
(1996) 11 BOM CK 0002
In the Bombay High Court
Case No : L.P.A. No. 24 of 1991

Shankarprasad

APPELLANT

Vs

Lokmat Newspapers Pvt. Ltd., Nagpur

RESPONDENT

Date of Decision : 06-11-1996

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 12, 12(4), 12(6), 17
Trade Unions Act, 1926 — Section 28

Citation : (1997) 3 ALLMR 58 : (1997) 75 FLR 869 : (1997) 2 LLJ 195

Hon'ble Judges : S.B. Mhase, J; L. Manoharan, J

Bench : Division Bench

Advocate : S.D. Thakur, for the Appellant; Ramesh Darda and M.S.M. Pimpalwar, for the Respondent

Judgement

S.B. Mhase, J.—This Letters Patent Appeal arises from the dismissal in limine of Writ Petition No. 70 of 1991 filed by the appellant before the Single Bench of this Court, on April 25, 1991. This appeal arises in the backdrop of the facts stated below.

2. The appellant is an employee of the respondent since November 14, 1971 and at the relevant time, was working as Foreman in the Composing Department of the respondent-Newspaper Establishment. Prior to January, 1981, the composing work of the respondent-Establishment was being carried out by hand composing. However, in January, 1981, the respondent installed photo composing machine, thereby introducing a new technique of without giving a notice u/s 9A of the Industrial Disputes Act, 1947 ("I.D. Act", for short). The respondent completely switched over their work of composing of newspaper on photo composing machine in October, 1981. On November 4, 1981, the respondent transferred appellant along with other 24 employees to Jalgaon. However, as the appellant and other employees were employed with the respondent, when the respondent was having only one establishment or concern at Nagpur, the services of the appellant and other employees were not transferable and, therefore, a complaint

under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("MRTU & PULP Act", for short) was filed before the Industrial Court, Nagpur. On the said complaint, initially an interim stay was granted. However, the said order was vacated by the Industrial Court. Therefore, in the petition, which came to be filed before this Court, this Court granted stay of transfer order and directed to dispose of the complaint within a period of three months. In the result, the Industrial Court decided the complaint on February 12, 1982 in favour of the appellant. The respondent filed Writ Petition No. 630 of 1982, which was admitted by this Court. However, this Court did not issue stay or injunction in favour of the respondent. In the result, the respondent has to accommodate and provide an employment to the appellant at Nagpur. Thus, the attempt to transfer the appellant from Nagpur to Jalgaon failed. In these circumstances, on March 25, 1982, the respondent issued notice to the appellant along with other employees from the Composing Department u/s 9A of the I.D. Act, wherein it was informed that as a result of the installation of the photo composing machine, there was no work available with the respondent so as to provide it to appellant and other 24 employees and, therefore, it is proposed to retrench the appellant and other 24 employees. The said notice was opposed by the appellant and the other employees. As there was an industrial dispute, the Conciliation Officer i.e. the Labour Commissioner, Nagpur, taking the cognizance of the said industrial dispute, admitted and commenced the conciliation proceedings on April 16, 1982. The conciliation proceedings thus initiated, failed before the Conciliation Officer on June 22, 1982 at about 4 p.m. and on the same day, i.e. on June 22, 1982, the appellant along with other 24 employees were retrenched by the respondent following the provisions of Section 25-F of the I.D. Act. The Conciliation Officer submitted his report to the Government on August 13, 1982 and the Government made a reference u/s 10 of the I.D. Act to Industrial Tribunal on August 25, 1982. Meanwhile, immediately after the order of retrenchment was passed by the respondent, the appellant filed a complaint u/s 28 read with items 1(a), (b), (d) and (f) of Schedule IV of the MRTU & PULP Act before the Labour Court, Nagpur on June 25, 1982. Thus, on the date when the Government made a reference u/s 10 of the I.D. Act, a complaint u/s 28 of the MRTU & PULP Act, as stated above, challenging the retrenchment of the appellant, was pending before the Labour Court. The respondent, therefore, raised an objection u/s 59 of the MRTU & PULP Act. Thereby the said objection was accepted by the Industrial Tribunal, Nagpur, and therefore, a reference made by the Government u/s 10 of the I.D. Act was disposed of u/s 59 of the MRTU & PULP Act. In the result, the complaint filed by the appellant on June 25, 1982 survived. The said complaint was decided by the Labour Court, Nagpur, on January 30, 1990. The appellant filed a revision petition against the said order u/s 44 of the MRTP & PULP Act. The said revision petition was dismissed on November 20, 1990. As stated above, therefore, Writ Petition No. 70 of 1991 was filed by the appellant from which the present letters patent appeal arises.

3. The main question that arises for consideration of this Court is to consider the

validity of the order of retrenchment issued by the respondent on June 22, 1982 by which the services of the appellant were terminated on the ground of rationalisation or improvement of plant or technique in the light of the provisions of MRTU & PULP Act and more specifically under items 1(a), (b), (d) and (f) of Schedule IV of the said Act.

4. The first contention raised by the appellant is to the effect that the introduction or installation of the photo composing machine is a rationalisation or improvement of plant or technique, which is likely to lead to retrenchment of the workmen, as provided under item 10 of Schedule IV of the I.D. Act and, therefore, before introduction or installation of rationalised or improved plant or technique, the respondent should have complied with the provisions of Section 9A of the I.D. Act. The thrust of the contention is that the compliance of Section 9A is a condition precedent to be complied with by the employer when the change in the conditions of service is to be effected in respect of any matters specified in Schedule IV. According to the appellant, the provision is mandatory and non-compliance with the said provision, renders the change effected non est in law. Therefore, according to the appellant, the order of retrenchment issued by the respondent is by way of victimisation and colourable exercise of the employer's rights. In the present facts of the case, there is an unfair labour practice with undue haste in termination of the services of the appellant.

5. The second broad contention raised by the appellant is that the services of the appellant were terminated by an order of retrenchment when the conciliation proceedings were not concluded or ended, as provided in Section 20(2) of the I.D. Act and, therefore, there was violation by the respondent of the provisions of Sections 33 and 33A of the I.D. Act.

Thus, according to the appellant, as the attempt to transfer illegally the petitioner from Nagpur to Jalgaon failed, the respondent retrenched the services of the appellant on a false pretext or reason of the appellant being surplus as a result of the rationalisation or improvement of plant or technique and that too, while the conciliation proceedings were going on. The respondent thus indulged into an unfair labour practice under clauses (c) and (e) of Item 1 of Schedule IV, namely, discharging or dismissing the employee patently for false reason and with undue haste. According to the appellant, while the conciliation proceedings were going on and have not concluded, as provided in Section 20(2) of the I.D. Act, it was an undue haste on the part of the respondent to retrench the appellant. Thus, the appellant contends that the discharge or dismissal of the appellant by way of retrenchment from the services of the respondent is an unfair labour practice under Clauses (a), (b), (d) and (f) of Item 1 of Schedule IV of the MRTU & PULP Act and, therefore, the respondent be directed to desist from indulging into such unfair labour practice and the appellant be reinstated with back wages.

6. As against this contention, the respondent contended that no doubt the photo composing machine was installed in the year 1981, but the respondent had tried

to accommodate the appellant by providing the work at Jalgaon. However, when the transfer was not accepted by the appellant and when it was found that there was no work available at Nagpur as a result of the installation of the said photo composing machine, the notice u/s 9A was issued. According to the respondent, there is no bar in rationalisation, standardisation or improvement of plant or technique by any provisions of the Act. When the rationalisation, standardisation or improvement of plant or technique is likely to effect in the retrenchment of the employees, then it becomes necessary to follow the provisions of Section 9A. Therefore, the respondent contended that when it was proposed to effect the change in the conditions of the service of the appellant and other employees, it was found necessary to follow the provisions of Section 9A and accordingly, by issuing notice on March 25, 1982 u/s 9A, the respondent has complied with the provisions of law. The respondent further contended that the conciliation proceedings came to an end on June 22, 1982. And when it was found that the conciliation has failed, the order of retrenchment has been issued. Thus, according to the respondent, the retrenchment, in the present matter has been effected after the conclusion of the conciliation proceedings and, therefore, there is no violation of Section 20(2) and Section 33 of the I.D. Act. It is further contended that the Conciliation Officer u/s 12(6) is supposed to submit his report within 14 days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government. Therefore, according to the respondent, as the conciliation commenced on April 16, 1982, the report must have been or should have been submitted by the Conciliation Officer on or before April 30, 1982 and the continuation of conciliation and submission of the report thereafter was bad in law because the continuation of conciliation proceedings after 14 days of the commencement of the conciliation proceedings is not provided by sub-section (6) of Section 12. Therefore, order of retrenchment issued on June 26, 1982 is not violative of the provisions of Section 20(2) read with Section 33 of the I.D. Act. It was further contended that the violation of Section 33 itself will not be sufficient to grant reinstatement and pay back wages to the appellant, because it is further necessary to consider the validity of the order of retrenchment and, therefore, it was alternatively tried to submit that in case this Court finds that there is violation of the provisions of Section 33, as the Courts below have not considered the validity of the retrenchment order, the matter may be sent back to the Labour Court to lead evidence in order to justify the retrenchment order and to consider the said aspect by the Labour Court.

7. Before dealing with the contentions raised by the rival parties, it is necessary to mention that there is no challenge in the present appeal by the appellant in respect of the non-compliance of the provisions of Section 25-F of the I.D. Act. On the contrary, it is admitted by the appellant that the respondent has terminated the services of the appellant following the provisions of Section 25-F of the I.D. Act and, therefore, this Court is not considering any aspect of the non-compliance of Section 25F simpliciter in the present matter.

