Engineer, Public Health Division No. 1, Panipat (Haryana) reported in 2010-II-CLR page 1, this aspect has been examined by apex Court. Relevant discussion made by Hon'ble apex Court while considering number of decisions on subject in para 13, 14, 15, 16, 17, 19 is quoted as under:

13. An analysis of the above reproduced provisions shows that no workman employed in any industry who has been in continuous service for not less than one year under an employer can be retrenched by that employer until the conditions enumerated in Clauses (a) and (b) of Section 25F of the Act are satisfied. In terms of Clause (a), the employer is required to give to the workman one month's notice in writing indicating the reasons for retrenchment or pay him wages in lieu of the notice. Clause (b) casts a duty upon the employer to pay to the workman at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. This Court has repeatedly held that Section 25F(a) and (b) of the Act is mandatory and non-compliance thereof renders the retrenchment of an employee nullity - *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, , *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*, , *The State Bank of India Vs. Shri N. Sundara Money*, *Santosh Gupta Vs. State Bank of Patiala*, *Mohan Lal Vs. Management of Bharat Electronics Ltd.*, *L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another*, *Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another*, *Gammon India Limited Vs. Niranjana Dass*, *Gurmail Singh and Others Vs. State of Punjab and Others*, and *Pramod Jha and Others Vs. State of Bihar and Others*, This Court has used different expressions for describing the consequence of terminating a workman's service/employment/engagement by way of retrenchment without complying with the mandate of Section 25F of the Act. Sometimes it has been termed as ab initio void, sometimes as illegal per se, sometimes as nullity and sometimes as non est. Leaving aside the legal semantics, we have no hesitation to hold that termination of service of an employee by way of retrenchment without complying with the requirement of giving one month's notice or pay in lieu thereof and compensation in terms of Section 25F(a) and (b) has the effect of rendering the action of the employer as nullity and the employee is entitled to continue in employment as if his service

was not terminated.

14. The question whether the offer to pay wages in lieu of one month's notice and retrenchment compensation in terms of Clauses (a) and (b) of Section 25F must accompany the letter of termination of service by way of retrenchment or it is sufficient that the employer should make a tangible offer to pay the amount of wages and compensation to the workman before he ask to go was considered in *National Iron and Steel Co. Ltd. and Others Vs. The State of West Bengal and Another*, The facts of that case were that the workman was given notice dated 15.11.1958 for termination of his service with effect from 17.11.1958. In the notice, it was mentioned that the workman would get one month's wages in lieu of notice and he was asked to collect his dues from the cash office on 20.11.1958 or thereafter during the working hours. The argument of the Additional Solicitor General that there was sufficient compliance of Section 25F was rejected by this Court by making the following observations:

The third point raised by the Additional Solicitor-General is also not one of substance. According to him, retrenchment could only be struck down if it was mala fide or if it was shown that there was victimization of the workman etc. Learned Counsel further argued that the Tribunal had gone wrong in holding that the retrenchment was illegal as Section 25F of the Industrial Disputes Act had not been complied with. Under that section, a workman employed in any industry should not be retrenched until he had been given one month's notice in writing indicating the reasons for retrenchment and the period of notice had expired, or the workman had been paid in lieu of such notice, wages for the period of the notice. The notice in this case bears the date November 15, 1958. It is to the effect that the addressee's services were terminated with effect from 17th November and that he would get one month's wages in lieu of notice of termination of his service. The workman was further asked to collect his dues from the cash office on November 20, 1958 or thereafter during the working hours. Manifestly, Section 25F, had not been complied with under which it was incumbent on the employer to pay the workman, the wages for the period of the notice in lieu of the notice. That is to say, if he was asked to go forthwith he had to be paid at the time when he was asked to go and could not be asked to collect his dues afterwards. As there was no compliance with Section 25F, we need not consider the other points raised by the learned Counsel.

15. In *State Bank of India v. N. Sundara Money (supra)*, the Court emphasised that the workman cannot be retrenched without payment, at the time of retrenchment, compensation computed in terms of Section 25F.

