

(2011) 02 BOM CK 0114
In the Bombay High Court
Case No : Writ Petition No. 2711 of 2006

The Executive Engineer, Public Works Department	APPELLANT
Vs	
Namdeo Govindrao Nandurkar	RESPONDENT

Date of Decision : 21-02-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes (Bombay) Rules, 1957 — Rule 81
Industrial Disputes Act, 1947 — Section 10, 12, 25F, 25G
Limitation Act, 1963 — Article 137

Citation : (2011) 4 ALLMR 611 : (2011) 129 FLR 1037 : (2011) 4 MhLj 33

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : A.M. Deshpande, Assistant Government Pleader, for the Appellant;
S.A. Kalbande, for the Respondent

Final Decision : Allowed

Judgement

R.K. Deshpande, J.—This writ petition is preferred by an employer challenging the award passed by the Labour Court, Wardha on 862005 in Reference (IDA) No. 14 of 1997. The Labour Court has answered the reference in the affirmative holding that the Respondent employee has continuously worked for 240 days prior to the date of his termination i.e. 2031985 and there was non compliance of the provisions of Section 25F of the Industrial Disputes Act, 1947. As a result, the termination dated 2031985 has been set aside and direction has been given to the Petitioner to reinstate the Respondent employee in his former post with continuity in service without back wages.

2. The facts not in dispute are as under:

The Respondent employee was in the service of the Petitioner employer as a Laborer w.e.f. 1381979 on the work of construction of Wardha Sevagram road. His services were terminated by issuing notice dated 1111983 and he was again appointed to do the same work on 2121984. However, he was discontinued from

service by oral order w.e.f. 2031985. The Respondent employee issued demand notice on 3171996. The matter was carried before the Conciliation Officer, who, in exercise of powers conferred under Clause (c) of Sub-section (1) of Section 10 read with Sub-section (5) of Section 12 of the Industrial Disputes Act, referred the dispute for adjudication to the Labour Court. In the statement filed before the Labour Court, the claim of the Respondent employee was that he had continuously worked for more than 240 days preceding the date of his termination on 2031985 and without complying with the mandatory provisions of Sections 25F and 25G of the Industrial Disputes Act read with Rule 81 of the Industrial Disputes (Bombay) Rules, 1957 his services were terminated. The Respondent employee claimed reinstatement with continuity in service and back wages.

3. The Petitioner employer filed his written statement denying the claim of the employee on several grounds. It was the stand taken by the Petitioner that the dispute raised was stale in nature, as the alleged termination was dated 2031985 and the reference was sought on 3171996, i.e. after the lapse of about 11 years. It was the stand taken that in terms of Clause 272 of the Public Works Department Manual, the records of the casual laborers beyond five years, were not retained. It was further the stand taken that there is nothing to show that there exists relationship of "master and servant" or "employer and employee" with the Petitioner and Respondent. The Petitioner employer also denied that the Respondent employee had completed 240 days of continuous service before the date of his termination.

4. Before the Labor Court, the employee entered into the witness box and has deposed his case. He closed his evidence by filing pursis at Exh.14. The Petitioner employer examined one Shri K. R. Bajaj, the Assistant Engineer and filed pursis closing their oral evidence. Relying upon notice (Exh.12) dated 1111982, the Labor Court has held that the employee has proved that he has completed more than 240 days of continuous service in each year. Such finding was recorded on the basis of the oral evidence of the employee and on the failure of the Petitioner employer to produce the relevant documents on record, adverse inference was drawn. It was held that there was noncompliance of the provisions of Sections 25F and 25G of the Industrial Disputes Act, 1947. On the question of delay in seeking reference, the Labor Court has relied upon the decision of the Apex Court in the case of Mahavir Singh Vs. U.P. State Electricity Board and Others, , to hold that the reference cannot be rejected on the ground of delay and at the most back wages can be denied. On the basis of these findings, the reference has been answered in the affirmative.

5. Shri Anand Deshpande, the learned A. G. P. for the Petitioner employer has urged that the Labor Court ought to have answered the reference in the negative on the sole ground that it was a stale reference, after the period of 11 years. In support of his submission that stale reference should not be entertained and it should be dismissed at the outset without going into the merits of the matter, he

has relied upon the following decisions of the Apex Court.

(1) Haryana State Coop. Land Development Bank Vs. Neelam, .

(2) Employers in relation to the Management of Sudamdih Colliery of Bharat Coking Coal Ltd. Vs. Their workmen represented by Rashtriya Colliery Mazdoor Sangh, .

(3) (2008) 17 SCC 627 - U.P. State Road Transport Corporation v. Ram Singh.

(4) (2008) 14 SCC 589 - Steel Authority of India Ltd. and Anr. v. State of West Bengal and Ors.

