

(2012) 10 AHC CK 0078

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 4695 of 2009

Rajendra Prasad Nishad

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 16-10-2012

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 18(2), 19(2), 2(oo), 20(2)

Citation : (2012) 10 ADJ 275 : (2013) 3 ALJ 115 : (2013) 137 FLR 193 : (2013) 137 FLR 189 : (2013) LabIC 1750

Hon'ble Judges : Sabhajeet Yadav, J

Bench : Single Bench

Advocate : Bushra Maryam, Rajeev Kumar Upadhayay and S.K. Shukla, for the Appellant; Piyush Bhargava, Gopal Misra and V.R. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

Hon'ble Sabhajeet Yadav, J.—By this petition, the petitioner has challenged the validity and correctness of order dated 23.10.2007 passed by Presiding Officer, Labour Court, Allahabad in Misc. Case No. 75 of 2006, whereby the Labour Court has rejected the application of petitioner filed u/s 33C of the Industrial Disputes Act, 1947 with liberty to the petitioner to raise an industrial dispute u/s 4-K of the U.P. Industrial Disputes Act, 1947. A true copy of the order dated 23.10.2007 passed by the Presiding Officer, Labour Court, Allahabad in aforesaid case is on record as Annexure-1 to the writ petition. The brief facts leading to the case are that the respondent No. 4 i.e. M/s Universal Tyres gave its unit at Allahabad on license basis for a period of 12 years to M/s Jai Shree & Rubber Products on 1.2.1977. The respondent No. 5 M/s Jai Shree Tea & Industries Ltd., Proprietor of Jai Shree Tyres & Rubber Product, New Delhi moved an application on 4.8.1986 to the State Government for closing down its concern. The State Government vide its order dated 20.9.1986 rejected the aforesaid application of the respondent No. 5 by reasoned order. Feeling aggrieved by which, the respondent company filed Writ Petition No. 19090 of 1986 and this Court has dismissed the

writ petition on the ground that the company can file review petition and can also come for adjudication. Thereafter the respondent company filed review application, thereupon matter of closure of concern was referred for adjudication by the State Government to the Industrial Tribunal, Allahabad. The Industrial Tribunal Allahabad by an award dated 26.2.1987 has rejected the said application holding that the intended closure of the concern is not only un-reasonable but it is also illegal. A copy of the said award dated 26.2.1987 is on record as Annexure-2 to the writ petition.

2. Feeling aggrieved against the award dated 26.2.1987, passed by Industrial Tribunal, Allahabad, the employer filed Writ Petition No. 6295 of 1987 challenging the aforesaid award and validity of Section 25-O of the Industrial Disputes Act 1947. This Court vide its order dated 28.3.1990 allowed the writ petition filed by the respondent holding that Section 25-O of the Industrial Disputes Act is ultra-virus. Feeling aggrieved by aforesaid decision of this Court, Jai Shree Tyres Karamchari Union and the State Government approached Apex Court challenging the order passed by this Court, by which Section 25-O of the Industrial Disputes Act (Central) and Section 6-W of the U.P. Industrial Disputes Act had been held to be ultra-virus. The matter was referred to the Constitution Bench of Apex Court which decided in case of Orissa Textile and Steel Ltd. Vs. State of Orissa and Others, , upholding the validity of Section 25-O of the Industrial Disputes Act (Central), consequently, the Supreme Court remanded the matter back to this Court for decision on merits. Thereupon Writ Petition No. 6295 of 1987 filed by the respondent No. 2 was dismissed by this Court on merit vide detailed judgment and order dated 28.1.2004. A true copy of the judgment and order dated 28.1.2004 passed by this Court in Writ Petition No. 6295 of 1987 is on record as Annexure-3 to the writ petition.

3. On dismissal of the aforesaid writ petition the petitioner moved an application u/s 33-C(2) of the Industrial Disputes Act and/ or Section 6-H(2) of the U.P. Industrial Disputes Act before the Labour Court. The case has been contested by the respondents and after hearing the parties vide impugned order dated 23.3.10.2007 the Labour Court has rejected the aforesaid application of the petitioner on the ground that since the services of petitioner has already been terminated and relationship of employer and employee between the petitioner and respondent company already came to an end, therefore, the Labour Court has no jurisdiction to decide the entitlement of the petitioner either u/s 33-C(2) of the Industrial Dispute Act or u/s 6-H (2) of the U.P. Industrial Dispute Act and if the petitioner so desires, he can approach the State Government to make reference u/s 10 of the Central Act or Section 4-K of the U.P. the Industrial Disputes Act. A copy of the said order is on record as Annexure-1 to the writ petition.

4. It is stated that the lease granted by M/s Universal Tyres to Jai Shree Tyres and Rubber Limited (respondent No. 3) came to an end in 1989 and M/s Universal Tyres resumed ownership of the Industrial Establishment at Naini,

therefore, Jai Shree Tyres and Rubber Ltd. would be liable for illegal closure of the industrial establishment at Naini. Thereafter M/s Universal Tyres was also liable for the liabilities incurred by the previous lessee and the claim of the petitioner against the Universal Tyres would continue and would subsist. Moreover, the Universal Tyres was aware of the fact that litigation was going on in respect of the closure of the Industrial Establishment at Naini and it was also a party before the Tribunal at Allahabad and in the High Court at Allahabad and in the Supreme Court and after the remand of the case again in the High Court, therefore, the Universal Tyres cannot claim that it was free from the liability incurred by M/s Jai Shree Tyres, the respondent No. 3.

5. It is stated that the Labour Court committed error in law in holding that under some orders of the Supreme Court the respondents could dispose of the properties of the industrial establishment at Naini and that M/s Jai Shree Tyres Company Limited/ the respondent No. 2 had ceased to exist, therefore, on the principle of no work no pay the workmen could be denied what was legally due to them. It is stated that the claims of the petitioner was for the period he was in employment and the liability of the respondents was in respect of his claims even after the undertaking had been closed. On the face of it the claim in terms of Section 25-O(6) would arise only when the industrial establishment is closed illegally. Moreover, when the Supreme Court granted permission to sell the properties it had asked the respondents to deposit a sum of Rs. 10,00,000/- with the Labour Court at Allahabad. The amount due to the petitioner becomes recoverable from the amount which is in deposit with the Labour Court in pursuance of the orders of the Supreme Court. In any case an alternative argument can be advanced that even if it be admitted that there was no relationship of master and servant between the petitioner and Universal Tyres the claim of the petitioner for the period 1986 to 1989 against M/s Jai Shree Tyres/respondent No. 2 could be computed for. There is no dispute on the point that the closure of undertaking in the year 1986 was illegal therefore, under the deeming clause of Section 25-O(6) of the Industrial Disputes Act the petitioner would be entitled to get all the benefits for the period 1986 to 1989 from M/s. Jai Shree Tyres Company. It may be stated that the petitioner is not giving up his claims against the Universal Tyres.

