

(1997) 10 BOM CK 0006
In the Bombay High Court
Case No : Writ Petition No. 94 of 1996

The Divisional Controller Mah. State Road Transport
Corporation

APPELLANT

Vs

Syed Shabir Jani

RESPONDENT

Date of Decision : 01-10-1997

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 30
Constitution of India, 1950 — Article 136, 14, 226, 227, 254
General Clauses Act, 1897 — Section 8
Industrial Disputes Act, 1947 — Section 10, 10A, 17B, 18, 19
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 20, 21, 3, 33C, 42

Citation : (1999) 101 BOMLR 820

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Judgement

F.I. Rebello, J.—Rule was issued in this matter on 2nd March 1996. Thereafter Civil Application came to be filed invoking the provisions of Section 17-B of the Industrial Disputes Act, 1947 during pendency of the petition. Similar applications were also pending In respect of other Petitioners. These applications on the applicability of Section 17-B are being disposed off by this Judgment apart from the merits of the matter. Counsels who had moved applications u/s 17-B in other petitions as also the members of the Bar who were interested in assisting the Court as to the applicability of Section 17-B in proceedings initiated under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act (in short MRTU and PULP Act were heard).

2. The issue apart from merits which is being answered is "Whether in a writ petition filed by an employer in respect of an order or reinstatement passed by Authorities, under the MRTU and PULP Act and which is pending, can an employee maintain an application u/s 17-B of the Industrial Disputes Act, 1947?"

3. On hearing Counsel, the following questions as contended arise for

consideration in the matter of application of Section 17-B of the Industrial Disputes Act to orders passed under MRTU & PULP Act.

(1) The provisions of Section 17-B form a part of the MRTU & PULP Act by referential incorporation and/or by citation.

(2) What Section 17-B speaks of is an Award. The mere fact that the Authorities under the MRTU & PULP Act pass orders would not mean that they are not Awards as the orders can be construed as Award and consequently Section 17-B would be attracted.

(3) Section 17-B constitutes a condition of service. Any violation of the same would constitute an unfair labour practice to which item 9 of Schedule IV would be attracted.

4. The Industrial Disputes Act, 1947 is a Central Act whereas the MRTU & PULP Act is a legislation enacted by the Legislature of the State of Maharashtra. Trade Unions, Industrial and Labour disputes, welfare of labour including conditions of work, social security, employment and unemployment are covered by Entries 22, 23 and 24 of concurrent list of the Constitution of India and as such both the Parliament of India and the Legislature of a State would be competent to enact legislation in respect of the said Entries. MRTU & PULP Act, 1971 was enacted by the State Legislature in the year 1972. The scope and ambit of the Act came up for consideration before the Apex Court in the case of *Shramik Uttarsh Sabha Vs. Raymond Woolen Mills Ltd. and others*, . The question which arose in that matter was whether a representative union under the Bombay Industrial Relations Act, 1946 has an exclusive right to represent the employees of the concerned industry in a complaint relating to unfair labour practices under the MRTU and PULP Act other than those specified in Items 2 and 6 of Schedule IV thereof. The Apex Court thereafter considered the provisions of the Bombay Industrial Relations Act and the MRTU and PULP Act. The Apex Court noted that the MRTU and PULP Act was enacted to provide for the recognition of trade unions of facilitating collective bargaining for certain undertakings, to state their rights and obligations, to confer certain powers on un-recognised union and and to define and provide for the prevention of unfair labour practices and to constitute Courts in this behalf, to provide for to facilitate collective bargaining, recognition of trade unions, to define unfair labour practices and to provide for prevention of unfair labour practices.

The Apex Court also noted that the MRTU & PULP Act takes note of the provisions of the Bombay Industrial Relations Act and that many of the definitions are stated to be those contained in the Bombay Industrial Relations Act. Thereafter reference is made to Chapter III which deals with the recognition of the Unions. Section 21 provides for representation of employees in respect of items 6 and 12 of Schedule IV only, though a recognised union as contemplated by the Central Act and a representative of employees is entitled to u/s 30 of the Bombay Industrial Relations Act. It is then observed that considering the provisions of the

MRTU & PULP Act and Bombay Industrial Relations Act, it can be said that there is commonality in the objects and their provisions and that the Legislature intended that they operate in tandem and complement each other.

