

(2019) 07 BOM CK 0089

In the Bombay High Court

Case No : Writ Petition No. 12119 Of 2016

Prakash Kashiram Sawant And Ors

APPELLANT

Vs

M/s Motherson Advanced Tooling Solutions Limited

RESPONDENT

Date of Decision : 03-07-2019

Acts Referred:

Maharashtra Recognition Of Trade Unions And Prevention Of Unfair Labour Practices Act, 1971 — Section 5, 5(d), 5(b), 7, 27, 28, 28(1), 30, 30(1), 30(2), 32, 33, 39, 42, 44, 48, 53, 55
Industrial Disputes Act, 1947 — Section 11A
Code Of Civil Procedure, 1908 — Order 6 Rule 17
Constitution Of India, 1950 — Article 38, 39, 42, 43, 43A

Citation : (2019) 07 BOM CK 0089

Hon'ble Judges : Ravindra V. Ghuge, J

Bench : Single Bench

Advocate : Y.I. Thole, S.V. Dankh, T.K. Prabhakaran, Y.R. Marlapalle, U.V. Khonde

Final Decision : Disposed Off

Judgement

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioners, original complainants in Complaint (ULP) No.338/2015, are aggrieved by the impugned interlocutory orders, both dated 23.08.2016

below exhibit U/2 and below exhibit U/8, passed by the Industrial Court, Aurangabad.

3. The petitioners submit that exhibit U/2 was an application seeking interim relief under Section 30(2) of the Maharashtra Recognition of Trade

Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, hereinafter referred to as ""the said Act, 1971"")) and the application exhibit U/8

was filed on behalf of petitioners nos.1 to 3 and 5 to 7, who have been stigmatically removed from service by the respondent employer by order dated

06.10.2015 when their ULP complaint was already registered on 05.09.2015.

4, It is further contended that petitioner nos.9 and 10 had submitted their resignation letter under duress on 29.06.2015. They withdrew the resignation letter on 01.08.2015. They were granted increments on 01.09.2015. As they had intimated the management that they were filing a ULP complaint, they were relieved on 03.09.2015 and they filed their common complaint on 05.09.2015.

5. These petitioners have preferred Complaint (ULP) No.338/2015 before the Industrial Court, Aurangabad on 05.09.2015. The prayers put forth in

the complaint below paragraph 17 are as under :Â?

a) Declare that the Respondent has engaged in and engaging in unfair labour practices within the meaning of item 1(a)(c), 4(a)(b) of Schedule II and

item 9 of Schedule IV of the MRTU & PULP Act, 1971;

b) Direct the Respondent to cease and desist from such unfair labour practices;

c) Direct the Respondent not to impose exploitative terms and conditions upon the complainant no.1 to 3, 5 to 7 and 9 and 10 and further be directed to

strictly follow the service conditions and terms of contract having statutory force;

d) Direct the Respondent not to act against the Complainants No.1 to 3, 5 to 7 and 9 and 10 with malafide intention and not to deliberately change the

service conditions;

e) Direct the Respondent not to coerce the Complainants No.1 to 3, 5 to 7 and 9 and 10 and not to interfere in any manner in their decision of forming

a trade union;

f) Direct the Respondent not to terminate, discharge, dismiss, transfer or not to act in prejudicial manner against the Complainant No.1 to 3, 5 to 7 and

9 and 10 and not to discontinue them in any manner;

g) Direct the Respondent to pay arrears of incentives till date to the Complainant No.1 to 3, 5 to 7 in terms of letter and spirit of the agreement

entered by the Respondent with Bhartiya Kamgar Karmchari Mahasang;

h) Direct the Respondent to continue to pay the incentive amount to the Complainant No.1 to 3 and 5 to 7 in terms of letter and spirit of the settlement

entered with Bhartiya Kamgar Karmchari Mahasang so long the settlement exist;

i) Direct the Respondent to pay to the Complainant No.4 arrears of incentive unpaid amount of Rs.700/Â per month from 1st April, 2011 till date and

further be directed to pay him regularly the incentive amount;

j) Direct the Respondent to pay to each of the Complainant No.1 to 3, 4 to 7 compensation of Rs.50,000/Â? for deliberately causing loss to their earning of incentives;

k) Any other relief or reliefs to which the complainants found entitled on the ground of they being prevented for exercising their right of forming trade union, and oblige;

6. In the application for interim relief, the prayers below paragraph 5 are as under :Â?

a) Declare that the Respondent has prima facie engaged in and engaging in unfair labour practices as complained;

b) Direct the Respondent to temporarily cease and desist from such unfair labour practices;

c) Direct the Respondent not to impose upon the Complainants No.1 to 3, 5 to 7 and 9 and 10 exploitative terms of employment and strictly adhere to the terms of service and contract which has statutory force;

d) Direct the Respondent not to coerce the Complainants and not to act in prejudicial manner in the decision of their forming statutory trade union;

e) Direct the Respondent to pay to the Complainants No.1 to 7 their respective incentives from the date it is due and further be directed to pay regularly their monthly incentive amount;

f) Direct the Respondent not terminate/ discharge/ dismiss/ transfer or alter service conditions of the Complainant No.1 to 3, 5 to 7 and 9 and 10 and oblige.

7. The respondent management opposed the said complaint by filing their written statement on 27.10.2015. All the allegations and contentions of the petitioners were refuted. Preliminary objections were raised. It was averred that the Industrial Court has no jurisdiction to grant the reliefs sought by

the complainants and that any case involving the termination of an employee or severing of employerÂ employee relationship, would fall under Section

7 r/w item 1 of Schedule IV of the said Act, 1971, due to which, the case could be maintained before the Labour Court.

8. The Industrial Court, vide the impugned order dated 23.08.2016, rejected exhibit U/2 holding that the allegation of forceful resignation is a matter of

evidence and cannot be considered for grant of interim relief merely on the basis of arguments. The contention of the petitioners/ workers that they

were forced to resign in the face of the contention of the management that they had voluntarily resigned, is a mixed question of facts and law.

9. The Industrial Court has considered the view taken by this Court in *Sudarshan Steel Manufacturing Company vs. Mumbai Labour Union*, 2004

(102) FLR 191 : (2004) (III) LLJ 704 Bom, wherein this Court has held that the Industrial Court cannot be oblivious to the circumstances and events

that have occurred during the pendency of the proceedings. It is the essential duty of a court to look into the events that have occurred during the

pendency of the complaint and assess whether, the original reliefs sought by the complainants could be granted or would survive, even after the

subsequent events. In *R.D.Surve vs. Tata Iron and Steel Company Limited*, 1987 (II) CLR 402 : 1988 (3) Bom. C.R. 709, this Court has held that the

issue as to whether, the resignation has been offered voluntarily or extracted forcibly, would depend upon the facts and circumstances of each case

and there is no straitjacket formula to be made applicable while addressing this issue. It is a matter of evidence and cannot be decided merely on the

basis of arguments.

