

(2006) 08 GUJ CK 0020
In the Gujarat High Court

Case No : Civil Application No. 9729 of 2006 in Special Civil Application No. 1376 of 2004

Rajeshbhai Jayanyilal Zakhariya

APPELLANT

Vs

Child Development Programme Officer and Another

RESPONDENT

Date of Decision : 29-08-2006

Acts Referred:

Constitution of India, 1950 — Article 12, 136, 226
Industrial Disputes Act, 1947 — Section 17B, 2

Citation : (2006) 08 GUJ CK 0020

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

Bench : Single Bench

Advocate : Nirav C. Thakkar, for the Appellant; P.V. Hathi, for Respondents 1 - 2, for the Respondent

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. Nirav C. Thakkar for the applicant original respondent/workman and Mr. P.V. Hathi, learned Advocate for present opponent original petitioner.

2. Rule. Service of rule is waived by the learned Advocate Mr. Hathi on behalf the original petitioner. In the facts and circumstances of the case, this civil application is taken up for final hearing today itself with the consent of the learned Advocates for the parties.

3. Through this Civil Application, the applicant original workman is praying to direct the present opponents to comply with the provisions of Section 17B of the ID Act, 1947 and order of this Court dated 18th August, 2005 in its true and legal spirit by paying proper wages to the workman forthwith and to clear the arrears till the actual payment.

4. Special Civil Application No. 1376 of 2004 is filed by the petitioner Child Development Programme Officer, Kalavad challenging the award of the labour court, Jamnagar in Reference No. 39 of 2000 dated 11th November, 2003

wherein the labour court has set aside the order of termination and has granted reinstatement with continuity of service with 25 per cent back wages for intervening period. Labour court directed to implement the said award within thirty days from the date of publication thereof. Said petition was filed on 18th December, 2003 before this Court and this Court passed following order on 16th February, 2004:

Rule. Ad.interim relief in terms of para 11(D). Notice as to interim relief returnable on 26th March, 2004.

5. Thereafter, respondent original workman filed the Civil Application No. 3327 of 2005. In the said civil application, he specifically averred that he is not employed in any establishment and not gainfully employed anywhere else. According to the workman, he is in dire need of employment and reinstatement as ordered by the labour court since he is having the liability of maintenance of his aged mother and family. Affidavit in reply has been filed by the original petitioner against the said Civil Application raising contention that the averments made in the civil application are not correct as the workman has been gainfully employed, therefore, application for wages u/s 17B of the ID Act, 1947 is required to be rejected. According to the original petitioner, workman was never employed but he was being engaged subject to availability of work. Affidavit in rejoinder was filed by the workman before this Court against the said reply filed by the petitioner. Sur-rejoinder to the affidavit in rejoinder was filed by the petitioner and considering the civil application, reply thereto and affidavit in rejoinder to reply as well as the sur rejoinder filed by petitioner to affidavit in rejoinder pointing out that the workman lastly in July, 1999 worked for only four days and, therefore, he is entitled for last drawn wages of four days alone at the rate of Rs. 145.00 per day because he was working as driver as per the days mentioned at page 27 of the civil application No. 3327 of 2005, Annexure III to said civil application. Page 27, Annexure III Exh.27 is the statement of working days prepared on the basis of Log book of the workman Rajesh Jayantilal Jankharia for the period from September, 1998 to July, 1999. Same is reproduced as under:

Monthwise Date

Name of Month	Days
September, 1998	3
October, 1998	15
November, 1998	21
December, 1998	25
January, 1999	19
February, 1999	14
March, 1999	19
April, 1999	21
May, 1999	19
June, 1999	21
July, 1999	08

6. Just below the said statement, details of payments as per voucher number, date, amount and days have been given in Annexure-III page 27 which is as under:

Sr. No.	Voucher No	Date	Amount	Days
1	2847	2.1.99	2250.00	1
2	3799	4.3.99	4250.00	30
3	302	3.5.99	2375.00	19
4	730	2.6.99	2750.00	22
5	1024	2.7.99	2375.00	19
6	1367	2.8.99	3915.00	27
7	1715	1.9.99	1015.00	7
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7. This Court (Coram : Hon''ble Mr. Justice M.R. Shah) passed following order on Civil Application No. 3327 of 2005 on 18.8.2005 after taking into consideration the averments made in the civil application, reply thereto as well as affidavit in rejoinder to reply and sur rejoinder to affidavit in rejoinder. Same is reproduced as under:

This is an application for granting the benefits of provision u/s 17(B) of the I.D. Act, 1947. Considering the fact mentioned in the application, affidavit-in-reply and rejoinder and considering the fact that the judgment and award passed by the Labour Court, Jamnagar in Reference (LCJ) No. 39/2002 granting reinstatement which is stayed by this Court therefore, the respondents are directed to pay wages to the petitioner payable u/s 17(B) of the I.D. Act, 1947 from 1.1.2005. Arrears to be paid within 4 weeks from today. It is also further directed that the respondent to pay wages u/s 17(B) of the I.D. Act, 1947 regularly to the petitioner till the main Special Civil Application is heard finally. In the facts and circumstances of the case, office is directed to notify the main Special Civil Application No. 1376/2004 for final hearing in the week commencing from 26th September, 2005.

Rule is made absolute to the aforesaid extent however, there will be no order as to costs.

8. This Court has, thus, directed petitioner to pay wages to the workman u/s 17B of the ID Act, 1947 from January, 2005. Arrears of wages u/s 17B of the ID Act, 1947 were ordered to be paid within 4 weeks from the date of the order. Petitioner was also directed to pay wages u/s 17(B) of the I.D. Act, 1947 regularly to the workman by petitioner till the main Special Civil Application is heard finally and while disposing off the said civil application, office was directed to notify the main Special Civil Application No. 1376/2004 for final hearing in the week commencing from 26th September, 2005. Thus, this Court has concluded the matter after considering the matter upto the stage of sur rejoinder of the petitioner in civil application No. 3327 of 2005 by order dated 18.8.2005.

9. Now, the question has arisen as to how much amount the workman is entitled as wages u/s 17B of the ID Act, 1947 because this civil application has been filed by the workman with a grievance that the original petitioner has been calculating wages for four days in a month payable to the workman as the wages u/s 17B of the ID Act, 1947 and, as against such grievance of the workman, it is the submission of the learned Advocate Mr. Hathi that last drawn wages means the wages of the month in which services of the workman were terminated and workman is entitled only for the wages of the days in which the workman has worked in the month in which his services were terminated and the workman is not entitled monthly wages as there is no provision in Section 17B of the ID Act requiring to make monthly payment to the workman. In this civil application also, original petitioner has filed affidavit in reply raising contention that the workman has been working as driver with one Naginbhai Mehta, a retired Mamlatdar and is receiving Rs. 600.00 p.m. from that work. According to the petitioner, vehicle is

not available with the centre and, therefore, driver is not required by the petitioner. According to the petitioner, family of the respondent workman is not starving and there is no question of violation of the fundamental rights as has been loudly stated by the applicant in this application.

10. In reply to the contention raised by Mr. Hathi, learned Advocate for the petitioner that the vehicle is not available with the petitioner and the work of driver is also not available and, therefore, petitioner is unable to give work to workman as driver, learned Advocate Mr. Nirav Thakkar appearing for the workman has submitted that if that is so, then, respondent workman is prepared to work even as peon on the salary of driver. Considering this statement made by the learned Advocate Mr. Thakkar, it was submitted by the learned Advocate Mr. Hathi on behalf of the petitioner that it will be open for the petitioner to take work from the workman as a peon in any office of the Taluka Panchayat, Kalavad.

11. I have considered the averments made by the applicant in this application as well as the averments made by the opponent original petitioner in its affidavit in reply to this application. I have also considered relevant documents on record at page 30 of the petition which is similar to the document at page 27 of CA No. 3327 of 2005. I have also considered the submissions made by the learned advocates for the parties keeping in view the provisions of Section 17B of the ID Act, objects and reasons thereof.

12. Section 17B of the ID Act, 1947 provides for payment of full wages last drawn by workman inclusive of any maintenance allowance admissible to him in rules if the workman had not been employed in any establishment during such period.