6. Learned counsel for the petitioner has contended that in view of provisions of Section 25-O(6) of the Industrial Disputes Act, 1947 (Central) and provisions of Section 6-W (6) of the U.P. Industrial Disputes Act, 1947, once the permission for closure of the industry has been refused by the State Government and by the Labour Court vide its award dated 26.2.1987, which has been upheld by this Court vide judgment and order dated 28.1.2004 passed in the writ petition No. 6295 of 1987, the closure of the undertaking shall be deemed to be illegal from the date of closure and workmen shall be entitled to all benefits under any law for time being in force as if the undertaking had not been closed down, therefore, the petitioner is entitled to be treated in continuous service and is entitled to get his wages and all the service benefits as if the undertaking had not been closed

down. In support of aforesaid submissions, learned counsel for the petitioner placed reliance upon several reported decisions of Apex Court and High Court, which shall be conveniently referred herein after at relevant places.

7. Whereas learned counsel for respondents on the basis of assertions made in the counter-affidavits filed on behalf of respondent Nos. 5 and 6 has contended that since the petitioner had collected a sum of Rs. 13,536.25 as his entitlement upon the termination of his service which included a sum of Rs. 6,693.75 as gratuity on account of his retrenchment/termination of his service, as such the relationship of employer and employee between the petitioner and answering respondents came to an end therefore the application moved by petitioner u/s 33-C(2) of the Industrial Disputes Act (Central) or Section 6-H (2) of the U.P. Industrial Disputes Act (State Act) was not maintainable. It is also contended that the services of petitioner were terminated by a notice dated 30.9.1986 and he has never challenged and/or disputed the termination of his service by raising an industrial dispute before the Labour Court, therefore, after getting the retrenchment compensation and terminal dues from the employer the petitioner's application u/s 33-C(2) of the Industrial Disputes Act (Central) and/or Section 6-H (2) of the State Act was not maintainable unless his retrenchment/termination of service was set aside by the Labour Court and he was reinstated with continuity of service alongwith the back wages. The view taken by the Labour Court in this regard is perfectly justified and does not call for any interference by this Court.

8. Having considered the rival submissions of the learned counsel for the parties and on perusal of records, it appears that the services of petitioner were terminated vide notice dated 30.9.1986 after refusal of permission for closure of undertaking by the State Government on 20.9.1986. The petitioner was paid retrenchment compensation and other terminal dues to the tune of Rs. 13,536/- including a sum of Rs. 6693.75 as gratuity on account of his retrenchment/termination of services. The petitioner did not challenge his retrenchment/termination of services by raising any industrial dispute either u/s 10 of the Industrial Disputes Act (Centra) or under Section-4-K of U.P. the Industrial Disputes Act before the Labour Court, instead thereof learned counsel for the petitioner has contended that the retrenchment of petitioner has been effected on account of illegal closure of the undertaking which is not "retrenchment" as defined under Section- 2(oo) of the Industrial Disputes Act, 1947, and such retrenchment is retrenchment only for the purpose of payment of compensation to the retrenched employees. In support of aforesaid contention, learned counsel for the petitioner has also placed reliance upon a decision of the Apex Court rendered in H.P. Mineral and Industrial Development Corporation Employees Union v. State of H.P. and Ors., 1996 (7) SCC 139 , wherein it was held that the retrenchment as defined in Section 2(oo) of the Industrial Disputes Act, 1947, does not cover the termination of service as a result of closure or transfer of undertaking. Though such termination of service of workman has been assimilated to "retrenchment" for certain purpose namely compensation payable

to the workmen whose services are terminated as a result of such closure. Learned counsel for respondents, did not dispute said proposition by citing any decision of Supreme Court contrary to it, therefore, in view of law laid down by the Apex Court, there can be no scope for doubt to hold that the retrenchment of the petitioner was effected by respondents on account of closure of undertaking which is not "retrenchment" as defined under Section-2(oo) of the Industrial Disputes Act rather it was retrenchment for limited purpose of payment of retrenchment compensation to him.

9. Although the proposition that "retrenchment" of workmen on account of closure of undertaking does not fall within the definition of "retrenchment" u/s 2(oo) of the Industrial Disputes Act, is not disputed by the learned counsel for the respondents but the factum of retrenchment of petitioner-workman on account of closure of undertaking has been disputed and it was contended that the petitioner's retrenchment had been made not on account of closure of undertaking but on account of circumstances mentioned in the retrenchment notice dated 30.9.1986 u/s 6-N of the U.P. Industrial Disputes Act, which may fall within the definition of retrenchment under Section- 2(oo) of the Industrial Disputes Act and since the petitioner did not challenge said retrenchment by raising an industrial dispute before Labour Court either u/s 10 of the Industrial Disputes Act (Central) or under Section- 4-K of the U.P. Industrial Disputes Act, instead thereof has accepted the retrenchment compensation and other terminal dues as a consequence of said retrenchment, therefore, Labour Court had no jurisdiction to adjudicate such dispute and grant relief claimed by petitioner u/s 33-C(2) of the Industrial Disputes Act and/or u/s 6-H (2) of the U.P. Industrial Disputes Act.

10. In order to resolve controversy as to whether the services of the petitioner were terminated on account of his retrenchment u/s 6-N of the U.P. Industrial Disputes Act or on account of closure of the undertaking, it is necessary to examine the content of retrenchment notice dated 30.9.86 issued to the petitioner whereby his services were terminated w.e.f. 2.11.1986 but the petitioner did not file his retrenchment notice dated 30.9.1986 in the writ petition. However in connected Writ petition No. 37008 of 2007, Mahendra Nath Mishra v. Labour Court, Allahabad, in the counter-affidavit filed on behalf of respondent No. 4, similar retrenchment notice issued to Sri Mahendra Nath Mishra on 30.9.1986, has been filed as Annexure C.A.-1 to the aforesaid counter-affidavit, which reads as under:

UNDER CERTIFICATE OF POSTING NOTICE

JAY SHREE TYRES & RUBBER PRODUCTS

(Prop. : Jai Shree Tea & Industries Ltd.)

P.O. Khadesara, Naini, ALLAHABAD

Shri Mahendra Nath

Mishra,

Dated 30.9.1986

Bardha, Karchana, Allahabad.

On account of acute financial losses it has become impossible to run the factory economically and there is no future prospects also. The Company has been consistently running at losses since they took over the factory on Leave and Licence basis from M/s Universal Tyres Ltd. on 1.2.1977.