16. The legal position has been beautifully summed up in *Pramod Jha v. State of Bihar (supra)* in the following words:

The underlying object of Section 25F is twofold. Firstly, a retrenched employee must have one month's time available at his disposal to search for alternate employment, and so, either he should be given one month's notice of the

proposed termination or he should be paid wages for the notice period. Secondly, the workman must be paid retrenchment compensation at the time of retrenchment, or before, so that once having been retrenched there should be no need for him to go to his employer demanding retrenchment compensation and the compensation so paid is not only a reward earned for his previous services rendered to the employer but is also a sustenance to the worker for the period which may be spent in searching for another employment. Section 25F nowhere speaks of the retrenchment compensation being paid or tendered to the worker along with one month's notice; on the contrary, Clause (b) expressly provides for the payment of compensation being made at the time of retrenchment and by implication it would be permissible to pay the same before retrenchment. Payment or tender of compensation after the time when the retrenchment has taken effect would vitiate the retrenchment and non-compliance with the mandatory provision which has a beneficial purpose and a public policy behind it would result in nullifying the retrenchment.

17. If the workman is retrenched by an oral order or communication or he is simply asked not to come for duty, the employer will be required to lead tangible and substantive evidence to prove compliance of Clauses (a) and (b) of Section 25F of the Act.

18. The stage is now set for considering whether the Respondent had offered compensation to the Appellant before discontinuing his engagement/employment, which amounts to retrenchment within the meaning of Section 2(oo) of the Act. In his statement, the Appellant categorically stated that before discontinuing his service, the Respondent did not give him notice pay and retrenchment compensation. Shri Ram Chander, who appeared as the sole witness on behalf of the Respondent stated that the compensation amounting to Rs. 5,491/- was offered to the Appellant along with letter Ext. M-1, but he refused to accept the same. The Respondent did not examine any other witness to corroborate the testimony of Ram Chander and no contemporaneous document was produced to prove that the compensation was offered to the Appellant on 25.4.1998. Not only this, the Respondent did not explain as to why the demand draft was sent to the Appellant after more than three months of his alleged refusal to accept the compensation on 25.4.1998. If there was any grain of truth in the Respondent's assertion that the compensation was offered to the Appellant on 25.4.1998 and he refused to accept the same, there could be no justification for not sending the demand draft by post immediately after the Appellant's refusal to accept the offer of compensation. The minimum which the Respondent ought to have done was to produce the letter with which draft was sent at the Appellant's residence. The contents of that letter would have shown whether the offer of compensation was made to the Appellant on 25.4.1998 and he refused to accept the same. However, the fact of the matter is that no such document was produced. Therefore, we are convinced that the finding recorded by the Labour Court on the issue of non-compliance of Section 25F of the Act was based on correct appreciation of the pleadings and evidence of the parties

and the High Court committed serious error by setting aside the award of reinstatement.

19. The judgment of the Constitution Bench in *Secretary, State of Karnataka v. Uma Devi* (supra) and other decisions in which this Court considered the right of casual, daily wage, temporary and ad hoc employees to be regularised/continued in service or paid salary in the regular time scale, appears to have unduly influenced the High Court's approach in dealing with the Appellant's challenge to the award of the Labour Court. In our view, none of those judgments has any bearing on the interpretation of Section 25F of the Act and employer's obligation to comply with the conditions enumerated in that section.

24. In view of aforesaid observations made by apex Court and considering facts of present case, Petitioner has committed breach of Section 25H also as per evidence of witness for Petitioner at Exh. 15. Finding of labour Court that workman has remained in service and including public holidays and weekly holidays, he has completed 240 days continuous service within 12 months preceding date of termination, such finding is absolutely correct and legal finding and there is no distinction made by apex Court in case of *Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation*, that weekly off and public holidays is to be included only in case of temporary employee and not to be included in case of daily wager. There is no such distinction in law to any continuous service which is to be established by workman. And moment workman satisfies continuous service within meaning of Section 25B(1) or (2), then, he is entitled for benefit of Section 25F of ID Act, 1947. Therefore, labour Court has rightly granted relief of reinstatement as daily wager driver in favour of Respondent workman and in doing so, labour Court has not committed any error which would require interference of this Court in exercise of power under Article 227 of Constitution of India. Offer has been made by Petitioner in its written statement filed by Petitioner before labour Court after dispute was referred for adjudication to labour Court. Fresh daily wager driver was appointed by Petitioner after termination of service of present Respondent workman and at that time also, no offer was made by Petitioner to Respondent before engaging or appointing fresh daily wager driver. Therefore labour Court has rightly held that Petitioner has violated Section 25F and 25H of ID Act, 1947 and has rightly set aside termination of service of Respondent and in doing so, no error has been committed by labour Court, Surendranagar which would require interference of this Court in exercise of powers under Article 227 of Constitution of India. Hence, there is no substance in this petition and same is, therefore, dismissed in limine.