The scope and provisions of the MRTU & PULP Act, Bombay Industrial Relations Act and Industrial Disputes Act, 1947 thereafter came for consideration before the Apex Court in the case of Hindustan Lever Ltd. Vs. Ashok Vishnu Kate and others, . The Apex Court has observed as under:

The preamble of the Act clearly indicates that the Maharashtra Act is brought on the statute book with the avowed purpose of regulating the activities of trade unions and for preventing certain unfair labour practices both on the part of unions of employees as well as the employers. As laid down by Section 2(3) of the Act, the Act has to apply to the industries to which BIR Act, for the time being applies and also to any industry as defined in Clause (j) of Section 2 of the ID Act and also to the State Government which in relation to any industrial dispute concerning such industry is the appropriate Government under the Act. Thus, the Act sought to supplement and cover the field for which the industries concerned are governed by the then ID Act and BIR Act did not get any coverage and that field was obviously amongst others in the field pertaining to prevention of unfair labour practices as defined by the Act.

The Apex Court then went on to consider the meaning of the words "to discharge or dismiss employees" as found in Item 1 of Schedule IV. On a consideration of the matter the Apex Court held that the expression to discharge or dismiss an employee on any of the listed grounds would include both the final act of discharge or dismissal of employee on any of these grounds as well as any penultimate step taken towards that destination and object by starting the process of disciplinary enquiry on giving the charge sheet to the employee and/or suspending an employee pending or in contemplation of such enquiry and all further steps during such departmental enquiry about which a complaint can be made on permissible grounds. The Apex Court on the consideration of the Scheme and objects of the Bombay Industrial Relations Act and the Industrial Disputes Act came to the conclusion that none of these Acts permitted prevention of unfair labour practices and provided for any remedy thereof. The Apex Court therefore held that the MRTU & PULP Act is an Act supplemental to Bombay Industrial Relations Act and the Industrial Disputes Act.

5. From a consideration of what has been stated above it is clear that the MRTU & PULP Act has been enacted for various purposes which includes restraining an employer from committing an unfair labour practice contrary to any settlement, award or agreement and/or imposing the punishment which is disproportionate to the misconduct alleged or proved.

6. With this background let me first deal with the point as to whether the Section 17-B of the Industrial Disputes Act can be said to be incorporated into the provisions of the MRTU & PULP Act by referential incorporation and/or by

reference/citation. The law regarding incorporation is now well settled. In the case of *State of Kerala Vs. Attesee (Agro Industrial Trading Corporation)*, , the question which arose for consideration was whether the Kerala General Bales Tax Act (1963) brings in the definitions of the Central Excises and Salt Act, 1944 by way of reference or citation and/or by way of incorporation. After considering various Judgments in para 3 of the Judgment, the Apex court observed as under:

It is unnecessary to make a detailed reference to these decisions. It is sufficient to say that they draw a distinction between referential legislation which merely contains a reference to, or citation of, a provision of another statute and a piece of referential legislation which incorporates within itself a provision of another statute. In the former case, the provisions of the second statute, alongwith all its amendments and variations from time to time, should be read into the first statute.

Thereafter dealing with the referential legislation by incorporation relying on its own Judgment in the case of *The State of Madhya Pradesh Vs. M.V. Narasimhan*, , it is set out as under:

On a consideration of these authorities, therefore, it seems that the following proposition emerges:

Where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases:

- (a) Where the subsequent Act and the previous Act are supplemental to each other;
- (b) Where the two Acts are in *pari materia*
- (c) Where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and
- (d) Where the amendment of the previous Act, either expressly or by necessary intendment, applied the said provisions to the subsequent Act.