The M/s Universal Tyres Ltd. who was running the factory Before 1.2.1977 was also running at heavy loss. We after taking the factory on Leave and licence basis on 1.2.1977 tried to improve the factory and its working by spending huge amount including installing new machines and employing experienced staff so that company may be able to run on profit and we have run the factory about 9 years, but the factory was always running at loss. Inspite of heavy losses we continue to run the factory with the hope that in near future the factory will run in profit and we are not convinced that there is no chance of earning any profit and the future prospects of the factory is also gloomy and it is not possible to run the factory economically and for this reasons we are closing our factory from 2.11.86 and for which we have already moved an application u/s 6W of Utter Pradesh Industrial Dispute Act to the appropriate authority for closing down factory although the same is not necessary and Section 6W is ultra-virus of the constitution. We hereby give you one month notice with effect from 2.10.1986 u/ s 6-N of Utter Pradesh Industrial Dispute Act.

That your services shall stand retrenched on account of the closure of the factory from 2.11.1986 and you will be paid retrenchment compensation on 2.11.1986 and you should collect you compensation amount on 2.11.1986 from the accounts office in accordance with law on account of closure.

The retrenchment which we are effecting from 2.11.1986 on account of the closure of the factory.

For Jay Shree Tyres & Rubber Products

Sd/- (Factory Manager)

11. From a plain reading of retrenchment notice dated 30.9.1986 issued to Sri Mahendra Nath Mishra, it is clear that employer/Jay Shree Tea & Industries Ltd. had intended to close its factory w.e.f. 2.11.1986, and the services of Mahendra Nath Mishra were retrenched/terminated on account of such closure of factory w.e.f. 2.11.1986 and he was asked to collect retrenchment compensation on 2.11.1986 and since similar notice dated 30.9.1986 was also issued to the petitioner and Learned counsel for respondents could not dispute the factum of issuance and content of such notice to the petitioner, therefore, there can be no scope for doubt to hold that the services of the petitioner were terminated by way of retrenchment vide notice dated 30.9.1986 on account of closure of

factory w.e.f. 2.11.1986, though the retrenchment notice was purportedly issued to him u/s 6-N of the U.P. Industrial Disputes Act without complying with the provisions of Section 6-N of the State Act, therefore, in my considered opinion, the aforesaid retrenchment/termination notice was pretended to be issued to the petitioner u/s 6N of the U.P. Industrial Disputes Act, but it was infact and in effect was issued on account of closure of the undertaking as revealed from notice itself, accordingly, I have no hesitation to hold that the petitioner's services were terminated not on account of his retrenchment u/s 6-N of the U.P. Industrial Disputes Act, instead thereof his services were terminated on account of closure of the undertaking.

12. Thus, in view of undisputed facts of the case, further the question arises for consideration is that as to whether Labour Court had jurisdiction to decide the application of the petitioner u/s 33-C(2) of the Industrial Disputes Act and/or Section 6-H (2) of the U.P. Industrial Disputes Act claiming computation of his wages and other allowances from the date of his termination from services by treating him in continuous service by virtue of Section 25-O (6) of the Industrial Disputes Act and/or Section 6-W(6) of the U.P. Industrial Disputes Act on account of illegal closure of the undertaking without challenging his termination/retrenchment through industrial dispute raised before the Labour Court?

13. To examine aforesaid controversy, first of all it is necessary to examine the content and scope of Section 33-C(2) of the Industrial Disputes Act and/or Section 6-H(2) of the U.P. Industrial Disputes Act. Section 33-C of the Industrial Disputes Act, reads as under:

Section 33-C(1): Where any money is due to a workman from an employer under a settlement or an award or under the provisions of [Chapter VA or Chapter VB] the workman himself or any other person authorised by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue:

Provided that every such application shall be made within one year from the date on which the money became due to the workman from the employer:

Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules

that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government [within a period not exceeding three months]:

[Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit.]

(3) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case.

(4) The decision of the Labour Court shall be forwarded by it to the appropriate Government and any amount found due by the Labour Court may be recovered in the manner provided for in sub-section (1).

14. Section 6-H(2) of the U.P. Industrial Disputes Act reads as under:

Section 6-H(2) : Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the State Government, and the amount so determined may be recovered as provided for in sub-section(1).

15. From a plain reading of the aforesaid provisions of the Industrial Disputes Act (Central) and State Act it is clear that the provisions contained under both the statutes are identical, therefore, it can be held that content and scope of aforesaid provisions contained under both the Acts are also identical.

16. While considering the content and scope of Section 33-C(2) of the Industrial Disputes Act in The Central Bank of India Ltd. Vs. P.S. Rajagopalan etc., , the Apex Court held that the scope of Section 33-C(2) takes within its purview the cases of workman who claimed that the benefits to which they are entitled should be computed in terms of money even though the right to benefit on their claim is disputed by their employer. Pertinent observations made by the Apex Court in paras 16, 18 and 19 of the decision are as under:

16. Let us then revert to the words used in Section 33-C(2) in order to decide what would be its true scope and effect on a fair and reasonable construction. When sub-section (2) refers to any workman entitled to receive from the employer any benefit there specified, does it mean that he must be a workman whose right to receive the said benefit is not disputed by the employer? According to the appellant, the scope of sub-section (2) is similar to that of sub-section (1) and it is pointed out that just as under sub-section (1) any disputed question about the workmen's right to receive the money due under an award cannot be adjudicated upon by the appropriate Government, so under sub-

section (2) if a dispute is raised about the workmen's right to receive the benefit in question, that cannot be determined by the Labour Court. The only point which the Labour Court can determine is one in relation to the computation of the benefit in terms of money. We are not impressed by this argument. In our opinion, on a fair and reasonable construction of sub-section (2) it is clear that if a workman's right to receive the benefit is disputed, that may have to be determined by the Labour Court. Before proceeding to compute the benefit in terms of money the Labour Court inevitably has to deal with the question as to whether the workman has a right to receive that benefit. If the said right is not disputed, nothing more needs to be done and the Labour Court can proceed to compute the value of the benefit in terms of money; but if the said right is disputed; the Labour Court must deal with that question and decide whether the workman has the right to receive the benefit as alleged by him and it is only if the Labour Court answers this point in favour of the workman that the next question of making necessary computation can arise. It seems to us that the opening clause of sub-section (2) does not admit of the construction for which the appellant contends unless we add some words in that clause. The Clause "Where any workman is entitled to receive from the employer any benefit" does not mean "where such workman is admittedly, or admitted to be, entitled to receive such benefit." The appellant's construction would necessarily introduce the addition of the words "admittedly, or admitted to be" in that clause, and that clearly is not permissible. Besides, it seems to us that if the appellants construction is accepted, it would necessarily mean that it would be at the option of the employer to allow the workman to avail himself of the remedy provided by sub-section (2), because he has merely to raise an objection on the ground that the right claimed by the workman is not admitted to oust the jurisdiction of the Labour Court to entertain the workman's application. The claim u/s 33-C(2) clearly postulates that the determination of the question about computing the benefit in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-section (2). As Maxwell has observed "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution". We must accordingly hold that Section 33-C(2) takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers. Incidentally, it may be relevant to add that it would be somewhat odd that under sub-section (3), the Labour Court should have been authorised to delegate the work of computing the money value of the benefit to the Commissioner if the determination of the said question was the only task assigned to the Labour Court under sub-section (2). On the other hand, sub-section 3 becomes intelligible if it is held that what can be assigned to the Commissioner includes only a part of the assignment of the Labour Court under sub-section (2).

