

P-951: Seminar on Employment law and judicial practices
(Labour Courts)

From- 28/10/2015 – 31/10/2015



Rapporteur- Aman Srivastava

(VIPS, IP University, Delhi)

Objective of the Program:

The programme aimed towards devising new breakthrough in the field of judicial interpretation of labour laws by the means of mutual discussions among the judicial officers regarding the existing system of labour laws and the possible amendments for the betterment and strengthening of the same.

Programme Coordinators:

Mr. Shivraj S. Huchhanavar (Research Fellow, NJA)

Ms. Nitika Jain (Law Associate, NJA)

Resource Persons:

1. Justice J. Chandru (Former Judge, Madras High Court)
2. Mrs. Jane Cox (Advocate)
3. Justice S.J. Mukhopadhyay (Former Judge Supreme Court of India)
4. Mr. Sanjay Singhvi (Advocate)
5. Prof. B.T. Kaul (Chairperson, Delhi Judicial Academy)
6. Mr. Jamshed Cama (Senior Advocate)
7. Mr. Michael Dias (Advocate)
8. Justice Sujoy Paul (Judge, Madhya Pradesh High Court)
9. Prof. Sharit Bhowmik (Academician)

Session 1: Contract labour: Issues and challenges

By: Justice Chandru

Mrs. Jane Cox

Chair: Justice S.J. Mukhopadhyay

Justice Chandru started his deliberations on the topic by discussing the views of royal commission of labor that- " whatever the merits of the system in primitive times, it is now desirable, if the management is to discharge completely the complex responsibility laid upon it by law and by equity, that the manager should have full control over the selection, hours of work and payment of the workers ". Also Justice O.P. Chinappa Reddy's views were tendered by Justice Chandru pertaining to the challenges faced by contract labour- "The practice of employing labour through contractors for doing work inside the premises of the primary employer, known to researchers of the International Labour Organisation and other such organisations as 'Labour only contracting' or 'inside contracting' system, has been termed as an *arobaic* system and a relic of the early phase of capitalist production, which is now showing signs of revival in the more recent period" Subsequently the position laid down in the judgment of - *Catering Cleaners of Southern Railway Vs Union Of India & Ors. case (AIR 1987 SC 777)* was discussed- "Of late there has been a noticeable tendency on the part of big companies including public sector companies to get the work done through contractors rather than through their own departments." "it is a matter of surprise that employment of contract labour is steadily on the increase in many organised sectors including the public sector, which one expects to function as a model employer."

Thereafter, Justice Chandru discussed the developments in the field of contract labour and the development of Contract labour (Regulation) Act, but the question which was posed for consideration and further deliberations was that what was the position before the coming into effect of the special act dedicated to the grievances of contract labor? To shed light on the existing position prior to the act, Justice Chandru cited the excerpt from the judgment of *The Standard-Vacuum Refining Co. of India Ltd. Vs. Its Workmen & Others (AIR 1960 SC 948)*. Justice Chandru discussed the order of reference passed by the Supreme Court to the tribunal in the present case, as summarized under:

"The contract system for cleaning the premises and plant should be abolished and workers working in the refinery through the Ramji Gordhan and Company should be treated as workers of the Standard Vacuum Refining Company of India Limited, Bombay, and wage-scales, conditions of service, etc., that are applicable to the workers of the refinery be made applicable to them. Past service of these workers should be counted and they should be treated as continuously in the service of the Stanvac refinery from the date of their entertainment."

The tribunal held that the reference was competent. On the merits: that the work which was being done through the contractor was necessary for the company and had to be done daily, though it was not a part of the manufacturing process doing of this work through annual contracts resulted in the deprivation of security of service and other benefits, privileges, leave, etc., for the workmen of the contractor. Therefore this was a proper case where a direction should be given to the company to abolish the contract system with respect to this work.

However, it was observed by Justice Chandru that the preliminary objection was overruled for the reason that- "The fact that the respondents who have raised

this dispute are not employed on contract basis will not make the dispute any the less a real or substantial dispute between them and the company as to the manner in which the work of the company should be carried on. The dispute in this case is that the company should employ workmen directly and not through contractors in carrying on its work and this dispute is undoubtedly real and substantial even though the regular workmen who have raised it are not employed on contract labour. Where, however, the party to the dispute also composed of workmen espouse the cause of another person whose employment or non-employment, etc., may prejudicially affect their interest, the workmen have a substantial interest in the subject-matter of dispute. In both such cases the dispute is an industrial dispute. "

Justice Chandru observed that It may be relevant to bear in mind that industrial adjudication generally does not encourage the employment of contract labour in modern times.

Thereafter Justice Chandru discussed the Supreme Court guidelines laid down for the tribunals with regard to disputes pertaining to contract labour as follows:

Whenever a dispute is raised by workmen in regard to the employment of contract labour by any employer it would be necessary for the tribunal to examine the merits of the dispute apart from the general consideration that contract labour should not be encouraged, in a given case the decision should rest not merely on theoretical or abstract objections to contract labour but also on the terms and conditions on which contract labour is employed and the grievance made by the employees in respect thereof. The contract in this case is a bona fide contract would not necessarily mean that it should not be touched by the industrial tribunals. If the contract had been mala fide and a cloak for suppressing

the fact that the workmen were really the workmen of the company, the tribunals would have been justified in ordering the company to take over the entire body of workmen & treat it as its own workmen.

Subsequent to the above discussed developments, The Contract labor (regulation and abolition) Act, 1970 was enacted and brought into force. The proposed Bill aimed at the abolition of contract labour in respect of such categories as may be notified by the appropriate Government in the light of certain criteria that have been laid down, and at regulating the service conditions of contract labour where abolition is not possible.

The Bill provided for the setting up of Advisory Boards of a tripartite character, representing various interests, to advise the Central and State Governments in administering the legislation and registration of establishments and contractors.

Under the Scheme of the Bill, the provision and maintenance of certain basic welfare amenities for contract labour, like drinking water and first-aid facilities, and in certain cases rest-rooms and canteens, had been made obligatory.

Provisions had also been made to guard against defaults in the matter of wage payment.

Justice Chandru also devised a presentation on the issue that How the law seeks to achieve the object of the said Act? A detailed presentation with regard to various important provisions of the Act and their object was discussed as under:

Section 7(1) - Registration

Section 9 - Effect of non-registration

Section 10 - Prohibition of Contract Labour

Section 12 - Licensing of Contractors

Section 21(4) - Principal employer liable in case of default by contractors

The Constitutional Validity of the act was challenged in the year 1974. The validity of the Act on the touchstone of the constitutional provisions was upheld by the supreme court of india in the case- *Gammon India Ltd Vs. Union of India (AIR 1974 SC 960)* by holding that-

The crucial point is that the interests of the workmen are remedied by the objects of the Act. Those interests are minimum labour welfare. There is no unreasonableness in the measure.

The position after 28.1.1996 regarding the challenge upon various question of “appropriate government” under the industrial disputes act was then discussed by Justice Chandru as-

Under Sec. 2 (a) of the Industrial Disputes Act; if-

(i) the concerned Central Government company/undertaking or any undertaking is included therein as nominee, or

(ii) Any industry is carried on (a) by or under the authority of the Central Government, or (b) by railway company or (c) by specified controlled industry, then the Central Government will be the appropriate Government otherwise in relation to any other establishment, the Government of the State in which that other establishment is situated, will be the appropriate Government.

Section 10 – Prohibition of Contract Labour-A notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour in any process, operation or other work in any establishment has to be issued by the appropriate Government :

(1) After consulting with the Central Advisory Board or the State Advisory Board, as the case may be, and;

(2) Having regarded to:-

(i) Conditions of work and benefits provided for the contract labour in the establishment in question;

and

(ii) Other relevant factors including those mentioned in Section 10(2)

Section 10(2)-No automatic absorption by principal employer.