8. However, one of the grievances of the appellant, as stated above, is a non-compliance of the provisions of Section 9A of the I.D. Act by the respondent, as the admitted facts show that the photo composing machine was installed in January, 1981 and the notice u/s 9A has been issued on March 25, 1982. Not only that, but the complete work of the respondent was switched over to the photo composing machine in the month of October, 1981. Thus, the respondent completely carried out the work of installation of photo composing machine and introduced rationalisation or improvement of plant or technique. Thereafter, the respondent tried to transfer the appellant along with others to Jalgaon and when that attempt failed, the notice of change u/s 9A of the I.D. Act was given on March 25, 1982. In the light of these facts, the question arises as to whether the respondent has complied with the provisions of Section 9A read with Schedule IV, Item 10 of the I.D. Act. In order to appreciate the contentions of the rival parties, it is necessary to state the relevant portion of Section 9A :

"9A. Notice of change - No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change, -

(a) Without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) Within twenty-one days of giving such notice"

9. In the present matter, the retrenchment has been effected on the ground of installation of the photo composing machine and, therefore, the present case has to be considered in the light of the provisions of Section 9A read with Item 10 of Schedule IV. So far as the compliance of Section 9A is concerned, the Apex Court, in the matter of Tata Iron and Steel Co. Ltd. Vs. The Workmen and Others, , has observed at pp 265-266 :-

"We now come to the main contention. Section 9A which has already been reproduced, lays down that change in the conditions of service in respect of any matter specified in the Fourth Schedule shall not have effect unless a notice is given to the workmen likely to be affected by such change. The relevant entries of the Fourth Schedule have already been reproduced

If that be so, then notice for effecting such a change would be within the contemplation of Section 9A. Further the real object and purpose of enacting Section 9A seems to be to afford an opportunity to the workmen to consider the effect of the proposed change and, if necessary to present their point of view on the proposal. Such consultation further serves to stimulate a feeling of common joint interest of the management and workmen in the industrial progress and increased productivity. This approach on the part of the industrial employer would reflect his harmonious and sympathetic co-operation in improving the status and dignity of the industrial employee in accordance with the egalitarian and progressive trend of our industrial jurisprudence, which strives to treat the capital and labour as co-sharers and to break away from the tradition of labour's

subservience to capital ... In our opinion, in order to effectively achieve the object underlying Section 9A, it would be more appropriate to place on the Fourth Schedule read with Section 9A a construction liberal enough to include change of weekly rest days from Sunday to some other week day. The appellant having thus effected a change in the weekly days of rest without complying with Section 9A read with the Fourth Schedule this change must be held to be ineffective and the previous schedule of weekly days of rest must be held to be still operative .."

In this case, the change under consideration was of the weekly holiday and the same holiday was changed from Sunday to some other day without compliance of Section 9A and the Supreme Court as above has observed ultimately that the said change is ineffective and the status quo ante of such change will be enforced so far as the conditions of the service of the employees are concerned. Thus, in this case, no doubt, the Section has been held to be mandatory in operation.

10. The Apex Court has also considered the provisions of Section 9A in the matter of Workmen of The Food Corporation of India Vs. Food Corporation of India, . In this case, the Court has considered the change in the mode of payment to the workmen. The initial system of a direct payment by the employer to its workmen was introduced abolishing the contract system. However, subsequently, the said work was entrusted to the contractor and the system of payment through the contractor was introduced. The relationship being established directly, the Court found that while effecting the change, the provisions of Section 9A required to be followed. In para 19 of the said case; it has been observed :

"It is at this stage necessary to examine the implication of Section 9A of the I.D. Act, 1947. As hereinbefore pointed out, Section 9A makes it obligatory upon an employer who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule to give a notice of desired or intended change. It cannot do so without giving to the workman likely to be affected by the change, a notice in the prescribed manner of the nature of the change proposed to be effected and within 21 days of giving such notice. There is a proviso to Section 9A which has no relevance here Now after introducing the direct payment system agreed to between the parties, if the Corporation or the employs, wanted to introduce a change in respect of any of the matters set out in Fourth Schedule, it was obligatory to give a notice of change. Item 1 in Fourth Schedule provides : "Wages, including the period and mode of payment". By cancelling the direct payment system and introducing the contractor, both the wages and the, mode of payment are being altered to the disadvantage of the workmen. Therefore, obviously a notice of change was a must before introducing the change, otherwise it would be an illegal change. Any such illegal change invites a penalty u/s 31(2) of the I.D. Act, 1947. Such a change which is punishable as a criminal

offence would obviously be an illegal change. It must be held that without anything more such an illegal change would be wholly ineffective."

The Supreme Court in the case of North Brook Jute Co. Ltd. and Another Vs. Their Workmen, , has considered the breach of Section 33 and has observed at page 583 :-

"The next argument was that whatever alteration was effected in the conditions of service, was made, on the date when notice under S. 9A was given and that being before December 13 there was no contravention of S. 33. There is in our opinion no substance in this contention.

(The Court has reproduced Section 9A)

What is important to notice is that in making this provision for notice the Legislature was clearly contemplating three stages. The first stage is the proposal by the employer to effect a change; the next stage is when he gives a notice and the last stage is when he effects the change in the conditions of service on the expiry of 21 days from the date of the notice. The conditions of service do not stand changed, either when the proposal is made or the notice is given but only when the change is actually effected. That actual change takes place when the new conditions of service are actually introduced."

This Court has considered the provisions of Section 9A; item 10 of Schedule IV in the matter of Nav Bharat Hindi Daily, Nagpur Vs. Nav Bharat Shramik Sangha and another, . In this case, the installation of mono composing machine in the press resulted in retrenchment of 13 workmen and, therefore, the installation of mono composing machine being a rationalised machinery likely to lead to retrenchment of workmen, Item 10 of Schedule IV of the I.D. Act is directly attracted. The Court has observed that, "Any employer, who proposes to effect change in the conditions of service applicable to the workman in respect of any matter specified in the Fourth Schedule, can effect change only after giving the workman likely to be affected by such change, a notice in the prescribed manner and after waiting for 21 days the proposed change can be brought about. The intention behind the notice appears to be that the workman affected has a chance to raise a dispute by approaching proper authorities. The said dispute can also mature into a reference if the parties do not arrive at an amicable settlement. It is thus, apparent that Section 9A was enacted with a view to protect the interests of workman who may be affected by a proposed change of the employer. In these circumstances, it would be difficult for us to hold that the provisions of Section 9A are not mandatory. In the instant case, the installation of the additional mono composing machine, which was admittedly a rationalised machine, it was bound to affect the workmen concerned and it was incumbent upon the petitioner to have complied with Section 9A of the Act. Failure to do so

would render the action of the petitioner wholly invalid"

11. Thus, the above-referred cases were pointed out that whenever change is proposed to be effected in respect of any matter covered under Schedule IV of the I.D. Act, the employer is under a mandatory obligation to comply with the provisions of Section 9A and non-compliance thereof will render the change effected in the conditions of service of the employee as non est or ineffective and the services of the employee will be deemed to be continued as were prior to effecting the change in the conditions of the service of the said employee. So far as the mandatory effect of the provisions are concerned, there is no dispute. The facts involved in the above-referred cases show that the employers concerned in those cases have not given change notice at any point of time and, therefore, when the matter was considered, it was considered in the backdrop of the fact that there is no change notice issued by the employer prior to effecting the change in question. In the present matter, even though the employer has not issued a notice u/s 9A prior to installation of photo composing machine, which is a rationalised improved technique, but the employer has issued the said notice u/s 9A after attempting to effect the transfer of the appellant prior to the actual retrenchment of the appellant. Therefore, the dispute in the present matter centres round the point as to what point of time the notice of change, as required u/s 9A, has to be given by the employer. It may be noted that the provisions of Section 9A in relation to the other items in Schedule 9A stand on a different footing, because Items 1 to 9 and 11, if perused, it will be evident that as a result of change in the service conditions mentioned in Items 1 to 9 and 11 of Schedule IV, the employees, even though adversely affected as a result of the change, will not go out of the employment. However, as a result of the change mentioned in Item 10 of Schedule IV, the employee is likely to lose the service, because the said change leads to the retrenchment of a workman. It is necessary to point out that the provisions of Section 25F providing for a retrenchment simpliciter stand on a different footing than when the said provisions of Section 25F are being considered along with Item 10 of Schedule IV and Section 9A. The retrenchment itself as provided u/s 25F independently cannot be said to be a condition of service, because in that case, the employer has a power to retrench the employee for whatever reason following the provisions of Section 25F and Section 25G and even though the said termination can be challenged in the Court of Law so as to ascertain the bona fides and/or as to whether it is by way of any unfair labour practice, still in that case, the industrial dispute arises after the termination has been effected by complying with the provisions of Section 25F of the I.D. Act.