18. Besides, there can be no doubt that when the Labour Court is given the power to allow an individual workman to execute or implement his existing individual rights, it is virtually exercising execution powers in some cases, and it is well-settled that it is open to the Executing Court to interpret the decree for the purpose of execution. It is, of course, true that the executing Court cannot go behind the decree, nor can it add to or subtract from the provision of the decree. These limitations apply also to the Labour Court; but like the executing Court, the Labour Court would also be competent to interpret the award or settlement on which a workman bases his claim u/s 33-C(2). Therefore, we feel no difficulty in holding that for the purpose of making the necessary determination u/s 33-C(2), it would, in appropriate cases, be open to the Labour Court to interpret the award or settlement on which the workman's right rests.

19. We have already noticed that in enacting Section 33-C the legislature has deliberately omitted some words which occurred in Section 20(2) of the Industrial Disputes (Appellate Tribunal) Act, 1950. It is remarkable that similar words of limitation have been used in Section 33-C(1) because Section 33-C(1) deals with cases where any money is due under a settlement or an award or under the provisions of Chapter VA. It is thus clear that claims made u/s 33-C(1), by itself can be only claims referable to the settlement, award or the relevant provisions of Chapter VA. These words of limitations are not to be found in Section 33-C(2) and to that extent, the scope of Section 33-C(2) is undoubtedly wider than that of Section 33-C(1). It is true that even in respect of the larger class, of cases which fall u/s 33-C(2), after the determination is made by the Labour Court the execution goes back again to Section 33-C(1). That is why Section 33-C(2) expressly provides that the amount so determined may be recovered as provided for in sub-Section (1). It is unnecessary in the present appeals either to state exhaustively or even to indicate broadly what other categories of claims can fall u/s 33-C(2). There is no doubt that the three categories of claims mentioned in Section 33-C(1) fall u/s 33-C(2) and in that sense, Section 33-C(2) can itself be deemed to be a kind of execution proceeding; but it is possible that Claims not based on settlements, awards or made under the provisions of Chapter V A, may also be competent u/s 33-C(2) and that may illustrate its wider scope. We would, however, like to indicate some of the claims which would not fall u/s 33-C(2), because they formed the subject-matter of the appeals which have been grouped together for our decision alongwith the appeals with which we are dealing at present. If an employee is dismissed or demoted and it is his case that the dismissal or demotion is wrongful, it would not be open to him to make a claim for the recovery of his salary or wages u/s 33-C(2). His demotion or dismissal may give rise to an industrial dispute which may be appropriately tried, but once it is shown that the employer has dismissed or demoted him, a claim that the dismissal or demotion is unlawful and, therefore, the employee continues to be the workman of the employer and is entitled to the benefits due to him under a pre-existing contract, cannot be made u/s 33-C(2). If a settlement has been duly reached between the

employer and his employees and it falls u/s 18(2) or (3) of the Act and is governed by Section 19(2), it would not be open to an employee, notwithstanding the said settlement, to claim the benefit as though the said settlement had come to an end. If the settlement exists and continues to be operative, no claim can be made u/s 33-C(2) inconsistent with the said settlement. If the settlement is intended to be terminated, proper steps may have to be taken in that behalf and a dispute that may arise thereafter may be dealt with according to the other procedure prescribed by the Act. Thus, our conclusion is that the scope of Section 33-C(2) is wider than Section 33-C(1) and cannot be wholly assimilated with it, though for obvious reasons, we do not propose to decide or indicate what additional cases would fall u/s 33-C(2) which may not fall u/s 33-C(1). In this connection, we may incidentally state that the observations made by this Court in the case of Punjab National Bank Limited Vs. K. L. Kharbada, that Section 33-C is a provision in the nature of execution should not be interpreted to mean that the scope of Section 33-C(2) is exactly the same as Section 33-C(1) (at P. 238 (of Lab LJ) : (at pp. 489-490 of AIR).

17. In Chief Mining Engineer East India Coal Co. Ltd. Vs. Rameswar and Others, , the benefit provided in the Bonus scheme under the Coal Mines Provident Fund and Bonus Scheme Act, 1948, which was to be computed was held to be fallen under subsection (2) of Section 33-C of the Industrial Disputes Act (Central) and Labour Court, therefore, had jurisdiction to entertain and try such claim of workman. The Apex Court in para 4 of the decision held as under:

4. The following propositions on the question as to the scope of Section 33-C(2) are deducible from these three decisions :

.....

(4) Section 33-C(1) applies to cases where money is due to a workman under an award or settlement or under Chapter V-A of the Act already calculated and ascertained and therefore there is no dispute about its computation. But subsection 2 applies both to non-monetary as well as monetary benefits. In the case of monetary benefit it applies where such benefit though due is not calculated and there is a dispute about its calculation;

(5) Section 33-C(2) takes within its purview cases of workman who claim that the benefit to which they are entitled should be computed in terms of money even though the right to the benefit on which their claim is based is disputed by their employers. It is open to the Labour Court to interpret the award or settlement on which the workman's right rests.

(8) Since proceedings u/s 33-C(2) are analogous to execution proceedings and the Labour Court called upon to compute in terms of money the benefit claimed by a workman is in such cases in the position of an executing Court, the Labour Court like the executing Court in execution proceedings governed by the Code of Civil Procedure, is competent u/s 33-C(2) to interpret the award or settlement where the benefit is claimed under such award or settlement and it would be

open to it to consider the plea of nullity where the award is made without jurisdiction.

It is clear that the right to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer. Since the scope of sub-section (2) is wider than that of sub-section (1) and the sub-section is not confined to cases arising under an award, settlement or under the provisions of Chapter V-A, there is no reason to hold that a benefit provided by a statute or a Scheme made thereunder, without there being anything contrary under such statute or Section 33-C(2) cannot fall within sub-section 2. Consequently, the benefit provided in the bonus scheme made under the Coal Mines Provident Fund and Bonus Schemes Act, 1948 which remains to be computed must fall under sub-section (2) and the Labour Court therefore had jurisdiction to entertain and try such a claim, it being a claim in respect of an existing right arising from the relationship of an industrial workman and his employer. The contention that the Labour had no jurisdiction because the claim arose under the said Scheme or because the benefit was monetary or because it involved any substantial question between the Company and the workmen must, in view of the said decisions, fail.