10. While dealing with exhibit u/8, the Industrial Court noted that the said application was filed only to the extent of complainant nos.1 to 3, 5 to 7, 9

and 10. These complainants had been terminated from service and had assailed their respective terminations dated 04.09.2015, 05.09.2015 and

06.10.2015. The Industrial Court once again considered the law laid down in *Sudarshan Steel* (supra) and *R.D.Surve* (supra) and concluded, at a

prima facie stage, that the issue raised by complainant nos.9 and 10 is whether, they have voluntarily resigned or whether, a resignation was extracted

from each of them by the management. It also considered that complainant nos.1 to 3 and 5 to 7 have sought quashing of their termination orders. The

Industrial Court concluded that these aspects cannot be gone into at a prima facie stage and can be considered at the final stage.

11. When this matter was heard on 13.12.2016 and 08.02.2017, the apprehension voiced by the learned advocate for the petitioners was that the issue

as regards entertaining the complaint under items 1 and 4 of Schedule II of the said Act, 1971, was not being looked into by the Industrial Court. After

considering such submissions and upon perusing the impugned interlocutory orders, I find that the Industrial Court has not declined to consider the

cases of these petitioners under items 1 and 4 of Schedule II. Nevertheless, in view of the contention that the Industrial Court was not applying its

mind to the unfair labour practices under items 1 and 4 of Schedule II, I framed the following two issues vide order dated 08.02.2017 :—

(a) Whether, the Industrial Court, dealing with a ULP Complaint under Section 28(1) read with Schedule II and items 5, 6, 9 and 10 of Schedule IV

of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("the said Act"), would have the jurisdiction to

consider the termination of an employee in the face of the allegation that the termination was apprehended and is aimed at ousting the jurisdiction of

the Industrial Court?

(b) Considering the above issue, whether, Section 32 of the said Act and the view taken by this Court in the matter of National General Mazdoor

Union vs. Nitin Castings (1990 II CLR 641), would cast fetters on the Industrial Court's jurisdiction in dealing with the case falling under Schedule II?

12. Considering the above, I called upon the learned advocates practicing in the Labour and Industrial Courts to address the court on the above stated

issues. After they concluded their submissions on 02.05.2019, some of them sought time to cite judgments. They have tendered the list of citations on

03/05/2019 and 10/05/2019.

13. Since the complaint is still pending before the Industrial Court and as the complainants have approached this Court assailing interlocutory orders, I

have considered the submissions of the learned advocates for the respective sides and the learned advocates invited to address the court, only to the

extent of the two issues framed by me.

14. The issue, therefore, would be as to whether, the Industrial Court needs to consider the scope of its jurisdiction under item 1(a) and item 4(a), (b)

and (f) of Schedule II of the said Act, 1971 in comparison to the jurisdiction of the Labour Court falling under item 1 of Schedule IV of the said Act,

1971.

15. It cannot be ignored that Sections 5 and 7 define the jurisdiction of the Industrial and Labour Courts as under :—

5. Duties of Industrial Court.

It shall be the duty of the Industrial Court:Â?

- (a) to decide an application by a union for grant of recognition to it;
- (b) to decide an application by a union for grant of recognition to it in place of a union which has already been recognised under this Act;
- (c) to decide an application from another union or an employer for withdrawal or cancellation of the recognition of a union;
- (d) to decide complaints relating to unfair labour practices except unfair labour practices falling in Item 1 of Schedule IV;
- (e) to assign work, and to give directions, to the Investigating Officers in matters of verification of membership of unions, and investigation of complaints relating to unfair labour practices;
- (f) to decide references made to it on any point of law either by any civil or criminal court and
- (g) to decide appeals under Section 42.

7. Duties of Labour Court It shall be the duty of the Laour Court to decide complaints relating to unfair labour practices described in Item I of

Schedule IV and to try offences punishable under this Act.â??

16. Schedule II under the said Act reads as under :Â?

SCHEDULE II

Unfair Labour Practices on the part of employers

1. To interfere with, restrain or coerce employees in the exercise of their right to organise, form, join or assist a trade union and to engage in concerned activities for the purposes of collective bargaining or other mutual aid or protection, that is to sayâ?

- (a) threatening employees with discharge or dismissal, if they join a union ;
- (b) threatening a lockÂ?out or closure, if a union should be organised;
- (c) granting wage increase to employees of crucial periods of union organisation, with a view to undermining the efforts of the union at organisation.

2. To dominate, interfere with, or contribute, support â?"financial or otherwiseâ?" to any union, that is to say â?

- (a) an employer taking an active interest in organising a union of his employees ; and
- (b) an employer showing partiality or granting favour to one of several unions attempting to organise his employees or to its members, where such a

union is not a recognised union.

3. To establish employer sponsored unions.

4. To encourage or discourage membership in any union by discriminating against any employee, that is to say –

(a) discharging or punishing an employee because he urged other employees to join or organise a union;

(b) discharging or dismissing an employee for taking part in any strike (not being a strike which is deemed to be an illegal strike under this Act);

(c) changing seniority rating of employees because of union activities;

(d) refusing to promote employees to higher posts on account of their union activities;

(e) giving unmerited promotions to certain employees, with a view to sow discord amongst the other employees, or to undermine the strength of their union;

(f) discharging office-bearers or active union members, on account of their union activities.

5. To refuse to bargain collectively, in good faith, with the recognised union.

6. Proposing or continuing a lock-out deemed to be illegal under this Act.

17. Item 1(a to g) of Schedule IV reads as under :–

SCHEDULE IV

General Unfair Labour Practices on the part of employers

1. To discharge or dismiss employees –

(a) by way of victimisation;

(b) not in good faith, but in colourable exercise of the employer's rights;

(c) by falsely implicating an employee in a criminal case on false evidence or on concocted evidence;

(d) for patently false reasons;

(e) on untrue or trumped up allegation of absence without leave;

(f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;

(g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service

of the employee, so as to amount to a shockingly disproportionate punishment.

18. Items 2 to 10 of Schedule IV read as under :Â?

2. To abolish the work of a regular nature being done by employees, and to give such work to contractors as a measure of breaking a strike.

3. To transfer an employee mala fide from one place to another, under the guise of following management policy.

4. To insist upon individual employees, who were on legal strike, to sign a good conductÂ?bond, as a preÂ?condition to allowing them to resume work.

5. To show favouritism or partiality to one set of workers, regardless of merits.

6. To employ employee as â??badlisâ?, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees.

7. To discharge or discriminate against any employee for filing charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute.