According to him, the employer was not expected to retain the record and the witness Shri K.R. Bajaj examined by the employer has deposed that in view of Clause 272 of P.W.D. Manual, the record prior to five years was not retained and was not available. It is his submission that heavy burden lay upon the employee to establish that he has continuously worked for more than 240 days preceding the date of termination of service and mere statement on oath by the employee before the Labour Court, was not enough. He further urged that the finding recorded by the Labour Court, on the basis of Exh.12 that the employee has completed 240 days of continuous service in the employment in each year, is perverse and also suffers from an error apparent from the record. He has invited my attention to Exh. 12, which nowhere disclose that the employee has completed 240 days of continuous service, as alleged.

6. Shri Kalbande, the learned Counsel appearing for the Respondent employee has urged that the Labour Court had recorded finding of fact based upon the evidence that the employee has completed 240 days of continuous service preceding the date of his termination. According to him, such finding is based upon the oral evidence of the complainant and the Apex Court has in its decision in the case of Director, Fisheries Terminal Department v. Bhikubhai Meghajibhai Chavda, reported in (2010) 1 SCC 47, has held that same is enough to shift the onus upon the employer to prove that the employee has not completed 240 days of continuous service. He further submits that the finding of the Labour Court is also based upon the adverse inference drawn for non production of document by the employer. According to him, the Labour Court was not satisfied about the explanation furnished for non production of document and the same, therefore, cannot be questioned under Articles 226 and 227 of the Constitution of India. He further submits that the Labour Court has relied upon the decisions of the Apex Court reported in:

(1) Mahavir Singh Vs. U.P. State Electricity Board and Others, .

(2) Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another, , and

Sapan Kumar Pandit Vs. U.P. State Electricity Borad and Others, .

to hold that the reference cannot be dismissed on the ground of delay. He

submits that at the most, an employee could be denied back wages, which has been properly done by the Labour Court. Hence, the order does not call for interference on that count also.

7. Undisputedly, there is a delay of about 11 years in making reference by the Respondent employee. Hence, the position of law in respect of a stale claim is required to be seen. The first decision in this regard is one in the case of *Shalimar Works Limited Vs. Their Workmen*, . In this case, the delay of 4 years in making reference after reemployment of other workers was held to be fatal. It was held that though there is no limitation prescribed for reference of disputes to an Industrial Tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly so when disputes relate to discharge of workmen wholesale. It was held that the Tribunal would be justified in refusing the relief of reinstatement to avoid dislocation of the industry and that is the correct order to make.

8. In the decision of the Apex Court in the case of *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, , the question was of delay in raising dispute with reference to the standing order and its effect on the validity of reference u/s 10 of the Industrial Disputes Act. The Apex Court in para 14 of its judgment has dealt with this aspect and the relevant portion is as under:

... If a dispute is raised after a considerable delay which is not reasonably explained the tribunal would undoubtedly take that fact into account in dealing with the merits of the dispute. But unless the relevant facts clearly justify such a course it would be inexpedient to throw out the reference on preliminary technical objections of the kind raised by the Appellant under the present contention. ...

9. In the decision of the Apex Court in the case of *Ratan Chandra Sammanta and others Vs. Union of India and others*, , it was held that the casual worker retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. It was further held that the delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. In this case, the delay of 7 to 9 years was held not fatal.

10. Then comes the decision of the Apex Court in the case of *Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another*, . In this case, the services of the workman were terminated on 16/7/1974. He had issued the notice of demand on 18/12/1981 and the reference was made to the Labour Court on 19/3/1982. Thus, there was a delay of about 7 years in seeking reference. The Apex Court has held that Article 137 of the Limitation Act is not applicable to the proceedings of reference and the relief under the Industrial Disputes Act cannot be denied to the workman merely on the ground of delay. The Apex Court has referred to its two earlier judgments in

the cases of Jai Bhagwan Vs. Management of The Ambala Central Co-operative Bank Ltd. and Another, , and H.M.T. Limited Vs. Labour Court, Ernakulam and Others, . In para 10 of the said judgment, the Apex Court has held as under:

It follows, therefore, that the provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. ...

On facts, it was held that the plea of delay was not raised before the Labour Court and if that plea had been raised, the workman would have been in a position to show the circumstances preventing him in approaching the Court at an earlier stage or even to satisfy the Court that such a plea was not sustainable after the reference was made by the Government. It was further held that the workman was justified in complaining that in the absence of any plea on behalf of the management and any evidence, regarding delay, he could not be deprived of the benefits under the Act merely on the technicalities of law.