Neither Section 10 of the CLRA Act nor any other provision in the Act, whether expressly or by necessary implication, provides for automatic absorption of contract labour on issuing a notification by appropriate Government under Section 10(1), prohibiting employment of contract labour, in any process, operation or other work in any establishment. Consequently the principal employer cannot be required to order absorption of the contract labour working in the concerned establishment. Thereby, the Air India's Case was over-ruled prospectively in 1997 by the Supreme Court by its judgment in the case- *Air India Statutory Corporation Vs. United Labour Union & Ors (AIR 1997 SC 645)*

Concluding the deliberations, Justice Chandru discussed the role of Labour Courts in the issues and how they can address the disputes pertaining to contract labour.

On issuance of prohibition notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade

compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. The setting aside of 1976 notification was discussed:

The impugned notification apart from being an omnibus notification does not reveal compliance of sub-section (2) of Section 10. This is ex facie contrary to the postulates of Section 10 of the Act. Besides it also exhibits non-application of mind by the Central Government. We are, therefore, unable to sustain the said impugned notification dated December 9, 1976 issued by the Central Government. Point No.3 remains to be considered. This is the moot point which generated marathon debate and is indeed an important one. "The changes brought about by the subsequent decisions of this Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident." - as observed in the case of: *U.P. State Brassware Corpn. Ltd. Vs. Uday Narain Pandey (2006 (1) SCC 479)*

It was also laid down in the above judgment that- Socialism might have been a catchword from our history. It may be present in the preamble of our Constitution. However, due to the liberalisation policy adopted by the Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away.

Thereafter Justice Chandru discussed the vagaries of the BHEL Sweepers on Contract on account of a Central Govt. Notification Abolition of Contract Labour relating to sweeping- S.O.779 (E) Dt.9.12.1976 "The Central Government after consultation with the Central Advisory Contract Labour Board, hereby prohibits employment of contract labour on and from the 1st March 1977, for sweeping, cleaning, dusting and watching of buildings owned or occupied by establishment

of respect of which the appropriate Government under the said Act is the Central Government”

The question which arose thereupon was that- Which is the appropriate govt. for BHEL? Which was answered as- “it must be held that the State Government is the appropriate Government with regard to the disputes in question”- in the case: Bharat Heavy Electrical Ltd. Vs.The Government Of Tamilnadu (1985 IILLJ 509 Mad). Subsequent to this decision, the Tamil Nadu Govt. issued a notification for abolishing the Contract Labour relating to sweeping G.O.Ms.No. 2082, Labour and Employment, 19.9.1988; which said-“The Governor of Tamil Nadu after consultation with the State Advisory Board on Contract Labour and after having regard to the conditions of work and benefits provided for the contract labour and other relevant factors in the establishments/factories referred to in clauses (a) to (d) of sub-section (2) of the said section, hereby prohibits the employment of contract labour in the process of sweeping and scavenging in the establishments/factories which are employing 50 or more workmen”

“They have to move the Central Government for appropriate notification so that the contract labourers employed in BHEL, Ranipet, could be benefited and the provisions of the Contract Labour (Regulation and Abolition) Act, 1970, social legislation could be enforced”

In BHEL Thuppuravu Thozhilalar Sangam Vs. Mgmt. Of BHEL & Ors (2000 ILLJ 1533 Mad)

An Industrial Dispute was raised and referred for adjudication where it was held regarding the impugned orders that- “I hold that the impugned order is not at all sustainable and therefore, the same is liable to be quashed and accordingly, it is quashed. The Writ Petition is allowed”

Justice Chandru concluded his deliberation by posing a very profound question before the assembly with regard to the awful position of the sweepers that Where will the workers go for the ambiguity and loopholes in the present legislation?

After Justice Chandru's presentation, Mrs. Jane Cox started her deliberations before the assembly by discussing the history of contract labour briefly. Mrs. Cox stated that there is no innovative methodology being used in the matters relating to the dispute of contract labour and the age old prevailing test of integrity being still applicable. Also the same practices of raising objections by the management before the industrial tribunals that the contract being sham or bogus or to oust the jurisdiction of the tribunal need to be changed and the criteria should be much more than the above issues.

Mrs. Cox proposed that the tests to be applied by the courts in the matters pertaining to contract labour should be based on the English tort law cases relating to the contract of employment and contract for employment, thereby determining the nature of employer employee relationship. Mrs. Cox discussed the *Silver Jubilee Bidi Workers Case* in which the test of supervision and control was laid down. With regard to the test of supervision and control, Supreme Court held that who has the authority to reject the work done whether contractor or the employer.

Also Justice Krishna Iyer's judgment in Hussain Bhai's case was also discussed and it was contended that the test laid down in this case was not applied too often by the courts but is not overruled as of yet either. In Hussain bhai's Case the test was that if a labour or a group of labours is working for the betterment of a person or

an organization then no matter who the employer is, the labour is to be considered as a part of the organization.

Some of the points of consideration which are to be observed while determining the test of employment are:

- If the contractors have come and gone but the employees remain the same in the organization.
- If no direct equipment provided by the employer to the employees but are remunerated for the same.
- If the contractor does not testify in a proceeding or is not made a party to the proceedings.

While concluding Mrs. Cox discussed the separate standard of test pertaining to the matters of canteens.

Session:2

Problems of outsourced Labour: Legal Way Out

By- Mr. Sanjay Singhvi

Mr. Singhvi briefly discussed the evolution and development of labour laws in India. While discussing the development Mr. Singhvi emphasized the role of Industrial tribunals in so far as to consider the issues at the very initial stage subsequent to which commissions were formed to work upon a code for the redressal of such matters and thereafter the issues were legislated by the parliament.

Mr. Singhvi contended that the concept of distinction between employer and contractor was evolved through the principle of civil law on vicarious liability. It was observed that the main questions to be considered in this regard being whether the contract is for services or it is a contract of service? Mr. Singhvi observed that if the employer can not only decide what work is to be done but also how the work is to be done, i.e. the manner in which the work is to be executed, then the employee shall not be considered as a contract or outsourced labour.

Mr. Singhvi suggested that contractual labour and all sorts of outsourced labour should be governed by Articles 39 and 41 of the constitution which sets a mandate upon the state to strive to achieve the criteria of minimum living wage for all the workers. According to Mr. Singhvi Articles 39 and 41 act as a compass for the industrial courts and without applying the principles mentioned under these articles the courts are bound to drift away from the path of righteousness for which they have been established.

Mr. Singhvi thereafter discussed the judgments in the *Airport Authority of India Case & Haldia's Case* wherein it is observed that the role of the labour courts is not restricted to maintain a day to day supervision over the functioning of industrial organizations with regard to the workers but they are meant to maintain an overall supervision over the activities of the organizations. Also it was contended that the judgment in *Uma Devi's case* which held that only if the workers were employed for a long period of time and hence must be regularized, would lead to a tremendous amount of practice of backdoor entry which is not good for the quality and efficiency of any organization.

Thereafter Mr. Singhvi discussed briefly on the two different concepts of Illegal Appointments and Irregular Appointments. Mr. Singhvi stated that illegal appointments are those when an unqualified employee is appointed for a job which requires a person more qualified than him. On the other hand irregular employment is that in which due procedure might not have been followed while appointing an otherwise qualified person for a job. The case of irregular appointment can't be made to the industrial tribunal and only the cases pertaining to that of illegal appointments can be referred to the industrial tribunal.