8. To recruit employees during a strike which is not an illegal strike.

9. Failure to implement award, settlement or agreement.

10. To indulge in act of force or violence.

19. It is thus, obvious from section 5 and section 7 that the duties of the Industrial and Labour Courts are well demarcated. Section 5(d) empowers the

Industrial Court to decide the complaints relating to unfair labour practices under the said Act, 1971, save and except those cases falling under item 1

of Schedule IV. Section 7 of the said Act prescribes the duties of the Labour Court to decide ULP complaints under item 1 of Schedule IV and to try

offences punishable under Section 48 r/w Sections 39 and 55 of the said Act.

20. In so far as apprehended dismissal or termination is concerned, the Honourable Supreme Court held in the matter of Hindustan Lever vs. Ashok

Vishnu Kate, 1995 II CLR 823 : 1995(6) SCC 326, that though an employee can certainly approach the Labour Court against his termination, he can

approach the said Court even at a penultimate stage after he realizes that the management is likely to dispense with his services. Therefore, he ought

not to wait till the management perpetuates the unfair labour practices (ULP). The law was thus, laid down that even before the issuance of the order

of termination or dismissal or discharge of any kind, the employee can approach the Labour Court.

21. The Honourable Supreme Court, in *Hindustan Lever vs. Ashok Vishnu Kate* (supra), was dealing with the judgment of the learned Division Bench

of this Court in the matter of *Ashok Vishnu Kate and others vs. M.R.Bhope*, Judge, Labour Court and *Hindustan Lever*, 1992 (I) CLR 531. It was

observed by the learned Division Bench as under :^Â

4. The Legislature was conscious that the unfair labour practice set out in Schedules II, III and IV may not be an exhaustive list and from

time to time a person may resort to practices which are unfair labour practices and therefore conferred power upon the State Government to add or

alter the items in the Schedule after obtaining the opinion of the Industrial Court. Regulation 147 framed by the Industrial Court in exercise of powers

conferred under Section 33 of the Act requires the Members of Industrial Court to submit a report upon any unscheduled unfair labour practice which

comes to the notice of the President of the Industrial Court to the State Government and on receipt of such report the State Government is entitled to

take action under Section 53 of the Act.

Section 27 of the Act issues a fiat that no employer or union and no employees shall engage in any unfair labour practice. Section 28 sets out the

procedure for dealing with the complaints relating to unfair labour practices and Sub^Âsection (1) inter alia provides that where any person has

engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer may file a complaint before the Court

competent to deal with such complaint, Section 5 of the Act prescribes that the Industrial Court shall decide the complaints relating to unfair labour

practices except the practices falling in Item 1 of Schedule IV. The practices falling under Item 1 of Schedule IV are dealt with by the Labour Court

in accordance with provisions of Section 7 of the Act. Section 30 of the Act sets out the powers of Industrial and Labour Courts, while deciding the

complaints and Sub^Âsection (1) provides that where a Court decides that any person has engaged in or engaging in any unfair labour practice, then

the Court may (a) declare that an unfair labour practice has been engaged in or is being engaged in by that person, and (b) direct all such persons to

cease and desist from such unfair labour practice and take such affirmative action as may in the opinion of the Court is necessary to effectuate the

policy of the Act. Sub^Âsection (2) of Section 30 confers power upon the Court to

pass interim order, including a temporary relief or restraining order

as it deems just and proper, including directions to withdraw temporarily the practice complained of pending final decision. The failure to comply with

the order of the Court is made punishable by conviction with imprisonment which may extend to three months or with fine which may extend to Rs.

5000/Â? by provisions of Section 48 of the Act.

5. With this background of the legislative provisions, which is obviously a beneficial legislation enacted with a view to prevent unfair labour practices to

ensure industrial peace and to ensure that the employees are not deprived of their source of income by wrongful discharge or dismissal, it is necessary

to examine the contentions urged at the Bar in support of the rival claims. On behalf of the management it was claimed that the Labour Court can

entertain the complaint of unfair labour practices on the part of the employer under Item 1 of Schedule IV of the Act only where the employee is

discharged or dismissed from service, while the employees claimed that the Labour Court can entertain complaint of unfair labour practices even

before the employer passed order of discharge or dismissal of the employee from service. In cases where it is established that the employer is in a

process of or is engaged in discharging or dismissing the employee by way of victimization, by falsely implicating the employee in a criminal case, for

patently false reasons or on untrue or trumped up allegations of absence without leave, in utter disregard of the principles of natural justice in the

conduct of domestic enquiry for misconduct of minor or technical character. In view of the rival submissions, the first question which requires

determination is whether the Act enables the employee to approach the Labour Court by filing complaint of commission of unfair labour practices on

the part of the employer under Item 1 of Schedule IV of the Act before the employment is terminated either by discharge or dismissal.

22. While considering the opening words of item 1 â??to discharge or dismiss employeesâ?, it was observed by the learned Division Bench as under

:Â?

7. It cannot be overlooked that the expression used in Item I of Schedule IV is ""to discharge or dismiss employees"" and the word ""to"" gives a

clear indication that in case the employer indulges in unfair labour practice which leads to discharge or dismissal, then the employee can approach the

Labour Court for redressal even before the order of discharge or dismissal is passed. The legislature has used the word "to", an infinitive instead of using the words "discharge or dismissal of employees" and that indicates that the Legislature never intended that the right of the employee to file complaint would arise only after the final order of dismissal or discharge is passed. Use of the word "to" in Item I of Schedule IV is an indicator that the Legislature was desirous that the employee can have a redress by approaching the Labour Court even when the employer proposes or intends to discharge or dismiss an employee by resort to unfair labour practice. The use of infinitive shows that the action of dismissal or discharge is not yet complete. In our judgment, the construction on Item No. 1 of Schedule IV should be harmonious to achieve the object of the legislation and the construction suggested by the management would lead to drastic consequences for the employee. The employee would be left without employment and the source of earning in spite of the fact that the dismissal or discharge was clearly by resort to unfair labour practice. Such a construction would lead to defeat the object of the Act and could have never been intended by the Legislature. It is well settled rule of interpretation that Court should be extremely slow in holding that the jurisdiction of the Court is ousted. Any construction which ousts the jurisdiction of the Labour Court to entertain the complaint of unfair labour practice should be avoided. Once an employee establishes that the employer has indulged in unfair labour practice which would lead to the discharge or dismissal from the employment, then the Courts cannot close the doors and the interpretation that though there is wrong committed by the employer the remedy is not available till the wrong reaches its ultimate in the order dismissal cannot be accepted. In no civilised set up and more so in industrial disputes the employee can be told that you must suffer at the hands of the employer and the remedy is available only when the wrong is completed. It is necessary to reasonably construe the provisions of the Act, so as to provide remedy and redress as soon as a wrong is practised by the employer. The unfair labour practice commences as soon as the employer starts proceedings against the employee and which proceedings fall within the mischief of Item No. 1(a) to (f) of Schedule IV of the Act. It is then no answer for the employer to claim that wait till the mischief results into a drastic order of discharge or dismissal and the Labour Court is entitled to entertain the complaint and prevent the drastic

consequences to the employee arising out of the resort to unfair labour practice by the employer. The Legislature enacted the provisions of the Act as

it was found that the Industrial Disputes Act did not contain provisions to prevent unfair labour practices which would lead to drastic consequences

and while construing the provisions of the Act, a construction should be employed which would prevent such drastic consequences. The Industrial