In the case of *Gauri Shankar Gaur and Others, etc. Vs. State of U.P. and Others*, , the question of legislation by incorporation once again came up for decision. On a consideration of various Judgments including the Judgment earlier referred to the Apex Court in so far as the legislation by incorporation observed as under:

It would thus be clear that in case of legislation by incorporation, incorporated provisions would become part and parcel of the later fresh statute as if it is written by pen in ink or printed bodily therein as part of the latter statute and became an integral scheme of that Act. The Legislature while incorporating them did not intend to speculate that any subsequent amendment to previous Act or

its repeal would alter the texture of the latter Act unless the former is supplemental to each other or both are in pan materia in which case it would render the latter Act wholly unworkable and ineffectual or by necessary intendment applies it.

Thereafter in so far as the Act making a reference the Apex Court observed as under:

If a later Act merely makes a reference to the earlier Act or existing law, it is only by way of reference and all amendments repeals, new law subsequently made will have effect unless its operation is saved by Section 8(1) of the General Clauses Act or void under Article 254 of the Constitution.

7. With this background the provisions of MRTU & PULP Act may be referred to. Sub Section 18 of Section 3 of the Act reads as under:

words and expressions used in this Act and not defined therein, but defined in the Bombay Act, shall, in relation to an industry to which the provisions of the Bombay Act apply, have the meanings assigned to them by the Bombay Act : and in any other case, shall have the meanings assigned to them by the Central Act.

Thereafter Section 59 of the MRTU and PULP Act reads as under:

If any proceedings 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.

Thereafter it is pointed out that Schedule I with reference to Sub-section 2 of Section 20 of the Act has amended several provisions of the Industrial Disputes Act viz. a proviso has been added to Sub-section 1, there has been amendment to Section 10, Section 10A, Section 18, Section 19 and Section 36. True, these amendments if considered, it will be seen are for the purpose of giving effective representation to a recognised Union. It is thereafter also pointed out that there are Schedules showing what are the unfair labour practices on the part of the employees and unfair labour practices on the part of the trade unions as also general unfair labour practices on the part of the employers. This has been pointed out to show that by virtue of an amendment to the Industrial Disputes Act, 1947 a Schedule has been added viz. the Vth Schedule which also shows what are unfair labour practices. On a co-joint reading of the said provisions, it is sought to be made out that Section 17-B of the Industrial Disputes Act is included on account of reference/citation in as much as the MRTU & PULP Act makes reference to the Industrial Disputes Act, 1947.

The argument is devoid of any merits. First and foremost at the highest what is

cited are definitions found in Industrial Disputes Act which are not found in MRTU & PULP Act. Schedule I pertains to amendment to the Industrial Disputes Act in so far as the proceedings under the MRTU & PULP Act are concerned. Otherwise there is nothing to contend that it can be said that this indicates that the provisions of the Industrial Disputes Act have been extended either by referential incorporation or for that matter by reference. It must also be borne in mind that Section 17-B was introduced by the Central Act 46 of 1982 and it came into force with effect from 21st August, 1984. The said amendments to the Industrial Disputes Act was pursuant to a legislation by Parliament. The Section reads as under:

17B - Payment of full wages to workman pending proceedings in High Courts. - Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court, or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:

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

The reference in Section 17-B is to a Labour Court/Tribunal or National Tribunal and an Award of a Labour Court, Tribunal or National Tribunal. Award is defined u/s 2(b). The Tribunal referred to viz. Labour Court, Tribunal or National Tribunal have been set up u/s 7, Section 7A and Section 7B of the Industrial Disputes Act. Section 17-B of the Industrial Disputes Act came up for consideration in case of Bharat Singh Vs. Management of New Delhi Tuberculosis center, New Delhi and Others, . What came up for consideration in the said Judgment was whether the provisions of Section 17-B would be applicable to awards passed before the Act came into force i.e. prior to 21st August 1984. The Apex Court held that the Section is applied even to award passed prior to 21st August, 1984 if they have not become final.

The Apex Court observed as under:

Instances are legion where workmen have been dragged by the employers in endless litigation with preliminary objections and other technical pleas to tire them out. A fight between a workman and his employer is often times an unequal fight. The legislature was thus aware that because of the long pendency of disputes in Tribunals and Courts, on account of the dilatory tactics adopted by the employer, workmen had suffered. It is against this background that the

introduction of this Section has to be viewed and its effects considered.

