

(2010) 04 BOM CK 0065

In the Bombay High Court

Case No : Writ Petition No. 4996 of 2009

Raymond UCO Denim Private Ltd., (Formally known as
Raymond Ltd. (Denim Division))

APPELLANT

Vs

Praful Warade and Others

RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 107, 109, 35, 36, 37
Bombay Industrial Relations Rules, 1947 — Rule 48, 49, 50
Bombay Shops and Establishments Act, 1948 — Section 38B
Constitution of India, 1950 — Article 141, 226, 227
Industrial Employment (Standing Orders) Act, 1946 — Section 12A, 3[2], 3[3], 7
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 26, 27, 28, 30, 5

Citation : (2010) 3 ALLMR 635 : (2010) 6 BomCR 424 : (2011) 128 FLR 393 :
(2011) 2 LLJ 147

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : C.U. Singh and R.B. Puranik, for the Appellant; S.D.Thakur, for
Respondent Nos. 1 to 53 and T.R. Kankale, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner/employer has challenged the order dt. 1.1.2009 passed by the Industrial Court, Yavatmal in ULP Complaint No. 27 of 2007. By that order, while allowing the ULP Complaint filed by present respondent Nos. 1 to 53, the learned Member of Industrial Court has directed the petitioner/employer to grant permanency to the said respondents from the date after completion of three months of their appointment as a probationer and to give them all other monetary benefits and service benefits in accordance with the agreement dt. 18.2.2005, within a period of two months from the date of its order. This Court has, on 10th December, 2009, admitted the matter, granted expeditious hearing and also granted stay of coercive recovery subject to

petitioner's depositing amount of difference as per the said order of the Industrial Court. Accordingly, the amount of difference has been deposited with the Registry of this Court.

2. It is not in dispute that the petitioner is a Company incorporated under the Companies Act, 1956 manufacturing Denim fabric. Its factory at Yavatmal has come up in 1996. Respondent Nos. 1 to 53 entered the services on 8.12.2004 as trainees, under training contracts. Forty-five out of them completed the training on 8.12.2005 and eight of them were given extension. These individual details are not very relevant for adjudication of present controversy. The trainees, after completion of training, were appointed on probation and accordingly, it is not in dispute that respondent Nos. 1 to 53 came to be appointed on probation for a period of six months. The employees completed said period satisfactorily and were also given confirmation letter by the petitioner. The appointment order given to one Praful Warade (respondent No. 1) on 23.12.2005 and thereafter, the confirmation order given to him on 17.11.2006 are produced before this Court along with Writ Petition as specimen copies.

3. In this background, on or about 22.3.2007, respondent Nos. 1 to 53 filed ULP Complaint No. 7 of 2007 under Sections 5, 28, 30 r/w. Sections 26 and 27 of the Maharashtra Recognition of Trade Union and Unfair Labour Practices Act, 1971 (hereinafter referred to as the MRTU and PULP Act) and invoked Item No. 9 of Scheduled IV thereof to contend that they were entitled to confirmation after completion of three months' period on probation. They relied upon the provisions of Model Standing Orders, particularly, Clause (A). They also contended that, after completion of period of six months, the employer did not pay them wages and other benefits applicable to regular and permanent employees, but continued to pay them at a lesser rate. In view of this, they sought declaration regarding indulgence in unfair labour practice with a direction to treat them as regular and permanent employees with all consequential benefits after their completion of one year's training period. They also sought a direction regarding grant of regularization and permanency after completion of a period of three months on probation after their appointment on probation upon completion of training period of one year. It is not in dispute that the learned Member of Industrial Court (respondent No. 54) has not granted declaration and direction, as sought for, in prayer Clause (iii) and there is no challenge to that part of Industrial Court's order by respondent Nos. 1 to 53. Thus, the respondents have accepted the appointment on probation after the period of training of one year.

4. This complaint was opposed by the petitioner/employer by filing Written Statement. They justified their action of appointment as trainees; of appointment on probation for a period of six months. They pointed out that the respondents were given wages equal to permanent and regular employees as per the practice prevailing in the establishment. They also pointed out that the wages and other conditions of service applicable to permanent and regular employees other than

complainants are governed by agreement dt. 18.3.2005 and that agreement was applicable to only those employees who were working with it as permanent on 31.3.2004. They denied that there was any violation of any of the provisions of the Model Standing Order.

5. In this situation, the respondents examined respondent No. 1 Praful Warade as their first witness and one Mahesh Dhake (respondent No. 40) as a second witness. The Management examined its General Manager (HR and Administration) Mr. Pradeep s/o. Purshottam Andhare as its sole witness. The learned Member of the Industrial Court has delivered the impugned order on 1.9.2009 in this background.

6. I have heard Mr. C.U. Singh, learned Senior Counsel with Mr. R.B. Puranik, learned Counsel for petitioner, Mr. S.D. Thakur, learned Counsel for respondent Nos. 1 to 53 and Mr. T.R. Kankale, Assistant Government Pleader for respondent No. 54.

7. Mr. C.U. Singh, learned Senior Counsel has contended that the learned Member of the Industrial Court has erroneously found the probation period for respondent Nos. 1 to 53 to be of three months in view of Clause 4-A of the Model Standing Orders. He contends that, after initial training of about one year, the respondents were appointed on probation of six months and this appointment or its continuation or extension in suitable cases is not prohibited. He has placed reliance upon the provisions of Clause 29 of the Model Standing orders to urge that the said clause is clearly attracted in the present situation. He has invited attention of this Court to the judgment of the Hon'ble Apex Court reported at Western India Match Company Ltd. Vs. Workmen, and a judgment of the learned Single Judge of this Court reported at 1990 (1) CLR 88 (The Indian Tobacco Co. Ltd. v. The Industrial Court and Ors.). He states that the judgment of the Hon'ble Apex Court in the case of Western India Match Company Ltd. (cited supra) considers the provisions of the Certified Standing Orders and that the judgment has been followed by learned Single Judge in the latter judgment (cited supra) as distinction between the Scheme of the Model Standing Orders and the Certified Standing Orders was not then pressed in service. According to him, the Model Standing Orders are applied to vast number and various types of Industries and hence, have been deliberately kept flexible. The Certified Standing Orders are framed after going through the procedure prescribed in Chapter VII of the Bombay Industrial Relations Act, 1946 and hence, the individual needs are looked into by the third person who has to certify those Standing Orders. In this situation, the Certified Standing Orders are meant for individual application and hence, their violation needs to be viewed differently. Clause 29 of the Model Standing Orders is deliberately kept wide and as the application of Model Standing Orders in present facts is not in dispute, Clause 29 is automatically attracted. He further states that though the said judgment of the learned Single Judge was assailed before the Hon'ble Apex Court, as the Hon'ble Apex Court had issued notice limited to the question of application of the Bombay Shops and