11. In the decision of the Apex Court in Mahavir Singh Vs. U.P. State Electricity Board and Others, , the Labour Court had held that on merits the termination could not be sustained. The High Court had agreed with the said finding of the Labour Court, but it was held that the reference was incompetent. The Apex Court has set aside the view of the High Court holding that once the termination was held to be illegal, the entire reference could not have been rejected. It was held that the dispute lingered on for a number of years, and that would not mean that the dispute had ceased to exist. This judgment does not refer to any of the earlier judgments and this is an independent view.

12. The next case of the Apex Court is in the case of The Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and Others, . In this case, the employee was dismissed from service on 11/8/1972. He filed an application for reference on 24/5/1979. Ultimately, the Central Government made a reference of the dispute. The Bank filed a writ petition, which was allowed on 24/11/1995 setting aside the order of reference. The employee filed an appeal challenging the order of the learned Single Judge. The Division Bench allowed the appeal and upheld the validity of reference. The Apex Court has set aside the judgment of the Division Bench and restored the judgment of the learned Single Judge. As a result, the order of reference stood set aside on the ground of delay. In para 8 of the said judgment, the Apex Court has observed as under:

It was submitted by the Respondent that once a reference has been made u/s 10 of the Act a Labour Court has to decide the same and the High Court in writ jurisdiction cannot interfere in the proceedings of the Labour Court. That is not a correct proposition to state. An administrative order which does not take into consideration statutory requirements or travels outside that is certainly subject to judicial review, limited though it might be. The High Court can exercise its powers under Article 226 of the Constitution to consider the question of the very jurisdiction of the Labour Court. In *National Engg. Industries Ltd. v. State of Rajasthan* this Court observed: (SCC p.393, para 24)

24. It will be thus seen that High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute and none apprehended which could be the subject matter of reference for adjudication to the Industrial Tribunal u/s 10 of the Act. Here it is a question of jurisdiction of the Industrial Tribunal, which could be examined by the High Court in its writ jurisdiction. It is the existence of the Industrial Tribunal (sic dispute) which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended the appropriate Government lacks power to make any reference.

It was urged before the Apex Court that once a reference has been made u/s 10 of the Act, a Labour Court has to decide the same and the High Court in writ jurisdiction cannot interfere in the proceedings of the Labour Court. The Apex Court has rejected the said argument stating that this is not a correct proposition to state, and an administrative order which does not take into consideration statutory requirements or travels outside, the same can be subject matter of judicial review by the High Court under Article 226 of the Constitution of India. This judgment also does not take into consideration the judgment delivered by the Apex Court in *Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another*, or in *Mahavir Singh Vs. U.P. State Electricity Board and Others*, .

13. The next decision of the Apex Court is in the case of *Sapan Kumar Pandit Vs. U.P. State Electricity Board and Others*, . There was a delay of about 15 years in making a reference. The High Court quashed the order of reference on the sole ground of delay. The employee, therefore, approached the Apex Court. The Apex Court has held that the long delay for making the adjudication could be considered by the adjudicating authorities while moulding its reliefs, and the High Court had gone wrong in axing down the order of reference made by the Government for adjudication. It was held that let the adjudicatory process reach its legal culmination. This judgment takes into consideration the Apex Court's earlier judgments in the cases of *Shalimar Works Limited Vs. Their Workmen*, and *Nedungadi Bank Ltd.* ((2002) 2 SCC 455). Paras 7 and 12 of the said judgment are relevant and the same are, therefore, reproduced below:

7. Hence the real test is, was the industrial dispute in existence on the date of reference for adjudication? If the answer is in the negative then the

Government's power to make a reference would have extinguished. On the other hand, if the answer is in positive terms the Government could have exercised the power whatever be the range of the period which lapsed since the inception of the dispute. That apart, a decision of the government in this regard cannot be listed on the possibility of what another party would think whether any dispute existed or not. The section indicates that if in the opinion of the Government the dispute existed then the Government could make the reference. The only authority which can form such an opinion is the government. If the government decides to make the reference there is a presumption that in the opinion of the government there existed such a dispute.

12. There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the Union on account of other justified reasons it does not cause the dispute to wane into total eclipse.

In this case when the Government have chosen to refer the dispute for adjudication u/s 4K of the U.P. Act the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered by the adjudicating authorities while moulding its reliefs. That is a different matter altogether. The High Court has obviously gone wrong in axing down the order of reference made by the Government for adjudication. Let the adjudicatory process reach its legal culmination.

It is thus apparent that the matter was left to be decided by the adjudicating authorities.