However, when we consider the case of a rationalisation, standardisation or improvement of plant or technique, which is likely to lead to retrenchment of the workmen, then the retrenchment effected as a result of these provisions stands on a different footing and one of the distinguishing features, as a result of the incorporating the said likely retrenchment in Schedule IV, is that it becomes necessary condition of the service and, therefore, the notice, u/s 9A has been

provided for, which may ultimately mature in reference u/s 10 of the I.D. Act. The rationalisation, standardisation or improvement of plant or technique, which has no likely effect of retrenchment of the workmen, can be effected by the employer without following the course of Section 9A. However, when the rationalisation, standardisation or improvement of plant or technique is likely to lead to retrenchment of the workmen, the said change in the conditions of the service cannot be effected unless the provisions of Section 9A are observed. What is important to be taken into consideration is the phraseology used in Section 9A that when the employer proposes to effect any change in the conditions of the Service, he has to comply with the provisions of clauses (a) and (b) of the said Section, namely, to give a notice in the prescribed form of the nature of the change proposed to be effected and shall not effect it within 21 days of giving of such notice. The provisions of Section 9A makes it clear that the actual change in the conditions of the service cannot be effected unless the notice is given in the prescribed manner of the proposed change and thereafter the employer waits for a period of 21 days. According to Section 9A, the change notice is to be given when the change is a proposed change. Item 10 of Schedule IV is also to this effect : rationalisation, standardisation or improvement of plant or technique, which is likely to lead to retrenchment of workmen. As a result of the words "likely to lead to retrenchment" being used in Item 10 of Schedule IV, it becomes necessary for the employer to consider and to assess, when any proposal of rationalisation, standardisation or improvement of plant or technique is under consideration, as to whether the said rationalisation, standardisation or improvement of plant or technique is likely to result in the retrenchment of the workmen. Therefore, while preparing the project report or a proposal for introduction of rationalisation, standardisation or improvement of plant or technique, the employee is bound to assess as to whether the likely effect of the said rationalisation standardisation or improvement of plant or technique is going to be the retrenchment of the workmen and if on such assessment, it is found by him that the rationalisation, standardisation or improvement of plant or technique, which the employer proposes or desires to carry out, is likely to result in retrenchment of the workmen, the employer is bound to follow the provisions of Section 9A. A combined reading of Section 9A and Item 10 of Schedule IV makes it abundantly clear that the notice of change u/s 9A in the matter of rationalisation, standardisation or improvement of plant or technique, which is likely to lead to retrenchment of the workmen, has to be given or shall be given prior to effecting actual rationalisation, standardisation or improvement of the plant or technique. It will not be open for the employer to say that after actual introduction of rationalisation, standardisation or improvement of plant or technique, the employer found that it had effect of retrenchment and, therefore, the employer proceeds to comply with Section 9A of the I.D. Act.

12. It is the contention of the respondent that for effecting the rationalisation, standardisation or improvement of plant or technique, it is not necessary to issue notice u/s 9A. According to the respondent, notice u/s 9A becomes necessary

when the employer decides to and/or the employer points out that the retrenchment of the workmen is likely after the"; introduction of the rationalisation, standardisation or improvement of plant or technique. In support of the contention raised, the learned counsel for the respondent tried to rely on the decision in the case of Hindustan Lever Ltd. Vs. Ram Mohan Ray and Others, , and pointed out the observations of the Supreme Court made in para 9 of its judgment :

"It appears to us that the arrangement of the words and phrases in that item shows that only rationalisation or standardisation or improvement of plant or technique, which is likely to lead to retrenchment of workmen, would fall under that Item. In other words, retrenchment or standardisation by itself would not fall under Item 10 unless it is likely to lead to retrenchment of workmen. The reference to rationalisation at page 257 of the report of the Labour Commission and the reference to standardisation of wages in it are not very helpful in this connection. Standardisation can be of anything, not necessarily of wages. It may be standardisation of product, standardisation of working hours, standardisation of leave privileges ..

"On the basis of this, it was being submitted that the provisions of Section 9A and Item 10 of Schedule IV are not opposed to the rationalisation, standardisation, or improvement of plant or technique and it is only when the said rationalisation, standardisation etc. is likely to effect retrenchment, the employer is supposed to comply with the provisions of Section 9A. According to the respondent, the photo composing machine, in the present matter, was installed in January 1981 and the total work was switched over on that machine in October, 1981 and thereafter, the employer has found that the likely effect is that the workmen are becoming surplus. At that stage that the employer found it fit to transfer the appellant from Nagpur to Jalgaon. However, the appellant challenged the said transfer order and which ultimately held to be an unfair labour practice on the basis of the decision in the case of Kundan Sugar Mills Vs. Ziyauddin and Others, , and, therefore, it was found that the introduction of a photo composing machine is likely to lead to retrenchment of the workmen along with the appellant and, therefore, a notice u/s 9A was issued and ultimately, the retrenchment was carried out. So in order to justify this act of the employer, the above-referred argument was being submitted by the respondent relying on the observation cited in Hindustan Lever Ltd's case (supra). It was contended that it is not obligatory or necessary to issue notice u/s 9A at the time introduction of rationalisation, standardisation or improvement of plant or technique. Such notice u/s 9A only becomes necessary after the actual introduction of the said rationalisation, standardisation, or improvement of plant or technique, if it is found that the likely effect is retrenchment. We do not agree with this contention raised by the respondent. The said ratio has not been properly construed by the respondent. The said observations have been made by the Supreme Court in para 7 while appreciating the argument that "the rationalisation and standardisation per se would not fall under Item 10 even if they are not likely to

lead to retrenchment of the workmen and only improvement of plant or technique would require that they should lead to retrenchment of workmen in order to fall under Item 10" and there the Supreme Court has observed rejecting the said contention that "it appears to us that the arrangement of words and phrases in that item shows that only rationalisation, standardisation or improvement of plant or technique which is likely to lead to retrenchment of workmen found to fall under that item." What is further important to be observed is that the Apex Court in the above-referred case has found that "moreover during the course of rather prolonged negotiations between the parties, the employer made it abundantly clear again and again that nobody would be retrenched. It was clearly made part and parcel of the scheme of reorganisation. Hindustan Lever Ltd. being a large organisation covering the whole of the country, there was no difficulty about giving effect to this reorganisation Scheme without retrenching anybody" and ultimately the Apex Court has observed in para 10 of the said case that "agreeing with the Industrial Tribunal that when we see no reason to differ from the finding of the Tribunal that there has been no change in uses adversely affecting the workers, and that as such there has been no retrenchment, Item 10 of Schedule IV is not attracted nor is Item 11". Thus, the human rationalisation introduced by the said employer as a measure of economic reorganisation of the company reflected through job integration has no likely effect of a retrenchment and, therefore, Item 10 of Schedule IV was found to be not applicable. However, in the present matter, it is an admitted position that Item 10 of Schedule IV applies and the notice u/s 9A is necessary and that the only nicety tried to be developed relying on Hindustan Lever Ltd's case (supra) that the notice u/s 9A can be so given after rationalisation, standardisation or improvement of plant or technique has been effected and when it was found that its likely effect is retrenchment of the workmen. Apart from the non-applicability of the ratio of Hindustan Lever Ltd's case (supra), we do not agree with the said submission of the learned counsel for the respondent. Firstly, the object of the Industrial Disputes Act is to provide for the investigation and settlement of the industrial disputes. Section 9A read with Item 10 of Schedule IV of the I.D. Act deals with the change leading to the retrenchment of the workman as a result of the rationalisation, standardisation or improvement of plant or technique and as the said change is in respect of the terms and conditions of the service of the employee, it is not a retrenchment simpliciter. Therefore, the object of Section 9A is that after the notice is issued u/s 9A, there should be a dialogue or discussion between the employer on the one hand and would be affected employees or their union on the other hand so that the retrenchment can be avoided. In such a negotiation, the employees or the union can equally appreciate and study the consequences of rationalisation, standardisation or improvement of plant or technique so as to avoid the retrenchment of the workman. In some of the cases, as a result of the introduction of the rationalisation, standardisation or improvement of plant or technique, even though the workers may become surplus, the retrenchment can be avoided by absorbing those workmen in the available posts with the employer.

Not only that, but on an improved installed machinery, even though, prima facie, the existing workers may, not appear to be useful, still on negotiations, it can be ascertained that what type of workmen are necessary to be employed on a newly installed rationalised machinery and if possible, instead of retrenchment, the existing workmen can be trained to operate the said machinery either by providing to necessary skill through training by the employer and/or by the trade unions. As, in the present matter, the evidence shows that the typing was necessary so as to work on photo composing machine installed by the respondent. Such a typing skill can be acquired within some span of time. In the present matter, the photo composing machine was installed in the month of January, 1981. However, the actual retrenchment came to be effected on June 22, 1982. Even if we consider that on November 4, 1981, the appellant being surplus was transferred to Jalgaon, still from the installation of the machinery till the time of transfer, 11 months have gone. Therefore, at any time prior to or at the time of installation of photo composing machine in January, 1981, the notice u/s 9A of the I.D. Act would have been given. Had the employer complied with the provisions of Section 9A prior to installation of machinery as a result of the negotiations between the employer and the employees or union, it would have been clear to employer that in order to avoid the retrenchment, the employee has to train himself in typing and within a period of 11 months, the employee could have obtained the necessary skill or he could have assured the employer that he will acquire the necessary skill of typing in stipulated time so that the retrenchment can be avoided. Thus, the provisions of Section 9A ultimately in effect force both the sides of the industrial dispute, namely, the employer and the employees to come together for the purposes of the negotiations and to consider the likely effect of the rationalisation, standardisation or improvement of plant or technique, which is likely to lead to retrenchment of the workmen. Not only that, if as a result of the negotiations inter se between 30 the employer and the employees, the dispute is not settled, the Conciliation Officer may commence the conciliation u/s 12 of the I.D. Act and see that the industrial dispute is settled as per the provisions of law and if the dispute is not settled before the Conciliation Officer, the said dispute may mature into reference u/s 10 of the I.D. Act and can be referred by the Government for adjudication to Industrial Tribunal. Thus, the machinery provided under the I.D. Act for the investigation and settlement of the industrial dispute may logically lead to the adjudication by the Industrial Tribunal and thereafter the rationalisation, standardisation or improvement of plant or technique likely to lead to retrenchment of the workmen can be effected. This process of law laid down under the I.D. Act is necessary to be followed in order to maintain the industrial peace and harmony. However, if the contention raised by the respondent is accepted, then the employer will be introducing the rationalisation, standardisation or improvement of plant or technique having the likely result of retrenchment first and the issuance of the notice at a later stage, as submitted by the respondent, would lead to frustrate the provisions of Section 9A and the scheme envisaged for the settlement of the industrial dispute under the I.D. Act. Not only that, but as the rationalised or