Establishment Act, 1948, said judgment of the Hon"ble Apex Court reported in Indian Tobacco Co. Ltd., Nagpur Vs. Industrial Court, Nagpur and Another, is not the authority for this purpose. He states that the said view expressed by the learned Single Judge can, in the given situation, be at the most held as binding on a Bench of equal strength. He has, however, invited attention to two other Division Bench Judgments to urge that these Division Bench Judgments of this Court show that the said view of learned Single Judge cannot be accepted as a correct view. He points out that the other learned Judge of this Court in the case reported at 2004 III CLR 315 (Engineering Workers" Association v. J.D. Jamdar, Member Industrial Court and Ors.) has taken a similar view, but then, that view is not found to be correct by the Division Bench of this Court in its judgment reported at 2007 III CLR 718 (Tulsiram K. Gothad v. The Superintendent, Mahatma Gandhi Memorial Hospital and Anr.). Attention is also invited to the Division Bench Judgment reported at 2006 II CLR 105 (Pune Municipal Corporation and Ors. v. Dhananjay Prabhakar Gokhale) to show how the provisions of Clause 32 of the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 are appreciated by the Division Bench. It is urged that the provisions of said Clause 32 are *pari-materia* with Clause 29. With the assistance of these two Division Bench Judgments, an attempt is made to show that the view of learned Single Judge in the case of the Indian Tobacco Co. Ltd. (cited *supra*) is not correct and this Court has to follow the two Division Bench Judgments pointed out above as binding precedents. To explain the situation of law of precedence, the learned Counsel has also pressed into service the judgment of the Hon"ble Apex Court reported at S. Shanmugavel Nadar Vs. State of Tamil Nadu and Another,

8. The learned Counsel contends that the Industrial Court has overlooked both the Division Bench Judgments of this Court and has reached an erroneous conclusion about binding nature of Clause 4-A of the Model Standing Orders. According to him, as Clause 29 is applicable in the present circumstances, the petitioners have correctly prescribed probation to the period of six months. In this situation, he argues that the Industrial Court has indirectly modified the prescribed period of probation in standing orders and such a jurisdiction is not available to it. If respondent Nos. 1 to 53 wanted to have any change in that respect, they ought to have taken appropriate steps to vindicate their grievance in relation to such period of probation. Lastly, he has urged that the period of six months prescribed for probation by petitioners is not arbitrary and is followed in large number of organizations and by several employers.

9. The other limb of argument by learned Advocate is about the relief granted by the Industrial Court in relation to agreement dt. 18.2.2005. He points out that the said agreement reached legally between the parties thereto gives its benefit to permanent employees in service as on 31.3.2004 only. Respondent Nos. 1 to 53 were not in the employment at the relevant time in permanent capacity and hence, said clause did/does not cover them. This stand in this respect was expressly taken in the Written Statement by the petitioners, but no consequential

amendment was made in the ULP Complaint by the respondents and they did not seek any relief in relation to prescription of that date - 31.3.2004. He argues that the learned Member of the Industrial Court has erroneously placed burden in this respect upon the employer when it was necessary that the respondents/complainants should have amended their complaint to incorporate necessary challenges to agreement dt. 18.2.2005 and to seek necessary reliefs. He relies upon the judgment in the case of Pune Municipal Corporation and Ors. (supra). particularly, paragraph No. 4 to substantiate this contention. According to the learned Counsel, the Industrial Court has, without proper case, reached a finding of discrimination and on that basis, the relief not claimed in the complaint has been given to the respondents. He points out that Item No. 5 of Schedule IV of the MRTU and PULP Act was not invoked by the respondents at all. In his words, it is the case of reverse engineering by the Industrial Court.

10. The learned Senior Counsel has, therefore, stated that the impugned order of the Industrial Court is unsustainable in law and the same needs to be quashed and set aside.

11. Mr. S.D. Thakur, Adv. for respondent Nos. 1 to 53 has supported the impugned order. He contends that if the purpose of Clause 29 of the Model Standing Orders and interpretation upon it, as explained by the petitioner/employer, is accepted, other clauses in the Model Standing Orders are rendered meaningless. He further argues that such an effort results in destroying the very purpose and object behind enacting Chapter VII of the Bombay Industrial Relations Act, 1946 and in prescribing the Model Standing Orders. Attention of this Court is invited to the judgment reported in A.G. Varadarajulu and Another Vs. The State of Tamilnadu and Others, . to urge that while interpreting such clauses or non-obstante clauses the object of enactment cannot be lost sight of. He states that Clause 29 cannot be treated in the way conducive to its overriding Clause 4A. The judgment of the Hon"ble Apex Court in the case of Western India Match Co. Ltd. (cited supra) and the judgment of the learned Single Judge of this Court in the case of The Indian Tobacco Co. Ltd. (cited supra) are stated to be direct judgments governing the controversy. The learned Counsel points out that even in the case reported at Indian Tobacco Co. Ltd., Nagpur v. Industrial Court, Nagpur and Anr. (supra) the Hon"ble Apex Court has found the period of probation to be of three months only.

12. While commenting upon the two Division Bench Judgments of this Court, Mr. Thakur, Adv. states that there the other provisions of the Model Standing Orders have been looked into and because of those provisions, it was not necessary to consider the provisions of Clause 29 or other pari-materia provisions. According to him the provisions of the Model Standing Order No. 27 dealing with age of superannuation itself contemplates the age agreed upon between the employer and workmen by any agreement to be the age of retirement. It is argued that the Division Bench of this Court in the case of Tulsiram K. Gothad (cited supra) has found it unnecessary to consider and comment upon the case of the Indian

Tobacco Co. Ltd. (cited supra). On the same lines, the other Division Bench Judgment reported at Pune Municipal Corporation and Ors. v. Dhananjay Prabhakar Gokhale (cited supra) is also sought to be distinguished. Reliance is placed on the observations made in paragraph nine therein. The settlement governing the subject of grant of permanency is urged to be the reason for taking the view as reached therein.

13. The argument about flexibility being deliberate & kept in the Model Standing Orders is stated to be misconceived and the provisions of Chapter VII, particularly Section 35 of the Bombay Industrial Relations Act are relied upon to urge that obligation has been cast upon every employer to frame its own standing Orders by following procedure & through machinery prescribed therein. It is pointed out that till such Standing Orders are settled, the Model Standing Orders apply to such industry. The other Sections in the Chapter are also relied upon to show to this Court sanctity given to such Standing Orders and Section 40 has been relied upon to show that the Standing Orders are declared to be determinative by the Legislature. Attention is also invited to the provisions of Section 40-A to show that even in respect of additional or altered matters, the provisions made in Model Standing Orders are automatically applicable. The Judgment of Hon"ble Apex Court reported at The Associated Cement Co. Ltd. Vs. P.D. Vyas and Others, is pressed into service to urge that the Certified Standing Orders need to be in accordance with the Model Standing Orders.