13. Payment towards the wages u/s 17B of the ID Act, 1947 calculated by the petitioner for the days for which the workman had worked in the last month in which his services were terminated is nothing but a joke with the legal aspects of the mandatory provisions. Statutory provisions provide that the workman is entitled for full wages and not the wages alone, otherwise, legislature would have taken note of it that only wages instead of full wages. So, it is having meaning that the full wages would mean monthly wages and not the wages for the days for which the workman had worked in the month in which his services were terminated. So, there is difference between the wages last drawn and full wages last drawn which would suggest that the employer shall have to pay full wages and not the last drawn wages alone which are received by the workman in the month wherein his services were terminated by the employer. If the submission made by the learned Advocate Mr. P.V. Hathi is accepted, then, it would be the meaning and interpretation that if the workman has not worked for a single day in the month in which his services were terminated, then, his last drawn wages would come to nil therefore, employer is not required to pay single pie to the workman towards the wages u/s 17B of the ID Act, 1947 though the award of reinstatement made by the labour court has been stayed by the High Court or the Supreme Court as the case may be. Another example is that if the workman

whose services were terminated had worked for only two days in a month in which his services were terminated, then, when the question for payment of wages u/s 17B of the ID Act, 1947 would arise, such a workman would get the amount of wages u/s 17B of the ID Act, 1947 only for two days and not the full wages last drawn. This would be the situation if the contention and calculation sought to be canvassed by the original petitioner is accepted which would, in sum and substance, nullifying the effect of provisions of Section 17B of the ID Act, 1947 which could not be the object of enactment of Section 17B of the ID Act, 1947. Therefore, Legislature has clearly provided that where in any case a labour court, tribunal or national tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in High Court or the Supreme Court, the employer shall be liable to pay such workman during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him. If the intention of the legislature would have been otherwise while enacting these provisions, then, the legislature would not have used the words "full wages last drawn".

14. Looking to the facts of the case before hand, as per Annexure III page 27 to Civil Application No. 3327 of 2005, full wages last drawn wages of the workman for about 30 days comes to Rs. 4250/- i.e. Full wages last drawn by workman and not the wages last drawn by the workman. Therefore, interpretation sought to be canvassed by the Public and Statutory Body is having adverse impact on the right of the workman in calculating the wages of Rs. 145.00 per day for four days in July, 1999. Looking to Section 17B itself, it suggests "full wages last drawn by him inclusive of maintenance allowance admissible to him under any rule. According to my opinion, full wages last drawn would be the wages of 30 days last drawn by workman as per Voucher of March, 1999 which comes to Rs. 4250/- and the workman would be entitled for the said amount as the full wages last drawn by him u/s 17B of the ID Act, 1947. Therefore, submission made by Mr. Hathi, learned Advocate for original petitioner cannot be accepted as the same is contrary to the object of Section 17B of the ID Act, 1947.

15. Object of enacting Section 17B of the ID Act, 1947 is required to be considered. The objects and reasons for enacting said provisions have been considered by the Hon"ble Apex Court in Dena Bank v. Kiritkumar T. Patel reported in AIR 1998 SC 511. Therefore, para 7 of said decision is reproduced as under:

7. It would be convenient at this stage to set out the provisions contained in Section 17-B of the Act which reads as under:

"Section 17-B. Payment of full wages to workman pending proceedings in higher courts. - Where in any case a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn

by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:

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

The objects and reasons for enacting the said provisions were as follows:

When Labour Courts pass award of reinstatement, these are often contested by an employer in the Supreme Court or High Courts. It was felt that the delay in the implementation of the award causes hardship to the workman concerned. It was, therefore, proposed to provide the payment of wages last drawn by the workman concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court or High Courts.

It would thus appear that the object underlying the enacting of the provisions contained in Section 17-B is to give relief to the workman in whose favour an award of reinstatement has been passed by the Labour Court and the said award is under challenge in the High Court or this Court. The said relief has been given with a view to relieve the hardship that would be caused to a workman on account of delay in implementation of the award as a result of the pendency of the proceedings in the High Court or this Court. The question for consideration is : what is the extent to which such relief has been granted to a workman under this provision? The objects and reasons do not indicate an answer to this question and its answer has to be found in the provisions of the enactment. Since the expression "full wages last drawn" in Section 17-B has been construed by the various High Courts in the decisions referred to above we would briefly refer to the same.

