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**SEMINAR ON EMPLOYMENT LAW AND JUDICIAL PRACTICES  
(LABOUR COURTS)**

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VERBATIM PROGRAMME REPORT – P951

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**Submitted by**

Nitika Jain  
Law Associate  
National Judicial Academy

**DAY 1**  
**SESSION 1**

**Prof. (Dr.) Geeta Oberoi:** Very good morning, maybe we can begin with your introduction, if you can do a quick introduction from which jurisdiction you are coming meanwhile Justice Mukhopadhaya will join us, no you can sit down you don't have to get up please.

**Participants:** I am Presiding Officer Haryana, JS Bhindal Presiding Officer Industrial Tribunal Amritsar, good morning to all of you I am Sushil Kukreja Presiding Judge Labour Court Shimla, I am Santosh Kumar Gupta Senior Civil Judge and ACJM, working last 5 months as Presiding Officer labour court Gwalior MP, I am Rakesh Kumar Sharma labour Judge Indore MP, good morning everybody myself Pranay Gupta Judge labour court Yavatmal Maharashtra, I am Krishna Kumar Presiding Officer Labour Court Kannur Kerala, my name is Babu Prakash I am also Presiding Officer labour court Kollam representing Kerela state, my name is Ashok Jain I am from Rajasthan working as labour Judge Jaipur, my name is NS Mamadapur labour court Bangalore Karnataka, good morning everybody I am Prem Singh Khimal I am from Uttarakhand I am working as PO labour court Haridwar, I am Kesang Doma PO Industrial Tribunal plus Commissioner workmen Compensation Industrial Tribunal Durgapur West Bengal, I am K.Rajesekar Industrial Tribunal Madras, good morning sir I am Sivakumar PO Industrial Tribunal cum labour court Puducherry Tamil Nadu, good morning sir I am Vijay Kumar Sharma PO Labour Court Ranchi Jharkhand, good morning sir PO Labour Court Bhubaneswar Orissa, good morning sir I am Jagjeevankumar from Andhra Pradesh I am PO Labour Court Warangal, I am Dilip Kumar Verma from Patna High Court presently PO Labour Court Dalmianagar Bihar, myself Sanjeev Agarwal PO KKD Labour Court Delhi, myself Narinder Kumar Add. District Judge and Sessions Judge PO Labour Court Delhi.

**Justice S.J. Mukhopadhaya:** Good Morning to all of you. The session one the topic is contract labour issues and challenges we have gathered here to discuss the problem. The Issues and challenges when we talk of the Hon'ble Judge and those advocates expert in the field they will be telling you in general what is matter but main problem that you face that we want is after the deliberation of Hon'ble judge and advocate that you'll be raising your question and you will answer that means, all problems should be raised by you and answer that is the solution to be given by you, if necessary then those who are expert here they will be assisting you they will be guiding

you, so I'll be requesting Hon'ble Justice Chandru my brother to deliberate on the issue. We want to give half an hour to them so accordingly you may divide amongst two of you the rest of the half hour.

**Justice K. Chandru:** Good Morning to all of you. Before I go to the Power Point presentation I want to make two points, first is that except in Maharashtra Gujarat we don't have a labour Judiciary we have only judges sent on deputation for some time and come back so there is always a scope for learning a new legislation which is not otherwise available in criminal and civil courts. The second was is today's topic in the labour field most crucial but you will be getting hardly any case arising out of contract labour except few cases. Most of the Labour Courts are now clogged with non-employment issues not major collective dispute like wage, dearness allowance, bonus, work norms, so many other collective disputes which were there once upon a time in Labour Courts and tribunals have less disappeared mainly for two reasons, one is, the result of a labour dispute takes a long time because we have a four tier appeal system. After the labour court you have single bench division bench and Supreme Court it normally take anywhere between 10 to 20 years so many places where the unions are strong they enter into settlement either bipartite or tripartite and matter is solved on give and take basis most of the collective dispute that come to labour court are all small establishments, the huge establishments go for a direct settlement therefore, there was no occasion for us to know the nuances of a collective dispute. Secondly, the contract labour issue directly doesn't come to you after the introduction of the new law it may come to you in an indirect fashion either as a side issue in a non-employment matter or in a issue where the union has come up with a plea that this arrangement is only a paper arrangement therefore they should be made as a regular workers but nevertheless the subject has become very important in the industrial world because increasingly management are adopting the engagement of contract labour system and today I don't know about other centers in Tamil Nadu the ratio between a contract labour and a permanent worker is anywhere between 1:10.

In an industry where there are 4000 workers only 400 are permanent and that 400 workers only they enter into settlement enter into dialogue the other 3600 workmen are not taken concern but, major unrest take place because increasingly the contract labours started coming to court in different forms in different dockets they courts therefore we felt that this session we should start about contract labour whether you get a case or not you should have a background so that certain

ticklish questions can be answered so far as the labour legislations are concerned though there are too many legislations in our country and there is an attempt to codify and simplify the laws but as of now each section is having a different legislation. How to understand you take the case of who is a worker in provident fund and ESI a persons employed through agency is covered in *beedi cigar Act* it is covered but in ID Act they are not covered a worker means it must be a direct worker not an indirect worker and every legislation has got a peculiar element definitions are different so when people come to labour court as presiding officers they suddenly get lot of confusion because too many legislations and the lawyers also start arguing a\_\_ on many matters. At the same time a easy way of understanding a labour legislation is to know what is the background of the legislation. You'll find our labour laws are nearly 100 years old.

First legislation 1921 The Trade Disputes Act but if you go and understand the history behind that legislation you will know what is the development that took place, why parliament or the state legislature made the law and therefore to understand a legislation you must know what is the history behind it and once you know the history you can easily trace the development up to date saying this is why this came and this is why these interpretations came and therefore my main attempt today is to tell you what was the position before the Act came and what was the position after the Act came so the earliest when in 1930's in the British parliament some of the members raised a question that in the Indian Colony who are expert in labour and there are no protection for them. The British parliament sent as Royal Commission of labour in 1929 and the Commission submitted the report in 1930 and this is what the commission said, 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 the manager should have full control over the selection, hours of work and payment of workers. What it means is you should not have too many control system. It is the single management which should select and fix the time therefore, the worker know who the employer is. So this was the recommendation made in 1930 but the British never bothered to bring any legislation till they were proving us and the world war II became a convenient excuse for them and while the workers were exploited but there were very few legislations in India while the England had a whole lot of legislation and Justice Chinappa Reddy in the *Railway Catering Workers case* say what is this contract labour? The practice of employing through contractors for doing work inside the premises of primitive employer known to the International Labour Organization in other such organization labour only contracting or

inside a contract can be termed as an Arabic system and the relic of the early phase capitalist production which is now showing signs of revival in the most period.

This Judgement was given AIR 1987 SC 777, off late there has been a noticeable tendency on the part of big companies including public sector companies to get work done through contracts rather than through their own department. It is a matter of surprise that employment of contract labour is steadily on the increase in many organized sectors including the public sector which is expected to function as a modern employer. What was the law before the Act came, this judgement summarizes the entire law *Standard Vacuum Refining Co. Ltd.*, this judgement was the last of the series of judgements which Supreme Court granted so this 1960's law summarizes the previous position whether the issue relating to contract labour can be raised by the workers or the principal employer, whether the Union of the Principal Employer workers of the principal employer can raise a dispute about contract labour? Suppose in an establishment there are direct workers and there are indirect workers indirect workers start increasing then the bargaining capacity of the workers will come down because they'll say if you don't provide work then we'll get into root by shift labour by a contractor, so the workers raise a dispute that the employer should not engage contract labour. Question came whether the workers can intervene in a matter of contract labour, so this question was answered by the Supreme Court. This was the order of reference, whether the order of reference was challenged by the employer the contract system for clearing the premises and plant should be abolished and the workers working in the refinery through the Ramji Gowardhan should be treated as workers of the standard work of the refining Co. of India Ltd. Bombay and wage scale, condition of service, applicable to the worker of the refinery made applicable to them. Past service of these workers should be, so for the first time the contract workers dispute was raised by the regular workers saying that they should get the same pay, they should get the same condition of service if you are going to employ them. Now this is a reference made by the Bombay government in 1958, this was challenged by the employer saying the labour courts have got no power to go into such issue this is not an industrial dispute, though the definition under 2(k) talks about "any difference between the employer and the workmen, any difference with relation to condition of service or terms of employment of any person, the word 'any person' has got significance because it does not use the word any worker it uses the word any person, therefore, the Supreme Court said the reference was held to be competent on the merits the work which was being done through the contractor was necessary for the company and had to be done

daily though it was not part of the manufacturing process. Doing of this work through annual contract resulted in the deprivation of security of service and other benefits and privileged.

Therefore, this was a proper case where a direction should be given to the company to abolish contract labour. Therefore, the labour court can give direction to abolish contract labour because it reduces their working condition, it also reduces their bargaining capacity of the regular workers. The Supreme Court upheld the terms of reference and also upheld the award saying that the Labour Court has the power to do this. The fact that the Respondents have raised a dispute or not employed on contract basis will not make the dispute any less a real or a substantial dispute between them and the company as to the manner in which the work of 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 have raised it are not employed on contract. So this is the first time Supreme Court said the Union can raise a dispute even about non workmen. The fourth point of the same judgement, 'however party to dispute also compose the workmen espouse the cause of another person whose employment or non-employment may prejudicially affect their interest. The workmen have a substantial interest in such matters, in such cases the dispute is an Industrial Dispute. It may be relevant to bear in mind that the industrial adjudication generally does not encourage the employment of contract labour in modern time. This was the position in 1960, where ever a dispute is raised by the workmen in regard to employment of contract labour by the employer it will be necessary for the tribunal to examine the merits of the dispute apart from the general consideration that the contract labour should not be encouraged. This is the basis of an industrial adjudication. Before the Act came in, in a given case the decision should raise not only merely on theoretical and abstract objections on contract labour but also on the terms and conditions on which contract labour is employed and the grievances made by the employees. This is Supreme Court observations, the contract in this case is a bonafide contract would not necessarily mean that it should not be touched by the industrial tribunal, the contract had been malafide or a clog for suppressing the fact that workmen were really the workmen of company the tribunal would have been justified in ordering the company to take over the entire body of workmen. Therefore you had all the power before the Act came if it is sham and nominal if it is only a clog, if it is malafide, you don't go for a theoretical examination you go to the actual case and then you have that power to order for abolition of contract labour in each case.

Now the law came you know the law The Contract Labour (Regulation and Abolition) Act. The 1967 the Bill was introduced in Lok Sabha 1968 it was referred to a joint select Committee. Joint Committee recommendations proposing amendment. Then the Contract Labour Act came in 1970, the Act was notified on 10/2/1971. What is the statement of objects of this new Act? The system of employment of contract labour lends itself to various abuses, the question of its abolition has been under the consideration. In the 2nd Five Year Plan, the planning makes certain recommendations namely:

- Undertaking of studies to ascertain the extent of the problem contract labour progressive abolition system.

- Improvement of service condition

These are all the objectives. We are going to see whether the objectives have been fulfilled by the law. The matter was discussed by the tripartite committee and the state government represented consensus that why the law came. The proposed bill aims at the abolition of contract labour in respect of such categories as it may be notified by the appropriate government. In light of certain criterion that have been laid down and regulating service conditions of contract labour where ever. So first object is abolition where ever it is not possible regulation. That is the object of the Act. Then it has got Advisory Board and Labour Commissioner can go and find out whether the service condition have been fulfilled for the contract labour. The Act can be summarized in this way Section 7: provides for registration of the establishment. Section 9: what is the effect of a non-registration, Section 10: the advisory board can recommend abolition and the appropriate government can abolish contract labour, No. 12: licensing contractors should have license, No. 24: incase the contractor does not fulfill his obligation the principal employer will pay the amount to thecontract, that's the only obligation made on the principal employer. Suppose salary is not paid, then principal employer has to pay the salary to the contractor. This is how the Act seeks to achieve the objects which are set out earlier. Now the constitutional validity of this Act has been upheld by Supreme Court in *Gammon India* AIR 1974 SC 960, the crucial point, in that judgement it was observed the crucial point is that the interest of the workmen are remedied by the objects of the Act, those interest are minimum labour welfare, there is no unreasonable in this measure. Even this Act was challenged by the employer but Supreme Court said this is constitutionally valid. Then what is the jurisdiction of Labour Court after the Act came? The jurisdiction of the Labour

Court is taken away by the Act and that was mentioned in *vegetable oil's case*, it is only the appropriate government that can prohibit contract labour by following a procedure and according to the provisions of the Act the Industrial Tribunal will have no jurisdiction. Therefore, from 1970 onwards we cease to have any jurisdiction but yet we are discussing this issue for other reasons. We'll come to that later.

This is a landmark judgement made by Justice Ramasamy that in case you abolish contract labour by the government abolishing contract labour in a particular employment, whether the workers who are employed in contract are entitled to get declaration that their employees of the principal employer. In other way round whether the principal employer obliges to him continue to employ the contract labour where there is abolition of contract system. His Lordship said that, you must secure them because that is the object of Indian Constitution, that is the object of social justice and in a proper case the court as a sentinel in the court is required to direct the appropriate authority to act in accordance to law and submit report to the court based there on proper relief should be granted. Now this judgement was overruled by larger bench in *Steel Authority* i.e. 2001 7 SCC page 1. What does the judgment say, though your paper compilation has got a reference to this judgement but what exactly this judgment say is there not clearly? Now you will find this judgement is known for some 6 points:

- What is an appropriate government? This judgement defines which is an appropriate government? For the first time it says whatever that is included in Sec. 2 is the Central government whatever is not included it is a State government. Previously there was confusion, what is the central government, what is the state government and this judgment puts an end to that. Then, Sec 10 a notification for Sec 10(1) prohibiting employment of contract labour in any process after consulting the Central Advisory Board the State Advisory Board, having record to the conditions of work so the legislature itself, the parliament itself gives the indication in which are the areas the contract can be abolished.

Then the *SAIL* judgment says there is no automatic absorption by the principal employer. Consequently the principal employer cannot be required to absorb the contract labour working in the establishment. So the *Air India case* has been overruled now the contract labours don't want abolition because the abolition mean their employment also will come to an end. More than they want to have improvement in their condition of service rather than abolition, abolition mean they

will be abolishing themselves. We overruled the judgement of this court in *Air India* prospectively. Therefore, whatever orders passed before that was upheld, its a prospective overruling. Then what is the role of Labour Court? On the issuance of prohibition of notification under 10(1) on prohibiting the contract labour or otherwise the industrial dispute brought before by any contract labour in regard to condition of service, the industrial adjudicator will have to consider the question whether the contractor has been imposed either on the ground of having undertaken to produce any ...for the establishment or for supply of contract labour or a genuine contract or a mere camouflage so your only jurisdiction now is to see decide whether it is a genuine contract or it's only a camouflage. Once it is not a, once it is held to be a genuine contract you can't give any further directions under the labour adjudication.

What is a right to get absorbed if the contract if found to be not genuine but a mere camouflage the so called contract labour will have to be treated as employees of principal employer who shall be directed to regularize the services of concerned servant subject to the conditions prescribed for that purpose. This is the only jurisdiction you have. If the contract is found to be genuine and prohibition under 10(1) in respect of concerned est. issued by the appropriate government prohibiting employment of contract labour , then the contract labour has got only preference in employment. In case the employer goes for a regular recruitment the contract labour is otherwise qualified for that post, as between outsider and a contract labour he may be given preference. Automatic absorption is now taken away. Then they say High Court should not interfere, therefore, most of the contract labour matter will come to labour court and not to the High Court. Under the *Air India* case the Supreme Court said the High Court can give direction because it is a matter of social justice whether it's been taken away. In such cases the appropriate government atop going to the issue is an industrial tribunal whose determination maybe subject to Judicial review but there is no direct power with the court. One of the other issue considered by the court was there was a notification of 1976, abolishing contract labour in all establishment where central government is appropriate government relating to cleaning processes and watching processes. Supreme Court said it should be relating to the industrial establishment or a process and not an omnibus order cannot be passed i.e. you can't say from today onwards all sweepers cannot be employed in contract. It has to go into each area, each establishment so that notification of 1976 was set aside. Now after this judgment there are also other observations made by Supreme Court. In this case SC said the changes brought about by subsequent decision have regard to the changes in policy

decisions of government the wake of prevailing market economy globalization and privatization outsourcing is evident, so contract labour is inevitable that's what SC observes in this judgment. The same Judgment they said we have a socialist preamble to the constitution. Now what does that mean does it mean India become automatically socialist? SC says socialism might have been a catch word from our history. It may be present in the preamble but due to the liberalization policy adopted by the Central from the early 90's this view that Indian society is essentially wedded to socialism is definitely withering away. So not only we have introduced the contract labour system we have now taken away the power of Labour Court in a greater manner, we are also now moving towards a path where they say it is inevitable and the socialist phrases can't be used freely. Now you have seen the law what was before and what was now. I want to show now under the law how the BHEL one of the industry in India there are sweepers who belong to Schedule Caste there are 300 women sweepers, this plant is in Tiruchirappalli in Tamil Nadu now these employees were engaged by having a labour contract society, they were given uniforms, they were given all the implement by the company, the company directory paid them, but it was paying them through the society a registered society was there it had elected office bearers. Now these employees went to the court saying that you can't everybody else is permanent except the sweepers who are the downtrodden in the lowest of employment who are paid some monthly salary far less than the payment made to last grade servant it's a genuine demand. This dispute started 30 years ago 35 years ago, now first question came; how you'll find how the labour enactments are really was put to test by them successively. The first these are all the sweeper. Now they relied upon the 1976 notification which said where the Central Government is the appropriate government contract labour in sweeping is abolished. This is the notification sweeping, cleaning, dusting and watching of building owned occupied by establishment in respect of which appropriate, so BHEL who is the appropriate government?

Now, whether the State Government or Central Government? So, the first question came for BHEL which is the appropriate government? The Madras HC held it is the State Government appropriate the notification was Central government notification, but the HC ruled State government is the appropriate government for BHEL therefore they can't make use of the central notification. This is the first judgment which is a reported judgment 1985 1LJ, actually you should see this judgment how from place to place these workers wedged. Now the second one then Tamil Nadu government brought a notification abolishing contract labour wherever there have more than 50 workers are

employed so the BHEL workers thought now there is a State government notification we may get regularization so they relied upon state government notification and that the Madras HC said they should move the Central government because we feel under the Contract Labour Act the appropriate government is a Central government. So when they came to the state government the court said you should go to the Central government back. This is the Judgment the *BHEL Sweeper Association*. Then in *SAIL* case this 1976 notification was set aside. Therefore nothing to fallback, originally Central government notification but they said appropriate government is a State government. While the State government issued the notification they said appropriate government is a Central government then the central government notification is gone what happens? In *SAIL* judgment SC said from 1996 the appropriate government is a State government if it is not mentioned specifically in the Act. So the workers thought after the *SAIL* judgment they have some relief by relying upon the State government notification. Now these State government notification was upheld by the Madras HC distinguishing *SAIL* judgment saying that in this case the government has applied his mind and then said wherever there are 50 and more workers it should be abolished as a relevant criterion, but then this judgment was overruled by Supreme Court in *L&T* case so the Central notification is gone, State notification is gone then what happens to the workers then they'll have to raise a dispute. They raise a dispute under Sec. 10(1) of the ID Act there was a reference, industrial dispute referred in 2004. Now that is set aside saying that you have no jurisdiction to go into this. I hold that the impugned order is not at all sustainable therefore the same is liable to be quashed. Now what happens to these workers? For 35 years they are fighting Central notification, State notification which is the appropriate government and now the reference is gone. Now the fundamental question is where will the workers now go? No ID Act, no Contract Labour Act. That's all. Thank you. (Applause)

**Justice SJ Mukhopadhaya:** Now I'll be requesting Mrs. Jane Cox to deliver.

**Mrs. Jane Cox:** Good Morning, Hon'ble Justice Mukhopadhaya, Hon'ble Justice Chandru, Prof. Geeta Oberoi, Prof. Kaul, Hon'ble members and Judges. Ah.. I want to follow up to what Justice Chandru has said and try to give some indications of locate the history of the whole evolution of contract labour and then the introduction of the Act. When a matter comes before the Industrial Court, What is to be done? What can be done? What can't be done and what are the tests to be applied? Has the paper been distributed? Yeah! Please, don't you don't need to look at the paper

now but whatever judgments I refer to the judgments and citation and everything is there in the paper. Now contract labour is really become a huge hot potatoes now politically and in terms of the way the case law has changed dramatically and the pendulum is switched and we have seen with judgments from the Supreme Court in the last 20 years or so a qualitative and dramatic shift ahh in judgments on labour and approach to labour and I think probably contract labour and casual labour is where we will see the most drastic shift. Where the pendulum has swung and now swing back a little bit but there is a huge subjectivity where the same test if we see from the 1950's and now if we see in two thousand and fifteen (2015) the same test applied with very different interpretations specially the whole concept of integration and how do you interpret the integration test and in the 50's that test was developed in cases like *Silver Jubilee* and *Ganesh PD workers*, to hold that workers who on first plush would be said to be contract workers and not permanent workers are in fact permanent direct workers. Now the test is shifted quite a lot where even on the 10th plush you'll feel that they are permanent workers but some of the judgments are now suggesting otherwise so this is really field of the law where there has been a huge amount of turmoil and a huge amount of controversy. The.. I just want to go back and introduce very briefly the history to emphasize what can be done by Industrial Court and if we understand the history we'll understand that because there are two or three sort of copy and paste defenses which are always brought up by managements before the Industrial Court to try to oust the jurisdiction and say that the matter can't be heard hear and which would actually bogies the matters can't be heard but they are brought up time and time again and always go carried right up to the Supreme Court. Now before the Contract Labour Act came in 1970 the role of the Industrial Tribunal, the whole point was the Industrial Tribunal would first of all examine, is a contract sham and bogus? Now what do we mean by sham and bogus? Basically it means is it a camouflage, is it really just a maya, a camouflage, a mask to hide what is really there and what is really there is a master servant relationship between the company and the workmen. The contractor has been brought in the middle just to stop that, just to bring down the wages, just not to pay provident fund, not to give the full allowances and benefits, ultimately an Industrial Court i will say has to see that. Whatever test you apply whatever test have change come or gone ultimately you are seeing that is it just a device to stop to to get the workers to be paid less than the other permanent workers and ultimately is the contractor truly an independent person and i would submit that ultimately contractor should be somebody what would be a really genuine contract. To do work which the principal employer does

not have the skill or expertise to do. So you bring in a you bring in a person who has expertise in that field, and he really does everything, he does the supervision control, he looks after everything and there is an independent contract. If you feel that that is not the case then frankly it would be in many cases i will say that is sham and bogus. Now prior to the Contract Labour Act coming in and all of this is summarized in judgment of *Standard Vacuum* case which Justice Chandru had referred to the Tribunal would first of all see, is a contractual arrangement sham and bogus? If yes, then the relief is not not to direct absorption but a declaration that the workers have always been the employees of the principal employer in fact and law and then to give the consequential benefits which are full back-wages. Relief can be molded, sometime it's given from the date of reference whatever but conceptually your right is right from the inception of the employment you are entitled to full back-wages and a declaration that you are the employees of the principal employer. If the court felt that in fact it is not sham and bogus it is a genuine contract but even being genuine the work and the circumstances are such that for that work you really should not have a contractor then the court would say that okay it is genuine but henceforth you now employ those workmen on a permanent basis and you should not employ, those workers should be declared henceforth prospectively to be the direct employees and what were the number of criterion will be worked out for that. Four principles once were:

-Is the work permanent and perennial?

-Is the work is it enough to employ a considerable no of full time workmen?

-Is it necessary and incidental to the main work of the, of the industry?, and the fourth what is..One second..permanent and perennial that is there and

-Is it generally in other establishments is it generally done by permanent workmen?

Now that is a bogie again today because now everybody started employing contract workers for work which really should be the permanent work. Those were the four main tests which were carved out. Now when the, so the Tribunal would first of all see that it is sham and bogus? If yes, then declaration and full back-wages, if no even then if those sort of criterion were present then the court would direct prospective absorption looking into the circumstances of the matter more the relief. When the contract labour and that was called a genuine contract when the Contract Labour Act was enacted in 1970 the test that was taken for abolition of a contract labour system

were those four tests and other criteria as relevant criterion including one, two, three, four. Now that has led to two confusions and this is what managements always will come with I mean in 80 percent of cases before Industrial Tribunal I am sure this contention will be taken that the Industrial Tribunal does not have the jurisdiction to take up the matter and if the workers if the poor workers have made an application under Contract Labour Act the cant separately come to Industrial Court and argue sham and bogus because they have admitted that contract is genuine. Why?, because those 4 tests which were now in Sec 10 of the Contract Labour Act for abolition are the tests evolved by the Tribunals for declaring a contract to be genuine. The important point is this is where the jurisdiction comes if we get this point. Earlier a contract was found to be genuine when it was found not to be sham and bogus because the Industrial Tribunal had examined and seeing ok applying the test is not sham and bogus is genuine. Now under the Contract Labour Act there is no such exercise and now the jurisdiction for abolition is only with the appropriate government the Tribunal can't touch the genuine contracts. It's only with the appropriate government. But the appropriate government doesn't first of all examine in the matter that comes before it. it's not a quasi-judicial body it doesn't examine is this contract in fact sham and bogus, it just goes it is a policy decision that, whether is sham and bogus or whether is not sham and bogus. If these four criterion are there anyway the contract labour system should not be there and it should be abolished. So therefore even if the even if workers have gone under the contract labour Act they can still make an application come in a reference raise a demand and come in a reference before the Tribunal to say that the contract is sham and bogus because if they succeed on sham and bogus they'll get declaration that they have been employees right from the day of inception and they'll get full back-wages. Now they were lot of cases on these two points saying that simultaneously you cannot do the two things, if you have gone in those Justice Pasayat's judgment in *SAILI Inot* the case which was before constitutional bench in other SAIL judgement, it's there in the write up saying that simultaneously you can't do it if you gone under the contract labour Act you have admitted that the contract is genuine you cannot go to the tribunal, the Tribunal will have to raise its hand to say it doesn't have that now the matter cannot be brought. That has now been dealt with in the matter of *SarvaShramikSangh v. Indian Oil Corporation*, where the Lordship distinguishingly overruled the SAIL judgement distinguishing on its fact and categorically held that you can do the two things and the reasons for that also is given in older judgement in *Gujarat Panchayat* of the Gujarat court which stresses why because conceptually these are two different

things, the history is different and in fact the application under the contract labour Act is an action in realm, is a general action, because if in the sense that if the contract labour system is abolished the workmen may not get back-wages. Henceforth, evermore theoretically employer cannot employ contract employees for that work, where sham and bogus though for the worker the individual worker will get more in terms of his benefit and past employment its only concerned with that particular worker or that particular group of workers that they'll get the benefit but it doesn't affect the system. So the important thing is now even now its clarified in the law that even if the workmen have gone for contract abolition they can come in sham and bogus, they can bring an application before the Industrial Tribunal for sham and bogus and even if they have already raised the demand for sham and bogus under Sec. 10 of Industrial Disputes Act they can still independently raise a demand, make an application under Sec.10 of the Contract Labour Act for abolition.

So that is one area. Now when the point is now in fact the Industrial Courts now more and more matters are coming before the Industrial Courts in sham and bogus because of what has happened to the Contract Labour Act in the interpretation by the Supreme Court of Sec.10. Earlier all private companies always went in sham and bogus not always but very often, public sector tended to go in on abolition matters, why, because they could approach the High Court and get a stay order because once a contract labour any contract labour raises a demand for permanency they'll be out unless there is any protection of the court or there is a very strong union of the permanent workers supporting them they'll be out. Therefore lot of the public sector unions tended to go to the High Court on the issue of abolition that notification is not being passed etc. and get a stay order. After the, now before *Air India* came the question, these issues were raised which we also thought one time we thought these are non-issues, management raised the issues Sec. 10 of the Contract Labour Act talks about abolition and prohibition but it doesn't mention what happens to the workers. Now with respect I would think is obvious if the contract goes because it shouldn't be there then the workers become the direct employees of the principal employer. *Air India* said yes, 3 Judges and on two main grounds, it's obvious and it must be inferred because the Act cannot have been intended to take away the employment of those who have fought against the system and Justice Majumdar's judgement that there are 3 players in the field, principal employer, worker and contractor. Once you take away one you are left with two so you left only with the direct master servant relationship between the workmen and the principal employer. *SAIL* judgement said the

complete opposite and said that there is nothing we cannot infer what is not written there and no. 2 that in fact the inference can the parliament must have deliberately not put in clause the workers to become permanent because it would evolve huge financial burden on the company to make them permanent and SAIL says that workers do not become permanent, the baby goes out with the bathwater the workers go out with the contractor and as per the *Gujarat Electricity Scheme* after the abolition then they must raise a demand under Sec.10 of Industrial Disputes Act, to be prospectively absorbed which will then, and then they will go through the hierarchy of the courts come back to the Industrial Tribunal which will be taken by the managements back up to the Supreme Court. So no workers I mean I can't think of any matters that will be there now for abolition there may be some cases for prohibition in the new industry before it starts but otherwise workers won't want to commit suicide and raise a claim that will result in their employment going. So now all the matters are largely before the Industrial Tribunal on the question of sham and bogus.

Now the question is that if matters come before the Industrial Tribunal what are the test to be applied to decide whether a matter is sham and bogus and a number from 1950's onwards a number of different tests have been evolved to decide that. Originally all the test were those from the old English Tort cases on accident matters as it is "contract for services" and "contract of services", whether employer be liable of vicarious, vicariously liable for accident etc., and those classic tests were supervision and control, who owns the equipment etc. etc. In our also the Supreme Court in 1950 there was a series of cases of out-workers, *Silver Jubilee* where there were women doing tailoring work where they would take the cloth often take it home, they would also work for other employers and all of that will be supplied by a contractor taken by the contractor back to the principal employer. *Ganesh Beedi Workers*, where women would do the beedi rolling in the *bastis* in the *gaon* and the contractor would bring the beedi leaves and the material, give it to them and take it back, so the management's off course always argue that we have nothing to do with them they are the employees of the contractor. We do not daily supervise their work, we have nothing to do with the supervision and control. There the Supreme Court extended the notion of supervision and control and whole test of supervision and control to say that it comes down to the question who has the ultimate power to reject? So the women will stitch the cloth, she'll roll the beedi. The contractor will collect it, take it back to the principal employer but ultimately it's the principal employer who can say that's not good enough, I don't want that material. So, the ultimate supervision control in terms of who can reject the work done lies with the principal employer and

therefore it is the principal employer who is the actual employer of the workers and the contract is sham and bogus so that is that series of cases. Then there is the judgement of Justice Krishna Ayer which till date has very often not applied but not set aside or struck down, the famous very short judgement in *HussainBhai*, in which His Lordship developed the economic control and choking off test, where His Lordship, and the test is this, "where a worker or a group of workers labour to produce goods or services and these goods or services are for the business of another that other is in fact the employer, he has economic control over the workers subsistence skill and continue to employment, if he for any reason chokes off the worker is virtually laid off." Now in all these matters also i want to stress here is Integration test was referred to and integration test means in substance are you part and parcel of the organization? No matter what the appearance may be or a camouflage may be given or veil maybe drawn, is the worker really part and parcel of the organization? And in *Silver Jubilee, Ganesh Beedi* the courts held that yes even though it doesn't look so in fact they are part and parcel of the organization.

Now that integration test has come all the way through but it has been interpreted in different manners. Now some of the, I'll just give few of the main other test which are in front of the Tribunal some of the main tests which have been found to hold a contract sham and bogus. No.1: that the principal employer and the contractor don't have a valid contract or license under the contract labour Act. Now earlier under *Best v. Crompton* the Madras Court held that if they don't have a valid contract and license under the Contract Labour Act itself they'll be the workmen will be deemed to be permanent. That was overruled by *DinaNathan Sale case* that, but still, when a Tribunal is examining if a matter is sham and bogus, if either of them don't have a valid license of contract or is not valid for the full contract, it might have been there for 6 months or 1 year but it's not being extended that will go a major way in showing that the contract is sham and bogus. No.2: contractors have come and gone but the workmen have remained the same in spite of an order of the court and it has been very often the case so that is a big issue. Equipment material is supplied or paid for by the principal employer, one word of warning here as these tests have involved employers have also become more sophisticated in trying to get around them, when still in fact is a sham and bogus contract. So one have to trace back of it further. Now they may not actually give the equipment but they'll be paying for it, they may not give the material but they'll be paying for it and all that can be traced and one big test which is still there is, who pays the wages? Now in every case the wage will come physically from the pocket of the contractor. The wage register will

be maintained by the contractor, voucher will be taken in the name of the contractor but, if the employer is reimbursing and he is reimbursing is not just a contract you take 5 lakhs and you produce this work in 5 lakhs, I don't know how many workers you have, I don't know what you do you just give me the result in 5 lakhs is one thing, if the contract or the reality may not even be in the contract because contracts are also quite made very consciously that the matter may go to court, if in fact the employer is reimbursing the wage portion or reimbursing the PF or ESI, that is the major factor that has been held to show that the contract is sham and bogus. If the contractor does not step in the box, the matter is before you, evidence is going on, the contractor doesn't come and testify then that is being held to be a very major ground on which again a major factor to be considered in holding that the contract is sham and bogus and most importantly the mere fact that registers, wage registers, attendance registers all documents are maintained by the contractor doesn't matter because any sensible person who wants to create a camouflage will at least make that paper arrangement but that is not important, in spite of that you have to look behind and see what the reality is. I'll just sum up there is a separate test evolved in the matters of canteens. Now after the SAIL judgement there was a whole series of judgement leading up to *Parimal Raha Chandra* where it was held that if a canteen is under Sec. 46 a canteen under the Factories Act which lays down that if there are more than 250 workers in an establishment then the establishment must run the canteen and a lot of criterion given in the rules, standard of food, menus *ye wo*, all of the details are given. In that case the Supreme Court held that because of that the workers will be held to be the direct employees. That was then in the case of IPC is it? *Indian Petrochemicals case*, it was held that no the mere fact that Sec 46 canteen that will only make them workmen for the purposes of Factories Act but not for other acts and they won't be deemed to be direct employees on that basis but the court then laid down a series of tests in the context of canteens saying that if it's a Sec. 46 canteen, if the menu is decided by the company, if the standard of food is decided by the company, if the timings of the opening and shutting of canteen is decided by the company, if the electricity, the fuel, the furniture, the premises, the cutlery are supplied by the company then in those circumstances it will be held to be sham and bogus . Now when the SAIL judgement came Sail judgement categorically stated that in spite of the Contract Labour Act coming sham and bogus matters stand on a different footing and Industrial Tribunal will have jurisdiction to go into sham and bogus. The court then took out a 3rd category of canteen, they said that the canteen matters stand on a different footing. Now that matter was very recently

decided, again examined by the Supreme Court in the matter of *Balwant Rai Saluja case*, where the court, and there, there was if the the court was dealing with a 3 judge bench was dealing with the judgement of two judges where the judges had dissented and Justice Gowda had gone back to the *Parimal Raha Chandra* test that the workers would automatically become permanent. The court again reaffirmed that no they'll just because its Sec. 46 the workers will not become permanent and also stated that the reference in SAIL to canteen matters standing on a different footing, that was not the main issue before SAIL and canteen matters are not separate though they may have evolved, there may be separate tests in the context of how a canteen is run. But in that matter again their seems to be a shift back from the Supreme Court and they have referred to the Integration test but again made it stricter and gone back to the integration test being a question of who appoints, who disciplines.

Ultimately I would say i will just conclude right now. Ultimately I'll say the approach has to be that which again was written in the *Hussainbhai case*, I'll just read out that paragraph to conclude

"The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like, may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The court must be astute to avoid mischief and achieve the purpose of the law and not be misled by the *maya* of legal appearances". Thank you

**Justice SJ Mukhopadhaya:** Thank you brother Chandru, and Mrs. Jane Cox. In fact next session is problems of outsourced labour practically interconnected so we'll be deliberating and discuss further in the next session. So now it is actually break.

## SESSION 2

**Shivaraj Huchhanavar (Research Fellow):** Good Morning and welcome back. In the first half of the session we will, we will hear Hon'ble Sanjay Singhvi Sir, on the issues relating to the problems of outsourced labour. I'll just request sir to deliver it and in the 2nd half we will take up the presentation from our participant judges and we'll discuss later on.

**Justice SJ Mukhopadhaya:** In fact when I am chairing I must tell you that we want your deliberation, when your deliberation will be there. Now Mr. Singhvi the learned senior advocate he'll initially introduce with regard to the subject and what we meant by this hypothetical question, he'll be just introducing and after that we want that you open your mouth deliberate on the issue.

**Mr. Sanjay Singhvi:** Thank you Justice Mukhopadhaya and all my learned colleagues. I am especially excited to be deliberation before the judges of the Industrial Tribunal and Labour courts because that is one part of the law in India that has not have been made I will say by Parliament but has been made by the Industrial court. Why do I say that? Every formula that exist today in labour law industrial law, whether it is a formula for bonus, what is allocable surplus, what is available surplus came first from the Labour Courts Industrial Tribunals. The Industrial Tribunals develop that law after which it was adopted by various commissions and then by parliament. The Bonus Commission 1965, then by parliamentary Act 1960 Bonus Commission started. The Jane Cox had mentioned the 4 criterion for abolition of contract labour. Those for criterion are mentioned in *Standard Vacuum case* that Justice Chandru.. but, before *Standard Vacuum* those same four criterion when you can abolish contract labour that if the work is of perennial nature, if it is sufficient to employ full, some sufficient number of full time workmen. All those four criterion first came from Industrial Courts. Gratuity, this average of fifteen days finally came through various awards of Industrial Courts. So we can safely say that Industrial Law was first made by Industrial Tribunals and Labour Courts. I would not say just Industrial Tribunals and Labour Courts, it was also the lawyers involved, the unions involved, they put forwards those demands from those demands these judgements came and from the judgements it is then that the law came. It is very rarely, I don't think that there is a single law i can think of in this country where the law has come first and the demand has come later or the awards have come later. It is always first the awards have come in Industrial Law, so it is very important. Now when we are talking of same thing on this contract labour this is the way it has happened. Already much has been said, I don't



I want to take much time because we want to hear your deliberation and we would be very happy in helping in whatever manner we can and that. But a few things that I would address. Firstly, what Jane said, I think the essence came from there that how we will decide whose employee a person is came from the concepts of civil law and vicarious liability. The question was this way that if a worker causes me some damage to a third party on a street. Let us say that a worker is working with a hammer and the hammer flies from the hand and hits a person from the street, can that person sue the owner of that factory where that worker is working. If that worker is an employee of the that factory then yes vicarious liability will be there but if he is not if he is an independent contractor then there will be no vicarious liability. If he is an independent contractor he alone will be liable. So that was the concept from which this whole concept of who is a Independent contractor and who is a worker. From there came the concept of contract of service and contract for service. This Contract of service where I directly employ, i am giving you a contract because otherwise every worker is a contract worker in that sense. Worker has a contract with his employer but that does not what we mean by contract worker when we say contract worker. Every worker has a contract with his employer but the question is whether it is a contract of service or it is a contract for service and what was taken as the decisive factor is whether the contract is only for what work is to be done or also for how the wok is to be done. So the thing came to control, supervision and control. Supervision and control didn't come as a test by itself, it came from here. That whether the employer can control how the work is to be done not just what is the work to be done? Today few judgements have come Jane mentioned *Saluja v. Air India*, I would say that that judgement went I think the Union there tried a little too much because they were workers of Hotel Corporation of India. Hotel Corporation is itself a big corporation, so to say that hotel corporation is a sham contractor is I think stretching it too far. But somebody Justice Chandru mentioned that there are 10 percent only in Tamil Nadu who are permanent workers. The all India figures are 94 percent of the workers in India according to the last census that is 2011 are in the unorganized sector. Mainly unorganized sectors contract workers. There is a small section in between, there is another statistic only 1percent of the workers in India are governed by settlement only 1 percent. So if 94 percent are unorganized they don't even minimum wages let us say, no law applies. 5 percent are those contract workers who get only minimum wages and one percent are the permanent workers who get little more than minimum wages, who get by settlement. This is roughly the way in which the cake is cut among the workers. So keeping that in mind I would urge

that finally the Industrial Courts are set up and must be guided by Articles 39 and 41 of the Constitution. We have to see that economic inequality must go. What has happened is that Justice Chandru off course gave a very big and very enlightening history of the Contract Labour Act.