14. About the absence of pleadings in relation to agreement dt. 18.2.2005 or challenge thereto, the learned Counsel has relied upon the reliefs as sought in the ULP complaint to urge that a prayer has been made to pay to complainants before the Industrial Court the benefits of regularisation and permanency, as applicable to other regular and permanent employees with retrospective effect. The Written Statement, as filed by the employer, is stated to be containing a plea of practice and it is urged that such practice needs to be established by the employer only. The agreement dt. 18.2.2005, particularly, its Clause 3.2 is also shown to point out that it also refers to "existing practice". Learned Counsel Mr. Thakur states that the complainant had no knowledge of any such agreement or document and all these facts were without the knowledge of their employer. They had, therefore, only sought benefits as applicable to permanent and regular employees. He points out that the workload as contemplated by said agreement has been enforced even in case of respondents and their appointment orders specifically stipulated that their service conditions are like other employees in the establishment. He contends that, as the respondents had no knowledge of dt. 31.3.2004 or its significance, there is no express pleading about it. As there was plea of receipt of less payment, along with the affidavit evidence of respondent No. 1, a chart showing difference in payment was filed on record and in the cross-examination, said chart has not been challenged. Attention is invited to evidence of complainant's witness No. 2 Mahesh to show that he has also stated that the provisions of agreement in relation to production are applicable to him also and he has specifically deposed that they are not getting remuneration in terms

thereof. This assertion has also not been subjected to any cross-examination. The evidence of Management (Mr.Pradeep Andhare) is also shown to this Court to support the argument that no practice to pay differently the employees like respondents has been established on record.

15. Shri Thakur, learned Counsel has pointed out that challenge to non availability of Item 9 or the jurisdiction of Industrial Court in the matter is misconceived, because respondents have not challenged the agreement dated 18.02.2005 in any way, and have also not sought any change in Standing Orders. He contends that burden to show different service conditions of respondents confirmed on expiry of probation was upon the petitioner/employer and Industrial Court has rightly concluded that said burden has not been discharged. The Industrial Court has only given effect to the provisions of Model Standing Order 4A.

16. In his reply arguments Shri Puranik, learned Counsel has contended that the reliance upon the judgment of Hon''ble Apex Court in case of A.G. Varadarajulu and Anr. v. State of T.N. (supra), to point out the scope of Clause 29 of the Model Standing Order is misconceived. He has also stated that the said judgment relies upon the two earlier judgment reported at Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another, and H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, . He therefore states that in the background of earlier two judgments, the 1998 judgment of Hon''ble Apex Court does not lay down any law to assist the cause of respondents. He further states that the earlier judgments in fact consider what is the enacting part of a statute and how said enacting part can control non obstante clause. In this background, he has argued that the provisions of Model Standing Orders, particularly Clause 4A itself shows that the different period of probation in settled or certified standing orders is contemplated and hence that clause in no way militates the the legislative intend in enacting Clause 29. Both according to him operate in separate field. He again points out that the Hon''ble Apex Court has in case of Western India Match Co. (supra) considers the certified standing orders and invites attention to the provisions of Section 35[5] of the B.I.R. Act to show that the Model Standing Orders in respect of Industry apply to undertaking till that undertaking formulates its own certified standing orders. He explains that in this part of Maharashtra, there are no Model Standing Orders framed in accordance with the mandate of Section 35[5], and the Model Standing Orders are of general type which are made applicable to various industries. According to him in view of this peculiar position, Clause 29 has been added to the Model Standing Orders. He further states that the provisions of Industrial Employment Standing Orders Act, 1946 and provisions of the Bombay Industrial Relations Act, 1946 (B.I.R. Act) in relation to settlement of Standing Order for any Industry are not pari materia and hence, the reliance on judgment of Hon''ble Apex Court at The Associated Cement Co. Ltd v. P.D. Vyas and Ors. (supra), by respondents is unwarranted. He further points out that 1969 [1] LL.J. 734 (Shahdara (Delhi) Saharanpur v. Shahdara-Saharanpur Railway) as

considered by the Industrial Court and relied upon the respondents, in fact does not lay down any legal proposition.

17. While shortly reiterating the contentions about absence of challenge to agreement dated 18.02.2005 the learned Counsel states that in view of the judgment of Division Bench in case of Pune Municipal Corporation (*supra*), the burden to prove entitlement to service conditions as per that agreement dated 18.02.2005 was upon the respondents, and that has not been discharged. He further states that evidence of witnesses examined by respondents also does not bring any material in this respect, and he points out that one of the witness has in fact referred to the said agreement as 2004 agreement. He also invites attention to the relevant clauses of 2005 agreement to show that entitlement to production allowance does not depend on individual & the performance of all departments together results into either grant or denial of production allowance to all employees i.e. respondents & those subject to 18.02.2005 agreement. In this background he explains that the production incentive, though a collective effort gets affected as per the production of the concerned department during the relevant period and contention of respondents that the production norms have been imposed upon them as per the said agreement, is therefore, misconceived. The appointment order on probation specifically mentions the service conditions of other employees and thus other employees are also mentioned in agreement dated 18.02.2005 and that phrase indicates those who were not permanent on 31.03.2004.

18. The question about the precedent occupying in the field raised by the parties needs to be looked into first. Effort of petitioners is to show to this Court that the judgment in *Western Match Company* (*supra*) which considers provisions of Certified Standing Orders cannot be applied in case of Industry to which the Model Standing Orders apply. The perusal of the said judgment of Hon'ble Apex Court reveals that there the employer was having its own Certified/Separate Standing Orders. In paragraph No. 7, the Hon'ble Apex Court has found that the terms of employment specified in the Standing Orders would prevail over all corresponding directions in contract of service in existence on the enforcement of the Standing Orders. It is not permissible to the employer to seek statutory modification of such standing order so that there could be one set of Standing Order for one set of employee and another for others. In paragraph No. 8 it has been found that when prior agreement, inconsistent with the Standing Orders cannot survive, an agreement posterior to and inconsistent with the Standing Orders, cannot prevail. In view of this position, the judgments of Allahabad High Court mentioned in paragraph No. 9 and taking a view that it was open to the employer to conclude the agreement with the individual workman inconsistent with the Standing Orders have been overruled. In paragraph No. 10, change brought about by system of standing orders i.e. earlier procedure when there used to be two parties at negotiation table and the presence of a third party i.e. State to represent interest of society has been noticed, and Hon'ble Apex Court has observed that the provisions of Industrial Employment Standing Orders Act,

give effect to this new thinking. In paragraph No. 11, the special agreement between the employer and employee which provided for additional 4 months of period of probation has been held to be an act in contravention of the Standing Order and it has been further held that inconsistent part of the special agreement cannot prevail over the Standing Order. The Hon'ble Apex Court has concluded that to uphold such special agreement would mean giving a go bye to the Act's principles of three party participation in the settlement of terms of employment. The judgment of Allahabad High Court reported at Banaras Electric Light and Power Co. Ltd. Vs. Government of Uttar Pradesh and Others, is also made available to this Court by the petitioners. In the said judgment, the learned Single Judge after following the various precedents [then valid] has concluded that it is open to an individual employee to enter into special contract with the employer and such special contracts are not prohibited by the Industrial Employment Standing Order Act. However, earlier the learned Single Judge has also observed that it is not open to the parties to enter into an agreement in contravention of the provisions of the statute. As this judgment is overruled expressly by the Hon'ble Apex Court, it need not be considered any further.