A Division Bench of this Court in the case of *Elpro International Ltd. v. K.B. Joshi and Ors.* 1987 M.L.J. 376 : 1987 (54) F.L.R. 528 : 1987 (2) L.L.N. 695, was dealing with the challenge to Section 17-B of the Industrial Disputes Act on the ground that it was violative of Article 14 of the Constitution. The Division Bench of this Court while rejecting the said contention observed as under:

Section 17-B operates within a limited sphere. Its operation is subject to the conditions laid down by the section itself. Section nowhere lays down that in extreme cases where it is demonstrated that the award passed is either without jurisdiction or is otherwise a nullity or grossly erroneous or perverse, the High Court or the Supreme Court is debarred from exercising its powers under Articles 226 and 136 of the Constitution. Therefore, it is not possible for us to accept the contention that Section 17-B is void as it encroaches upon or overrides the powers of the High Court or the Supreme Court of India under Articles 226 and 136 of the Constitution of India. The powers of the High Courts or the Supreme Court under Articles 226 and 136 of the Constitution are paramount and Section 17-B does not interfere with nor restrict the said constitutional powers.

8. Having said this, is it possible to hold that provisions of Section 17-B can be read into the provisions of MRTU & PULP Act on account of reference or citation of some provisions of the Industrial Disputes Act into the MRTU & PULP Act by reference/citation and/or by referential incorporation. First and foremost there is nothing in the MRTU & PULP Act by which it can be said that the provisions of the Industrial Disputes Act including subsequent amendments like Section 17-B have been incorporated by reference. The MRTU & PULP Act was in operation before Section 17-B was enacted and even if certain definitions and other provisions are included it cannot be said that Section 17-B is incorporated by referential incorporation as when the MRTU & PULP Act was enacted. Section 17-B was not a part of the Industrial Disputes Act. As also observed by the Apex Court itself the principle of referential incorporation is not applicable when the subsequent Act and the previous Act are supplemental to each other. The Apex Court in the case of *Hindustan Lever Limited (supra)* has observed that the MRTU & PULP Act was enacted to supplement and cover the field for which the industries concerned governed by the then Industrial Disputes Act and Bombay Industrial Relations Act did not get any coverage. Thus the Apex Court itself having held that MRTU & PULP Act as a supplemental legislation, the principles of referential incorporation would be excluded as in the case where the Act is supplemental it is an exception to the principles of referential incorporation. Thus I have no hesitation in holding looking at the Scheme, purpose, object and the reliefs that can be granted by the Courts under the MRTU & PULP Act that the provisions of Section 17-B are not incorporated into MRTU & PULP Act by referential incorporation or for that matter by reference/citation.

9. Second contention which is sought to be argued is that even though the order passed by the Authorities under the Act are styled as orders, nonetheless for all

purposes they are awards and it being an award the provisions of Section 17-B are attracted. The definition of an award under the provisions of the Industrial Disputes Act means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made u/s 10-A. Thus award is interim or final determination of any industrial dispute or any question decided by the Labour Court, Industrial Tribunal or National Tribunal as constituted under the Act and includes also awards passed by an Arbitrator appointed u/s 10A. The Authorities under the MRTU & PULP Act are the Labour Courts and the Industrial Courts as set out under the Act. There is no definition of award under the said Act but what is referred to under Sub-section 12 of Section 3 of the Act is order which means an order of the Industrial or Labour Court. Faced with this stark reality it is still contended that such an order is an adjudication and merely because it is styled as an order it does not cease to be an award. It is pointed out that Item 9 of Schedule IV refers to an Award under the heading "General Unfair Labour practices on the part of the employers". Thus it is pointed out that the word Award is also included in Schedule IV. Item 9 of Schedule IV sets out that if an employer fails to implement an award that would constitute an unfair labour practice. Award here would mean an award passed by a Labour Court, Tribunal or National Tribunal under the provisions of the Industrial Disputes Act or by an Arbitrator u/s 10-A of the Industrial Disputes Act bearing in mind Sub-section 18 of Section 3 of the MRTU & PULP Act which has clearly set out that if the word is not defined in the MRTU & PULP Act then the word would have the meaning in the Central Act. An order passed by the Labour Court or Industrial Tribunal is defined as an order and is enforced by invoking Section 48 or Section 50 of the MRTU & PULP Act.