14. Then comes the decision of the Apex Court in the case of Assistant Executive Engineer, Karnataka v. Shivalinga, (2002) 1 LLJ 457SC . In this case, the services of the employee were terminated on 2551985 and he approached the Labour Officer on 1731995 and thereafter reference was made by the Government to the Labour Court. There was a delay of more than 9 years in approaching the Labour Officer. In para 6 of the said judgment, the Apex Court has considered both the earlier judgments in the cases of Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another, and Sapan Kumar Pandit Vs. U.P. State Electricity Board and Others, . Para 6 of the said judgment, being relevant, is reproduced below:

Learned Counsel for the Appellant strongly relied on the reasoning of the Labour Court and contended that the view of the High Court would not advance the cause of justice. Learned Counsel for the Respondent relied upon two decisions of this Court in Ajaib Singh v. Sirhind Coop. Marketing cum Processing Service Society Ltd. and Sapan Kumar Pandit v. U.P. SEB to contend that there is no period of limitation prescribed under the Industrial Court even belatedly and the

Labour Court or the Industrial Tribunal can properly mould the relief by refusing or awarding part payment of back wages. It is no doubt true that in appropriate cases, as held by this Court in the aforesaid two decisions, such steps could be taken by the Labour Court or the Industrial Tribunal, as the case may be, where there is no such dispute as to relationship between the parties as employer and employee. In cases where there is a serious dispute, or doubt in such relationship and records of the employer become relevant, the long delay would come in the way of maintenance of the same. In such circumstances to make them available to a Labour Court or the Industrial Tribunal to adjudicate the dispute appropriately will be impossible. A situation of that nature would render the claim to have become stale. That is exactly the situation arising in this case. In that view of the matter, we think the two decisions relied upon by the learned Counsel have no application to the case on hand. Proceeding on the facts of the case we think the High Court is wrong in having interfered with the award made by the Tribunal. The order made by the High Court in the writ proceedings, therefore, shall stand set aside and the award made by the Labour Court shall stand restored. The appeal is allowed accordingly.

Thus, it has been held that in cases there is a serious dispute, or doubt in such relationship and records of the employer become relevant, the long delay would come in the way of maintenance of the same. It was held that in such a situation, the decisions in the cases of Ajaib Singh and Sapan Kumar Pandit would not be applicable.

The order of the Labour Court rejecting the reference as barred by time was restored and the judgment of the High Court granting reinstatement and continuity in service without back wages, was set aside.

15. Then comes the decision of the Apex Court in the case of S.M. Nilajkar and Others Vs. Telecom, District Manager, Karnataka, . In this case, there was a delay of nearly 7 to 9 years in raising the disputes. In this case, the workmen had not placed any material on record to hold that there was no delay and the disputes were promptly raised. It was because of this delay that the employer was not in a position to produce the record relating to the days for which the workmen had worked inasmuch as according to the standing instruction of the Department, the registers of muster rolls were preserved for a period of 5 years only, where after they were eliminated. The Tribunal recorded the finding on the basis of the oral evidence that the workmen completed more than 240 days of service. The learned Single Judge of the High Court held that the workmen were not entitled to any back wages. Thus, the workmen were granted reinstatement with the benefit of continuity of service, but without back wages. The employer preferred an appeal. The Division Bench allowed the appeal of the employer and set aside the judgment of the learned Single Judge and that of the Tribunal holding that there was undue delay of 7 to 9 years in raising an industrial dispute and hence set aside the award of the Tribunal and the judgment of the learned Single Judge. The Apex Court in appeal, has set aside the decision of the Division

Bench and restored the decision of the learned Single Judge, maintaining the order of reinstatement and continuity of service, but without back wages. In this judgment, the Apex Court has considered its earlier judgments in the cases of Shalimar Works Limited Vs. Their Workmen, and Nedungadi Bank Ltd. 2002 2 SCC 455. Para 17 of the judgment, being relevant, is reproduced below:

It was submitted on behalf of the Respondent that on account of delay in raising the dispute by the Appellants the High Court was justified in denying relief to the Appellants. We cannot agree. It is true, as held in Shalimar Works Ltd. v. Workmen that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute, it does not mean that the dispute can be raised at any time and without regard to the delay and reasons there for. There is no limitation prescribed for reference of disputes to an Industrial Tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even reemployment of most of the old workmen was held to be fatal in Shalimar Works Ltd. v. Workmen. In Nedungadi Bank Ltd. v. K.P. Madhavan kuttya delay of 7 years was held to be fatal and disentitled the workmen to any relief. In Ratan Chandra Sammanta v. Union of India it was held that a casual laborers retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the Appellants to any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the Appellants was terminated sometime in 1985 or 1986. Pursuant to the judgment in Daily Rated Casual Labour v. Union of India the Department was formulating a scheme to accommodate casual laborers and the Appellants were justified in awaiting the outcome thereof. On 16/11/1990 they were refused to be accommodated in the Scheme. On 28/12/1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal cum Labour Court. We do not think that the Appellants deserve to be not suited on the ground of delay.

It was held that though there was a delay, the same was not fatal one in initiating the proceedings and the employee cannot be blamed for the delay.