While concluding Mr. Singhvi discussed some instances of outsourcing pertaining to the present time by citing the example of U.P. Government's notification in 2013 with regard to outsourcing all class IV posts in the government departments. When the matter went before Allahabad high Court recently, it was held that this practice of mass outsourcing cannot be resorted to.

Thereafter the following hypothetical case was discussed:

Workmen

v.

Madhya Desh Power Development Corporation Limited and others

15 workers all deep tube well pump operators working continuously without break of service on and from different dates since 1990. They were employed at 'M', 'P' and 'D' places for operating the deep tubewells used by the inhabitants under different contractors engaged by the Madhya Desh State Electricity Board and now by the Madhya Desh Power Development Corporation Limited (Employer). Dispute broke between workmen and employer on the issue of regularisation.

Contention of the Workers

1. Workers contended that the Employer has always been engaging different contractors for creating an artificial intermediary for oblique purposes disregarding the fact that the services of the workers which are perennial in nature and the job performed by the all 15 workers are regular jobs.
2. In spite of rendering such perennial jobs for more than two decades the workers are getting less benefits than those directly in the pay roll of the Madhya Desh Power Development Corporation Limited (MDPDC) as they have been working under the contractor appointed by the MDPDC from time to time. The workers made several representations to the MDPC for absorption. The Workers have also approached the Hon'ble High Court of Madhya Desh with their grievance.
3. Matter went up to the Hon'ble Supreme Court on 21st April, 2010 by which the order of the Single Bench and the Division Bench of the High Court were set aside. The workers, however, were given liberty to approach the concerned authority for redressal of their grievance.
4. All the Workers submit that they have been working in the establishment of the MDPDC from different dates since 1990 till date and an intermediary has been put in between i. e. 'contractor' only with a view to deny the workmen including

the 15 workers from direct employment in the establishment of the MDPDC and the said arrangement is only a camouflage and a veil, artificial one.

5. It is stated that the paper trappings and/or arrangement by way of introduction of intermediary is to avoid the benefit to the workmen who are really contributing by rendering services and other activities of regular and perennial nature of the MDPDC. The workers stated that their case can only be settled by the appropriate Industrial Tribunal after referring the same by the Madhya Desh government based on the report of the State Advisory Contract Labour Board. Workers contended that the State Advisory Contract Labour Board miserably failed to appreciate the case and hence passed a wrong order affecting the interest of the workers.

Contentions on behalf of the employer (MDPDC)

Employer contended that,

1. The industrial dispute before the tribunal is not maintainable since there is absence of employer-employee relationship and in view thereof the question of regularisation does not arise.
2. Neither the Labour Court nor the Writ Courts have the power to determine as to whether a contract labour could be regularised or not which is within the domain of appropriate government (to be decided by the appropriate government by taking report of the State Advisory Contract Labour Board into consideration).
3. The employers have also denied that the engagement of contractor is a camouflage or veil or an artificial one or sham. The contractor was really a contractor and there have been no paper trappings or arrangement.
4. The reading of the said provisions indicate that as to whether the contract labour should be abolished or not shall fall within the exclusive domain of the

authorities prescribed under the CLRA Act, 1970. The Industrial Court does not have any jurisdiction to determine such questions. **It is only the appropriate Government under the said Act which has the jurisdiction and authority to abolish contract labour system and not the court including the industrial adjudicator.** Thus, Industrial Tribunals does not have jurisdiction to entertain the issues relating to contract labour especially of regularization.

In light of these arguments of the both parties, the important issue involved in the case are:

1. Whether the Industrial Tribunal has jurisdiction to decide a question that the, contract entered into by and between the employer and the contractor is a camouflage or a sham one.
2. Whether the Industrial Tribunal has jurisdiction to decide a question that the, employees appointed by the contractor would, in fact and substance, be held to be direct employees of the management. (Decide both the issues with reasons)

Assuming that the Contract is not genuine, whether the employees are entitled for automatic absorption?

Session: 3 – Unfair Labour practices protection and remedies.

By- Justice S.J. Mukhopadhyay

Justice Mukhopadhyay started the deliberations on the topic by stating that there are no legal provisions for regularization of workers in the legislation. Justice Mukhopadhyay opined that the reason behind the position is that the question of regularization would arise only when something is irregular, when the appointment is illegal then regularization cannot be made.

Thereafter, the term 'Unfair Labour Practices' and legal provisions pertaining to it were discussed by Justice Mukhopadhyay. Section 2 (ra) states that the practices specified under schedule V of the act shall be considered to be as unfair labour practices.

The Practices under schedule V were briefly discussed. Justice Mukhopadhyay suggested that the solution for the problem can be reached by giving the temporary or irregular employees a status and privilege of regular employees. The judiciary must play with words to redress the problems in the system as suggested by Justice Mukhopadhyay. Justice Mukhopadhyay contended that in such a way judges can clear away the problem caused by the lack of provision for 'regularization' in our legislation and can ensure efficiency of the workers by conferring benefits upon the mto which they are otherwise not made entitled to. In such a manner, as contended by Justice Mukhopadhyay, the principle laid down in *Uma Devi's case* will not be violated and the courts will not question the judgment in appeal as well. Justice Mukhopadhyay discussed the judgment in *Uma Devi 3 case* which was decided by a constitutional bench whereby it was held that regularization shall not be done as it may lead to backdoor entry.

Therefore instead of granting a regular status, the workers may be conferred the benefits of regular workers for increasing their efficiency and commitment towards the organization.

While concluding Justice Mukhopadhyay discussed the cases pertaining to transfers and the workers causing unnecessary troubles with regard to the transfers thereby causing delay in the court procedure on one hand and also loss of productivity of the organization on the other hand. It was observed that as per schedule V of the act, unless 'Malafide' is proved in the case of a transfer it can not be challenged as a ground for unfair labour practice and should be outrightly rejected by the court in the very first instance for being devoid of any malafide on the part of the employer while transferring the employee.

Session 4: Dismissal and discharge of employees: relief under section 11A of the ID Act 1947.

By: Prof. BT Kaul

Justice Chandru

Prof. Kaul described the power of dismissal and discharge in the hands of the employer as a method to penalize wrong doings and adverse actions of the employees and to set an example so as to refrain others from repeating the condemned action. Prof. Kaul equated the power of the employer in such matters with the power of state to penalize deviant actions. Prof. Kaul explained that however such power can only be used in the cases of 'Gross Misconduct' on the part of the employee by the employer to ensure discipline by the workforce employed in his organization. The actions which can be taken by an employer in cases of misconduct were classified as:

- Dismissal
- Centaur
- Major penalty
- Minor penalty

Prof. Kaul discussed that the position of formalized action has developed and come a long way since the time of industrial revolution, when the absolute powers of hire and fire were available with the employers. In the present times, Prof Kaul contended that dismissal must have a causal and not a casual relation with the serious misconduct of the employee. Prof. Kaul contended that the position is also upheld by the supreme court wherein it has been laid down that an employee is not a bonded labour and he cannot be penalized for an act which

he has done while he was not on duty. The conduct of the employee must have a direct nexus with the departmental/industrial activity.

Prof. Kaul suggested that the action against the employee in case of a serious misconduct shall always start with a preliminary enquiry to establish a prima facie case. Thereafter some legal provisions pertaining to the procedural aspects of the preliminary enquiry were discussed and the manner in which the enquiry must be conducted was also observed. It was tendered that a preliminary enquiry is not a judicial act and therefore the principles of natural justice need not apply while conducting a preliminary enquiry to establish a prima facie case against the employee.