Disputes Act has now introduced a Schedule which sets out unfair labour practices, but does not provide for grant of interim relief preventing the

person from engaging in or continuing to engage in the unfair labour practice. The provisions of Section 30 of the Act enables the Court to direct

person indulging in unfair labour practice to cease and desist from such practice and it is open for the Court under Sub-Section (2) of Section 30 of

the Act to pass interim order pending final decision. The Labour Court therefore is entitled not only to entertain the complaint of unfair labour

practices on the part of the employer, and which will lead to order of discharge or dismissal, but is also entitled to direct the employer to cease and

desist from such practice pending the decision of the complaint.

(Emphasis supplied)

23. Thus, the learned Division Bench concluded that it is a well settled rule of interpretation that the court should be extremely slow in holding that the

jurisdiction of the court is ousted. Any construction which ousts the jurisdiction of the Labour Court to entertain a complaint of unfair labour practice,

should be avoided, unless it is a unavoidable or inevitable. This would, mutatis mutandis, apply even while considering whether, the jurisdiction of the

Industrial Court would be ousted.

24. In the case in hand, the petitioners have approached the Industrial Court raising a ground that the management is interfering in their union activities

and in order to restrain or discourage the employees in organizing, forming, joining or assisting a trade union and that they are being threatened with

discharge or dismissal which would fall under item 1(a) of schedule II. They have also made a grievance that the management has resorted to

discrimination against the employees in order to discourage membership of the union by discharging or punishing an employee or discharging or

dismissing an employee or discharging office bearers or active union members, on account of their union activities, which would fall under Item 4(a, b,

f) of Schedule II.

25. In *Delux Theatres Pvt. Ltd. vs. Bombay Labour Union*, 1992 (I) CLR 256 (Bombay), the workers had approached the Industrial Court in

Complaint (ULP) No.140/1983. Delux Theatre was a company doing the business of exhibiting films and which owned a cinema theatre by name

“Navrang Cinema” at Andheri, Mumbai. There were about 38 workers working in Navrang Cinema. Out of them, 10 were employed in five

cafeteria situated on the premises of Navrang Cinema. The others were unconcerned with the said litigation. In the last week of January, 1983, 13

workmen connected with exhibition of pictures and 07 workmen working in the cafeteria, joined the Bombay Labour Union. The Union issued a letter

dated 27.01.1983 informing the management that the majority of its workmen had joined the Union and the management should recognize the Union

as being the sole collective bargaining agent. The Union also placed certain demands on behalf of its members.

26. On 29.01.1983, the services of four workmen, who had joined the Union recently, were abruptly terminated. On 30.01.1983, the services of

another five workmen were terminated. On 03.02.1983, one workman Tanaji Limkar was removed from service and on 25.02.1983, another five

workmen working in the cafeteria were also terminated. During this period, 08 workmen, who were working in the cafeteria, had refused to resign

from the membership of the Union and they were terminated. Some 07 workmen addressed a joint letter/ resignation on 18.02.1983 to the respondent

union purporting to resign from its membership. The Union preferred a ULP complaint before the Industrial Court and pleaded that the acts of the

management would be covered by items 1(a), 4(a and f) of schedule II of the Act.

27. The Industrial Court delivered its judgment on 09.07.1984 concluding that no ULP was made out under item 1(a) and 4(f) of schedule II. It,

however, declared unfair labour practice against the management under item 4(a) of schedule II and granted reinstatement to the eight terminated

workers with continuity and full back wages. This Court concluded, on appreciation of facts and circumstances proved by evidence, that the Industrial

Court was right in dismissing the complaint under item 4(f) of schedule II.

28. Insofar as the judgment of the Industrial Court allowing the complaint under

item 4(a) of schedule II was concerned, the Industrial Court had relied upon the observations of the Honourable Supreme Court in the matter of Hussainbhai, Calicut v/s Alath Factory Thozhilali Union, Calicut and others, 1978 II LLJ 397. Late Justice Krishan Iyer had observed with regard to the true test of the employer-employee relationship as under :

The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different, perfect paper arrangement, that the real employer is the management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43A of the Constitution. The Court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances.

29. This Court, therefore, observed in Delux Theatres Pvt. Ltd. (supra) that the Industrial Court had relied on the said test and concluded that despite the paper arrangement, which was prepared for obscuring or blurring the actual identification of the employer, the said workers were held to have made out a case under item 4(a) of schedule II. In the words of Hon'ble Justice B.N.Srikrishna, the Industrial Court had come to the (right) conclusion that despite the paper arrangement set up to obfuscate identification of the real employer, the real employer was the petitioner company, inasmuch, as it was the petitioner company, which was interested in running Navrang cinema. This Court considered the analysis of evidence made by the Industrial Court and concluded that it had the jurisdiction.

30. This Law of assessing as to who is the real employer, now has undergone a drastic change in the light of the judgments delivered by the Honourable Supreme Court in the matters of Vividh Kamgar Sabha vs Kalyani

Steels Ltd., 2001(1) CLR 532, Cipla Limited v/s Maharashtra General

Kamgar Union, 2001(1) CLR 754 and Steel Authority of India vs. National Union Water Front Workers and others etc. etc., 2001 (III) CLR 349 and

the judgment delivered by the learned Division Bench of this Court in Hindustan Coca Cola Bottling S/W Pvt.Ltd.,Mumbai and another Vs. Bhartiya

Kamgar Sena, Mumbai and others [2002(1) Mh.L.J. 559].

31. It has been canvassed by the petitioners herein that they were being consistently threatened and intimidated by the management that they would

be discharged or terminated or transferred, if they indulge in unionism. Their joining of a union and filing of the complaint before the Industrial Court,

triggered off a backlash at the hands of the management. Their terminations or forcible resignations are results of the management's retaliatory

tactics.

32. The learned advocate for the management denies all the allegations and submits that any case of termination or dismissal would not be covered

under any of the items of schedule II unless the requirements under item 1(a) or 4(a, b, f) are fulfilled. It is premature to deal with this issue as the

Industrial Court has not declined to consider the pleadings of the parties. The petitioners are unnecessarily apprehensive and they ought to show

patience till the Industrial Court finally deals with their complaint.