One portion maybe he might have missed, the first Labour Commission in 1967 had suggested, Justice Gajendra Gadkar had suggested the Contract Labour Act, the first draft was made in July 67', May 67' was the report of Justice Gajendra Gadkar, 1st Labour Commission. He called the contract labour system as pernicious. He said we have to remove it, in those days he had seen in the mining industry, steel industry government controlled industries there were 60 to 70 % of contract labour, he thought that was very bad. Today it is 94%. So in those days they had thought that that is very bad we have to remove contract labour therefore they must bring this law. He had suggested those same four criterion which had come from Industrial Courts *Standard Vacuum case* and those same four criterion he had suggested in his this. The 2nd Labour Commission which came in 98' and gave its report in 2001 Verma not Justice Verma, it was some other Verma Commission. Labour Minister Verma. That 2nd Labour Commission had stated a strange thing, it has reached the conclusion that we have to now accept that contract labour exists and change the mindset of the workers. That is the exact wording that is used. That we have to change the mindset of the workers, worker today believes that once he gets the job he is there till he retires, that mindset must go. But like Justice Chandru said that yes, he pointed out to the judgement from *UP Brassware*, where they say that with globalization the same understanding will have to change. There is also Justice Harjinder Singh, Justice Singhvi's Judgment in Harjinder Singh where he has said that many judges are saying today that with the coming of globalization we will have to rethink what is meant by quality what is meant by.. Globalization may have come but the Constitution remains the same and until the Constitution is changed we have to go by that understanding. So what is our Constitution, till today our Constitution contains 39, 41 that we have to remove economic inequality, we have to fight for a living wage. An unorganized sector worker can't get living wage we know that. The reason why they are kept as contract workers is that so that they will not get the living wage. So we have to fight for getting a living wage. I would only say that the construct has to be from that view point, finally. The view point and it has been said our Supreme Court has said that Art 39 and 49 they may not be justiciable but they are the compass, they are the compass for the Industrial Courts. They have to act as a compass for the Industrial Courts of where we have to go because without that we will keep drifting. So the question as it

comes off course all these judgements have been put forward I would like to leave more time, I think that what has to be gone to is this that is it being used as a cover up this whole contract system. To keep the workers as workers only for the reason of not giving them the wages due to them as permanent workers. If it is a cover up then yes it has to go, if it is not a cover up, if it is genuine then there may be some changes in the wages, there may be some differences, that will not for instance, to give an instance, the same case *Saluja's*, which he said it was the workers of Hotel Corporation. Hotel Corporation is not a small operator, Hotel Corporation owned center hotel, Hotel Corporation owned many hotels all over India. Now the workers of Hotel Corporation were claiming to be the workers of Air India saying that Hotel Corporation is a sham contractor or Air India control, in those in that case yes in *Saluja's case* they have held. Off course it has come now that there is the test of absolute control. What is the test of absolute control? It has been stated in that earlier judgement that was of Airport Authority, Airport Authority judgement recently again it has been stated that the control has to be seen it is not the day to day control, day to day control will always be with the principal employer but what has to be seen is the overall administrative control. This is the point put forward by the *Airport Authority* case. Following the earlier *Haldia Refinery case*, Haldia Refinery, Airport Authority both go on this line, they are 2005 and 2007. I will if you like we can get, they are I think mentioned in the. They are there in the citation which are given. They both go on the basis that supervision cannot be day to day supervision because day to day supervision is bound to be done by the principal employer, so you have to see overall supervision. Meaning does the contractor have the right to withdraw the person from this place and put him to another place? Does the contractor have the right? In my view off course these are Supreme Court judgements, they have come recently they will be further tested, they will off course things are changing in a many ways right now. If I have to give my view I would say that supervision and control has to be seen not only as an overall thing but sometime it will have to be seen on the basis of the actual establishment also because if you are controlling in an actual establishment then whether the contractor can send you to another place or not remains only an academic or theoretical question, and it maybe that that contractor has 2 places, though many of the sham contractors are working in only one establishment, then it is easy to settle this question. If you are working only in one establishment then the contractor cannot send you to other establishment. But if they are working in two let us say, but he never changes, now I don't think that in that sort of a case it will be held that the Supreme Court if that sort of a case comes, it will

be held that no, just because he has the right to change from one employer to another they are no more under the supervision and control of the principal employer, so that will have to be seen. Another important aspect, again as i said we would like to have more time for you but one small aspect of the matter if I may just take up is the case that came up in *Uma Devi*, everybody is now talking about Uma Devi's case, and Uma Devi's case has said that all these contract workers come again and again and they have filed all these cases and they expect to be made permanent, merely because they are working for a long period of time, and this would amount to a back door entry. Now but again Uma Devi must be kept in my view to where it is a back door entry and it was in the case where the workers were seeking regularization. We have to make this difference right in the beginning that when a worker says that this is a sham contract, when the demand is that this is a sham contract, then it is not a case for regularization. Then the worker is claiming that he has always been a permanent worker only thing is he treated as a contract worker, there is a 'fasad' and then the veil has to be lifted. That is one method of this. If the worker says no I am a contract worker but I would like to be treated as permanent worker, if he admits that he is a contract worker, I am saying not only admits, if it is proved that he is a genuine contract then the question will become one of abolition, merely the worker's admission also may not be enough that's all I am saying because finally what the Industrial Tribunal will have to see is the actual state of affairs , the mere admission of the worker may not be sufficient. So the actual state of affair reveals that it is a genuine contractor then from that line of cases like Jane said, first *Gujarat Mazdoor Panchayat* case which was of the Gujarat High Court after which the *Gujarat State Electricity Board* case, Justice Sawant and Majumdar and in that Gujarat State Electricity Board 95'they said that we have to treat both these cases differently, one is a case of regularization and the other is a case of where sham and bogus, where you are saying, that it was always i have always been the worker of principal employer. Now this particular case i.e. *Uma Devi* was concerned only with regularization. It was not concerned with casual workers, of regularization of casual workers..

**Justice SJ Mukhopadhaya:** Casual workers not contract labours

**Mr. Sanjay Singhvi:** Yes, it was not even contract labour it was casual workers but it is again.. I am raising it because it is quoted again and again.

**Justice SJ Mukhopadhaya:** That has already been taken note of in one of the judgements..

**Mr. Sanjay Singhvi:** Yes, that is Castribe and also.. Hari Nandan..

**Justice SJ Mukhopadhaya:** *Uma Devi's* case, *Uma Devi vis-a-vis* the labour matters which is 14, 16 applicable to the government. Art 14, 16 is not applicable to the. No no recently.. and if it is not applicable whether the benefit, one can say back door sighting allegation of, so making a two class of people. One from the PSU, the other from the private industries, so for them regularization is permissible and for these people not permissible. So after this when we will be discussing we will be going on these subjects and it is very good that you have raised with regard to *Uma Devi* because now this is a problem they are raising in most of the cases.

**Mr. Sanjay Singhvi:** Everywhere it is being quoted as if *Uma Devi* is a Euclid's theory to put and therefore now a days, but there have been as Justice Mukhopadhaya has rightly i mean that latest judgement off course he will also say, but there are one or two others there is *UP State Electricity Board v. Puran Chand Pandey*, *UP State Electricity Board v. Puran Chand Pandey* in which they have said that *Uma Devi* cannot overrule *Maneka Gandhi* because *Uma Devi* was of 5 judges, *Maneka Gandhi* was of 7 judges and *Maneka Gandhi* said Articles 14 and 16 must be. Then there was another *Hari Nandan Prasad*, *Hari Nandan Prasad* has gone *Castribe*, *Castribe Parivahan karamchari Sangathana v. MSRTC* i.e. Maharashtra state where it has come. In all these judgements they have held that *Uma Devi* will at most govern a case of regularization not a case of sham and bogus contract. This is the general that comes out of all this and when casual workers want to be regularized then there also *Uma Devi* has been, *Castribe* has shown that *Uma Devi* talks of 2 different types of this, what is an illegal appointment as oppose to irregular appointment, they say if the persons being appointed even though after been working for many years, if they don't have the requisite qualifications or if they don't have the requisite, if they don't have whatever is necessary for becoming a appointed as permanent workers then it is illegal. If only the procedure has not been followed it is only irregular. Merely because, and irregular appointment can be made regular by the courts. So that way it has already been held. So therefore in these questions, it is a very important question which now comes up of *Uma Devi*, the again I would go back each time to Articles 39, 41 that the duty that has to act as the compass for the courts that the courts will have to see that economic inequality is removed that a worker goes towards a living wage and keeping that in mind even when approaching Industrial matters, even when approaching especially contract labour matters, also keeping in mind that today 94 percent in the time of the 1st Labour Commission 67' it was 60 to 70 percent, the statistics are given in their report. Today its 94 percent which is in the unorganized sector. So we can see the real wages,

if we see the real wages of actual construction workers since 72 till today there has been a down. Real wages have not grown, by real wages i mean yes in terms of Rupees and paisa the wages have grown but in terms of what you can buy with that rupees and Paisa that is what we call real wages in economic terms. The real wages have been falling right since 72' of workers. So keeping these things in mind I would once again say that it is you who will be making the law like all industrial law and I would suggest, all I can say is that I would suggest that that compass which was stated by the Supreme Court itself to be the compass Articles 39 and 41 should remain the compass, bring the workers towards living wage and remove economic inequality in society. So these are the ways many judgements have already been sighted, outsourcing, I am not going to take much time on that. If my, I'll be permitted 3 minutes, 4 minutes on that, outsourcing as such is basically nothing but contract labour in a sense. What do we say when Jane talked of Hussainbhai, Hussainbhai was a 'rassiwala' in the name of the Hussainbhai talattolelali that is a rope worker Hussainbhai. So the question was where he was making rope at home and then bringing it back, that is outsourcing, what today we call outsourcing that word had not come up in those days or beedi's, when beedi workers were given to take it to their home, that is nothing but outsourcing, if you like. Today outsourcing just because it is done by under a big name BPO or VPO or something and then done otherwise the concept in law the relationship is the same. So this outsourcing has not.. Two very interesting cases have very recently come up directly on outsourcing I will just mention those, one is 2012 SCC All 553 or 2013 137 FLR page 14, I will give them later, that was a very interesting case where the UP government had said all class 4 posts should be outsourced as a notification to the education department, all class 4 posts should be outsourced. Now that have come up and that notification was challenged but the UP Government has then, the Allahabad High Court has reached the conclusion that that cannot be done because you will be removing and a certain system of working and introducing a new system without giving notice under 9 a, actually that same thing had come up in 85'in the case of Food Corporation, Allahabad High Court has not noticed the Supreme Courts judgment of 85'but the same thing had come up in 1985, Krishna Ayer's judgement in which he has said, Food Corporation of India there were contract workers, for some time the contractor went away, and the wages were paid directly by food corporation to the 'mukadam' who use to distribute them to the workers, after some time they got another contractor and put him in place. The Supreme Court held that this is violation of Sec 9a of the Industrial Disputes Act because the method of payment of wage is one of the items mentioned in schedule

IV, what will be covered under Sec 9a, so earlier if the method of payment was direct then to make it indirect now through a contractor will require notice under 9a, since no notice has been given under 9a that was struck down, and it was said that they are therefore entitled the workers to be continued as to be paid directly as direct workers of FCI, Justice Khalid's judgment and that was not noticed by the Allahabad High Court but it was independently come to the same conclusion than this case 2013 case where they have said that this sort of a notification abolishing all class 4 work and saying all class 4 work will be outsourced, that is the work, the name given in this. Another very interesting case division bench of the Karnataka High Court, where already a certain occupation, profession there was abolition of contract labour for that profession. Abolition is there, notification was issued that now all this work will be outsourced because there is abolition and employing contract labour, we will outsource it, but there also Karnataka High Court said no, once there is a abolition of contract labour in a certain trade or occupation then you can no more contract it outside and call it outsourcing because otherwise that will be nothing but going around, and there also that notification was struck down. Off Course both these were public sector undertakings so the matters had come directly to High Court but the principles will apply to Industrial law as they stand today, that outsourcing cannot be done in a work which is already been done by permanent workers without following line, and outsourcing cannot be done for a work which has already been abolished. So these judgements have come, more judgements on outsourcing will keep on coming because outsourcing is nothing but like Justice Mukhopadhaya has said a form of contract labour, different form of contract labour. In those days we didn't call it when *Mangalore Ganesh Beedi case* was there we didn't call it outsourcing but the relationship created is the same where there is BPO now, you have the 'Mukadam' of those days who use to distribute the beedis to different workers and like these workers go and work in BPO's or VPO's it is outsourced. Now whether off course many different, I am not talking about the BPO's which were for the foreign companies and whether they will be therefore entitled to be employ. All those questions are wholly different, they will come into many other considerations including of foreign International Law etc., but I am not on that right now, at least within the country when a company outsources which they are doing in big ways now because now right since the 70's earlier it was only the ford system, large assembly lines one after the other. Now it is called the Toyota system, it is called the just in time system used by management and that system is nothing but outsourcing. That means you have the milcra, if today you need four tyres I'll pick up four tyres from him and put them on my this. The tyre

manufacturer is no more a part of the car manufacturer. The tyre manufacturer himself will be getting rubber from different place getting probably the tyres molded in one place, so there will be a molder, there will be a deferent so this is all outsourcing. The system I think like Justice Chandru had pointed out in the beginning right since the Whitley Commission 1930, the Royal Commission which he said that was Whitley Commission. The Whitley commission had put it forward that we have to remove all this middle man and see the real relationship for what it really is between the person who is contributing his labour and the person who is earning the profit. So that is all I would say right now rest we can discuss later. Thank you

**Justice SJ Mukhopadhaya:** Thank you Mr. Singhvi. Now if you look into the session wise topic, the first session contract labour issues and challenges, the session two is problems of outsourced labour and it continues with the third session unfair labour practice. So in fact the third session has a direct relevancy with the first and second session. The mindset is one and deliberation here is just to find out and to see ensure that your mindset goes in a manner which will be balancing both the labourers at one side and the industry at one side. It cannot be a situation like you know, some of the states where industries have been closed because of the labour problem. Simultaneously it cannot be a problem if you think that the industries will grow without the growth of the labourers. A balance is to be maintained and there comes your role. Now we will be asking you, the hypothetical session means certain questions, you raise one hypothetical question with regard to both the sessions combining together that what are the problems you face, that this is the situation the problem faced, anyone of you, give situation a. Yes from this side. Any problem you have faced in these matters.

**Participant:** A worker has been outsourced by a particular company, he works for five six years, then that dismissal put him out of the job, then the worker files a petition for reinstatement, reference.

**Justice SJ Mukhopadhaya:** What do you mean by outsourcing?

**Participant:** Outsource like a contractor, like a company

**Justice Mukhopadhaya:** Like a contract labour?

**Participant:** yes like a contract labour. A contract labour give a labour to a particular factory. The owner of the factory says we are, we were not responsible, it is the company who has given up

labour. Now the labour files a reference under say 2(s), before labour c/m that comes to us then what to do? Can he be reinstated and we can ask the company to reinstate him?

**Justice SJ Mukhopadhaya:** Anybody who'll be giving the reply. This side somebody will give a reply. The workmen is engaged by a contract by a contract labourers given to a company and his service is terminated. What will be the nature of order you can pass and what are the factors you can look into. Now all deliberations have been made by the 3 speaker.

**Participant:** I think my lord it should be regularization.

**Justice SJ Mukhopadhaya:** It is a matter of termination first. Yes it is with regard to termination. He says termination is by contractor.

**Participant:** *Company ke saamne nahi ho sakta order, woh contractor ke samne kar sakte hai ke unko reinstate kardo*

**Justice SJ Mukhopadhaya:** Who will be making the reference? What will be the reference? If that is the reference what will be the answer?

**Participant:** Whether the employee should be reinstated?

**Justice SJ Mukhopadhaya:** If that is the reference what will be the answer?

**Participant:** the answer will be no.

**Justice SJ Mukhopadhaya:** No, no. Either yes or not the. Whether termination is good or bad. No no term of reference is.. What will be the reference first?

**Participant:** First question is who is the employer? Whether employee will be entitled for reinstatement?

**Participant:** Sir, I will tell you. What are the prime consideration i such type of question. There is one line reference, whether the workmen has been terminated illegally by the management and if so what relief is to be granted?

Justice SJ Mukhopadhaya: Yes

**Participant:** This is reference we receives. What comes in the plaint of the workmen? I will tell you the entire case, what comes in plain he will not specify, he will say i am the employee of the

management, I have been appointed on such and such date and i am doing this job. On such and such date I demanded these facilities which were legal facilities not provided.

**Justice SJ Mukhopadhaya:** Therefore, there are two opinion I find here, you say the reference will be with regard to the question whether the termination is legal or not. So you are supposed to answer the question, either yes or no. If it is yes then he is to be reinstated. Where to be reinstated, by whom to be reinstated? He says that that should be the first question. But is it not the second question> If it is illegal if the termination is right, then where is the question of reinstatement/ The question of reinstatement will come only if you decide the case in the favour. Then the question may be raised by two employer you know one is the contract labour who may say that actually they are doing the job on there, so they have not allowed me to continue, if they say that my contract is no more or I have been reduced from 10 to 5. I was asked to give 5 labourers or 10 labourers, now they have said that I require 5, so naturally I have to remove 5, so reinstatement if you say that the termination is bad, you hold that in such and such violation it's bad reinstatement. Then what will be the order you'll pass? Because he can't reinstate because 5 is to be taken by them. yes who will be the employer and where to be reinstated ? What sort of order can be passed?

**Participant:** One thing is that we could give closure compensation to him.

**Justice Mukhopadhaya:** That is the easy way

**Participant:** first we are to sight the relationship between employer and employee, and if we find that the contract is sham and camouflage then the questions will come, that this person was working for the principal employer and for that reason I have to see the contract agreement also i have to scan the agreement comes tot the court i have to scan whether the agreement is a sham or is it genuine and if we find and the evidence comes I have to see the evidence after see the evidence with the agreement and I have to come to a conclusion and I have to follow the guidelines given by the Supreme Court since we have decisions, applying those principles I have to come to conclusion. If I find that person is a contract laborer, I have very few number of cases, I have only 35 cases in my Industrial Tribunal but out of 35 I think 12 cases of this type of contract labour cases. The person is , what is the plaint is that application is I am a contract labour but i used to work for this principal employer but what he says I have been terminated from service but he doesn't mention who terminated his services and he says I may be reinstated in the job with back-wages. I am facing this problem in this sort of cases.

**Justice SJ Mukhopadhaya:** Therefore, according to you that pleading coupled with the evidence will be the factor for determination as to who will be the actual employer. For example another example is given one is 5 cottled and therefore 5 are retrenched, another example is that the principal employer says he is dishonest, allegations are made against him, no proceeding nothing is there, he says the contractor I don't need you and the contract labour that contract labour contractor he remove you or retains you without anything, then what will be the procedure? Who is the principal employer? What will be the amount? Yes. Again the evidence. The contractor is supplying 10 labourers to the principal employer, I won't say principal employer employer some other person. The other employer is asking the contractor that this man is a corrupt one, so making allegations against him, and says I don't require him you remove and contractor naturally terminates.

**Participant:** Then *toh* contractor is the principal employer, he is the immediate employer of that person because termination right power is is with the contractor not with the principal employer.

**Participant:** Sir, I have a slight different view, if misconduct is alleged against the workman, necessarily an inquiry has to be conducted against him, but here is the case in which the termination is done by an employer. First of all the Tribunal or Labour Court has to decide the question as to who is the principal employer. Then the second aspect comes up whether the denial of employment or termination is on the basis of misconduct alleged against the workmen. If misconduct is alleged then an impartial inquiry has to be conducted observing the principles of natural justice wherein the workmen must be given the opportunity to represent himself and defend himself. Then only termination becomes legal or illegal.

**Justice SJ Mukhopadhaya:** So if the termination is illegal and reinstatement is to be made then what will be the position that we are asking the where he is to be reinstated?

**Participant:** If the outsourcing or the contract is a camouflage or bogus then he will have to be reinstated by the principal employer for whom he has been

**Justice SJ Mukhopadhaya:** I will be requesting brother Chandru that if you can give them a little bit guideline about this, about the evidence, allegation, and reference. You know how the reference is counsed that is whether the termination is so and so, if he says that because of the allegation. You know the other side says the evidence is in record and then you say that it has not been

followed then what will be the order that will be passed? What are to be looked into? These are the matters my brother Chandru will explain it in little so that there should not be any confusion.

**Justice Chandru:** The question posed is not very simple because there is enough judicial precedents where you'll have to come to some term with the precedents themselves. First if a reference is made improperly, the employer will say this reference is bad. The principal employer will come and say I am not their employer and therefore the reference is bad to the extent I have been made a party. So there are enough judgements on both sides, you'll have to reconcile those judgements. In fact there is a latest judgement in 2015 by Justice Kalifulla. He says reference is bad. The issue was that contract labour wanted regularization with the principal employer. The contract is terminated and the contractor sends away the workers, now the reference comes, when a reference does come, a dispute should exist or apprehended. Now Justice Kalifulla has written in this *Sudhamith Coal Washery Bharat Coking Coal Ltd.* case 2015 2 SCALE 153 at page 5 of your paper-book. He says this is not a case where a dispute exists because they are already terminated. Question of regularization doesn't arise. The next question comes, is an apprehended dispute. According to the learned judge once you are terminated the question of regularization doesn't come. Then the next question comes, then you should challenge the termination, challenge the termination on what ground? The worker said it's an illegal reference because we are not offered any compensation before retrenchment. Now the learned judge says that you'll have to make a separate claim on that, whether they have been retrenched, how long they have been working, whether eligible for? So today more and more this question is complicated in the sense there is only two ways of looking at the things, 1) that you'll have to see the reference in a larger context, a judge has to see whether the reference is vague or very clear or you'll have to read the reference in such a way that 10(1) doesn't become meaningless. Now as the previous speaker mentioned, Uma Devi case, Uma Devi case says regularization is not a method of recruitment, somebody cannot say please regularize which means you are getting into the job. Now Uma Devi says the recruitment is different from regularization. Now in those cases there is a small answer which has come in a judgement from coming under the Bombay Industrial Relation Act and the prohibition of unfair labour practice and the recognition of Trade Union Act that is reported in 2009 8 SCC page 556, *Maharashtra State Road Transport Corp. v. Castor B Rajya Karamchari Sangathana*, there is one small silver line where it says, Uma Devi arose under 32 and 226, it does not take away the power of Industrial Court to go into the question was there an Unfair trade

practice? I think the next session that issue will be discussed. In fact the judges have said Uma Devi is an authoritative pronouncement for the proposition, where Supreme Court under Art 32 and High Court under Art 226 should not issue directions of absorption, regularization of permanent or permanent continuance of temporary, contractual, casual, daily wage or other employees. Unless the recruitment itself was made regularly in terms of the Constitutional scheme Uma Devi does not derive the Industrial and Labour Courts of their statutory power under Sec 30 of the Maharashtra Act, Sec 32 of the Act, the order of permanency of the workers have been victim of unfair labour practice on part of the employer under item 6 Schedule IV where the post on which they have been working exist. Uma Devi cannot be held to have overridden the powers of Industrial and Labour Court in passing appropriate orders under the Prevention of unfair practice Act Once unfair labour practice on the part of the employer under item 6 of Schedule IV is established. Now what applies to the Bombay Act also applies to the other Industrial Disputes Act because in Industrial Disputes Act now Sec 2 ra defines what is 'unfair labour practice', the Sec 25T prohibits unfair labour practice, 25 U provides imprisonment for unfair labour practice. What is an unfair labour practice is set out in V Schedule. However keeping the workers internally as a substitute, as casual is an unfair labour practice. So there termination is suppose you hold it was an unfair labour practice on the part of so called principal employer then in which case nothing prevents you from giving a relief. For example the V Schedule read with Sec 25T, there is no procedure for enforcing those provision, there is no separate mechanism. So, the industrial dispute comes before you, you can also apply 5th Schedule and if the workers are able to establish that it is an unfair labour practice, nothing provides you from giving relief. Though this judgement in Bharat Coking Coals slightly pick out because they have not gone into other issue and at page 7, they said what comes to an end by the influx of time or as per the terms of contract employment or by termination by the employer then in such an even the relationship of employee employer comes to an end and no longer subsists except for the limited purpose of examining the legality and correctness of the termination. The issue of absorption of 39 workers was decided in their favour as the issue came for adjudication when their services are still persisting, merely because the workers in both the references were working in one project by itself was not enough to give them any right to claim parity with that of other, very unfortunate because there is a larger bench judgement in *Jaipur zilla Sugar factory Worker's* case where the Supreme Court said, worker need not raise a dispute if a matter is pending and there is infraction of Sec 33, they need not raise

separate dispute because what is mandatory under the statute, one need not raise a dispute. Therefore the court can grant relief notwithstanding there is no amendment to the reference. If you come to the conclusion, termination is bad since the termination comes during the pendency of the regularization issue and the employer has not sought for permission to terminate them in which case the relief can be granted in terms of Jaipur Zilla's case. That's my opinion I don't know whether the Supreme Court will agree or not.

**Justice SJ Mukhopadhaya:** No, when I am before you I am not as a retired judge of the Supreme Court, I am a learner like you. I come to for learning. I will be telling you one thing because if the reference is no. 1 that termination is bad, your prime duty will be to decide whether termination is bad or not. It will be followed by another reference that what will be the consequential relief if it is bad, there actually what brother Chandru is highlighting. There gives a discretion to you. The consequential relief maybe that you dont allow reinstatement, you say take wage for the reasons, you know there are allegations etc. You say reinstate, principal employer, main employer reinstate, you find that actually they are hiring and firing, I engage a worker for about 7 months, 8 months, 1 year, 2 year, 3 year, now they have raised the question of regularization and they have been thrown out. You say this has been violated reinstate but as the basic issue they have raised regularization pending matter i.e. 33 and if because in the garb of some other thing that my power to terminate because he is a daily wager, then in that case you have also the right to decide what relief is to be given, and you say not only the you reinstate because of these reasons for which we will be going to the next session unfair labour practice, you can also direct to give reinstate in the regular post. Scale of pay, regularization, i have my own feeling and perception there is nothing like regularization in service jurisprudence or in labour jurisprudence according to me. The question of regularization have come if there is something irregular then the question of regularization has come, there is nothing like regularization, it is simplicitor grant of regular scale of pay and there we will be coming in the next session, that how you can grant the relief because the moment you coin the word regularization Uma Devi will come. If it is a PSU then it is very difficult Article 14, 16, Uma Devi say, one of the judgement say art 14, 16 is above the labour law, so if Art 14, 16 is above the labour law how the back door employee can be regularized. In one of the judgement has been here quoted reference is not there at page 98, curiously that was judgement in which I was also a member, page 98 if you look into and if you get it in SCALE or you can also download, this is, *Durgapur Casual Workers Union*, in this case distinction has been made

between the Uma Devi's case and labour matter. Article 14, 16 qua non following the Art 14, 16 is not attracted for the private industry so, whether the labour law will be different from those who are in the private industry and those who are in the, so Art 15, 16, therefore they cannot be regularized and Art 14, 16 is not attracted for the private industry, they can be regularized. Is it the law prescribes making a class amongst the equals. Whether that will be violative of Art 14 or not? Therefore that have been discussed. First quote says that in the matter of termination 25 F or where unfair labour practice has been made, you'll have to give reply only with regard to unfair labour practice. You can't raise another issue without raising the issue about the labour court giving an opportunity to the party that your entry is a back door entry. If back door entry is there, illegal void, then it is there. Therefore, first a reference or you raise this dispute that this question should also referred. Then the laborer can be given an opportunity to defend who can say that there is nothing like back door appointment but that is a judgement, we will have to be more practical. Frankly speaking if I am there, merely Uma Devi have not granted relief, no i want to grant relief, I am going in that one. Therefore, initially I said I am not talking like a judge. I have to grant relief because i find there is unfair labour practice. Then what relief, that relief we will be discussing in the next session, but keep it in mind main thing is the mindset, anywhere you find that there is a problem occurred due to this outsourcing and contract labour and the evidence is there to grant relief then consequential relief must be granted. The laborer has no money to pay 5 lakhs to a lawyer or 10 lakhs to a lawyer. His engagement will be either himself, or through labour union, or a 500 Rs. lawyer. So that will not change the complex of the case that will not take out the merit of the case. Pleading should not be looked into stringently, evidence is a fact, they will produce evidence and your application of mind should be humanitarian approach. It should not be such that the industry will be affected and the industry will close, no, don't put a bombshell. I was told when i became a judge by one of the Supreme Court judge that you have been given a power like an atom bomb you can show it but don't throw it. So that power is with you, ensure that the industries flourish but simultaneously ensure that labourers they get their dues, that's more important. Labour industries, no no you are there because of labourers, if labourers are not there you are not there, you will not be a labour judge, you are there because of the industries. You are there to give a solution to the dispute, for settlement of the dispute. So your prime duty is to settle the dispute. Therefore whenever there is a question please there is no straight answer. If you answer of termination is that the termination is bad because termination is different, this followed, this is

followed or not whether allegation, no allegation, opportunity given or not is independent. Automatically there will be reinstatement. Now reinstatement if he is a daily wager you can say daily wage to the work he was doing with the employer, with whom he was there you can say so. What I said in a case where others have been removed, retained and he has been, if the senior has been retained, whether the juniors have been retained? Are those things are the factors to be noticed before termination? You will have to see if it is allegation then without application of mind by the contractor, merely because the principal employer has stated, then whether principal employer is also liable or not, then if there is a pleading he has worked for 10 years and they are giving them daily wage and if you are clothed the power of regularization, consequential relief is the answer. Not no reference is required because if the second question is what consequential relief you will be getting, you are clothed with the power or further you are asked what consequential relief, its for you to decide work for so many years, this is this is, these are all the evidence, not denied, regularization now what regularization i will be coming in the next session. You want to add something Yes.

**Mr. Sanjay Singhvi:** Off course everything has been already said but one or two things, one is I think that *Gujarat State Electricity Board* case that same question has come up and almost answer it as all these things. The question had come up very clearly. There they were workers employed through a contractor in the Gujarat State Electricity Board and they were dismissed exactly like you said. The reference was, the reference is also given in that judgement. The reference was clearly whether they are entitled to be reinstated with full back-wages in Gujarat State Electricity, though they were workers of the contractor and that being the reference it went up to Supreme Court and Supreme Court said that the industrial adjudicator will do two three times. First this is what was laid down, first they will see whether the contract is sham or bogus, if the contract is sham or bogus they will directly grant reinstatement. Even if the contract is not sham or bogus the industrial adjudicator reaches the conclusion that it is a genuine contract. That will not be the end of a case then they will stay there hands, stop the case at that point and ask the state Government, refer it to state government to take a decision whether there should be abolition of the contract. if there is abolition then that second part of it then there will have to be another dispute made by the permanent workers, that these workers should now be reinstated, or taken back, that can be gone into by industrial adjudicator in that same matter. This is the way, off course it is an elaborate thing. Later on Air India had said that no no that is too elaborate, we should take it shorter after

that SAIL overruled Air India, but this is there that even though the wording may be give as can he be reinstated with full back wages with the principal employer, it can be gone into at least at this stage, if sham and bogus directly it can. So up to that extent Gujarat State Electricity Board has not been either overruled or disagreed with in my view.

**Justice SJ Mukhopadhaya:** There is a break, we will be here again after half an hour and while going on the question of this unfair labour practice we'll practically continue with the topic. Therefore though only my name has been shown but I think all of you will have to play a role in the matter of unfair labour practice. That means those who are on the chair and those who are off the chair, on your side. Thank you.

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### SESSION 3

**Justice SJ Mukhopadhaya:** Good afternoon, now this session we will be dealing with Unfair Labour Practice, Unfair labour practice protection and remedies. Practically we will be going on discussion the hypothetical discussion in this session and apart from your discussion i will be requesting my all good friends who are there in this side also to take part in this for clarification. I said in the very beginning that I'll not be talking like a judge. I will talk like a layman to understand what is unfair labour practice and simultaneously regularization. I am asking a question. Is there any terminology used as regular except the judgment of High Court and Supreme Court and your judgment? Is there any word regularization used in service jurisprudence or in labour jurisprudence in Industrial Disputes Act or any other Act the word regularization is there? Anybody has knowledge, my brothers and sisters? Anywhere any law speaks of regularization, then you can show me. For my personal perception i was talking with brother Chandru, the question of regularization will come if something is irregular then the question of regularization will come. Now for example if an appointment is illegal for an initial ab initio void then regularization will be attracting Uma Devi's case Art 14, 16, you cannot regularize, initial appointment is bad, back door entry. I am not criticizing Uma Devi presumes and on the basic fact of back door entry but if there is no back door entry, if the entry is straight, i am asking a question to myself and for your reply, how a daily wager will be appointed? An advertisement to be issued, name to be called from employment exchange, a merit list is to be prepared, how that is to be done. So this you'll be keeping in mind before deciding the case as to what procedure has been followed. Second thing is if you go on this unfair labour practice then you will have to go on the definition of Sec. 2 (ra) I hope. Look into S. 2 (ra)..Unfair labour practice means any of the practices specified in the Fifth Schedule'. Now we will go to the Fifth Schedule. Please open fifth Schedule, page 105. Now anybody will read this fifth schedule? Yes.. No.1: on the part of the employers and trade union of the employers.

**Participant:** restrain from or coerce, workmen in the exercise of their right to organise, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

**Justice SJ Mukhopadhaya:** Now come to small 'a'

Participant: Threatening workmen with discharge or dismissal, if they join a trade union,

**Justice SJ Mukhopadhaya:** this we will be keeping in mind. What type of cases they generally come before us then,

**Participant:** Sir, (b) Threatening a lock-out or closure, if a trade union is organized, (c) Granting wage increase to workmen at crucial periods of trade union Organizations, with a view to undermining the efforts of the trade union Organizations.

**Justice SJ Mukhopadhaya:** Please also keep this in mind. Granting wage increase to workmen at crucial period of trade union organization with the view to undermine the efforts of.. Now you have a Trade Union which is the recognized trade union the biggest trade union, Five a separate trade union they have formed who are actually more close to the management. Now on their request they increase something so that more people will join there Union, no unfair labour practice when we are talking about. Then,

**Participant:** to dominate, interfere with or contribute support financial or otherwise

**Justice SJ Mukhopadhaya:** then come to 3

**Participant:** to establish employer, sponsor trade unions of workmen

**Justice SJ Mukhopadhaya:** So that we were saying, sponsored, encourage or discuss membership of the trade union, this we have just going shortly. Discharge or dismiss the workmen by way of victimization. You know so not only 25 F, when we were talking of earlier that somebody has done this and therefore throw him away, You know discharge or dismiss workmen by way of victimization not in good faith but in colorable exercise of the employer's right. Therefore, discharge or dismissal is not only 25 F or any other provision, this is unfair labour practice, not only violation of the provisions of the certain provisions which you decide unfair labour practice also includes this type of discharge and dismissal one should keep in mind, just casually I am highlighting. Then 'c', falsely implicating a workmen in a criminal case, for patently false reasons, unfair labour practice. On untrue or tempered up allegation of abuse without leave. In utter disregard of principles of natural justice in conduct of domestic inquiry or with undue haste. So not rules of natural justice. You know unfair labour practice in the matter of discharge, these are various aspects which has been highlighted for misconduct of a minor or technical character without having regard to the nature of any particular misconduct or past record of service or the workmen they were leading to a disproportionate punishment, unfair labour practice. So

proportionate punishment no, Supreme Court judgement is not required, these are the things which have already been codified. Then come to abolish the work of regular nature being done by workmen and to give such work to contractors as a measure of breaking a strike`. So regular nature work abolish give it to the contractor. Then to transfer worker malafide from one place to another under the guise of following the management policy. You'll find in many cases you know, one workmen is transferred to north India to extreme south or a workmen from south India is transferred to extremely. Actually its a penal transfer, so that is also unfair labour practice, so the moment you come to the conclusion, this is unfair labour practice then nothing to do with whether the transfer is penal or not. These are the factors which are there, then insist upon the individual workmen who are on legal strike to sign a good conduct bound, as a pre-condition to allow them to resume work, to show favoritism and partiality to one set of workers regardless of merit. Not gone on merit one set of worker the benefit given, the other set not given.

Tenth is important, please read it 10 very slowly. To employ workmen as badris, casuals, daily wagers, or temporaries, on temporary basis, now temporary is also getting regular service, regular pay casual is getting daily wage etc. or contract basis badlis are there and to continue them as for years. For years together 5 years, 10 years, with the object of depriving them of the status and privilege of permanent workmen, so what they are depriving the status and privilege of a permanent workmen. So if you say unfair labour practice, what you can grant? If I pass an order give him status and privilege of permanent workmen. Whether it will be incurred as mentioned in schedule V. is it regularization? Whether they will be getting the same benefit or not? If it is directed to give the same status and privilege of a permanent workmen so status and privilege includes everything, everything, so the moment you couch the word regularization, actually on this basis you'll say regularize, make him permanent. These are the common word which we are saying and sometime you find High Court will say no regularization, not permissible, alright no regularization is permissible give them status and privilege of permanent employees. Let them be happy with that. You will be happy, workmen will be happy and let the employer be happy and let me see which court will quash it that it is Uma Devi's against. Uma Devi has not created that if the status or privilege, Uma Devi said don't regularize, I'll not regularize because regularization is a misnomer. Regularization means give the regular scale of pay that of a regular employee. Actually what they want, also I should be treated like a regular employee, I should be given a regular pay scale, I should be given my seniority, i should be given my advantage of promotion. So if that

privilege is given privilege includes everything, not only and status means status includes your status also. The moment the other will get it they will also get so it is very important to couch, therefore I was saying that with the first two things it is the judging who will be writing the award. His application of mind, you know in cricket sometime you bowl straight, fast bowling but some time you have to go for googly. Dusra. Whatever you call it, you'll have to evolve and I'll be requesting because I said that I am really in mess when you talk of regularization, I don't find any word but I find a better word, giving a status and privilege of a permanent. Privilege of a permanent employee is that he cannot be thrown out without a departmental proceeding and this is applicable to temporaries. I have appointed a person on temporary basis in the regular scale of pay but he is temporary for years together make him permanent, court will quash it. You can say that give the statue of permanent privilege of permanent, court will not quash it. How you are directing, so play with the words which you have been empowered by the legislature, don't exceed. The moment you exceed a judgement will come, Uma Devi, now Uma Devi is the durga and therefore will be having the respect for her but apart from that there are other devta's, we can take the course of them, Shiva is there, take the course of him, this is Shiva. If the status and privilege, then come to the next. To discharge or discriminate against any workmen for filing charges or testifying against the employer in inquiry or proceeding relating to any industrial dispute. To recruit workmen during a strike which is not an illegal strike, failure to implement award, settlement or agreement, to indulge in acts of force and violence, to refuse to bargain correctly in good faith with the recognized trade union, proposing or continuing a lock-out deemed to be legal under this Act. So this is on the part of the Trade Union, now we are not going on that, because generally the management do not move that unfair labour practices by you know Trade union. There if the Trade Union v. workmen is there then the next one on the part of the workmen and trade union that will be there. This is I have just highlighted but the discussion will be from you end. How you'll be dealing one case or the other case, taking into consideration again the earlier questions raised by us in the matter of discharge, in the matter of regularization, in the matter of because these questions we were deciding. Now what are the situations in which you can grant relief? Please raise a question and one of you will give the answer. Yes, anybody has any, who have gone through the judgement of Uma Devi? Anybody has gone through the judgement. Uma Devi judgement says the 5 judge constitution bench judgement. Uma Devi III, no nono Uma Devi III, there are three Uma Devi judgement. Uma Devi I, Uma Devi II, Uma Devi III. III is the

Constitution Bench 5 judge judgement. They say that back door employee, the daily wagers have been presumed to be the back door employee. First they are presumed and then they say you cannot regularize them because it will be violative of Art 14 and 16 but curiously in paragraph 53, one time amnesty in violation of Art 14 and 16. In violation of 14 and 16, I am five judge I can do anything violate 14, 16. You are a labour judge you can't. Please irregular appointment I am asking a question and therefore in very beginning I asked what is irregular appointment, can be regularize, there cannot be any other question of regularization is not there. What is irregular appointment? What is irregular appointment and what is back door entry? In 25 F if unfair labour practice is there then you cannot raise the initial appointment because that is not the question of reference is the judgement in that Durgapur Cement. Durgapur Cement says, discussing Uma Devi and other two judgement given earlier which brother was showing that when a matter of 25 F, when the matter of termination, discharge from service is coming, your reference is only with regard to the discharge. You cannot raise and another issue that you have illegally appointed, you have illegally appointed them and therefore I'll be doing another illegal work, another illegal order passing order. If you raise the dispute in the initial stage that his initial appointment is bad, the workmen can give reply. Now initial appointment cannot be bad because they wanted it for immediate effect. 20 people on daily wage, how they can say it is bad, they can only say that it was not required. I was giving another example, then court says that you cannot say 14, 16 with regard to PSUis different and for private industry they can be regularized, no, regularization has nothing to do with discharge from service, discharge from service has to be looked into from this angle. One whether the procedures have been followed or not, second thing whether it comes within the purview of unfair labour practice. Regularization when you are talking of then you'll find regularization is not there if continuous is there and in that case you can simply direct to give the status and privilege of a permanent employee. That will be suffice, everybody will be happy. Problem will be in some cases. There are problems, that problems you'll have to highlight it that I have faced this problem in one case.

**Participant:** Workmen, his appointment have been new appointment for certain period, after one or two days break then again the similar appointment is given and it is continued for 5 or 6 years or 10 years whatever, then the workmen is discharged saying that your term is expired now your contract is not renew you are out of the service workmen comes to the court saying that my Termination is illegal the management come with plea that he was appointed for fixed term, term

expired and it is not retrenchment, 2 oobb will apply so he is not entitled to get any wages or reinstatement anything else, so this is the problem.

**Justice SJ Mukhopadhaya:** So 240 days he has continued then there is an answer. If he moves before the court first of all reference has to be there, you know every two days break they are continuing then two days break you can say continuous one year is there. No no no 240 days is not 365, two days include that you know if 240 days is there then he has worked for a year. Daily wager you know tell to employ workmen on *badris*, casual, casual includes daily wagers also. So if 240 days is there then he has worked for 240 days, one year break, no break you can't say.

**Participant:** Question is discharge *jo hai* after the expiry of contract.

**Justice SJ Mukhopadhaya:** Please this artificial break if the workmen moves against the artificial break, the reference will be one, if the workmen is continuing you know I give artificial break again continuing and he is continuing for 10 years. He can show that this is artificial break otherwise my continuity is 240 days every year. You'll have to write a judgement in a manner to show that every year he has contributed for 240 days and therefore continued in the service. Years together, what is the language years together, years together has to be read in context with other provisions of the law. One year means 240 days. Am I clear? So why you count that if you have to write a judgement you say 240 days this year 91 240 days 92 240 days 93 more than 240 days 95, so for 10 years he is continuing, because what is the language in 10. Yes you add

**Mrs. Jane Cox:** There is a division bench judgement in Bombay High Court saying that..

**Prof. BT Kaul:** There is a Supreme Court judgement direct on the issue. *State of Rajasthan v. Rameshwar Lal Ghilot*, Supreme court very clearly says in that judgement when the appointment is for a fixed period unless there is a finding that the power under 2 clause 'bo' was misused or vitiated by malafide exercise it cannot be held to be illegal. In the absence, in its absence the employer can terminate the services in terms of the letter prepared unless it's a colorable exercise of power. So where you are continuously giving these artificial breaks and fixed some appointments, the colorable exercise of power, therefore you as a Industrial adjudicator are within your right to hold that this is not the case which is covered by 2 oobb, very simple you can take the help of this judgement.