Thereafter, post enquiring the matter for establishing a prima facie case, a charge sheet must be filed. The importance of charge sheet was discussed by Prof. Kaul in detail with the participants and it was suggested that the chargesheet must be clear and unambiguous in its terms so that the employee is made known of the charges against him which he requires to defend. The employee needs to be provided with sufficient time after furnishing him with the chargesheet for the purpose of filing a reply and an explanation to the charges, as laid down in *Janaki raman's Case*.

Prof. Kaul cited the judgment in the 1993 case of *Delhi Development Authority V. F.C. Khurana* where the questions which were considered were- a) What is the starting point of the departmental proceedings and b) what is the significance of chargesheet? And c) what is the significance of hearing an explanation from the employee even after establishing a prima facie case?

Thereafter certain exceptions were discussed against holding of departmental enquiries where departmental enquiries can be dispensed with if it is against the national and public interests to do so.

If there are no cases of exceptions, the departmental enquiry starts with the appointment of an enquiry officer. Prof. kaul tendered that the role of an enquiry officer is judicial in nature and hence the principles of natural justice are bound to apply upon him while holding the departmental enquiry.

Thereafter, Prof. kaul brought into picture the situations when a misconduct on the part of an employee also qualifies as a criminal act. In such cases the enquiry may prejudice the proceedings and the decision of the court trying the employee for the criminal act. As a departmental enquiry is not a criminal trial, the employee may approach the court to grant a stay on the departmental enquiry until the matter is pending in the court. Prof. kaul stated that the legal position with regard to this point was laid down in the *Kaushambhar Dubey's* Judgment passed by the supreme court in 1988 which clearly stated that the employee is entitled to a stay in the departmental proceedings while the matter is pendente-lite. Although rules of admissibility of evidence in both the proceedings are different but the degree of evidence is higher in the judicial proceedings than in departmental enquiry. Also the defence of double jeopardy was considered in the case of *A. Kalra* by the supreme court in such instances.

Prof. Kaul submitted in this regard the judgment in the case of *Union of India V. J Ahmed* wherein it was held that a departmental enquiry shall not be initiated against an employee merely because of his inefficiency. An inefficient employee may be denied promotion but no departmental action can be taken against him on the account of non performance. Therefore inefficiency can't be a ground for

initiating departmental enquiry against an employee. Subsequently, the rule of 'one who alleges, must prove' was discussed, and it was observed that the person who alleges misconduct shall be the first one to lead evidence as a general rule of evidence in departmental enquiries.

Finally, Prof. Kaul suggested that the enquiry officer must base his findings only based upon the materials on record as to the factum of guilt whether proved or not.

Justice Chandru started his deliberations on the topic after the conclusion by Prof. Kaul. Justice Chandru opined that the procedure enshrined under section 11A of the ID Act 1947 is a very cumbersome one in nature. According to Justice Chandru the real problem starts when the case arrives before the High Court in appeal.

Justice Chandru opined that appreciation and re-appreciation of evidence leads to a number of different views which ultimately lead to the ambiguities. It is because of these complicated outcomes that the procedure is often stretched beyond the limits of reasonability and ultimately leading to the failure of the mechanism of serving justice. Therefore Justice Chandru stated that there is a dire need to devise certain methods to efficiently deal with such matters and serve justice accordingly.

While forming his conclusions Justice Chandru strongly suggested the judges to forget all the intricacies, pressures and the shortcomings involved in the process and strictly base their decisions on the facts of the case and the material available on record.

Day 2- 29/10/2015

Session 5: Issues of Retrenchment, Lay off: Legal Implications

By- Prof. B. T. Kaul

Prof. Kaul started the deliberations on the topic by devising a detailed distinction between the concepts of:

- Lay off
- Retrenchment &
- Closure

It was observed that retrenchment in its ordinary sense connotes discharge of surplus workforce. When a company or government goes through retrenchment it reduces outgoing money or expenditures or redirects focus in an attempt to become more financially solvent. Many companies that are being pressurized by the stockholders or have had flagging profit reports may resort to retrenchment to shore up their operations and make them more profitable. Although retrenchment is more often used in countries throughout the world to refer lay offs, it can also label the more general tactic of cutting back and downsizing. Retrenchment has more to it than just termination of employment by an employer.

The Industrial Disputes Act, as originally enacted, had no provision for the payment of lay off compensation or retrenchment compensation to the workmen who were laid off or retrenched in certain contingencies. The definition of retrenchment was not included in the Industrial Disputes Act, 1947 in its original form. It was inserted by amendment to the act in 1953. Thus the industrial

disputes act, 1947 now provides for certain conditions in which the termination of employment would not be considered as retrenchment.

Retrenchment is defined under section 2(oo) of the industrial disputes act and it refers to the termination of services of a workman for reasons besides termination owing to some disciplinary action. The definition further points out that retrenchment does not include voluntary retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation on that behalf or termination due to non renewal of the contract for employment between the employer and the workman concerned on its expiry or of such contract being terminated pertaining to such stipulation contained therein or termination of the service of a workman on the ground of continued ill-health.

On the other hand it was contended that layoffs as defined under section 2kkk of the Industrial disputes act means the failure or refusal or inability if an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the break down of machinery or any natural calamity or any reason connected thereto, to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched. It is further provided that every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid off for that day within the meaning of this clause.

Chapters VA and VB of the act contains provisions relating specifically to retrenchment and lay off, and these chapters provide for the application of the sections in the certain establishments i.e. chapter VA is applicable to industrial establishments in which less than fifty workmen on an average per working day have been employed in the preceeding calendar month; or to industrial establishments which are of a seasonal character or in which work is performed only intermittently and chapter VB is applicable to an industrial establishment (not being an establishment of seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen are employed on an average working day for the preceeding twelve months. These chapters also include conditions precedent for retrenchment, procedure for retrenchment and lay off, compensation, prohibition of lay off etc.

Subsequently following case laws were discussed:

Gauri Shanker V. State of Rajasthan (MANU/SC/0455/2015)

It was observed in this case that, the labour court in exercise of its powers under articles 226 and 227 of the Constitution of India erroneously interfered with the award of reinstatement and future salary from the date of award till date of reinstatement as rightly passed by the labour court recording valid and cogent reasons in answer to the points of dispute holding that the workman has worked from the said duration and that non compliance of the mandatory requirements under section 25F,G&H by the respondent department.

On the similar lines, judgments in the cases-

Jasmer Singh V. State of Haryana (2015(1)SCALE360)

Bhavnagar Municipal Corpn. V. Salimbhai Mansuri (2013 14 scc 456)

Mackinon Mackenzie and Co. Ltd. V. Mackinon Employees Union
(MANU/SC/0188/2015)

State of Maharashtra & Anr. V. Sarva Shramik Sangh, Sangli & ors
(Manu/SC/1088/2103)

Were discussed.

Session 6- Issues and approaches to domestic enquiries

(Hypothetical)

In the present session, the following hypothetical cases were discussed pertaining to the issues and approaches to domestic enquiries:

Mr. 'A' v. 'X' Company

Mr. 'A' was appointed as general mazdoor in the Switch Gear works of the 'X' Company and his duty, *inter alia*, was to bring materials from the shop rack to the working benches and afterwards to take them to their respective racks. On 4th of August 2014, a charge sheet was issued against the Mr. 'A' on charges of major misconduct, namely, instigation, insubordination and using of abusive and filthy languages against his superiors and dilatory tactics, which are major misdemeanor in terms of Section "L" Appendix "D" of the certified standing orders of the 'X' Company.¹

By the charge sheet, Mr. 'A' was called upon to submit his explanation and he was suspended from service with payment of subsistence allowance pending inquiry. Mr. 'A' filed his written explanation on 6th of August, 2014 to the charge sheet which being found unsatisfactory, an inquiry committee was constituted with Mr. 'B' (the company lawyer) as the Inquiry Officer who submitted his report on 29th of Oct., 2014, report shows that, Mr. 'A' was allowed to cross examine the witnesses produced by the 'X' company, however in the course of inquiry the slang words used by Mr. 'A' was not recorded. On the basis of domestic inquiry the company concluded that Mr. 'A'

¹

was guilty of major misconduct consequently Mr. 'A' was dismissed from service.