19. In Indian Tobacco Company Limited [supra], the learned Single Judge of this Court was required to consider the application of provisions of Clause 4A of the Model Standing Orders framed under Industrial Employment Standing Orders Act, 1946 to an establishment to which said Standing Order become applicable because of Section 38B of the Bombay Shops and Establishment Act, 1948. After considering various judgments in paragraph No. 11, the learned Single Judge has concluded that the Model Standing Orders framed under the Industrial Employment Standing Orders Act and Bombay Industrial Employment (Standing Order) Rules, 1959 govern the relations between the employees to be engaged by the petitioner Company. Then provisions of Clause 4A prescribing probation period of three months are looked into and in paragraph No. 17, the effect of those provisions is considered. It has been found that there is no provisions for extension of period of probation and three months period is maximum period. In paragraph No. 19, the position of an agreement inconsistent with the Model Standing Orders has been considered in the light of Clause 32. Said Clause 32 is in same language as that of Clause 29 of the Model Standing Orders framed under Bombay Industrial Relations Act, and after noticing the wordings thereof, the learned Single Judge has found that the provisions contained in Standing Orders cannot operate to the prejudice of any right and contract of service, customs, usage or agreement, settlement or award in limited situations. This prohibition is found to be cast against operation of Standing Orders only when better rights acquired by an employee under the contract of service are to be prejudiced. The contention of employer that any inconsistent contract of employment was saved by said Clause No. 32, was not accepted. The learned Single Judge has further observed that if interpretation, as suggested by the employer before him was to be accepted, then such standing order No. 32 would be invalid and incapable of being enforced for reasons stated in the decision of

the Hon'ble Apex Court reported in *Western Indian Match Co.* (supra). This judgment of learned Single Judge is sought to be distinguished by pointing out the two later judgments of Division Bench of this Court. Before considering those Division Bench judgments, reference to other judgment of learned Single Judge of this Court in case of *Engineering Workers' Association* [supra] is necessary. There, the question was of age of superannuation which as per the Model Standing Order the employer had taken a stand that in 1964 there was a settlement which fixed the age of superannuation at 58 years and the Industrial Court had dismissed the complaint filed by the Union. The learned Single Judge held that the provisions of Model Standing Orders would be applicable and hence the age of retirement was 60 years. Settlement of 1964 was therefore found to be not available. The relevant clause which has been considered by the learned Single Judge is Clause No. 27 and it is important to note that as per said clause, the age of retirement of superannuation should be 60 years or such other age as may be agreed upon the employer and workmen by any agreement, settlement or award which may be binding on the employer and the workmen under any law for the time being in force. Thus, this Standing Order No. 27 uses the word "may be" and also contemplates the age of retirement being regulated by agreement, settlement or award. The learned Single Judge therefore has also reproduced the Standing Order No. 32 which has been considered in case of *Indian Tobacco Company Ltd.* [supra] and reference to that judgment has been made in paragraph No. 13 to point out that the learned Single Judge there has held that the Standing Orders have to prevail over all contract of employment, except when a contract of employment offers better rights.

20. In *Pune Municipal Corporation* [supra], the Division Bench of this Court has considered the provisions of Clause [c] of Model Standing Order while dealing with grant of permanency after completion of 240 days. The employer had relied upon a settlement reached between the parties which prescribe grant of permanency to employees who completed 5 years of continuous service. It is in this background the inconsistency between the Model Standing Order 4[c] and the settlement has been looked into. In paragraph No. 9 the Division Bench has noticed that inspite of Clause 4[c], the Union entered into settlement in September, 1989 and agreed to grant of permanency on completion of continuous service of 5 years. It also noticed that all the employees who had completed 5 years of continuous service were granted permanency accordingly as and when permanent vacant post duly approved by the Competent Authority became available with the appellant - Municipal Corporation. The provisions of Clause 4[c] of the Model Standing Order have been held to be disjunctive. The Division Bench has also made reference to settled principle of law, that mere completion of 240 days in service, in absence of a permanent vacant post duly approved by the Competent Authority is not sufficient to claim permanency. In view of this position, the Division Bench has held that the settlement of September, 1989 cannot be ignored. Besides this, the Division Bench has made reference to Clause 32 of the Model Standing Order and held that there was a

valid settlement occupying the field and therefore on completion of 5 years continuous service only and upon availability of permanent vacant post duly approved by the Competent Authority, claim of permanency could have been made. In other words, the Division Bench concluded that Clause 4[c] of the Standing Order could not have been pressed into service ignoring the settlement of September 1989. It is to be noted that the employer there was a Local Authority constituted under the Bombay Provincial Municipal Corporation Act and employment with it was a public employment. This Division Bench judgment does not mention the view taken by the learned Single Judge in case of Engineering Workers' Association [supra] or in case of Indian Tobacco Company (supra). The Division Bench only interprets the provisions of Clause 32 of the Model Standing Order framed under the Industrial Employment Standing Orders Act, 1946 and notices that anything contained in Standing Order can operate in derogation of September 1989 settlement. Thus, the interpretation by the learned Single Judge in Indian Tobacco Company Limited (supra), that such settlement has to be more beneficial to the interest of employees, was not placed for consideration before the Division Bench, and no similar effort was even made before it. This Division Bench judgment therefore, cannot be used as an authority to conclude that view of the learned Single Judge of this Court in Indian Tobacco Company Limited (supra) upon interpretation of Clause 32 has been overruled or not found to be correct. The aspect relevant before this Court i.e. about the availability of better rights for attracting Clause 29 of Model Standing Orders has not been considered by the Division Bench in Pune Municipal Corporation (supra).