**Justice SJ Mukhopadhaya:** I will be going on Supreme Court judgement, what I am saying you go to the language first. Please if you read the language, your question's answer is in the language. What is casual? What is casual worker? I am asking a question to me. What is the difference between a temporary workers? Casual worker will do work every day, so there is a termination every day and there is employment every day. If he is a casual or temporary, now it says that casual or temporaries and to continue them as such as casual or temporary or badli for years they don't say continue them, continue them for years they don't say that two day one day break every year you are taking me except, you know some places you'll find there are seasonal workmen, seasonal workmen's there case is different, they are taken for 3 months 4 months in a season and then their services are terminated, they do some other work in other session, so they may have a right to work again in other session but they don't have a right for this regular status, status of a permanent employee or privilege. But daily wagers even if break because they are continuing for years together, without any break language is not there. Therefore keep it in your mind that we will be going on language and count this language in your judgement. That's 240 days more than 240 days and so and so and I find that every year he has continued so he has continued for years together. It is how you write an award, if you say there is a break in service you can say, why it cannot be because 240 days he has worked therefore he has worked for year. Am I clear? That is already there in the definition.

**Participant:** But My lord the question is of 2oobb, there is prior judgement of *Batala Sehkari Sugar Mills*, which clearly says 2oobb means those who have been employed for a fixed term, there is big difference between theses and that is the exception to the retrenchment that has been defined under 2oo. That is bb is exception, that wherever sir, in majority of electricity companies employee has been engaged for 60 days, for 90 days, for 120 days and thereafter a break of say 1 month or 3 months or 4 months. He is again being employed on contract basis

**Justice SJ Mukhopadhaya:** May I ask you one question? 2ra is dependent on 2oo? 2ra is independent unfair labour practice. It has nothing to do with you know with termination, in the matter of termination you can say 2oo etc., fixed wage etc., unfair labour practice will have to see whether he is coming within the for corners of Schedule V. If four corners of Schedule V shows one of them have been violated you will say unfair labour practice. Discharge is there it has

nothing to do with 25F. You know don't go on the main law, discharge, discrimination, that is the reason I was reading each and every clause of Schedule V. Schedule V is independent of Sec 25.

**Participant:** Sir I have a doubt to ask. I have a practical problem which says, there was a, is a permanent employee who has been transferred by the employer to a far of place, he was working in Kerala, he was transferred to Madhya Pradesh. He finds it difficult to join there, so he didn't obviously did not join there. The management found it as a misconduct, the management appointed an inquiry officer who conducted an inquiry in which off course, and the employee has got sufficient opportunity to participate. At last after the inquiry, the inquiry officer laid a report finding that there is misconduct on the part of the employee in not joining at the place where he was transferred, then consequently the report was accepted by the management and the management terminated the service of the employee. The employee raise industrial dispute and the government referred the matter to the labour court. When the matter came before the Labour Court the employee raised the contention that the transfer amounts to malafide which is an unfair labour practice contemplated under 7th category of Schedule V. Whether the management raises the objection that he cannot raise the question of unfair labour practice regarding the question of termination because it itself is a question which he owe to have raised as a dispute.

**Justice SJ Mukhopadhaya:** Now if I write an order then I'll be writing an order that the transfer of the workmen is malafide and violation of clause 7 which amounts to unfair labour practice coupled with discharge from service or dismissal of the workmen by way of victimization. As in clause 5, so if I refer clause 7 and 5 together that both attracts unfair labour practice. First you do 7 violate and then you violate 5, 5 is to discharge or dismiss workmen by way of victimization. You go otherwise I'll dismiss, so first you violate 7 then you discharge me, it attracts 5 also. So in both the case if you simply stop at 7 then court will say bad, if you say 7..

**Participant:** Sorry to interrupt, if it is a service condition that the transfer is a service condition, in that case also it will be this thing?

**Justice SJ Mukhopadhaya:** No No malafide only. 7 is transfer which is malafide

**Mrs. Jane Cox:** Even if there is power.

**Justice SJ Mukhopadhaya:** Please read 7, let us read the language, to transfer..

**Participant:** If the standing orders has a clause that you are liable to be transferred because if he is working..

**Justice SJ Mukhopadhaya;** Please read 7. There is italic word there. I want that you should answer. There is an italic word. So first you'll have to prove. Mere transfer will not do. I have been transferred from Kerala to Chandigarh not, did I show it is malafide and once malafide is shown then only 5 can be attracted.

**Mrs. Jane Cox:** and then it doesn't matter even if there is power to transfer. Malafide you can still stay it.

**Mr. Sanjay Singhvi:** On malafide there are so many cases and the question is what post are you send to? You'll see, whether, doesn't matter Kerala to Chandigarh on what post whether the people the type of work you are doing there are sufficient people to do that work in Kerala already? Whether there are that type of people in Chandigarh having that, supposing you are sent as a welder, now one minute let me just complete, you are sent as a welder then all this will have to come in evidence. Whether they have extra welders in Kerala and whether they have vacancy for a welder in Chandigarh? Or whatever may be this, so all this will have to be seen, why the workmen, the worker will also say that I am being transferred because I have formed trade union. Then that is victimization, so all these surrounding circumstances will prove malafide. Malafide will never be written in the order, whether it is malafide, no employer is going to write in the order that I am malafidely transferring you. Malafide will always be proved by circumstances surrounding.

**Justice SJ Mukhopadhaya:** I am adding. Who'll say malafide?

**Participants:** Workmen!

**Justice SJ Mukhopadhaya:** So who'll have to prove malafide?

**Participants:** Workmen!

**Justice SJ Mukhopadhaya:** So malafide will be proved by the workmen. So there'll be evidence to be there on the record. I am giving one example. The workmen or the union shows that he had a quarrel with the one of the manager and the manger writes that he has quarreled with me, punish him by transferring him to Kerala and that note basis, a simplicitor order of transfer is passed, then

he places before the court a record that because of this activity, without taking action against me, it's a malafide transfer, transfer is malafide because basic concept of transfer is the my some short of argument with the senior most. Therefore evidence must be there on the record. First you'll have to prove that this is a malafide. Once they prove that it is malafide, because they'll be proving malafide, you know the moment they say malafide, union will be leading evidence and once you come to that conclusion and then if the termination for non-joining is there then you can club it. We are just giving you that how you'll couch your word in you award. If malafide you don't find you can't say that it is unfair labour practice that you reject it.

**Participant:** Sir my doubt is not that. The question is, Employee has been terminated from the service finding that he has done misconduct in not joining the place where he has been transferred, so that dispute has been referred by the government saying that whether that termination of service of the workmen is legal or illegal. In that reference whether he can raise the question of malafide transfer or not? That is my doubt. Does it not require another reference? Should we not have raised that question?

**Justice SJ Mukhopadhaya:** Please, because we are only on Schedule V. Come to Schedule V, now discussion is on Schedule V. Let us come to Schedule V, page 108. Your answer will be there, let us find. Now, yes, you know to discharge that is clause 5 or dismiss workmen, then come to clause f, what are the grounds, by way of victimization, not in good faith then come there by false implicating the workmen criminal case, on so and so allegation of absence without leave, utter disregard to the principle of natural justice of conduct of domestic inquiry or with undue haste. So if this regard to the domestic inquiry it is unfair labour practice. Next for misconduct to be minor or technical character.

**Participant:** How can we say that it is a minor misconduct?

**Justice SJ Mukhopadhaya:** that is for you to decide. Misconduct you know, misconduct, i am telling you

**Participant:** Misconduct after finding an inquiry after conducting an impartial inquiry

**Justice SJ Mukhopadhaya:** He is charged because proportionate to disproportionate to the punishment, read it. Misconduct of minor technical without having regard to the nature of particular misconduct or past record or service of the workmen thereby leading to a

disproportionate punishment. Now for 10 days leave without application is a misconduct, unauthorized leave, I discharge you and another person is on leave for two months and you have the you know there is a rule under which 30 days earned leave can be given and for 10 days leave without ahh you don't grant leave but you discharge. So misconduct how you'll be adjudging it, proportionate or not is for you to decide. That we cannot say because there you'll be sitting we'll not be sitting with you.

**Mrs. Jane Cox:** Your jurisdiction can come from Sec 10(4). I think your problem is, your problem is that if this issue is not in the terms of reference how can it be addressed? It'll come from Sec 10(4) incidental issues, incidental matter because there defense to the workers case will be that I did not report why I have been terminated because I did not report, I did not report because it is a malafide transfer. Therefore it is an incidental issue under 10(4) of the Act.

**Justice SJ Mukhopadhaya:** Even in the main issue of this termination, even in main issue of your discharge, unfair labour practice can be a ground to set aside.

**Participant:** Does it not require a reference?

**Prof. BT Kaul:** No I think what she has said that is the correct approach to the problem. Problem is you are bound by the terms of reference. Right? But I am not saying that there is no termination I am saying there is termination but I am saying that termination is not on Bonafide ground but on malafide grounds. What are the malafide grounds is because my termination is a case of victimization it's a case of earliest threat which was given to me. Like two three things are very important at this stage, one is job which is Transferable, transfer is an incident of service a person cannot have any claim not to be transferred. If you take an assignment which is a all India liability you have to accept the transfer also but where the employer standing order or terms of employment appointment is for geographical specific then you are transferred outside that specific area right now that is not the term of contract therefore it can't be a basis for your claim and secondly the grounds as we say that matter incidental thereto will cover the cases where the court go to the question as to what is the basis of transfer whether it is malafide, victimization or it is a bonafide exercise of Management prerogative. Those are issues that can be gone into and basis can be what is unfair labour practice 2 ra, read with schedule 5 and I'm not denying that there has been not employment of mine but I am saying non employment is

not bonafide but non employment is vitiated because it is by extremist consideration that is how you have to construct.

**Justice SJ Mukhopadhaya:** May I add to it? Just a minute. you are making up difference between, actually you are taking schedule V as independent one, schedule V is not independent, schedule V has a meaning with the reference, a reference is before you, just one by one let me clear it, reference is either with regard to discharge, reference maybe either with regard to transfer, reference maybe something else while deciding that there is one formula that discharge is bad because of the not following of the procedure of Section 25 F. Am I clear? You can say that misconduct you have not conducted inquiry and therefore it is violative of rules of natural justice as Supreme Court has said. Apart from this general principles you can also see that reference on the basis of evidence come within the four corners of unfair labour practice, then you also add that this also amounts to unfair labour practice under clause so and so of fifth schedule. While looking into the totality of the case independently you always look into it, notice not given, 15 days so and so not given, 240 days' work done discharge bad but can you also say that this is also against the clause so and so schedule V. Misconduct, you have not conducted enquiry, you have not discharge, inquiry is a violation of this is this rules of natural justice, no notice given bad. But you can also refer it is unfair labour practice in view of clause so and so of schedule. So independently you can also look into whether is made or not under 25 f, he may not be in a position to show that the discharge every procedure has been followed but he may show the discharge under clause f amounts to practice unfair labour. What I am saying that independently you act to it. Reference is discharge, whether discharge is bad or not, can't you say it is bad in view of violation of clause 5 of schedule 5. Can't you say? I asking a question.

**Participant:** It itself is a dispute which ought to have been raised then and there.

**Justice SJ Mukhopadhaya:** you know if the evidence is there that it is in violation of clause 5 then discharge is in violation of clause 5 of schedule V. Evidence to be seen only, evidence is malafide for example in the matter of transfer, there is a you know in haste they have dismissed no procedure followed so all these things are there and if you apply your mind you can say that this is in violation, he may not they may have followed 25 F, Given notice etc. but he can say that there is unfair labour practice because this is this this the evidence.

**Participant:** lordship my doubts is the question of malafide regarding the transfer is an incidental question to the dispute referred, this is not an independent issue for which order have been raised.

**Justice SJ Mukhopadhaya:** It is to be raised by the workmen. He is to show that my transfer is malafide, once he proves you'll have to answer in his favour. If he fails to prove no reference is, reference is whether transfer is good or bad and if he shows it is malafide on the basis of the evidence then the answer will be in his favour if he fails to show then in that case answer in favour of Management.

**Mrs. Jane Cox:** Your problem is the terms of reference don't directly refer to transfer, they only refer to termination. Now Sec 10 of Industrial Dispute Act says an Industrial Tribunal shall confine itself to the terms of reference and any issues incidental thereto now here the workmen coming saying I am challenging my transfer my transfer is bad why it was premised on my not reporting to duty on the transfer, the transfer is malafide there for my termination is bad that is an incidental issue, it is an incidental issue on 10(4) and will not be exceeding your jurisdiction.

**Participant:** I have lot of doubts over all these things there are two types of cases first one my learned brother has referred where in a person has been transferred from one place to another and thereafter. Sir, I am just narrating the things. First case there are 2 types of cases when an employee has been transferred from one place to another either on promotion or on same post and he has been asked to report on duty there after he seeks extension extension extension extension and then he has served charge sheet and thereafter a due procedure has been adopted and he has been terminated on ground of noncompliance of the order, this is one issue and that termination is only been referred to the court first. Second one these types of case both type of cases I have decided lot cases I have decided. Secondly the second type of case that is of Dainik Bhaskar that it is a leading newspaper of Madhya Pradesh, Rajasthan and Hindi band. In fact there in Jaipur they have installed printing press with German technology automatic printing automatic printing press so they have to reduce the number of workmen there, they transfer those fellows to, and thereafter they struck off their name from Jaipur. Reference to me, I allowed all reference reinstated them at Jaipur with all consequential benefits because in those cases the enquiry has not been conducted, that is the issue the second one the question in regard to 10(4) is concerned I want to remind the landmark judgement of *Imperial Hotel* where in it has been defined what is incidental thereto and there are lots judgement of Hon'ble Supreme Court as well as High Court that what are

the incidents and how you'll decide, they say the principle of interim relief which has been granted by civil courts they have to be applied as regards to 10(4) is concerned. There is of course one judgement of Hawchiff that is 64 Supreme Court that says with reference to 18(3), the court can enlarge the scope just to add the justice process.

**Justice SJ Mukhopadhaya:** Please, let us be very clear I am not going on 10(4). I am not going I am saying that I am a layman, like a layman I am looking into what is the reference to me. Reference is about the transfer or termination. That is the first question. If the reference is transfer and the party alleges malafide, party will have to prove that it is malafide. Therefore reference is the main thing and once it is proved then you can say transfer is against the provision of so and so and therefore it is bad. I am not going on any judgement, it is a direct issue, not incidental. If termination of service is bad or not that is an independent issue in that issue if somebody shows that anything not followed, so he may say that Sec 25 F not followed, he may say misconduct for that he has done so violation of rules of natural justice. He may independently show that unfair labour practice because of this. What we are saying that we are on unfair labour practice, unfair labour practice is the subject now so apart from the regular theory we are saying that you can add unfair labour practice also if you somebody can show you what judgement you have delivered we are not on a particular case it is for the party to show that there is a matter of unfair labour practice in the matter of discharge if he can show then it is not an incidental question, the main question is whether discharge is bad or not then on the basis of schedule 5 also you can declare it bad not only 25F, regular what we do 25 F is bad, go beyond it, unfair labour practice for which he has been discharged please enlarge it we are here to enlargement we will have to go through that is the reason I said with regards to regularization, crouch the world I am to here to request you what your doing is good but what you should do farther it will be tested by Supreme Court High Court that your new type of judgement on the basis of these facts whether upheld by the High Court, whether that will, you take a chance, yes. References the main thing you see we are going on the general as if the reference is whether the termination of service because of noncompliance of transfer order, then answer will be different main thing is the reference. don't jumble both termination and that is a fact, fact is that I have been transferred, fact is maybe malafide maybe bonafide, fact is I have not joined, fact is they have followed all procedure and terminated, what is the reference we are only saying that, if the reference is X about termination then answer termination it is the transfer then answer transfer. If reference is whether the termination is in view

of noncompliance of the transfer order then answer that. Reference is the main question but what am I adding here that please refer to schedule V very important in the matter of regularization so called regularization of service in the matter of discharge these are the regular matter which are coming before you on discharge please look into it schedule V. regularization and looking to schedule V they will cloth you with more power, they will give you more power if you want to take advantage for you to take advantage if you don't want to take advantage I have retired I can't say anything. Unfair labour practices is the discussion of this but you know this workman contract labour then followed by the other Workman and in these cases you'll find unfair labour practice is there. Grant them the relief. Is the subject of evidence they may not count in that fashion but they may produce the evidence and confusion should not be there we are not saying that don't follow the procedure which is there. The traditional system of going on Will Go On section 10(4) etc. 11A those procedure to be followed. that is a traditional way we're dealing it but out of the traditional way let us also follow schedule V to find out unfair labour practice and particularly in the matter of regularization of service, discharge, transfer.

**Mr. Sanjay Singhvi:** if I may add. Just one or two things on the question of the reference some questions were raised. Who makes the reference? State Government in theory but in reality who is making the reference? Today for instance recently I had to do a matter which came from Union Territory of Dadra and Nagar Haveli, there the power of Labour Commissioner is given to collector and power to make reference is delegated to collector now doesn't know anything so there is a labour enforcement officer the lowest in the rank he is actually drafting the reference. So very often reference may not be worded exactly correctly placing all the matters before the court what do we do we advise people if they come to us please go get a corrigendum done and if there is a, now in a case like yours supposing there is a reference only about the dismissal, later on they get a corrigendum add to that the question of transfer, that is ok so then merely because such a corrigendum has not got that worker should loose, so I think that generally one has to keep justice in perspective, that is all I am saying, off course if it is absolutely an unjust case one will go against it but the wording of the reference as Justice Chandru has pointed out there are off course differing judgements, he has pointed out Justice Kalifulla's latest judgement but nevertheless I would say that what Jane was trying to say by 10 (4) etc. again hotel Imperial does not say that only interim relief can be done under 10(4), it is only one example of what can be done under 10(4), in Hotel imperial. But nevertheless I would say that one has to go as Justice Mukhopadhaya is trying to say,

one has to see the essence of whether there has been an unfair labour practice committed in this whole case before us and if that is being done then we can definitely you can grant relief, it is not that the reference is wrongly worded, some labour enforcement officer has made some word wrongly, because of that after 15 years the worker should loose.

**Justice SJ Mukhopadhaya:** just let me conclude

**Participant:** there is one judgement sir I want to point out i.e. *Pottery Worker 79* Supreme Court, it says you can't go beyond Sec 10.

**Justice SJ Mukhopadhaya:** Please, please, what is sec 10? What is 10? Reference, so you can't go beyond reference, I am saying remain in reference but take aid of Schedule V, 10(4) is within Sec 10, Sec 14(4) includes in Sec 10, let us do not confuse and don't go, my advice is, don't go on Supreme Court judgement now, don't jump to Supreme Court judgement, don't jump to High Court judgement, plain and simple a finding of fact is an award, judgement we refer 10 judgement and hold, please don't go on that, you sight evidence, you sight what is the reference.

**Participant:** But Sir, if we will not discuss the judgements given by the lawyers, then judgement will be bad.

**Justice SJ Mukhopadhaya:** If you do not discuss, it will not be bad, if your award is good it will not be bad, main thing is your award, judgement is mere an opinion with regard to principle of law, if you follow the law they can't say why principle have not been discussed. if principle of law is X.

**Participant:** Sir there is always complaints of judges

**Justice SJ Mukhopadhaya:** Don't bother for complaint, please if you bother for complain you'll think of your character role, if you think of your character role, you'll never write a judgement.

**Mrs. Jane Cox:** And terms of reference have to be read in the context of the pleadings, there is umpteen judgements on that, you see the pleadings, you see what was the issue and the terms of reference has to be read in that context, so you can't go beyond, but it can be read in that context.

**Justice SJ Mukhopadhaya:** Terms of reference is the prime thing, evidence is the prime thing, pleading is the prime thing, the only thing which we are saying in this session is also take of the benefit of Schedule V in addition to the other systematic na, you are running in the regular way,

the regular way we follow, we are not asking you to deviate. Add to it, add to it some flavor. You know it's the spice you are adding, taste will be better. Thank You, main problem is that after the lunch we can understand more, and I'll not be there after the lunch, because I am not there. Thank you all

**Prof. (Dr.) Geeta Oberoi:** Can we have a big round of applause for Hon'ble Justice Mukhopadhaya, also before going to lunch all of you, if you can assemble at porch for group photograph.

## SESSION 4

**Prof. (Dr.) Geeta Oberoi:** Good afternoon, I was just thinking that post lunch it is so difficult, but it should not be that difficult, it's just a one hour and we'll make it little bit more interesting, we have 2 judges amongst you who have prepared a problem. They are going to actually be on different sides, they'll be presenting different sides, they'll be taking different roles today and then all of you take a paper and write down your decision and then we'll discuss about that decision, so sir are you ready? You have to come here. Times are changed due to e-committee, everyone has got laptop since year 2005, we cannot say that we'll give dictation that is exactly not what government of India wants, it wants that all of us should have our own laptop. The basic reason for giving laptop was this that we all work our self rather than relying on some court staff, they won't even understand, they don't even have that linguistic skills to understand what law means and what to type.

**Participant:** Mam, I would like to correct you, because I myself appointed in a e-committee and from last 4 years I am conducting the training courses to Judicial Officers, Judicial officers are not meant to write the judgement, first of all. We only provide 17 hours training, nothing more than this and this laptop is for searching and keeping update. I am just correcting you.

**Prof. (Dr.) Geeta Oberoi:** No no no no, slowly and slowly you have to be more into the system rather than saying this laptop is not a show piece

**Participant:** No it is not a show piece, you see majority of the people in the world.

**Prof. (Dr.) Geeta Oberoi:** I am not saying writing a judgement, but little 2 3 paragraphs you can definitely write, you won't say that I don't want to use laptop at all, this is for somebody else will use it. And then more and more computers have been given, one person, one person is given 8 computers, one officer. We are not saying that. Ya, it is not for staff, it is for judge himself. No that are desktops but laptops are given to Judicial Officers.

**Participant:** Mam, earlier it was 1 plus 4, now it is 2 plus 6, earlier it was 1 plus 4 but second phase is yet to be implemented, Government of India is provided 1465 Crores to the e-committee, i.e. next 4 years that will take next 4 years.

**Prof. (Dr.) Geeta Oberoi:** I'll handle you don't have to say. Now what are we, you just have to write on piece of paper, you are a judge you definitely write, what is the problem? I don't understand. No steno's we don't have and stenos are going to be, according to government of India they are going to be removed.

**Participant:** Excuse me mam, I think you have misunderstood my version. In fact I only corrected your view. We can write so many pages that is not an issue, you see we can write Hindi as well as English. The question is you said that Judicial Officer is supposed to write judgement on.

**Prof. (Dr.) Geeta Oberoi:** That is on different thing that was on different thing, I was answering some other judge, in between you are actually coming and saying some other totally different approach and path you have taken. Now can we have our session please? Sir so you had a argument with me only, my God I was not at all prepared to do arguments. Arguments were prepared by judges themselves, please yes, no here Sir, here both of you can, there ok.

**Participant (Narinder Kumar, PO):** This is the grace of His almighty, I have done nothing my name is there. Sir good afternoon. Sir this problem pertains to contract labour. There were 15 workers all were deep tube well pump operators, I am representing those workmen. The case of the workmen is that they were employed in 1990 and they are in service continuously without any break but the management Madhya Desh Power Development corporation ltd. and others has been doing is that they have been availing services of contractors, different contractors in employment of these workmen in 3 places M, P and D. There were two stages of litigation. The first was when a writ petition was filed before the Hon'ble High Court, the point therein was, actually the dispute which the workmen raised was that we should be regularized and from that dispute presently 3 issues have been framed, First issue is: 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, this is one issue. The other is, 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, this is the second question. The third is, assuming that the Contract is not genuine, whether the employees are entitled for automatic absorption? So in the First rank of litigation what happened a writ petition was filed by the workmen, the prayer was that a reference, that they should decide the dispute. The single judge decided in favour of workmen, the matter went to division bench, it was again decided in favour

of the workmen , then the matter went up to the Hon'ble Supreme Court. There they said no, the High Court was wrong, the High Court was wrong and they set aside the orders passed by the learned single judge and the Hon'ble Division Bench, they say the actually this issue that whether this contract was sham, camouflage, it is a matter of evidence to be recorded. It could not be decided in the writ petition, so they but they observed, the Hon'ble judges said that you move the appropriate authority, so this was ambiguous, what was the appropriate authority. Then whatever advice was given to my workmen was that you should move the assistant labour commissioner. Application was filed by assistant labour commissioner, the assistant labour commissioner did not make any reference and rejected the application, now again the matter came up before the Hon'ble High Court ke ok, whether this order passed by labour commissioner is justified or it needs to be set aside, that is how these issues have been framed although the matter according to the facts was before the Hon'ble High Court but here we are to decide whether Industrial Tribunal has got jurisdiction or not. But the management I say my version my contention for the workmen is that, appropriate authority, what the Hon'ble Supreme Court meant was under the Industrial Dispute Act, not under the Contract Labour (Regularization and abolition) Act because had there been only one issue ke whether this job is of perennial nature or temporary nature it could be decided by the government authority under by the supervisory advisory board but industrial dispute why Industrial Tribunal has got jurisdiction to decide this matter is because of the nature of the contract whether it is sham or not, it is to be decided by the Industrial Tribunal, so I contend in favour of the workmen that it is the Industrial Tribunal which has got the jurisdiction to decide this issue that the contract entered into by and between the employer and the contractor is a sham or not and the appropriate authority does not mean the advisory board, as regards the other issue that the employees appointed by the contractor would be held to be direct employees of the management, we have already observed that because it is a matter of evidence to be lacked. Let a reference be made to the Industrial Tribunal, the Industrial Tribunal would decide the assistant labour commissioner has wrongly decided it, wrongly rejected our contention and third is in case the reference is made and it is adjudicated by Industrial Tribunal, the answer would be that in case the contract is not found to be genuine, even then the court has got jurisdiction to stay the state government as already pointed out by the Hon'ble speakers. Thank you very much.

**Participant:** Respected members on dais and friends, I am representing management as you know my learned has already explained what is the fact I'll explain briefly the fact is that worker has

raised dispute before Ass. Labour Commissioner to refer their dispute to the Industrial Tribunal that they be declared workmen, employee of Madhya Desh Power Development Corporation Ltd. The Asst. Labour commissioner has said that no no benefit is going to be from this reference, therefore he is going to refer the dispute to the Industrial Tribunal. I support the view of the Asst. Labour Commissioner, he has rightly pointed out because earlier there was a litigation round in which similar issues were almost raised by the workmen. The matter went up to the Supreme Court, Hon'ble Supreme Court has held that the issue whether the contract labour is to be continued in a particular industry or not is the decision of the government, only the government can prohibit whether these worker is to be employed as contract labour or it has to be abolished, this is the main facts says on which entire thing has happened. Now what is the issue, issue is workmen were to be regularized or not?

As per section 4 of the Act it is the Advisory Board, state Advisory Board which decide, which frame the opinion in which industries the contract labour is to be engaged and in which it is not to be engaged, no doubt the worker are doing the work from long periods, but continuity for a long period is no ground for to abolish the contract labour. It has to see whether direct relation is there or not and it has to be decided by the government only. Whether the worker is to be continued as contract labour or not. Only the government has the power. In my view no purpose is served if they refer the dispute to the Industrial Tribunal because Industrial Tribunal cannot decide whether the contract labour in this particular industry is to be kept or not, prohibited or not. Hence again the issue will go against the workmen, there is not purpose to send it back.

**Prof. (Dr.) B T Kaul:** Let us go to the participants and ask them their views, now that you have heard both the views one is supporting the reference. They are writing it now? The judgement? ok. See the problem is you are too much obsessed by the judgements. Problem is that we want you to go out of those mindsets, let there be your opinion at least in Judicial Academy you can give your own opinion. Here you are not bound by precedents, here you can write something which you think maybe innovative, maybe something which is different from what the Supreme Court has said, so therefore it is better that you forget about precedents. Take support of precedents if you have to take support in your arguments or in your judgements but what is important is if you come with the same mindset and go back from here with the same mindset. At least in Delhi Judicial Academy I keep on telling them, I think they both have participated in number of programmes in

Delhi Judicial Academy. We always tell them that you have to leave your baggage outside the Academy, here we have to do something where we think we feel that this is the proper approach to the problem and how we should deal with this problem. Please do not refer to any of the judgements if you don't want to, but, if you want to refer only when it supports your contention or you want to say that this problem is different from the problem which was before the court in that case that is what we want.

**Prof. (Dr.) B T Kaul:** I think we can do one thing if, we can have your oral opinions, judgements we'll receive from you tomorrow, I think they can write at their place and give it to them. You already completed? Bohot achcha, bohot badiya. Oh my goodness, you must say then that no evidence is laid therefore we cannot. What we can do is the issues, let us discuss the issues here. Yes please any one from this side. Not this side. Ok he has already given. I think i can take up this issue and you can decide whether it is right or wrong. Right? You have done it, please let us have your opinion not reading, in two minutes you sum up what is your view. Not reading

**Participant:** Asst. Commissioner has no jurisdiction to deny reference. Contract is sham or bogus? It is purely jurisdiction of Industrial Tribunal. If there is no dispute contract is sham or bogus then Labour Commissioner has jurisdiction to deny reference otherwise not. There is a judgement of Gujarat High Court, *Gujarat Madhur Panchayat v. JAB*, industrial Tribunal has power to decide to decide contract is sham bogus or no. Above judgement labour Commissioner has no power to deny reference, refer reference contract is sham or bogus it is a matter of evidence, labour commissioner has no power to go in merit of case whether contract is sham or bogus. Contract is sham or bogus, it is Industrial dispute so it is only decided by Industrial Court not Labour Commissioner. Labour Commissioner has only conciliation power, it is dispute not resolved then dispute should be referred to the appropriate government. Appropriate court.

**Prof. (Dr.) B T Kaul:** I think we'll discuss it and you can look for yourself whether judgement is right or wrong. Let me go to this problem, the problem as i would understand it. Now when Supreme Court says that you have to go to the appropriate authority because that relate to are factual issues and therefore it is a question of evidence. Now which is the appropriate authority to which they show proceed. So far as Sec 4 of the Contract Labour Abolition Act is concerned, now that authority does not have the powers of judicial forum, now it cannot adjudicate, it can only give its opinion, that too when it is a question of abolition of contract labour right? Now here the

question was, i'll start from where Justice Chandru started *Standard Vacuum Co.* Case, now Standard Vacuum Co.'s case was a very landmark decision because at that time there was no legislation like Contract labour abolition Act 1970, so therefore, the question before the court was and that is the question which you should always consider. If suppose contract labour comes before you, you'll firstly see whether they can raise a dispute before you or not. Now in that case the dispute was raised by the regular employees for the abolition of the contract labour and that's a very important aspect I think justice Chandru will also dell upon it. Who can raise a dispute, is a dispute can be raised by the workers of the employer now but if the Gujarat standard vacuum co. case the case was raised by the Union of the workers for the abolition of the contract labour in that organization, the Court was only dealing with the question whether a dispute espouse by a trade union of workers for abolition of the contract labour relating to the dispute relating to terms and conditions of any person and they said yes this is an Industrial Dispute where the Industrial Tribunal can give the relief so therefore at that time the whole issue of regularization or abolition of contract labour was in the domain of the Labour Court and Industrial Tribunals but subsequently came this Act of 1970 where this power of Industrial Tribunal to give a relief of abolition of contract labour was taken away, it was reposed exclusively in the hands of appropriate government. Am I clear? Now in subsequent cases right up to SAIL, I am not going to all case, the courts held unanimously that Labour Court does not have power to grant relief of abolition of contract labour but now that was the most important caveat that's what I keep on telling them at my Delhi judicial Academy every time I say the powers you have are so enormous but you don't exercise those powers, power that labour Court industrial Tribunal have only the power if a dispute is raised and it is referred to the industrial Tribunal or labour Court and the case of the workers or so called Contract labour is that it is a Sham or camouflage then they can ask the parties to leave the evidence and come to a conclusion whether it is a genuine contract or it is a Sham or a camouflage. if they come to the conclusion this is a Sham and a camouflage then you have the jurisdiction adjudicate upon this dispute, but if you come to the conclusion that it is a genuine contract labour system your hands of appropriate authority for that is only the appropriate government. Its a very clear position on that case. So therefore, if the Supreme Court says you approach the appropriate authority because High Court does not have the power under extraordinary jurisdiction under 226, 227, to score whether it is sham or not because it is a question of evidence. Therefore you approach the appropriate authority, therefore the question in this problem

was stated all through in the judicial decisions up to steel authority of India is Industrial Tribunal or Labour Courts therefore appropriate authority for them is either conciliation failing which by adjudication and the remedy under Sec 4 is not the appropriate remedy because the state advisory board is not the quasi-Judicial or Judicial forum which can decide this question. Therefore that is my view and perhaps that is the appropriate view to be taken in this matter and if on reference Labour Court comes to the conclusion yes, what Justice Mukhopadhaya was saying that this is unfair labour practice and therefore it is not a genuine contract labour system, you have all the jurisdiction to deal with this matter and go to the question of granting appropriate relief to the extent of regularization. But if you come to the conclusion that it is a genuine contract labour system you have to say that the appropriate remedy for them is to invoke the powers of the appropriate government under section 10 of the Contract Labour Abolition Act. Any questions on this?

**Mrs. Jane Cox:** Also it is a sham and bogus claim then the contract worker also so called contract workmen themselves can raise the dispute.

**Prof. (Dr.) BT Kaul:** You see it was never the question in Steel Authority or in Air India that these workers never said it was a sham contract and you have to make a distinction. In those cases question was what happens where sec 10 notification is issued, there is an automatic link build between the principal employer and contract labour. Air India said yes but Steel Authority said no, now those were not the case which we are discussing now. What we are discussing is the workers are saying that we are actually the employees of the principal employer, and these people have created a paper, silicon phraseology draped in the, now arrangement is a silken phraseology but it is a sham contract and we are actually the employees of the principal employer. So actually that is where we brought in the principle of lifting of the veil. The corporate law principle brought in by the Industrial Jurisprudence by the Supreme Court in number of judgements include GB Pant university's case where they said that on lifting the veil if we find that actually it is the principal employer who is holding due control and supervision, are you understanding my point or not? Now that is where you have to understand the distinction between this problem and the problem in Air India and Steel authority of India and that is where the basic, if you have these position clear in your mind I think we have enough powers and if you exercise this power and go into the question, take evidence on the question whether I will show you most of the case of the Public

sector undertakings will be sham contracts and you'll be able to lift the veil , hold them, that will be a revolution in this country, I think if you decide you can be the Torch bearers of that revolution of this country, only question is that you decide not to exercise your powers, that is a different story . That's why we are here, that why we in Delhi Judicial Academy and that is the promise these people have done to me there, that they'll exercise all their powers. I always say the first question you must keep in mind is the federal court decision of 1949, AIR 1949 Federal Court page 1, *Western India Automobile Association* and that is where the court said Labour Courts exercise extra ordinary jurisdiction unlike civil courts, labour Courts can rewrite the contract of employment. It is in that case the federal court held the labour court has the power which Civil Court does not have, order reinstatement, back-wages, continuity of service, otherwise under the specific reliefs act, personal contracts are not specifically enforceable. There are three exceptions to that principal one is Art 3(11), second is statutory body and third is the Industrial Disputes Act or similar legislations made by the State legislatures. Now if you understand that background of the powers you have I think you are the luckiest lot, the best of the positions you hold amongst all the judiciary because you deal with the poorest of the poor, you deal with the person for whom the constitution of India was drafted but who was ignored by all other functionaries in this system so therefore you are having direct link with what Gandhi Ji says when you decide a case you must keep the last man and your focus and the last man is the poor man of this country and the poor man of this country is the worker who is not a partner in sharing of the profits but partner in the production process of this country. Therefore your job is one of the best jobs that you are performing that's why all of us justice Chandru, my friends from the bar and of course Michael Dias will come here and he'll give the prospective. I wish he had been in one of the session and I always have a fight with him because he will tell you employers vision only, I'll give you the both versions, I say employees make a lot of profit share it with people who help you to contribute, who help you to become wealthier that's why economic growth which has to be inclusive not exclusive of the poor people of this country. I just wanted also to bring one very beautiful case justice Krishna Iyer in Gujarat Steel tubes case, first job of the industrial judge is, I don't have the copy of the judgment I wish I had that with me, he says the first job of the industrial adjudicator is conciliation first adjudication later but not conciliation with trade union, conciliation with the person who is before you and ensure that whatever settlement is arrived at it is just, fair and reasonable. If you do that I think many of the cases in your court of course the cases are

decreasing. I just wanted to make a comment on that transfer issue you see understand that 2 a was created as an exception to the industrial disputes Act, 2 a brings it in the fold of industrial dispute individual disputes but what are not cases of non-employment are still the individual disputes. Transfer is an individual dispute unless espoused by the trade union, therefore how difficult it is for a person in the industrial field to get its dispute espoused but then you have the remedy available to you. When he brings in case of non-employment you can bring all those principles that justice Mukhopadhaya was telling you and therefore you can do justice there and what you cannot do directly you are doing it indirectly. That is permissible as far as Industrial law is concerned. you can go into the question, he is not saying that I have not been thrown out of the employment he is only saying the reasons of termination are oblique, my issues of Transfer has not been decided by them, my representations are pending they have thrown me out of the job and that is sufficient ground for doing justice in the matter. Judge anybody can do but justice must be done. That's why we have a program called from Judging to Justicing. Role of a judge is not to judge, role of a judge is to do justice. And Justice in accordance to the constitutional law, constitutional values and what are the constitutional values, Directive Principles of State Policy and fundamental rights those have to be enforced by you and you are in the best position to enforce those fundamental rights of the poorest sections of the country.