Subsequently Mr. 'A' through a letter dated 22nd of November, 2014 admitted all the charges and sought condonation and mercy attributing his acts to his mental illness which was not considered by the 'X' company on account that, Mr. 'A' was on earlier occasion also charged with similar grounds and was given a chance to amend his conduct. The plea of Mr. 'A' was not entertained by the company.

Consequently on 2nd of April, 2015, dispute was referred under Section 7A of the Industrial Disputes Act to Industrial Tribunal, and both the parties filed their written statements presenting their cases before the Tribunal.

Contention on behalf of Mr. 'A'

1. That, he was denied a fair hearing and was dismissed in violations of the principles of natural justice.
2. That, the charge sheet did not contain the specific abusive language and thus it was difficult for him to defend his case.
3. He further argued that, he was not furnished with the list of witnesses and copy of the documents to be treated as evidences and materials on which the management was to rely.
4. He was also denied a chance of being represented by a lawyer or a representative who is equipped with legal background during the enquiry proceedings.
5. Learned counsel for Mr. 'A' further contended that the company had not presented before the court any documentary evidence to prove that he had on

earlier occasion misconducted himself and was thus in a habit of disobeying his superiors.

6. The learned counsel also strongly argued that the work assigned to Mr. 'A' was not part of his duty as he was appointed to carry things from one place to another outside the shop and not to fix the top planks on the braker stand.

Contention on behalf of 'X' company

Advocate on behalf of the company contented that:

1. During the inquiry witnesses deposed that Mr. 'A' used abusive language against his superior.
2. Inquiry officer had given equal opportunity to Mr. 'A' to defend his case, it is recorded that Mr. 'A' also had an opportunity to cross examine the witnesses and,
3. Mr. 'A' had developed a habit of misconducting himself in an undesirable manner despite opportunities being given to rectify his conduct.

Issue involved are:

- (i) Whether the right of legal representation can be claimed at the domestic inquiry stage and,
- (ii) Whether inquiry conducted in the instant case is in violation of principles of natural justice, please decide the issue with appropriate reason.

Hypothetical case 2-

'X' Trade Union v. The Gram Panchayat, Suraj Nagar

Mr. 'P', Mr. 'Q', Mr. 'R' and Mr. 'S' were working in the Suraj Nagar Gram Panchayat, on the post of *safai kamdars* of the Gram Panchayat and served for 18 years, 16 years, 8 years, 5 years, respectively. They were however,

considered as daily wage workers and were therefore, not being paid benefits such as pay and allowances etc. as are being paid to the permanent *safai kamdars* of the Panchayat. The workmen raised industrial dispute on 23.7.2014 before Conciliation Officer, at Bhojpur, through trade union 'X'. The settlement between the workmen and the Panchayat failed to resolve amicably during the conciliation proceedings and therefore, the failure report was sent to the Dy. Commissioner of Labour, Bhojpur, who referred the same to the Labour Court vide Reference (LCD) No.6/2014.

Contention on behalf of Workmen:

Counsel appearing on behalf of workmen and Union contended that,

- (1) The concerned workmen have been working for many years, such as 18 years, 16 years, 8 years and more than 5 years in the Panchayat. They are not paid the monetary benefits and allowances etc. as are being paid to other permanent *safai kamdars* who are working in the Panchayat.
- (2) The concerned workmen are doing the same work as is being done by the permanent *safai kamdars* and they have been working for similar number of hours, i.e. eight hours per day like the permanent employees of the Panchayat.
- (3) they are (workmen) being monetarily exploited by the Panchayat by not being paid regular salary and other monetary benefits for which they are legally entitled to but are being paid much lesser wage, i.e. Rs.1390/- per month.
- (4) The panchayat is practicing unfair labour practice as it is avoiding the benefits to the workmen unreasonably, thus, the action of the Panchayat is

illegal and the workmen should be allowed to get permanency in the said posts.

Contention of the Panchayat:

- (1) On behalf of the Panchayat it was contended that the concerned workmen were engaged in the services, as and when required by the Panchayat and it is not obligatory on the part of the Panchayat to provide work to the workmen on a day-to-day basis and the Panchayat has no control over them as there is no employer- employee relationship between them.
- (2) The workmen were not appointed on permanent basis and as per the rule and regulations of the concerned Act.
- (3) They have entered through back-door, appointment were not made according to the norms.
- (4) The Panchayat has no right to make them permanent employees. For making their services permanent in the Panchayat, an application has to be made before the District Panchayat, Bhojpur, and a demand has to be raised before it and the recruitment of the employees of the Panchayat is done by the State Panchayat Service Selection Board and directions will be issued on its behalf. However, there are no such directions issued in relation to the concerned workmen. Thus, the Panchayat cannot proceed to appoint the workmen.
- (5) There is no documentary evidence produced on record before the Labour Court which shows that the present workmen are working 8 hours or for more number of hours as that of the permanent employees of the Panchayat.

(6) The financial capacity of the Gram Panchayat is not so sound to bear the extra cost for the payment of the wages/salary and other monetary benefits to the concerned workmen if they are made permanent.

(7) In the present case, the principle "equal work, equal pay" has not been violated by the Panchayat as the workers are not permanent workmen, and thus, the practice of the panchayat cannot be termed as 'unfair'.

Issue involved: In light of these facts and contentions raised, adjudge, whether the practice of the panchayat amounts to unfair labour practice.

Session 7: Reinstatement and Backwages

By- Justice Chandru

The session started with the discussion of Supreme Court verdict on the power of labour courts while interfering with disciplinary action. Supreme Court while interpreting the power of the Labour Court to interfere with the disciplinary action taken by the employer had put an embargo in the Indian Iron & Steel Company's case. It was held that- "In cases of dismissal on misconduct, the Tribunal does not, however, act as a Court of appeal and substitute its own judgment for that of the management. It will interfere (i) when there is a want of good faith, (ii) when there is victimisation or unfair labour practice, (iii) when the management has been guilty of a basic error or violation of a principle of natural justice, and (iv) when on the materials the finding is completely baseless or perverse" *Indian Iron & Steel Co., Ltd. Vs. Their Workmen (AIR 1958 SC1 (30)1958 SCR 667)*.

As a result to the above judgment, Justice Chandru contended that the Parliament introduced Section 11A with effect from 15.12.1971. It was stated that the Indian Iron & Steel company's case curtailed the powers of the Labour Court & in order to give effect to the ILO resolution no. 119 wherein by which it was directed that the law must provide

- for a third party neutral arbitrator
- to go into the imposition of the penalty imposed on the employee but
- the court should have power to interfere on those penalties.

The object of introducing Section 11A as found in the objects and reasons appended to the Bill was that the Labour Courts/Tribunals must have power to

interfere with the quantum of penalty imposed by an employer. This was to give effect to the international obligation found in Resolution No.119 of the I.L.O.(1963) wherein it was agreed by the ratifying countries to have a law by which any punishment of removal imposed by employers must have an approval by a third party neutral observers. This section was interpreted by the Supreme Court in *Workman of M/s. Firestone tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management reported in 1973 (1) SCC 813*. The Supreme Court held that after the introduction of the provision, the Labour Court's power is akin to that of an appellate court. As a result, Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry & satisfy itself whether the evidence, established the misconduct. Limitation imposed by the decision in *Indian Iron & Steel Co. Ltd.* case is no more available.