21. The three judgments mentioned above i.e. two judgments of respective learned Single Judges and one of Division Bench are cited before the subsequent Division Bench reported at 2007 (III) CLR 718 (Tulsiram K. Gothad v. The Superintendent, Mahatma Gandhi Memorial). In this judgment, the question was of age of superannuation and hence the interpretation of Clause 27 of the Model Standing Orders. Perusal of this judgment, particularly its paragraph No. 4 shows that the Division Bench has commented upon the judgment of learned Single Judge interpreting that Clause 27 in case of Engineering Workers' Association (supra). It has been noted that the exercise to import requirement of better service conditions in the scheme resulted in addition of some words to the Model Standing Order No. 27 and it violated the settled principles of law and such interpretation which results in addition of words is open only after recording a finding that reading the provisions literally results in absurd and expressly unjust situation. As the learned Single Judge has not recorded any such finding and therefore, that judgment is found by Division Bench to be not taking a correct view of interpretation of Model Standing Order 27. The Division Bench has, therefore, specifically overruled that judgment. In paragraph No. 4 the Division Bench has then considered the provisions of Clause 32 of the Model Standing Orders and also there is a reference to the judgment of the Hon'ble Single Judge in case of Indian Tobacco Company Limited (supra). The interpretation put on Clause 32 by the Division Bench in case of Pune Municipal

Corporation (supra), was specifically placed before this Division Bench in paragraph No. 4, and the Division Bench has noticed that a construction different from the one placed by the learned Single Judge has been accepted in Pune Municipal Corporation (supra). But, then the Division Bench has found that as language of Clause 27 itself being very clear, it was not necessary for the Division Bench to consider the Model Standing Order No. 32. Thus, after noticing this different interpretations placed upon Clause 32 of the Model Standing Order, the Division Bench of this Court has refused to interfere in the matter & no opinion is expressed either way. View of Hon. Apex Court in appeal therefrom in Indian Tobacco Co. Ltd., Nagpur v. Industrial Court, Nagpur and Anr. is also not brought to its notice. It is therefore apparent that this Division Bench judgment cannot be construed to mean that the view taken by the learned Single Judge of this Court in Indian Tobacco Company Limited (supra) has been overruled or found incorrect. The question is left open by it. I have already found above, that the earlier Division Bench judgment has not considered the view reported at Indian Tobacco Company Limited (supra).

22. This discussion therefore, clearly shows that effort to point out to this Court that the judgments of learned Single Judge in Indian Tobacco Co. Limited (supra) is no longer a good law, cannot be accepted and the issue needs to be considered on its own merits.

23. In S. Shanmugavel Nadar Vs. State of Tamil Nadu and Another, , the Hon''ble Apex Court has considered the issue of merger and this judgment is pressed into service to show that the judgment delivered by the learned Single Judge in Indian Tobacco Company Limited (supra) cannot be treated as approved by the Hon''ble Apex Court. The judgment of Hon''ble Apex Court in Appeal from the said judgment of learned Single Judge is reported at Indian Tobacco Co. Ltd., Nagpur Vs. Industrial Court, Nagpur and Another, . In paragraph 1 of this judgment in appeal the Hon''ble Supreme Court has mentioned the narrow question which required its attention, as interpretation of Section 38B of Bombay Shops and Establishment Act, 1948 and the Standing Orders issued under the Industrial Employment Standing Orders Act, 1946. The Hon''ble Apex Court has also stated that this was in accordance with the terms of grant of special leave. Thus according to the petitioners, the interpretation put upon Clause 32 by the learned Single Judge was never the subject matter of consideration before the Hon''ble Apex Court. In this background, attention has been invited to some portion of paragraph No. 10 therein by both the sides. The Hon''ble Apex Court there has held that the provisions of Section 38B of the Bombay Shops and Establishment Act make the Standing Orders applicable to the Industrial Establishment irrespective of number of persons employed therein. But then the Hon''ble Apex Court has further found that the said Standing Orders provided period of three months only. The Hon''ble Apex Court therefore, found that the High Court was right in importing the applicability of Standing Orders Act and has further concluded that its interpretation was in accordance with that of High Court. The petitioners contend that these observations do not approve the

interpretation put upon Clause 32 by the learned Single Judge and the issue is still open. The respondent contends that by accepting the period of probation to be three months, the Hon"ble Apex Court has accepted the primacy to beneficial provision given while interpreting Clause 32 by the learned Single Judge. I see that in this finding the Hon. Apex Court has accepted the conclusions drawn by learned Single Judge and I can not approve the distinction attempted to be carved out by petitioners.

24. In *S. Shanmugavel Nadar* (supra), particularly paragraph Nos. 10, 2, 14, 16 and 17 are relied upon by the petitioners to urge that as there was limited special leave granted, in view of the provisions of Article 141 of the Constitution of India, the question of merger of interpretation of Clause 32 with the verdict of Hon"ble Apex Court in case of *Indian Tobacco Company Limited* (supra) does not arise. The facts clearly show that in paragraph No. 1, the Hon"ble Apex Court has itself mentioned that narrow question requiring its attention was about interpretation of Section 38B of the Shops and Establishment Act and the Standing Orders issued under Industrial Employment Standing Orders Act. The observations in concluding portion mentioned above show that the Hon"ble Apex Court has expressly mentioned that its interpretation was in accordance with that of High Court. Not only this, it has also observed that the High Court was right in importing the Standing Order and the Standing Orders prescribed period of probation of three months. The contention of learned Counsel for petitioner therefore cannot be accepted. In view of this finding, it is not necessary for me to consider the judgment on issue of merger i.e. *S. Shanmugavel Nadar* (supra).

25. Clause 32 or then Clause 29 of the Model Standing Orders which falls for determination in present matters are identical. Clause 29 is as under:

29. Nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service custom or usage or an agreement settlement, or award applicable to the undertaking.

The said clause appears with negative words and these words are being pressed into service as non obstante clause. Respondents have relied upon the judgment of Hon"ble Apex Court in case of *A.G. Varadarajulu and Anr. v. State of T.N.* (supra), to support its contention about the scope of this provision. There in paragraph No. 16, the Hon"ble Apex Court has stated that while dealing with non obstante clause under which the legislature wants to give overriding effect to a Section, the Court has to find out the extent to which the legislature has intended to give one provision overriding effect over another provision. This intention has to be gathered through enacting part of the section. For said purpose, the Hon"ble Apex Court relied upon its two earlier judgment. These two earlier judgments are also pressed into service by petitioners to urge that the contention as advanced by Shri Thakur, learned Counsel is not supported by any of these three judgments.

In *Aswini Kumar Ghose v. Arabinda Bose and Anr.* (supra) the Hon''ble Apex Court has observed that the enacting part of the statute must, where it is clear to be taken to control the non obstante clause where both cannot be read harmoniously. In *H.H. Maharajadhiraja Madhav Rao v. Union of India* (supra), the Hon''ble Apex Court has observed that non obstante clause is very potent clause intended to exclude every consideration arising from other statute, but, for that reason only it needs to be construed strictly, while determining its scope. When such clause containing non obstante clause does not refer to any particular provision to which it intends to over ride, but reference to provisions of statute jointly, it is impermissible to hold that it excludes the whole of the Act and stand alone by itself. A provision in a statute can not be construed to defeat its manifest purpose and general values which animate its structure. The Hon''ble Apex Court has found that a search has therefore to be made with a view to determine which provision answers the description and which does not. The observations of Hon''ble Apex Court in paragraph No. 16 in *A.G. Varadarajulu and another* (supra) are very clear. I do not find anything inconsistent therein with earlier two judgments referred in that paragraph by the Hon''ble Apex Court itself. Though the learned Counsel for petitioner has tried hard to explain the situation, I do not find it necessary to refer to those earlier judgments in more details here.