33. The learned advocates Shri Prabhakaran, Shri Marlapalle and Shri Khonde submit that as the law underwent a change in view of Ashok Vishnu

Kate judgment (supra) delivered by this Court and by the Honourable Supreme Court, the management is likely to canvass that apprehended

termination would also render the complaint untenable as such a situation would be covered under item 1 of schedule IV. I am of the view that in such

circumstances, the law granting interim relief, laid down in paragraph No.54 of the Hindustan Lever judgment (supra), can be pressed into service.

34. Shri Prabhakaran submits that in a case where the workers have pleaded in the complaint that the management is holding out such threats, which

are covered under schedule II and if such threats / apprehensions turn out to be true after the complaint is filed or coincide with the filing of such a

complaint, the Industrial Court would have to consider the said aspect and a union is not required to amend it's complaint to include the cause of action

that has occurred in the interregnum. It is enough for the Union to file an

application under Section 32 of the said Act, 1971.

35. Section 32 reads as under :Â?

32. Power of Court to decide all connected matters. Notwithstanding anything contained in this Act, the Court shall have the power to decide all matters arising out of any application or a complaint referred to it for the decision under any of the provisions of this Act.

36. This provision had fallen for consideration of this Court in *National General Mazdoor Union vs. M/s Nitin Castings Limited*, 1990 (II) CLR 641.

This Court concluded that Section 32 would not enlarge the scope or extent of the jurisdiction of the Industrial Court beyond what is conferred upon it by the provisions of the Act. If the Industrial Court does not have the jurisdiction to decide unfair labour practices (ULPs) falling under item 1 of schedule IV, Section 32 would not enlarge the jurisdiction of the Industrial Court and such matters will have to be decided by the Labour Court alone.

37. Shri Marlapalle submits that the law laid down in *Nitin Castings (supra)* will have to be considered to imply that if a worker is likely to be discharged or alleges apprehended discharge or termination only on account of the union activities, such a workman could approach the Industrial Court. However, if he has already been discharged or terminated, Section 32 would not be the remedy as it would amount to enlarging the jurisdiction of the Industrial Court. Considering the law laid down in *Hindustan Lever vs. Ashok Vishnu Kate (supra)*, he has to approach the Labour Court under item 1 of Schedule IV.

38. I am of the view that the language used in the various items under schedule II, is plain and unambiguous. One cannot read more than what meets the eye. Item 1(a) would indicate a threat being held out to the employees that they would be discharged or dismissed. It, therefore, indicates the possibility of a discharge of an employee (in future). However, sub clauses (a), (b) and (f) under item 4 of schedule II speak about an action which has already occurred. Threatening an employee with discharge is distinct from discharging an employee. Changing seniority would mean that the employer has already embarked upon the exercise of changing the seniority rating. Similarly, giving unmerited promotions or discharging office bearers or active union members would also indicate that the management has already commenced the act or exercise of giving unmerited promotions or

discharging office bearers or active union members. In my view, if acts of threatening employees with discharge or discharging employees or office

bearers have occurred on account of union activities, such cases would fall under Item 1(a) of schedule II and the Industrial Court would then deal

with such cases, provided such cases are filed prior to such discharge or termination.

39. By way of an illustration, in the event an employee has been chargesheeted for certain misdeeds committed during the formation of a union or

organizing a union or while collectively bargaining, though the alleged acts may be connected with the union activities, yet such acts would not be

covered under schedule II since the management is following the Model Standing Orders or the Certified Standing Orders while initiating the

disciplinary action. A worker may co-relate such disciplinary action with his union activities. However, in disciplinary proceedings, the acts committed

by the worker will have to be proved in an enquiry and in such cases, the punishment awarded could be dismissal from service for a serious

misconduct. Taking an overall view of Section 5, Section 7, item 1 of Schedule IV and the judgment delivered by the Honourable Supreme Court in the

matter of Hindustan Lever vs. Ashok Vishnu Kate (supra), I am of the view that the jurisdiction vested with the Labour Court under item 1 cannot be

nullified. If an employee is dismissed from service by way of punishment based on a full-fledged domestic enquiry, it would be open for him to make

out a case that false charges have been leveled upon him only because he indulged in union activities. It is settled position of law that once the charges

are proved, the allegation of victimization, be it legal or factual, fails.

40. In Engineering Laghuudyog Employees' Union Vs. Judge, Labour Court and Industrial Tribunal and another [(2003) 12 SCC1,]the 3 Judges

Bench of the Hon'ble Apex Court, while dealing with the powers of the Labour Court with reference to the dismissal of an employee pursuant to

conducting a departmental enquiry, observed in paragraph Nos.5 and 6 as under :
?

5. Having heard the matter, we are of the view that the said submission cannot be accepted as this question stands concluded by a Constitution

Bench decision of this Court in P. H. Kalyani v. M/s. Air France, Calcutta, [1964] 2 SCR 104. In P.H. Kalyani's case (supra), it was held by the

Constitution Bench that where a domestic inquiry is found defective and the employer leads evidence before the Labour Court and subsequently the

Labour Court gives its approval that the charges are proved, the order of termination would relate back to the date of original order of termination.

This decision was followed in Punjab Daily Development Corporation Ltd. and Another v. Kala Singh and Others, [1997] 6 SCC 15 9 wherein it was

said that the Constitution Bench decision in P.H. Kalyani's case (supra) and the decision in R. Thiruvir Kolam v. Presiding Officer, [1997] 1 SCC 9

have held that when Labour Court records a finding that the domestic inquiry was defective and opportunity was given to the management and the

workman to adduce evidence and Labour Court upholds dismissal order passed by the management, the dismissal order would relate back to the date

of order of original dismissal and not from the date of award of the Labour Court. In Vishweshwaraiah Iron & Steel Ltd. v. Abdul Gani & Ors., [

1997] 3 SCC 713, this Court however, observed that some of the decisions rendered by this Court subsequent to P.H. Kalyani's case (supra) require a

relook as the same are not in consonance with the Constitution Bench decision. The same Bench in Director, State Transport Punjab and Another v.

Gurdev Singh and Another, [1998] 2 SCC 159 held that where an order of termination is found defective having been passed contrary to the principles

of natural justice and the employer before Labour Court has adduced evidence to prove the charges and the Labour Court comes to the conclusion

that the charges are proved, in such a situation the order of dismissal will relate back to the original order of termination. In Rambabu Vyankuji

Kheragade v. Maharashtra Road Transport Corporation, [1995] Suppl (4) SCC 157, it was held that the effective date of dismissal after domestic

inquiry if Labour Court finds the inquiry to be unfair and as such gives the employer an opportunity to prove the charge and finally upholds the

dismissal, will relate back to the date of original order. This has been the consistent view of this Court.

6. Section 11A of the Industrial Disputes Act, 1947 (for short 'the Act') confers a wide power upon the Labour Court, Tribunal or the National

Tribunal to give appropriate relief in case of discharge or dismissal of workmen. While adjudicating on a reference made to it, the Labour Court,

Tribunal or the National Tribunal, as the case may be, if satisfied that the order of discharge or dismissal was not justified, it may, while setting aside

the same, direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including

the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Thus, only in a case where the

satisfaction is reached by the Labour Court or the Tribunal, as the case may be, that an order of dismissal was not justified, the same can be set aside.