**Participant:** Sir we are a teeth less tiger as we obviously cannot execute or enforce our award.

**Prof. (Dr.) BT Kaul:** Execution will come tomorrow, but I think you make the award, you do your job, and execution will take later. Don't be afraid of second stage, do your stage that is most important part of it, execution will be taken care of. That Justice Chandru is taking care of. Correlating the three sessions. I think we have moved very aptly, i think first we should do what is domestic enquiry, what is the managers prerogatives, now like the state ha like the state has the power to disappears the power to discipline, the deviants by punishing them under the Indian Penal Code or other other relevant laws, similarly employer has his own world, and that world must be disciplined world, so therefore he has his own disciplinary jurisdiction like the state has its own dispute settlement jurisdiction but punishing the subject is a sovereign function of a state. so therefore imposing penal consequences, only state can do, but an employer has the power to the extent of dismissing the employee for a misconduct which is a serious misconduct. It goes from dismissal to censure, some of the penalties we talk about as minor penalties, some of the penalties

we talk about major penalties and they are relatable to the seriousness of misconduct, now earlier as all of you know during the laissez faire era empire had the unbridled power of hire and fire and he could hire and fire an employee without cause, without passing an order without holding a departmental inquiry but we have made great inroads on this hire and fire theory of the employer through the constitutional provisions, through the statutory provisions, through common law, so therefore we are living in a realm which is not guided by the theory of hire and fire but before I take up all these areas I wanted to talk to you what Justice Mukhopadhaya very aptly brought in the morning in this session, which you must not forget because I think Supreme Court has misled in many of its judgements by not understanding the jurisprudence that Justice Mukhopadhaya wanted to do in the morning, am happy that at least I heard somebody talking about that aspect of the matter. You see we have core civil servants who are governed by 3(11), we have defense personnel who are not getting the protection of 3(11), they are protected under their respective legislations whatever they maybe. Then we have public sector undertakings which are stated within the meaning of Art 12 of course there has been lot of disinvestment in this areas and they are gone out of that protection which was earlier was with their protection. Then we have an area where we have public employment and private employment together. That's a very important area which I want to talk to you, Industry, definition under the Industrial Disputes Act is very wide, it does not cover only private sector, It covers public sector, it covers government sector, also all cases that you will see from DN Banerjee going up to Jaiveersingh and beyond. Most of them have been related to government departments or local bodies. Hospital Mazdoor Sabha was a government hospital, DN Banerjee was a case relating to the municipalities, Baroda Municipality, Nagpur Municipality, all these cases were the cases of local bodies. Now these people we have the choice of forum, they could go to the High Court, they could come by the Industrial Disputes Act way, in the matter of Disciplinary proceedings. Similarly Sabdarjung Hospital, you must have all read that judgement, six judge bench which led the Supreme Court to constitute a 7 judge bench in *Bangalore Water Supply* case which is now to be reviewed by a nine judge bench in *Jaiveer Singh's* case,. Now please understand one basic fact which I think Supreme Court over the period of time have not been able to appreciate. When we talk about those who are covered by 3(11), like suppose Sabdarjung Hospital is a government hospital. It is a part of health Department of the government of India. So therefore they have 3(11) protection also, they have Industrial Disputes Act protection also. Especially those who are covered by the definition of workmen. Now look at

this person who was this person Kuldeep Singh? Kuldeep Singh was a driver or he was a class 4 employee working in Sabdarjung Hospital. So Class 4 employee who was a civil servant but decided to go the Industrial Disputes Act way. So therefore he had a choice of forum. If he had gone the High Court way then High Court exercises only supervisory functions but if he goes by the Industrial Disputes Act way, Labour Court exercises 11(a) powers. After 1971, this distinction has become most important and this is where all the Supreme Court judgements after *Firestone Tyre Rubber Co.* have faulted when we talked about the government or public sector undertakings. Now I just want to say powers of the Labour Court are much wider in service matters especially dismissal, discharge than the powers of the High Court or Supreme Court while exercising Advisory or Supervisory jurisdiction in relation to civil servants or those public sector undertakings which are states within the meaning of Art 12 of the Constitution. Am I clear to you on that part or not? If I go the ID Act way then I, my service matter relating to dismissal discharge cannot be equated with the powers of High Court, if I have gone through the powers of the High Court way or what is now being exercised by the Central administrative Tribunal or State administrative Tribunals, now that distinction has been wrongly I would say overlooked by the Supreme Court and this is why when I came last year we had justice Kurian Joseph here. When I brought this distinction to his notice he says I did not know it before I am glad that I have understood this distinction these lawyers would mislead us. This is what Justice Radha krishnan had told me when we had one of the session here in National judicial Academy I said so this is where the distinction Supreme Court is not appreciating today because Firestone tire company case has not been overruled by the Supreme Court that remains the law of the country. That is the proper enunciation of the position that the labour Courts exercise under 11 A. now there is a distinction between 33 and 11 A, when you move before labour Court under 33 when the matter is pending then the position prior to 11 A applies and that is the position that High Court or Supreme Court exercise over civil servants in the matter of jurisdiction over their dismissal and discharge, this is very important because under 33 when they exercise power you cannot re-appreciate the evidence, you cannot set aside or reduce the punishment unless it shakes the conscience of the judge but 11 A if you can do both. I will take up that tomorrow when I come to that topic tomorrow I'll take up that and that's a very important aspect that I wanted to discuss, but let me come and tell you these basic premises that workmen can be in a government department, Railways, hospitals, Civil Aviation ministry, surface transport, telecommunication

department, lot of cases that have gone to the supreme court you will see that lot of cases are there, so the question is that, when you're dealing with the government servant you are dealing with the public sector employee or dealing with private sector, workmen can be anybody therefore you cannot make a distinction on the basis of employer. it can be an industrial dispute, it can be espoused by the union, it can be dismissal discharge, retrenchment all those issues are wide open in all these areas that is why in *Bangalore water supply*, Supreme Court had to say activities which are sovereign strictly excluded from the definition of industry activities which are welfare activities are covered by the definition of industry provided they fulfill the triple test and what is the test whether those activities can be undertaken by private individual or not is the litmus test to decide whether the activity is a sovereign function or it is a welfare function of the state. so I just wanted to keep this basic thing because when we talk about dismissal discharge we will be talking about keeping in view most of this background material that I gave it to you please have a look at it because you will see some of the cases like *ECIL v. Karunakaran*, is applicable to the private sector, is applicable to the public sector, is applicable to the government sector. *Vishaka* is a case which is applicable to the private sector, which is applicable to the government sector, is applicable to the public sector undertakings. So therefore when I talk about Labour Law principles of domestic enquiry, principles of natural justice, I talk them in terms of wider spectrum not confined to the private sector employees only. So therefore that is where my whole process will start. now you must all be aware that there is a it is very impossible for an employer to define with precision what are the misconduct, misconduct can be illustrative they cannot always be exhaustive, it's very difficult because they may vary someone is establishment to other establishment from one kind of work to another kind of work but you will see whether you talk about civil service people are you talking about industrial employment standing orders it says misconduct includes, generally speaking it does not say misconduct means, misconduct is very difficult to decide but it has a very important connotation it must have causal relationship to the discipline in the industrial establishment. it should not have a casual relationship, that is why we make a distinction between causal and casual relationship. it cannot be and again there is a judgement of the supreme court which all of you should look at this is very very important judgement which I always refer to is *M Paul Anthony vs. Bharat Gold mines*, very basic case on what is a misconduct in which Supreme Court has reviewed all its earlier decisions and has laid on certain basic points, this is 1999 3 SSC 679. now it says that an employee is not a bonded labour, so therefore when a person

when he goes out of the establishment and he is sitting with his family members and if he gives a slap to his son you can't say give slap your son all he has a tiff with the labour it can be a subject matter of a disciplinary enquiry. Are you following me or not? the point that I'm trying to make is misconduct is relatable to this conduct which have a bearing upon discipline in the industrial establishment and therefore if a person is alleged to have conducted a misconduct the law accepts and admits that the employer is a right person to take a decision whether to proceed against him departmentally or not and therefore we divide. First we say preliminary enquiry, an employer may hold a preliminary enquiry to satisfy himself prima facie. Whether there is a case made up for proceeding against departmentally so therefore preliminary enquiry is purely at the discretion of the disciplinary authority and therefore principles of natural justice are not applicable. but once the management decides that there is a prima facie case made out against the employee, the first thing is what he has to prepare is called a charge sheet. Now the charge sheet must be clear, unambiguous, not vague, it must state exactly what is the allegation against him, what is the place, what is the time, in whose presence and who are the people, that's why we say a charge sheet generally must be accompanied by the list of the witnesses and the document on which the management relies. Am I clear to you? And once a charge sheet is framed, if you talk about the Civil servants and the charge sheet is issued Janakiraman's case comes into operation. so we have that seal cover procedure and all that I need not to go into that if a person is to be considered for promotion then the seal cover procedure begins but I am not on that but just to say he must be given a reasonable time to furnish his explanation. and if you want to see the best part of the judgement on the subject there is a case called *DDA vs. HC Khorana*, 1993 3 SCC 196, now I will tell you why it is important, now DDA is not a government organization, it is a statutory body so therefore article 3 (11) is not applicable but you can adopt *mutatis mutandis*, you can adopt those rules, now this judgement is very beautiful from the point it says what is the starting point of a disciplinary proceedings. And it also explains you what is the purpose of a charge sheet and what is the purpose of seeking an explanation from the employee. Now suppose the management who has made up its mind that there is a prima facie case, gets an explanation and is satisfied with explanation, it can drop the proceedings. So therefore disciplinary proceedings will come to an end. Am I clear to you or not? but suppose it accepts partly and partly does not accept then it can proceed with those acquisitions on which it is not satisfied but partly it remains with respect to those charges it is closed. You read this judgement, this judgement is very beautiful from that

point of view but if it is not satisfied and generally the management is not satisfied so therefore it is a case set for holding a departmental enquiry. Appointing authority with respect to the Civil servants is the disciplinary authority but no disciplinary authority can be below the appointing authority not that is a principle that we follow. That's a very first clause of article 3(11) when I'm talking about civil servants only. Not there for the 2nd. That I just want to make is employee is within has right before giving an explanation also to see prima facie have a copy of documents or Inspect documents so that she is able to prepare his defense. Now these are important issues because you'll find in civil servants law at least lot of cases on this issue. now having gone through the explanation and not satisfied with explanation given by the employee or the employees does not care to reply within specified time or extended time then the point is that employer can Resort to disciplinary enquiry hold a departmental enquiry. now departmental enquiry you will see that generally management must hold a departmental enquiry but there are three exceptions to article 3(11), second proviso to article 3(11) which has been also adopted by the management in there industrial employment standing orders that is where 3 cases you can dispense with the departmental enquiry which is one where a person has been convicted by a Criminal Court, second is where case of where it is not practical to hold departmental enquiry, third is national security I am not going to that aspect of the matter but there are exceptions and Tulsiram Patel's is the judgement on civil service law another judgement I will give you the judgement in due course of time but that is on the same line so far as the private employment is concerned that there are situations where the employer maybe within his right not to hold departmental enquiry dispense with the holding of the departmental enquiry but in order to have a clear case of bonafide, the management is generally advised to hold departmental enquiry and appoint an enquiry officer who must be an impartial person and therefore once an enquiry officer is appointed the powers of an enquiry officer has been laid down as quasi-judicial powers. it's a fact finding body who has to give finding on the acquisitions against the employee but following the principles of *Audi alteram paradim*, no person shall be condemned and heard without giving an opportunity to defend himself and the opportunity must be a reasonable opportunity to defend, today for the person must be free from bias, opportunity must be a reasonable opportunity to defend himself and one who alleges must prove is the basic principle. If the management alleges therefore management must first lead the evidence with the right of the worker to cross examine, followed

by Defense of the workmen and right of the management to cross examine the evidence produced by. How long can I continue?

**Prof. (Dr.) Geeta Oberoi:** 10 minutes

**Prof. (Dr.) BT Kaul:** now it brings to the most important issues and that's very important for all of us to know, some misconduct may also be crimes like suppose first charge sheet is served upon, I tell the management if I reply to your charge sheet it will prejudice my defense in the court or what I want is that principles of natural justice dictate that you should withhold the departmental enquiry till the decisions of the criminal court. there are number of judgement of the supreme court so I can in that case approach to court and say please with hold the departmental enquiry pending the trial because it will prejudice the case in the trial court, or it may prejudice my case before the enquiry officer. But then you must understand to very important facets departmental enquiry is not a criminal trial because any punishment that the employer will impose is maximum civil consequences, stigma, loss of employment and therefore loss of value but he cannot punish the way the state punishes. so therefore first question that comes is what is the Law when there is simultaneous proceeding sand founded on the same facts, like suppose the people who were involved in 2G were also involved in the departmental, they could be preceded departmentally it was a criminal offence by the state and the conspiracy to cause loss to the management so therefore for both found it on the same facts. criminal breach of Trust, criminal misappropriation whatever you like to call it, criminal conspiracy all those cases so therefore we have a case, one of the cases that I wanted to draw you attention was Khushambar Dubey, I think many must of you dealt with this case which is very important, it is 1988 4 SCC 319, cases you'll get everywhere. So therefore the question Khushambar Dubey has said well the person must is within his right to go to the court and get a stay to departmental inquiry if grounded on same facts, and involves complicated question of law and facts but i was on something else. In criminal Trial you have to prove guilt to the hilt beyond reasonable doubt. Second confession before the police officer is not admissible as evidence in criminal trial, those principles do not apply in departmental inquiry it is civil nature, now these are basic principles, that is why you must have seen a number of cases, even when a person is acquitted by the criminal court, Supreme Court has held that the person can be departmentally proceeded because the degree of proof in criminal trial is high whereas degree of proof in departmental enquiry is less. Rules of admissibility of evidence

are different, therefore you must keep in mind. Second point of departmental enquiry must be very clear. Now you have a rule against double Jeopardy so far as article 20 sub clause 2, but there is a judgement of the Supreme Court which says that you cannot *ex post facto* create a misconduct and say that you have committed misconduct. you see what can Judges do, judges can do this much, you bring in the principle rule against double Jeopardy through judicial decisions because it is very fair that you should not be able to, management should not have the opportunity to put the clock back and say now we hold you guilty for this kind of thing, you have a very specific judgement, *A Kalara v. Project and Equipment Corp. Ltd.* 1984 3 SCC 316, and one more which I am very fond of referring that is, every act or omission on part of the employee is not a misconduct, some people may be inefficient and they may be because of their inefficiency not very good at their work they may be denied promotion but they cannot be punished for misconduct. A police officer with the best office judgement use his powers to meet the situation of law and order and is not able to come up to the best is expected of a Police Officer but he has used best of his judgement, but he cannot be proceeded departmentally, his act cannot be construed as a misconduct, there is a case *Union of India vs J Ahmed*, every act of an employee or a Civil Servant cannot be construed as a case of a misconduct, 1979 2 SCC 286, you must read very beautiful judgement, relating to Civil Servant who was in command but was not able to in spite of best of his judgement. That's why you will see that Income Tax Commissioner who use best of the judgement but there are cases that they have been proceeded departmentally, so therefore for you have to make a distinction between malafide decision and inefficient decision. Those are cases you know where we need to look at, but I just want to quickly come to the second stage which I just want to take up in the position is, one who alleges must prove and therefore question of evidence who first leads evidence is very important. Second is the important question of legal representation. Now whether an employee has the right to ask for representation by lawyer. I think there are number of judgements I need not to dwell on this point for long , but most of the cases I would like to talk about at this stage is on case which is given in reading material, that , *Board of Trustees, Dilip Kumar's Case*, I think the latest of the cases I think is *Bharat Petroleum Corp.*, it is 1999 1 SCC 626, its only when the presenting officer is legally trained mind that the courts have held that they can be entitled to legal representation but over the period of time this principle is also to an extent diluted. Even *Bombay Port Trust, Dilip Kumar's case* says that. That rule was changed in that case, later that was allowed. Now I just want to quickly say that the enquiry officer must base

his findings on the basis of material on record and he has only one duty and he has no duty to recommend punishment and it is not within his powers to recommend punishment. He has to give finding on whether the guilt is proved or is not proved. Now when he submits his report, you have to see *ECIL v. Karunakaran* and earlier to that we had Ramzan Khan's case which is applicable to all the sectors of employment because second opportunity under the Art. 3(11) was removed but then the Supreme Court bought it from the back door and thought it as the part of first opportunity itself once the enquiry officer gives his finding, if they are adverse, then he must supply a copy of the enquiry officer report and also suppose he says what are the punishments proposed then he can make a representation on that and that must be made available to the workmen and the workmen has a right to make representation only then thereafter the management will take a decision, what should be the punishment and what should be the quantum of punishment. Lastly, once the enquiry officer's report is submitted the disciplinary authority is within his power to accept or not to accept it. Suppose it's a case of no finding against the employee, the management i.e. disciplinary authority on re appreciating the enquiry material come to a diff. conclusion but then he has to give reasons as to why the findings of the enquiry officer, only then the process is in accordance to principles of natural justice and as soon as management makes a decision, issues a penalty and if there is a provision of an appeal, appeal can be filed and on that basis the appellate authority can take a decision but beyond that we will take up tomorrow. Thank you very much.

**Prof. (Dr.) Geeta Oberoi:** Any questions

**Justice Chandru:** The law relating to 11 A is made very cumbersome. Now 11 A has got 3 stages. First is the preliminary inquiry and if the inquiry is set aside and the employer seeks opportunity then record fresh evidence. Then otherwise on the fresh evidence you decide the matter. If you hold that inquiry is fair and proper then no evidence is possible, no fresh material can be called for, in which case you have to give the finding whether the employer's finding is perverse or not. You can't re-appreciate the evidence, now after 11 A you can re-appreciate the evidence and give a diff. finding in the light of *Firestone* case, it is like a first appeal now assuming you find the findings are all correct, charges are proved, you got power to enter into diff. punishment, it can be reinstatement or it can be compensation in lieu. Now what happens is the labour courts are asked to make preliminary issue on the inquiry, now most of the cases where Trade unions representatives or worker themselves come to argue like a pre bargaining labour court tells them

you make an endorsement that you are not taking the enquiry I will consider relief under 11 A, so the short procedure, the unwittingly the labour leaders saying, we are not taking the enquiry we are only arguing under 11A, now some orders are passed, matter comes to High Court. High Court now finds that the enquiry is not on fact so the lawyer who appears in the High Court cannot argue on the validity of the enquiry because you bind yourself by not taking the enquiry and more often Madras High Court has struck down those awards because once the employer's evidence is accepted then it is very difficult for you to decide on the question of penalty. Suppose charges are proved, charges are very serious, then where is the question of 11A. I know some Judges, there is a judge of Labour Court who is nick named as 50 50, every case he will only order reinstatement of 50% only, every case as a matter of routine he is called as a 50 50 judge. Now this is one factor. Why Labour Courts are asking workers not to attack, if you write a preliminary award that is not considered as a norm and more often when preliminary awards are returned it becomes the subject matter of challenge to the High Court, though in *Cooper Engineering* case which is included that Supreme Court said you should not entertain writ petition under article 226 at the stage of preliminary inquiry but many judges who are sitting in the writ admission roaster they are not aware so they will admit it. By the time the case is made the records come from labour court, it takes long years 2 to 3 years for the matter to go back, now this is one procedure. Second procedure is that on a re-appreciation of the evidence you can come to different conclusions. Now how many Labour Courts are willing to re-appreciate the evidence and take a diff. Normally they do paraphrasing of the evidence found on enquiry and says it is appreciated by the court and therefore I am not taking a different view or more often the lawyers argue, if two views are possible you can't take your view. That is not available in the appellate court but then nevertheless you follow. The third question is that what is the penalty proportionality of the. Now you know the background of 11A because of the ILO norms 19th Resolution where, punishment should have the approval of the third party neutral arbitrator. Now you are a neutral 3rd party arbitrator so the penalty issue is before you but what happens is there are enough case laws on every subject. Suppose the worker uses bad language, there are judgements to say that purity of language is not the term of contract, you can't expect a worker coming from gutter to speak a refined language, there are judgements to say that no no language also matters, so you have conducted cases variety of cases, 3 Rs. or 30 Rs. is immaterial, no relief is possible. You take driver case of rash and negligent drive, you take assault, you take any issue for that matter there are judgements of both sides. then what to follow

so in these cases really what happens is that the Labour Court are also computing the various precedents, so as Justice Mukhopadhaya said First decide the facts, decide your issue first then apply all these precedents, but before you can't have the precedent mind and apply the facts. There are cases on cases where we find it very difficult because ultimately when you talk of proportionality... now suppose a bus conductor takes one rupee and he has got 15 year service then the Court said no there are enough judgement, last month there is a judgment that you can't show mercy on these people, so where you go from here..therefore the strongest exercise that one to do is to go into the facts and then apply yourself, there are many instances where how we got in the sitting in the High Court, how we got over the Supreme Court judgements, take the case of bus conductor. Now in our state there are shortage of bus conductors, there are shortage of drivers, so what the management do, it's a government corporation pending the writ petition, in order to avoid payment under 17 B where last drawn pay will have to wait. Most of the management will say come back to work. Now that takes 5 years or 7 years. Now after 7 years when the matter comes the management lawyer sight some UP Transport Corp. 3 Rs or 30 Rs, no sympathy, then what you have to do sitting in the High Court, so in those cases what we do, we apply the family law, if suppose somebody husband alleges cruelty or a wife alleges cruelty and then they live together, you can't raise such issue like desertation, the ground goes, so what we do is in order to avoid Sec 17 B, you reinstate him which means you yourself don't consider it such a serious offence, forget Supreme Court but you want conductors and you don't have prime conductors, you got him back therefore you repose that man therefore virtually you condone the delay, you condone the allegation, therefore we will not now take that stand that these judgements will apply to this case. There are so many times you'll have to exercise our ingenuity our concern for an ordinary person, we'll have to apply some new principles in these matters and you'll have to be innovative. So it's a laborious job of a three stage inquiry preliminary issue, then re-appreciation then disproportionality or proportionality, it's a three stage procedure. You have to do that exercise whether you like it or not. Secondly have some concern, these judgements are there, definitely there judgements on judgements are there, and therefore you apply to the fact situation. Thirdly if possible you must innovate method by which you are not completely precedent oriented, you should also think of the fact situation, ultimately when the matter comes to court, it may take a different turn, ultimately there are judges on judges, if you see the entire Labour Jurisprudence from 1950 till now last 65 years, there has always been a parallel current, there are judgements of

this side and there are judgements on this side also. You can't be searching on which judgement applies to us, therefore having in mind applying the fact situation and also the social concern and decide the matter. Don't think of the extra work load, extra workload is always there so long as there is unique work for that matter. Thank You

**Participant:** I would like to draw your attention, our High Court and Supreme Court in misappropriation cases or theft cases, HC and SC has stated that no mercy to be given to worker when misappropriation is there looking to his past record, no mercy will be given to him, that type of judgement have been already and suppose we help the worker then the matter will go higher court, higher court stays the matter or quash the matter.

**Mr. Sanjay Singhvi:** I have one case where I wanted to tell before we complete, there was a worker in the Kanpur Corp... He always write a petition to the managing director about his problems and once he wrote a letter saying if you don't concede demand I'll jump from the headquarters and commit suicide. Then the panicked corp. does a police complain and police books him under attempt to commit suicide and dismiss him also and it comes to Labour Court, Labour Court also says you are wanting to commit an offence and I can't agree with you therefore no reinstatement. The matter comes then we don't know what to do, its reversing the Labour court order is difficult so at the times it occurs that in 1994 there was a judgement by *P Rathiram v. State of Tamil Nadu*, now the Supreme Court shut down that attempt to commit suicide can't be a reference, within two years Supreme Court reversed in Gian Kaur's case that no nono it is not for us to decide, it is for the parliament to decide and therefore the right to live does not include right to die also. So this particular case came in between Rathiram and the gaur's case. So I said on the day when he made that statement it was not an offence as per the Supreme Court, we compared the date also. So I wrote an order by saying between these two period since Supreme Court declared that provision is unconstitutional there is no question of any offence therefore there is no charge made off. Notwithstanding the facts absolutely Supreme Court took a different view but worker was right in saying that I will commit a suicide and there is no offence at all and therefore we'll have to find some matters like this.

**Participant:** I just wanted to give in that sense for misappropriation etc., I accept that there is a quote from Annapelle France that I would like to give you, "the poor have to labour in the face of the majestic equality of the law which forbids the rich as well as the poor to sleep under the bridges,

to beg in the streets and to steal bread", the rich are not going anywhere and when the rich steal 3000 crores nobody does anything, but 30 Rs or 3000 Rs, he must be dismissed. That is of conductor.

**Justice Chandru:** Ultimately Justice Potter Stewart of US Supreme Court said, off late our judgements have become like railroad tickets, good for the day and good for the trip only. So that is all about the precedent.

**Prof. (Dr.) Geeta Oberoi:** Okay can we have a big round of applause for Jane Cox and Sanjay Singhvi who would be leaving us today, so we meet tomorrow again and you can go and take rest because I was thinking because there is a master trainer from the supreme court you can have at least e- committee phase 1 what developments have taken place. There is a session in the Library, library itself there is a computer lab at least you can exchange with each other, each state have made big leap actually, big progress you can share with each other what progress you have made in that area. With this we meet tomorrow 9 o' clock. Thank you so much

**DAY 2**  
**SESSION 5**

**Prof. (Dr.) BT Kaul:** Area that we are going to traverse today is a very fascinating area. In fact you must see the co-relation between retrenchment, lay off and closure. In fact we start with that when a person starts and activity and activities in industry and in that industry he is employed as a workmen in the meaning of Sec 2(s), there are certain situations where an employer may not be able to provide employment to his workers on account of various reasons which are called reasons beyond his control and therefore he can be laying off his employees, but it's very important to understand that lay off is not a right under the Industrial Disputes Act, though there are provisions in Chapter V A which was introduced not in the original Act but introduced in the form of an amendment then Chapter VA was introduced in 1953. I'll come to the background and how it was introduced and the statement object of the reasons but Lay off under the ID Act is not a right conferred upon the management, it only provides for situations which can be described as lay-off, it provides for compensation if the management decides at the contract of employment or Standing Orders which are certified Standing orders to make a provision for declaring a lay-off and if you see there is a judgement of the Supreme Court, very very clearly talking about this position and that position has been, the Workmen of the Firestone tyre and Rubber Co. not the one we talked about in 11 A but this is 1976 3 SCC 819, and I just want to draw your attention to that very aspect of the matter which the Supreme Court dealt with and very clearly stated that, that it is strange to find. no section in Chapter V in express language or necessary implication confers any such power even on the management of the industrial establishment to the relevant provisions are applicable to the lay- off of workmen, this indicates that there is neither a temporary discharge of the workmen nor a temporary suspension of the contract under the general law and employer may discharge an employee as temporarily or permanently but that cannot be without adequate notice. Mere refusal or inability to give employment to the workmen when he reports to duty on one of the reasons mentioned in Sec 2 kkk is not a temporary discharge of the workmen. Such a power is to be found out from the terms of the contract or the standing orders governing the establishment, now that is very clear that there is no provision which empowers like we say employer's right to retrench, now right to retrench is a common law right, right to lock- out is a common law right, right to close is a common law right, which has now acquired the status of the fundamental right or a legal right but lay off is not a common law right, nor is it a statutory right, it is a right which must exist either

under contract of employment or under the standing orders. therefore it is always better for the management to make a provision in the standing orders to say that they shall have a right to declare lay-off in situations of Sec. 2 kkk of the ID Act and the compensation payable shall be as provided under Sec 25 C and it shall not be payable in situations provided under 25 E, now these are very very important things that we must know. The point that I am trying to make is that where a person employer is faced with the situation, we'll go to section 2 kkk we'll see that all these situations are beyond the control of an employer and that's one of the important distinction that we make between lay off and lock out. Now lock out is also situation refusal, inability failure of the employer to provide employment but reasons are within the control of employer. It's the act what we call as reappraisal or it is a tactics in Industrial action by the employer to make the workers to see his point of view like suppose the workers resort to strike the worker can declare lock out, any lockout which follows illegal strike is always legal and the lock out which follows a legal strike is always illegal. Now these are basic principles that I think we by now know all together therefore one of the important distinctions between lock out and lay off is they both happen in a running industry but what is the difference between the two is that in one case the reasons can be within the control of the employer but in case of lay off these are all the case where the employer has a situation in his organization which are beyond his control. If you look at Sec. 2 kkk it is very clear that every word there is very important, it says failure, refusal, or inability of an employer, on the account of shortage of coal, now this is a fact which is beyond the control of employer, power again is beyond the control of employer, raw material again is beyond the control of employer, accumulation of stock is again beyond the control of employer, failure of machinery is again a situation beyond the control of employer, or natural calamity, or due to any other connected reason, that is why reasons has to be read *Jus dem generis* with the words preceding it, therefore it has to be one of the reasons which is beyond the control of the employer. To give employment to a workman whose name is on the muster rolls of his industrial establishment and who has not been retrenched. Now one very important thing that you'll notice is in this chapter VA which was introduced in 1953 was introduced because it was felt necessary to have uniformity of law on retrenchment, compensation and also on the layoff situations. This was when the 2nd world war came to an end the textile industry in Bombay had accumulation of stocks because now there was no demand of the textile because the war had come to an end and many industries suffered a lot of problem some had to be closed, some of them had to be laid off and some industries it had to be retrenched, so a need felt

to have a uniformity of the law and Chapter VA starts with Sec 25 A and Sec 25 A says the provision of 25 A shall be applicable to, Sections 25C to 25E inclusive not not F, shall not apply to industrial establishments to which Chapter VB applies, to industrial establishments in which less than fifty employees, so therefore lay off provisions applicable to factories, plantation, mines which employ 50 or more workmen any day in the proceeding 12 calendar months and therefore not applicable to Establishments below 50 employees. Sec 25 applies to all Industrial Establishments and in 76 we find a distinction being made between those employing first 300 then reduced to 100, 100 or more workmen where we have prior permission to be taken in case of lay off, retrenchment and closure. That's why I said this topic has to be closely understood. So first situation before an employer came, retrench his employees or closes establishment the one stage that he can first adopt is lay- off the employees and wait for the situation to improve and if he has power under the Standing orders to lay off the employees and says compensation payable shall be 25 C that is where there is a via media found by the legislature that the employer has to pay salary but he has no control over the reasons why the layoff situation, workmen must not suffer any loss when he is ready to work but there is a situation which is beyond the control of employer. So a humane provision which says that 50 % of the wages plus dearness allowance minus the days, intervening holidays coming in between, so you have compensation provision that is 50% of the dearness allowance minus the intervening holidays which can go up to 45 days. Now if the Standing Order says that there is no compensation payable after 45 days there can be a provision to that effect but if there is no then he'll have to go on paying the layoff compensation. If suppose 45 days the situation does not improve then he can retrench the employees and the layoff compensation can be adjusted towards the retrenchment compensation payable and even after retrenching the employee if the situation does not improve he can declare a closure. That is how you have to look at these provisions, there is a systematic way of looking at these provisions. An employer where he is forced to close the establishment before he is forced to close the establishment he can resort to a situation called lay off situation where he can wait for some to see the situation improves, if the situation improves he is able to give back employment to the employees, if situation does not improve he can resort to retrenchment and if still the situation does not improve the situation of closure is warranted, therefore he can declare a closure in his establishment. Lay off situation is a commonality between lock-out, lay off and retrenchment is a situation when there is a continued employer employee relationship, where there is a continuing

business and we have an industry which is in operation that is one aspect that I wanted to take up. First 25 A, 25 B says for the purposes of continuous service of 240 days on the date proceeding 12 calendar months, a person has put into 240 days. 25 C says lay off compensation but in what situation it will not be payable and then, 25 D says Duty of an employer to maintain muster rolls of workmen because only those employees who are on the muster roll can be laid off and then you have a concept of Badli worker. When does a badli worker cease to be a badli worker that you can look into the provisions yourself and then 25 E says when can a person not be entitled to lay off compensation. I would like to come to the topic of retrenchment compensation, a very important topic because most of the cases that come before you now a days are either cases of dismissal discharge or there are cases of retrenchment. Can we understand before this definition 200 came in the Industrial Disputes Act, there is already a concept of retrenchment which was in the ordinary meaning of the term i.e. labour surpluses, now labour surpluses could be for variety of reasons, it could be automation standardization, all those rationalization policy of the employer but then question is when Sec 200 was brought into the statute book, the legislature had to give a definition, what we call as a dictionary have of its own because every statute have a dictionary of its own that's what we say Sec 2 and a dictionary of its own can have a meaning which is narrower than the ordinary meaning of the term or it can have a wider meaning as is the ordinary meaning of the term and therefore if you look at Sec 200, it says, that is very important for us to understand it says, means the termination by the employer of the service of a workman for any reason, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-- voluntary retirement of the worker; workman reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or termination of the service of a workman on the ground of continued ill- health, that was the original definition of Sec 200 "Retrenchment". There were cases which went to the Supreme Court I think main problem started with when we went to the Sundramani's case but before that there were 3 important cases that went to Supreme Court was Sukhla, Barsi and Pipri Sugar Mill's case, now those were cases where the Supreme Court had to decide as to whether termination on account of closure of undertaking whether it would amount to retrenchment or not and therefore where the employee is entitled to retrenchment compensation. Similarly on the transfer of an undertaking if there was termination of services of employees whether they would be entitled to the retrenchment compensation or not and Supreme Court in

those 3 set of cases which are constitutional bench judgement cases, 5 judge bench cases, SC said retrenchment can happen only in a continued business and on the transfer of an undertaking on the closure of an undertaking there is end of the industry therefore there cannot be retrenchment, therefore closure, transfer undertaking which is the cause for the termination of the services of employee, they are not entitled to retrenchment compensation. Now the parliament did not amend the definition of retrenchment, parliament decided to have two more provisions in the statutes in the form of 25 ff and 25 fff, where it said that on transfer of undertaking and on closure of the industry the worker shall be entitled to the compensation which shall be as if it is a deemed retrenchment compensation and therefore it made a very important distinction that compensation payable shall be as if there was a retrenchment but it did not bring under the definition but there are certain observations in the judgement which was used by the employers i Punjab Line Development reclamation case which was a constitution bench constituted by the SC to review all the judgements passed by the SC after the decision in Shukla, Barsi railways and Pipri sugar mills to see whether the later judgements were in conflict with the constitutional bench judgement in Shukla's case. Now you'll see Supreme Court. Why did this situation arise because first time Sundramani's case was an important case and it raised two questions about the true meaning to be given to for any reason whatsoever and second the definition of termination. Now here there was an employee in the state bank of India who was given jobs in bits and pieces and the last job given to this person was 9 days, now in the appointment letter it says that you are appointed for 9 days and you employment will come to an end after the expiry of these 9 days but these 9 days make it 240 days in calendar year of 12 months preceding the date of termination and therefore he said, by that time the SC had very well established the law that Sec 25 F which says no employer shall retrench a workmen who has put in one year of continuous service for any reason whatsoever, so therefore he said these are conditions precedent, violation of Sec 25 A, Sec 25 B which were held by the SC to be mandatory and noncompliance of which was ordinary to be treated as non-extinct law and therefore workmen was entitled to reinstatement , back wages and continuity of service. So therefore the question was, what is the meaning to be given to the word termination and what is the significance of the term if any reason whatsoever? It says termination of service for any reason what so ever except 4 cases one was the case of dismissal or disciplinary action, termination, superannuation attaining the age of superannuation or a person voluntarily retiring, or a person whose termination takes place on account of continued ill health. therefore the Supreme

Court said termination means, it can have 3 situations one where there is an order active order passed by management like your services are terminated so you are no more required in the employment, second it by efflux of time or a stipulation in the contract of employment on the one hand you give the job on the other hand you take the job you don't have to pass a new order of termination. So therefore termination what so ever whether by lapse or time or stipulation in the contract of employment or by the active step taken by the employer, all cases are case of termination. Now for any reason what so ever SC said are not confined to labour surplus age, it includes more than labour surplus. That's a very important judgement, because if you read this judgement Sundramani's case subsequent with Hindustan Steel that was Justice Chinappa Reddy, and Justice Chinappa Reddy said what is the object of retrenchment compensation, he said this is a country where there is not social security provisions provided by the state so therefore an employee has to be compensated from the date of the job loss and job found and therefore this is an amount which will bear compensation to stand the world within till the workers finds a new job, this is the social responsibility of the employer and this social responsibility of the employer must proceed retrenchment. so therefore if a person for any reason what so ever has been terminated, has been put out of job is a case retrenchment and this followed Santosh Gupta's case, Third case to fall in line was Santosh Gupta where Santosh Gupta was to be confirmed in the State Bank Patiala, if she pass the test, if she failed in the test but had put 240 days of service and therefore she said even though she failed and therefore her termination took place but they did not follow 25 F, so therefore the courts held yes this is termination and it is not divert by any of the exceptions made to section 2 oo. Therefore the termination was illegal and entitled to reinstatement, back wages continuity of service and therefore you can see line of case, but these were all judgments given by the division bench, they were judges, 2 judge benches or 3 judge benches and therefore there is a clamor on the part of the management that SC have off late been going contrary to the Constitutions bench judgement of the Shukla, Barsi, Pipri railways case so therefore first way they succeeded was they brought an amendment to Sec. 2 oo and a new clause was inserted in Sec 2 oo as an exception clause and therefore I said Sundramani's had two aspects one was definition of termination, second was for any reason what so ever. Now 2 oo says that, if you look at definition it is basically telling you what is termination and what is not termination, kindly look at the definition, it says, 'termination of the service of the workman as a result of the non- renewal of the contract of employment between the employer and the workman concerned

on its expiry or of such term', therefore Sundramani within 9 days.. you'll cease to be an employee, therefore there was a stipulation to that effect in the contract of employment or termination of the service of the workman as a result of non- renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein, therefore now what happened was cases of lapse of time and stipulation were taken out of the definition of termination. This amendment admitted that the termination could take place by efflux of time or stipulation in the contract of employment because it says termination on account of, therefore termination meaning given by Justice Krishna Ayer in Sundramani's case holds good but now those case 2 case have been brought within the exceptional clauses but as i said yesterday my friend from Delhi had raised if there is a stipulation in the contract of employment daily wage or for that person any other person it says just look at the case which I said Ghelot's case SC very clearly saying that if termination by the efflux of time or stipulation in the contract of employment is malafide. Am I clear to you or not? That's where you have to understand if it's a bonafide stipulation, there is a bonafide efflux of time but a daily wage has to work every day, every day he has a termination and everyday he has a new employment, like you go in the case of Maharashtra Road Transport Corp. Where Justice Lodha dealing with unfair labour practice law of Maharashtra said there are permanent positions but these people were appointed on the temporary basis and therefore this was a malafide situation and therefore you could not say these were cases which are excluded from the definition of retrenchment. So therefore those are situations what yesterday Justice was telling you and what Justice Chandru also told you. Kindly make sure that you make use of the provisions of the chapter 2 read with Schedule V and 25 T and 25 U of the ID act. Though 25 T and 25 U are giving criminal law action against unfair labour practice but then again the definition of Industrial dispute brings within its fold and powers of Industrial Tribunal in Western India Automobile Association are enormous was and therefore a civil remedy is always available and you can resort to that kind of a situation. Now Supreme Court had to deal with this when we had the Punjab Land Reclamation case which was a constitution bench judgement, in fact the argument was that the definition given by the SC in Sundramani's case, Hindustan Steel and Santosh Gupta run contrary to the scheme of the Industrial Disputes Act. Supreme Court said no, it doesn't run. 25 G and 25 H are applicable only to the cases which are retrenchment because of the labour surpluses and even in those cases the employer can make a departure because he says ordinarily they shall follow the last come first

go or first come last go rule given in Sec. 25 G and very important thing to highlight, one year of continuous service is only for the purpose of 25 F, one year continuous service is not a condition precedent for invoking 25 G and 25 H, it's a very important distinction we must understand and there are very clear cut judgements of Supreme Court on this point that 25 G and H are irrespective of the number of days a person has put in. Once you are inducting a person in an establishment you have to follow bonafidely last come first go rule unless for reasons to be recorded you depart from this rule and that is why 25 G says if you violate this reinstatement, back wages, continuity of service. If you do not give reengagement preference to the person in section 25 H again there is a violation of Sec 25 H and those are important observations when you are dealing with the law on retrenchment. I just come back to the judgement of the Supreme Court in the Punjab Land Reclamation case, very important judgement and also one important point that i want to make. 240 days you don't have to work from December to January, 12 calendar months preceding the date of retrenchment. I may have joined in march and I make it 240 days in December and suppose i have not worked in January , I have not worked in February, you don't have to say that he has to be first an employee for 12 months and then he must put in 240 days, immediately preceding the date of termination you just see whether in 12 months he has put in 240 days even if he has put it only 9 months he has qualified for retrenchment compensation, mandatory provision under 25 F, the law is very well settled *Manohar Mohan Lal v. The Management, Management of Bharat Electronics* is a judgement which clearly talk about this position, AIR 1981 SC 1253. let me come back the most important aspect I want to cover is change in the position of Supreme Court from one position to another position and the position that we are today why and why not should we not give relief which are not merely what are ornamentation but they must be punitive reliefs because compensation has to be punitive, a person cannot be punished for illegal action of the management. I lose the job not because I have not worked for these years but because i have been kept away from the work. So therefore if you are not paying adequate compensation to the workman you are giving premium to the illegalities of the management therefore the compensation cannot be merely eye wash, it has to be punitive compensation, huge compensation keeping in view the number of years a person has put in. Now Punjab Reclamation Corp. is a judgement of Supreme Court where the SC has discussed all the cases that went to the SC after the new law was brought in the statute book and the SC did not find any inconsistency between the provisions of ID act and scheme of the ID Act by giving a wider definition to the ordinary.. they said they have a choice if you look

at the very first line of the judgement, it says the precise question to be decided therefore now that was the precise question before the SC, now precise question to be decided therefore is whether on a proper construction of the definition of retrenchment in Sec 200, it means termination by the employer of the services of a workman as a surplus labour for any reason whatsoever or it means termination by the employer of the services of the workman for any reason whatsoever otherwise than punishment as inflicted by way of disciplinary action those expressly excluded by the definition. In other words that is the main question to be understood in the case the question to be decided is whether the word retrenchment in definition is to be understood in its narrow labour surplus natural and contextual meaning or in its wider literal meaning. Now we have rule of Interpretation of statutes and that is the primary rule of construction of statutes, where the words used in the statutes are plain, unambiguous, clear the question of interpretation does not arise. Its only when the words used in the statutes are capable of more than one construction, therefore the question of interpretation of statutes arises. So therefore literal rule applies where the language of statute is plain but where it is not plain and that's why it is said whether the meaning retrenchment of labour surplus for any reason whatsoever or it is termination of services by the employer of the services of the workmen for any reason whatsoever. If it would have been a labour surplus, voluntary retirement is not a labour surplus, why should it be excluded, attaining the age of superannuation he does not become service, termination on account of ill health it is not surplus, disciplinary action is not a surplus. Therefore the purpose was to give literal meaning to the words used in the statute and the SC looks at the scheme of 25 G, 25 H, Sec 25 J, now like suppose the employer says under the Standing Orders Act I have to give one month's notice. I have complied with that therefore 25 F is not applicable in the situation, 25 G, J. Can we have a look at section 25 J? Now this is an important argument which you should consider it says, the provisions of this Chapter, now this is important it is a special legislation, The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including standing orders made under the Industrial Employment (Standing Orders) Act, 1946, therefore even if you have complied with the Industrial Employment Standing orders Act you still have to comply with 25 F and if you have not complied with 25 F the retrenchment is bad. Now before I come up to final conclusion to this chapter is in 1976 we had Chapter VB and therefore this was only to give more protection to the workers in the manufacturing sectors because Chapter VB has nothing to do with the service sector you must understand that part because Sec 25 K, have a

look at Sec 25 K which is the starting section for Chapter VB, just have a look at it, The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than initially it was 300 but it was reduced to 100 by amendment in 1984 employed on an average per working day for the preceding twelve months. Now it defines in further 25 L says For the purposes of this Chapter, -- "industrial establishment" means-, a factory as defined in Factories Act, 1948, a mine as defined in of the Mines Act, 1952, a plantation as defined in Plantations Labour Act. This is basically only in 3 sectors Chapter VB has to be read and prior permission of the authorities has to be sort in industrial establishment employing 100 or more workmen on any day in the preceding 12 calendar months and that prior permission if not taken the termination is non set whether it is a form of Lay off, whether it is in the form of retrenchment, whether it is in the form of closure and therefore the consequences is not only the worker had to be put back into the same position but this is also a penal offence punishable under section 25 Q of the industrial disputes act. now the challenge to this area came initially in the Excel Ware case where provision of 25 O was challenged, the Supreme court upheld the right of this legislature to put these reasonable restriction but then the scheme of the act was questioned and therefore they struck down that provision but not the power of the government to impose those conditions. When it was later on in Orissa Textile Mills case that the Supreme Court upheld the constitution validity even of the scheme that is in Sec 25 O. Then there was Meenakshi Mills case where on the question of retrenchment provision was again, constitutional validity was challenges Supreme Court held right to carry on business includes right not to carry on business but this is not an absolute right, similarly right to carry on business includes right to retrench but then it is not an absolute right but then it did not go into detail, it said assuming that right to retrench is included in right to carry on business and is a concomitant right of the right to carry on business. The Supreme Court upholding the constitution validity. Now this is a provision which is in my opinion stood the test of time when the world over economic crisis were taking place but this chapter was able to protect labour in this country and they were not subjected to the hire and fire and therefore they were able to sustain themselves and India was not affected in the manufacturing sector primarily because of these reasons but I think what has happened over the period of time is that MNC's are wanting these provisions to be done away with, to be diluted and Rajasthan has followed the suit, Rajasthan , Madhya Pradesh they have raised the limit of the workers from 100 to 300, definition of factory has been increased, definition of contract labour

application has been raised from 20 to 50 that is the age we would like to have some discussion on but one basic thing that i just want to take up earlier the law was noncompliance with the mandatory provisions of 25 F made retrenchment *non est deus* of law and once it is non est on declaration that it is non est the same position follows and therefore the worker was ordinarily given the relief of reinstatement, back wages and continuity of Service. Yesterday Justice Chandru brought in that UP Brassware, Justice Sinha's judgement where he said that the pendulum have swung too far in one direction and courts have not kept the interest of industry in mind and therefore time has come we have to respond to the globalization, liberalization and therefore the remedy has to be different from what was given earlier. The worker who has not worked all these years cannot be given a premium and therefore given back wages and therefore the compensation should be the rule, reinstatement should be the exception answer to that if you what to read that argument I think Harjinder Singh is a very important judgement you can always read and there is a judgement which is by Justice Gowda a recently in 2014 it is ONGC, BHEL all cases you must read and those are beautiful judgements where you can go back to the old theory of reinstatement, back wages and continuity of service but I just want to draw a line here and that is where we must connect this discussion with the discussion we had yesterday. courts have confused with reinstatement with regularization and I submit whenever a case under 25 F comes in its not a question of regularization, it is putting the employee back into the position in which he was, if he was a daily wager he cannot be put as a permanent employee, if he was temporary hand he cannot be put as a permanent hand but if there is a specific reference of regularization if there is a specific averment of victimization in the matter of regularization then the situation is different, then the labour Courts is within its powers to go into the question of regularization. But what has happened in SC we'll see Harjinder Singh's case when we'll go to Harjinder Singh. It was not the case of management in Harjinder Singh that that the claim was for regularization and you'll find that High Court bringing in Uma Devi and on the basis of Uma Devi setting aside the order of the Tribunal and Supreme Court saying two important things which you must understand, you have more powers than the High Courts, High courts have very limited power of interference, Harjinder Singh is the best judgement to read, so is the ONGC and BHEL case where the court has very clearly stated that the powers of the High Courts is limited, it's a supervisory jurisdiction while as when you are dealing with 11 A you have the appellate jurisdiction, when you are dealing with the retrenchment situation you are dealing with beyond you are dealing as the court of first instance and you have the powers

conferred upon you by Western India Automobile Association. So never fail to exercise those power whether it is reinstatement, back wages or continuity of service but if you are not keen to give reinstatement I think because many years have passed by, please do not hesitate to give good compensation to the workers which will act as a deterrent for the management so that tomorrow they do not resort to such actions otherwise giving of paltry amounts as the Supreme Court has been giving in the past you do not know many of us do not know what happens in Supreme Court even ordinary lawyer charges you 20 to 50000 Rs for each appearance , a senior lawyer will charge 150000 rs minimum and therefore if you give 50000 for a person who has put in 20 years of litigation even his cost will also not be met. Even these Trade Union people must have got more money than what you are giving him therefore you have to give exemplary cost, you have to give exemplary damages, exemplary compensation. These are some of the observation I think Justice Chandru is there he will further like to add on the subject, I think I can wait for your questions because I think we must have a debate we should not have a lecture here, we are not teaching the law students we are interacting with the judges we just put some thoughts before you and you look at it and tell me what are your concerns? Thank you very much.