16. Looking to the objects and reasons for enacting said provisions in the Statute Book, it appears that it was felt by the legislature that the delay in the implementation of the award causes hardship to the workman concerned, legislature, therefore, proposed to provide the payment of full wages last drawn by the workman concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court or High Courts. Apex court considered and interpreted the words "full wages last drawn in the said decision to which ultimately the workman was entitled as defined in Clause (rr) of Section 2 of the ID Act, 1947. It is also considered by the apex Court that Parliament has used the words " full wages last drawn" indicated wages they were actually paid and not the amount payable , meaning thereby, whatever amount of wages as per the award may not be paid but full wages drawn by the workman shall have to be paid by the employer during the pendency of proceedings before the High Court or Supreme Court. This amount is non refundable and not recoverable in

the event of setting aside of the award and it is not in any way precluding High Court or Supreme Court to pass order directing payment of the higher amount to workman if such higher amount is considered proper in the interest of justice. Therefore, in view of these observations made by the apex court and also considering the objects and reasons of inserting provisions of Section 17B in the Statute Book, according to my opinion, workman is entitled for full wages last drawn by him of Rs. 4250.00 as per Voucher of March, 1999 for 30 days as the wages u/s 17B of the ID Act, 1947.

17. In *The Management of M/s. Praga Tools Ltd. And The Chairman cum Presiding Officer and Anr.* reported in I LLJ 1996 page 748, Section 17B of the ID Act, 1947 has been interpreted by the Division Bench of Andhra Pradesh High Court. It has been observed as under in para 4, 5 and 6 of the Judgment:

4. The above, in our opinion, answers the second and the third contention in full and we are in respectful agreement with the above view. When Section 17B creates a liability upon the employer and conversely a right in the workman to pay and receive wages last drawn by him inclusive of any maintenance allowance admissible to him under any rule during the period of pendency of the proceedings in the Court with the exception that if during this period or any part thereof he was gainfully employed elsewhere, he would not be entitled to such wages for the period of gainful employment, the Court has unfettered power under Article 226 of the Constitution to grant stay of the final adjudication i.e. The award. But this power cannot be used to destroy the statutory right granted to a workman u/s 17B of the Act i.e. A right *pendente lite* which has been recognized to remove the hardship and to protect the interest of workman. The workman cannot be left uncared to suffer a total deprivation of wages merely because the employer has chosen and accordingly initiated a proceeding under Article 226 or 136 of the Constitution. We have good reasons to hold that the expression "wages last drawn by him" cannot mean the quantum of money received by the workman last from the employer before he was discharged or dismissed from service. The Act carries a definition of "wages" to mean SAll remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled be payable to a workman in respect of his employment, or of work done in such employment, and includes -

(i) Such allowances (including dearness allowance) as the workman is for the time being entitled to

(ii) the value of any house accommodation, of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grain or other articles.

(iii) and travelling concession.

Any commission payable on the promotion of sales or business or both; but does not include (a) any bonus; (b) any contribution paid or payable by the employer

to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service. S(See Section 2(rr) of the Industrial Disputes Act). According to this "wages" is a comprehensive expression for all remuneration capable of being expressed in terms of money and payable to a workman in respect of his employment if the terms of employment expressed or implied were fulfilled. The expression "full wages last drawn by him thus must mean the wages which were last payable to the workman and will pick up with the non payment from the last drawn until for the reason of suspension of the award of reinstatement, he is entitled to draw. Logically this can only mean that on such suspension of the award of reinstatement, the employee shall receive full wages payable on the date of suspension of the award of reinstatement. Even proceeding on the footing that Sfull wages last drawn must mean the pay packet which the employee had received last from the employer the words "inclusive of any maintenance allowance admissible to him under any rule of the workman" are only additional or supplementary payment to him as allowances including the dearness allowance etc. , which are included in the definition of wages must form part of the wages draw by him. If this is extended to the rule of revision of scales of pay and wages and the factors which are taken into account, increase in wages for the reasons of revision of pay and allowances must be included in the quantum of money payable to the workman. If this is not accepted and the pay and allowances are kept at the level of the last pay packet of the employee, the increase in dearness allowance which is merged at one stage in the revised scale of pay and new rate of dearness allowance added upon the revised scale of pay and must continue to add to the wages last drawn by the workman. This logically will come almost on par with the current rate of wages paid to the employee or workman of the grade of the workman whose award of reinstatement is sought to be suspended. We have, however, a Division Bench judgment of the Karnataka High Court, in the case of M/s Visveswaraya Iron and Steel Co. Ltd. Vs. M. Chandrappa and another, While not accepting the contention that revised scale of pay will have to be payable, it is stated.