18. From a close analysis of provisions contained in Sections 33-C(1) and 33-C(2) of the Industrial Disputes Act (Central) and law laid down by Apex Court indicated herein before it is clear that Section 33-C(1) applies to the cases where money is due to a workman under (i) an award or (ii) settlement or under the provisions of (iii) Chapter V-A or Chapter V-B of the Act already calculated and ascertained and there is no dispute about its computation. But sub-section-2 applies to monetary benefits as well as such other benefits which are capable of being computed in terms of money. In case of monetary benefit it applies where such benefit though due is not calculated even though there is dispute about its calculation. Not only this but Section 33-C(2) takes within its purview, cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money even though the right to benefit on which their claim is based is disputed by their employers. Where the right to benefits on which their claim is based is disputed by the employer, the Labour Court is empowered to hold an enquiry about the existence of the such right of the workmen and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-section (2). Since the scope of sub-section (2) is wider than that of sub-section (1) and sub-section (2) is not confined to cases arising under an award, settlement or under the provisions of Chapter V-A or Chapter V-B of the Act, therefore, there is no reason to hold that a benefit provided by a statute or scheme made thereunder cannot fall within sub-section (2). It was also held in the aforesaid cases that the right to benefit which is sought to be computed must be an existing one i.e. to say already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer.

19. Now coming to the content and scope of the provisions of Section 25-O of the Industrial Disputes Act (Central) and/or Section 6-W of the U.P. Industrial Disputes Act, it is to be noted that Section 25-O of the Central Act is an analogous to Section 6-W of the State Act, therefore, it would be useful to refer the provisions of Section-25-O of the Industrial Disputes Act, 1947 (Central) first, thereafter Section 6-W of the U.P. Industrial Disputes Act, 1947. Section 25-O of the Industrial Disputes Act reads as under :

25-O. Procedure for closing down an undertaking.--(1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner:

Provided that nothing in this subsection shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.

(2) Where an application for per-mission has been made under sub-section (1), the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workman.

(3) Where an application has been made under sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting or refusing to grant permission shall, subject to the provisions of sub-section (5), be final and binding on all the parties and shall remain in force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of

such reference.

(6) Where no application for permission under sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

(8) Where an undertaking is permitted to be closed down under sub-section (2) or where permission for closure is deemed to be granted under sub-section (3), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.

20. Section 6-W of the U.P. Industrial Disputes Act, 1947 reads as under:

6-W. Procedure for closing down an undertaking.--(1) An employer who intends to close down an undertaking of an industrial establishment shall, in the prescribed manner, apply, for prior permission, at least ninety days before the date on which the intended closure is to become effective, to the State Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner:

Provided that nothing in this subsection shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.

(2) Where an application for permission has been made under sub-section (1), the State Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under sub-section (1) and the State Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have

been granted on the expiration of the said period of sixty days.

(4) An order of the State Government granting or refusing to grant permission shall, subject to the provisions of sub-section (5), be final and binding on all the parties and shall remain in force for one year from the date of such order.

(5) The State Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(6) Where no application for permission under sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the State Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary to do so, by order, direct that the provisions of sub-section (1) shall not apply in relation to such period as may be specified in the order.

(8) Where an undertaking is permitted to be closed down under sub-section (2) or where permission for closure is deemed to be granted under sub-section (3), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average--pay for every completed year of continuous service or any part thereof in excess of six months.

21. From a careful reading of provisions of Section 25-O sub-section (1) of the Industrial Disputes Act (Central), it is clear that where an employer who intends to close down an undertaking of an industrial establishment to which Chapter V-B applies, shall apply, for prior permission at least 90 days before the date on which the intended closure to become effective, to the appropriate Government, stating clearly the reasons for intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in prescribed manner. However, this sub-section shall not apply to an undertaking set up for constructions of buildings, bridges, roads, canals, dams or for other construction works. Sub-section (6) postulates that where no application for permission under sub-section (1) is made within the period specified therein i.e. within 90 days before intended closure, or where the permission for closure has been refused, the closure of the undertaking shall be

deemed to be illegal from the date of closure and workmen shall be entitled to all benefits under any law for the time being in force as if the undertaking had not been closed down.

22. Thus, from a joint reading of sub-section (1) and sub-section (6) of Section 25-O of the Industrial Disputes Act, it is clear that statute itself has provided the mode and manner of closure of undertaking and consequences flowing from violation of procedure of closure of undertaking and refusal to grant permission for closure. First consequence which shall be ensued therefrom is that closure of undertaking shall be deemed to be illegal from the date of closure and second consequence is that workmen shall be entitled to all benefits under any law for time being in force as if the undertaking had not been closed down. In my opinion, there can be no difficulty in understanding the correct meaning and import of the first consequence of the illegal closure of the undertaking contained in the first part of sub-section (6) of Section 25-O of the Industrial Disputes Act but it is not easy to understand the correct meaning and import of the second consequence contained in second part of Section 25-O(6) of the said Act, without any assistance from interpretation of statute and judicial pronouncements in respect of deeming provision used in the sub-section (6) of Section 25-O of the Industrial Disputes Act.

23. In this connection, it would be useful to refer the statement of law contained at pages 307 and 308 in IV Edition of Legislation and interpretation by Late Jagdish Swarup, wherein it is observed that the word "deemed" is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail but in each case it would be question as to with what object the legislature has made such a deeming provision. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give comprehensive description that includes what is obvious, what is uncertain and what is, in ordinary sense, impossible. Similarly in the words and phrases the word "deemed" is also used to mean "regarded as being", it is equivalent to "shall be taken to be." When a statute enacts that something shall be deemed to have been done which in fact and truth was not done, the Court is entitled and bound to ascertain for which purpose and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

24. It is also observed by the author of the said book that the deeming provision creates legal fiction. The effect of such legal fiction is that a position which otherwise would not be obtained is deemed to be obtained under certain circumstances. A legal fiction is one which is not an actual reality but which the law requires the Court to accept it as a reality. In construing the scope of legal

fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate. Where a deeming provision is made in a statute, the state of things will have to be assumed, though such things do not exist, and the rights of the parties will have to be determined on such imaginary things. Therefore in case of legal fiction, the Court believes something to exist which, in reality, does not exist. In other words, it is nothing but a presumption of the existence of a state of affairs which in actual reality is non-existent. When viewed from this context there is not much difference between a legal fiction and a presumption. However, it cannot be said that legal fiction and a presumption are wholly identical in all respects. A presumption may be conclusive or it may be rebuttable. It is conclusive, if no evidence can be permitted to be led to deny it. In case of a presumption which is rebuttable, unless the contrary is established, fictitious state of affairs is presumed to exist as if it is a reality.