So long as the same is not set aside, it remains valid. But once whether on the basis of the evidences brought on record in the domestic inquiry or by

reason of additional evidence the employer makes out a case justifying the order of dismissal, we fail to understand as to how such order of dismissal

can be given effect to only from the date of the award and not from the date of passing of the order of punishment. The distinction sought to be made

by this Court in some of the matters including Gujarat Steel Tubes (supra), in our opinion, is not based on a sound premise, particularly when the

binding decisions of this Court in Motipur Sugar Factory's case (supra) and Workmen of Messrs Firestone Tyre & Rubber Company of India (P.) Ltd.

v. Management & Ors., [1973] 3 SCR 587, have not been taken note of.â??

41. In Sahil Khan Vs. Hashmat and Company [2006(4) LLN 890], the learned Division Bench of this Court concluded that in union activities,

disorderly behaviour by an employee is a serious misconduct and the punishment of dismissal of service would not amount to a disproportionate

punishment. The observations in paragraph Nos.10, 11 and 12 read as under :â??

â??10. We have no hesitation in holding that the decision in Blaze Advertisings case cannot be said to lay down the correct law with regard to the use

of the words like ""thief"" or ""class one thief"" hurled by the workers at their employer during the course of the demonstration.

11. Besides that, it would be seen that insofar as the present case is concerned, the Inquiry Officer held that the abuses hurled during the course of

the demonstration were so indecent that he did not feel it like to record such abuses in the inquiry.

12. In the case of this nature where serious allegations of the employee indulging in acts of riotous, disorderly and indecent behaviour as well as raising

dirty slogans during the course of the demonstration have been very well proved and such demonstration and abuses have potential of disturbing the

industrial peace, it cannot be said by any stretch of imagination that the

punishment of dismissal is grossly disproportionate to the charges proved.â??

42. In view of the above, for a cause of action to fall under Items 1 or 4 of Schedule II or under Item 1 of Schedule IV, would depend upon the

background in which the Management has initiated action against an employee. If the concerned worker or a union leader has resorted to a gross

behavioral misdemeanor as a part of his union activities and he is charge sheeted for the same and dismissed from service after conducting a domestic

enquiry, such a case would not fall under Item 1 or 4 of Schedule II and will have to be considered as one falling under Item 1 of Schedule IV.

Moreover, it neither causes any prejudice nor injustice to him by filing a case under Item 1, Schedule IV since it enables him to avail of an additional

remedy u/s 44 of the 1971 Act.

43. Item 1 of Schedule II is exclusively with regard to a management adopting an intimidating attitude in order to curb or subdue the workers in the

formation of a union. The language used in Item 1 of Schedule II is in connection with such formation or indulging in collective bargaining. However,

sub clause (a) is exclusively connected with the act of joining of a union. Similarly, the clauses under Item 4 of Schedule II are also in connection with

the joining or formation of a Union. Any broader meaning, if attributed to the sub clauses under Items 1 and 4 of Schedule II, would obfuscate the

applicability of Item 1 of Schedule IV and the exclusive jurisdiction of the Labour Court in dealing with cases of discharge, dismissal, termination or

similar modes of imposing unemployment.

44. I find that Item 1 of Schedule IV pitted against Items 1 and 4 of Schedule II would indeed create a mirage of conflict of jurisdiction, if the latter

two items are not properly interpreted. Any act of termination or discharge or dismissal falling under Items 1 and 4 of Schedule II could also be

entertained under Item 1 of Schedule IV. However, viceÂ versa would not be permissible. In short, forms of termination or discharge falling

exclusively under Items 1 and 4 of Schedule II would also fall under Item 1 of Schedule IV. However, all such cases falling under Item 1 of Schedule

IV would not be maintainable under Items 1 and 4 of Schedule II.

45. Item 1 of Schedule IV would enable the Labour Court to consider as to whether the act of the employer, of discharging or dismissing an employee,

would amount to victimization or is not in good faith, but in the colourable

exercise of the employers' rights or for patently false reasons or is shockingly disproportionate punishment. As such, an act of an employer which would otherwise fall under clause (a) of Item 1 or clause (a), (b) or (f) under Item 4 of Schedule II would also fall under clause (a), (b), (d) or (g) of Item 1 of Schedule IV. Considering this position, the law laid down by this Court in *Delux theatre (supra)*, *Nitin Castings Limited (supra)* and by the Hon'ble Apex Court in *Hindustan Lever (supra)* would fortify my view that if an employee is already discharged or dismissed before lodging a ULP complaint on the allegations against the employer falling under Item 4(a) or (b) or (f) of Schedule II, it would be open for such an employee to approach the Labour Court under Item 1 of Schedule IV, though he can approach the Industrial Court. The additional advantage in doing so would be that the worker would have a statutory remedy of filing a revision before the Industrial Court u/s 44 of the Act, upon being aggrieved by any order passed by the Labour Court. Approaching the Industrial Court, will compel him to approach this Court against any order passed by that Court.

46. It has been held by the Hon'ble Apex Court in *Pfizer Limited Vs. Majdoor Congress and others* [(1996) 5 SCC 609] that the allegation of an unfair labour practice on the part of an employer can only be proved by the complainant. The onus to substantiate such allegations against the employer would lay on the complainant. It was also held in paragraph no.22 that it would depend upon the facts of each case whether an employer has acted with undue haste while discharging or dismissing an employee.

47. In *Uttam Baban Abhang Vs. Durwani Karmachari Sahakari Patsanstha Maryadit and others* [2016(7) All MR 837], wherein I had the occasion of deciding an issue as to whether the dismissal of an employee by way of punishment would fall under Item 1 of Schedule IV considering the jurisdiction of the Labour Court prescribed u/s 7 of the 1971 Act. I have held that in a case wherein a worker is charged with committing misconduct and has been dismissed from service on account of the charges being proved, such a case would fall under Item 1 of Schedule IV and Section 32 of the 1971 Act r/w Sections 5 and 7 of the Act, would not enlarge the jurisdiction of the Industrial Court to deal with such dismissal. The law laid down by the Hon'ble Apex Court in *Hindustan Lever (supra)* would offer an option to the aggrieved workman to approach the Labour Court under Item 1 of

Schedule IV against any apprehended termination or discharge or dismissal.

48. In *National General Mazdoor Union (supra)*, this Court has held in paragraph Nos. 9, 10 and 11 as under :¹

9. From the language of section 32, it is clear to me that this does not enlarge the scope or the extent of the jurisdiction of the Industrial Court

beyond what is conferred upon it by the other provisions of the PULP Act. If under the other provisions of the PULP Act the Industrial Court has no

jurisdiction to deal with the unfair labour practices mentioned in Schedule IV of the Act, section 32 does not give such power to the Industrial Court.