"Hence we are of the view that the content of the words "full wages last drawn" would take into their fold the wages drawn on the date of termination of the services plus yearly increment and the DA to be worked out till the date of the award and that sum has to be paid to the workman during the pendency of the proceeding before this Court. We would like to make it clear that the wages that would be worked out upto the date of the award shall have to be paid during the pendency of the proceedings before this Court in the event of the award is stayed, without reference to revision of wages if any during the pendency of proceedings before this Court.

Bombay High Court's view in the case of Carona Sahu Co. Ltd. Vs. Abdul Karim Munafkhan and Others, however is similar to the view taken by us in these

words;

The Parliament had introduced Section 17B of the Act with the object that the workman is not deprived of wages which he is entitled to draw in case the award directing reinstatement is implemented. The workman is deprived of the wages payable in pursuance of the award only because of pendency of the proceedings. The award directing reinstatement and continuity of service makes it clear that the dismissal of the employee was illegal and in the eyes of law the workman continued in service and consequently the workman was entitled also to payment of backwages. The determination of the backwages is only on the basis of what was the workman would have drawn during the period commencing from the date of dismissal and till the date of reinstatement and the quantum of backwages includes all the permissible increases during that interregnums. The expression "full wages last drawn" in our judgment means the full wages which the workman was entitled to draw in pursuance of the award and the implementation of which is suspended during the pendency of the proceedings. The submission of Shri Bhaktal, that the expression "last drawn" suggests that the workman is entitled only to that amount which was received by him at the time of dismissal, cannot be accepted. Though the word "drawn" connotes past tense, it is obvious that the proper construction of the section is that the workman is entitled to the full wages which the workman would have been entitled to draw but for the pendency in this Court.

5. We are in respectful agreement with the view expressed by Bombay High Court. We conclude accordingly that the learned Single Judge has committed no error.

6. There is hardly any reason for us to detain our conclusions for answering the argument that the court cannot take into account the date of the award and should order, if at all, payment in lieu of reinstatement, from the date the award becomes executable. Date of award shall always be the date when the award becomes enforceable and if backwages are not granted and only reinstatement is ordered, the reinstatement shall take place only when the award is enforced and it can be enforced only from the date it is made enforceable.?

Also see the judgments in the same subject as under:

1. Sasikala Kumari Vs. Piravathoor Service Co-operative Bank Ltd.,
2. Municipal Committee, Mohindergarh v. Presiding Officer, Labour Court, Gurgaon and Anr. 2002 Lab IC 203.
3. M/s Visveswaraya Iron and Steel Co. Ltd. Vs. M. Chandrappa and another,
4. Shri Paramjit Singh Ahuja Vs. Presiding officer Labour Court-VI and others,
5. Sandhya Baul v. Director of Panchayat and Anr. 2006 1 CLR 299.
6. Executive Engineer v. Ashokbhai J. Desai 2004 5 GHJ (246).

7. Secretary, Department of Canteen Management Vs. Krishna Kumar Saxena,
8. Krishna Ramanujam V. Vs. Pandian Roadways Corporation Ltd. and Another,
9. RK Nigam v. Swadeshi Cotton Mills and Anr. 2004 SCC (L&S) 195.
10. Narender Kumar and Ors. And Management, Taj Services Ltd. and Anr. 2001 (90) FLR 356.
11. Ram Dhan And Judge, Labour Court No. 2 Jaipur and Ors. 2003 II LLJ Rajasthan 959.
12. Hindustan Carbide Pvt. Ltd. and Government of NCT of Delhi and Ors. 2002 II LLJ 166 Delhi.
13. Indra Perfumery CO. through Sudershab Oberoi And Presiding Officer and Ors. 2004 II LLJ Delhi Page 413.