25. In view of legal position stated herein before in respect of meaning and import of deeming provision used in a statute, in my opinion, by using deeming provision in sub-section-6 of Section 25-O of the Industrial Disputes Act (Central) and sub-section-6 of Section 6-W of the State Act, the Legislatures have created legal fiction in favour of workmen of an industrial establishment whose services are terminated on account of illegal closure of the undertaking for the purpose of granting them certain benefits which could not be otherwise granted to them due to termination of their services. In construing the scope of legal fiction, it would be proper and even necessary to assume all those facts on which alone such legal fiction can operate. The state of things will have to be assumed, though such things do not exist in reality and right of the parties will have to be determined on such imaginary things. Since on account of illegal closure of undertaking the workmen shall be entitled to all benefits under any law for time being in force as if the undertaking had not been closed down, therefore, in my considered opinion, unless termination of services of workmen on account of illegal closure of the undertaking is ignored as void-ab-initio and workmen are treated to be in continuous service, they cannot be given all the benefits under any law for time being in force, such as salaries, wages and other allowance as if the undertaking had not been closed down, Thus, in order to give full effect to the legal fiction created by the statute i.e. Section 25-O(6) of the Industrial Disputes Act or Section 6-W(6) of the U.P. Industrial Disputes Act, the Courts or Tribunals are bound to assume that workmen are continuing in service until their services are not terminated in accordance with law and the undertaking shall also be assumed as functional for grant of benefits of salary and allowances to the workmen. Though such facts may not exist in reality but the law requires the Courts to accept as reality and right of the parties shall be determined on such imaginary things which are essential for the operation of legal fiction created by the statute and for carrying the same to its logical conclusion. Any other interpretation of Section 25-O(6) of the Industrial Disputes Act to my mind would not serve the purpose of statute creating such legal fiction. In this view of the matter, I have no hesitation to hold that petitioner is entitled to be treated in

continuous service by ignoring the termination of his services as void-ab-initio effected on account of illegal closure of the undertaking from the date of termination of his services w.e.f 12.11.1986 until his services are not terminated in accordance with law and further entitled to receive his full salary and other allowances on the post held by him from the date of termination of his services till the date, and shall continue to receive his salary/ wages and other allowances regularly in future until his services are not terminated in accordance with law. But the aforesaid observation of continuity of services of the petitioner shall be confined only till attaining his age of superannuation under law. However, while computing the past salary/wages of the petitioner-workman, it shall not be open to the Labour Court to deny the salary/wages and other allowance to the petitioner on principle of no work no pay so also in respect of payment of future salary/wages and allowances as said principle is not applicable in given facts and circumstances of the case.

26. In view of the aforesaid findings the question which remains to be addressed is that as to whether the workman is required to raise industrial dispute either under Section- 10 of the Industrial Disputes Act or u/s 4-K of the U.P. Industrial Disputes Act for setting aside the order of termination of his services for grant of relief of reinstatement with continuity of service alongwith back wages before the Labour Court or not?

27. In this connection it is to be noted that validity of termination of service of workmen on account of illegal closure of the undertaking is not required to be adjudicated by the Labour Court for grant of relief of continuity of service and other service benefits such as salary/wages and other allowances to the workmen for the reason that as held earlier that termination of services of workmen on account of closure of the undertaking is not "retrenchment" as defined u/s 2(oo) of the Industrial Disputes Act (Central) and it is "retrenchment" only for limited purpose for payment compensation to the retrenched workmen u/s 25(FFF) of the said Act, therefore, validity of such "retrenchment" of the workmen cannot be examined by the Labour Court for grant of other relief like reinstatement of workmen in service with back wages in cases of bona fide closure of the undertaking. However, on account of bona fide closure of the undertaking, retrenched workmen can straightway claim computation of compensation payable to them u/s 25-FFF of the Industrial Disputes Act by invoking the provisions of Section 33-C(1) and/or Section 33-C(2) of the said Act. But where the services of workmen are terminated/ retrenched on account of illegal closure of the undertaking (as indicated hereinbefore in instant case), in such situation, the legislature has itself created legal fiction u/s 25-O(6) of the Industrial Disputes Act and Section 6-W (6) of the U.P. Industrial Disputes Act for grant of relief continuity of service alongwith full backwages to the workmen, whose services were terminated on account of illegal closure of the undertaking. However in normal course such relief could not be granted by the Labour Court unless the Industrial Dispute is raised before it challenging the validity of termination of services of workmen either under

Section- 10 of the Industrial Disputes Act or u/s 4-K of the U.P. Industrial Disputes Act, but aforesaid relief of reinstatement with continuity of service alongwith back wages can be straight-way granted to the workman due to the legal fiction created by Section 25-O(6) of the. Industrial Disputes Act or by Section 6-W(6) of the U.P. Industrial Disputes Act u/s 33-C(2) of the Industrial Disputes Act or u/s 6-H (2) of the U.P. Industrial Disputes Act for the reason that the provisions of Section 25-O(6) of the Industrial Disputes Act falls under Chapter V-B of the said Act.

28. It is no doubt true that while ascertaining the rights and the entitlement of workmen under the statute i.e. Section 25-O(6) of the Industrial Disputes Act or u/s 6-W(6) of the U.P. Industrial Disputes Act, the Labour Court is required to make an inquiry to the effect that as to whether the services of workmen are terminated on account of illegal closure of the undertaking or due to bona fide closure or otherwise for granting salary and other allowances to them. After holding such inquiry in case it is found that the services of workmen were terminated on account of illegal closure of the undertaking, in such event of the matter relief of continuity of service with backwages shall be straightway granted to them by the Labour Court u/s 33-C(2) of the Central Act and u/s 6-H (2) of the State Act but such inquiry, in my opinion, is incidental to ascertaining the rights of workmen for grant of aforesaid relief. However, in instant case since I have already held that the petitioner's services were terminated on account of illegal closure of the undertaking, therefore, Labour Court is not required to hold such inquiry. Thus, I have no hesitation to hold that in given facts and circumstances of the case, the petitioner was not required to challenge his termination of services effected on account of illegal closure of the undertaking for relief of continuity of service alongwith backwage and payment of future salary and other allowances before the Labour Court which could be granted to the petitioner-workman u/s 33-C(2) of the Central Act and Section 6-H (2) of the U.P. Industrial Disputes Act basing his claim u/s 25-O(6) of Central Act and u/s 6-W(6) of the State Act on account of illegal closure of the undertaking. The view taken by Labour Court in this regard, contrary to the view taken by this Court is wholly erroneous, thus cannot be sustained.

29. The view taken by this Court herein before, finds also support from the view taken by the Apex Court in S.G. Chemicals and Dyes Trading Employees' Union Vs. S.G. Chemicals and Dyes Trading Limited and Another, and a Division Bench of Delhi High Court in Clifton Electroniks and Another Vs. Lt. Governor and Others, .