Justice Chandru: Good morning to all of you, I think this is the 2nd day of our seminar I find most of you are very tired bored with the subject and when Dr. Kaul was referring to some provisions you are not even looking into the book. I am telling it to everybody if you don't have the ID Act you please have the copy of ID Act. You have the copy of ID Act? Please whenever the provision is mentioned refer to that provision because I can speak for myself I have been associated to this branch of law for last 45 years. Every time when a provision is mentioned I again look into it because I can never claim I have memorized the entire thing because it gives a new interpretation to the issue and we should not think that we know or we don't want to know as after all there is nothing in this law. This law is a pre Constitutional law as you know 1947 came before the constitution, this law never trusts the labour court Judge or Industrial Tribunal judge. When I say like that you may be shocked, you first know there is a very peculiar thing if you see Sec 7C this is not found in any other provision. What is the qualification or a disqualification of a Labour Court Judge? Sec 7C he must be an independent person, a Labour Court judge has to be an independent person. What does that mean? What is independent? Have you ever come across any other provision of any other law where the prescription of a judge is mentioned that you must be independent? This is one question you must think of yourself. Second who is your appointing

authority not the High Court it is the Government, unless the government appoints you you can't be a Labour Court judge. There was a case in Bombay where a Labour Court judge appointment came to an end and the High Court recommended the extension but the government did not issue the notification. What happens to the Labour Court judge when there is no notification, he is not there whatever he wants to he can't do, then when the High Court took exception government started giving a weekly extension, so every week there will be a notification which is extended. So there are peculiar situation you may come across. In Tamil Nadu you have one labour court in every three districts and in one district Coimbatore where the work is very heavy, the High Court send the recommendation but the appointment was not coming so the Labour Court was functioning without the officer so the clerk in that office use to give dates, it went on for first month 2nd month and large number of claims of Labour Courts, Tribunals, management lawyers use to come and go away. One day one impatient trade union leader, he got into the seat of the Labour court judge, he said please call the case I will now decide, he declared himself as a Labour Court judge. I am saying the frustration can be so much that these things can happen in our practice so now you decide the matter and pass an award. Now there is a peculiar provision, the government may accept or may not accept your award then what happens, can you see that after having gone through the entire exercise of a quasi-judicial power you make an award, if you see Sec 17 A that it is not final, the government may agree, may publish may not publish, unless it publishes in the gazette it doesn't come into appreciation and the Government has got power to restrict the life time of an award that also is there. In fact Madras High Court has struck down that provision but never the less I am only showing this provision to see how not everything is not happy in a pre-constitutional law. Then suppose a case has to be transferred from your court who can transfer, it is not the High Court it is a state Government. You see Sec 33B state Government can transfer the case from your file and send it to somebody else that is 33 B and if you see Sec 17, 17(2) the award published under sub- section (1) shall be final and shall not be called in question by any Court in any manner. Now the idea was it should be made final so that there is some industrial peace. You are supposed to bring in industrial peace by an award and now if it is final I know there was a time when we practiced law in the High Court, the Labour Court awards will not be accepted in a writ petition and the judges used to put some questions because at that time the law relating to certiorari was only when there is a perversity found in the award the writ of Certiorari will not be issued, so matters used to be argued for hours together even for an admission of a Labour Court

award but today you find in our High Court if you just get up and say My Lord writ petition against the award admit so we have thousands of writ petition pending. So this idea of 17(2) becoming final is not final it is subject to single bench then division bench then Supreme Court. Therefore you have onerous responsibility at the same time lack of faith by very legislature itself so this is the twin area where you are operating, it is in that context if you see the provision relating to retrenchment and lay off why these provision are brought in. I told you yesterday unless you know the historical context you may not know what this is lay off and what is this retrenchment that will cover a solution to you. Every provision under the ID Act if has got some suffix also A, B, C they are all newly introduced provision. There is a chapter V A relating to lay off retrenchment, it is a newly introduced 1947 is the Act 1953 Chapter VA was brought in what happened during that 6 year period you must know suppose there is a lay off in the industry, most of these provisions are claimed against the textile mills because the textile mills always go through a booming period and that period of depression, recession most of the textile mills also use to gamble in cotton cotton price and therefore there is always a rise and fall of the cotton prices. Even there is cotton gambling you must have heard of that some newspapers use to every day there is a column this Bombay billion market, it used to be New York Market, so every day the cotton prices use to go up and people play gamble on that , so it is because of the textile mill either sometime over stocked, sometime the price of the cotton goes up production goes down, there always be lay off resorted to or sometimes retrenchment is resorted to, Lay off is where inability of the employer to provide employment, retrenchment is where some people become surplus to the requirement , I need only 800 people not 1000 so 200 have been sent out. In both cases the worker becomes unemployed, sometimes it is temporary unemployment, sometimes it is a permanent unemployment. Now in each case each lay off is raised as a dispute, each retrenchment is raise as a dispute imagine the number of cases that will come to Labour Court. In 1947 when they united the law they did not anticipate that there may be a large number of litigation because of the employer's playing with the market economy and therefore they felt if the worker raise a dispute and the Labour Court decides which is subject matter of further litigation then the very purpose of granting compensation is lost, Tomorrow i have to buy my food, if I wait for 5 years than what will happen to my family therefore in order to avoid that the workmen is sent out to fend for himself without any money and the unemployment leading to social unrest the parliament laid in the matter of retrenchment and lay off you provide the compensation rate itself in which case the workers may receive the

compensation and struggle to live though it will be 50% of wages, nevertheless it gives him some means for a living instead of waiting for a litigation which is indeterminable. Therefore in order to avoid the litigation to feel that the Labour Court should not be clogged with so much of litigation the word lay off and retrenchment were sort to be defined and in Chapter VA the compensation was fixed so that the worker need not to litigate and in getting these amount he can go to the labour Court, if suppose the employers do not pay he can go to the Labour Court only compute the amount, he is not disputing the layoff, he is not disputing the retrenchment. Therefore Chapter VA was brought with a purpose to avoid the Labour Court going out of gear. Suppose there is a textile mill and there are some thousand workers if there are thousand claims of lay off, if there are 100 textile mills and there are going to be problems of lay off every year and there are going to be problems of retrenchment every year you can imagine the number of dispute that may come therefore it is to save the labour court of further adjudication the parliament introduced compensation fixed rate of compensation and in what circumstances the compensation can be paid therefore to some extent these provisions were saving the labour Court from multifarious litigation. Now what happened form 1953 to 1976 now once the employers have told pay compensation? Now the employers are happy pay the compensation 25 days lay off then retrenchment compensation, number of service in to 15 days. Now when the unemployment started increasing and the lay off and retrenchment are not merely compensation provision but also employment protection should be given. In 1976 when these amendments came Chapter VB was introduced where the government took over to see whether the layoff is justified whether the retrenchment is justified. Once again the power essentially vested on the Labour Court is taken over by the government. You see now one they want to avoid the litigation Second they felt that the Labour Courts are not fast enough to decide these matter because many times it is not final. The government said in a given case where there are 300 workers it was reduced to 100 workers. The very factory having 100 workers if they want to lay off you must seek permission from the competent authority, competent authority are many times the Labour Commissioner or the Labour Secretary. So in any factory or a plantation if you want to lay off or retrenchment you must get permission. He was also mentioning about these provisions were challenged. Now in Excel Ware Co.'s case Supreme Court said right to start and industry has got right to close also, in that matter when Palkiwala was arguing that case he said I am arguing before my Lord's suppose I just feel like stopping my argument can Your Lordship tell me continue to argue this is there in the

Judgement itself, it is like asking an employer to continue to run the industry when he doesn't want so that provision was struck down and again the parliament reenacted the provision in reenacting there was a change made you'll find again a role was given to the Tribunal if you see in Sec 25 M, this is where you'll have to learn these provisions once again. Originally it was the justification of lay off then it was the rate of lay off compensation then now it is again it went to the government whether lay off should be given or not whether the government decision is right or not is again will come back to the Tribunal you see Section 25 M. It is there in all the three provisions. You see 25 M (7) at page 69 if permission is not obtained worker is entitled to get full wages as if there is no such lay off, now Sec 25 brought in a Judicial Review the appropriate Government or the specified authority may on its own motion or the application made by the employer or the workman review its order granting or refusing to grant permission or refer the matter to the Tribunal for adjudication so now you are back to adjudicating whether lay off is justified or not. Originally you had the power to adjudicate, in 1953 they tried to minimize the litigation by providing compensation but nevertheless layoffs, retrenchment was not coming down therefore the provision for prior permission was made. Now prior permission is now subject to the Labour Courts deciding whether it is right or wrong therefore you'll have to necessarily deal with whether a particular lay off is justified whether a particular retrenchment is justified and the Labour Courts are once again had to deal with such provisions. Now he has mentioned about the retrenchment in fact in the book on Krishna Ayer you'll find the Sundramani's case mentioned at page 35 you can read leisurely later. The only question was in case lay off there are circumstances under which lay off can be refused. You'll find Section 25 C, 25 E at page 60 Workmen not entitled to compensation in certain cases.- No compensation shall be paid to a workman who has been laid-off-- if he refuses to accept any alternative employment in the same establishment from which he has been laid-off, or in any other establishment belonging to the same employer situate in the same town or village or situate within a radius of five miles from the establishment to which he belongs, if, in the opinion of the employer, such alternative employment does not call for any special skill or previous experience and can be done by the workman, provided so and so, so it has got several ifs and buts. The establishment should be in the same area within 5kms, it does not involve any other skill to be applied and then the establishment should belong to the same employer, he can't say go and work with somebody else. In fact there is one judgement you'll have to read in the paper book at page 81, it relates to this similar issue. You can read leisurely but we'll

have to go for tea I'll only conclude by saying at the time when decision of the labour Courts were also publishes in Labour Law Journal if you see 1949 to 1960 the Labour Law Journal used to contain Labour Law awards also because the law was shaping and there was hardly any judgements of the High Courts and there was only one volume in 1949 till 1960 Labour Law Journal had only one volume, Now you have 10 Labour Law Journals. There are 10 different publications and each publication has got minimum 2 to 4 volume. now the number of decisions of the Supreme Court and High Court is on the increase and it's difficult to keep track of every provision therefore the job of the Labour Court is not only merely a fact finding authority but also to applying the law and there are too many decisions to lay and therefore I think it is not a mere job of a human relationship between an employer and worker but also complicated questions of law have started coming back to the Labour Courts and therefore you got to keep track of day to day problems, in fact I find whenever any labour matters are listed each side is equally matched unlike Labour Courts High Court its equally matched and they'll be sighting some 10 to 15 judgements of the same so the problem become more complex now and therefore I feel that you should keep track of latest position of this and see to it that real justice is done and you also explore what is the meaning of the term independent person over the period we will also discuss the meaning of the word independent person. Thank You we'll now go for tea and come back.

**Prof. Dr. Geeta Oberoi:** We'll come back at 10:30

## SESSION 6

**Justice K Chandru:** This previous session we, whatever questions you want to ask Dr. Kaul you can ask. During tea break some of the participant asked about passing ex parte award arise from the earlier proceeding but if you see the book an award after 30 days of its publication becomes operational after passing the award normally the labour court becomes sufficio because it gets power only from the order of reference, now there are conflicting views on this subject, the latest one was the *Raja Krishnamani Tripathi's* case, Supreme Court said if the rules provide then the question of 30 days doesn't matter, question of sufficio doesn't arise, in that case they were referring to the central rules you'll find in the central rules in this book. There are 2 rules The first rule is rule 10B which is found at page 115 rule 10 B (9) that is 115 last paragraph in case any party defaults or fails to appear at any stage the labor court tribunal as the case maybe proceed with reference ex parte and decide the reference application in the absence of defaulting party provided Next page. Now the Labour Court as case maybe on application of either party filed before the submissions of award revoked the order that case shall proceed ex-part. If it is established that the absence of a party was unjustifiable ground. Now this rule is little misleading because it say application should be filed before filing the award. Now if you see the rule the next rule no. 24, rule number twenty two. If without sufficient cause being shown any party to the proceeding before. That is page 117. Before the Labour Court. Fails to attempt to be represented the court may proceed as if the party has been duly attended or is being represented.. Now if you see rule 24 in addition to the powers conferred into the act the courts labor courts shall have the same power as are vested in a civil court under Code of civil procedure 1908. When trying a suit in respect of following matters be granting adjourn. Now if you see the C.P.C. Order 9 Rule 13 provides for setting aside ex parte order if party is absent it can file an application for setting aside. Therefore Supreme Court reading upon the rule 24 under the central rules said if the rules given the power to set aside ex parte order Then you can.. The question of Fanta sufficio does not arise. This is one ahh one clearance. Then some members wanted to know whether there state rule has a similar rule? In my experience found the first central rules were made and most of state governments copied the same rule in there rules so you'll have to check up in your state rule whether similar provision like rule 24 is there if rule 24 is there and power of adjournment as that of a civil court is given to you then Order 9 Rule 13 application can be made in which case the setting aside need not be filed only in 30 days if there is any delay there is a delay in contemplation

of article 19 and 13 therefore It is possible for you to entertain an application under rule 24 to set aside ex parte award Notwithstanding it has been already gazette that thirty days have elapsed. Listen to what she is saying, she's telling something.

**Participant:** Like ahh like in civil court if both the parties doesn't appear they do not appear then we dismiss the suit. But why can't we do in Industrial Tribunal cases why can't we dismiss the case in Industrial Tribunal cases because in West Bengal we have Section 10(1) B

**Prof. (Dr.) BT Kaul:** Your Question is if parties do not appear before the Labour Court?

Participant: Just now my Friend said it's a reference case but in West Bengal I found that we have amendment in Sec 10 and Sec 10(1) B has been added in West Bengal wherein individual workmen can come before the court and file a case.

**Prof. (Dr.) BT Kaul:** That is also in the Central Act now in 2010 amendment is you can straight away come in case of non-employment cases but not in case of collective disputes.

**Participant:** No no in case of retrenchment also..

**Prof (Dr.) BT Kaul:** You can go without coming from a reference by way of reference. What is important is you must go to the conciliation officer. If the conciliation does not succeed in forty five days. Then you can straight away approach the Labour Court.

**Participant:** Why can't we straight away dismiss the case?

**Prof BT Kaul:** For nonappearance?

**Participant:** Yes.

**Prof (Dr.) BT Kaul:** They say why we can't dismiss the case where parties do not appear before us.

**Justice Chandru:** Again it depends on the rule for example in Tamil Nadu rules says incase Ex parte order is passed it should be passed as if the other party is present. What is as if the other party is present, previously our labor use to have a format order worker present, claim filed examined him as PW1, award passed, four lines. Then our High Court took the view as if the other party is present to discuss in some manner. Though not an elaborate award you can't simply pass in one sentence claim proved like a suit. When the defendant doesn't appear. Decree the suit that's

not possible. You'll have to make it. So in those cases the High Court has set aside the award by saying the award does not confirm itself to the rules. So it depends on the rule. Normally you'll have to discuss in a few sentences what is the case and why the other side is not there.

**Prof BT Kaul:** Because the definition of award says determination by the labour Court. So determination has to be on merits. Determination cannot be one line.

Participant: my question is not that my question is since it is a reference you have to answer that

**Prof. Dr. BT Kaul:** One at a time. No no you address here. Justice Chandru is saying that it is not a situation of the suit. Once a reference has been made you have to answer that you have to. Therefore it has to be deemed as Industrial Dispute so for Industrial Dispute reference has been made to you. You see it is deemed reference individual dispute is a deemed reference that is the distinction between 33C (2) and this Sec 33 C(2) is an application not a reference you know.

**Justice Chandru:** There that Sec 10(1), the terms of reference is given by the government, under 10(4) you are bound to answer the reference on any matter incidental thereto, merely because reference is made doesn't become industrial dispute, for example. He may not be an employer. He may not be a workman. It may not be an Industrial Dispute. Therefore you have also got power to decide whether the reference is valid or not that power is still given to you. And therefore you can't simply say suppose some non-workmen files a case. Because it is Ex-parte you can't give the ex-parte award. It all depends on the issue.

**Participant:** My lord this is a section 33 C... It's not a reference case. It is filed by the person who received the award. If he does not appear then what can I do. Even in that case I have to pass a dispute award.

**Another Participant:** Sir when reference is made..

**Justice Chandru:** I think we have two more day therefore we'll reserve general questions to the later. Now the previous session was relating to retrenchment and lay off. I think question should relate to that because we have enough time to discuss the other issues.

**Participant:** Sir my one question is regarding compensation. We have been using word compensation Professor BT Kaul referred to 3 words damages, compensation, and penalty. When

I am awarding compensation to the claimant. I am compensating the workman. At the same time can I penalize the employer?

**Prof Dr. BT Kaul:** What I said was they should be compensation that you award in lieu of reinstatement must be exemplary. It must be a deterrent. On the management so that they do not resort to these illegal terminations as a matter of practice. So it is not illusory amount you can compensate. It should act as a punitive damages also in the says. I'm not saying you have to say it as a while you're awarding it you must set up you know example that if such illegal actions are resorted by the management compensation will be which will be adequate, just and equitable. And also the point that you know, There's a variation in the awards the judgments of the Supreme Court. You must understand the litigating costs are very heavy these days and a workman whether he is represented by the trade union or by a lawyer. He has to pay for it. And also legal aid is not available in the manner in which we think it is available. I mean you have to have competent lawyer to present a case of the workers. So I'm only saying that compensation must be. What is meaningful compensation which should have an element of deterrence which you don't have to say in the award but I mean in the judgement. But it must appear to be something you know where the employer is not comfortable with.

**Participant:** Sir I am further elaborating my question actually this is my Query Because I am confronted with this positions. Many times, I'm compensating the workman. No doubt. But what about the illegality which the employer has committed why not penalizing him, this is my. This is my question. I may be wrong. We are compensating the workman. But he transferred the person he and then he dismissed him why he should not be penalized also by way of monetary imposition of fine etc.? In the same award the reference is to which benefits he's entitled generally. In case of termination whether he is entitled to reinstatement other benefits to which we say continuity in service and back wages that is there but when I see that yes this employer has committed illegally. He acted malafidely why I should not impose a penalty on him in addition to that compensation. This is my question. I may be wrong.

**Justice Chandru:** If you apply that theory it can work both ways, suppose a worker also behaves and misbehaves and bring a frivolous case you can also penalize him, you are not only Labor Court doesn't mean only for Labour. Both management and labor you try to resolve the dispute. Now your power draws only from the provisions of the act. Suppose he has committed unfair labor

practice, penalty is there under 25T and 25U worker can prosecute him. But when a matter comes as a non-employment issue. You can give compensation. You can give some exemplary competition provided within the law. Now if your theory is accepted. There is a judgement of Justice Krishna Ayer in Rhotas Companies case.

**Prof (Dr.) BT Kaul:** Rhotas Industries where workers went on illegal strike and there were damage to property as of the employer. Then the company is willing to restart provided matter is referred to arbitration. So under Section 10A. An arbitration constituted. The dispute was whether the action of the workers was justified? If it is not justified to what damages they are liable to? The arbitrators provided exemplary damage again.

**Prof. (Dr.) BT Kaul:** 6 lakhs ninety thousand.

Justice Chandru because there was a reference because of the illegal strike the management lost heavily. Therefore the arbitrators gave damages against the workers. Now this case is before the Supreme Court. How it can be decided the strike is illegal is admitted whether the arbitrators can provide exemplary damages was the issue now justice Krishna Iyer said strike is not a common law right. Strike is created under the act that you can go on a strike, in a common law if you refuse to work then it is breach of contract. After the breach you can only claim damages not continuous work. Therefore he said if the strike is creation under the ID Act any remedy must also found under ID Act. In illegal strike there is a penalty by way of prosecution under the act. So that is the only thing arbitrators could have done not illegal damages. So you set aside the award. Using this argument that your right or power of adjudication flows from the act. Therefore you confine yourself to the four corners, there are other provisions, but you can say as a self-appointed champion I will now give damages. That's not provided therefore what applies to the worker will also apply to the management

**Prof (Dr.) BT Kaul:** You know punishment for what are treated as offenses under the ID Act, what the Supreme Court said rightly, Justice Chandru pointed out is a very basic case which I think every student of law should read. Every judge should read this judgement because this judgement came from Patna High Court. And that judgement of Patna High Court is very illustrative judgment, beautiful judgment. In fact we will see that Section 17, 18 and 19 of the trade unions Act gives you immunities against Criminal conspiracy, 17, 18 and 19, It gives you immunity against conspiracy in tort it gives you immunity against restraint on trade. These are the civil law

remedies, General Law remedies are available against breach of contract and then he goes to say that ID Act is complete code in itself. It provides for compensation for closure it provides compensation for layoff it provides compensation for transfer of undertaking. But for violating the provisions of the ID Act, Prohibition on strikes lockouts it provides remedy only by way of penalty. Similarly for violating the provisions of Section 33 it provides penalty is Section 31. And also provides a remedy under 33 A that it shall be deemed to be a reference and the court can adjudicate upon that. Where the dispute is pending. Now therefore you have to see the whole scheme of the Act, you can do what is permitted by the court. There is no provision where the employer can get a relief by way of compensation by participating in an illegal strike. But common law remedy is that if a worker goes on strike and strike is legal and Justified, court has built the law that worker is entitled to full wages during the period of strike. Similarly During the lockout if a lockout is legal and justified workers are entitled No wages. If Lock out is legal but unjustified or illegal, workers are entitled to full wages. So these are the areas that all all the judges Labour Court judges must understand. You can't create every day a new jurisprudence. You have to work within the jurisprudence that has been created by the statute and by apex Court in exercise of its powers in 142 and accept it. What Industrial Adjudicators had over the period of time evolved a law which has got the acceptance from the Supreme Court in 142?

**Participant:** Sir one question, Sir some time we find that an officer of government or local body or public corporation. Due to fault of that officer or mischief played by that officer a workman was removed or retrenched and while passing the award or order can we direct that the amount of back wages or compensation can be recovered from the pocket of that officer.

**Prof (Dr.) BT Kaul:** Supreme Court has done in many cases. In fact when you find Many cases in the criminal law where the where the investigating officer has a deliberately fail to investigate properly Supreme Court saying that fair investigation is part of the fair trial procedure. And if you don't have a fair investigation you can't have a fair trial. And there said fixing the responsibility of the officer to be Departmentally dealt with that you can do but only Supreme Court can say you deduct the salary from the money from the salary of the employee.

**Participant:** Sir most of the time I find that against the rule they used to dismiss or retrench the workman and. And while passing the award we have to grant back wages or compensation there

runs in to lakhs of rupee and due to fault of the. Can I explain one example? Can I give Sir one example. Because public money. Because well...

**Justice Chandru:** No no if you go beyond beyond the brief. That may be a ground for High Court to take the matter, we won't be able to experiment in these matters. That you'll have to be careful. In fact I know when I was practicing in labor Court some of judges used to call me. In the chamber. I want you to go through my award see any mistakes as there. I said why? They'll all challenge the High Court and I don't want HC to call for explanation. Therefore you please read it before why I am saying is they're afraid of the High Court in passing strictures against them. So they want to be safe while while playing safe you can do small experiment. But who should pay is ultimately worker doesn't mind. It is paid by the company or paid by the particular person who is responsible. It is difficult to pinpoint a particular officer because he will be advised by the Law Department. Some law officer and he may give up, so it may not be a personal malafide you you understand this. Even to go into that issue it will be difficult because there is a hierarchy of officers. Who will say yes yes yes.

**Participant:** Sir when a reference is made, It is reported that both parties already entered into compromise but they will not report to the Labour Court. Both the parties remain absent one including the claimant first party and 2nd party then what will be the procedure to be followed we are returning the reference without answering.

**Prof (Dr.) BT Kaul:** The argument was that we have entered into a settlement therefore you return the reference. There is no power of withdrawing the reference therefore the court said let this settlement be filed before the Labour court which can be given in the form of award and Labour Court can look into whether the settlement is just fair and reasonable.

**Participant:** But the problem is they are not at all appearing coming to the Labour Court. Both parties remain absent even they have engaged there advocate they are not responding even when court issues notice to appear before Court in person, notice is duly served in spite of that they are not appearing. Reference cannot be dismissed.

**Justice Chandru:** If you want to see the settlement you can always summon the record.

**Participant:** They are not at all coming Sir.

Justice Chandru: You have the power to compulsorily make them attend if you are curious what they have done to you can because you'll have to write an award, you'll not want to dismiss it non prosecution.

**Participant:** Sir whether we can return the award without answering.

**Prof. (DR.) BT Kaul:** There may not be determination of the dispute. You must compel the parties to come before you, Sec 11.

**Justice Chandru:** See see in Reserve Bank The majority union entered into a settlement with the management which was filed before the national tribunals. Now some of the unions went to the court saying that they are not representative body now the question is whether they're representing body or not Reserve Bank undoubtedly a statutory body. Now the court Supreme Court unusually ordered your referendum on the representing capacity of the Union. And there was election conducted. Thanks to the orders of the Supreme Court and that that union representing the class 3 employees found that they were having ninety four percent of the ballot and thereafter the award was upheld. On the ground. We had the consensus of the majority union there are some issues and issues are like that. For example in L.A.C 1960 they entered into settlement of the majority union one cross relating to hire grade assistant who are not workers. Now that sought to be made as an award what the Madras High Court said, you can't pass an award on non-workman. So to that extent that settlement is not valued. So there are the final say is with the Labour Court it will not be the parties and you can find out about that representing capacity about the terms and conditions are fair and reasonable. And whether even non-members have received a benefit in fact Supreme Court has in series of cases starting from Albertson 1979 and standard. They said you can't wait with the golden scale. If majority accept that itself is fair. There is nothing like a fairness independent of the majority suppose majority agrees they say give and take should be there. You can't see only the laws. You must see the benefits also so a negotiated settlement in the final proof for industrial peace number one. Number two you can weigh the settlement in their golden scale. Number three. It is a give and take is permissible. Number four if majority. Even non-members agrees. There is no question of adjudicating for a small minor. See there are several Guidelines given by the Supreme court in series of judgement as to how to accept the settlement or not.

**Participant:** Sir I have one question generally whenever claim is filed in some of the cases claim is verified in some of the cases it is not at all verified when I ask why it is not verified they said CPC is not applicable. The other argument would be that it is not provided in the rules. The formats made available at the end of the act. Some of the formats need verification, some of them do not. So basic rules regarding pleadings. Are they not applicable to these claims? What is the.. because your Lordship has s dealt with this matter for the last forty five years I need to be enlightened. Because I am in dark on this subject. Whether a pleading need to be verified while the legislature has not required all those claims or applications to be verified and only some of them are required to be verified. Why this distinction?

**Justice Chandru:** Procedure is only a ran merry it is not a mistress and whether some lacuna for example you take the settlement itself under two pieces Settlement should be signed in a manner prescribed. Now how do you determine majority? Suppose you go to a conciliation officer conciliation officer has got discretion to Go in to the membership or look issue on record under the Tribunal How many members they have claimed or you can order conducting of elections. Suppose it doesn't verify and take money and sign call for settlement. Now once there is a 12(3) settlement it puts an end to the reference. Now in those cases what happens to Labour Court? Now conciliation officer must also induce party to come to settlement. And if there is a settlement he has to see the reasonableness of the settlement whether the terms are fair and reasonable. How do you determine whether the conciliation officer has applied his mind to go to the question of fair and reasonable? There was a case in Madras High Court where the worker and management enter into settlement bipartite settlement. Then they went to the Labour Officer for the rubber stamp to become a tripartite. The advantage of tripartite settlement is it covers even non-members. So they go there and that officer in his anxieties simply Signs before me sign but the preamble portion was not changed. There is nothing in the preamble to say that he had gone through it and it is fair and reasonable. He simply signed whatever management produce the matter came to the High Court the section says he must see the fair and reasonable. There must be some record what is record you must look in the preamble of the settlement. It simply says. What was eighteen one converted to eighteen three. So the HC has clear case of non-application of mind. It has the seal of the conciliation officer but he never applies his mind he puts a rubber stamp to the management. Therefore the settlement was declared to be in valid. In so far as it sought to be given as a 12(3) settlement there are so many things for example Majority. Now there is a majority

union. Many States in India don't have a law to recognize a union. It is for the management to say these are the majority union or minority union, it may grant recognition, and it may not grant recognition. Now the Schedule V says not negotiating with the recognized union is bad. Suppose he doesn't give recognition there are four unions. Now there is a strike. What the management does it they commune a general body workers of the workers Elect five members and sign a settlement with the five members, there are unions and union but they never deal with the union. But they deal with the workers directly. Now the management come and tell the Court saying that the law does not say I must deal with the union I can deal with workers. If five members elected in a meeting held for the purpose so strike continues for fifty days. Workers are frustrated, Management fix there And one person calls a meeting all of them sign we want to enter into settlement. So there are many cases of five member settlement also. Notwithstanding unions are there. So both parties invent ingenious method How to get into the gaps. There are gray areas on regard in the absence of law for recognition there is no compulsion for the management to sign settlement only with union. They can settlement with workers also. In some cases they sign settlement with each worker. Not with the union if there are one hundred workers, there are 100 settlements all signed and unless you sign the settlement you are not allowed inside. And they have settled solved the problem. Therefore there are so many ifs and buts under the act.

I have given you the problem? We'll go to the next..

**Justice Chandru:** Before I take you to this next session today we circulated an extract from a Supreme Court judgment I think all of you have got it, Justice Khehar's judgement in that Gwalior Judges case. This para 17 alone was given to you, this paragraph i thought we should go through again and again for two reasons one is that it is coming from a very senior judge in Supreme Court that he says every day is a learning process. That your scholarship doesn't come to an end the moment you get a law degree or gain sufficient experience. He begins by saying. In this case we may as a matter of further understanding the sensitivity involved in the controversy. We may venture to demonstrate this by noticing a verbal exchange. I'll come to that later. (Pause) Now this is a case where a case relating to sexual harassment was before the court. Now as the argument was going on for the high court the lawyer for the district judge started interjecting during argument which you have seen in your court. Some lawyers are always of that type get up and start speaking in between. So you'll be hearing as Kaul said one thing one question at a time. So there is

simultaneous Arguments. Then the judge, The bench told the lawyer, very senior lawyer Mrs. Indra Jai Singh, He told that please don't interrupt.. You always say he only said please don't don't interrupt. This lawyer for the High Court another senior lawyer got up and said No no no don't tell her all this we always we are delightful for an interruption this is what he said we are delightful. The word delightful is another English word. Whether Indra Jai Singh won't give up and she said, "What is delightful? When it comes to women lawyer you say delightful, are you all doing some dancing or some music performance?" If suppose a man.. So she took exception to the word. Delightful. Being used by the other side. Now she said this word, every word if you deconstruct it may have some sexist part to it. Now the learned judge after going through this says at paragraph last two lines you'll find, having given our thoughtful consideration to the response, of the learned counsel for the petitioner, we may only say, that she may well be right. There is a lot to be learnt, from what she innocuously conveyed. Her sensitivity to the issue, one may confess, brought out to us, a wholly different understanding on the subject. It is, therefore, that we have remarked above, that the evaluation of a charge of sexual harassment, would depend on the manner in which it is perceived. Each case will have to be decided on its own merits. Whether the perception of the harassed individual, was conveyed to the person accused, would be very material, in a case falling in the realm of over-sensitivity. In that, it would not be open to him thereafter, to defend himself by projecting that he had not sexually harassed the person concerned, because in his understanding the alleged action was unoffending. The first line if you read every day is a matter of learning hearing submissions. Now it come from a second member of the Supreme Court. We can understand ourselves. We are very lowest in the order. Therefore we should With all from humility and modesty, We should think that the everyday a case is argued, We try to understand a new problem In a new method and it is that way I brought this because this arose under The Visakha case. And i found at least in my tenure as a High Court judge I have five different awards. Dealing with sexual harassment case. From the labor court awards now in some cases the judges never understood.. There was a case like Vishakha in existence. In some cases. They felt 11 A, It's a disproportionate punishment. Now how do we become sensitive to these issues. Should we become completely oblivious of what is a law around or only deepen upon lawyers arguing matters before us or to have an overall world view On these matters. It is in that context for example. I know a case. Since we are talking about reinstatement. I know a case where a woman Union worker, she got a call from her house saying please come back the child is

not well so she took permission from the management. And then wanted to go. It was a very small town. The buses are not very frequent. So she asked one of the worker will you drop me that worker was the vice president of the Union. That man took out a scooter two wheeler as the vehicle was proceeding he was trying to misbehave. And she felt very uncomfortable and. She could not speak out immediately and then next day she came to the factory and gave a letter saying this fellow, when I was using his lift in the two wheeler. He tried to do all kinds of things. I want the management to take action. So management issued a show cause notice to the vice president saying that you misbehaved with a women worker. Now the union leader brought two defense and after when no buses were available I only offered lift for her Instead of being grateful she now trying to abuse me of this number one number two, This took place outside the factory, Nothing to the fact. So you can't have any show cause notice. Thereafter inquiry was conducted she came to the inquiry and she described what all he did in the two wheeler travel. And finally the management dismissed him and said jurisdiction is not a problem because its harassment to a worker is always there. Secondly your being union leader is not a matter, she herself is a member of the Union. So during the cross-examination. The Union Leader in defense put out the question that you are set up by the management to victimize the union leader. She said I am also active worker i participated in every union movement and this something I can't tolerate that a fellow Union member, that you can misbehave. Taking advantage that you are the boss. So the management enquiry officer appreciated all this and then gave a finding of guilt. And he was dismissed. Matter came to the labor court. Unfortunately the proceeding officer of the labor court said instead of thanking a man who offered the lift these women is making all kinds of allegation number one. Secondly he thought that 11A is a complete answer, only one time is that all these. It's highly disproportionate so reinstate him with back wages or something like fifty percent back wages. Now when I went through the award. I found that he's not even referred to Vishaka's case, he not even referred to what is sexual harassment, not even referred to that the sexual harassment has to be prohibited and international law requires a dignity of women and Supreme Court has framed a law instead of parliament. In 1997 Justice Verma framed the law virtually saying until the parliament makes the law this will be the law. And 142 all courts whether civil or other authorities shall implement the order. Now unless somebody is aware of what is sexual harassment and what Vishaka case says so you will not be in a position to apply 11A mechanically and say Now this is a disproportionate punishment. I am exercising power under 11A. And I must

also add that Presiding officer was a woman judge On top of all this. So therefore sensitivity doesn't mean man or a woman. It has to come by getting ourselves involved that is why this Khehar's observation, even some lawyers angry exchange the words used can also have sexual overtones. That's what he says. So every day is a learning process. It is in that way. We'll have to look at things and I'll come to Vishaka later. Now the first question about 11A. What is the. So management may say just keep quiet otherwise you can be fired. Now this picture you know this of court where you are presiding is a English Court the man is bowing before. We had a very interesting case. That was a time when 11A brought into force. In 1971, so matter went to the Labour Court the worker filed a very small claim statement saying Please reach it. Then it came to the High Court. The argument was that the labor court did not invoke 11A. The argument of the management was, You look at the pleadings of parties. Nowhere the worker pleaded that the court must exercise power under 11A. So if the pleadings are silent. There is no obligation of the labor court to invoke 11A. This was the argument advanced. Fortunately the Madras High Court said, nobody need to bow there head and argue before the court, if the power is available with the labour Court It has to exercise the power. He only wants reinstatement you'll have to see whether the power can be exercised or not. It is not for a matter of pleading and after all pleading is not finally labour matter. Therefore one need not plead that you must exercise the power. If you have the power you must exercise the power. It is only or that purpose I put the. Now these are the days when pink slips are given in Software companies. Hundreds of people are sent out and therefore there are more number of litigation in this possible. Now the Supreme Court. These are the first embargo which came after 1947 Act in 1958 Supreme Court said, The Labor Court is constrained to exercise power only under the following circumstances. It was held in that Indian Iron and Steel Co. case. In cases of dismissal and misconduct the Tribunal does not act as a court of appeal and substitute its own judgement for that of the management. If will interfere suppose in want of good faith and there is Victimization or unfair labour practice. Then the management is guilty of basic error or violation of principles of.. Therefore virtually the power of the Labour Court interpreted by the Supreme Court means that once a employer imposes a penalty You have very little power to interfere. This was a constraint on the labor Court. Therefore parliament brought in 11 A. In that judgement they specifically said in order to overcome the restriction put by Iron and Steel case this provision was brought in. Secondly the resolution number 119 of the International Labor Organization. In order to give effect to the ILO Resolution this is done. What is the ILO resolution?

It says the penalty of a worker on the post of the worker should not be final say with the management. It should have a third party neutral arbitrator to go into imposition of penalty imposed on the employer. But the court should have the power to interfere with that penalty. It is not merely saying whether it is proper. In a given case it can alter the penalty. So the 11A has twin object. Over ruling the Supreme Court judgement or removing the embargo put by Supreme Court. Secondly the third party neutral arbitrator the labor Court should have power not only go in to penalty but also to interfere in a given case. Now these are the objects and reasons under the 11A. But you'll find in the act itself where the objects and reason itself refers to these two judgment under the resolution and you have seen 11A, I won't detain you. 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. That is you must understand first. 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 finding. What was once the satisfaction of the employer, now satisfaction of the Tribunal that finally decides the matter. You'll have the final say in the matter. That is the change in law.

## SESSION 7

**Prof. (Dr.) Geeta Oberoi:** Good afternoon!

We have given you one hypothetical saying that Session 4, A was appointed as *general Mazdoor* in switch gear factory. Is it possible..

**Prof (Dr.) BT Kaul:** Have you done this?

**Prof (Dr.) Geeta Oberoi:** written responses can we have, can we have written response from you all? No no we don't have to save the time, we have plenty of time. No no we want to know the views secretly.

**Prof. (Dr.) BT Kaul:** What you can do is, you can have a group of 5, 3 groups and one will be the representative who will present the presentation. Let us do that. A group of 3 groups only you can divide yourself into 3 groups and discuss it and bring out the points that you find. 5 groups alright, alright 5 groups. I think these can be, this full row can be one group.