26. Perusal of Model Standing Order 29 reproduced above, clearly shows that the right under a contract of service, custom or usage or an agreement, settlement or award applicable to the undertaking is sought to be protected from the application of standing orders as a whole. In facts before me, said clause is being pressed into service to save the right under a contract of service with respondent Nos. 1 to 53. Those individual contracts personal to respondents, are sought to be protected from application of provisions of Standing Orders. When Clause 29 is viewed, it is apparent that it covers all earlier clauses i.e. Clause 1 to 28 and therefore, entire area of instrument of Model Standing Orders itself. Thus in view of the verdict of the Hon''ble Apex Courts mentioned above, it is necessary to find out its scope and determine which provision of Standing Order answer the description and which do not. It is also therefore necessary to consider the provisions of law regulating the settlement of Standing Orders.

27. In so far as the Bombay Industrial Relations Act, 1946 is concerned, the relevant provisions are contained in Chapter VII. The said Chapter deals with the Standing Orders and it contains Sections 35 - 41. By Section 41 it is made clear that the provisions of Industrial Employment Standing Orders Act, 1946 are not applicable to Industry to which the provisions of Chapter VII apply. Section 35[1] stipulates that within 6 weeks from the date of application of Bombay Industrial Relation Act to any Industry, the employer has to submit for approval to the Commissioner of Labour draft Standing Orders regulating the relations between him and his employees. The matters on which draft Standing Orders are to be framed are stipulated in Schedule -I of the Bombay Industrial Relations Act. Sub-section [2] then contemplates hearing or consultation with the representatives of

employees and employers by such Commissioner of Labour and making of an inquiry and then for settlement of said draft as Standing Orders. As per Sub-section [3], he has to forward copy of those Standing Orders to the Registrar and within 15 days of such receipt the Registrar has to register it in a register kept for that purpose. The Standing Orders so settled come into operation from the date of their recording in such register. Sub-section [5] of Section 35 states that till the Standing Orders so settled come into operation, the Model Standing Orders notified in the official gazette by the State Government in respect of Industry shall apply to such undertaking. Section 36 permits a person aggrieved by decision of Commissioner of Labour to file appeal to Industrial Court and enables the Industrial Court to confirm, modify, add to or rescind all or any of such standing orders. Under Sub-section [5] of Section 35 copy of the order passed by the Industrial Court has to be sent to the Registrar, who has to record it in the register specified in Section 35[3]. Section 37 enables a person aggrieved by the decision of the Industrial Court to apply for review. Section 38 states that if standing orders are settled, no alteration therein can be made for a period of one year from the date of coming into its force. This of course is subject to the orders passed by the Industrial Court in Appeal or review. Sub-section [2] contemplates opportunity to employee or employer to apply to the Commissioner of Labour for a change, after expiry of one year. Section 39 deals with the procedure to be adopted by the Commissioner of Labour after receipt of such application. Section 40 lays down that the Standing Order settled in Chapter VII and in operation and in absence of such Standing Orders, the Model Standing Orders are "determinative" of the relations between the employer and his employee in regard to all industrial matters specified in Schedule-I. Sub-section [2] thereof permits a reference to Labour Court. Section 40A deals with Model Standing Orders in respect of additional or altered matters and states that such Model Standing Orders in respect of additional or altered matters are applicable to the workmen, if they are not held to be less advantageous by Commissioner of Labour.

28. Rules 48 to 50 of the Bombay Industrial Relations Rules, 1947 prescribes procedure in this respect. For present purpose it is not necessary to look into that procedure.

29. Shri Thakur, learned Counsel has relied upon the judgment of Hon"ble Apex Court in case of *The Associated Cement Co. Ltd. v. P.D. Vyas* (supra). The said judgment considers the provisions of Industrial Employment Standing Order Act and states that the draft submitted by the employer has to be in accordance with the Model Standing Orders so far as applicable to it. It is further held that the certifying officer functioning under that enactment has to be satisfied with the draft Standing Orders dealing with every matter set out in schedule and are otherwise in conformity with the provisions of the Act. These observations of the Hon"ble Apex Court are because of provisions of Section 3[2] which then required employer to submit draft Standing Orders containing provisions for every matter set out in schedule, which may be applicable to his Industrial

Establishment. It also stipulated that where the Model Standing Orders have been prescribed such draft shall be so far as is practicable in conformity with such Model Standing Orders. It is not necessary to go into that controversy because the said provisions of Section 3[2] has been deleted from the Industrial Employment Standing Orders Act, 1946 vide Bombay amendment 21 of 1958.

30. It is important to note that the provisions of Section 107 of the Bombay Industrial Relations Act prescribe a penalty for contravention of Standing Orders and Section 109 prescribes penalty for offenses not provided for else where. Section 109, states that who ever contravenes any of the provisions of Bombay Industrial Relations Act or of any Rules made thereunder, shall on conviction, if no other penalty is elsewhere provided, be punishable with fine which may extend to Rs. 100/- and in the event of his previous conviction with fine which may extend to Rs. 200/-. Before me, it is an admitted position that the establishment of petitioner has started functioning in 1996 and till date they have not taken any steps to have Standing Orders of their own, as required by Chapter VII of Bombay Industrial Relations Act. In fact faintly, an effort was made by the learned Counsel to urge that violation of said Chapter VII is all together different issue and is totally irrelevant for adjudication of the present controversy. However, when one looks into the provisions of Chapter VII and importance given to it in the scheme of adjudication of disputes under Bombay Industrial Relations Act, it is clear that such an argument cannot be accepted. Punishment is a deterrent measure to induce petitioner to have certified standing orders within prescribed time as per legislative mandate and it can not be used as an excuse for avoiding to or as defence for not framing certified standing orders. The dispute before this Court is in relation to provisions of Clause 4A of the Model Standing Orders. Said Clause prescribes the maximum period of probation of three months and states that every probationer who has satisfactorily completed period of 3 months uninterrupted service in which he is provisionally employed, shall be made permanent in that post by the Manager by an order in writing within 7 days from the date of completion of such period. There is a proviso to it and that proviso states that where the settled Standing Orders were in operation on the date of coming into force of this notification and because those settled standing orders prescribed period longer than 3 months, a probationer had to complete such period. It is to be noted that same Clause 4A has been considered by the learned Single Judge in Indian Tobacco Company Limited (supra). It is not in dispute that said Clause 4A has been added to Model Standing Order in the year 1977.