improved plant or technique has been introduced, the retrenchment becomes a fait accompli with the employees. As a result of rationalisation, standardisation or improvement of plant or technique being introduced first and the provisions of Section 9A followed subsequently in respect of Item 10 of the Schedule IV not only the scheme provided under the Act is violated, but the collective bargaining power of the employees or the union is considerably affected. The employer and the employees are not at par with one another in this situation and, therefore, the employees can be forced to accept the retrenchment in the service and the very basic object of a negotiation between the employer and the employee so as to settle the industrial dispute by avoiding the retrenchment on the basis of the collective bargaining, stands frustrated. In consequence of such effect, there will be an unrest in the employees and, therefore, whenever an employer will try to install the rationalised, modernised, standardised or improved plant or technique, the employees will oppose the installation of the said machinery and if necessary, for the said purpose, the employees may come on road, because ultimately it affects the bread of the employees. Therefore, in order to avoid such an alarming consequence disturbing the industrial peace and tranquillity, the provisions of the I.D. Act provide for the machinery for the investigation and settlement of the industrial dispute and, therefore, for the reasons quoted above, we hold that the notice of change u/s 9A of the I.D. Act is required to be given, when the change is in respect of Item of Schedule IV of the said Act, prior to the installation and/or introduction of the rationalisation, standardisation or improvement of plant or technique, if it is likely to lead to retrenchment of the workmen.

13. It was argued that when the photo composing machine was installed, it was in the contemplation of the respondent that the respondent will transfer the appellant and the other workmen to Jalgaon wherein the respondent is having the same concern or establishment and, therefore, initially, according to the assessment of the respondent, there was no likelihood of retrenchment of the workmen or the appellant. However, the transfer orders were not accepted by the workmen, so also by the appellant and, therefore, in consequence, the retrenchment became necessary. Thus, an attempt was made to point out that the installation of the photo composing machine in the present case was not likely to lead to retrenchment of the workmen and, therefore, it was not necessary to follow the provisions of Section 9A at the time of installation of the photo composing machine in the month of January, 1981. The said submission cannot be accepted for the reason that it itself pointed out that the respondent was well aware of the fact that the installation of the photo composing machine is likely to lead to a position wherein the appellant and the other workmen will be surplus and, therefore, they will have to be absorbed and/or retrenched. In the present matter, assuming for some time that the respondent wanted to absorb them by transferring to Jalgaon in the establishment of the respondent, the said transfer orders have been held to be an unfair labour practice by the Industrial Court in view of the ratio laid down by the Supreme Court in the case of *Kundan Sugar Mills v. Ziyauddin* (supra). Thus, the transfer of the appellant and the

other employees in the present matter was equally a change in the conditions of their services, so also it was contrary to the service contract when the appellant and the other employees entered. In the service of the respondent, because it was not in the contemplation of the appellant and the other employees that their services will be transferable in other concern or establishment of the respondent. We clarify here that we ourselves are not considering the validity of the transfer order in the present writ petition, but we only take into consideration the fact that the transfer of the appellant has been stayed by the Industrial Tribunal and this Court has further refused to stay the judgment of the Industrial Tribunal. Therefore, so in fact, the said transfer order has been found by the other Court as not legal one. We adverted to this fact for the purpose that whenever the employer is assessing the absorption of the employees instead of retrenchment so as to avoid the compliance of Section 9A of the I.D. Act read with Item 10 of Schedule 10 of the I.D. Act. the anticipated act of absorption shall be equally a legal one and shall be of such a nature that it could be effected without affecting the change in the conditions of the service of the employee. In the present matter, the absorption by way of transfer could not materialise, because the act of transfer of the appellant from Nagpur to Jalgaon was itself an unfair labour practice as observed by the Industrial Court. We are aware had the said act been done by the employer without indulging into an unfair labour practice, the services of the employee could have been absorbed by way of a transfer. We further clarify here that had the notice been given prior to installation of the photo composing machine in January, 1981 as a result of the negotiations between the affected employees or union and employer, the appellant would have trained himself in typing and/or would have accepted the absorption in the service by way of transfer to Jalgaon and as the said change would have been brought by the negotiations, he would not have further raised an industrial dispute, as we are considering in the present matter. Therefore, we observe that wherever the employer desires to carry out the rationalisation, standardisation or improvement of plant or technique, which is likely to effect retrenchment, by reorganising the labour force and absorbing the surplus labours either in the same establishment and/or by way of a transfer, the said act of absorption or transfer, as it being intended by the employer without taking recourse to the provisions of Section 9A, the said absorption or transfer should be a legal act and shall not amount to an unfair labour practice, as is found in the present matter.

14. Then the respondent relied on the case of L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another, and submitted that when the workman has been retrenched, it cannot be said to be any change in the conditions of service and, therefore, the provisions of Section 9A are not applicable. The respondent relied on para 7 of the said judgment, which is as follows :

"It was obligatory upon the employer, who wants to retrench the workmen to give notice as contemplated by clause (a) of Section 25-F. When a workman is retrenched it cannot be said that change in his conditions of service is effected. The conditions of service are set out in Fourth Schedule. No item in Fourth

Schedule covers the case of retrenchment. In fact, retrenchment is specifically covered by Item 10 of the Third Schedule. Now, if retrenchment which connotes termination of service, cannot constitute change in conditions of service in respect of any item mentioned in Fourth Schedule, S. 9A would not be attracted. In order to attract S. 9A, the employer must be desirous of effecting a change in conditions of service in respect of any matter specified in Fourth Schedule. If the change proposed does not cover any matter in Fourth Schedule S. 9A is not attracted and no notice is necessary

It requires to be pointed out that the above-referred observations of the Apex Court have been made when the Court was considering the submission that the proviso to Section 9A, which exempts the employer from giving the notice of change if the case falls in any of the two provisos to Section 9A. It is pertinent to note that in that case, the question of termination of the service or the retrenchment was not related to any of the Items covered under Schedule IV and more specifically to Item 10 of Schedule IV of the I.D. Act. The termination or the retrenchment of the workman in the said case was independently of Item 10 of Schedule 40 IV and, therefore, the observation came to be made that the retrenchment is covered under Item 10 of Schedule III. However, the Apex Court has observed that "in order to attract Section 9A the change proposed must be in the conditions of service applicable to the workman in respect of any matters specified in the Fourth Schedule." Not only that, in para 8, the Apex Court has observed :

"Section 9A imposes an obligation on the employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule to give notice as therein provided and the employer is precluded from effecting the change without giving to the workman likely to be affected by such change notice in the prescribed manner of the nature of the change proposed to be effected, and the change cannot be effected within 21 days of the giving of such notice. In order to attract Section 9A the change proposed must be in the conditions of service applicable to workman in respect of any, matters specified in the Fourth Schedule. If the proposed change falls in any of the matters specified in the Fourth Schedule the change can be effected after giving notice in the prescribed manner and waiting for 21 days after giving such notice."

Thus, it is eloquently clear from the observations of the Apex Court, which are pointed out above, that the submission of the respondent that the retrenchment read with Item 10 of Schedule IV of I.D. Act cannot be a change in the conditions of the service of the workman and, therefore, the notice u/s 9A is not necessary stands rejected. We too reject the said submission of the respondent.

15. This Court has considered the same argument raised in the case of *Navbharat Daily v. Navbharat Shramik Sangh* reported (*supra*), wherein it has been observed in para 8 that, "On behalf of the petitioner, it was further contended that Section 9A was not applicable in view of the decision of the

Supreme Court in *L. Robert D'Souza v. The Executive Engineer, Southern Railway & Anr.*, reported (supra). In the said case, it has been held that in order to attract Section 9A, the change proposed must be in the conditions of the service applicable to the workmen in respect of any matters specified in the Fourth Schedule. When, however, a workman is retrenched, it cannot constitute a change in the condition of service specified in that schedule. It was, therefore, submitted by Shri Bhangde that while retrenching compositors, it was not necessary for the petitioner to comply with the provisions of Section 9A of the Act. In our opinion this case does not support the case of the petitioner at all. What it purports to decide is that no notice of change is required in the case of retrenchment of employees since it does not affect the conditions of service applicable to the workman in respect of industrial matter specified in the Fourth Schedule. At the same time it does rule that if the proposed change in respect of conditions of service applicable to workman in respect of industrial matter is specified in the Fourth Schedule, Section 9A is attracted. We will shortly point out that in the instant case Section 9A is attracted." In para 9, it has been further observed that. "Needless to say that installation of the mono composing machine was a rationalised machinery. It is the case of the petitioners themselves that the retrenchment of 13 workmen flows as a result of installation of the said machine. In a way, the respondent would be justified in showing to the Industrial Tribunal that the very installation of the machine was without the compliance of Section 9A of the Act. Be that as it may, the fact remains that the installation of the mono composing machine being a rationalised machinery likely to lead to retrenchment of workmen, Item 10 of the Fourth Schedule is directly attracted. It was hence imperative on the part of the petitioner to serve a notice of change u/s 9A of the Act. Omission to do so would necessarily vitiate the retrenchment resulting from the operation of such a machine," Thus, this Court has already held in the above-referred case that the *L. Robert D'Souza's* case cited (supra) lays down the ratio, that it is obligatory for the employer to comply with the provisions of Section 9A whenever the change is proposed to be made in the conditions of the service of the employees in respect of the matters covered under Schedule IV of the I.D. Act.