As a last limb of this proposition, it is sought to be pointed out that even where order was not an award it has been so held to be an award for invoking the provisions of the Industrial Disputes Act, 1947. Reliance is placed on a Judgment of the Division Bench of the High Court of Judicature at Calcutta in the case of *S.K. Samser Ali v. Kesoram Industries Cotton Mills Limited* and Anr. 1988 (1) C.L.R. 60 1987 (55) F.L.R. 419 : 1989 (1) L.L.J. 1 : 1987 2 L.L.N. 104. In that case the employer had made an application for approval for terminating services of a workman u/s 33(2)(b) of the Industrial Dispute Act, 1947. Permission was refused. The same was challenged by way of a writ petition. An application u/s 17-B of the Industrial Disputes Act came to be filed. The question that had to be decided was whether considering the language of Section 17-B which uses the word "award" in case of an order refusing to grant approval, the provisions of Section 17-B could be attracted. On a consideration of the Scheme of the Industrial Disputes Act and the fact that it was an order by an Authority constituted under the Industrial Disputes Act which had refused to give permission for termination of an employee, the Division Bench of the Calcutta High Court held that such an order could be construed as an award and an application u/s 17-B was maintainable. This Judgment therefore would be of no

assistance to extend the definition of the award to mean and include an order under the MRTU & PULP Act. It is now well settled principle of interpretation that words and expression used in one legislation need not necessarily have the same meaning even in a cognate legislation and they have to be read in the context in which they have been used in their respective legislation. The next Judgment cited was a Judgment of a Full Bench of the Andhra Pradesh High Court in the case of *The Divisional Engineer, M.R.T. Operation, City Circle, A.P.S.E. Board, Mint Compound, Hyderabad v. Ikram Ahmed and Anr.* 1979 L.I.C. 915 : 1980 (41) F.L.R. 25. The facts before the Full Bench of the Andhra Pradesh High Court were that the Industrial Disputes Act was not in force and what was in force at the relevant time in the region of Hyderabad was the Trade Disputes Order made under Rule 72-A of the Defence of Hyderabad Rules. An award came to be passed under the provisions of the said Order. As the same was not implemented some employees moved an application u/s 33C(2) for enforcement of the said award. In between the provisions of the Industrial Disputes Act came to be extended. The question before the Full Bench of the Andhra Pradesh High Court was, what was the law which was applicable as there was no express provisions repealing the earlier Act. The Full Bench of the Andhra Pradesh High Court held that the provisions of the Industrial Disputes Act as amended and in force in the State of Hyderabad pursuant to its extension under the Industrial Disputes (Appellate Tribunal) Act 48 of 1950 shall prevail. Secondly, the Full Bench of the Andhra Pradesh High Court held that as the award passed under the local legislation was still in force in the absence of anything to the contrary the same could be held to be an award under the Industrial Disputes Act which could be enforced under the provisions of the said Act. This Judgment, therefore, is also of no assistance to the point raised in the instant case. It was also sought to be contended that in the Petition filed from an order arising from foe MRTU & PULP Act, a Single Judge of this Court in the case of *Chief Engineer, P.W.D. Nagpur and Ors. v. P.W.D.S.C., S.T., O.B.C. Employees" Council and Anr.* 1995 Lab. I.C. 143, has held that the provisions of Section 17-B would be attracted. Against the said Judgment a Letters Patent Appeal was filed which was numbered as L.P.A. No. 140 of 1994. The question whether the provisions of Section 17-B would apply came up for consideration. The Division Bench noted that for the reasons it had given for setting aside the Judgment, it was not necessary to consider the contentions raised on behalf of the Appellants that Section 17-B of the Industrial Disputes Act, 1947 is not applicable to the proceedings and the orders passed under the Act. However, it is pointed out that in para 49 of the said Judgment the question was left open and the Petitioners were permitted to move an application before the Single Judge for consideration afresh. All that can be said is that the question was left open.