**Pro. (Dr.) Geeta Oberoi:** Form your groups first of all. Depends on your strength to form a group. Organize a group. Everyone wants Delhi haan what is this, she is saying she wants Delhi.

Session 7 was a hypothetical session. Participants were divided into groups of 5. They were given a Hypothetical problem by NJA and were given time for discussion. The Hypothetical problem was based on the original case decided by Supreme Court of India i.e *Biecco Lawrie Ltd and Others v. State of West Bengal* 2009 SC1 GJX 1105 SC

Conversation between Justice Chandru and Prof. BT Kaul during the break out hypothetical exercise i.e while the participants were discussing in groups:

**Prof (Dr.) BT Kaul:** They are drafting this definition of contract labour and they finding it difficult, they ask me what to do I really can't interfere. Government is saying that this is what we are trying to do on this definition of contract labour, I could not understand what they really need, I said I'll ask Justice Chandru in the mean time you can discuss.

**Justice Chandru:** See if they want to retain the system and then try to regulate it, it will be very difficult. They try to regulate then the definition is difficult to make. In Gammon India they wrote some very simple judgement. See in Gammon India argument was I am making a factory for you

how that my labour. So if you say those are in the original factories Act definition involved in the manufacturing process and incidental to. This should be the rule.. But I come only for the purpose of constructing, painting some rolling once in a while then I may not..you know the first judgement I referred to in the factories act that a mali in the managers bungalow may not be directly in manufacturing process but he keep the upkeep of the place. See that is different from in a case where some company comes in some extension refinery. In connection of the work maybe. Where will you say which is the work is a direct manufacturing work.

**Prof. (Dr.) BT Kaul:** So what we can say is contract labour is where you are..

**Justice Chandru:** One is a prospective approach. You want the system to be retained and then try to improve the system. You may come up with..you have to retain the system. The problem is such a huge problem nobody wants to give up and the other thing is that the idea of contract labour is not only breaking union it is also cheap labour, longer working hours so it is to go away with the permanent labors. Assuming if there is ideal situation taken everything as permanent worker. Then there is no distinction then 25(5) B where a commissioner says whether it is perennial and continuous, he'll say yes it is perennial continuous, they are not getting the same service conditions. I know many major industries only 1:10, every company 1000 contract workers 400 permanent workers. Suppose they are going to pay the same thing what the worker.. The idea is cheap labour

Prof. (Dr.) BT Kaul: Cheap labour and then longer working hours and then Hire and fire. I think that what they want Difficulty is that they don't want to give, they want to have cheap labour they want hire and fire.

**Justice Chandru:** this regularization business is again next issue

Hypothetical problem for the session was as follows:

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. 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' 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 contended 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.

**Shivaraj Huchhanavar (Research Fellow):** Excuse me, I think you can conclude your discussion. Let us have your submission. Do you want another 2 3 minutes? Ok then Conclude within 5 minutes so that we can take your submissions also. Excuse me please time is up let us take submission because Hon'ble Professor Sir has to.. Can we have submission please? I request team one to submit their case please. Sir I request you to be very brief so that sir can take their own time to express their views please.

Submissions by the Participants (Teams):

**Participant (Team 1):** Good Afternoon, the allegations are very clear, allegations are there, the workmen has challenged the dismissal from service, the grounds taken by him are issues involved on the basis of those grounds are Whether the right of legal representation can be claimed at the domestic inquiry stage/ Sir we have in this regard some observation made in *Board of Trustees of the Port of Bombay v. Dilip Kumar and others*, this is the where the Hon'ble court observed that the trend is in the direction of permitting the person who is likely to suffer serious civil or pecuniary consequences as a result of enquiry to enable him to defend himself adequately, he may be permitted to be represented by a legal practitioner although this appears to be an *Obiter Dicta* but these are the observations by the Hon'ble Court and no doubt this question was left open to be decided later on but this judgement is sighted, so in this regard the management should have permitted him the fair opportunity but the management failed to do so. The enquiry officer has not taken into question this aspect so this inquiry needs to be set aside. The other objection, the other issue is whether the principles of natural Justice have been followed or not, the first contention is that the specific abusive language was not used in the charge specific abusive language that word should have been used as my lord was referring to that delightful word, have the delightful word not been there there would have been no controversy at all the council would not have been able to defend that or say whatever he have to say. Similarly this word should have been specified in

the charges so that he was able to defend himself in accordingly this is one of the grounds where we can see he is not being provided fair opportunity to defend himself. Then the other argument is that he was not provided with list of witnesses and copy of documents, there is nothing in the problem that he was supplied with the list of witness documents, he should have been supplied if any statements were recorded in the preliminary inquiry but since these were not supplied as per the problem so this is again a second ground for setting aside the inquiry. The third is that the 5th point that the disciplinary authority took into consideration the previous misconduct this was not in the inquiry this was not a issue of inquiry, he has not given any finding on this, furthermore had it been made a part of the charge like a criminal then it would be a different matter like herein since it was not mentioned in the inquiry it was not one of the charges that now you are going to be, because the punishment would be stricter in case there is one allegation it is a different matter but when you say that earlier also you have committed the same offence then naturally the disciplinary authority has to take into consideration both the allegations, so since it was not mentioned this also goes in favor of the workmen. So other contention is or as in charge I would say the inquiry should be set aside. He has admitted. Your Honor he has no doubt admitted but it was subsequently not in the inquiry had he admitted all these these questions would not, he was stopped from raising all these points but it was subsequent. Thank you.

**Participant (Team 2):** Sir there are two issues, one about the legal representation, my learned friend has referred the judgement of Dilip Kumar, I thoroughly disagree with that judgement because thereafter much water has flown and entire law has been summarized by Hon'ble Apex Court in the case of *BPCL V. Maharashtra Kamgar Sena*, in fact in latest judgement 2008 that is *K Rangunath Babu v. RPF*, it has been laid down by the SC that it is the delinquent who had to himself defend in the inquiry. The perception is he had to defend himself and there is a larger bench judgement of *Crescent Dies and Chemicals*, our view is though there are two among the six there are two dissent in our group our majority view is unless standing order permits no legal representation can be allowed this is first ground. Second is what are the contentions raised by the workman whether they attracts the principle of Natural justice or not, our view by majority is that it doesn't attract therefore the inquiry is fair and proper whatever is the issue that is left under Sec 11A. Thank you

**Participant Team 2:** regarding the first issue the right of legal representation, there is a case in this the presiding officer of the company itself is the company lawyer, suppose the workman is coming from the gutter who does not know the nuances of the law. Is it an equal representation, its not at all an equal representation so the worker should have been provided legal representation for adequately defending himself, the first view. My view is that if the company has appointed a lawyer presenting their cases then they'll employee.. Then regarding the 2nd aspect violation of natural justice specific allegation against the workman is that there is misconduct insubordination and using of abusive and filthy language what is the misconduct is nowhere stated in the charge sheet. what is the instigation nowhere stated in the charge sheet what is the insubordination nowhere stated what is the abusive language, that specific language or that filthy language used by the worker should find their place in the name of charge, it is not there then what is the defense he has to make, so there is violation. The other aspect is that the workman was not provided with the list of witnesses copy of documents, materials etc. etc. even if he doesn't ask it he has to be supplied with. It is the materials which are going to be used against him it must be supplied, inquiry is totally vitiated.

**Participant Team 3:** On the first issue that whether the right of legal representation can be claimed at the domestic inquiry stage? Our group agrees with the view of my learned friend from Delhi and we also relied upon the judgement of Hon'ble Supreme Court in Board of Trustees v. Dilip Kumar that where the workman is likely to suffer serious civil pecuniary consequences as a result of inquiry we must enable him to defend himself adequately. So far as the second issue is concerned it is well settled that in domestic inquiry strict and sophisticated rules of evidence may not apply but the principles of natural justice and *audi alterm partum* must be followed. The essence of judicial approach is objectivity, exclusion of extraneous presentation and observance of rules of natural justice as held by Hon'ble Supreme Court in 1977 Vol. 2 Supreme Court Cases Pg. 49 i.e. *State of Haryana v. Ratan Singh* so the workman should have been given the charge sheet, complete charge sheet giving the specific abusive language, he should have been given the list of witnesses, copy of documents and proper opportunity of representation should have been given to the workman as per the principles of natural Justice. Thank you

**Participant Team 4:** Our team is of the view that issue no. 1 since the inquiry officer is the panel advocate of the company and in order to make him to represent adequately to provide fair opportunity legal representation must have been allowed and in this case it has to be allowed. With regard to second issue violation of natural justice has been found on 4 grounds. The first ground is list of witnesses and copy of documents which were laid down by the inquiry officer to come to the conclusion have not been supplied and similarly the prior conduct because that is also one of the ground to come to the conclusion that the prior conduct of the workman continuously of using a character as the documents have not been supplied on that ground also there is violation of natural justice and third one is the exact words which attract the very basis of the inquiry have not been placed on record without placing on that record the exact words the principle of natural justice in this case have been violated. Apart from that our team has agreed that report of the inquiry officer whether it is supplied or not has not been stated but he presume that report of the inquiry officer has not been supplied since the report of the inquiry officer has not been supplied to the workman and that ground also is violated. Thank You!

**Prof. (Dr.) BT Kaul:** Very good performance and very good reasoning's but I think 2 3 things which require consideration. This is based upon one of the decided case but that is not material, what is important is that we must understand there was a argument made that the charge sheet must be unambiguous, precise, clear and my observation is that has not been done in this case so one has to be very clear on their point that what is the insubordination you have to see whether the charge sheet states the incident time place in whose presence no these are some basic things required to be taken into account. Now the question of non-availability of documents it may be informative but then a worker must ask for these documents if they have not supplied to him. It only when these documents are not supplied after he makes a request or he asks for inspection of these documents and inspection is not granted and those documents are the material bearing upon his defense that we can talk about violations of principles of natural justice. Third I think the gentleman who talked about the latest case Dilip Kumar to that extent Supreme Court has now narrowed the right of legal representation and I think he referred to that latest judgement of Supreme Court in that petroleum. Yes that is 1999 which is Justice Ahmedi's judgement where he says that unless the standing orders provide to that effect it may deny representation by a lawyer unless the management is represented by a lawyer and a serious prejudice is caused to the person merely because he was denied representation by a lawyer when there is no provision to that effect

in the Standing Orders then it will not amount to violation of principles of natural justice and I think the argument that was said that if you are taking previous conduct of person's account and then it must come during the course of inquiry because he does not have time to give representation for that or suppose the enquiry officer has taken that fact into account then he has a right to have copy of the inquiry officers report and make a representation otherwise it will cause a great prejudice to him. But important fact we must keep in mind is admission on part of the delinquent employee that he admitted all the acquisitions against him is a serious matter which goes against the workman and there are number of judgments of Supreme Court where they have taken into account this fact that once the worker has admitted his guilt then all these infervatives in the inquiry will be washed away and because he asked for leniency in the punishment but admitted the guilt as long it is voluntary and no evidence to show it was fraud that he was need to write these presentations courts have taken the view that in that case once a person admits his guilt there is no question of holding a departmental inquiry or the inquiry has been held that infervatives are in the inquiry perhaps that maybe a answer to those questions in that case. Then final I would like to share that when we are dealing with such cases you have the right to re-appreciate the evidence, you have a right to look into the evidence substitute the satisfaction of the employer by your satisfaction of the proof and misconduct. thirdly on the question of punishment specially when he is using abusive language in subordination and a previous conduct of the person put on record I think dismissal is where ordinarily you should not interfere with that's my observation, Justice Chandru has more better view on the matters of this because he has dealt with them as a judge so he can decide these things that is my view was an academic.

**Justice Chandru:** See in any matter you can't go by precedent, I heard opinion expressed by saying this judgement is held like this you must go to the fundamentals of the true points actually this problem was taken from the judgement of the Supreme Court which you can later read it was reported in 2009 SCC 32 *Biccie Lawrie v State of WB*, and decide by Tarun Chatterjee who always represented the workman but then in this case it is.. So forget the judgement, two fundamental questions come what about reasonable opportunity of having a lawyer? Now right or wrong judges don't like lawyers likewise labour law also don't like lawyers this is a fundamental principle, we 'll be hearing more on Sec 36 later. The idea conceived is they felt lawyer's interference will always lead to non-settlement. Therefore lawyers were kept outside or unless the other side don't object with the permission of the court you can come in. now when it comes to lawyer engagement, courts

have always framed upon lawyer coming into domestic tribunal and followed mostly judgments on this now everybody said about Bombay Port Trust case, if you read seriously that is not a proposition of law at all, what was laid down was if the management is represented by the lawyer then the worker should not be denied but in this case the inquiry officer was a company lawyer that is different from management representative. this issue has come up several times if management itself can conduct how does the lawyer of the management coming in will become bad suppose there is only one month show there is one industry sole proprietor he can conduct inquiry, now where law prevents he engages a lawyer instead of his doing the work in which case how does bias come in only because lawyer coming in, this is the lawyer as on due date who is the inquiry is not relevant who is the presiding officer is relevant so if you say merely because the inquiry officer is the lawyer you don't get chance and that is your first point, if management can conduct and the management appoints the agent it would not automatically lead to a bias so if inquiry officer is a lawyer which law says that you'll have a lawyer that one. number two prejudice some people said charges are vague but he has examined the witnesses and the charge sheet contain the bad words it is the findings which does not contain the bad words the inquiry report did not tell but the Charge sheet contained the bad word. He examined at no point of time he made a grievance that because i was denied all this I could not examine so the question of bias is always there. Secondly prejudice unless you establish prejudice the inquiry won't become bad so in that case the single bench remanded the matter to the Tribunal division bench dismissed the appeal but Supreme Court reversed the Calcutta High Court judgement as well as the division bench by saying this is not the case where interference is called for so it's mostly on the fact situation but ultimately we must keep 3 issues in mind was any reasonable opportunity denied, was any prejudice caused to the workman, was any bias crept into the final report, all the three are absent in the fact situation given to you and courts have always have said you must have a world view on the matter you can't say I want to give a relief therefore find fault in the inquiry that's a things but there is nothing wrong in saying he is a poor man he could have done this but you can't pervert the procedure to suit your convenience you can't reach the final conclusion thereafter retrench the steps to find this is a bad inquiry, this is one issue. I think this debate only shows there can be as many as different 25 awards as there are 25 different presiding officers. Actually one it shows creativity that is there, nobody copies another secondly it shows that they had applied their mind to their own conviction. Third there are so many precedents and you tend to justify your final action by precedent I think

there I feel you are wrong because you must come to the fact situation then apply the law not other way round, lawyer, Bombay Port Trust case, this is not possible at all and I think ahh you have done a better job but there are still scope for improvement. Thank You

The next session 7 and 8 will be combined, so we can continue it after also because without deciding the recovery of money you can't talk about Execution actually section 7 should be read with Section 8 and we'll first start with Recovery of money under the Industrial Disputes Act. This question always comes that after you give the award worker is unable to realize the monetary benefit of the award, that's one. Secondly to what extent monetary benefits can be computed. there are cases and cases where it is not mere question of arrears of wage or difference in wage it is also any monetary dues which are nto given in monetary term but capable of being computed in monetary term, for example the plantation workers in the hilly areas they are given one clothes and blankets suppose in a particular company they don't give so you'll have to you can make a claim for the blanket or a uniform or oil, suppose in cement industry they give oil and soap so even others which are being capable of being computed in terms of money you can also claim. Now we will be seeing why these provisions are made under the ID Act, suppose you give an award I know in my earliest I use to practice this, the Labour Court judges when they pass award for reinstatement in the award itself they'll mention back wages instead of saying 50%. What we will do, ask the management and the worker if ultimately worker succeed what will be the back wages? Management may give a figure, worker may give a figure worker's figure maybe little exaggerated management figure maybe little less. You somehow find a via media and say he is reinstated back wages quantified of 2 lakh rs, no problem at all. Now he is merely entitled for 50% back wages again the worker goes to the Labour Court to compute the amount then the third process is after computing the amount he has to go for recovery mechanism. So now today we will be seeing how to recover the amount. In case of a civil Court you file a EP application you have a attachment procedure but when it comes to Labour Court what happen.. there were times when the law was slightly different in the writ jurisdiction a government worker or government employee files a writ asking for a declaration his termination is bad then after getting the HC order he files a suit for recovery of the amount, the government do not pay now more often people find contemplations, contemplation is treated like a EP in courts now because there is no executive proceeding given to article 226 unlike Labour Courts the High Court do not have power to execute his order so your contemplation is treated unthreatened the department is threatened and then they pay the money.

Now in Civil Court they'll have to end up paying Court fee for that amount and then limitation, whether it is 3 years beyond 3 years there are judgements and judgments which says if it is a continuing cause of action then 3 years limitation is not counted. There is judgement of Supreme Court on Railway workers said 3 year is limitation for recovery of money you might have succeeded for 10 years for back wages but when you go to civil court the limitation comes in then you end up paying Court fee Lawyer fee, so in order to avoid all this the ID Act has amended and provision has been made to recover amounts. Now you see the history if it is a contract it can Enforced through Civil Suit or By Criminal Prosecution, then civil is not advisable because if you go to the Labour Court for relief and for recovery you can't go to civil court because it is Expensive, Delay and Limitation is there and if you see all these legislations these legislations also provide the very same authority to recover the amount in case of Workman's Compensation act The Commissioner, in case of Payment of Wages Act, the Payment of Wages Authority (Sec 15), in case of Minimum Wages Act, Min. Wages Authority (Sec 20) in case of the ID Act is to investigate and settle Industrial Disputes and dispute can be settled either by conciliation or adjudication whichever sought but after an award is passed then how to recover the amount. Now Sec 33C was the purpose of Recovery of Money 33 C (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], 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: So it seems it is one of the old legislation the colonial practice of collecting the money as if it is arrear of land revenue. Suppose there is a land revenue what does the revenue authorities do they come and attach the property and here it is as if the arrears of land revenue the Government issues the certificate to the collector as if it is arrear of land revenue, then collector sends it to the Tehsildar, tehsildar goes to the place and attaches the property recovery amount and then sends it to the collector and then it is departed to the Labour Court and then you get the amount for that the first requirement is that the government gives the certificate. In some state they are delegated with the powers of Labour Commissioner to issue the certificate but here it doesn't decide the quantity, the due should be established before the certificate is given otherwise

he can't give a certificate we will come to that later. Then 33C (2) is a Labour Court Power 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. 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. Then 33C (3) Labour Court may 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. In fact I want to tell you one thing the maximum number of petitions in labour Court are under 33 C(2) and your paucity of time you are not able to record evidence, in those cases you can always appoint commissioner to record evidence and bring it to the court, you can dispose of these matters fast. There are enough lawyers who appear in court to record evidence so you can do fast track method but many judges don't use this 33C (3) where you can appoint the commissioner, this is one way. Suppose a worker's claim is admitted to be genuine according to you what amount should be paid? With all prejudice you should give the statement then worker is also asked to give his statement, his lawyer is also asked to give a correct amount, then you reduce those difference and then compute the amount after hearing the parties. Commissioner method is cumbersome it takes more time, then this method of asking both parties to submit the statement of calculation, suppose the worker says I am entitled for reinstatement with back wages, what is the back wage worker may say all increment everything he should be liable to, management say post work there are no increment so both side can be asked to cooperate and if that method specially in public sector corporations you'll be able to finish number of workers, number of cases under this and you can even dispose of some 200-300 matters in a month.

33C(4) 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. Then 33C (5) is all workers by a group can file an application, previously individual workers will file there'll be 100 applications will be there then the management will say in each case you must record evidence in this group application you can convert it into single application and then decide

the matter. Then wages, wages defined in different act differently ID Act Sec 2(rr) defines wage in fact it includes value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any confessional supply of food grains or other articles; any travelling concession.

Now there are statutory payments under the Act, these are all the statutory payments Sec 25-M Lay off Compensation, Sec 25-N Retrenchment Compensation, Sec 25-O, Closure Compensation. Then there are other Statutory payment under Chapter VB where the employer do not seek prior permission not obtained or no application made, worker entitled full wages till such permission is obtained. In case the retrenchment application by the management is dismissed then it has to be treated as if he is in service so these are all the claims you'll have to compute. Now Revenue Recovery Certificate there is a judgement under Sec 33C(1) you can issue a certificate without the order of the labour court for example there is no dispute regarding the wages, then you can always compute what is the wage, I can tell you one example, the employer wants to give retrenchment under the chapter 25M chapter VB, he wants 25 M he wants to retrench, he makes an application to the competent authority, many times it is Labour Commissioner, now while issuing notice under Sec 25 M each worker will have to be given notice. and the Act requires 3 months' notice pay before the application is made, so the employer when he makes the application to the government he also encloses that he issued the notice to the worker and he has calculated 3 months' pay and cheque issued to the worker, that statement is already available on record if the application under 25 M is dismissed then the commissioner will have to see the notice and grant certificate he doesn't need any computation because the rate of the amount is admitted by the employer and you have the record the application itself shows how much money is paid for a 3 months wage you'll have to calculate what is the further wage to be paid. Therefore this judgement says in every case worker need not go to 33C (2) then come back for a certificate, in case where the commissioner or the government has already records of the wages or it can even call for the record of management wage register then say the amount is correct and issue a certificate and this judgement says you can issue a certificate every case you need not got to.. The Difference between 33-C (1) and 33-C (2), 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, therefore it is better for you in an award even to quantify the back wages, it may involve some more work but then worker may not be willing to.. he may be willing to forgo some few amount instead of saying back wages 50%, 75% quantify the amount, make a small calculation that is much better. The government does not have the power to determine. 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 exercise. Now what happens is he goes to the labour Court gets an award and file under 33C (2) application then goes to the government for recovery, that is a 3 stage recovery proceeding which takes quite some time and many time the court keep 33C (2) application pending because many High Courts have fixed norms under the ID Act and not for the applications so the applications are also increasing. Therefore appoint a commissioner for some lawyers also get benefit out of them and you can get in a month 10 15 cases recorded evidence and then pass the order on the arguments of the parties. 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. You can even go to a civil court remedy , in fact you'll find under the payment of wages Act the payment of wages authority has got power to attachment and execution so we tell the workers go under the Act get attachment because 33C(2) by the time you can sell the property. Suppose it is only nonpayment of wages he can go to the payment of wages authority who has got power of attachment. Now off course the question is different. We'll finish in 2 minutes and we'll come to the debate later. Now you can prosecute the management for not adhering the award or a settlement under Sec 29, there is a prosecution you see he can be punished for imprisonment for 6 months and with fine. It requires prior sanction by the state government. Though there are drastic penalties but no worker wants to go this is by the company Section 32. Now under Sec 34 he has to seek the permission in order to prosecute it is not a matter of right unless there is a sanction no magistrate can take cognizance of any complaint so this great powers many time gets delayed by the government. They send it to the Labour Commissioner, Labour Commissioner sends it to the Assistant Commissioner, Assistant Commissioner sends it to the Labour officer, by the time 6 months period is over under CrPc if you don't file a complaint within one year then limitation starts you can't say I went to the Labour Officer I went before Commissioner as soon as the sanction is not given within that period then the limitation operates

within the CrPc. Now we can now continue in the afternoon, this afternoon session will be continued.

**Shivaraj Huchhanavar (Research Fellow):** Before we break for lunch I request all the participants to give big round of applause to Hon'ble professor BT Kaul Sir and I on behalf of National Judicial Academy on behalf of participants and my personal behalf I extend my gratitude to Professor Kaul Sir for sparing his 2 days valuable time with us and bringing his legal wisdom to us. Thank you very much Sir.

## SESSION 8

**Justice Chandru:** Friends we saw in the morning different methods of recovery of money. We saw in the morning that the civil Courts are expensive. Where as in 33C(2) you can file an application without a court fee. There are no limitations and the procedure is summary and a group application is also allowed. Apart from the 33C(2) we have the option of prosecuting the management and recovering the amount indirectly. Now to put an end to all this a new provision has been made which is not in this book because this is a 2010.. Now with this we have been campaigning for quite some time because I've been given an award. The Courts don't have a provision to execute its own order. And in this the Labour Court shall transmit any award, order or settlement to a civil court having jurisdiction and such civil courts shall execute the award, order or settlement as agreed. So after you pass an award you transmit to the court concerned. Now if you are part of the Central government Labour Court governed by the central rules then this provision is there but there are some state governments made a different provision even before the central amendment came. Like here you don't execute the award, you don't have the power of Order 21 of the C P C. They're only a transmitting authority. The execution is done by regular civil Court. Now in this case 2 problems will arise the first problem is that the central government has got Labour Courts all over India and six seven places only not all over, for example entire South India there are only three la tribunals are there that is central government Industrial Tribunal come labor court. So the entire South India to the concerned court you transmit and then keep quite whatever happen that particular civil court will have jurisdiction. Now, the worker will have to go to the that particular civil court wait for the award to be transmitted. Now normally what happens is in normal civil court the executive court do not directly receive the decree. So there is something like transmission of a decree. So you file application, then it is transmitted but unlike that here the law obliges you to transfer automatically to the concerned court. In other normal civil court the civil court passes a decree unlike there is an application for transfer it doesn't do that. Even some some courts in the arbitration award also unless it is transferred they wont execute the order. So an application is filed for transmission. Further there is a procedure. Now in this case you merely transmit to a civil court and then that court will take care of the, the issue of execution. So you don't have a staff, you don't have execution work whereas in Tamil Nadu.. Now we'll come to that Tamil Nadu issue later. Now what are the advantages of Section 33 C(2)? Why should a worker prefer 33C(2)? There is no limitation, there is no court fee. Then legal

workman legal head.. then joined petition you saw 33C(5). Then material benefits also can be computed and there are no technicalities. Now there is no limitation this is always an issue which comes up decided long back in 1969 2 SCC 199, since labor court is not a court they said no limitation will apply. How does the labour court compute the amount under 33C(2)? The first part concerned with the money claim, *Simplicitor*. Second part speaks about computation of any money of any benefit. This is the scope of 33C(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 Labor 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 need to be done. This what I was mentioning in 33C(2) application the first question you'd like to ask you must conduct a preliminary hearing of the parties. Are you disputing the liability? No sir only the quantum. Then the issue can be decided within few minutes. Ask both sides file a statement come to some via media, pass orders. Only in case of disputes the question of taking evidence will arise. If the said dispute the right is not disputed nothing more needs to be done. Labour court can proceed to compute the value or benefits in terms of money. The Labour Court has gained the power to allow individual to execute or implement its existing individual right. It is virtually exercising execution powers, it is well settled 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 subtract from the provision of the decree. These limitations also apply to the Labour Court. So the courts have consistently held a worker has filed 33C(2) application, management says that very award is a illegal award. Can you now go behind the award in a 33C(2) application? Supreme Court says whatever limitation applies to execution court will apply to 33C(2). Like the executing court the Labor court also will be competent to interpret the award or settlement on which the workman bases his claim under 33C(2). Suppose reinstatement with back wages and other attaining benefits. Suppose you dont use the word other attaining benefits does it mean when only reinstatement and back wages? But a man who is reinstated is as if there was no termination at all, in which case any other workman who receives increment during that period, who receives bonus during that period there are disputes come up saying the labour Court did not say attaining benefits, therefore he's only eligible for mere back wages and multiply the number of your service and that back wages. unless suppose you use a word attaining benefits then you can also talk about increment and other things. Now therefore these are the issues we can decide.

Whether the award provides for this relief or not for the purpose of making the necessary under 33C(2) it would be open to the labor court to interpret the award or settlement in which the workman's right rests. Then this is a long standing judgement though it is 1964, nearly forty years old. But this is a last word because every judgment will keep on referring to central bank. The labor Corp must deal with the question of any so and so and there is a right, if the right is disputed what you should do? the benefit imposed under section 33 c 2 is a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right benefit on one hand and right or benefit which is considered just and fair on other hand is vital. The former falls within the jurisdiction of labor Court exercising power under 33C(2) of the Act. now this is what you'll have to keep in mind the fine distinction. Was it a pre-existing existing right or a right claimed for the first time. There are cases which are filed by workmen by saying had I been reinstated.. suppose he his superannuation age has, he is now claiming the back wages so he can come an argument saying had I been reinstated I would have got promotion, in that promotion I would have got a higher salary therefore compute this amount. Was it a pre-existing right or a right accrued after the decree is passed? The Supreme Court says in Brijpal Singh's case that while the first is permitted and not the second.. There's another new case under 33C(2), now Supreme Court for the first time said that if approval is not obtained under 33(2)B Where a matter is pending in the Tribunal or labour Court the employer alters the service condition, he has to seek prior permission. Suppose it is nothing to do with alteration, but he's dismissing a worker during the pendency of the proceedings then he has to seek permission. That is *a post facto* permission. Even in such cases the supreme court said is approval under 33(2)B is not obtained then nothing more is required to be done by the employee as well dealing with the order of discharge or dismissal has never been passed. Consequence of this is the employees deemed to have been in continued service. Now number of cases has been filed, there was a dispute I was dismissed but I did seek permission. Therefore I need not get it declared.

Previously the legal position was in *Punjab beverage* case that if there is any infraction of 33(2)B you'll have to file a complaint under 33a where the labour court will have to go into the question whether the dismissal is justified or not. Now after this judgement, that's all that he has to do is to get a declaration that I have been dismissed illegally, approval is not obtained and the courts say why should the worker be driven to court after court. He need not go to court again to get it declared illegal. He can claim sitting at home wages for that period. This is a new development

where you may get cases based upon Jaipur Zilla case. Now another question comes, what is the entitlement? Suppose there is a dispute on the entitlement, Can you simply reject the management? the management in the written statement says he's not entitled for this amount, the claim is disputed supreme Court says mere denial by the employer will not oust the jurisdiction. The labor court clearly had jurisdiction to decide whether such right did or did not exist when dealing with the application under that provision. On mere denial by company could not take any jurisdiction. We hold it was competing for the Labor court to decide whether this case before it was a case of retrenchment so and so.. Now suppose the worker do not dispute the retrenchment he want only back wages. Can the employer come and say no this is not retrenchment at all he was terminated. Now therefore you can decide whether it is a case of retrenchment or not. You can't decide whether retrenchment is valid or not. If the worker agrees with the retrenchment and only wants compensation you can decide. But in written statement they say it is not a case of retrenchment he was terminated it is abandonment of service. In all those cases you can decide whether it is a case of retrenchment or not? Mere denial will not take away your jurisdiction. Then bonus claim, this is again. Many petitions are filed under bonus. Since bonus under the bonus act is an industrial dispute, normally a worker will have to raise an industrial dispute for getting bonus and it can't be done under 33C(2). The claim for bonus in the context of Section 32 is only raised by way of arising dispute it cannot be raised by way of an execution application. This is what Supreme Court has said. Now if a worker raises a bonus dispute he claim some 18 percent, suppose it is based upon settlement with other workers you can say based upon a settlement but no dispute is raised no determination of Bonus takes place on the basis of Bonus Act he says I am liable for 18% bonus no Supreme Court says this can be done under 33 C2 it has to be done by way of industrial dispute but there is one exception to this because the difference between a preexisting right or benefit on one hand and the right on benefit which is considered just and fair otherwise vital. This is what the Supreme Court said you saw earlier. now as I told you one exception is that, that the bonus act under Section 10, provide for a statutory minimum bonus. Whether the employer makes profits or loss is bound to pay 1 month bonus In which case claiming statutory minimum bonus is not taken away, you can always say, I'm not claiming more than eight point three three percent. I want only one month bonus. Which the employer is bound to pay all that I'll have to prove is I am an employee and this is my salary and I am not under any punishment. Suppose in a bonus act there is a

disqualification, you are dismissed for destroying employers property you can be denied bonus. So in those cases you can only claim a minimum bonus provided that you are not disqualified and your employment is proved. In those cases the judgement of the Supreme Court may not come in way because it is a pre-existing right where quantity quantification is done by the parliament itself and not by the court.

now claim for back wages this is another important issue suppose somebody says he was terminated he doesn't go to the labour Court claiming retrenchment compensation. Retrenchment compensation under 25M is maintainable but he says since I was retrenched without following the condition precedent under 25F, the retrenchment is void therefore I am deemed to be in service. Supreme Court says without setting aside the illegal termination you can't claim it cannot be said in the award in the present one such a right of benefit accrued to the workman as a specific question of relief granted is confined only to reinstatement without stating anything over of the back wages. suppose the award is silent it does not give back wages, that can't be dealt in 33C(2) he has to challenge the award and get the declaration only under section 10 reference you can do that. then gratuity claim now suppose the Gratuity Act declares gratuity and the rate is prescribed under the act and your your termination or superannuation or resignation is accepted, can you claim gratuity under 33 C2 question came up. Now normally you must be aware of Premier case where an act provides for remedy and also right, you must claim relief only under the act. Where the act creates a right but does not provide remedy then you can claim remedy elsewhere also but if an act is a special law creates not only a right and a remedy you must go under that law and not any other law. in fact Madras High Court took the view since employer has not disputed I can compute gratuity but this is a judgement given by justice Krishna Iyer who said that the gratuity is the creation of a right the Act provide for a controlling authority as well as appellate authority so its a case of act creating a right, act providing for forum not only forum of the first instance even appellate forum it provides and therefore is a case of special law overwriting the general law 33C2 you can't make a gratuity claim. Now these three acts are where you are also having forum to claim like Payment of Wages Act, Minimum Wages Act but worker has got option to come under both the forum. It's not a case of rights being created, the workmen has forums to claim amount under these enactments also. Now there is one other point I want to mention was that in the in the Tamil Nadu Act while giving execution powers, Tamil Nadu Act provided for executing power to the court itself. That is we have are now giving staff like a

civil court we have a section for nazir section where they have got a executing court. Now there's one judgment in this paper-book at page 102.

Now this judgement came in peculiar circumstances first Tamil Nadu amendment came. Then the central amendment came, you saw in the central amendment, there's a transfer of decree to the appropriate civil court whereas in Tamil Nadu the same labor court can act like a executing court and execute a decree. As soon as the central act came Tamil Nadu government took the stand since the central act came, why they took the stand was there are some seven labour courts in Tamil Nadu and one Industrial Tribunal. Now each court in order to have a executing staff minimum annual budget will be one crore which means 10 crores will be spent every year which is a recurring expenditure. So somebody in the aaa aaa finance department told that now we'll take the stand and let it go to the center Act. State act becomes invalid because of the central act on the same field. This was the stand taken by them. Not with a view of any bonafide view but with a view to curtail the expenditure. So the labour law practitioners Association filed case and we decided the Comparative..two things we decided that, since the matter related to labor is on the concurrent subject both legislature can make law, both parliament and the state legislature can make law and in under 254(2) the repugnancy of the state law will arise only when the state law did not receive the ascent of the president. Once it is received the ascent of the President under 254(2) the it becomes the law for the state excluding the central on the subject either before or after. So far as Tamil Nadu is concerned Tamil law provides Not section eleven eight. And we also found that the 7 because there was a lot of letter exchange between the High Court and the government. What will be the staff required, what will be the amount involved.

So we are continuously corresponding between the state enactment and central enactment there is a gap of one and a half years. Then they completely gave up the correspondence fight and took legal stand that the central act will apply only because they need not create additional stuff, they need not create additional space, they need not create additional stationery, therefore best this is to go under the central act. So in this judgement we said that that the state law is valid so far as the state's conduct and the should not be based upon any financial consideration. The.. The other point which we pointed out was as I told the central tribunal are situated few and far, for example the entire Tamil Nadu there is one Central government Labour Court which means suppose an award is passed it has been transmitted to some place where the worker is there and again the

worker will have to employ somebody else to collect the amount. Now whereas the labour courts are there in every two one three district there is a labour court so in terms of workers executing the award the central Act is not very satisfactory and the state enactment, the enactment which is applicable so finally now they've created additional staff. So the Labour Court judges are also dealing with executing section also like the city court they are having nazir, ameen and other provisions are there and worker need not go to the government like the old procedure in 33C(1), get a land revenue certificate then go to collector, then go to the *tehsildar* and then revenue inspector, then village administrative officer, all of them he has to take care of to get the order executed and many times the collector do not work with the efficiency which is expected. So what happens is number of writ petitions are filed in the High Court asking for directing the collector to take action, so writ petitions increase and we monitor the collector collecting the amount and also the employer changes the address, changes the name board. In those cases the revenue officers cant do anything. If the name is same they can execute the order, the name is not the same they'll say there is no such establishment. So in a executing court executing power is given then application can be filed for modified relief also. So that is why the new procedure is more satisfactory and this *Central Bank of India v. Rajagopalan* is given at page 120 of this book. At page 121 you see the operative provision. The only point which the Labour Court can determine in relation to the computation of benefit in terms of money. We are not impressed by this argument, in our opinion on a fair and reasonable construction of sub section 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 before proceeding to compute the benefit in terms of money. The labour court inevitably has to deal with the question as to whether the workman has a right to receive the benefit, the said right is to be disputed. Nothing more needs to be done. And the Labour Court can part, proceed to compute the value of the benefit in terms of the money. But if the said right is disputed the Labour Court must deal with that question and decide whether the workman has a right to receive the benefit as alleged by him and it is only if the labour court answers this point in favor of the workman The next question of making the necessary computation can arise. It seems to us that the opening clause of subsection two does not admit the construction for which the appellant contends unless we had some words in that cause. That clause where any workman is entitled to receive from the employer any benefit does not mean where such workman is admittedly or admitted to be or entitled to receive such benefit. The appellant's construction would necessarily

introduce the addition of the words admittedly or admitted to be in that cause and that is clearly not permissible. So this is the understanding 33C(2) and in respect of 33C(1) you will find at page 123, what is the power of the authority? Now you'll find at page 124 the first line section 33C(2) exists in addition to any other mode of recovery which the workman has under the law, an analysis of the scheme of 33C(1), 33C(2) shows that the difference between two subsection is quite obvious. While the former subsection deals with the cases where money is due to the workman from an employer under settlement or an award or under the provisions of chapter VA VB subsection 2 deals with the cases where where workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money. That's where the amount due to the workman flowing from the obligation under settlement is pre-determined and ascertained or can be arrived at by any arithmetical calculation or Simplicitor verification. The only inquiry that is required to be made is whether it is due to the workman or not. Subsection 1 of section entitles the workman to apply to the appropriate government for issuance of certificate for recovery of any money due to them. Under an award or settlement or under Chapter VA of the government if satisfied that a specific sum is due to the workman is obliged to issue a certificate for the recovery of the amount. After the requisite certificate is issued by the government to the collector, the collector is under statutory duty to recover the amount. The proceeding procedure is aimed at providing a speedy cheap and summary manner of recovery amount due which the employer has wrongfully withheld. Therefore follows where money is due on the basis of some amount predetermine the rate of which sends determined in terms of settlement or award or chapter VA or VB and the period for which arrears claims also due the case covered by as only calculation is required to be made. Now you can take the word, take the term VB, now if you see the ID Act Chapter VB now section 25M at page Sixty eight of the book 25M deals with the prohibition of Lay off, if you see the subsection 8 of 25M where the employer where no application for permission under subsection one is made or where no application for permission under subsection 3 is made within the period specified therein where the permission of layoffs has been refuse such layoff shall be deemed to be illegal from the date on which the workmen had been laid off and the workman shall be entitled to all benefits under any law for the time being in force, as if he had not been laid off. Now the worker need not raise a dispute again. He has to wait for the government to refuse permission or he has to find out that no permission is even applied for by the management. In both cases, there is a pre-existing right with the worker. Now in those cases they

can directly ask for a certificate under 33C(1) also because if no permission is there then all that amount is to be computed. Now if you see the form, the form prescribed at pg. one forty seven, Form O 3. Now you take next form that is form mm form number P A at page one fifty one. Now this form in Para number 2 says, 'the workman concerned have been given notice in writing as required under clause a of subsection one of section 25N. Now this notice if you see earlier you'll have to give three months' pay or 3 months' notice. Now three months' pay will be mentioned in the notice itself. Therefore there will be no difficulty in computing the wages because the notice goes to each workman and each workman will be given a cheque for the 3 months' notice by the management and therefore it is easy for the authority he need not even under 33C(2), he can go under 33C(1) saying I've been given notice. Now the government has refused to give permission therefore give me certificate. Therefore in this Gazozza's case which is there at page 121, 33C(1) directly certificate can be there. Now how to obviate all these difficulties? Now we have got power of execution under eleven eight. So the the worker need not go through the government to the Labor Department, he can straight away come to court file application under transmission and fight for his execution of the decree. And thank you.

**Participant:** Sir whenever there is 33C(2) applications..

**Shivaraj Huchhanavar** (Research fellow): You can ask your question and while asking question please be bit louder so Lordship can make it out.

**Justice Chandru:** we can have question answers not only on this topic but any other left out topic my only request is if you are able to write down your question because after hearing the lawyers for so many years I lost my hearing power and therefore if you're able to send the question in writing I can give a better answer otherwise if you want to ask a question you can ask I'll ask Shivaraj to tell.

**Participant:** Sir in all 33C(2)b applications whenever a workman files an application for recovery of money.

**Justice Chandru:** It need not only confined to the topics which you have taken it can be relating to any other issue relating to labour tribunals.

**Shivaraj huchhanavar:** Sir you can write it down your questions So that it will be very convenient you better write take 2 minutes write your questions and then..

**Participant:** The only question is the other side will always raise a dispute of workman the management always says that he's not a workman that's all there is no other defense.