16. The only distinction, which arises, is that the retrenchment simpliciter u/s 25-F is not a change in the conditions of service while the retrenchment under Item 10 of Schedule IV read with Section 9A is a change in the terms and conditions of the service. A similar question has been also considered in the matter of *Rajasthan State Road Transport Corpn. and Another Vs. Shri Krishna Kant and Others*, . The relevant facts from the said case for our purpose are to this effect. In August, 1979, however, the 1st respondent Company lost Border Security Force contract, and D.C.IV Air-craft operations contract for lifting perishable cargo and in May 1981, it lost flying operations contract given by IGRO. The workload was reduced in 1980-81 by more than 50%. The Pilots were also retrenched and the site at which the work was carried out was reduced from two sheds to one shed. In 1982, one of the hangars collapsed. The Company had a

Dakota Plane before 1979 which also came to be returned to the Government. In 1987, contract of the Company with Mahindra & Mahindra for maintenance of their aero-planes was also terminated and so also contracts with Birlas and Agro-Air-craft Companies were also terminated and, therefore, the retrenchment notice was given. The Single Bench of this Court observed in these facts, "Coming to the last contention of the learned counsel for the petitioner, it was contended that u/s 9A of the Industrial Disputes Act read with Items 10 and 11 of the Schedule IV to the Industrial Disputes Act, no notice of change, as contemplated by the said Section, was given and in the circumstances, the retrenchment was bad in law. I do not find any merit in the said contention. In the present case, there is no plea taken in the statement of claim filed by the union regarding non-compliance of Section 9A of the Industrial Disputes Act. Secondly Section 9A has no application to the facts of the present case. Section 9A does not apply to the cases of retrenchment. Section 9A applies to change in service conditions of existing workmen. By way of illustration, if on account of exigency of work the existing workers are required to put in more work on account of increased workload, then certainly Section 9A would apply, but that is not the case in the matter of retrenchment."

17. These observations have been made when the Court was considering the case of retrenchment simpliciter u/s 25F and not Section 9A read with Item 10 of Schedule IV of the Industrial Disputes Act. We have already observed and we make it clear that the retrenchment simpliciter without reference to Item 10 of Schedule IV does not require the compliance of the provisions of Section 9A of the I.D. Act, but so when it is correlated to Item 10 of Schedule IV, the employee is under a mandatory obligation to comply with the provisions of Section 9A and that mandatory obligation has to be discharged by the employer as observed above prior to effecting the actual rationalisation, standardisation or improvement of plant or technique.

18. The next aspect of the case is that according to the appellant, the respondent has violated the provisions of Section 20 read with Section 33 and 33A of the I.D. Act and thereby has committed an unfair labour practice of terminating the services on patently for false reason and With undue haste. According to the appellant, the order of termination issued on June 22, 1982 immediately after the failure of the conciliation proceedings on the very day was against the provisions of Sections 20(2) and 33 of the I.D. Act. According to the appellant, during the pendency of the conciliation proceedings before the Conciliation-Officer, the employer shall not have issued the termination order, as it had the effect of prejudicing the appellant in respect of the conditions of the service 25 applicable to him immediately before the commencement of such proceeding. The provisions of Section 33 of the I.D. Act provide for that during the pendency of any conciliation proceeding before a Conciliation Officer or a Board, no employer shall in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings;

or for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending. Therefore, according to the appellant, on June 22, 1982, the conciliation proceedings were pending and the employer, therefore, could not have terminated the services of the appellant without obtaining the permission of the Conciliation Officer and thus, according to the appellant, the order of termination is violative of Section 33 read with Section 20(2) and, therefore, it is an unfair labour practice under clause (f) of Item 1 so of Schedule IV of the MRTU & PULP Act. (to be continued in the next issue).

As against this, the respondent has submitted that it was incorrect to say that on June 22, 1982, the conciliation proceeding was pending and, therefore, it was incumbent to obtain the permission prior to terminating and/or altering the conditions of service of the appellant. It was further submitted that even assuming that there is a breach of Section 33, that violation or breach of Section 33 itself will not invalidate the order of termination, but the Industrial Tribunal is bound to consider the validity of the order of termination in a reference u/s 10 or in a proceeding u/s 33A. In short, the contention is that the violation of Section 33 read with Section 20(2) would not invalidate the order of termination of the services and the Court is required to consider the justification of the said order independently of the violation of provisions of Section 33 read with Section 20(2). At the outset, we reject the contention or the submission of the respondent that on June 22, 1982, the conciliation proceedings were ended or concluded. A reference may be made to Section 12 of the I.D. Act where sub-section (1) lays down that where any industrial dispute exists or is apprehended, the Conciliation Officer may, or where the dispute relates to a public utility service and a notice u/s 22 has been given, shall, hold conciliation proceedings in the prescribed manner. Sub-section (6) provides that a report under this Section shall, be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government. Provided that, subject to the approval of the Conciliation Officer, the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute. Sub-section (1) points out that in the matters of public utility service, the Conciliation Officer has to hold conciliation proceedings and, therefore, the said conciliation proceedings are mandatory.

In the present matter, we are not concerned with the public utility service. The conciliation proceedings save and otherwise than the public utility service, are therefore, within the discretion of the Conciliation Officer and, therefore, the Conciliation Officer may commence the said proceedings if he is pointed out that the industrial dispute exists or is apprehended. However, in the mandatory conciliation proceedings or the discretionary conciliation proceedings, the report has to be submitted within fourteen days of the commencement of the conciliation proceedings as provided in sub-section (6) of Section 12 of the I.D.

Act. A reference may be made to Section 20 of the I.D. Act. Sub-section (1) of Section 20 provides for that a conciliation proceeding shall be deemed to have commenced on the date on which a notice of strike or lock-out u/s 22 is received by the Conciliation Officer or on the date of the order referring the dispute to a Board, as the case may be. Sub-section (2) provides for that a conciliation proceeding shall be deemed to have concluded ... (a); (b) where no settlement is arrived at, when the report of the Conciliation Officer is received by the appropriate Government or when the report of the Board is published u/s 17, as the case may be; or (c) On a combined reading of Sections 12 and 20 of the I.D. Act, the learned counsel for the respondent submitted that the law contemplates two types of conciliation proceedings, namely, mandatory and discretionary, as pointed out above and that Section 20, sub-sections (1) and (2) provide for the commencement and the conclusion of the conciliation proceedings, which are mandatory conciliation proceedings. According to the learned counsel, sub-section (1) of Section 20 being a legal fiction controls sub-section (2) of Section 20 and, therefore, Section 20, sub-sections (1) and (2) are only applicable in the matter of conciliation pertaining to the public utility service and, therefore, he further submitted that as the conciliation pertaining to the present case were the conciliation proceedings within the discretion of the Conciliation Officer, the proceedings come to an end or stand concluded on the date the conciliation fails and according to him, as the conciliation has failed on June 22, 1982, the termination order passed thereafter cannot be said to have been passed while the conciliation proceedings are pending before the Conciliation Officer. We reject the said contention or submission made by the learned counsel. The so scope of this provision has been considered by the Supreme Court in the case of *Workers, Industry Colliery v. Industry Colliery* reported in 1951 I LLJ 190, wherein in para 4 of the said judgment, it has been observed :

"Shri N. C. Chatterjee, however, argues that in point of fact the conciliation proceedings came to an end when the appellants had withdrawn from the proceedings and the Regional Labour Commissioner had sent his report. It is by a legal fiction, introduced by Section 20(2)(b), that the conciliation proceedings are prolonged until the actual receipt of the report by the appropriate Government. According to Shri Chatterjee 1 the conciliation proceedings should be held to terminate when the Regional Labour Commissioner sent his report within fourteen days of the commencement of the conciliation proceedings. The difficulty in accepting this argument is that while the word "send" is used in Section 12(4) and the word "submitted" in Section 12(6), the word used in Section 20(2)(b) is "received". That word obviously implies the actual receipt of the report. To say that the conciliation proceedings shall be deemed to have concluded when the report should, in the ordinary course of business, have been received by the appropriate Government would introduce an element of uncertainty, for the provisions of Section 22(1)(d) clearly contemplate that the appropriate Government should have a clear seven days" time after the

conclusion of the conciliation proceedings to make up its mind as to the further steps it should take. It is, therefore, necessary that the beginning of the seven days" time should be fixed so that there would be certainty as to when the seven days" time would expire. It is, therefore, provided in Section 20(2)(b) that the proceedings shall be deemed to have concluded, where no settlement is arrived at, when the report is actually received by the appropriate Government

This provision again came to be considered by the Apex Court in the case of *Andheri Marol Kurla Bus Service and Another Vs. The State of Bombay*, wherein the Apex Court observed at page 238 after quoting Section 20 of the I.D. Act that "The provisions of sub-section 20(2) apply to all conciliation proceedings whether in regard to utility services or otherwise. All conciliation proceedings under this sub-section shall be deemed to have concluded in the case where no settlement is reached, when the report of the Conciliation Officer is received by the appropriate Government. The conciliation proceedings therefore do not end when the report under S. 12(6) is made by the Conciliation Officer but when that report is received by the appropriate Government" Both these cases of the Apex Court, therefore, negate the contention raised by the respondent that the conciliation proceedings come to an end when the conciliation fails and that the provisions of Section 20(2) are not applicable in the conciliation proceedings, which are not pertaining to the public utility services.