18. As regards the contention of Mr. Hathi that the workman is not entitled for the wages u/s 17B of the ID Act, 1947 because he is engaged by one retired Mamlatdar Naginbhai as a driver and earning Rs. 600.00 p.m. for such contention, this Court is of the view that the bald averments without any positive proof thereof cannot disentitle the workman from claiming wages u/s 17B of the ID Act, 1947. Petitioner is required to establish this fact by producing and proving cogent and convincing evidence to that effect to the satisfaction of this Court. So, in absence of any positive proof thereof, mere averments made in the reply are not enough, unless the affidavit of said Naginbhai is produced, court cannot consider the same. Respondent has denied that he is employed in any establishment and it is also denied that he is getting adequate remuneration. Even if it is assumed that what is contended by Mr. Hathi is correct, then also, required to be considered that merely because workman is engaged and/or receiving some amount, say Rs. 600.00 as alleged by Mr. Hathi, by doing some petty miscellaneous work, whether it can be considered to be gainful employment in any establishment, looking to the words "gainfully employed in any establishment" employed in Section 17B of the ID Act, 1947? Whether it can be considered to be the adequate remuneration as per the language of Section 17B of the ID Act, 1947 ? There is purpose behind employing the words "gainfully employed in any establishment" and "adequate remuneration in Section 17B of the ID Act, 1947. It gives powers to the Court while deciding an application u/s 17B of the Act that if the court is satisfied that the workman is not receiving adequate remuneration by doing the work or if the workman is not employed in any establishment, then, court can ignore such things while considering the application u/s 17B of the ID Act, 1947, and court can pass appropriate order granting full wages last drawn by the workman from the employer. SO, according to my opinion, even if it is believed that the workman is doing driving work and earning Rs. 600.00 p.m. from such work as contended by Mr. Hathi, according to my opinion, it is necessary for workman to do the same for survival of his own and his family in these hard days when prices of every

essential commodities are going up day by day and the amount of Rs. 600.00 in these days can never be considered to be the adequate remuneration or amount, therefore, that contention cannot be considered on two grounds, one that there is no positive proof thereof and another is that even if positive proof is there, it cannot be construed as an employment in any establishment and second, remuneration of Rs. 600.00 cannot be considered as adequate remuneration. Therefore, according to my opinion, if such miscellaneous work is done by workman for maintaining himself and his family while keeping body and soul together and not to starve during this interim period, that cannot be considered to be gainful employment of the workman. This aspect has been considered by the apex court in case of *Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others*, , the Apex Court has observed in Para 21 as under:

21. It was next contended on behalf of the appellant that reinstatement with full back wages be awarded to him. Mr. P. K. Jain, learned Counsel for the employer countered urging that there is evidence to show that the appellant was gainfully employed since the termination of service and therefore he was not entitled to back-wages. In support of this submission Mr. Jain pointed out that the appellant in his cross-examination has admitted that during his forced absence from employment since the date of termination of his service, he was maintaining his family by helping his father-in-law Tara Chand who owns a coal-depot, and that he and the members of his family lived with his father-in-law and that he had no alternative source of maintenance. If this is gainful employment, the employer can contend that the dismissed employee in order to keep his body and soul together had taken to begging and that would as well be a gainful employment. The gross perversity with which the employer had approached this case had left us stunned. If the employer after an utterly unsustainable termination order of service wants to deny back wages on the ground that the appellant and the members of his family were staying with the father-in-law of the appellant as there was no alternative source of maintenance and during this period appellant was helping his father-in-law Tara Chand who had a coal depot, it cannot be said that the appellant was gainfully employed. This was the only evidence in support of the submission that during his forced absence from service he was gainfully employed. This cannot be said to be gainful employment so as to reject the claim for back wages. There is no evidence on the record to show that the appellant was gainfully employed during the period of his absence from service. Therefore, the appellant would be entitled to full back wages and all consequential benefits.