Reference is also made to an order of the Learned Single Judge of this Court in Civil Application No. 5223 of 1996 in Writ Petition No. 2633 of 1995 dated 27th September, 1996. The Learned Single Judge there has only observed that the provisions of Section 17-B are meaningful and are introduced to reduce the

hardship of the workmen in the case where the reinstatement has been directed by the Labour Court, Industrial Tribunal or National Tribunal and if such reinstatement is challenged before the High Court or the Supreme Court, letter of Section 17-B may not be applicable to the proceedings arising out of the MRTU & PULP Act but its spirit cannot be ignored and overlooked, and in these circumstances the provisions of Section 17-B be employed in a case arising out of the MRTU & PULP Act while considering grant of interim relief. The citation cited above do not lend any support to the contention of the Petitioner that order passed by the authorities under the MRTU & PULP Act is an Award. Therefore, the second contention on behalf of the Petitioner has also to be rejected.

10. The last contention on behalf of the Petitioner is that the same amounts to a condition of service. It is pointed out that Section 17-B is a condition of service and as such violation thereof would attract the provisions of Item 9 of the Schedule IV of the MRTU & PULP Act. A bare perusal of the provisions of Section 17-B of the Act shows that this is a benefit conferred on a workman in the event there is an award of reinstatement in his favour. In a case where a Labour Court, Industrial Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such an award in the High Court or Supreme Court, the employer shall be liable to pay such workman during the pendency of such proceedings in the High Court or Supreme Court full wages last drawn by him. Thus there must be order of reinstatement and the order of reinstatement must be challenged by way of a writ petition and the workman has to file an affidavit before the Court where the petition is pending that he is not employed during such period. The proviso further sets out that if the High Court is satisfied that the workman had been employed and had been receiving adequate remuneration during any such period or part thereof the Court shall order that no wages shall be payable under this Section for such period or part thereof as the case may be. As therefore can be seen the relief which is available is during the pendency of the writ petition against an award when the employer has been directed to reinstate the workman. As interpreted by a Division Bench of this Court granting of relief u/s 17-B is not mandatory but discretionary. In the case of Elpro International Limited (*supra*) the Division Bench has set out that in an appropriate case this Court can still refuse to grant relief to the workman as provided for u/s 17-B. In these circumstances can it be said that this would be a condition of service. It is pointed out that violation of Section 33 of the Industrial Disputes Act would amount to an unfair labour practice under Item 1(f) of Schedule IV. It is also sought to be pointed out that if statutory provisions of law are violated while discharging or dismissing the employee the provisions of Item 1 and Item 9 of Schedule IV would be attracted. This is for the purpose of pointing out that Section 17-B is a condition of service and if it is so violated it being statutory condition of service it can amount to an unfair labour practice under Item 9 of Schedule IV. Reliance for that purpose is placed on a Judgment of the Division Bench of this Court in the case of Shankarprasad Vs. Lokmat Newspapers Pvt. Ltd., Nagpur, . The argument has to

be rejected. First and foremost Section 17-B would spring into force not when an award is passed but on the award being challenged by way of writ petition and the High Court admitting such petition. If a petition is not filed this section is not attracted merely because there is an award. Therefore, filing of a writ petition is mandatory for invocation of Section 17-B. Further the Section indicates that this power to grant relief could be by the workman moving an application before the High Court in the pending proceedings, and filing an affidavit that he is not employed. It is then that the High Court is seized of the matter for grant of relief. Further more as already pointed out by the Division Bench in Elpro International Ltd. (supra) there is a discretion in either granting the relief or refusing it. It is, therefore, something which is not certain. It depends upon the facts of each case. It is not available if the employer satisfies the High Court that the workman is being employed for a part period or has been drawing adequate remuneration during the said period. A condition of service as understood must be a term of employment. It must be provided by contract either express or implied or by a settlement, award or by statute as an express term of condition of service during employment. A condition of service normally springs into force on a workman joining service. Condition of service comes to an end on the workman's service coming to an end. The benefit of Section 17-B is a situation where reinstatement has been ordered and the employer challenges the order of reinstatement by way of a petition and the matter is in issue before the High Court. In other words the issue of reinstatement is itself under challenge. To avoid hardship to an employee who had to go through a protracted legal proceedings, Parliament has provided that during the pendency of the petition the High Court where a situation warrants and the workman is out of employment to pay him the full wages last drawn, during the pendency of proceedings. This cannot be said to be a term of employment to hold that it is a condition of service. In these circumstances, it cannot be said that the benefit conferred by a statute and the object for which the said Section has been introduced would constitute a condition of service. To my mind, therefore, as it does not constitute condition of service there can be no question of Industrial Court or Labour Court invoking jurisdiction to decide a complaint by a workman that on account of a petition being filed in the High Court and the employer having not complied with the mandate of Section 17-B there was a violation of statutory condition of service and hence the employer has committed an act of unfair labour practice.