19. The other submission, which was tried to be developed on the basis of the provisions of Section 12(6) of the I.D. Act i.e., the Conciliation Officer has to submit his report within a period of 14 days and, therefore, it was being submitted that the continuation of the proceedings beyond the period of 14 days was not proper and legal, not only that, the conciliation stands concluded within the period of 14 days. An attempt was made to point out that in the present matter, the conciliation was commenced on April 16, 1982 and, therefore, the conciliation proceedings relying on the provisions of Section 12(6) stand concluded within a period of 14 days i.e., by the end of April 30, 1982 and, therefore, the order of termination issued on June 26, 1982 should be held to have been issued when the conciliation proceedings were not pending. This contention also stands negated because the period of 14 days, if lapsed, the proceedings will not be had in law. The Apex Court has observed in *A.M.K. Bus Service's case (supra)*, that, "It was contended that the conciliation proceedings should be held to terminate when the Conciliation Officer is required u/s 12(6) of the Act to submit his report but the provisions of the Act above quoted do not support this contention as the termination of the conciliation proceedings is so deemed to take place when the report is received by the appropriate Government. This is how S. 20(2)(b) was interpreted in *Workers of the Industry Colliery, Dhanbad v. Management the Industry Colliery, (supra)*". The Apex Court further observed in para 5 that, "No doubt S. 12 contemplates that the report should be made and the proceedings closed within a fortnight and if proceedings are not closed but are carried on, as they were in the present case, or if the Conciliation Officer does not make his report within 14 days he may be guilty of a

breach of duty but in law the proceedings do not automatically come to an end after 14 days but only terminate as provided in S. 20(2)(b) of the Act". Thus, the contention raised by the respondent that the conciliation proceedings come to an end on the date of the failure of the conciliation and/or on the day when the period of 14 days as provided u/s 12(6) is over, is required to be rejected and we, therefore, reject it and we hold that the conciliation proceedings either in the case of public utility services or in any other case will be deemed to be continued if the settlement is not arrived at between the parties till the day when the report of the Conciliation Officer is received by the appropriate Government or when the report of the Board is published u/s 17, as the case may be.

20. For the purpose of a breach of Section 33, it is necessary that the alteration in the conditions of the service shall have been made by the employer while the proceedings are pending before the Conciliation Officer without obtaining the permission of the Conciliation Officer. In the present matter, the conciliation failed on June 22, 1982 and on the very day, the termination/retranchment order has been issued. Therefore, it is evident that on the day when the termination/retranchment was effected, the report of the Conciliation Officer has not been tendered to the appropriate Government and/or received by the appropriate Government. The Supreme Court in the matter of North Brook Jute Co. v. Their Workmen, reported (supra) has observed in para 7 that, "It necessarily follows that in deciding for the purpose of Section 33 of the Act, at what point of time the employer "alters" any conditions of service, we have to ascertain the time when the change of which notice u/s 9A is given is actually effected. If at the time the change is effected, a proceeding is pending before a Tribunal, Section 33 is attracted and not otherwise. The point of time when the employer proposes to change the conditions of the service and the point of time when the notice is given are equally irrelevant". Thus analyzed, the facts of the present case, the conciliation proceeding was very much pending as observed above on June 22, 1982 before the Conciliation Officer and at that moment, the actual order of termination/retranchment was issued and the conditions of the services of the employee-appellant were altered without obtaining the permission of the Conciliation Officer. We, therefore, hold that the respondent has violated and committed a breach of Section 33 while terminating the services of the appellant by way of retranchment.

21. Having found that there is a breach of Section 33 while the proceedings were pending before the Conciliation Officer, the question, which falls for our decision, is what is the effect of such contravention. Sections 33 and 33A have undergone changes from time to time. But, as the facts involved in the present case are, of the date June 22, 1982, we have to consider the provisions of Sections 33 and 33-A as they stood on that day. Section 33(1), which is relevant for our purpose, was to the effect that during the pendency of any conciliation proceeding before a Conciliation Officer or a Board in respect of an industrial dispute, no employer shall (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of

service applicable to them immediately before the commencement of such proceeding; or (b) for any misconduct connected with the dispute, discharge or punishment, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending. Then Section 33-A provided for where an employer contravenes the provisions of Section 33 during the pendency of proceedings before an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner to such arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly. On a combined reading of Sections 33 and 33-A, as then stood, it will be evident that in Section 33, alteration of the conditions of the service applicable to workmen immediately before the commencement of such a proceeding without obtaining the permission of the Conciliation Officer or a Board during the pendency of the conciliation proceedings was prohibited or banned unless the permission of the Conciliation Officer is obtained. However, we find that Section 33-A does not refer to and provide for a breach of Section 33 while the conciliation proceedings are pending before the Conciliation Officer and, therefore, a complaint u/s 33-A was not in contemplation in respect of the breach of the provisions of Section 33 when it has taken place while the proceedings were pending before the Conciliation Officer or a Board and, therefore, the only remedy for the purpose of a breach of Section 33 while the proceedings were pending before the Conciliation Officer was to initiate the prosecution u/s 31. A complaint u/s 33-A can be made to the Labour Court, Tribunal or National Tribunal by an employee aggrieved by the contravention of Section 33 when the breach of Section 33 has taken place while the proceedings were pending before the arbitrator, a Labour Court, Tribunal or National Tribunal. In short, the remedy of filing the complaint u/s 33-A was not available to the employee in the year 1982. Apart from this analysis, it will be evident that the provisions of Section 33-A have undergone a change as a result of the amendment of the said provisions by the Amending Act 46 of 1982, which came into effect on August 21, 1984. However, even though the amended Section 33-A provides for a complaint being made to the Conciliation Officer or a Board in case of the contravention of the provisions of Section 33 by the employer, still the said section provides that the Conciliation Officer shall take into account such complaint in mediating in, and promoting the settlement of, such industrial dispute. Therefore, even prior to amendment and after amendment, if the employer contravenes the provisions of Section 33, while the proceeding was pending before the Conciliation Officer, the only remedy for settlement of dispute was Section 10 of the I.D. Act and remedy of old Section 33-A or new Section 33-A(b) will be available only if the employer contravenes the provisions of Section 33, while the proceedings are pending before the arbitrator, a Labour Court, Tribunal or National Tribunal. If the aggrieved employee makes a complaint in

writing to Arbitrator, Labour Court, Tribunal or National Tribunal, the said Arbitrator, Labour Court, Tribunal, National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.

22. The above-referred analysis of the provisions of Sections 33 and 33-A have been set out because, according to the appellant, the contravention of the provisions of Section 33 is not only punishable u/s 31, but it violates the industrial dispute, resolution or settlement system scheme provided under the Act and, therefore, it is unfair labour practice covered by Clause (e) of Item 1 of Schedule IV, namely, discharge or dismissal with undue haste. In reply to this submission made by the appellant, the respondent contended that the contravention of the provisions of Section 33 itself is not sufficient to quash and set aside the order of discharge or dismissal, but the Industrial Tribunal is bound to consider apart from the breach of Section 33 the validity and propriety of the order of discharge or dismissal. The respondent relied on the case of *The Punjab National Bank Ltd. Vs. Its Workmen*, . It has been observed at p. 681 of the said judgment, after analysing the provisions, "Thus there can be no doubt that in an enquiry u/s 33-A the employee would not succeed in obtaining an order of reinstatement merely by proving contravention of Section 33 by the employer. After such contravention is proved it would still be open to the employer to justify the impugned dismissal on the merits. That is a part of the dispute which the Tribunal has to consider because the complaint made by the employee is treated as an industrial dispute and all the relevant aspects of the said dispute fall to be considered u/s 33-A. Therefore, we cannot accede to the argument that the enquiry u/s 33-A is confined only to the determination of the question as to whether the alleged contravention by the employer of the provisions of Section 33 has been proved or not". The respondent also relied on the case of *Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another*, , which lays down that, "Section 33, of which sub-section 2(b) forms part must therefore be construed not as if it were standing alone and apart from the rest of the Act, but in the light of the next following Section 33-A and if these two Sections are read together, it is clear that the legislative intent was not to invalidate an order of discharge or dismissal passed in contravention of Section 33, despite the mandatory language employed in the Section and the penal provisions enacted in Section 31(1)" "It will be seen that mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement, because inquiry u/s 33-A is not confined only to the determination of the question as to whether the employer has contravened Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal. The very fact that even after the contravention of Section 33 is proved, the Tribunal is required to go into the further question whether the order of discharge or dismissal passed by the

employer is justified on the merits, clearly indicates that the order of discharge is not rendered void and inoperative by such contravention. It is also significant to note that if the contravention of Section 33 were construed as having an invalidating effect on the order of discharge or dismissal, Section 33-A would be rendered meaningless and futile. Such a highly anomalous result would never have been intended by the Legislature". The respondent also relied on the case of Bhavnagar Municipality v. Alibhai Karimbhai reported in 1977 I LLJ 401, wherein it has been stated, "That, however, does not conclude the matter. The Tribunal was clearly in error in not adjudicating the complaint on the merits. In a complaint u/s 33-A, even if the employer is found to have contravened the provisions of Section 33, the Tribunal has to pronounce upon the merits of the dispute between the parties. The order passed in an application u/s 33-A is an award similar to one passed in a reference u/s 10 of the ct. For the purposes of the Act the complaint u/s 33-A takes, as it were, the form of a reference of an industrial dispute by the appropriate authority and the same has to be disposed of in a like manner."