16. The next decision of the Apex Court in the case of Haryana State Coop. Land Development Bank Vs. Neelam, . In this case, the employee was discontinued from service with effect from 30/5/1986. On 30/9/1993, a demand notice was issued for a reference. The Labour Court passed an order on 24/2/1998 answering the reference against the employee, holding that the claim was belated. A writ petition filed before the High Court was allowed and the employee was directed

to be reinstated with continuity of service, but without back wages, relying upon the decision of the Apex Court in the case of Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another, . The Apex Court has set aside the judgment of the High Court and restored the judgment of the Labour Court. As a result, the reference stood answered in the negative. The Apex Court has considered its earlier judgments in the cases of Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another, and Sapan Kumar Pandit Vs. U.P. State Electricity Borad and Others, . Similarly, the Apex Court has also considered the judgment in Balbir Singh v. Punjab Roadways, reported in (2001) 1 SCC 133. The judgments in the cases of Sapan Kumar Pandit Vs. U.P. State Electricity Borad and Others, and Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, have also been considered. Paras 13 to 17 of the said judgment being relevant, are reproduced below:

13. In Ajaib Singh the management did not raise any plea of delay. The Court observed that had such plea been raised, the workman would have been in a position to show the circumstances which prevented him from approaching the court at an earlier stage or even to satisfy the court that such a plea was not sustainable after the reference was made by the Government. In that case, the Labour Court granted the relief, but the same was denied to the workman only by the High Court. The Court referred to the purport and object of enacting the Industrial Disputes Act only with a view to find out as to whether the provisions of Article 137 of the Schedule appended to the Limitation Act, 1963 are applicable or not. Although, the court cannot import a period of limitation when the statute does not prescribe the same, as was observed in Ajaib Singh but it does not mean that irrespective of the facts and circumstances of each case, a stale claim must be entertained by the appropriate Government while making a reference or in a case where such reference is made the workman would be entitled to the relief at the hands of the Labour Court.

14. The decision of Ajaib Singh must be held to have been rendered in the fact situation obtaining therein and no ratio of universal application can be culled out therefrom. A decision, as is well known, is an authority of what it decides and not what can logically be deduced there from (Bharat Forge Co. Ltd. v. Uttam Manohar Nakate and Kalyan Chandra Sarkar v. Rajesh Ranjan, SCC p.58, para 42: Scale para 42).

15. In Balbir Singh v. Punjab Roadways as regards Ajaib Singh this Court observed: (SCC pp.13435, paras 56)

5. The learned Counsel for the Petitioner strenuously urged that the Tribunal committed error in denying relief to the workman merely on the ground of delay. The learned Counsel submitted that in industrial dispute delay should not be taken as a ground for denying relief to the workman if the order/orders under challenge are found to be unsustainable in law. He place reliance on the decision of this Court in the case of Ajaib Singh v. Sirhind Coop. Marketing cum

Processing Service Society Ltd.

6. We have carefully considered the contentions raised by the learned Counsel for the Petitioner. We have also perused the aforementioned decision. We do not find that any general principle as contended by the learned Counsel for the Petitioner has been laid down in that decision. The decision was rendered on the facts and circumstances of the case, particularly the fact that the plea of delay was not taken by the management in the proceeding before the Tribunal. In the case on hand the plea of delay was raised and was accepted by the Tribunal. Therefore, the decision cited is of little help in the present case. Whether relief to the workman should be denied on the ground of delay or it should be appropriately moulded is at the discretion of the Tribunal depending on the facts and circumstances of the case. No doubt the discretion is to be exercised judicially.

16. Yet again in *Asstt. Executive Engineer v. Shivalinga* a Bench of this Court observed: (SCC pp. 16869, para 6)

6. Learned Counsel for the Appellant strongly relied on the reasoning of the Labour Court and contended that the view of the High Court would not advance the cause of justice. Learned Counsel for the Respondent relied upon two decisions of this Court in *Ajaib Singh v. Sirhind Coop. Marketing cum Processing Service Society Ltd.* and *Sapan Kumar Pandit v. U.P. SEB* to contend that there is no period of limitation prescribed under the Industrial Disputes Act to raise the dispute and it is open to a party to approach the court even belatedly and the Labour Court or the Industrial Tribunal can properly mould the relief by refusing or awarding part payment of back wages. It is no doubt true that in appropriate cases, as held by this Court in the aforesaid two decisions, such steps could be taken by the Labour Court or the Industrial Tribunal, as the case may be, where there is no such dispute as to relationship between the parties as employer and employee. In cases where there is a serious dispute, or doubt in such relationship and records of the employer become relevant, the long delay would come in the way of maintenance of the same. In such circumstances to make them available to a Labour Court or the Industrial Tribunal to adjudicate the dispute appropriately will be impossible. A situation of that nature would render the claim to have become stale. That is exactly the situation arising in this case. In that view of the matter, we think the two decisions relied upon by the learned Counsel have no application to the case on hand.