**Justice Chandru:** In fact I had a very a very interesting episode in a labour court once that was a preliminary issue, management said he is not a workman so the workman examined himself in the evidence in the box PW1 so the management lawyer put a suggestion you're not a workman under the ID Act. Then the workman said then I am the managing director he asked him. So this is every case. Whenever there is an opportunity. Management will raise objection that a. It is not a industry notwithstanding Bangalore Water Supply they keep on raising that issue. Now if you see the ID Act there is a new definition of the word 'industry' under the 2(j) at page 13 of the book. Now if you see 2(j) at page 13 of the book industry means, any business, trade, Undertaking, manufacturer or calling of employers includes any calling service employment handicraft or industrial occupation or avocation of workman. Now if you see the word 2(j) there is a footnote given under thirty seven, if you see thirty seven, On the enforcement of clause C of 2(f) Act forty six of eighty two clause j shall stand substituted. Now the definition of Industry means any systematic activity carried on by cooperation between employer and his workmen whether such workmen are employed by such employer directly or by or through any agency, including a contractor for the production, supply or distribution of goods so and so.. Now stopping here for a moment parliament amended the ID Act and reintroduced 2(j).. Now that section is not been brought into force, the section yet to come into force, now the old section continues. The old section has been reinterpreted by Supreme Court by the seven judge bench in *Bangalore Water Supply case* now to give effect to the to that judgement. The definition is borrowed from the judgement itself, 'industry' means means any systematic activity carried on by co- operation between an employer and his workmen. Now want is found in the bracket, whether such workmen are employed by such employer directly or by or through any agency, including a contractor. Now there is a wider definition. You.. Supposes this act. This section is notified then even a person employed by contractor will become a worker under the act. So Central government had not notified the section for two reason one is it gives a very sweeping definition of the term worker, which means outsourcing everything will be gone. Anybody who is employed through agency also the workman means then in which case the principle employer will be put to lot of obligation. The second was it excludes after having an inclusive definition it exclude certain categories as many as 9 categories and if you see number 3, number two hospital or dispensaries. In

1960 Supreme Court said hospital is an industry. Like Number 3 educational, scientific, in 1991 SC said educational institutions covering non-teaching staff is covered. Now these organizations which are representing these industries. They said. You are now going to exclude us. Then you must give us some other missionary for our redressal. So central government tried thrice to bring a alternative law in the respect of Hospital and other institutions. But then nothing was agreeable. Therefore for the last 31 years this section is still not been brought in to force. Some of the labor law books don't contain this footnote that this section is not to brought into force, there are some Labour courts which committed mistake by saying that you are not a you are working in a hospital therefore you are not covered. Not knowing the section is not coming to force. Therefore it is left with a management to raise any issue, number one. Number two we have notified.. in this book, In this book it is mention. In some Allahabad books there is no mention they simply put the new section. So labour courts are misguided by that provision hospital continues to be industry, continues to be the old law.

**Participant:** Yes yes sir the old law is prevailing now.

**Justice Chandru:** Once when I was a lawyer a senior high court judge called me to his room please come I want to ask some doubts I asked him what's the doubt. I want to know whether this section has come into force or not. I said No sir it has not been notified. But in this book it doesn't show like that then I brought the book showed him it is not been brought it, yet to be notified by central government. So when I told him that there was a lawyer waiting in the anti-chamber so he called him he apparently argued before the judge he was appearing for the management sir this is exclude cooperative societies are excluded. So he was arguing to quash the award. Then he told that lawyer it is not fair for you to mislead the court. But then how many times they'll get advise from various people. The law book should have some responsibility. And to see whether it is notified or not. Therefore there are more confusion. Now not an industry. Not a workman. Not an employer. All this can happen. So when you decide how to decide whether he is a worker or not? Then the management will say order fourteen decide as a preliminary issue, Supreme Court said you cant decide every issue is preliminary issue, you can decide along with the main issue also. Then they will say it goes to the root of the matter you take it up as a preliminary issue. Then a writ petition will be filed everything will be stated. Though nowadays we don't entertain such a a writ petition at the preliminary issue but there are some judges who entertain also. Now the net

processes is everything is delayed but fortunately Supreme Court said, nobody can compel Labor court to decide an issue as a preliminary issue. He can frame an issue whether it should be tried as a preliminary issue or any other issues is left to the Labour Court. So you can always tell.

**Participant:** Sir what is the judgement?

**Justice Chandru:** I'll like give you the judgement. But you can write an order see there is.. even even under order fourteen also now if you see order fourteen. What is the law. You need be compelled to decide something as preliminary issue. Nobody can compel you. No no no. What has happened was in Maharashtra now in C.P.C they have amended and 9a a provision has come. No in 9a in Maharashtra means in civil court when a issue is framed as a preliminary issue you are forced to decide first. So recently Supreme Court went into the issue, what is the effect of 9a and order 14? They said in order 14 discretion is left to the court to decide whether as a preliminary issue or along with other issue. But in 9a you got to decide within first and then only you can go to other issue because they found some frivolous suits are being filed they want to decide. Like that in the labor court where does it say you must decide something as a preliminary issue under Section 10(4) you must answer the points of reference or any matter incidental there. Now this matter is incidental there to you get power only from the order of reference. Order of reference cannot on a non-industrial dispute or a non-workman or a non-employer, non-industry. So it may be a valid point. But nobody can compel that that you must decide that as a preliminary issue. It may be one the many issue. And you can take evidence on both. Both on the preliminary issue and the merit also. But what happens is some judges decide preliminary issue and pass a order and then that is subject matter of writ petition and then main method get pending for years together. But it is left to you i'll give you the reference you can.. This is one one issue. Then there are some questions which has come.

**Participant's Question 1:** Whether an employee can claim for recovery of bonus by filing an application under 33C(2)?

**Justice Chandru:** Just now I showed the judgement. If it is more than 8.33% you cant claim. I'm only making a via media solution because if it is more than 8.33 you must analyze the balance sheet. What bonus you will be entitled to get. But that rule has got two exceptions. One, the employer declares bonus gives it to every workman denies to some workman. Then the settlement itself says, what is the bonus payable? There won't be any difficulty because you are not claiming

bonus directly, you are only claiming a benefit under a settlement. So 33C(2) is maintainable. The second exception is that in case of a minimum bonus. The Section 10 itself declares that every worker is entitled to get a minimum bonus of one month period is equal to 8.33% in which case whether the employer make profit or loss, there is no question of going into the balance sheet itself. Even if he makes a loss he'll have to pay minimum bonus. Therefore it is a statutory payment. And therefore you can claim. But if it is more than 8.33 then the SC judgement will apply then it is not maintainable.

**Participant's question 2:** In a claim petition filed u/s 33C(2), management has raised a contention that petitioner is not a workman. Whether the labour court in a petition u/s 33C(2) can determine the status of the petitioner as a workman?

**Justice Chandru:** That certainly he can decide because that's the question arising out of the claim. The bonus application if it is maintainable then the question whether whether he is a worker or not has to be decided. And you can decide a matter which is incidental thereto that he is a worker or not that can be decided in a 33C(2) also.

**Participant's Question 3:** Whether an NGO can be treated as an industry?

**Justice Chandru:** Now that is why if you see section 2j newly amended section. You see here. You take Section 2j on page thirteen subsection four institutions owned or managed by organizations wholly or substantially engaged in any charitable, social or philanthropic service. Now that is excluded under the act. Now this section is yet to be notified. So after Bangalore water supply Justice Santosh Hegde has referred That Bangalore Water Supply requires reconsideration. Because the word industry is too sweeping any activities will be hit by this definition. Though he made a reference in 2005 the Supreme Court is yet to constitute a larger bench because Bangalore water supply decided by 7 Judges and it has to be reconsidered by 9 judges. Now there has been, a successively seven chief Justices have come. Nobody has constituted a larger bench that is why in this book I have discussed the the this topic is discussed at pages, Page eighteen. This is doubted but then no no but the parliament has amended. But the point is that the at pg 23 if you find first paragraph, though the larger bench attempted to settle the dispute which gave rise to court battles for over 30 years, the pressure lobby was not satisfied with the definition given by the court. There were attempts to derail the said judgement by bringing a new labour legislation one in 1978 and another 1982. Both bills were resisted by the working class

and were never was passed by the parliament. Ultimately the parliament accepting the said judgement amended the definition by Amending Act 46 of 1982, so at page 26 I have given the amendment and the footnote says this section is yet to be brought into force by the central government but however a whole lot of exemptions were given from the purview of the definition thereby keeping out a large number of workers outside the ambit of the act. Fortunately this amendment is yet to be notified even though more than 32 years have gone by. As expected another smaller bench doubting the proposition made by larger bench in Rajappa's case has referred the issue to be reconsidered by another larger bench. But even after we have a lot of time we said X. once only a prayer. Passenger bus. Where does the business comes within the definition of the reference is made after 19 years ago none of the Chief Justice of India thought to construe a larger bench. So this section as it was earlier which continues to be in force.

**Participant's question 4:** Mr. X owns only a passenger bus. Whether his such business comes within the definition of industry?

**Justice Chandru:** Now whether he owned one bus or a one hundred is not a criterion because the definition says Industry means any business, trade. Even a one man show. Suppose somebody runs a provision store, engages an assistant shop assistant. Suppose somebody runs a motor mechanic shop, engages two mechanics. It is not the number which matters it is the activity which matters. And the definition says, Industry means any business trade or undertaking or manufacturing or calling of employers including any calling, service employment, handicraft, industrial occupation or avocation, therefore it is too wide and Supreme Court said. Any systematic activity and a co- operation between an employer and his workmen Not only for production but also service is an industry and therefore even if he owns one bus. For one bus under the motor transport act.. Suppose you are running a bus full day. Which means 2 shift, Motor Transport Workers Act fix the timing of worker maximum 8 hours. Suppose you run the bus for sixteen hours, morning four o'clock to night 12 o' clock you must have 2 shift workers. So one bus has got one conductor and one driver two shift means two conductors and 2 drivers. Then it also requires one technical stuff as a cleaner and a technician therefore it become two plus two plus one five. So there is no question of one bus having our one worker. Minimum they'll be 5 workers irrespective of a bus.

**Next question:** Why the legislature through “transmission of Award” by Labour Court to Civil Court necessary for execution? Should the law be amended to permit direct filing of Execution Petition before civil court?

**Justice Chandru:** There are two problems first problem is so far as the central government is concerned. While they want to provide execution power they don't want the labour court have additional staff. So best thing is to use the executing court as already in existence. There is one danger, because if the award is transferred to the executing Court. It is a civil court it is not a labor court. Suppose the contesting party, the objecting party raises the objection that this is not an award under section 2b of the ID Act. Should the executing Court reject the application or decide that issue whether the award is a nullity or not. So you are indirectly clothing the civil courts the power to reinterpret the award. This is why we say in Tamil Nadu the same court has got executing power. It's easy for the court to interpret. If it is given to a common civil court then the problem become more because a civil court which is not familiar with the labour law will have to go to the question whether he is a worker, whether it is the industry, whether the award is nullity? Both this issue will be arising. But why the central government did not want to give executing power because it minimum costs court a minimum of one crore per per year, a minimum staff for executing the order. So they don't want to have the additional workforce therefore send it to the same court. So you create a new jurisdiction make the same court work. For example in Tamil Nadu the labour court has got additional power under the ESI Act, under the standing orders act. In many act they'll make the appellate authority why Labour court is not having any work give them more work so every enactment they'll say their will be appellate authority or a competent authority. Under Section seventy five of the ESI act the Labor court has given ESI court power. Under Section six of the standing orders act Labour court is made as appellate authority so they keep on adding so people more work is given to you. And the the other question, should the law be amended to permit direct filing? If you say direct filing, then you'll have to declare as a decree of a civil court alright if the award is declared as a civil court. What happen to a settlement? What happen to a 33C(2) order where they also declared as decree. For example if you see any award order or settlement or any order of the labor court can we transmitted to the court. If you say. You can directly file. Then how will you say two settlements between parties. How it becomes a decree of a civil court. So you'll be straining the language by doing this. Therefore the best method is like the Tamil Nadu example that each court labour court or a tribunal will have

executing power so that better results can be produced. Though it may be little expensive. That is my personal view which we have set in a case where we have said why it is important. The same court should have the executing power. Even when objections are raised the court can overrule the objection saying it has already gone through the issue for the labor court it is not a second exercise. Whereas a new new civil court will have a second exercise of understanding the labor law for the first time. Even experienced labour lawyers are finding it difficult given to the civil courts. And then giving power to go behind the decree then it's a difficult thing.

**Participant's Question:** (1) A church is conducting an industrial establishment in which a worker who was working was denied of employment. Later the dispute was referred VII 10 (i)C the church raised the contention that church is not an industrial establishment therefore not an employer? Is that correct?

**Justice Chandru:** Now this is a very difficult question based upon the evidence you'll have to decide. Now if suppose you say it undertakes some other work. Nothing to do with any spiritual activity, nothing to do with any religious activity. But it prints and sells text book or is running a nursery school and collects money. now you'll have to see what is called as what is a dominant work and what is the other work? If you able to split the work making it into individual compartment you can you can apply the ID Act there is no difficulty at all. For example under the P.F. act Osmania University was running a press all the publication of the university was printed in the press and sold to public for a cost. Now the PF authority said it is covered by the PF and ESI Act. Can the university say, I am a university I am not covered by Act. The Supreme Court said that if you are able to split the activity and whether this activity can be an autonomous activity. You can apply the provisions of the act similarly when it came to the Tirupati jaiv stana, Tirupati when you go you know how much money the temple makes you know but then they're also having other activities. If you go you can travel in free bus to various points and then the temple has got a huge transport establishment. There are conductors there are drivers, there are mechanics, there are work shade. Now the the workers of the transport department wanted to have bonus then matter went to the court. First the Andhra Pradesh High Court said It is not a industrial establishment under the bonus act. Matter went to the Supreme Court. Supreme Court said where there is a cooperation between men and men or a service rendered between men by the cooperation that is a definition a systematic activity carried on by cooperation between employer and his

workman. And for the production, supply or distribution of goods, services with view to satisfy human wants or wishes not being wants or wishes which are merely spiritual or religious nature. That spiritually and religious nature is now included by the parliament. Now in those circumstances Supreme Court said. You may be an industry under the ID Act for the purpose of bonus Act you'll have to decide whether an industrial establishment under the bonus act, now the Bonus Act under Section 32, 32(5) grants exemption to several institution. If an institution is not intended for profit then it is exempted under Bonus Act therefore the Supreme Court said. If something is declared an industry it doesn't automatically become industrial establishment. In that act you'll have to prove that you are coming under the bonus. Therefore in this case where he's denied of employment and he is working in a industry run by the church. Merely because the church runs a industry doesn't mean it is going out of purview of the Act. If you're able to see that it can be operated as a separate establishment you can always apply that test.

**Shivaraj Huchhanavar:** Any other questions please we have time you can ask question and you can also say your experience too.

**Participant's Question:** In state of Uttaranchal's case Hon'ble Apex Court has held that if there is allegation that the settlement arrived at between parties before Labour Court is a result of fraud etc., such dispute should be got referred to Labour Court as on industrial dispute and cannot be decided by the court which passed the Award.

**Justice Chandru:** Now this is a very complex, complicated issue because now the settlement reached between the parties are recorded as a final determination of the dispute. Then it becomes an award. Then some party brings an action saying that this settlement is bad settlement. Where will you prove that case? Now there are 2 difficulties comes. If a settlement becomes an award then there is no further reference. So another party cannot raise a dispute saying that settlement is illegal settlement that award is bad so while challenging the award allegations are made the settlement is by a fraud. In that context Supreme Court said you cant go into this issue directly you'll have to raise a dispute. If it is a 18(1) settlement. That is between two parties there maybe workman who are outside to another party 18(1) only binds.. is a bilateral settlement binds only party to a dispute. Suppose there are 100 workers, 80 workers belong to a union which signs the settlement it only bind eighty workers there are still 20 workers left. Therefore some other organization, some other union which is a B. union can bring an action saying this settlement is a

fraud. Normally in a bilateral settlement the question of challenge does not arise because it is only binding on the parties. But if it is passed as an award then it is also binding on the non party to the settlement. It is in those cases if they go to the court. It is in the context Supreme Court said that this issue can't be derived in that award passing court. This has to be raised as a separate dispute where it has been derived that the settlement is fraud, whether it is binding on you or not. That is what they say but again it's a very complex situation because the courts have always said once an award is passed upheld, the question of challenge will not arise such challenge will have to be made in the high court under article 226 and the High Court may decide the larger question whether the settlement is a fraud in the morning. I was telling you. The settlement was converted into an award in doing so the labour officer did not write a separate para that he has gone through the settlement. It was fair and reasonable and he's satisfied that the party signs the settlement is a majority, representing the majority or substantial sections of workman. So in extreme case this is this issue was in 1979 where the court found the conciliation officer under the ID act see S. 4. Conciliation officer are appointed in section four and the power of a conciliation officer is given under Section 12. Section 12(3) if you read If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government and so and so. And Section 12(2) if you see, The conciliation officer shall, for the purpose of bringing about a settlement of the dispute, without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. So he has to apply his mind that it was a fair settlement. Suppose there is nothing found in the settlement. Normally they write in the preamble. I have parties at variance they are having some minor dispute, they came to me. We had a parlay on our two days. And finally on my suggestion they have agreed. And I found the terms are fair. If he doesn't write a paragraph he merely puts a rubber stamp, what was agreed between the parties? Then there is a scope to strike down the settlement. In fact in Tamil Nadu we had a very interesting case where a settlement was signed between the worker and management and the labor commissioner was I.A.S. officer. He wanted to prove to the minister that he had brought the settlement. So he's signed as a conciliation officer. But then the conciliation offices are under section 4 is appointed by the... And they we never had a notification declaring the labour commissioner as a conciliation officer. What happened was a person who is not a conciliation

officer under the act signed as a conciliation officer; this was not known to anybody. And then the settlement was signed. When the action came to the court it was found It was not signed by a conciliation officer therefore it cannot we have 18(3) settlements or a 12(3) settlement. 18(3) give the effect of a 12(3) settlement. You see Section eighty three. What is the effect of? A settlement arrived at at page fifty two a settlement provided under the conciliation proceeding under the act which has become enforceable shall be binding on all party to the industrial dispute. No problem. All other parties summoned to appear as proceeding party to the dispute Then c where the party referred to in clause A or clause B is an employer. He's heir, successor assigns, that is for the...employer. Then d where the party referred to clause A or b composed a workman all persons who are employed in the establishment are part of the establishment to which the dispute on the day of the dispute and all person who subsequently become employed in that establishment which means it has got extended operation it is a special contract. In a contract is only between two parties that eighteen three D makes even a party which is not before the court, it is also made a party by virtue of the signature given by conciliation officer. So conciliation officer plays a crucial role. The moment he signs even who are not party also become parties. In that case what happened was the government passed an order after this judgement came. They found the labor commissioner ha got no power then they issued a GO retrospectively giving power to the Labor Commissioner and that became again a subject matter of dispute because under Section thirty four. These are all litigation point that the government has nominated Common can delegate the power under the act. So the using the power they delegate it. But then the it can only be prospective it cant be retrospective. So again the court struck down that. But the cu curious aspect was when the matter came to the Chief Justice's Court and Chief Justice's was very much wanting to uphold the settlement. Then finally they said that at that time the governor office became vacant, the Chief Justice became the acting governor and the order was issued in name of the acting Governor. So we said you should hear this case because you are the author of the GO, then it went to some court. So it had so many chain reactions. That.

**Participant's Question:** Whether any question relating to fixing of sincerity can be decided by Labour Courts?

**Justice Chandru:** Certainly yes. The Supreme Court has held that there is no the term industrial dispute is so wide even these issues can be there. There are number of reported judgments. You

can go into the issue of right to promotion and promotion is also comes within the difference of opinion of any condition of service or terms of employment. And the terms of employment do not provide for a a promotion. You can seek for promotional avenues and the courts have held which is a promotion post and its not outside the purview of the court.

**Prof. (Dr.) Geeta Oberoi:** Is that alright? I think some of you are very keen because some of you are going out. Just one announcement that please if possible come back by seven o'clock because seven o'clock we are showing you a movie, 'A prayer for rain'. It's a movie about industrial disaster, Bhopal gas leak disaster in fact. And its made by some Hollywood basically production house. So you'll see that movie from seven to eight it's just one hour movie and then followed by dinner which will be in auditorium itself. So we hope to see you all like seven o'clock at auditorium. Dinner would be served only there. Seven thirty? eight? Yeah exactly. Eight would be too much seven thirty is all right no seven thirty OK? Ok then. See you all at seven thirty. We will because tomorrow we'll discuss something about that movie also so I've really want that all of you should see that movie. Thank you so much.

**DAY 3**  
**SESSION 9**

**Prof. Dr. Geeta Oberoi:** Very good morning to all of you. Yesterday all of you saw that movie? Yes! Ok. We will talk later about that movie in later part of the day. So now today we have with us Senior Advocate Mr. Jamshed Cama and Mr. Michael Dias. Both of them will do their own introduction. I leave it to Speakers to introduce themselves little bit about themselves and then proceed with this session. Each one of them has thirty minutes to themselves.

**Mr. Jamshed Cama:** Learned judges and my compatriot out here. I'm fortunate that I'm speaking to you first it was a topic involved so little to say that I'm afraid my friend when he gets up to speak 1 hour is tough time. My topic you today is legal representation of labor. The only think I can think of really in the context of legal representation presentation of a labour would be both before the tribunals and in departmental inquiries. Those are the two places where legal representation becomes an issue. The moment just step into a civil court there is no question of legal representation otherwise everybody has right to have a lawyer. Coming down to the industrialist who will act first, the statutes prescribes... In 1947, when the statute was created the intention of the legislator was a keep it simple as far as possible. Not involve us lawyers because we lawyers have a nasty capacity to comminute to something which is very simple. So they didn't want lawyers to be involved. Therefore under the ID Act they made a provision that basically representation would be between labor or laborers themselves. OK. Can you hear me. So the invention of the statute was that you would have legal representation by laborer themselves because of anticipation was it is a straight forward matter man is dismissed, he knows why he is dismissed. Company knows why he dismissed him. Why you want lawyers we involved in this the idea was simple straightforward adjudication. Therefore they're prescribed that a labor or a laborer or a union leader whoever represented him would have a right to object to management having lawyer involved. This created controversy as to what stage must that objections to the legal representation by the other side be involved. Labor have an absolute right. The question was does management have a corresponding absolute right to be represented by a lawyer in the tribunal. This issue was agitated before the Bombay High Court and they came to a conclusion that yes labor has an absolute right to object to an advocate appearing on behalf of management but that's right must be taken up front and on the very first date on which the matter is posted before the Tribunal or labor court, the labor

or the the union must raise objection saying I don't want management to be represented by a lawyer. If they did it, they could object. If they didn't and if that first date expired. Then on the next day they are barred from raising the objection. Now what happened in some states? Again I am basically in Bombay though I'm now in Delhi. But in Bombay, we have what's called the MRTUPL Act. It is a local statute. The effective of this act is part, it divided partly into recognition of trade unions and the other part in dealing with unfair labor practices. As far as recognition is concerned any union which has 30 % or more membership in a company is entitle to apply for recognition from the industrial court. Once that recognition is granted then a dispute can only be raised by a recognized union on general demand issues. Corresponding only that union that represent labor, indeed tribunals and nobody else. We also this have a statute called the Bombay Industrial Relation I telling you about Bombay because I'm more familiar with it. The Industrial Dispute Act which is central act has only the one provision I spoke to you but since you all here and all judges I thought you would like to know what's happening in some parts the country. Under under the B.I. Act also there is a concept of representative Union. Now this is an interesting statute purely academically because where a representative Union appears nobody else not even the worker himself can appear that is significant because the understanding was that a representative union represents not just one worker or one Union of Workers. It represents the entire industry in which that union is representative. Now there's a distinction between a recognize Union in Bombay which for the establishment, the factory. The representative union is for the industry. So under the B I Act where a representative union appears then only that union can appear and nobody else not even the labor himself can appear. And if labor does appear and thereafter the representative union appears laborer has to leave the court and only the representative union can continue the matter so there has this slight restriction on the rights of the laborers who fall under that particular statute. Moving out of the statutory law and become upto the most common place where this becomes an issue i.e departmental inquiries and what does a law on departmental inquiries? it is reasonably well settled. In departmental inquiry take for example in a private company and then take it separately in the case of a PSU. In the case of a private demented company, the law is simply this that you are allowed to be represented yourself. You do not have a right to call a lawyer to represent you in a departmental inquiry. You don't even have the intrinsic right to call your union to represent you in an inquiry under the pure and simple Private law. This is because standing order act which is a statutory contract between employer and employee does

not provide a right. Now the courts have taken the view that the right to representation has to be provided either by statute or by rules or by a settlement. So in some cases in private industry a settlement may provide for the representation through the the union. In some rules and regulations in P.S.U.s there is a provision that you would be represented by a lawyer or by union representative of your choice or by an employee of your choice. The point I'm trying to make is that where the law and the rules or regulations other contract of employment are silent. There is no intrinsic right of the employee to be represented in a departmental proceedings by anybody other than himself. Now a controversy arose as to what happens if the management is represented by a lawyer in an inquiry which is very rare. It has happened. In such a case, principal of justice and equity laborer would be equally entitled. Now there's a slight grey area. The grey area comes in when this happens that if you have a lawyer who becomes an in-house lawyer. Now that in-house lawyer is not a practicing lawyer but he is what's called legally trained mind. So if you have a person who is a lawyer who is an employer of the company and who represents a management in the inquiry as the presenting officer then he being what's called a legally trained mind. The the you workers would be entitled to then say I want a lawyer to represent me and if it is not granted it would be a violation of the rules of natural justice. So therefore to put it ethically right to representation is subject in department the proceedings through a union, through another friend, through a labor or through a lawyer depends entirely upon the rules governing that particular employment. If it is there - Well and good. If it is not there then this principal who is a prosecuting officer or the presenting officer. Now very often have been held that yes the presenting officer is not a lawyer but he has done fifty inquiries. Again the principle would be is he not the legally trained mind accustomed to holding inquiries. Poor laborer is doing his first inquiry his whole life is on the line. So to speak, you present him with a person has done 50 inquiries. We would take it as a legally trained mind and therefore to that extent they would be a right to representation by dispersant but through a lawyer, right but short of that there is no such right. But these are the two areas in which I can consider the question of labor right of representation. In the case of P.S.U.s, as I said it depends on the rules and regulations governing their employment and ultimately the rules prescribe well and good if they don't prescribe you don't have right I think there is a judgment of the apex court on crystal or something or the other that I must remember it where they have finally lay down the law on the topic out here. But this in substance is the law. Thank you very much!

**Mr. Michael Dias:** Good morning friends. By way of introduction I'm a lawyer, I practice in Delhi I've been in this field of employment laws for a very large number of years. I've had the privilege of representing Indian employers at the Indian labour conference. The last fifteen eighteen years. I represent Indian employers at the International Labour Organization and the regional office in Bangkok as also at the headquarters in Geneva and I work very closely with the Government of India on various labor laws and initiatives.

I am in the session going to share a couple of ideas on legal representation and legally aid in Indian labor matters and of course I would be in the next session also on concerns of management employer's rights. To take the discussion further friends I'll go by what Mr. Cama said towards the end of his very brief and specific presentation and he said it's unfair that an employer representative in a domestic inquiry who may have done 80 inquiry as he mentioned but not a legally trained qualified person. Assuming that he doesn't have an L.L.B. qualification but the reality is that he's done 80 domestic inquiries on behalf of the management and therefore in his opinion he suggested that the worker should be also permitted to represent through a lawyer or a legally trained qualified person. So I would rather put it the other way around. I have been in this work dedicatedly over the last many many years and I know there are literally very very few professionals who are only representing employees. Whereas when it comes to representing workers what really happens is their first training is when they are dismissed from their own employment so that the starting point of their career in the realm of labor laws and employment laws. They lost their job for whatever reason rightly or wrongly. But the reality is they lost their job and in the process they are fighting for their own survival. And as a consequence of that they have learnt the ropes very well. So as a practitioner myself, I can tell you that labor laws per se is one of the most complicated laws that we have in this country. You know we talk about being notice pay. What are the components of a notice pay? There are judgments to that effect which would say that every component would be deemed to be not for purposes of notice period. So if an employer pays let's say Basic wage plus the dearness allowance. The action is wrong in law. The technicalities of the labor law take 33(2)(B) which mandates that before terminations you have got to send the money to the employee. I remember doing a case for Novice Drycleaners in Delhi years ago where for some reason the cost of the money order was deducted from the wage that was being sent and unfortunately the matter traversed right up to the Supreme Court and the employer lost. So what I'm trying to share with your friends. The technicalities of labor laws has just gone

absolutely astronomically high. And the only way is that you have to update yourself based on judge made law which comes on a regular regular basis. In such a situation friends does it really make sense to have section 36 on the statute books? I do not know friends whether you are aware but the new Modi government also has brought up a new legislation called the industrial disputes code, where they sought to amalgamate the various labor laws together. And I'm sorry to share with you friend but Section 36 is very much there even in the new law. I took it up with the Ministry of Labor and Employment recently. Just a couple of weeks of when I said friend I don't think it makes sense in today's time to have that embargo that lawyers will be prohibited from attending and participating in the adjudication proceeding before labor courts and tribunals. My own experience has been my own experience practical experience and even in domestic inquiries my experience has been having lawyers is far more quicker, easier, smoother and the whole process works out well because he knows what I'm talking I know what he's talking. There is when it comes to the worker, he is so focused on his problem that she can't understand what this principles of natural justice and why should this be done in this manner of I should be a handwriting expert to be brought etc. etc. I mean I can just go on and on and on. I would believe friends, the time has definitely come when we need to revisit it. I have not going to court because I'd do a lot of work in tribunals, high courts and across the country. I know of trade union people whose only job is to raise an objection under section 36. I remember in Delhi, we used to have problem in the 80s and the way of dealing with I make a confession to your friends don't misunderstand me. The only way we would be able to get around it was pay the union leader fifteen hundred rupees I'm talking of the eighty's. I'm being honest to that extent. It has been used to harass the employer so that the proceeding do not carry on. That's the only purpose because let's be honest if you want justice what difference does it make as to whether it's a lawyer or not a lawyer. Are you saying that you do not have faith, trust and believe in the presiding officer? If you have faith and trust in the presiding officer, he will take care of everybody's interest. That is his job that is what he's sitting there for. I have seen and even currently certain courts this is fashionable. I don't want to be named places but I am aware of it. That these objections are standard objections and like Mr. Cama we're saying - it comes the day the statement of claim is filed, the case is fixed for written statement that they excel irrespective of who is coming the application come. It does...in some cases in Delhi I did it along with the statement of claim. I mean I have done those type of cases along with the statement of claim the documents are filed, the list witnesses are filed and an

application under Section 36 is filed. Sir no lawyer should... I think we are making a mockery of the whole thing. I mean today sir, friends I mean each one of us sitting I mean I challenge you who is.... what is an industry, who is an industry, who is a worker, who is a workman? I mean these basic issues even today are being challenged and even this very issue of section 36 as I see even in the document it's being referred to a larger bench in the Supreme Court. So I don't...I mean the judges in the Supreme Court has not been able to finalize it one way or the other I think it's an exercise in futility, I think Section 36 should just go out of the statute book. I would believe that real justice be...I am appalled when I look at the Labor Court industrial tribunal situation and even in the background I have seen delays in labor courts. This is one critical area I've seen it over the years and it is done let it be honest. The delay in the proceeding is for a very simple reason and this is what trade union people has shared with. So the case carries on for seventeen years. I get back wages for seventeen years and I put a question to you honestly friends - Does the worker really want reinstatement in today's time. In the scenario in which we are working but I'm sorry to say we have huge egos whoever it is, I am not talking of employer, worker or I mean our education our training I'm sorry I'm disappointed with our own education system. I don't see it anywhere in any forum, in any forum, in any place. I think we are people who are trend setter for this country. We need to see what is in the best interest of the country? And to my mind Section 36 is an absolute No no. It makes no sense there is no future in it. I would believe let's have the best brain. In fact let me be honest with you, Judges I have really truthfully seen are those people who listen to lawyer is carefully or the parties carefully, intently and try to learn the law because particularly in this branch of law there are a few people like me who have dedicated their entire life from 1976 I have been in this work and I only represented employers. I did it primarily as a challenge to my Christian faith because in my Bible it is repeatedly written that the poor will get heaven and the rich will not. And that was as a young boy the challenge me. And I can tell you in India, there are employees like the godrej and the tatas and quite a few others I mean I shouldn't be mentioning names I don't mean in any manner what I'm trying to say is to paint everybody with the single brush. I think is unfair. In a word that we live today I'm not against workers workers need to be protected I've no doubt in my mind. I know there are a good employees there are evil employers. Absolutely evil employers who exploit of workers I don't hold a brief for them at all. Please the law should be dealt with in that manner. And therefore he need to do what has happened to the consequence of the work being the poor person to the city of Bombay. How many industries

do you have in Bombay? Look at the fact as to what is happening in industry today. Are working population in India and I'm quoting government statistics. The working population today friends is about ninety percent plus in the unorganized sector. What is happening to the organized sector? I think we really need to look at these issues I just conclude by referring to the discussion in the debate could be on so that we get your perspective and your point of view is with regards to legal aid in labor matters. I think that is an important issue. Practicing only for employers let me be honest with yo I find today the employers are in desperate need for the labor for legal aid. As you are aware, the mother of all labor laws in India is the industrial disputes act and you are fully aware that that industrial disputes act is applicable even if you are just one worker. I mean I have done cases in Delhi for instance that in karol bagh there was a person selling slippers at agmal khan road, he used to sell a slippers against the wall and he had a person who had worked with them for the last twenty three years...I think the time has come when we need to make this labor law either more simpler or make it more available to the the masses. Whether it is employers or workers. I think that is an important area that we need to focus and to develop so that the employer does not feel handicapped and definitely provisions like Section 36 that deal with legal representation I think that is an area that really needs to be relooked and revisited. I somehow would conclude by saying that lawyer my experience have been more positive in a solution and more positive in the larger picture of getting justice done rather than to to depend upon people who have sort of you know self-educated themselves and based on their own experience are trying to work it out because I have seen cases particularly in Delhi in the early ninety's for instance the type of vandalism that would happen in labor courts and tribunals. And it used to be so embarrassing for people like us because there was a trade union leader. He was not a lawyer. He would stand up and abuse the judge a left right and center say his dishonesty is corrupt. One day I asked him why you do all this. He says Mr. Dias, first and foremost when I do my support base gets increased by my making these allegations because nobody in a court will dare to do it. The second thing is I'm waiting for that judge to have me arrested and sent to Tihar jail because by that my leadership in Delhi with these workers will go up more because in the in the newspapers you will have that Mr So and So union leader on the calls of the workers has even gone to jail. I mean I was appalled at the type of thought processes that would work out. I am going to stop here because it's about nine thirty. I think it is only fair that you all are very wise and educated people I'm sure you would have your own thoughts and we have an excellent panel in two judges along with us. I'll put keep the floor

open for discussion on the subject both on legal aid in labor matters as also with regard to legal representation. And in the next session of course I will deal with concerns of management employer rights after the tea break. Thank you!

---One thing I just want to add in the subject Mr. Cama and Mr. Dias has already said many things about the subject and this subject is not that wide that we can consume one hour addressing the gathering. But one subject is legal aid in labor matters which I just want to remind you that in legal services authority act there's a provision that industrial work will get legal aid so that is also related to the subject.

---Good morning to all of your Mr. Michael Dias made a passionate plea that the law should be changed by then the forum is parliament or the Supreme Court has to struck down and coming from the trial court we are bound by the judgments of the Supreme Court under Article 141. Therefore the problem is that how to get over the law or how to cleverly interpret the law so that broad justice is done. In fact, ever since the legal profession is been created there has always been mistress on the profession. Once you know the famous quote Shakespeare said "kill all the lawyers". We have tradition in Tamil Nadu, the trained lawyers are there for both worker and the management. There are lawyer who only appears for management. There are lawyer who only appears for workers but are equally competent. So this problem is not that much acute because worker can have a effective lawyer so in that way the law has given a little way for actual practice but only our understanding that we will not raise objections second is that there are equally competent lawyers at both sides and ultimately we have to wait for the supreme court till such time we may indulge either in the case of the bus owner or in the case of the trained person being appeared in the one side whether in balance is being created so but still the problem faced you is continuous to be the same and there is one judgment which is there in the paper book at 127 and as usual as Justice Katju said this law is bad.

{Question and Answers }

The language of section 36 A is very clear it says : of a registered union of which he is a member. So unless he is a member and second protection is B if that trade union is affiliated to some other

federation or confederation that is a different aspect but otherwise he has to be member of that. Now you see where worker is not a member of any trade union by any of the members of the executive or the other office bearer of any trade union connected with or by any other workman employed in this connected with is a very confined to A only. That is has to be member of that trade union.

Participant: {Not audible}

You are absolutely right. You see one is that you have to be member of the same union then there is no problem. if that union is affiliated to an bigger confederation and that confederation leader is representing then he can very well represent it as per B. And C talks about that any other industry or any other trade union connected with. You have to see whether they are trade union who is representing is connected with this or not.

What you are saying is now your finding excuse to throw out people, we are trying to bring in people. I tell you, suppose in Tamil Nadu there is a union leader who floats and association called Tamil Nadu general workers union. In the bylaws he says, engineering, general workers all...he has got only 5 members as soon as a dismissed worker comes he makes him a member. Then he appears. So what wrong in that. When law puts unreasonable restriction, people will find matters to get over with....

You see the whole problem is that a judge of labor court cannot decide that union is fake or not if there is a valid registration with them because if there is a separate statute which deals with it that is registration of trade union act and if he has got registration under the trade unions act it can be cancelled as per the manner prescribed in that act. Labor court cannot sit over it and say that although he has a valid registration still it a fake union it's a pocket union of the employer and will not recognize you. That much freedom is not there under the statute.

**Mr. Jamshed Cama:** A trade union leader can never be legal practitioner because a legal practitioner cannot be employed or held on for business. Therefore a trade union leader he may have a degree but moment he comes to a court in a capacity as a trade union leader he is not a legal practitioner. Look at his back ground, look what he is today. As the learned judge mentioned. He himself once came before a court as a legal practitioner but he went to the court as a officer bearer

of an association. I have done it. I am sure all of us out here in our time have done it. You remain an advocate but when you appear in the court you have a different face. When you look at him as a tribunal...

Under advocates act, bar council rules says if you are a member of any association, you can appear as a party. Only in cases where you are member as a bar association or bar council you can appear as the lawyer. In other cases you can't appear as a lawyer. You can only appear as a party.

**Mr. Jamshed Cama:** Can I make one clarification here I think you are making one mistake here. You are looking at the antecedent of the men. You are a tribunal, I come before you I am an advocate. I come before you not as an advocate. I have come from the High Court of Bombay or Supreme Court or wherever I am practicing, right! This morning I was in court of law. I am coming to as a representative of an employer association. When I stand before you I do not stand before you as an advocate. A man is an advocate, he practices in the court and come before me as a representative, he may come tomorrow before you as an advocate in the other matter.

Participant: we always welcome lawyers. It is much easier to deal with a lawyer then a trade union leader.

**Prof. Dr. Geeta Oberoi:** Can we go for a tea break? Off course the topic will continue for whole day. We are all there. But let's take some tea break and meet in informal exchange also.

## SESSION 10

**Shivaraj Huchhanavar:** Welcome back! Before we take session number 2 I request the participant if you have any doubt and questions relating to the previous discussion that is session number 1, you can pose and there after our expert panel will be dealing with session number 2. I request all of you to if you have any questions you can pose the question we can take up for 5 or 10 minutes.