23. On the basis of the above judgments of the Supreme Court, the respondent submitted that the contravention of Section 33 itself is not sufficient and, therefore, the Labour Court, which considered the unfair labour practice complaint, should have considered the validity of the order of discharge or dismissal on merits. It was further submitted that the validity of the order of termination on merits has not been considered by the Courts below and, therefore, the matter may be sent to the Labour Court, as the respondent, being an employer, is entitled to justify the order of dismissal or termination from service by way of retrenchment. It is pertinent to note and as we have already pointed out above, that the breach of Section 33 of the I.D. Act has taken place in the present matter when the conciliation proceedings were pending before the Conciliation Officer and the remedy of Section 33-A was not available, as the provisions then stood. Not only that even after the amendment of Section 33A in the year 1982, even-though the aggrieved employee was provided with a remedy of making a complaint before the Conciliation Officer, still the Conciliation Officer was/is only supposed to take into account such complaint in mediating in, and promoting the settlement of the dispute or at the most, on failure of the conciliation proceedings, while making a reference to the Government in respect of the industrial disputes can further refer to the breach of the provisions of Section 33. Therefore, the provisions of Section 33-A as then stood, have a force of Section 10 in case the complaint is made while the proceedings are pending before the Arbitrator, a Labour Court, Tribunal or National Tribunal. In short, the position of a breach of Section 33 while the conciliation proceedings were ending before the Conciliation Officer or a Board prior to 1982 or after 1982, is practically the same except that after the Amending Act of 1982 came into force, if the complaint is made about the contravention of Section 33, the Conciliation Officer can take into account such complaint in mediating in, or promoting the settlement of the industrial dispute. This analysis will, therefore, point out that

apart from the remedy of Section 31 for contravention of Section 33, the appropriate remedy for settlement of Industrial dispute under the I. D. Act, when the breach of the provisions of Section 33 is made by the employer while the conciliation proceedings were pending before the Conciliation Officer or a Board, is a reference u/s 10 if made by appropriate Government. The remedy of Section 33-A, as it then stood, and Section 33-A(b), as it stands now, equating it with the reference u/s 10, was and is not available to employee when employer contravenes provisions of Section 33 while the conciliation proceeding was pending before the Conciliation Officer or a Board. Under these circumstances, the breach of the provisions of Section 33, while the conciliation proceedings were pending before the Conciliation Officer or a Board, requires a distinct consideration in relation to Unfair Labour Practices Act. It is further necessary to point out that in all those cases, which are relied on by the respondent, the contravention of the provisions of Section 33 has taken place while the proceedings were pending either before the Arbitrator, a Labour Court, Tribunal or National Tribunal on a reference u/s 10 and, therefore, those authorities or Courts have to consider the main industrial dispute apart from the contravention of Section 33. However, in these circumstances, i.e., when proceeding is pending before those authorities and complaint of breach of provisions of Section 33 is made u/s 33-A old or 33-A(b) new, the complaint u/s 28 of M.R.T.U. and P.U.L.P. Act will not arise in view of the provisions of Section 59 of M.R.T.U. and P.U.L.P. Act. Therefore, the question of contravention u/s 33 of the I. D. Act will arise for consideration of Labour Court under Item 1 of Schedule IV of M.R.T.U. and P.U.L.P. Act, if a complaint is filed (i) alleging apprehended discharge or dismissal while the conciliation proceeding is pending before the Conciliation Officer, (ii) challenging the order of discharge or dismissal actually effected. In case of first category, the complaint u/s 28 of M.R.T.U. and P.U.L.P. Act will be sustainable. The Supreme Court has observed in 1995 (5) Scale 400, that the complaint could be filed by workman apprehending discharge or dismissal by way of unfair labour practice as contemplated by relevant clauses of Item of Schedule IV even prior to actual passing of order of discharge or dismissal. Thus, the contravention of the provisions of Section 33 while the conciliation proceedings were pending before the Conciliation Officer, violates the very machinery or scheme of the settlement of the industrial dispute provided under the I.D. Act and also violate the object of Section 33, which attempts to provide for continuation and termination of the pending proceedings in a peaceful atmosphere undisturbed by any causes of friction between the employer and his employees. The said section insists upon the maintenance of a status quo pending the disposal of the industrial dispute between the parties and, therefore, it is an unfair labour practice under clause (f), Item 1 of Schedule IV of the M.R.T.U. and P.U.L.P. Act, i.e., the termination or discharge of the services of the employees with undue haste.

24. Second category is of challenging order of discharge or dismissal after said order is actually issued in breach of Section 33 while proceedings are pending before Conciliation Officer. We have observed above that prior to 40 1982

amendment of Section 33-A, the remedy of Section 33-A was not available, while the breach of Section 33 takes place during the pendency of the proceedings before the Conciliation Officer or a Board and we have further observed that even after amending the provisions of Section 33-A, the remedy of Section 33-A(b) is not equally available. The old Section 33-A and the new Section 33-A(b) thus equate the complaint under the said Sections with a reference u/s 10 of the I.D. Act if the breach of Section 33 takes place while the proceedings were pending before the said Authority and while considering those provisions, the Supreme Court has observed in the above-referred decisions that the said Authority cannot proceed to set aside the order of discharge or dismissal only on a finding that the provisions of Section 33 are violated, but he is bound further to consider on merit whether the order of discharge or dismissal is justifiable. Thus, we find that the provisions of old Section 33-A and the amended Section 33-A(b) and Section 10 ultimately provide for the same remedy and, therefore, the Apex Court has found that even under the provisions of Section 33-A old the said Authority has to decide on merit the order of discharge or dismissal apart from the contravention of Section 33. Thus, the main industrial dispute needs to be decided.

25. In the present matter, we are considering the complaint u/s 28 of the M.R.T.U. and P.U.L.P. Act. Section 59 of the M.R.T.U. & P.U.L.P. Act provides for if any proceeding in respect of any matter falling within the purview of this Act is instituted under this Act, then no proceeding shall at any time be entertained by any authority in respect of that matter under the Central Act or, as the case may be, the Bombay Act; and if any proceeding in respect of any matter within the purview of this Act is instituted under the Central Act, or, as the case may be, the Bombay Act, then no proceedings shall at any time be entertained by the Industrial or Labour Court under this Act. Thus, as a result of this provision, the Legislature has provided for option of pursuing only one remedy in order to avoid the multiplicity of the proceedings and the decision in respect of the same industrial matter by the different Courts. This provision makes it clear that the remedy, which is availed of first in point of time, will be proceeded with and the subsequent proceedings are barred. In the present matter also, this complaint came to be filed on June 25, 1982 while the State Government referred the dispute u/s 10 on August 25, 1982 and the said reference was disposed of by the Industrial Tribunal on August 18, 1983 as being barred under the above referred provisions of M.R.T.U. and P.U.L.P. Act. Thus, the powers of the Labour Court in the complaint u/s 28, Item 1 of Schedule IV are the same like that of the reference u/s 10 and/or a complaint under the old Section 33-A and/or under the amended Section 33-A(b), apart from the fact that the provisions of M.R.T.U. and P.U.L.P. Act supplement the provisions of the I. D. Act in a field which is not covered by the said Act as has been observed by the Supreme Court in the judgment reported in 1995 (5) Scale 400. Therefore, the submission of the learned counsel for the respondent based on the cases reported in *The Punjab National Bank Ltd. Vs. Its Workmen*, *Punjab Beverages Pvt. Ltd., Chandigarh Vs.*

Suresh Chand and Another, and 1977 I LLJ 401 referred to above and quoted supra, will be applicable when the complaint u/s 28 of M.R.T.U. and P.U.L.P. Act is pending before the Labour Court and, therefore, the Labour Court will have to find out whether the order of discharge or dismissal is justiciable by the employer on merit while considering alleged unfair labour practice. However, while considering as to whether actual order of discharge or dismissal suffers from unfair labour practice, the Labour Court will also consider the breach or contravention of Section 33 of I. D. Act, along with main contention rendering the said order of discharge and dismissal being of unfair labour practice under Item 1 of Schedule IV of M.R.T.U. and P.U.L.P. Act. However, even though the legal submission made, is being accepted by us, we are not inclined to remand the present matter to the Labour Court, as submitted by the learned counsel. Firstly, because such request is being made for the first time in L. P. A. Secondly, there are no averments to this effect in the say filed before the Labour Court. Thirdly, no attempt was made before the Labour Court to lead evidence of justifiability of order by exercising alternative option and fourthly, we are of the view, as has been observed above, that whenever the rationalisation, standardisation or improvement of the plant or technique likely to lead to retrenchment of the workmen is to take place, the change notice u/s 9A, as observed above, will have to be issued. The said notice has to be issued prior to rationalisation, standardisation or improvement of the plant or technique. Issuance of notice u/s 9A after carrying out the rationalisation of the plant or technique is not valid and proper. Here in the present matter, we are considering the change in terms of conditions of services of appellant brought about by terminating the services of appellant by way of retrenchment, as a result of installation of rationalised machinery without following the provisions of Section 9A of the I. D. Act. We have held that respondent has not followed the provisions of Section 9A. Not only that, whatever attempt to follow Section 9A was made by the employer, was also not in accordance with law, which ultimately leads to only inference that the respondent has violated and not complied with the provisions of Section 9A of the I. D. Act. Therefore, change of service conditions of the appellant brought about by way of retrenchment was non est or ineffective in law and appellant is deemed to have continued in service on those terms and conditions as were applicable to him prior to termination of his services and even if the matter is remanded to the Labour Court, the justifiability of the order of retrenchment will have to be decided on the backdrop of this important fact. However, this violation of the mandatory provisions of Section 9A of the I. D. Act cannot be mitigated or justified by any other fact except the compliance of Section 9A as has been explained by us. And lastly that the respondent has led evidence being very much at issue on this point. Even the respondent has failed to point out what evidence would respondent lead to justify his action violate of Section 9A read with Item 10 of Schedule IV of the I. D. Act and, therefore, no purpose will be served in remanding the matter, as submitted by the teamed counsel and we hold that change in conditions of services of the appellant brought about by the order of retrenchment issued to the appellant by the

respondent on June 22, 1982 even on merits is bad in law.