30. In S.G. Chemicals and Dyes Trading Employees' Union case (supra), Marketing division of company was closed down illegally in contravention of the provisions of Section 25-O(6) of the Industrial Disputes Act. Union of the employees filed a complaint on October 8, 1984 before the Industrial Court Maharashtra Bombay u/s 28 of the Maharashtra Act read with Item No. 9 of Schedule IV thereto. The contention of union in the said complaint was that the

closure of Churchgate Division was contrary to the provisions of Section 25-O of the Industrial Disputes Act and therefore, the employees continued to be in the service of Company notwithstanding the said notice of closure and were entitled to full wages and all allowances as provided in the settlement dated 1st February, 1979 entered into between the company and employees union which were not paid to them, therefore, the company had committed an unfair labour practice under Item 9 of Schedule IV of the Maharashtra Act. The Industrial Court dismissed the said complaint by its order dated 26th July, 1985. Feeling aggrieved against which the union of employees approached the Apex Court. While allowing the appeal preferred by employees' union and setting aside the order passed by the Industrial Court of Maharashtra dated 26th July, 1985, the Apex Court allowed the complaint filed by appellant's union against the respondent by holding that the closure of Churchgate division of S.G. Chemicals and Dyes Trading Limited was illegal and the workmen whose services were terminated on account of such closure be continued and are continuing in the employment of the company on and from September 18, 1984 and are entitled to receive from the company their full salary and all other benefits under the settlement dated 1st February, 1979 entered into between the company and appellant-union from September 18, 1984 and thereafter they were directed to be paid regularly until their services are lawfully terminated according to law. It was also directed that if any workman whose services were purported to be terminated by closing down of the Churchgate division of the company has received retrenchment compensation from the company, the amount of back wages will be set off against such retrenchment compensation and if after such setting off any balance of retrenchment compensation still remains, it will be adjusted by deducting 20% from the periodical salary payable to such workman.

31. The pertinent observations made by the Apex Court in paras 23, 24, 25 and 26 of the said decision are as under:

23.In the present case, there was a settlement arrived at between the Company and the Union under which certain wages were to be paid by the Company to its workmen. The Company failed to pay such wages from September 18, 1984, to the eighty-four workmen whose services were terminated on the ground that it had closed down its Churchgate division. As already held, the closing down of the Churchgate Division was illegal as it was in contravention of the provisions of Section 25-O of the Industrial Disputes Act. Under sub-section (6) of Section 25-O, where no application for permission under sub-section (1) of Section 25-O is made, the closure of the undertaking is to be deemed to be illegal from the date of the closure and the workmen are to be entitled to all the benefits under any law for the time being in force, as if the undertaking had not been closed down. The eighty-four workmen were, therefore, in law entitled to receive from September 18, 1984, onwards their salary and all other benefits payable to them under the settlement dated February 1, 1979. These not having been paid to them, there was a failure on the part of the Company to implement the said settlement and consequently the

Company was guilty of the unfair labour practice specified in Item 9 of Schedule IV to the Maharashtra Act, and the Union was justified in filing the complaint u/s 28 of the Maharashtra Act complaining of such unfair labour practice.

24. It was lastly submitted that several employees must have taken up alternative employment during the intervening period between the date of the closure of the Churchgate division and the hearing of this appeal and an inquiry, therefore, should be directed to be made into the amounts received by them from such alternative employment so as to set off the amounts so received against the back wages and future salary payable to them. It is difficult to see why these eighty-four workmen should be put to further harassment for the wrongful act of the Company. It is possible that rather than starve while awaiting the final decision on their complaint some of these workmen may have taken alternative employment. The period which has elapsed is, however, too short for the moneys received by such workmen from the alternative employment taken by them to aggregate to any sizeable amount, and it would be fair to let the workmen retain such amount by way of solatium for the shock of having their services terminated, the anxiety and agony caused thereby, and the endeavours, perhaps often fruitless, to find alternative employment.

25. It was also submitted that most of the workmen have already accepted the retrenchment compensation offered by the Company and cannot receive full back wages or future salary until the amount of such compensation received by them is adjusted. Learned counsel for the Union has very fairly conceded that the workmen cannot retain the retrenchment compensation and also claim full back wages as also future salary in full and that the amount of retrenchment compensation received by the workmen should be adjusted against the back wages and future salary. There would be no difficulty in adjusting the amount of back wages against the amount of retrenchment compensation received by the concerned workmen but if thereafter there is still any balance of retrenchment compensation remaining to be adjusted, it would be too harsh to direct that such workmen should continue in service and work for the Company without receiving any salary until the balance of the retrenchment compensation stands fully adjusted; and, therefore, so far as future salary is concerned, only a part of it can be directed to be adjusted against the balance of the retrenchment compensation, provided there is any such balance left after setting off the back wages.

26. In the result, this appeal must succeed and is allowed and the order dated July 26, 1985, passed by the Industrial Court, Maharashtra, Bombay, dismissing the Complaint (ULP) 1273 of 1984 filed by the appellant-Union against the respondents is set aside and the said complaint is allowed and it is declared that the closure of the Churchgate division of S.G. Chemicals and Dyes Trading Limited was illegal and the workmen whose services were terminated on account of such illegal closure continued and are continuing in the employment of the Company on and from September 18, 1984, and are entitled to receive from the

Company their full salary and all other benefits under the settlement dated February 1, 1979, entered into between the Company and the appellant-Union, from September 18, 1984, until today and thereafter regularly until their services are lawfully terminated according to law. If any workman whose services were purported to be terminated by the closing down of the Churchgate division of the Company has received retrenchment compensation from the Company, the amount of back wages will be set off against such retrenchment compensation and if after such setting off any balance of retrenchment compensation still remains, it will be adjusted by deducting 20% from the periodic salary payable to such workman.

32. In Clifton Electronics case (supra) a Division Bench of the Delhi High Court at page 1950 of the report held as under :

In our view, the first part of sub-clause (6) of Section 25-(O) is clearly attracted. It deals with a situation where there is closure but no application is made by the management within the time prescribed in sub-clause (1) of Section 25-(O) for such closure. Sub-clause (1) of Section 25-(O) prescribes a period of 90 days before the intended date of closure. In the present case, the closure was on 31.3.1993 and the application was dated 26.4.1993. It was, therefore, not sent 90 days before the date of closure. Hence, under the first part of sub-clause of Section 25-(O), the closure is, by statutory fiction, deemed illegal. No adjudication by a Labour Court is, therefore, necessary to hold the closure to be illegal. Further, the sub-clause says, the workmen "shall" be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down. This part of the sub-clause confers a right to the benefits. Benefits obviously include wages. There was no evidence or contention that workmen were, during 31.3.1993 and 18.7.1994, otherwise gainfully employed, even assuming that such a contention is permissible under sub-clause (6) of Section 25-(O). If that be so, we do not think that there was any need for adjudication of the right to wages. What merely remained was the quantification of the amount for which Section 33(C)(1) was entirely applicable.