17. In *Nedungadi Bank Ltd.* a Bench of this Court, where S. Saghir Ahmad was a member (His Lordship was also a member in *Ajaib Singh*) opined: (SCC pp. 45960, para 6)

6. Law does not prescribe any time limit for the appropriate Government to exercise its powers u/s 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no

rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the Respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject matter of reference u/s 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made u/s 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made.

17. Subsequent to above judgments, the Apex Court has considered the issue in question in its following judgments:

- (1) Employers in relation to the Management of Sudamdih Colliery of Bharat Coking Coal Ltd. Vs. Their workmen represented by Rashtriya Colliery Mazdoor Sangh,
- (2) U.P. State Road Transport Corporation Vs. Babu Ram,
- (3) Assistant Engineer, C.A.D., Kota Vs. Dhan Kunwar, .
- (4) Dharappa Vs. Bijapur Co-operative Milk Producers Societies Union Ltd., .
- (5) Haryana Land Reclamation and Development Corporation Ltd. Vs. Nirmal Kumar, .
- (6) (2008) 14 SCC 589 - Steel Authority of India Limited and Anr. v. State of West Bengal and others.
- (7) (2008) 17 SCC 627 - U.P. State Road Transport Corporation v. Ram Singh and another.
- (8) State of Karnataka and Another Vs. Ravi Kumar, .

In the first case of Sudamdih Colliery of Bharat Coking Coal Ltd., the matter was sent to the High Court to examine the question of delay in seeking reference in the light of the decisions of the Apex Court in the cases of Nedungadi Bank Ltd. and S.M. Nilajkar.

In the second case of Babu Ram, the termination was dated 1991 and the reference was made on 29/8/1998. The Labour Court held the termination as invalid without considering the question of delay. The High Court dismissed the writ petition. The Apex Court has held that no material was placed on record to show that the dispute was raised within reasonable time and the employee was not responsible for delay. It was held that there is a need for raising industrial dispute within a reasonable time. The onus of showing that industrial dispute was raised within a reasonable time, is upon the workman and he has to show that he was not responsible for delay. The delay cannot be condoned on surmises and conjectures. The judgments of the Apex Court in the cases of Nedungadi Bank

Ltd. and S.M. Nilajkar were referred and the matter was remanded back to the High Court for considering the question of delay.

In the third case of Dhan Kunwar, the delay was of about 8 years in raising the dispute. The Labour Court granted reinstatement with 30% back wages. The writ petition and the writ appeal were dismissed. The Supreme Court relying upon the judgments in the cases of Nedungadi Bank Ltd. and S.M. Nilajkar, set aside the judgment of the High Court and the Labour Court and held that no relief should have been granted.

In the fourth case of Dharappa, the claim was made after a lapse of 10 years and it was held to be dead and unenforceable relying upon the judgments of the Apex Court in three cases, viz. (1) Nedungadi Bank Ltd., (2) Shivalinga, and (3) S.M. Nilajkar.

In the fifth case of Nirmal Kumar, the termination was dated 18/7/1991 and the reference was made on 20/2/1997. The Labour Court granted reinstatement, continuity of service and 50% back wages to the employee. The writ petition and the writ appeal were dismissed. The SLP before the Supreme Court was only against the award of 50% back wages. After referring to the decisions of the Apex Court in the cases of Ajaib Singh and Nedungadi Bank Ltd., the order of back wages was modified and an amount of Rs. 10,000/- was only directed to be paid.

In the sixth case of Steel Authority of India Ltd., the order of regularization of employee passed on the reference made to the State Government in the year 2003 was quashed relying upon the decision of the Apex Court in the case of Babu Ram.

In the seventh case of Ram Singh, the termination was dated 15/3/1973 and the reference was on 15/6/1986. There was a delay of about 13 years in making the reference. Relying upon the judgments of the Apex Court in the cases of Prakash Chandra Sahu Vs. State Transport Authority and Others, , and Nedungadi Bank Ltd., cited supra, the reference was dismissed on the ground of delay. Para 7 of the said judgment being relevant, is reproduced below:

We are of the view that in the facts and circumstances of the case, the High Court erred in not setting aside the award of the Labour Court. Apart from the unacceptable manner in which the Appellant was denied the opportunity of participating in the proceedings, including being debarred from cross examining the Respondent, the Labour Court should not have entertained the industrial dispute given the enormous delay. This Court has in several decisions held that while delay cannot by itself be sufficient reason to reject an industrial dispute, nevertheless the delay cannot be unreasonable. The decision in Prakash Chandra Sahu has reaffirmed this principle. The reason for diligence and promptness lies in the fact that the records pertaining to an employee might have been destroyed and it would be difficult to obtain witnesses who would be competent to give evidence so many years later if the Labour Court wishes to hold a further enquiry

into the matter. In the present case the delay of 13 years is unreasonable. The mere fact that the Respondent was making repeated representations would not justify his raising the issue before the Labour Court after 13 years. In any event the last representation was made in 1983 and the industrial dispute was admittedly raised in 1986. The lack of diligence on the part of the Respondent is apparent.