What is contemplated in section 32 is that the Industrial Court or, for that matter, even the Labour Court has power to decide all matters arising out of

an application or a complaint referred to it for decision under the provisions of the PULP Act. The complaint or the application which is referred to the

concerned Court must be made to the proper Court. While deciding such a complaint or an application if certain matters or issues or questions arise,

the concerned Court has been invested with the power to decide all those matters, issues or questions so arising. The Court is not debarred from

dealing with such matters, issues or questions arising merely on the ground that no specific provision has been made elsewhere conferring power upon

the concerned Court to deal with such incidental questions. This is the meaning of section 32 of the PULP Act. It does not enlarge the jurisdiction of

either the Industrial Court or of the Labour Court which is otherwise not being conferred upon but by the other provisions of the PULP Act.

10. Mr. Puri, however, is demonstrably on sound ground when he says that the Industrial Court was in error in dismissing the application of the

petitioner on the ground that the complaint related to only items in Schedule IV. The heading of the application itself and the averments made in the

application go to show that the petitioner² union also wanted to complain of the unfair labour practices in items Nos. 3 and 4(a) of Schedule II of the

PULP Act. The Industrial Court had undoubtedly jurisdiction to adjudicate upon the complaints in respect of these items. The dismissal of the entire

complaint, therefore, is wholly unjustified. The petition, therefore, must succeed to that extent.

11. In the result, the petition is partly allowed. The order dated 24th of July 1981 passed by the Industrial Court, Thane, in Complaint (ULP) No. 162

of 1980 is hereby set aside. The said complaint is restored to the file of the Industrial Court, which will dispose of the said complaint in so far as it

relates to unfair labour practices mentioned in Items Nos. 3 and 4(a) of Schedule II of the PULP Act. No order as to costs.â??

49. This Court relied upon Nitin Casting Limited (supra) in Blue Star Limited Vs. Blue Star Workers Union and another [1997 (II) CLR 1018] and

held in paragraph Nos.9 and 10 as under :Â?

â??9. Section 32 by its very nature is supplemental provision which empowers the Industrial Court or Labour Court exercising the power under the

MRTU and PULP Act to decide all matters arising out of any application or complaint referred to it for the decision under any of the provisions of the

Act. The said power is intended to be given to the concerned Industrial Court or Labour Court to ensure that certain incidental matters arising out of

any application or complaint referred to it for decision may be decided by the said Court notwithstanding anything contained in the Act. The

supplemental power provided to the Industrial Court or the Labour Court under the MRTU and PULP Act under Section 32 does not enlarge scope of

jurisdiction exercisable by the said Court but is intended as any other supplemental provision to prevent the ends of justice from being defeated and

pass appropriate order with regard thereto. Power exercisable by Labour Court or Industrial Court under Section 32 needs to be harmonious and

consistent with the powers given to such Court under Section 30 of the Act and such supplemental power under Section 32 being in aid of the principal

powers of the Industrial Court or Labour Court under Section 30 of the Act enables the Court to decide all incidental matters that may be required to

be decided while deciding the complaint even in the absence of specific provision. However once the Court holds that no unfair Labour practice has

been committed or is being committed, the power of such Court issuing any further direction ends and in the garb of exercise of power under Section

32 it cannot pass the order of declaration or issue direction which it cannot do under Section 30(1). In National General Mazdoor Union. Thane v.

M/s. Nitin Casting Ltd. & Ors. 1990 II CLR 641 the provisions contained in Section 32 of the MRTU and PLUP Act came up for consideration.

10. I find myself in agreement with the view expressed by this Court in Nitin Castings Ltd.(supra) that Section 32 of the Act does not enlarge the

scope or extent of the jurisdiction of the Industrial Court or Labour Court beyond what is conferred upon it by other provisions of MRTU and PULP

Act. As it is the very scheme of the Act clearly spells out that the entire exercise of power by the Industrial Court or Labour Court under MRTU and

PULP Act is dependent upon its finding that the person named in the complaint has engaged in unfair labour practice or is engaging in any unfair

labour practice and to curb that unfair labour practice, the appropriate order as contemplated under Sec. 30(1) or Sec. 32 of the Act can be passed.â??

50. Mr.Prabhakaran, learned Advocate has canvassed that if a complaint is filed before the Industrial Court prior to any discharge or termination for

indulging in the formation of union activities, a ULP complaint before the Industrial Court under Item 1(a) of Schedule II would be maintainable. He

has further submitted that if an employee has suffered an action of discharge or termination which would fall under Item 4(a), (b), (f) of Schedule II, a

ULP complaint would still be maintainable before the Industrial Court.

51. In my view, the fact remains that there would be an extremely thin distinguishing line and if an employee fails to make out a case as is contended

by him under Item 1(a) or 4(a, b, f) of Schedule II, the complaint would be rendered untenable after a complete trial, which may take 5 years or even

more in contested matters. Such an employee may then be required to approach the Labour Court. This delay would not be in his interest as he would

not be entitled to any subsistence allowance. (Mumbai Cricket Association Vs.Pramod G.Shinde, 2011 (1) CLR 745).

52. He has also submitted that if an employee approaches the Industrial Court for a case falling under Item 1(a) of Schedule II before he is actually

discharged or dismissed for union formation activities, it would not be necessary for him to amend the complaint and it would be sufficient to file an

application under Section 32 of the 1971 Act, after he is actually terminated or dismissed thereby attracting Item 4(a,b,f) of Schedule II.

53. I find a flaw in his submission since an application u/s 32 would be a stand alone application. To contend that such an application may be

considered alongwith the complaint would not appear to be appropriate. Instead, it would be appropriate to amend the complaint, bring on record the

pleadings and averments with regard to the subsequent event of actual discharge or dismissal (including a challenge to the domestic enquiry) and put

forth a prayer for quashing and setting aside such discharge or dismissal. As such, rather than a Court dealing with an independent application u/s 32,

the complainant should amend the complaint by including the cause of action based on subsequent events on the ground that Section 32 would permit

the said Court to deal with the said issue while deciding the complaint finally. In fact, if an employee, after preferring a complaint under Item 1(a) of

Schedule II suffers action at the hands of the employer, which is likely to fall under Item 4(a) or (b) or (f), he can move an application u/s 32 of the

1971 Act r/w Order 6 Rule 17 of the CPC for bringing the subsequent events on record and for challenging the said action of the employer.