- Tribunal is now at liberty to consider whether the finding of misconduct recorded by an employer is 'correct; but also to differ from the said findings
- What was once the satisfaction of the employer, now satisfaction of the Tribunal that finally decides the matter

The Supreme Court observed- "after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the Labour Court/Industrial Tribunal in interfering with the quantum of punishment awarded by the management where the workman concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to hereinabove and it is certainly not unlimited. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any

mitigating circumstances which require the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment” *Mahindra and Mahindra Ltd Vs. N.B.Narawade*[2005(3) SCC 134].

After the Supreme court’s verdict on the position related to section 11A, the discussion moved further with regard to the course of action which the labour courts and industrial tribunals are bound to take. Justice Chandru observed that the Labour Court will have to do the following exercises:

To find out whether the enquiry held by the employer is contrary to the certified standing orders or is vitiated on account of violation of Principles of Natural Justice. In case the enquiry is vitiated and if the employer seeks to lead fresh evidence by making a proper application then evidence will be recorded by the Labour Court. If the employer does not seek to lead any fresh evidence then there is no obligation to provide any opportunity to lead fresh evidence and it can straight away order reinstatement by holding it was a case of no evidence.

After coming into the force of section 11A if the enquiry was held to be valid, then the Labour Court can re-appreciate the evidence recorded by the employer & can also come to different conclusions. In essence the power of the court is that of an appellate court. Labour Court has power to interfere with the penalty if it is satisfied that the penalty was not justified & can direct reinstatement with consequential benefits. Alternatively, the Labour Court can also impose a lesser penalty. Ever since the section was notified (i.e. 15.12.1971) the Labour Courts/Tribunals were exercising their powers and most of the times, their

awards were upheld by various High Courts and by the Supreme Court. But since late 2000, the decision of the Supreme Court has taken the law backwards by virtually putting an embargo on the power and almost denied such a power to the Labour Courts by their judicial interpretation.

Thereafter various decisions of the Supreme Court pertaining to various instances in which non interference by the labour courts is called for was discussed. The view in this regard is- All these decisions are in the teeth of the language of Section 11A fulfilled an obligation mandated by ILO. In very many other spheres off late, the Supreme Court had pressed into service the “Wednesbury principle” and the theory of proportionality and reasonableness to review the State actions.

Thereafter, the interpretation of ‘Material on Record’ by the Supreme Court was discussed to be as-The proviso to 11A makes a tricky reading. What is the “material on record” and the bar of taking fresh evidence came to be considered in *Workmen of Firestone* case. If an enquiry held by the employer is set aside and if fresh enquiry is ordered by the labour court then no part of the evidence recorded in the enquiry conducted by the employer can be relied upon by the labour court.

The position with regard to various points as affirmed by the Supreme Court is that- Denial of subsistence allowance will not vitiate the enquiry unless the workman proves Prejudice. Burden of proof shifted on workmen regarding proof on the length of their service. Failure to seek for approval under Sec 33(2)(b) will vitiate the order of termination since the provision is mandatory. In such cases the order passed by the employer is ab-initio void.

Thereafter the issue of Backwages and when can they be ordered by the labour court was discussed. The Supreme Court has held in *Hindustan Tin Works Pvt. Ltd*

Vs. Employees Of Hindustan Tin Works (AIR 1979 SC 75) “Ordinarily, therefore 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 litigating activity of the employer”

While concluding, the question that was considered was regarding Loss of Confidence and whether a ground for denial of Reinstatement? It was observed in this regard that the judgment of Supreme Court in the case of- L. Michael & Anr Vs. M/S.Johnston Pumps India Ltd (AIR 1975 SC 661) is that- Loss of confidence is no new Armour for the management; otherwise security of tenure, ensured by the new industrial jurisprudence and authenticated by a catena of cases of this Court can be subverted by this neo formula Loss of confidence in the law will be the consequence of the Loss of Confidence doctrine.

Session 8: Recovery of money under the ID Act 1947

By- Justice Chandru

Justice Chandru started the discussion by talking about the history of recovering money from employers by the employees before the industrial disputes act.

Recovery was done pursuant to the terms of the employment contract which could be enforced through Civil Suit or by Criminal Prosecution. Justice Chandru contended that filing a civil suit was a cumbersome process for the employees as it proved to be expensive, caused enormous delay and the period of limitations applicable on the filing of the suit.

Thereafter to redress the problems of enforcing contracts, the following Legislations were formulated:

1. 1923, Workmen's Compensation Act- In case of disability, employee could approach Compensation Commissioner under section 19 of the said act.
2. 1936, Payment of Wages Act- In case of delayed payment, the aggrieved employee could approach the Payment of Wages Authority under Section 15.
3. 1948, Minimum Wages Act- In case of non-payment of minimum wages, employee could approach the Minimum Wages Authority under Section 20.

Thereafter the provisions of 1947 industrial disputes act was discussed. Industrial Disputes Act aims towards investigating and settling of Industrial Disputes. A dispute can be settled either by conciliation or adjudication. Under section 33C, the provision for recovery of money due from an employer- 1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter VA or Chapter VB. Under this provision, the workman

himself or any other person authorized by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate government for the recovery of the money due to him, and if the government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue.

However the Limitation Under Section 33-C(1) with regard to the recovery of money is that every such application shall be made within one year from the date on which the money became due to the workman from the employer, also any such application may be entertained after the expiry of the said period of one year, if the appropriate government is satisfied that the applicant had sufficient cause for not making the application within the said period.

Further under section 33-C(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate government within a period not exceeding three months provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit.

Similarly, Justice Chandru analysed the provision under section 33-C(3) of the industrial disputes act which provides for the purposes of computing the money

value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case. 33-C(4) provides that the decision of the Labour Court shall be forwarded by it to the appropriate government and any amount found due by the Labour Court may be recovered in the manner provided for in sub-section (1). 33-C(5) Where workmen employed under the same employer are entitled to receive from him any money or any benefit capable of being computed in terms of money, then, subject to such rules as may be made in this behalf, a single application for the recovery of the amount due may be made on behalf of or in respect of any number of such workmen.

The Explanation to the section provides that "Labour Court" includes any court constituted under any law relating to investigation and settlement of industrial disputes in force in any State.

The discussion was then pertaining to the term Wages and as to what it means under I.D.Act? Under Sec 2(rr) "wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes-

- (i) such allowances (including dearness allowance) as the workman is for the time being entitled to;
- (ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grains or other articles;

(iii) Any travelling concession;

Justice Chandru discussed Statutory Payments provided for under the I.D.Act are-

1) Chapter V-A

Sec 25-C Lay off Compensation

Sec 25-F Retrenchment Compensation

Sec 25-FFF Closure Compensation

2) Chapter V-B (If prior permission not obtained or no application made, worker entitled full wages till such permission is obtained)

Sec 25-M Lay off Compensation

Sec 25-N Retrenchment Compensation

Sec 25-O Closure Compensation

Sec 33-C (1) Revenue Recovery Certificate the amount due to the workmen, a settlement, is pre-determined and ascertained or can be arrived at by any arithmetical calculation or simplicitor verification and The only inquiry that is required to be made is whether it is due to the workman or not, recourse to summary proceedings under Section 33C (1) is not only appropriate but also desirable to prevent harassment to the workmen.

M/S. AGENCIA E. SEQUEIRA M/S. FABRIL GASOSA Vs. LABOUR COMMISSIONER & OTHERS (1997 (3) SCC 150).

Section 33C is in the nature of execution proceedings. The Difference between 33-C(1) and 33-C(2) as discussed by Justice Chandru is that by the means of Section 33C (1) and (2), the legislature has provided a speedy remedy to the workmen to have the benefits. The distinction between 33-C(1) and 33-C (2) lies mainly in procedural aspect and not with any substantive rights of workmen.