The question had indirectly come whether an application u/s 17-B can be moved under Sections 42 and 44 of the MRTU & PULP Act before the Revisional Court. Learned Single Judge of this Court in the case of Motor Industrial Co. Ltd., Nasik Vs. Deelip Daulat Deore and others, , has held that the Industrial Court would have no jurisdiction to invoke the provisions of Section 17-B of the Industrial Disputes Act. I am in respectful agreement with the said Judgment. It is clear that the Revisional Courts while exercising jurisdiction is only considering the legality of the Order. The section springs into force only when the matter is in challenge not before the Industrial Court but before the High Court or the

Supreme Court.

Thus I am clearly of the opinion for reasons aforesaid that no application moved u/s 17-B of the Industrial Disputes Act would be maintainable in a pending writ petition arising from an order of reinstatement passed by a Court under the MRTU & PULP Act. This Court however has always the power to grant interim relief in the exercise of the power vested in it under Articles 226 and 227 of the Constitution of India.

11. Coming to the merits of the matter, the Petitioner was a bus conductor who was charged with the misconduct of having collected fare from a passenger and pocketing the same. He received money but did not issued tickets to the passenger. On an enquiry being held the Petitioner was found guilty of the misconduct. The Labour Court on a consideration of the matter was pleased to hold that enquiry was fair and proper and that the misconduct had been proved. The Labour Court also held that the punishment was not disproportionate and accordingly dismissed the complaint. In revision the Industrial Court found that the amount pilfered by the Conductor was less than Rs. 5/- and in these circumstances relying on a Judgment of this Court in the case of Ganikhan Vs. Maharashtra State Road Transport Corporation, , held that the punishment of dismissal for theft of less than Rs. 10/- was disproportionate and set aside the order of dismissal and directed reinstatement with continuity of service.

It is this order which is in issue before this Court. The Industrial Court was clearly wrong in reversing the order of the Labour Court on the ground that the punishment is disproportionate. The past service record of the petitioner shows that there are seven other cases of similar nature in respect of which punishment of stoppage of increments and fine had been imposed. In these circumstances, considering the past record the Industrial Court could not have set aside the order of the Labour Court. The order of the Industrial Court discloses that the Industrial Court has not addressed itself to the past record. One of the factors to be considered while imposing punishment is the past service record of the delinquent employee. The past service record is a basis for considering whether there are extenuating and/or attenuating circumstances warranting lessor or harsher punishment. The Industrial Court did not consider the same while reversing the order of the Labour Court to the extent it has directed reinstatement. It must be noted that it is not a question whether a conductor misappropriated a rupee, Rs. 2/-, Rs. 5/- or Rs. 10/-. It is not the amount that is misappropriated, it is the question of faith and confidence of the employer 4n its employee. A conductor necessarily has to collect the fare and if the Conductor is found wanting in the discharge of his function merely because on a particular day he happens to be caught his case cannot be decided on the amount that is found to be pocketed. Will any employer continue any employee in service who instead of discharging his duties is found to appropriate the money for himself. In a one time situation if there are other mitigating factors perhaps an opportunity could be given but considering the past record of the petitioner there was absolutely no

material before the Industrial Court warranting interference. Hence the order of the Industrial Court dated 9th October, 1995 is liable to be quashed and set aside, and the Order of the Labour Court to be restored.

12. For the aforesaid reasons, Rule made absolute in terms of prayer Clause (i) of the writ petition. In the circumstances of the case, there shall be no order as to costs.