54. In Hindustan Coca Cola Bottling S/W Pvt.Ltd., Mumbai and another Vs. Bhartiya Kamgar Sena, Mumbai and others [2002(1) Mh.L.J. 559], the

learned Division Bench of this Court has held in paragraph No.11 as under :¹¹

¹¹. As regards the question as to whether Section 32 of the Act confers such powers on the Labour Court or Industrial Court, the Supreme Court

in terms held :

Section 32 would not enlarge the jurisdiction of the court beyond what is conferred upon it by other provisions of the Act. If under other provisions of

the Act the Industrial Tribunal or the Labour Court has no jurisdiction to deal with a particular aspect of the matter, Section 32 does not give such

power to it. In the cases at hand before us, whether a workmen can be stated to be the workmen of the appellant establishment or not, it must be held

that the contract between the appellant and the second respondent is a camouflage or bogus and upon such a decision it can be held that the workmen

in question is an employee of the appellant establishment. That exercise, we are afraid, would not fall within the scope of either Section 28 or Section

7 of the Act, In cases of this nature where the provisions of the Act are summary in nature and give drastic remedies to the parties concerned

elaborate consideration of the question as to relationship of employer¹¹employee cannot be gone into. If at any time the employee concerned was

indisputably an employee of the establishment and subsequently it is so disputed, such a question is an incidental question arising under Section 32 of

the Act. Even the case pleaded by the respondent¹¹union itself is that the appellant establishment had never recognised the workmen mentioned in

Exhibit ""A"" as its employees and throughout treated these persons as the

employees of the second respondent. If that dispute existed throughout, we think, the Labour Court or the Industrial Court under the Act is not the appropriate court to decide such question, as held by this Court in General Labour Union (Red. Flag) Bombay v. Ahmedabad Mfg. and Calico Printing Co. Ltd and Ors. (supra), which view was reiterated by us in Vividh Kamgar Sabha v. Kalyani Steels Ltd. and Anr., 2001 (I) CLR 532 SC.

55. In Pepsico India Holdings Pvt.Limited, Chembur, Bombay Vs. Noshir Elavia and another, [2002(2) Mh.L.J.744], this Court has held in paragraph

Nos.14 and 15 as under :Â?

â??14. However, in the present case, although there may have been a breach of the standing orders applicable to the establishment, the result is that

there has been a termination of service of the employee. Consequently, the reliefs which can be claimed is of reinstatement with continuity of service

with full backÂwages. This is a relief which can be granted by the Labour Court under Item 1 of Schedule IV of the Act. In fact, under Section 7 of

the Act, all complaints relating to unfair labour practices described in Item 1 of Schedule IV of the Act are to be tried exclusively by the Labour

Court. In the instant case, the action of petitioner in terminating the services of the respondent has resulted in the petitioner's claim for reinstatement

which is the final relief that can be granted to the respondent.

15. This relief is within the scope and the ambit of the jurisdiction of the Labour Court and, therefore, it was necessary for the respondent to file a

complaint under Item 1 of Schedule IV of the Act. This is the view taken by this Court in the case of Bajaj Auto Ltd. (supra) after considering the

judgment in the cases of Supertext (India) Corporation (supra) and AÂZ (INDL) Premises CoÂop. Society Ltd. (supra). The Division Bench of this

Court has considered these judgments and has held thus :Â?Â?

A conjoint reading of Sections 5, 7 and 32 of the 1971 Act would make it clear thai, though, for the purpose of exercising initial jurisdiction into a

substantive Complaint, the jurisdictions have been compartmentalized inasmuch as the Labour Court has no jurisdiction to entertain complaints other

than Complaints falling under Item 1 of Schedule IV of the 1971 Act and conversely, the Industrial Court has been given powers to entertain

complaints in all other matters, it does not mean that the Industrial Court, while exercising jurisdiction within the sphere legitimately assigned to it,

cannot pass an order which is required to be done in the interest of justice. It cannot be forgotten that Section 32 starts with a non obstante clause

notwithstanding anything contained in this Act" and provides that the Court trying the matter shall have the power to decide "all matters arising out of

any Application or Complaint referred to it for the decision under any of the provisions of this Act." In our judgment, the decision in National General

Mazdoor Union (supra) does not recognise and give full effect to the amplitude of the non obstante clause in Section 32. In our judgment, the

enumeration of the respective jurisdictional limits of the Industrial Court and Labour Court, provided in Sections 5 and 7 of the 1971 Act, when read

with the non obstante provision in Section 32 of the 1971 Act, means this : A substantive Complaint can be entertained by the Court (Labour Court or

Industrial Court) only with regard to the matters provided in Section 5 or 7. If a complaint is substantively made to the Industrial Court, then by reason

of Section 5(b), it has no jurisdiction to entertain a Complaint relating to unfair labour practices falling under Item I of Schedule IV of the 1971 Act;

conversely, a Complaint of unfair labour practice falling only under Item 1 of Schedule IV can be entertained by the Labour Court, but not any other

complaint. This does not, however, mean that while trying a substantive Complaint legitimately falling within its jurisdictional purview, the Labour Court

or Industrial Court is precluded from moulding the relief as required by the facts of the case.

In the present case, the initial jurisdiction in the substantive complaint filed by the respondent can be entertained by the Labour Court only. The

Industrial Court has no jurisdiction to try a complaint in which the only grievance is wrongful termination. A substantive complaint can be entertained

only by the Labour Court as it relates to a matter provided in Item 1 of Schedule IV of the Act and, therefore, the complaint filed under Item 9 of

Schedule IV of the Act is not maintainable.â??

56. Considering the above, this petition is disposed off. While answering the issues framed, I conclude as under :â??

[a] An employee, who claims to have suffered unfair labour practices at the hands of an employer under Item 1(a) or 4(a), (b) or (f) of Schedule IV,

would have the option of preferring the complaint for challenging such acts, either before the Industrial Court or under Item 1(a), (b), (d) and (g) of

Schedule IV of the 1971 Act before the Labour Court.

[b] If such an employee prefers a complaint before the Industrial Court, the same shall be considered on the facts and circumstances emerging from

each case and in view of the Law laid down in the matter of Delux Theatres Pvt. Ltd. (supra) and the observations in this order. Needless to state,

the issue of whether the respondent is an employer and whether there is an employer employee relationship, will not be maintainable before the

Labour Court or the Industrial Court in view of the Law laid down in Vividh Kamgar Sabha vs Kalyani Steels Ltd., (supra), Cipla Limited (supra) and

Steel Authority of India (supra).

[c] In the event of a complaint being preferred before the Labour Court or the Industrial Court, in view of the above, the complainant will have to

amend his complaint based upon the subsequent events that have occurred during the pendency of the complaint, in the sense that if a complaint is

filed under Item 1(a) of Schedule II before the Industrial Court or the same cause of action is raised under Item 1 of Schedule IV, the complainant

would amend the complaint to bring on record the subsequent event of actual discharge or dismissal, which would fall under Item 4(a) or (b) or (f) of

Schedule II or under Item 1(a), (b), (d), (g) of Schedule IV.