33-C (1) comes into play when on the application of a workman himself or any other person assignee or heirs in case of his death, the Government is satisfied that the amounts so claimed are due and payable to that workman.

On that satisfaction being arrived at, the Government can initiate action under this sub-section for recovery of the amount provided the amount is a determined one and requires no 'adjudication'. The Government does not have the power to determine the amount due to any workman under 33-C (1) and that determination can only be done by the Labour Court under section 33-C(2) or in a reference under Section 10(1) of the Act. After determination made by Labour Court u/s 33-C(2) the amount so determined by the Labour Court, can be recovered through the summary and speedy procedure provided by 33-C(1).

33-C (1) does not control or affect the ambit and operation of 33-C(2) which is wider in scope. The rights conferred under Section 33C (2) exist in addition to any other mode of recovery which the workman has under the law as laid down in the case of- *M/S. AGENCIA E. SEQUEIRA M/S. FABRIL GASOSA Vs. LABOUR COMMISSIONER & OTHERS (1997 (3) SCC 150)*

Prosecution of the Employer for non-payment of dues under the Act, Settlement or Award under Section 29 any person who commits a breach of any term of any settlement or award, which is binding on him under this Act, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both, and where the breach is a continuing one, with a further fine which may extend to two hundred rupees for every day during which the breach continues after the conviction for the first] and the Court trying the offence, if it fines the offender, may direct that the whole or any part of the fine realized from

him shall be paid, by way of compensation, to any person who, in its opinion, has been injured by such breach.

Under Section 31, the penalty for other offences was discussed:

(1) Any employer who contravenes the provisions of section 33 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both

2) Whoever contravenes any of the provisions of this Act or any rule made thereunder shall, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with fine which may extend to one hundred rupees. Whereas, Sec 32. Offence by companies, etc.- Where a person committing an offence under this Act is a company, or other body corporate, or an association of persons (whether incorporated or not), every director, manager, secretary, agent or other officer or person concerned with the management thereof shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence. Under Section 34 provisions regarding Cognizance of offences is provided that-

(1) No court shall take cognizance of any offence punishable under this Act or of the abetment of any such offence, save on complaint made by or under the authority of the appropriate government.

(2) No court inferior to that of [a Metropolitan Magistrate or a Judicial Magistrate of the First class] shall try any offence punishable under this Act.

The Power of Execution under Section 11 (8):-

"Every award made, order issued or settlement arrived at by or before Labour Court or Tribunal or National Tribunal shall be executed in accordance with the

procedure laid down for execution of orders and decree of a civil court under Order 21 of the code of civil procedure, 1908.

The Labour Court or Tribunal or National Tribunal, as the case may be shall transmit any award, order or settlement to a civil court having jurisdiction and such civil courts shall execute the award, order or settlements as if it were a decree passed by it“- with effect from 15.9.2010.

Justice Chandru then summarized the advantages of Sec 33-C(2) as-

1. No limitation
2. No court fees
3. Legal heir / ex-workmen can also file
4. Joint petition in respect of more than one petitioner
5. Material benefits can also be computed in terms of money.
6. No technicalities

The Scope of Sec 33 C(2) on a fair and reasonable construction of 33C (2)it is clear that if a workman's right' to receive the benefit is disputed. that may have to be determined by the Labour Court. The Labour Court inevitably has to deal with the question as to whether the workman has a right to receive that benefit. If the said right is not disputed, nothing more needs to be done, Labour Court can proceed to compute the value of the benefit in terms of money; the Labour Court is given the power to allow an individual workman to execute or implement his existing individual rights it is virtually exercising execution powers it is well settled that it is open to the Executing Court to interpret the decree for the purpose of execution. The executing Court cannot go behind the decree, nor can it add to or subtract from the provision of the decree. These limitations apply also to the Labour Court; like the executing Court, the Labour Court would also be competent

to interpret the award or settlement on which a workman bases his claim u/s 33C(2). For the purpose of making the necessary determination under s. 33C (2), it would be open to the Labour Court to interpret the award or settlement on which the workman's right rests. but if the said right is disputed the Labour Court must deal with that question and decide whether the workman has the right to receive the benefit only if the Labour Court answers this point in favour of the workman the next question of making necessary computation can arise, as laid down in- *The Central Bank Of India Ltd. V. P.S. Rajagopalan (AIR 1964 SC 743)*.

Also it was observed that Mere denial by employer will not oust jurisdiction.

The Labour Court clearly had jurisdiction to decide whether such a right did or did not exist when dealing with the application under that provision, and that the mere denial of that by the company could not take away its jurisdiction.

We hold that in this case it was competent to the Labour Court to decide whether the case before it was a case of retrenchment compensation or the proviso to sub-s. (1) of s. 25FFF was attracted on closure of the establishment, as laid down by the Supreme Court in the case of- *Sahu Minerals & Properties Ltd Vs. Presiding Officer, Labour Court & Ors. (1976 (3) SCC 93)*.

With regard to the claim of bonus it was observed that a claim for bonus in the context of Section 22 of the Payment of Bonus Act can be raised only by raising an industrial dispute. It cannot be raised by way of an execution application.

While concluding it was observed by Justice Chandru that the difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered, just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33C(2) of the Act

while the latter does not. In the end the position with regard to gratuity claims and back wages was discussed.

Day 3- 30/10/21015

Session 9: Legal Representation and legal aid in labour matters

By- Mr. Jamshed Cama

Mr. Michael Dias

Chair- Justice Sujoy Paul

Justice Chandru

The session started with a discussion pertaining to the grievances of the workers and the employers with regard to legal representations. Subsequently it was tendered that the subject of appearance of the advocates as of right before the labour courts and industrial tribunal created under the industrial disputes act 1947 had been a matter of controversy for a long time. The reason being that although the advocates act 1961 was enacted, still section 30 of the said act was ineffective for the want of notification by the central government. The central government issued notification in 2011 giving effect to section 30 of the advocate act 1961 with effect from 15th june 2011.

However section 36(4) of the industrial disputes act 1947 provided that the advocates cannot appear before the authorities under the said act, without consent of the opposite side and permission of the authority.

The provision in the industrial disputes act debarring the lawyers from appearing before the labour court or industrial tribunal is unconstitutional being violative of articles 14 and 19(1) (g) of the constitution of India. This is because industrial law has become so complex that a layman cannot possibly present his case before the

industrial tribunal. Hence to debar the lawyers will really be denying justice to millions of people.

The problems at the practical stage of proceedings as discussed by the judges relate to the inefficiency and lack of qualification of the persons representing the case of the workmen. It was agreed by the speakers and the participants unanimously that the unqualified union leaders cause innate delays in the proceedings and often do not have any value for the dignity of the court and the judge. They usually violate the decorum and the sanctity of the institution. Justice Chandru cited an instance where he being a practicing advocate could not represent the trade union of the workers to present their grievance before the court pertaining to this disability posed by the statutory provisions. A possible solution to the problem as suggested by Justice Chandru is that the lawyer may be designated as a leader of the trade union by moving a mutual resolution by the workers and he may then represent their case before the labour court or industrial tribunal. Another problem which was brought forward by various participants was that the trade union leaders merely believe in delaying the proceedings of the case by resorting to practices as vague as accusing the judge of the labour court of being corrupt and biased.