In fact, none of these reasons are necessary because Section 33(C) (1) itself says that for purposes of Chapter V-B (which chapter includes Section 25-(O), Section 33(C)(1) could be straightaway invoked. Admittedly, the words "Chapter V-B" were added in sub-clause (1) of Section 33(C) by the Amending Act 32/76. The facts of the present case relate to 1993-1994 and hence Chapter V-B matters come within Section 33(C)(1). The learned Judge rightly referred to Chapter V-B and Section 33(C)(1) in the judgment under appeal. The objection later raised that the workmen were 44/39 and that Chapter V-B was not attracted cannot, as already stated, be permitted to be raised by the management in as much as the management had obtained the order from the Division Bench that its application, though filed, (though filed beyond the prescribed period) could be disposed of by the Commissioner-cum-Secretary.

33. The submission of learned counsel for respondents that since the workmen

including the petitioner have received retrenchment compensation and terminal dues on receipt of notice of retrenchment/termination dated 30.9.86 and petitioner himself had collected a sum of Rs. 13,536.25 including a sum of Rs. 6,693.75 as gratuity on account of his retrenchment from services, and as such the relationship of employer and employee between the petitioner and answering respondent came to an end, therefore, the application moved by petitioner u/s 33-C(2) of the Industrial Disputes Act (Central) or Section 6-H(2) of the U.P. Industrial Disputes Act was not maintainable, appears to be wholly misconceived and deserves to be rejected for the reason that the aforesaid retrenchment compensation was paid to the petitioner and other workmen of the undertaking on account of closure of said undertaking but once the closure of said undertaking was refused by the State Government and subsequently by the Labour Court and this Court, the closure of undertaking had become illegal from the date of closure itself by a legal fiction created by statute under sub-section (6) of Section 25-O of the Industrial Disputes Act (Central) or Section 6-W(6) of the U.P. Industrial Disputes Act, therefore, consequent actions taken by employer to the illegal closure of the undertaking by making payment of compensation and other terminal dues to the workmen of industry are null and void and can be of no legal consequence and further by said legal fiction created under sub-section (6) of Section 25-O of the Industrial Disputes Act or sub-section (6) of Section 6-W of the U.P. Industrial Disputes Act the workmen became entitled to received all the benefits under any law for time being in force, such as full salary/wages and other allowances, as if the undertaking had not been closed down rather remains as functional, therefore, the aforesaid benefit given by the statute through legal fiction cannot be obviated by paying the retrenchment compensation and other terminal dues to the workmen on account of closure of the undertaking as held by the Apex Court in *Oswal Agro Furane Ltd. and Another Vs. Oswal Agro Furane Workers Union and Others*, , that legal, fiction created by Section 25-O(6) must be given full effect and said fiction cannot be permitted to be defeated by any settlement between the employer and workmen, and settlement entered into between the employer and workmen was held to be void and of no legal consequence. It was also observed by the Apex Court that the provisions contained u/s 25-O are imperative in character would prevail over the right of the parties to arrive at any settlement. Therefore, in this view of the matter, in my opinion, the submission of learned counsel appearing for respondents cannot be accepted. However, as held in *S.G. Chemicals and Dyes Trading Employees Union* case (supra) the amount of retrenchment compensation and other terminal dues received by the workmen shall be adjusted towards the salary/wages payable to workmen on account of illegal closure of the undertaking as the workmen cannot be permitted to retain said compensation and also claim for full back wages and future salary on account of such illegal closure of undertaking, therefore, the amount of retrenchment compensation received by them shall be adjusted towards their salary liable to be paid by the employer on account of illegal closure of undertaking.

34. It was lastly submitted by the learned counsel for the respondents that several employees including the petitioner must have taken up alternative employment during the intervening period between the date of the closure of undertaking and the hearing of this petition, therefore, an enquiry should be directed to be made into the amounts received by them from such alternative employment in case any direction is made for payment of back wages and future salary to the petitioner and other workmen whose services have been terminated on account of closure of the undertaking. In my opinion, in view of the observations made by the Apex Court in para 24 of the decision rendered in *S. G. Chemicals and Dyes Trading Employees' Union* case (supra), the aforesaid submission of the learned counsel for the respondents can also be not accepted. It is possible for petitioner and other workmen to have taken alternative employment during the period consumed in prolonged litigation and they must have earned their livelihood for sustaining their lives and family, therefore, it would fair to let the petitioner and other workmen retain such amount by way of solatium for the shock of having their services terminated, the anxiety and agony caused thereby, and the endeavours, perhaps often fruitless, to find alternative employment.

35. Thus, in view of the aforesaid discussions, in my opinion, the impugned order dated 23.10.2007 passed by the Labour Court, Allahabad, in Misc. Case No. 75 of 2006 contained in Annexure-1 of the writ petition, whereby the Labour Court has rejected the application of the petitioner moved u/s 33-C (2) of the Industrial Disputes Act, 1947, cannot be sustained, accordingly, the same is hereby quashed. The Misc. Case No. 75 of 2006 instituted by the petitioner before the Labour Court, Allahabad, is restored to its original number. The petitioner whose services were terminated on account of illegal closure of the undertaking, shall be deemed to be in continuous service by ignoring the termination of his services and be paid his full salary admissible to his post and other allowances from the date of termination of service till date and further the petitioner shall also be entitled to receive his full salary and other allowances and service benefits from the respondent company regularly month to month in future as if the undertaking had not been closed and rather it remained as functional until the petitioner's services are not terminated according to law but the observation of continuity of the services of the petitioner-workman shall be confined till his attaining the age of superannuation under law.

36. In case the respondent companies have been liquidated and wound up, the amount of back wages and future salary payable to the petitioner, as directed above, shall be paid from the deposits made by the respondent before the Labour Court, Allahabad in pursuance of direction of the Apex Court which is lying with the Labour Court, Allahabad. The Labour Court is directed to compute the salary and wages payable to the petitioner in accordance with the observations made by this Court herein before within three months from the date of production of a certified copy of this order before the Labour Court. In case the amount as indicated herein above, is not with the Labour Court for payment

of past and future salary and other allowances payable to the petitioner, the Labour Court shall take appropriate steps available under law for payment of such salary and allowances to the petitioner from the concerned respondents who are liable to pay under law on account of illegal closure of the undertaking.

37. However, the amount paid to the petitioner as retrenchment compensation and terminal dues on 2.11.1986, in pursuance of the notice of retrenchment shall be adjusted towards payment to be made to the petitioner. In case even after such setting off the compensation received by the petitioner-workman any balance of retrenchment compensation still remains, it will be adjusted by deducting 20% from the periodic salary payable to the petitioner. With these directions/observations, this writ petition stands allowed.