26. We have already observed that the basic object of the I.D. Act is to investigate and settle the industrial disputes and for the said purpose, the machinery or the scheme has been provided for by the Act. However, as a result of the M.R.T.U. and P.U.L.P. Act, it is further necessary to find out whether the change in the conditions of the service of the appellant brought about by the termination of the services of the appellant by way of retrenchment is an unfair so labour practice as alleged by the appellant. According to the appellant; the respondent has committed an unfair labour practice of terminating the services of the appellant by way of retrenchment under Item 1(a) by way of victimisation, (b) not in good faith but in colourable exercise of the employer's right, (d) patently for false reason and (f) with undue haste. The object of the M.R.T.U. and P.U.L.P. Act is to desist the employer from the commission of the unfair labour practices and to remedy the employee who suffered from the commission of the unfair labour practices. The M.R.T.U. and P.U.L.P. Act is to supplement the I. D. Act and to cover the field for which the concerned industries covered under the I. D. Act did not get any coverage and that the field was obviously amongst other fields pertaining to prevention of unfair labour practices as defined in M.R.T.U. and P.U.L.P. Act . It had been further held in the matter of S.G. Chemicals and Dyes Trading Employees' Union Vs. S.G. Chemicals and Dyes Trading Limited and Another, that the statutory provisions form the terms and conditions of the services of the agreement of a contract and violation of those provisions is an unfair labour practice under Item 9. We have found that the conditions of the services of the appellant were changed by terminating the services of the appellant by issuing an order of retrenchment without following the provisions of Section 9A. We also hold at whatever attempt the respondent has made to comply with the provisions of Section 9A is not in accordance with the provisions of Section 9A read with Item 10 of Schedule IV of the I.D. Act and therefore, the said attempt to comply with the provisions of Section 9A is superfluous and cosmetic one as the change in the conditions of the services of the appellant have not been brought about following the provisions of Section 9A as observed above. The conditions of the services of the appellant have been contravened by the respondent while effecting the retrenchment under Item 10 of Schedule IV of the I. D. Act. We further hold that the said change in the conditions of the services of the appellant have been brought about while the conciliation proceedings were pending before the conciliation officer without getting the permission of the Conciliation Officer. Not only that, but we so find that the respondent wanted to transfer the appellant to Jalgaon in contravention of the conditions of the contract of service and the said transfer has been held by the Industrial Court as an unfair labour practice, and after the said order of the Industrial Court has become enforceable as against the respondent, the respondent has issued a notice u/s 9A and we also find that without allowing the conciliation proceedings to mature into reference the respondents have altered the conditions of the services of the appellant by terminating the services of the

appellant by an order of retrenchment. We hold that these alterations in the conditions of the services of the appellant have been brought about so that the appellant shall accept the illegal and unfair transfer to Jalgaon, which the Industrial Court has directed the respondent to desist from implementation. Thus, we find that the termination of the services of the appellant was by way of victimisation and in colourable exercise of the employer's right. We further find that the respondent has acted not in good faith. We also find that the conditions of the service contract and much more the statutory conditions of the service contract as observed in S. G. Chemicals case (supra) have been violated or contravened by the respondent and, therefore, relying on 1985 Mh. L.J. 338, we hold that the respondent has indulged into an unfair labour practice of undue haste also. It is further pertinent to note that the main object of the termination order being to accept the illegal transfer, the reason given in the termination order was patently false. Thus, we hold in the facts and circumstances of this case that the respondent has indulged into unfair labour practices under Items 1 (a), (b), (d), (f) of Schedule IV of the MRTU & PULP Act.

27. The last contention raised by the respondent is that the complaint filed u/s 28 under Item 1 of Schedule IV by the appellant is not tenable or maintainable in law. According to the respondent, the appellant is pointing out the contravention of the provisions of Section 9A, Section 20(2)(b) read with Section 33 of the I. D. Act and, therefore, according to the respondent. the unfair labour practice alleged is an unfair labour practice under Item 9 of Schedule IV, that is, failure to implement the award, settlement or agreement and the complaint in respect of Item 9 can be entertained by the Industrial Court only. No doubt, the S. G. Chemicals" case (supra) has laid down a ratio that the statutory provisions are the conditions of the contract of the service and thereby treated to be the settlement or the agreement between the employer and employee and relying on this, the above submission is developed by the respondent. However, we reject the said submission. In the present matter, we are considering the change in the terms of the contract of service of the appellant brought about by terminating the services of the appellant by way of retrenchment. Therefore, the main subject is of the discharge or dismissal of the employee and said subject is covered under Item 1 of Schedule IV. We would further like to observe that whenever the Labour Court has to consider the complaint under Item 1 i.e., discharge or dismissal of an employee on the grounds (a) to (g) mentioned in the said Item, the Labour Court is expected to look into the failure of the statutory provisions of law discharging or dismissing the employee and thereby unfair labour practice under Item 1. However, it would be inappropriate and improper to hold that because in the matter of discharge or dismissal of the employee under Item 1. The Court is called upon to consider the failure of statutory provisions of law, which form the terms and conditions of the settlement or agreement of service contract, the jurisdiction of the Labour Court is ousted. On the contrary, reading Item 1 along with Item 9, the contextual and harmonious interpretation, will be that Item 9 does cover item 1 and, therefore, by implications those

statutory provisions of law, which are violated while discharging or dismissing the employee can very well be considered by the Labour Court under Item 1 and for the said purpose, Item 9 will not be attracted. Thus, by necessary implications, Item 9 does not cover Item 1 and thus interpreted, the overlapping effect of Item 9 in relation to Item No. 1 stands excluded. This interpretation is further necessary for the purpose that the Labour Court is the lowest Court and the Industrial Court u/s 44 of the M.R.T.U. and P.U.L.P. Act can exercise the power of superintendence over the Labour Court and the said power of superintendence conferred upon the Industrial Court, includes the judicial power of superintendence 1987 MLJ 85 and, therefore, the Industrial Court, on an application or suo motu, can call for and consider the judicial propriety or legality of the order passed by the Labour Court u/s 28 of the 4 M.R.T.U. and P.U.L.P. Act. According to judicial process, the parties should prefer the lowest forum. We further hold that it is specifically necessary to maintain the jurisdiction of the labour Court under Item 1 as desired by the Legislature instead of keeping it simultaneous with the Labour Court and the Industrial Court reading the Items 1 and 9. The judicial propriety and public policy require that the parties should prefer the lower Court and the parties should not be left to choose the Courts. We, therefore, reject the last contention raised by the respondent and hold that in the matter of Item No. 1 the Labour Courts only have jurisdiction.

28. This takes us to an p1 important question of the reinstatement. It may be mentioned here that we are told at bar that the birth date of the appellant is May 3, 1935 and, therefore, he has attained the age of superannuation. In the result, even if the complaint succeeds, the reinstatement is not possible, because the appellant has attained the age of superannuation. However, as we have held that the change in the conditions of the service of the appellant was effected in violation and breach of the provisions of Section 9A of the Act, the said change in the conditions of the service of the appellant is non est or ineffective in law and resultant termination is an unfair labour practice under Items 1(a), (b), (d), (f) of Schedule IV of the M.R.T.U. and P.U.L.P. Act and, therefore, the appellant will be governed by the conditions of the services, which were existing prior to effecting the said illegal change and, therefore, the appellant is deemed to be in service and that the appellant is entitled to back wages from the date of illegal termination of the services of the appellant i.e., from June 22, 1982 till the date of superannuation with all benefits. It was submitted by the respondent that the back wages should not be granted, because the appellant must have earned and must have employed somewhere in this period. However, the respondent could not point out from the evidence that the appellant was employed anywhere so as to lose the back wages. The Supreme Court has laid down in respect of the back wages in the case of Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, , as follows at p 477 :

"Ordinarily, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a

premium on the unwarranted litigate activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz., to resist the workman's demand for revision of wages, the termination may well amount to Unfair Labour Practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. If the normal rule in a case like that is to award full back wages, the burden will be on the appellant-employer to establish circumstances which would permit a departure from the normal rule At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular".

As we have observed above, the respondent has not made out any case and led evidence before the lower Courts as to why the Courts shall depart from the normal rule of granting the full back wages when the order of termination of services of the appellant has been found bad in law. In the absence of such material on record, it will be unjust to depart from the normal rule and we, therefore, grant the full back wages as stated above.

29. Appeal is allowed. We hold that the respondent has indulged into unfair labour practices under Item 1(a), (b), (d), (f) of Schedule IV of the M.R.T.U. and P.U.L.P. Act and further direct that the respondent shall not indulge into and shall desist from indulging into such unfair labour practices. We further direct that the respondent shall pay back wages with all benefits to the appellant from June 22, 1982 till the date of retirement or superannuation along with cost of this appeal within a period of three months from the date of this order. In case of failure to pay the back wages as directed above, the respondent shall be liable to pay interest at the rate of 12%.