31. Provisions of Schedule-I on which Standing Orders are required to be framed also underwent change in 1977 and entry at item 14 dealing with "Employment or re-employment of probationer or badlis or temporary or casual workman and their conditions of service", came to be added by Maharashtra Amendment 47 of 1977. The corresponding amendment to Chapter VII was also effected by very same Amendment Act and Section 40A came to be added to Chapter VII. Said Section 40A of BIR Act reads as under:

40A. Model standing orders in respect of additional or altered matters to apply to certain workmen, if they are not less advantageous.

Notwithstanding anything contained in the foregoing provisions of this Chapter, any model standing orders made and notified in this Official Gazette by the State Government from time to time, in respect of any additional matters included in Schedule I, or any alteration made in that Schedule, on or after the date of commencement of Bombay Industrial Relations (Amendment) Act, 1977 (Mah. XLVII of 1977), shall unless such model standing orders are held by the Commissioner of Labour, to be less advantageous to the employee than the corresponding standing orders applicable to them, also apply in relation to such employees in the undertakings in respect of which standing orders have already been settled u/s 35.

32. Thus cumulative effect of Section 40A read with entry 14 in Schedule I and Clause 4A of the Model Standing orders is that the provisions of model standing orders 4A as added in 1977 became applicable to all probationers as Commissioner of Labour has not found the said provision in Clause 4A less advantageous to the employees than the corresponding standing order about probation applicable to them i.e. Clause 29 here. Moreover, the petitioner employer is relying upon Clause 29 to urge that the period prescribed in contract of service as period of probation has to prevail over Clause 4A of model standing order. Clause 29 of model standing orders has not undergone any change in 1977 or thereafter. The prescription of period of probation in Model standing orders or then the requirement of framing of standing order on it has been added in the year 1977 to the statute. Because of Section 40A it is apparent that the model standing order 4A as incorporated in Model standing order in pursuance thereof is final and determinative in so far as the maximum length of period of probation is concerned. In this situation, Clause 29 cannot be used to curtail the scope of Model standing order 4A. In the face of Clause 29 the legislature has provided for Section 40A and has added entry 14 in Schedule-I of Bombay Industrial Relations Act, 1946. The legislature has therefore, clearly intended that the Standing order framed in relation to period of probation as an additional matter on entry No. 14 vide Clause 4A has to prevail and has to apply to all employees. Clause 29 of the Model Standing Orders is a piece of subordinate legislation and it cannot be therefore interpreted to cover the field of probation created by 1977 amendment. In any case it can not curtail or limit the width of said added provision in a way contrary to Section 40A.

33. The scheme of Chapter VII of the Bombay Industrial Relations Act mentioned above and the position/status of model standing orders therein clearly show that the model standing order occupy the field temporarily till the certified standing orders applicable to concerned or individual industry are settled. Section 12A of Industrial Employment (Standing Orders) Act, 1946 however expressly stipulates that the model standing orders framed under that Act apply temporarily to the establishment, It mentions that period commencing on date when Industrial

Employment Standing Order Act becomes applicable to the industrial establishment and till the date on which the standing orders are finally certified under the said Act and come into operation u/s 7 thereof, the prescribed model standing orders are deemed to be adopted in that establishment. I find the Scheme of B.I.R. Act is not different. Due to the language of various sections in Chapter VII and provisions for punishment as contained in Section 107 and 109 of the B.I.R. Act, it clearly make it obligatory for the employer to take steps to have certified standing orders to meet its peculiar demands. The employer cannot be permitted to continue indefinitely under the model standing orders and contend that model standing orders are not designed for any specific industry or nature of employment and being a generally applicable carry a clause like Clause 29 to enable employer to meet such individualistic contingencies. Permitting such self serving argument will not be in accordance with scheme of Chapter VII and the spirit of B.I.R. Act. Infact having failed to get the standing order settled as required by Chapter VII, the petitioner cannot be heard raising such contention. In any case, in view of the finding that the said Clause 29 is not relevant and cannot control the natural sweep envisaged for Clause 4A by legislature, it is apparent that the reliance upon the provisions of Clause 29 by petitioners to urge that the period of probation of six months as provided for in contract of service must prevail, is misconceived and unsustainable.

34. The second challenge of petitioner is to relief given to respondents in terms of service conditions as prescribed in agreement dated 18.02.2005. The contention is there is no specific challenge to the agreement dated 18.02.2005 and though respondents had an opportunity to effect amendment to their complaint after noticing particular stand in written statement, the complaint was not so amended.

The reliance is also being placed upon the Division Bench judgment of this Court in the case of Pune Municipal Corporation (*supra*).

35. The Industrial Court has directed petitioners to give to respondents monetary benefits and service benefits as per agreement dated 18.02.2005. The prayers made by respondents in their ULPA Complaint show that the respondents have, vide prayer Clause [v] sought of benefits as are applicable to every regular and permanent employee with retrospective effect. Perusal of paragraph No. 7 of the ULP Complaint shows grievance that immediately after completion of training period of one year the complainants [respondents before this Court] had become regular and permanent and, therefore, they should have been paid the wages and other benefits applicable to regular and permanent employees since then. But every month they were getting amount of Rs. 2000/- to Rs. 2500/- less after they became regular and permanent after successful completion of probation period. The similar grievance is reiterated in paragraph No. 11 of the complaint, wherein the respondents have stated that despite confirming them/complainants as regular and permanent employees after completion of 6 months period of probation, the employer did not pay them the wages and other allied benefits

applicable to other regular and permanent employee, but continued to pay to complainants the basic pay of Rs. 17.35 ps per day. It was therefore urged that inspite of the letter of confirmation, the benefits thereof were denied to the complainants. In response to grievances, petitioner has filed written statement and in paragraph No. 7 petitioners have stated that after joining services as permanent and regular employees, complainants were given wage increase "as per practice". In paragraph No. 10 petitioners have stated that wages and other conditions of services applicable to permanent and regular employees with it are governed by the agreement dated 18.02.2005 and as per the said agreement, the said benefits are applicable only to such employees who were working with the respondent as permanent employee as on 31.03.2004. The affidavit of Praful Warade [present respondent No. 1] has been filed in this background. In his affidavit of examination-in-chief in paragraph No. 6 he deposed that he has filed a chart as Annexure-II which revealed that wages being paid to other permanent employees and to them. He has further specifically deposed that as basic pay was less, their H.R.A., Medical allowance, production allowance, bonus, P.F. were also less. He has further asserted that there was no justification for not giving the wages and other facilities being extended to other permanent employees.