This Court (Coram : Jayant Patel, J.) had occasion to consider the term "full wages last drawn" in case of *TJ Shukla v. Sr. Supdt. of RMS* reported in 2004 (1) GLH 672. This Court observed as under in para 7 of the judgment:

7. Mr. Mehta, appearing for the original petitioner submitted inter alia that the prior to the raising of the dispute under the ID Act, the workman was even otherwise being offered work not for a continuous period but only for few days in

a month as and when there was work, and he submitted that on an average, the workman was offered work for 10 to 11 days in a month, and accordingly the wages as per the requirement of Section 17B are calculated, keeping in mind the minimum wages prescribed for each day, and payment is made accordingly. He also submitted that since the reinstatement is made on the basis of availability of the work, the engagement is continued and whenever work is available, the services of the applicant is used as an Outsider Extra Departmental Agent and he is being paid minimum wages accordingly. Since the original engagement was also for 10 to 11 days on an average basis, and at present since the work is offered for 13 to 14 days and payment is made accordingly, in the submission of Mr. Mehta, reinstatement is accordingly effected and therefore, there is no question of paying further more wages as per Section 17B, and in any event, as per his submission, there is compliance to Section 17B since the backwages are already paid.

Section 17B of the Industrial Act reads as under:

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

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

The language used by the legislature is "full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule". Therefore, if the petitioner has calculated the wages drawn by the workman at the relevant point of time, lastly drawn on the basis of work being offered to him keeping in view the number of days of engagement, it cannot be validly contended by the workman that calculation must be for the full month period, i.e. 30 days, and not on the basis of the work being offered to him prior to his reinstatement. So far which was being offered to him prior to his reinstatement. So far concerned, the calculation has been made on the basis of minimum wages but since the number of days are considered by the original petitioner on the basis of work was being offered at the relevant point of time prior to termination, the amount is reduced, and, therefore, even if the contention of Mr. Pathak is accepted that for compliance of Section 17B, minimum wages are required to be paid, then also if the petitioner has made payment by considering the average number of days for which the work was being offered in a month, it can be said that full wages last

drawn is paid and it cannot be said that there is any breach of the provisions of Section 17B of the Act.

This Court has not examined and interpreted term Sfull wages last drawn? in the decision but this Court has examined the facts in light of term "full wages last drawn". This Court has considered that since the number of days are considered by the original petitioner on the basis of work which was being offered at the relevant point of time prior to termination, the amount is reduced, therefore, it cannot be validly contended by the workman that the calculation that it must be full month peirod namely thirty days and not on the basis of work being offered to him prior to his reinstatement. It was a case of daily wager as extra departmental male man and work was being assigned to him or his services were taken when regular work was not available or there were some exigencies of work, therefore, facts of this case are not the facts of the case on hand because in present facts, workman had worked even 30 days as a driver. He was not engaged as and when the work was required. However, in aforesaid reported decision, this Court has not decided the issue while interpreting term "full wages last drawn". So, there is no ratio laid down by this Court in aforesaid decision in case of TJ Shukla v. Sr. Supdt. of RMS (Supra).

8. Recently, Division Bench of this Court has also examined issue in light of the provisions in Section 17B of the ID Act, 1947 in case of Cyanides and Chemicals Company Vs. Mansingh Mangalram Varma, . In said decision, Division Bench has considered judgment of learned Single Judge of this Court in case of University Granth Nirman Board Vs. Udesinh Togaji Solanki, . Relevant observations made by the Division Bench of this Court in para 8, 9, 11, 12, 13 and 15 are reproduced as under:

8. From the above provision of law it would clearly appear when proceedings are initiated before the High Court or Supreme Court by any employer in a matter where the Labour Court, Tribunal or National Tribunal has awarded reinstatement, then the employer shall be liable to pay to such workman during the period of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period. The moment the workman files an affidavit that the said workman had not been employed in any establishment during such period, then liability of the employer crops up.

9. From the proviso appended to Section 17B of the Act, it would again appear that the benefits flowing from the main part of Section 17B of the Act can be denied, if it is proved to the satisfaction of the High Court or Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof. A conjoint reading of the main section and the proviso would make it clear that the question of the self employment would not be material for the purposes of Section 17B of the Act. The language employed in the section says that the workman who informs the

Court that he had not been employed in any establishment then the wages cannot be denied. The wages can be denied if the High Court or the Supreme Court is satisfied that the workman is employed and had been receiving adequate remuneration.

10. xxx

11. To employ somebody would mean to give work to some one and pay them for it. It would also mean to keep the person occupied. An employee would be a person who is employed for wages or salary. When the law says that the wages are to be paid to the workman, if he has not been employed in any establishment, then the only consideration before the Court would be whether such person has been given some work in some establishment, i.e. he has been employed by the establishment or employer for wages or salary.