The cases which were discussed with regard to the developments on this point through judicial pronouncements are enlisted as follows:

- Hygenic Foods V. Jasbir Singh and ors. (MANU/SC/0708/2011)
- R. Rajamani V. The PO, II Addl. Labour Court and P.V. Sundaram (Director), Addisons Paints and Chemical Ltd. (2007 II LLJ 704)

- Vadodara Mahanagar Seva Sadan V. Maha Gujarat Industrial Employees union and Ors (MANU/GJ/0383/2015)

- Rajya General Kamdar Mandal and Ors. V. Member or Her Successor in Office AS and Ors. (MANU/GJ/0188/2015)

- South Arcot Vallar District Mazdoor Union, rep. by its General Secretary, N. Rajendran
V.
The Presiding Officer, Labour Court, Parry's Confectionary Limited, rep. by its General Managaer and Lotte india Corporation Limited (2011 129 FLR 995)

- Management of Muttrapore Tea Estate V. Presiding Officer, Labour Court and Ors. (2005 1 LLJ 660)

- Schneider Electric India Pvt. Ltd. V. Kailashben R. Valand (MANU/GJ/1268/2013)

Session 10: Legal Representation and legal aid in labour matters

By- Mr. Michael Dias

Justice Sujoy Paul

Chair- Justice Chandru

The session was aimed at devising targets towards protecting the employers against malafide and baseless action by workers and trade unions. The new bill on industrial relations was discussed in the light of the above topic.

It was tendered by the speaker that as a part of its attempt to improve growth, the government has put forth the Labour code on industrial relations bill, which amalgamates the provisions of the Industrial Disputes Act and the trade unions act. In spite of some positive features, the bill's aversion to the rights of the workers and trade unions is quite apparent. For instance, penalties are imposed on individual workers for illegal strikes, but for illegal lockouts, the fine is borne by a collective entity; this is but one of many unequal provisions.

Soon after the victory of the national democratic alliance in 2014 elections, there was euphoria in the industry. After coming into power, the prime minister repeated in many forums that economic growth would be the main objective. This would boost industry and commerce which in turn would increase employment. Labour would get the spillover benefits of high growth. At the same time the government stressed that there were too many laws regulating work (i.e. granting protection to labour) and that they needed to be changed. Rajasthan, led by chief minister Vasundhara Raje Scindia, took the lead by announcing that laws relating to labour protection and firing of workers had to become more liberal to generate more employment. The state legislative assembly resolved in July 2014 that laws

such as the factories act, industrial disputes act and contract labour (regulation and abolition) Act should be amended to release employers from their stranglehold and increase investment in industry, creating more jobs.

The argument that removing legal protection for labour and allowing industries to shut down at will would increase employment is not new and not even original. The world bank's world development report for 1995 was referred as to had been stating that- *In many Latin American, South Asian and Middle Eastern countries, labour laws establish onerous job security regulations, rendering hiring decisions practically irreversible. And the system of worker representation and dispute resolution is often subject to unpredictable government decision making, adding uncertainty to firm' estimate of future labour costs.*

It explained that laws providing too much protection would discourage foreign investment because even though it may be easier to employ comparatively low cost labour, retrenching workers would be almost impossible.

Subsequently various parts of the proposed statute were discussed in detail and how far they seek to address the situation

Session 11: Problems faced by labour Courts and Industrial Tribunals

(Break out Group Presentation)

In the final session the participants were divided into five groups to discuss and make a presentation with regard to the problems which the system of labour courts and industrial tribunals faces in their respective states.

The following problems and suggestions relating to the betterment of the same were brought about in the presentations made by the participants from different states:

- Lack of infrastructure
- Lack of training and skills with the subordinate staff
- Lack of I.T. resources
- No adequate support from the High Courts
- Inadequacy of funds
- Procedural problems
- Problems in recording of evidence
- Lack of cooperation from the parties

The above mentioned points were broadly brought forward as a drawback in most of the industrial tribunals and labour courts in different states.

Session 12: Break Out Group Presentation

In this session the hypothetical problem provided to the participants in the previous session was discussed.

Day 4: 31/10/2015

Session 13- Recent legislative amendments in Employment laws

By- Prof. Sharit Bhowmik

Justice Chandru

It was contended that India is far behind on both, with low literacy and complex labour laws. The laws are archaic and among the most rigid in the world. Of particular concern is the issue of job security law, which was first introduced in 1976 and then further stiffened in 1982. At that time the objective was to improve job security in private sector firms so they were in line with the public sector.

The outdated laws create problems for restructuring particularly during economic downturns. Furthermore, in the long run it discourages employers from increasing recruitment of permanent staff and also adversely affects the workers' initiative to acquire skills. The overall employment effect of job security regulations has been significantly negative, as various studies confirm.

Recent legislative initiatives relating to labour laws at the national level is evident from amendment to the labour laws (exemption from furnishing returns and maintaining registers by certain establishments) Act providing for maintenance of registers and filing registers electronically under 7 more labour laws in addition to the earlier nine labour acts. Further, there are a few other legislations which are being considered at the central level like small factories (regulation of

employment and conditions of service) Bill, 2014; Factories (amendment) bill 2014 to ease regulation of hours of work and overtime to workers and to increase the threshold of workers for the definition of a factory.

It was tendered that industrial harmony can only be achieved when the objectives of employment and employability are interwoven with the goals of industrial development and national growth. The ministry of labour and employment is therefore committed to good governance through transparency and accountability in the enforcement of labour laws.

Subsequently, various legislative amendments in different legislative amendments so far were discussed, as follows:

- The Labour Laws (exemption from furnishing returns and maintaining registers by certain establishments) Act, 1948
- Comprehensive amendments in the apprentices Act 1961
- The Small Factories (regulation of employment and conditions for service) Bill
- Implementation of labour codes
- Amendments to child labour protection and regulation Act

While concluding, the notification by ministry of labour and employment was discussed to amend the foregoing provisions of the Industrial disputes Act in detail.

Session 14: Need for unification of labour laws: Issues and Concerns (Discussion)

By- Prof. Sharit K. Bhowmik

Justice Chandru

It was discussed that Labour policy reforms in India are due for a long time, as the context in which they were framed has changed drastically. The laws framed mainly to cater the manufacturing sector do not address the problems of the service sector, which today, accounts for 55 % of the country's GDP. The outdated and inflexible nature of labour laws protect a handful of the workforce, thereby seriously hampering employment generation capacity of the organized sector and most of the youth joining labour force every year, are forced to join informal economy, where the working conditions are pathetic and earnings are also abysmal.

Thereafter the issue of multiplicity of labour laws was also considered for discussion. The large number of central and state laws regulating employer employee relations, face operational problems in implementation and compliances that need to be looked into. Besides usage of different terminologies yet covering different components in the legislations have made compliance very cumbersome and this has multiplied litigation in such matters.

It was tendered that the large number of labour laws protect only 7-8 % of workers coming from the organized sector only. The majority of the workers who come from the unorganized sector are left unprotected. It was thereby submitted that the entire gamut of labour laws should be simplified and clubbed together wherever possible and made less cumbersome to make the working conditions more employment friendly for the workers.

In the end Justice Chandru presented his views upon the Ad-Hoc-ism in decisions to modify labour laws. In the presentation Justice Chandru discussed the position of labour legislations in various states and the attempts made to modify or amend the same by some states. The points of the submissions by Justice Chandru were broadly based upon the Industrial Disputes Act, The changes pertaining to night shift of women workers in the act and related to the betterment of working conditions for children employees. Justice Chandru also discussed that how the central government also followed the footsteps of increasing activity of various state governments in this field. The formation of National Labour Commission and its recommendations were also tendered.

While concluding, Justice Chandru discussed some judicial pronouncements and emphasized upon the support from judiciary towards strengthening the position of worker friendly legislations. It was observed that various factors for motivation existed to reach the aim of such amendments in the age old existing provisions of the acts.

-Programme Concluded-