36. The learned Member of the Industrial Court has recorded a finding that the respondents complainants before him] were entitled to same service conditions as are extended to other permanent employees. It has found that it was duty of the employer to show what service conditions were applicable to the employees like complainants, as per the existing practice and to produce the relevant rules before the Court. Because of failure of the employer to produce such material, it has concluded that there has to be same set of rules regarding services of employees working under one roof and there cannot be any discrimination in the matter. One of the reason given by it in paragraph No. 17 is onerous terms and conditions relating to production as per 2004 Agreement have been made applicable to the complainants. Witness No. 2 for complainants namely Mahesh Dhake has also made reference to 2004 agreement. However, it is not in dispute before me that there is no such agreement of the year 2004 and that the reference was only to 2005 agreement.

37. I find Shri Puranik, learned Counsel right when he points out that the finding of Industrial Court about imposing the condition of production upon respondents is not correct. Perusal of the relevant condition dealing with productivity efficiency and allowance appearing in Clause No. 2 of the agreement shows that the efficiency has to be calculated on the basis of over all performance of spinning and weaving department. In other words, it is apparent that if a particular level of efficiency is reached by the spinning and weaving department, then every individual worker in that department becomes entitle to the said allowance. Thus as per this settlement, a composite responsibility has been envisaged and hence it cannot be said that the norms of production have been forced upon the respondents by management. If 80% of the base production is achieved, the employees of that department become entitle to the said allowance

and if it is not achieved no body in the department is entitled to it.

38. In other words, this position also shows that to achieve this efficiency, the present respondents have also to exert along with other regular/permanent workers. The specific assertion about absence of any valid yard-stick of difference between respondents on one hand & employees permanent on 31/3/2004 is not traversed by employer at all.

39. The pleadings in complaint are briefly mentioned by me above. Those pleadings clearly show that the respondents were complaining of dual standards being practiced by the petitioners. The petitioners had sought to justify the same by pointing out the practice. It is, therefore, apparent that issue before the Industrial Court was of legality of the dual standards and the defence thereto taken by the employer i.e. of practice. The learned Member of Industrial Court has correctly appreciated this position and has placed the burden upon the petitioner - employer to prove it. Its observations as contained in paras 14 and 16 of the impugned order show that the agreement dated 18.02.2005 was not on record for quite some time.

The respondents obtained leave of Industrial Court to lead additional evidence and then examined Mahesh Dhake and in his evidence, the copy of said document came on record. The Industrial Court has in this back ground noticed that after completion of period of probation, when the respondents were appointed as permanent workers, burden was upon the employer to show rules and regulations applicable to their services as per alleged prevalent practice. The prevalent practice was the defence of present petitioners and Industrial Court has noticed that the employer could not produce any such prevalent practice or other set of service conditions applicable to the respondents in accordance with it. Because of failure of employer to produce it, the Industrial Court has further commented that such practice was never in existence. Thereafter it has found that there could not be different service conditions of employees working under same roof and then has made comment about the grievance of respondents that they are also expected to give particular production. The discussion above shows that burden to give production was put on all and not only upon the respondents. The facts show that the respondents were not exempt from this collective responsibility and were entitled to incentives or production allowance depending upon achieving the said production target. This application of mind by Industrial Court cannot be labeled either as erroneous or misconceived. The evidence of Shri Pradeep Andhare in this respect shows that he has chosen to depose on the basis of records maintained by the petitioner - company. He has further stated that salary and other benefits payable to respondents during the period of probation are mentioned in the appointment order and also in order making them permanent. He has stated that those terms and conditions were accepted by the respondents. His cross examination is only to find out whether any practice as alleged by the management was prevalent and he has stated that there was no fixed salary regularized by company as a practice. He could not say

when practice of giving wages to workers after their confirmation came into existence. He accepted that there was one category of employees getting wages as per settlement and another set of employees getting salary as per alleged practice. He denied that no such practice was in existence. He has accepted that no document was produced on record to point out any such practice.

40. The reference to practice is in written statement and also in agreement dated 18.02.2005. In that agreement, it is mentioned that "the agreement benefits for those who are on muster roll but on probation or training will be applicable as per existing practice". Thus, the agreement benefits are stated to be applicable even to employees on probation or training as per practice. After completion of period of probation the said clause, therefore, does not help petitioners to contend that some other practice was/is prevalent and accordingly the respondents who were confirmed were being paid. No practice of paying differently the workers not on permanent roll on 31.03.2004 but getting that status thereafter is mentioned anywhere in this agreement. The establishment of the petitioner has come into existence in 1996. If any such practice of treating permanent workers differently is to be established, the necessary material to prove the distinct and separate treatment given to two sets of permanent employees and therefore, two sets of permanent employees ought to have been produced & case to that effect needed to be pleaded. There are no such pleadings in written statement. I, therefore, do not find anything wrong with the conclusion reached by the Industrial Court. There is nothing in Clause 3.2 to hold that agreement benefits are not meant for employees becoming permanent subsequent to 31.3.2004. It is apparent that all those who became permanent after 31.03.2004 are also entitled to benefit of this agreement dated 18.02.2005.

41. The objection to availability of item 9 now needs to be looked into. The conclusion that Clause 29 of Model Standing Orders does not override Clause 4-A thereof in view of Section 40A of Bombay Industrial Relations Act, 1946, read with item 14 of Schedule I thereof is already reached above. It is, therefore, apparent that the respondents did not seek any relief of modification of any term and condition of their service or of any provision of Standing Order. On the contrary, they were seeking service conditions as per Model Standing Orders. The argument suggesting modification therefore, is misconceived. The petitioner employer has not found it convenient to have certified standing orders till date and can not raise such defence in the light of clear and unambiguous Clause 4A and legislative mandate. The argument of practice as alleged by the employer is also found to be misconceived. It is, therefore, clear that the respondents were seeking treatment equal to other permanent employees and hence the contention that they were seeking modification of agreement dated 18.02.2005 is unsustainable. It only shows that without reference to any agreement, they were seeking equal treatment for equal work. There is no reason here to invoke item 5 of Schedule IV of MRTU & PULP Act because of defence of alleged practice by employer. The reference to burden of giving particular production so as to be enable respondents to claim incentive by Industrial Court needs to be understood

only in this back ground. The said grievance of employees, therefore, also falls under item 9 of Schedule IV as it is case of non-implementation of agreement benefits to them.

42. I, therefore, do not find a case made out warranting any interference in writ jurisdiction. Writ Petition is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs. Rule discharged accordingly.

43. At this stage, Shri Puranik, learned Counsel states that the petitioners have deposited some amount with the registry of this Court and hence that amount should not be allowed to be withdrawn and interim orders granted by this Court on 10.12.2009 should be continued for a period of eight weeks more. Shri Thakur, learned Counsel is opposing the request. However, considering the position & in the interest of justice, request made by Shri Puranik, learned Counsel is granted. The interim orders passed by this Court on 10.12.2009 shall continue to operate for a period of eight weeks more and shall cease to operate automatically thereafter. C.C. expedited.