In the last case of Ravi Kumar, the employee was discontinued on 14/11/1984. After 14 years, the writ petition was filed, which was dismissed, with the observation that the representation be made to the State Government for making the reference. The reference was made by the State Government. It was rejected by the Labour Court on 30/7/2001.

In the writ petition, the order of the Labour Court was set aside and the employee was directed to be reinstated in service without back wages. Relying upon the decisions of the Apex Court in the cases of Nedungadi Bank Ltd. and Shivlinga, the Apex Court has set aside the order of the High Court and dismissed the reference on the ground of delay or that the claim was stale. It was held that the person supervising could not be expected to prove after 14 years that the employee did not work or that he did not work for 240 days in a year or that he voluntarily left the work.

18. Thus, the two judgments of the Apex Court - one in Ajaib Singh's case and another in Sapan Kumar's case - were held to be decided in the facts of those cases. In the decision of the Apex Court in Shivlinga's case, it has been held that in cases where there is a serious dispute or doubt in such relationship and the records of the employer become relevant, the long delay would come in the way of maintenance of the same. In such situation, the judgments in Ajaib Singh's case and Sapan Kumar's case were held to be not applicable. In the decision of the Apex Court in Neelam's case, it has been held that the decision in Ajaib Singh's case must be held to have been rendered in the fact situation obtained therein and no ratio of universal formula can be culled out there from. Though Mahavir Singh's case has not been referred to in all these judgments, the same is also decided in the facts of that case. Almost in all the subsequent cases, the decisions of the Apex Court in the cases of Nedungadi Bank Ltd., Shivlinga and S.M. Nilajkar have been followed and in none of these judgments, the decisions in the cases of Ajaib Singh, Sapan Kumar and Mahavir Singh are referred to.

19. In view of the aforesaid law laid down by the Apex Court, it has to be held that though the Court cannot import the period of limitation and the reference cannot be dismissed merely on the ground of delay, it does not mean that irrespective of the facts and circumstances of the case, a stale claim must be entertained and the relief should be granted. In case of delay, no formula of universal application can be laid down and it would depend upon the facts and circumstances of each case. The Court dealing with the reference will have to hold an enquiry and record its finding on the question whether the reference should be dismissed on the ground of delay. In appropriate cases, the Court may

mould the relief either by reducing the back wages or by denying it completely. While considering the question of delay, the Court will have to be guided by certain principles, which are culled out from various judgments of the Apex Court, discussed above, are stated as under:

(a) A plea of delay must be specifically raised so that an employee gets an opportunity to lead evidence and explain it.

(b) There is a need to raise an industrial dispute within a reasonable period and the onus of showing that the dispute was raised within a reasonable time is upon the employee.

(c) It is for the employee to explain, the delay by furnishing acceptable explanation to the satisfaction of the Court or that he was not responsible for the delay caused.

(d) The fact that the workman was making repeated representations, is not sufficient to explain the delay.

(e) Delayed reference causes prejudice to both the employer and the employee. Lapse of time results in losing the remedy and the right as well.

(f) Whether relief to the workman should be denied on the ground of delay or it should be appropriately moulded by denying full or partial back wages, is a matter of discretion, which should be judicially exercised depending upon the facts and circumstances of the case and no fixed formula can be laid down.

(g) The delay would certainly be fatal if it has resulted in material evidence relevant to the adjudication being lost and rendered unavailable.

(h) The person supervising cannot be expected to prove after long delay that the employee/workman did not work for 240 days in a year or that he voluntarily left the work. It would be difficult to obtain witnesses, who would be competent to give evidence so many years later if the Labour Court wishes to hold an enquiry into the matter.

(i) An administrative order making reference of industrial dispute, which does not take into consideration the statutory requirements or travels outside, can be a subject matter of judicial review by the High Court under Article 226 of the Constitution of India. This does not mean that the adjudicating authority/Labour Court cannot make an enquiry to find out whether the reference should be dismissed on the ground of delay or that the relief is required to be moulded keeping in view the facts and circumstances of the case.