12. It is to be noted that the words Sworkman had not been employed in any establishment have been used in a particular context and they would indicate that these have been used in the sense of a relationship brought about by express or implied contract of service in which the employee renders service for which he is engaged by the employer and the latter agrees to pay him in cash or kind as agreed between them or relationship of command and obedience. The essential condition of a person being employed within the phrase would mean that he should be employed to do the work with someone else and that there should be, in other words an employment of his by the employer and that there should be, a relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus, so employed, the wages u/s 17-B will have to be paid.

13. It is to be noted that in the present matter the workman made a statement before the Court that the moment he is reinstated he was ready and willing to join. If that is so it would lead to only irresistible conclusion that what he was earning in his self-employment was less than what he could have received on his reinstatement.

14. Xxx

15. We would also agree that the observations made in the judgment in the matter of University Granth Nirman Board (supra) that the words Sadequate remuneration on being employed in an establishment would mean receipt of salary or wages from an employer and what workman earns to maintain his body, soul or family by doing miscellaneous work would not be coming within the sweep of "employment with an establishment.

16. Therefore, in view of the facts of this case, even if some miscellaneous work is done by workman, same cannot be considered as gainful employment and remuneration earned therefrom cannot be considered as adequate remuneration. Therefore, that contention raised by Mr. Hathi is rejected.

17. Therefore, according to my opinion, payment which has been made by the

petitioner to the workman is totally contrary to the objects and reasons of Section 17B of the ID Act, 1947, therefore, respondent workman is entitled for full wages last drawn by him, meaning thereby, 30 days wages of month from the employer.

18. It is necessary to be noted that submissions made by the petitioner are against the poor as well as weak workman to receive right of wages from the employer. Such technical contention, if accepted and approved, would nullify the object of enactment of Section 17B of the ID Act, 1947. Full wages last drawn means 30 days wages lastly drawn by workman as per voucher No. 3799 dated 4.3.99 which is Rs. 4250.00 and workman is entitled to receive the same as the wages from employer as per the direction issued by this Court on 18.8.2005 in Civil Application No. 3327 of 2005 for payment of wages u/s 17B of the ID Act, 1947. Petitioner, being a State authority under Article 12 of the Constitution of India, is supposed to act as a Model Employer and, therefore, stand taken by the petitioner that workman has lastly worked for four days alone and, therefore, he is entitled for only four days wages as the wages u/s 17B of the ID Act cannot be accepted by this Court as it would, if accepted, nullify the object of enactment of Section 17B of the ID Act, 1947. Therefore, such submission made by Mr. Hathi on behalf of the petitioner is rejected. According to my opinion, workman is entitled for full wages last drawn of Rs. 4250.00 p.m. From the petitioner with effect from 1st January, 2005 and the petitioner is required to pay arrears as a consequence of present order for a period from 1st January, 2005 to 31st August, 2006 within four weeks from the date of receipt of copy of this order and to continue to make such payment to the workman regularly every month at the rate of Rs. 4250.00 with effect from 1st September, 2006 till the main petition is finally decided by this Court. Prayer made by the applicant workman for grant of interest on the arrears is rejected. If the vehicle is not available with the petitioner and work of driver is also not available and yet petitioner wanted to provide work to the respondent workman, then, it will be open for the petitioner to take work from the respondent workman as a peon in any of its offices at Kalavad but in that event, petitioner shall have to protect the salary of workman as a driver while taking work from him as a peon. Request made by Mr. Hathi for giving effect to this order from 1st June, 2006 and not from 1st January, 2005 is rejected as it would cause injustice and prejudice to the workman. It also amounts to denial of legitimate right of workman.

19. Considering the request made by the learned Advocate Mr. Hathi for fixing the main matter for final hearing in the near future, office is directed to notify SPECIAL CIVIL APPLICATION No. 1376 of 2004 for final hearing on October 5, 2006 on condition that petitioner shall have to first implement present order in favour of workman by making payments with arrears to the Respondent workman present applicant. SO long said order is not implemented by petitioner, main matter cannot be examined by this Court while testing bona fide of the State Authority who is fighting against workman worst than private employer.

20. Subject to aforesaid observations and directions, this civil application is partly allowed. Rule is made absolute in terms indicated herein above with no order as to costs.