20. Keeping in view the principles laid down, the facts of this case are required to be seen. A plea of delay was raised by the employer in reply to the statement of claim. The employee entered the witness box and has deposed that he was not in a financial position to proceed with the matter. Except this statement on oath, neither any oral or documentary evidence is placed on record, nor is any other explanation offered. The Labour Court has not referred to this aspect of the

matter, but has relied upon the decision of the Apex Court in Mahavir Singh's case, cited supra, to hold that the entire reference cannot be held to be illegal. In my view, the explanation furnished by the employee for not seeking reference cannot be accepted, as for making demand of reference, no financial implications are involved. The decision of the Apex Court in Mahavir Singh's case, as pointed out above, was rendered in the facts and circumstances of that case, as pointed out in earlier paras. In that judgment, the evidence of completion of 240 days was available and all the Courts below accepted it. In view of this, it was not a case where the employer was required to produce evidence and that the employer failed to produce it in spite of availability. The ratio of the said judgment cannot be made applicable. In the present case, the burden of proof was upon the employee to show that the dispute was raised within a reasonable time and to offer an explanation to the satisfaction of the Court for the delay of 11 years caused in seeking reference. Even on merits, no evidence is placed on record to shift the onus upon the employer. The reference was, therefore, stale and was liable to be rejected on that sole ground.

21. On merits, the claim of the employee was that he had continuously worked for more than 240 days preceding the date of his termination from service, and there was noncompliance of the provisions of Sections 25F and 25G of the Industrial Disputes Act. On this count, the claim for setting aside the termination, reinstatement and back wages was made. The question whether the employee has completed 240 days of continuous service preceding the date of his termination or in any calendar year, is a question of fact, which is required to be pleaded and proved. The burden is upon the employee to establish it. The employee has entered the witness box and has deposed that he was in the employment as a Labourer with effect from 1381979 on Wardha Sevagram Road. Except his own statement, neither any documentary evidence is placed on record, nor any witness was examined to corroborate the same. The Labour Court has relied only upon Exhibit 12, the order of termination, to record the finding that an employee has completed 240 days of service. Perusal of Exhibit 12 shows that there is nothing in it to record such finding. Hence, the finding is perverse.

22. As pointed out earlier, the Apex Court has held that the delay would certainly be fatal if it has resulted in material evidence relevant to the adjudication being lost and rendered unavailable. It has been held that the person supervising cannot be expected to prove after long delay that the employee/workman did not work for 240 days in a year or that he voluntarily left the job. It is difficult for the employer to obtain witnesses, who would be competent to give evidence so many years later if the Labour Court wishes to hold an enquiry into the matter. It has also been held that lapse of time results in losing the remedy and the right as well and the delay in seeking reference causes prejudice to both the employer and the employee. Keeping in view this principle, heavy burden lies upon the employee in such a situation to establish that he has completed 240 days of continuous service. The employee has to lead positive evidence and he cannot

rest upon the weakness of other side in not producing the relevant record. In such a situation, mere statement of an employee on oath would not be enough to show that he had completed 240 days of continuous service. The decision of the Apex Court in Bhikubhai Chavda's case, cited supra, does not apply to a situation where a demand for reference is proved to be stale. The employee has failed to establish that he had completed 240 days of continuous service. In view of this, the question of noncompliance of the provisions of Sections 25F and 25G of the Industrial Disputes Act does not arise.

23. The Labour Court has committed an error of law in drawing an adverse inference against the employer for non production of relevant record including muster roll, pay slips, seniority list, etc. The employer has examined one Shri K.R. Bajaj, the Assistant Engineer, who deposed that in view of Clause 272 of the P.W.D. Manual, the records of casual laborers beyond five years were not retained. The witness denied that there existed any relationship of "master and servant" or "employer and employee" between the Petitioner and the Respondent. The Petitioner employer also denied that the Respondent employee had completed 240 days of continuous service before the date of his termination. Hence, it was not a case for drawing an adverse inference.

24. The learned Counsel for the Respondent employee has invited my attention to the pleadings in the petition and the admission given by the Petitioner employer in ground No. 5 of the petition, wherein it was stated that the employee had completed 240 days of continuous service. This admission given in ground No. 5 cannot be acted upon, as it is apparent that throughout the reference the employer had raised a serious dispute about completion of 240 days of continuous service by an employee. The employer had not only strongly opposed the claim on the ground of delay, but had also raised a dispute as to existence of relationship of "master and servant" and also that of an industrial dispute. The evidence was led before the Industrial Court to show that no record was available showing that the Respondent was either employed or had completed 240 days of continuous service. The statement in ground No. 5 seems to be based upon misconception of facts and the stand taken by the employer. It cannot, therefore, be construed as an admission of the employer. Hence, the said contention cannot be accepted.

25. For the reasons stated above, the present writ petition succeeds. The award passed by the Labour Court on 862005 in Reference (IDA) No. 14 of 1997 is hereby quashed and set aside. The Reference stands answered in the negative.

26. Rule is made absolute accordingly. No order as to costs.