**Mr. Michael Dias:** Good morning friends once again. This session is titled as concerns of management, employers rights. Apparently it's the organizers of the seminar have thought of having an employer representative. Presenting his chapter of demands to the Augusta body as to what it is and all but that's definitely not on the agenda. What is on the agenda I think is that we need to get a couple of issues clear. For instance how employers views Labor laws? I mean do Indian employers really have rights under labor laws I think that a very pertinent question. Very very pertinent question. More so in the year twenty fifteen. When we are you know. Projecting ourselves into being a global economy. But first things first. Since I've had the privilege of being in this field since the mid seventy's. I have really seen how it has grown You see I began my career when I was in law school I was picked up by D.C.M. chemical works as a young law officer and I worked for a couple of years with industry at that point of time. But my heart and mind was always in donning the black coat and therefore I was looking for an opportunity to move out. I had the privilege then of while in D.C.M. and you're the Shambu Nath case and all these thing because D.C.M. was aa huge litigant at that point of time in the city of Delhi and textile being a very major issue. I had the privilege of working with some of the best labour lawyers of the time. People like Dr. Anand Prakash people like Mr. G.B. Pai people like Omkar Chand Mathur, Mr. Gymwala etc.. I had the privilege of working with them very very closely and doing a lot of work over there. But somewhere down the line since I was always interested in doing employers work as I mentioned to you. Thanks to my faith and my Bible and the rest of it all. I did have the opportunity of putting in about six years with the Punjab Haryana Delhi Chamber of Commerce and Industry. That opportunity of my life just totally converted me. You see when I worked with people like Dr Anand Prakash or G.B. Pai the rest of them the approach in dealing with labor laws was extremely liberalistic. Everything we would sort of bisect dissect etc. In fact I'm sure you must have read Mr. OP Malhotra's books. I have contributed in possibly the third of the Fourth Edition. Because

I worked with him even at a certain point of time and I mean I had a passion for the subject so let's be very clear about it and passion from the employer's side and having said that having seen what it was like at the law places and I had the privilege of being in the presence of Krishna Iyer, Desai, Chinappa Reddy and the entire works. I realized very soon I mean I remember addressing down when I was doing a matter that came in from Chennai, this was a Fulton and partridge for Simpson's group. I yet remember Fali Nariman shouting Sanjay Mohan and me giving us a long lecture on what retrenchment is all about. I very early in life realized that labor laws in court is a no go. It's an absolute no go. What is critical and important is ground realities. Ground reality is right at the word go. How do employers and workers behave and conduct I think that's the critical thing. The labour court tribunals it's too late but I can share with you friends if you look at your cause list. If you may be at Amritsar you may be in anywhere. If you see the cause list of labor courts & tribunals today it no longer has big employers. I remember having done cases for Pan American airways. All the big companies Coca-Cola etc. Today nobody comes to court. Let's be very honest about it. We have developed a style a system, a mechanism in place. Step one which we all employers I mean if you're a decent employer I am please understand. I don't hold a brief for all employers I hold employers a brief for those employers who comply with the law. Who are considered as good employees so the first lesson that is stock to all good employers is your compliances? And therefore they can be no controversy see that am I paying minimum wages, am I contributing to ESI, am I having a provident fund and the rest of it all. If a worker has a demand a request. Please do it. In fact let me tell you labor laws have become a lot more easier now because if you look at your cause list there are just two types of cases that normally come to you. It is a case of termination. And B is a case of charter of demands or a group demand. Broadly speaking and putting it. As far as the individual terminations cases that has become the easiest for employers in today's time for all employers when I'm using the word employer I and Talking of the good employer, so automatically you exclude the other. All good employers said if you work in their establishment irrespective of whether it is Gurgaon, Chennai, Bangalore anywhere, *upar wala sab dekh raha hai*. I repeat *upar wala sab dekh raha hai*. What does that mean? My entire Campus from the moment you enter to the point you leave is all under camera surveillance. So if you a go slow it is recorded. You are abusing the employer, it is recorded everything is there. Audio video recording is there. Ninety percent of my cases sir sleeping while on duty. Seven times this has happened I'm showing you. Seven video clippings *bhaiya tumhara ye*

*dekho falana tareek pe so rahe the fir falana tareek pe so rahe the fir falana, bhaiya mai kitna kar sakta hun* let me tell you workers are very decent people , let me tell you I have lot of faith with the workers *who khud he kahe ga haan main jana chahta hun* . Consuming liquor it's been such a problem in Faridabad areas had huge problem but thanks to the cameras now it has become a lot easier. So all these disputes with regard to for misconduct at least is more or less now no longer exists. So you're left with very few issues really of a larger thing. But let's examine labor laws a little bit more. I was last week here in Bhopal on an invitation of the Punjab Haryana Delhi chamber, we were doing a programme. This was in collaboration with provident fund, employer's provident fund organization. We were doing a program and one of the questions raised very interesting question her in Bhopal a man stood up a participant stood up and said sir *main kheti baadi karta hun*, I have agricultural land here Outside of Bhopal. The M.P government announced that we are going to have some food processing industry mechanisms in place. So they announced that. And I also applied because it looked very attractive. In in that form the document to participate in that whole program required me to be covered under Provident fund. *ESI uss samay tha nahi provident fund ka..* So he said what did I do I didn't have any factory I didn't have any such thing *maine apne family members ke naam bana diye* and they said twenty is the requirement *maine apne aur logo ko milake 30 logo kar diya maine registration* and this he's talking about at least about nine years ago. It's not now it about 9 year old story. And on the strength of that he applied for a provident fund court number he got it. That process you know how it is to work with Government of India or the state governments. It took close to about two years before he got sad unfortunate story told him *ke bhaiya ye aapko hum de nahi sakte* you can't be part of that thing for A.B.C. XYZ reason. The simple question you are all learned judicial people. Simple question, I've got myself registered under provident fund I got myself registered under provident fund because I thought Government of M.P. is giving me a very good scheme and I will apply for that scheme. And in thought process I have done it. But in reality I have no factory I have no nothing *meri sirf kheti baadi hoti hai*. The issue raised before the employers, employees provident fund, they were all senior people from the E.P.F. organization. Sir I want to get out of this. How do I do it. Let me be honest with you friends none of those top leading bureaucrats of the E.P.F.O had an answer as to how can he get out of it. Why because in labor laws in India once that labor law is applicable to you possibly even God can't help you, possibly God even can't help you. Provident fund law once you're covered always covered E.S.I. law once covered always

covered gratuity law once covered always covered bonus said I'm making losses for the last seventeen years. I still have to pay mandatory eight point three three bonus. This is what labour laws is in India so I'm just giving you a feeling of understanding *ke* What happened then I can tell you since I've been in this business for so many years. I don't see second generation employers coming. I have seen *jin logo ke saath maine kaam kiya hai* like Atlas Cycles, D.C.M., Mafatlal, Modi's. These are all industries and employers who don't exist anymore. And any of their children are into anything but running an industrial manufacturing. You possibly be also aware that we've had a jobless growth in India in the last fifteen eighteen years. Primarily because of a whole range of restrictive. Practices. Put on the employer. Which makes it difficult so therefore to begin with. I'm not too sure as to how employers really feel about it but I have circulated prints amongst you I normally don't do too much of case law work but I thought this was a beautiful judgement. It was circulated to you this morning. This is the Supreme Court of India judgment *The Workmen of Bhurkunda Colliery ... vs The Management of Bhurkunda* and I just want to draw your attention to the last paragraph because that is what really puts things from my presentation to you this morning. And I'll read just six lines. If you've got it. Both employers and employees have their respective obligations. They must have the appreciation of each other's responsibilities. Duties and obligations. The Trade union and labor union should understand and appreciate the fact that Labor is not a commodity. Nor is it a mere supply of labor force at the management's disposal. Essentially labor is the real basis that underlines the production of goods and services through the work. It should be human personality and that sense of responsibility be able to unfold. Management should appreciate this. And always attribute its success to the trained and effectively labour force. It must be understood by all concerned that both the employees and employers are vital for any industry. Unless there is proper coordination. A smooth functioning of any industry would be difficult. I'll stop here. Friends! We have moved from an era where it was believed *ke worker bechara hai, worker ko malum nahi hai, worker ka Exploitation ho raha hai*, let's be clear the dynamics, the Times, the situation has changed. Let's get down more closer to twenty fifteen. Where we are where we stand at this point of time. Today India's economy is one of the largest in the world it's a fact. So we are no longer a poor economy or we are a developing economy we are one of the largest in the word. Friends there is another very critical factor where you play a very important role in my country India we need every year ten million jobs. Not my statistics. Could be more. I'm talking government of India statistics. Ten million

jobs in that scenario an industrial dispute which assures and protects employment is an issue we need to address is an issue we need to address. How do we take it forward? I say this more particularly. What is the economy today? Today it is a market driven economy where critical components are priced competition and productivity. These are three key elements, price if I manufacturing mobile phones. Who's selling it at the best price? With the best applications with the best features etc. price! Price! Price! How am I going to get a price? Then you have competition. Let's be clear. We moved from that regime where we had only a fiat car manufactured and an ambassador car manufactured. Today the entire market the entire world global market is available. How do we address ourselves to it? Therefore if we have to achieve the goal of make in India and the ease of doing business is critical the legislative framework that we all here reflect needs to be appropriately considered. Because we need to consider, does the industrial disputes act give us productivity? Can we have job security? Which is the basic document of the industrial dispute Act with increasing pay packets. You may be aware friends that even minimum wages. In every city or every state is revised normally twice a year. You get an increment practically twice a year. That is the reality. And please remember the employer has no control on minimum wages. He has no control on price of electricity or aaa other things that they have to invest in the business that is required. Please appreciate that. Now what are the major impediments of the industrial disputes act? The major industrial impediment we find. Number one is your Chapter Five B huge problem. I have a hundred in ten workers. I need to lay off people. I need prior permission. And please understand when we talk of politics and the political arena there are wheels within wheels of situation. I don't want to get into that discussion at all but retrenchment layoffs Closure all requires a procedure to be complied with. If you're a chapter five B... What about Section twenty five capital B? What does it say? Any person who has put 240 days continuous service is deemed to be in regular and permanent service. What's the consequence of that? I hired the man purely because I had big demand from Germany to make some panels that demand carried on for about four years after four years the German party said Sorry I can't carry on with you. Where do I go? How do I deal with it? What is the answer to it? But merely because he has put into the forty days I'm stuck with it. Section nine capital a, change in working condition. I have done cases where the trade union leader would say Sorry I don't want my table to be put over here it's too close to the washroom, it's not acceptable to me. So that place it was overlooking a golf course is the place where I'll work. He has raised a dispute I've done cases of

a honeymoon allowance. Sir it changes my working conditions. We need it. These are issues I think which need consideration. Similarly section eleven capital a which gives you the powers to go beyond. My question is very simple. So do you believe that the employer has some vicarious pleasure in terminating services of people? Yes! There have to be certain norms prescribed I agree with you no argument with you I'm let me make it one thing clear right at the beginning I am not an advocate of hire and fire. No, I'm very clear with regard to the rule of law in fact in a lot of international law conferences that I attend and particularly with regard to employment laws I have big debates with my American counterparts who have the principle of hire & fire. Which is they are driven. So simply in terms of this is in the contract and therefore we ask you to go. I do believe that the rule of law has to be there. That it cannot be compromised. But I do believe. Even this issue of strikes, *Gheraos* work stoppages, go slow work to rule. Can't we consider some newer mechanism to register our protests? Yes, that is one way of doing it. But that impacts all stakeholders. All stakeholders is not the employer. Not only the country but even the customer and the consumer. I think we need to reexamine it I am not against that strike should not be the I'm that's not my case. But what I'm definitely trying to suggest you for example in Japan if the workers are unhappy with the employer let's say they work in a shoe factory. To register their protest they like only to manufacture the shoe of the left foot only and they won't manufacture the shoe of the right foot. So that production gets totally sculled, I would believe it is time for us to develop within our system. For instance, I am disappointed with conciliation which is a statutory provision. When I talk to senior bureaucrats who handle the words Mr. Dias, Its garbage in garbage out. So you ask for honeymoon allows I will refer you for adjudication I am not bothered. Sir in t1989 I did a case for consumer price index being 1939 series. Please Understand. And they're very clear the courts have told us you should not interfere in it. I would believe if conciliation is more effective, Mediation is more effective, Arbitration is more effective, I would believe a lot of the problems that come to the labor court and tribunal would be resolved. Regrettably I tell you where the problem is in this whole debate. The entire debate is predicated only on one thing and that is a huge huge deficit of the Word Called Trust. *Mere ko toh worker pe vishwaas nahi aata hai*. Until & unless we keep on harping on that issue ke no he is not good or he's not good. We will just not to be able to make it forward. So I'll try and wrap it up because my time is coming up and I'd like to have a debate with you also. What are the concerns of management? A few of them. I would believe number one, is the primacy of employment contracts. I think we need to

give employment contract their due respectably and I'll give a simple example. There was a case of a driver in the city of Delhi. We had a retirement age of fifty five. We felt that the traffic in Delhi is so high that retiring at fifty five is safe for the drivers safe for the people who are in the vehicle or in the outside will stand protected. And we had a mechanism where would offer a job to him outside the driving the thing for instance, he could take the job of an electrician. But he would have to pass a test of an electrician or a plumber or some other this thing. Believe you me it was just felt no fifty five is not correct. So I think we need to revisit the issue with regard to employment contract. The second issue which is a very critical is discipline. I think that should be an area where we should have a no compromise on discipline. And now a days discipline also include sexual harassment at workplace. I can tell you as a professional. I am, inundated with work on sexual harassment at work place believe you me it's happening in a rampant manner. I would believe the courts would need to deal with this issue very strongly that is my second Plea. My third plea is with regard to productivity linked with ensuring fair wages. I think that balance needs to come out very very strongly. While yes, we talk of productivity as employers, as managers. We must also talk of fair wages. And we need to find a balance I am just sharing thoughts as to how we can sort of try and work it out. So that is my third agenda as far as concerns for management is productivity to ensure fair wages. The fourth problem that currently we are facing in industry is exclusivity in employment. We do not find today at particularly at senior levels. People are totally committed to the organization. They are into some other businesses in their wives names in their son's names while they are in employment and this creates a huge amount of problems. So therefore this aspect of exclusivities in employment becomes another critical aspect. The fifth, a concern would be adhering to conditions of service. For instance you have things like transfer, the employee just refuses to go. You have to go through the whole process of charge sheet inquiry Etc etc. I think these are some areas that we need to address ourselves in adhering to conditions of service. That was the fifth. And the last one is that trade unions who have the interest of workers should also have the interest of industry, consumer, environment and the nation. I would believe if this is what we are able to work you see we have to move away from the mindset *ke trade union ke kaam kewal yahi hai ke maine sangharsh karna hai, maine ladna hai*. I have to be in confrontation mode. I think this confrontation mode which is so aptly reflected in the name of the act which is industrial dispute's Act. I think that is an area where we really fundamentally need to visit. Are we really in conflict with one another I don't

believe so I would believe that we are all partners in the whole process of trying to work out what it is and how it is and why it is. And then to build it up. This is as far as my broad presentation goes and since the organizers very clearly told me that there must be interaction discussion and debate so I'm going to leave about thirty minutes half of the time only on what I have to say another half an hour we can have a discussion. But I want to leave two questions to your mind. And I would look forward to your response or reaction because these two questions really are critical to your nature of work that you do. And my first question is do workers truly want Reinstatement in service in cases of termination of services? Or is it that the back wages are more attractive to them as they feel that the employee employer relationship in any event has soured. So does it is it there focus in that litigation only to get back wages is is that thing? Or is there something else? Is it does it help that the worker be reinstated in service? Would that really help in the grand plan of *mera bharat mahaan* to make the country more beautiful and wonderful *ke* here was a worker that the employer rightly or wrongly felt that my relationship has broken. It can't carry on. Should that be a reinstatement? I think these are question because Cama said I belong to that time when we would say it is easier to get rid of your wife under the Hindu Marriage Act. Because at that time the Christian Marriage Act was not amended now in 2010 the Christian Marriage Act has also been amended and there you have the marriages irretrievably broken down and both parties are permitted to part ways. In labor laws it didn't happen in those days but things have changed. Things have been.. So this is question one that I want to put the second question that intrigues me very very much. And so I can share it with you whether you are in Amritsar whether you are in Delhi, you may be in Rajasthan wherever you are maybe I can assure you every individual workmen's domination case has a para 8 or a para 9 everywhere, *Hindi mai likh ho gurmukhi main likho, angrezi main likho, kejis din se malik ne mereko naukri se nikala hai mai kewal footpath pe rehta hun ji, bhaiyo se main paisa leta hun, gurudware jata hun mai aur mai apna guzara kar raha hun.* I can share with you friends to collect evidences on the issue that the person was gainfully employed during the pendency of the litigation. And here is a worker who stands up on oath and says files an affidavit in cross-examination says *Sir maine koi naukri nahi ki maine toh logo ke charity pe main chal raha hun.* My question to you friends is, is it possible to institute perjury proceedings against a workman who makes a deliberate false statement regarding his unemployment since the date of his termination of his services. So these were friends some thoughts. I thought I'll spend half an hour. Just share with you an employer's perspective. I'm not

saying anything beyond that it's a perspective it's a point of view. And we're all educated people, a healthy debate. All I would say my entire discussion is predicated only on one thing. My country my economy and the future of this country. That's all I have to say. Thank you

**Hon'ble Justice Sujoy Paul:** I would like to start from the point my friend Mr. Dias has left. In nutshell what my friend has said that if workers do their *karma*. An employer does his *Dharma* then there will be no problem at all the.. If correctly follow what he has said. But the whole problem is that as we know that in the ground realities these wishful thinking these goals are not practically followed either by the workers or by the employer. I'll give you a real example, how things are actually taking place. And this example is not from any private employer. This is from a very sensitive sensitive Industry. That is ordinance factory. One of my friend was in managerial level in ordinance factory. During the recess lunch recess he found that one machine German machine very costly machine in crores it is running unnecessarily on and nobody has everybody has gone for a lunch. And It is it unnecessarily working and it's a very costly machine. Though he wanted to put it off but he was not aware of where is the switch he unsuccessfully made that effort. And he found that the worker is working in another machine nearby *toh* he said Mr please come here and switch it off. He even did not listen to him. Then he came to that person and said you go and switch off that machine. He said I am a welder that is a different machine it's not my job. If you want, if you know how to switch it off please switch it off. It's everybody's property. So he said I'll not do that it's not my thing it's not my job although I know how to switch it off. He said if you won't switch it off I'll suspend you right now at two thirty. Then he told me that he reluctantly went there to switch it off. And before he could finish his lunch there was a *gherao murdabad* that my working you are compelling me to work for something which is not my job. It is violation of my service condition this that, exploitation, unfair labor practice. Here is the catch in my opinion and I For agree with what my brother what my friend Mr. Dias has said. What is lacking is for the employees or the workers is, that they and the employer are sailing in the same boat. If boat of industry is not there neither workers will survive not employer will survive. But during these last few decades a situation has arisen where the conflict is like a caste system. Employers doesn't have trust in many cases, employers doesn't have trust on workforce, Workforce. On everything they will create a hindrance whether it's a right thing whether it is in their favor whether it's not. This is a situation which needs to be improved by policy makers by stakeholders those who are working in Industry. Many aspects which have

been highlighted by Mr. Dias were relating to policy making and policy making is naturally. Not within the province of the judiciary. Law-making is not within the within our domain. Therefore that aspect which is a very relevant aspect projected needs to be addressed at appropriate level. But I would like to confine myself on the real issues on the real aspect which are placed before the courts for the purpose of adjudication. You see this the question of employers concern and right. *Toh* undoubtedly concern of every employer is that his industry should run smoothly. It's should earn profits so that he can flourish. He can give some benefit out of it to his workers share it, there should be a discipline. The maximum workforce should be utilized to get maximum output. These are in nutshell broadly the basic concerns of a of an employer. But the right of an employer has to co-exist with the right of the employees. Now the rights which have been recognized in our law or not only in our law internationally by International Labor Organization. I just like to refer what ILO has said in June 1998, the rights which were recognized, is freedom of association and effective recognition of the fight for collective bargaining. Second, Eliminating of all forms of forced or compulsory labour. Third, effective abolition of child labor. Fourth the elimination of discrimination in respect of employment and occupation. The National Labor Commission in India recognized and adopted inalienable rights of the workers. One, right of work of one's own choice, right against discrimination. Prohibition of child labor, just and human condition of work, right to social security protection of wages including the right to guarantee wages right to redress grievances, right to organize and form trade unions, right to collective bargaining right to participation in the management. Now all these principles broadly accepted were already codified in the shape of various laws in India. The practical difficulties as we discussed in the first session. That law when prepared, when brought into force may be with a different aim and objective but when it is put to test in practical life. There are various fall outs there are instances of misuse or abuse by the parties. Now the courts, courts have to implement the law, courts have to interpret the law on the basis of a given fact. What. Courts have a given set of facts on the basis of those facts there's a demand. You have to examine that demand on the anvil of the law applicable. Suppose it's a case of terminations, after inquiry you have to examine whether domestic inquiry was properly conducted or not if yes whether findings of the inquiry officer are perverse or not if findings are OK with the quantum of whether punishment is excessive or not these are broadly you Do with Department inquiry matters. Now in labor laws the entire development is a judge made law. Neither industrial disputes nor standing order tells you how to

conduct a departmental inquiry. When Department inquiry is to be declared illegal. Whether question of deciding inquiry as a legal or illegal should be decided as a first issue. ID Act is silent on that. The entire progress of industrial law is a on the basis of judgments of various courts and Supreme Court. Therefore, and everybody agrees, agreed that it's a very complex law. Therefore all of us those who are dealing with labor law for labor laws friends. We have to be equipped with the legal knowledge on that particular subject. Because everything is a judge made law. I'll give you an example. There may be an industry run by state government or central government. Suppose an employee terminated after conducting a departmental departmental inquiry, he has two options. He can go to the concern administrative tribunal of that particular state or central government of Central Administrative tribunal or if it is an industry he can and he's a worker workman he can raise an industrial dispute. In, if he chooses the first option and goes to the central administrative tribunal and tribunal comes to the conclusion that departmental inquiry was defective. The tribunal will set aside the order. Remand the matter back to proceed from that stage. But in labor courts suppose inquiry is not conducted or erroneously conducted. The Labor Board has option to record the evidence and decide whether the management is able to prove his case on merits or not all these things what we see at on judicial side that this is scope of jurisdiction to interfere about employers right employees right is sometime is not taken care of. We have seen the orders of Labor Court industrial court where inquiry is found to be a defective, inquiry is set aside punishment, set aside reinstatement with such and such wages. The employer has not been given his right to lead evidence proved the case before the Labour Court. Therefore for labor.. Those those who are working in labor laws the responsibility is on a higher side. Because we cannot forget this fact that Labor Court is the and industrial courts are the courts which are dealing with the person who is in the lower rung of this, Lowest rung of the society. When they come before you they may not be legally trained mind their lawyers may not be that much equipped in comparison to the lawyers of the High Court or Supreme Court. But all the same this is your responsibility to examine the right of the workers and right of the laborers. This is a peculiar situation. It is said that when I received the invitation from the N.J.A it was written that, 'in the wake of globalization. We have to examine whether our labor laws are pro-labor or not..' as I earlier said that that is not within the province of this section or this gathering to decide whether labor law is correct or not it is in the province of the legislature. But the question is that in these changed scenario when... as Mr. Dias said that there are serious abuse while entering

saying that I'm not gainfully employed for the purpose of getting seventeen B or for the benefit or for the purpose of getting back wages. Whether we. Whether the labour court should just primarily record what workman is saying, what workman has said in his written statement of claim and then depose the evidence and the mechanically grant wages without examining what are the reasons for his termination? What is the period he was not gainfully employed? Whether he has said anything about the period when he was not gainfully employed? How he maintained himself, how he kept his body and soul together? *Toh* in mechanical method back wages are sometimes granted. Sometimes it is seen that, for example it's a case of WTO Tourism by state tourism of by State Transport Commission. If conductor is carrying more than five passengers if reinstatement then ten percent back wages. If he is doing ten, carrying ten employees then twenty percent. This kind of formula. This is a mechanical kind of exercise which many times hampers the interest of the employer. The basic and huge problem with government employment in public sector employment and in private employment is the question of discipline. Before coming to this side I had an occasion to appear on behalf of the trade unions, on behalf of the good managements, on behalf of the.. If I quote my friend bad managements also. And I have seen that there Courts, It is for the courts to strike a balance. We cannot frame a straight jacket in all cases and decide the rights of the employee and employers. We have to examine the things very thoroughly and then only we can apply. Whether which whether which right will approve. Now the basic question is about employer's rights on the end, at the advent of and in the era of globalization. Now with globalization market economics it is market economy it is profit oriented economy it is price which will determine something. Everything. Survival of the industry. If industry survives then only the worker survive. This ground reality cannot be forgotten. Now the question is while adjudicating a matter at this is stage when we are on the crossroads. When we are coming to a different era where the consideration of market forces are different, whether we have to apply some other principle? In my view this is a very important question. The question which deals with policy making is totally different. But when there exists a law when exist a provision which deals with a particular fact situation you are bound by that existing statutory provision. You are bound by the interpretation given by the higher courts on on that principles. This question. Interestingly came long back before the Supreme Court in *Keshavanand Bharti* and that judgment is very relevant for this purpose the Supreme Court said that Preamble of the Constitution is manifesto of the people. There are judgments where Supreme Court assert that it's a unique poetry is coming from

the heart of the people of India. The Supreme Court said that fundamental rights and directive principles constitutes the conscience of our Constitution. The purpose of fundamental rights is to create an egalitarian society. To free all citizens from coercion or restriction by society and to make liberty available for all. The purpose Directive principle is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social resolution, revolution. Through such a social revolution the Constitution seeks to fulfil the basic needs of the common man and to change the structure of bur society. It aims at making the Indian masses free in the positive sense. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution. What is implicit in the Constitution is that there is a duty on the courts to interpret the Constitution and the laws to further the Directive Principle which under article 37 are fundamental in the governance of the country. I think there are rights which in here in human beings because they are human beings. Whether you call them natural rights or some other abolition is immaterial. As the preamble indicates. It was to secure the basic human rights like liberty and equality. That the people give unto themselves the constitution. And these basic rights are essential feature of the Constitution. The Constitution was also enacted by the people to secure justice political social and economic. Therefore the moral rights Embodied in part four of the Constitution are equally an essential feature of it. The only difference being the moral rights embodied in past four are not a specifically enforceable as against the state by citizen in a court of law. In case the state fails to implement its duty. But nevertheless they are fundamental in the governance of the country. And all organs of the state including the judiciary are bound to enforce those principles. Not its very important. The Nation stands to-day at the cross-roads of history and exchanging the time-honored place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it. Now the question of rights concerns and freedom of workers and management can be best described by an example given by Rabindranath Tagore, Tagore said that, "when a river, moves, Flows, it flows with full force, with full potential but that river has to flow within the banks. Otherwise that river will create havoc, that river will not be beneficial for the human being. This is the basic thing for the employer this is the basic principle which has to be adopted by the laborers. That while they

are fighting for their right or there concern they has to take into account that the right which they are claiming, whether it will hamper the employer's interest to the extent that it will be difficult for him to run the industry? You have the example West Bengal you have the example of what Mr Dias has said about Faridabad and most of the industries are are closed down. I'll finish my address with a real example of Calcutta. One industrialist, I'm not saying industrialist, one person who was an employee of a central government department took a loan from central government and started a small factory of manufactured manufacturing steel almirah and fortunately because of his hard labor he could succeed and he got good orders from state Bank of India and big organizations. Within one year he had hardly fifteen sixteen employees. Loan was still going on. The There was a demand of wages hike, wage review. *Toh* he called the employees and asked them to sit in front of him. He explained that you see this is the amount of loan on my head. This is the orders which you have received. If this order, these orders are fulfilled this much I'll get. And the, this much has to be paid for the purpose of loan payment. And then it is very difficult to run the industry if he accept demands of wages hike. The employees were convinced they said that we cannot decide this, our trade union leader will come and he will decide. In turn the trade union leader came who was not an employee of that area he was not employ of any area. He was a professional trade union leader. He said It is not acceptable and if you don't increase it within thirty days we'll start gherao, *gherao* started the industry in the result was closed. The employer since was on loan he faced those recovery proceedings. He suffered a cerebral attack, he died died. His three children who were studying in good schools were taken out from those schools and were put in very small government schools of that area. And I personally know that family that that family is ruined, and in fact finished. All the employers they say that they are still out of job from that date. It's about twenty five years ago but I'm telling you there are still out of job. Here when the matter comes before you on judicial side. What happens we take a pro-labor attitude or we take a pro justice it is said that earlier the view of courts was pro-labor now the courts are view of pro employer. In my humble opinion both the views are.. If it is that both the views are not correct. For a judge it is only justice oriented approach which is correct. And that depends on the peculiar facts and circumstances of that case. There cannot be a thumb rule that in one case if you have done irrespective of difference of factual situation or legal situation you are bound to give give it to the other case. If one employee is terminated the reasons for termination may be different his past antecedent history may be different. The nature of his job may be different if your sentry is

sleeping. It's very serious. If a clerk is sleeping it's not that serious. If a machine operator of a heavy machine is sleeping it's a very serious matter. *Toh* there can't be a thumb rule that in one case, in a case of person found sleeping in the duty hours, we have granted reinstatement in fifty with fifty percent back wages we should grant it in all cases of sleeping. I just want to narrate this fact so that to make this point clear that. When laws will be amended and not it is not within your province. But as on date whatever laws are applicable. You have to keep in mind the changed circumstances. Constitutional, Constitution laws are dynamic they there are enough scope of interpretative process to apply the existing law. Therefore while doing that we have to keep into account the employers right because the subject is basically with about employers right or employers concern. I only gave you two examples but most of you must have seen this kind of examples in your day to day that in what manner these things are misused abused or trade unions have become trade. So while doing your judicial work you have to strike a balance so that the employee because what happens when employee on the provocation of trade union leader enters into such kind of *hartal*, *gherao* or anything. He doesn't know what will be his fate later on when he's when industry is closed when he's out of employment nobody bothers him. Bothers about him and then it is very difficult. You cannot pass a judicial order to open the industry and reengage him. In such situation a very important valuable suggestion came that during the course of judicial proceedings also because Judge is an independent person, you can authorize both the parties that this can be amicably settled in this manner and if twenty percent ten percent matters are also settled in this manner that will be a very good thing for the purpose of maintaining industrial relation. So in nutshell, this is my full. Contention about this. That... In the present scenario you have to deal with the matters by considering all these facts. Thank you so much.

**Justice Chandru:** Speakers before me pointed out. The policy matter can't be a subject matter of discussion we're only talking about as to how far these changes have affected the working of the courts. Both at the labour court and High Court level. As Dias mentioned that this Industrial Dispute it should be industrial relation. So you change the name and does it matter that the name change is going to bring a structural change whatever name you call the ground reality can't be forgotten. And therefore Justice Gajendra Gadkar in 1969 when he wrote national Commission labour report. He mentioned that he should be industrial relations. Twice the parliament brought a bill called the Industrial relation bill 1978 and 1982 but the bills were not passed by the parliament because of so many of the reasons. In my opinion mere change of nomenclature is

not going to help. There are first thing to admit, there are problems and the management problems are not necessarily created by the labour or the Trade Union. There are other problems also. If you take the ID act Section three talks about work's committee, Section nine C talks about a grievance settlement machinery. Honestly I'm asking in how many industries the work committees are efficiently functioning. Because works committee relates to election of a worker representative. So it becomes a battle ground to elect some real representative of the worker and many management don't encourage an election in the respect of works committee because indirectly it shows who is the leader. So many places there are only nomen clature work's committee are functioning. After this 9c was brought in internal differences can be settled by a grievance settlement machinery and it is not effectively functioning anywhere because this section is a stillborn child. Nobody goes to that.. Therefore we can find out methods and method by which problems of workers can be dealt with at the floor level. At the industry level, all is possible. But it doesn't happen. You have for example central government you have a bipartite missionary. But we don't have missionaries where the management wants to share some of the floor level problems with the workers. They think it is their prerogative and workers just obey and this attitude continues.. And my first Statement I want to make the problems of the management are necessarily not arising out of worker issue alone, there are other factors. Therefore you can go on and give you examples in this case it happened.. As you know a bad case make the law look bad also. I can give thousand examples of how the management behaved in a particular situation how they brought about the downfall of the industry. Now when we talk about globalization an industry in India necessarily linked with a global economic recession, Change. So suppose some industries close here it doesn't mean the problem of local problem. It means it's a global problem also. I can give you an example when I was a degree student near my college there is one car factory, Standard motor factory. At that time in India there was only three factories Hindustan Factory at the Calcutta. Then the Fiat at Bombay and Standard at Madras. So it was closed. And as a first year degree student it was closed. There were two thousand families standing in the streets every day there was meeting and all that. When we tried to find out why it was closed, it was stated that there was no much demand for such type of cars. Now in the same place that I studied the same district there are car factories. You want to have B.M.W. you want to have folks wagon. You want to have any Car Toyota, Mitsubishi all cars are.. Some some 45 years ago. One car factory could not function. Now we have nine car factories. Petrol price is also on increase and if you

take up the phone the manager says do you want car loan sir. When we say no we have a car why don't you buy a second car there are people who have second car also. You must now look at the problem. You know there's a place called Detroit where cars are manufactured in America. The Detroit has got a municipality. That municipality gave a bankrupt notice. Have you seen municipality giving insolvency notice. That happened in Detroit and they tried to ask for government loan they refused. They took heavy borrow Bank loans and they could not manage so they declared insolvency and now the reason given by municipal chairman was that our car factories are closed. Workers are not paying tax, therefore there is no revenue for the municipality. So what is a loss for America is a gain for Madras A gain for south India. So I know some people call them. But you will a district has a deck right up South India. So now some people call it as Detroit of South India. So now what happens is companies shift the technology .They don't shift the technology shift the industry to more backward nations because of rigorous laws in America. So go to some Asian countries. What is the technology that is transferred that is a screw driver technology? They don't tell you how to manufacture a car but they put some average Semi skilled worker who can tighten screws. It's put in assembly line. So entire factory units are shifted from Detroit to South India. Now this is the business loss which they make. This is the stiff resistance the government brought in, Protection laws in America. They find an easy place to make money. Therefore they come to Asian countries. The fact that we had becoming industrialists nation because after all what we got is only a screw driver technology. Nothing more nothing less and some of that skilled technicians are brought in from other countries. You take the South Korean companies which are there in Madras. Now when they come here. The first thing that they are surprised was how they are allowing trade unions. But we have trade unions for the last hundred years. Trade unions evolved over the period and now these Korean company says i will not allow any union in my in a factory. So some workers raised the union flag in front of the factory. They closed down the factory. Now how do you explain this situation that it is not only local management which are known what is a local problem. It's a foreign M.N.C. are coming here. They dictate to the Indian government that your law should be changed. And now I've seen some other demands made by and German Chamber of Commerce. I had even taken some classes for the German labor court judges they want to know that this kind of protectionism cannot be allowed. When we have our independent republic. We evolved our law parliament is Supreme and parliament makes a law and Supreme Court interpret the law. Now because some companies

want to invest here can they demand a different labor law in this country? Can they say that we will not allow trade unions? In fact our labour department understanding itself is that in case of special economic zone. No labor law will be allowed. They won't even initiate conciliation so there are problems and problems that we can talk indefinitely on these problems. How to solve these problems. Suppose you take the question of union. Do we have an honest recognition policy of union? Now you talk about multiplicity of union, number of unions on increase, have become the root cause and therefore there are strikes, direct actions. Now suppose you recognize only one union is there a guarantee that there won't be any strike. Is there a guarantee there won't be retrenchment? Therefore the cases of retrenchment, layoff are not necessarily based upon the worker issue. It's also based upon other economic market demand and so many other factors. What is now happening today in 1973 Supreme Court very clearly said in western match India company's case that the summary days as market economy is over we can't have hire and fire as our constitutional background. There are laws to protect workman and workman are the weaker section in this country. And therefore the government should come and and protect the rights of workman that is how the laws are developed. In fact when 1030, the Royal commission made a recommendation, it said, said you are not recommending any laws but we are recommendation one issue that create unions. Give them power of collective bargaining. It is a collective bargaining of workers which can improve the condition of service of the workers. This was in 1930 when there were no law in India. The Royal commission said make the unions to grow and they will bargain with the management and that bargaining power will bring them some decent service conditions. Which means you don't bring perfect laws, give them the power to make negotiations and to enter into settlements. Now looking back after all these years. I'm only able to recall a statement made by an American Public Sector Union. He said very candidly that off late we are not having collective bargaining. We are having collective begging. Because the crucial thing for our collective bargaining is a right to strike. What will workers have got he has got no investment he has got no other power. You can say if you don't agree with my demand. Today every section is fighting. But if you see the ID Act there can't be any legal strike at all. It is concealed in such a method every strike is an illegal strike except one exception which call pointed out. The strike followed by illegal lockout is valid. That's only exception. That if the employer makes illegal lock out then you can strike. Which makes no sense because anyway you'll close the factory. If you come to work it's not an issue. Now our laws do not recognize the collective

bargaining in the true sense because, we do not know a Uniform standard as to how to recognize union, how to recognize by law any right to strike. Now how does the worker bargain? They'll not necessarily come to court in every issue. Now what happens to come to court? Matters have litigated forever. In fact in the report in 1973 Justice Krishna Iyer, Report on process will justice to people. He says that from 1950 to 1970 for 20 year there were 186 appeals filed by management to Supreme Court. Civil appeal against Labor court order. More so the matter was pending for 10 to 15 years and ninety five percent of the management appeals were dismissed by the Supreme Court which means courts are made use of by the management to delay relief being given to worker. That is what we say that these mechanisms are not used for the purpose for which it has been established. There was a time when people used to implement labor Court's award. Now we have a single bench, we have a division bench, intra court appeal, then we have S.L.P in the Supreme Court, so we have a three stage appeal. After three stage appeal if you calculate the number of year any labour matter takes minimum of 20 years and the labor do not believe that these judicial system responsible for giving relief. Even if they get a relief from labor court it is not going to be realized at all because thanks to innovative strategies there has been continuous litigation. A four tier appeal system. When I told this to German labor court judges they got a shock that how could they have a four time appeal system? But every matter goes there. So why should the workers think that if I want a wage dispute I will go to a labour court. Then I'll go. Wait. How long to wait? Thirty years? When a wage settlement is only for three years or two years. You can't wait for relief for the thirty year period. Therefore basically we have created a system which is not granting relief within a time frame. So if you say you can't have a direct action, come to the court. But wait for thirty years that's not possible. And therefore these problems we like to address as Labor Court judges. We must do. And we must just finish this. We must aa We must think on these lines. And secondly the, the problems of management. There are problems of management are many. Does it mean that every time respect the law. Otherwise why should they come to court? I know an instance where In the Madras University there was an adult education department. So we thought we'll educate the workers on basic minimum labour law. How to conduct a inquiry? So the classes went on, it was a six months course. So the evening after six o'clock to seven thirty workers will come from various industries the classes are run in the university afterwards certificate is given so in order to balance the lecture. We invited a management lawyer to speak in the in that class. So the management lawyer said. Your employer

has given you the employment. He also pays wages why should you know all these technicalities. You do a mistake, admit the mistake. You don't need to know how to conduct inquiry, how to give explanation. How to conduct cross-examination all that is not necessary your employer is giving employment. You are surviving because of employment. All these technicalities are meant for bad people good people must go and say yes I have committed a mistake. He will keep you in service within fifteen minutes he finished his speech. This is to understand that every management is always a good management. You need not understand all these laws at all they know how to take care of it. This kind of paternalism or patriarchy will not work in labour law, right or wrong, there are rights given to parties and the courts are the forum to exercise the right. Now when they come to court. You say alternative dispute Resolution mechanism. Now we have Lok Adalat. So when I was High Court judge I used to have a look at every week. Most of the litigation today. Which are pending in courts are all from public sector. Now the public sector manager just come and tell you Sir right or wrong, decisions are taken at some level. We can't compromise any matter. If you compromise they will make allegations against us that you are doing something illegal. So best thing is to pass an order in the open court you will implement the order. We have taken the decision to contest your contested. Now we can enter into any settlement. So we filed in 98% of the matters which are not deserted in the Court or in the Lok Adalat were decided in the open court. We pass orders they implement the order because they put the blame on the court. So there is a basic element of not implementing the law in its letter and spirit and try to litigate to the extent possible and it is in this context what labour court can do is an issue we ponder over. We'll continue our discussion after tea break.

**Shivaraj Huchhanavar:** I'm sure in this regard you are having many questions will take up the questions in the next session. Let us take tea break and we'll be quickly back at 12 o' clock.

## SESSION 11

**Jamshed Cama:** In the field of labour law you are the most important a High Court judge is bound by your findings of fact, a Supreme Court judge is equally bound by your findings of fact. So in the entire hierarchy of labor laws, you gentlemen and ladies are by far the most important segment and therefore there are certain aspects and certain attributes which I would like to place before you which we as practitioners on the other side of the bar would like to see coming out of your courts. First thing is when a person comes to you and he says I'm a worker. Workman! Please don't take it in face value. There have been cases of people who have been relationship officers in a bank I had a case like that lady concern doing everything possible interacting with plans, proposing the banks business, selling the banks business so to speak. I'm a workman. You had a legal officer or a legal the whatever ya a legal officer in a company. He said I'm a workman. You had people of all segments doing all kinds of work and what is the test that tribunals apply. Is he doing supervisory work? Is he granting leave? Has he somebody working under him? Please appreciate that the that the definition of workman includes not just men I mean excludes not just managerial & supervisory but there is in between that he remembers that is administrative, person doing administrative work is also not a workman. And that is something that the tribunals and labor courts consistently overlook. But had the court member the bar also don't really emphasize that. Now what is meant by administrative?

The Bombay high court had occasionally considered this. And they said that you have three levels of management lower middle and upper. All three of them are involved in administrative work. Administrative work also defined as being anything which propels the company's business. So when you look at a workman. And you look at the exclusions caught don't look at only easy supervisory, has he got a boss.. Is he granting leave look also at the nature of work because a person doing administrative work is not required to supervise he is not required to have a person working under him. He is doing administrative work he is not a manager, He is not a supervisor. But he is still not a workman. And every every workman, please remember every workman is an employee. But every employee is not a workman. That's why you have sales representative for example as an illustration I was involved in that judgment and the court ultimately laid down every as I just said right now every employer every workman is an employee. But a salesman though an employee is not a workman because he is not doing manual

technical clerical work etc. So you have to bring the person when you look at a workman you have to bring him within the seven categories. If he doesn't fall he may be an employee but he's not a workman please look into that. There after what I like you to bear in mind the most important thing is Chapter Five B my learned friends Mr. Dias and the others also referred to 5B, but I'd like to bring to your notice that in *Excel ware* the Supreme Court did say the closure is a fundamental right. Thereafter in the seven five judge bench thereafter in the next five judge bench. They turned around and said the tribunal must examine the company's case. But please remember they have not said that it is not a fundamental right. It is still a fundamental right but it is restricted. No fundamental right not even the right to life is absolute. So also the right to carry on business and to close it down as a concomitant is a fundamental right but it is not absolute. Now when the, when a matter comes to you under Chapter Five B by way of a reference. It will come under twenty five O five. There are two things to note one, is that you have to bear in mind that a company who applied for permission to close is not a company who is playing jokes. No company plays a joke by asking to close down. No employer starts a business with intent to close down. Tribunals and even the courts look with great suspicion on an employer who wants to close down. But as I was telling learned judge just now been a few minutes ago, please bear in mind that in Chapter five B matters, an employer has come to you because he cannot run. Look at him. Test his argument. But don't be highly suspicious also highly suspicious as to say that no no not even if your economy is not right, even if you are suffering losses, the workman will lose their jobs therefore I will not allow you to close. That is wrong. I have seen cases in Bombay in my years when Bombay was an industrial hub is not now. I have seen cases where employers will try their luck try and close. In those days Closure permission was impossible. Now it is better in those days it is impossible to get closure permission. What do the tribunals do? Order the company to rather *Ke* just close down *thik hai*, I'll see later you do what you want. Who benefited? The employer or work? The workers got zero, they had to run around and getting their dues. So therefore when an application under twenty five o five comes to you. Please remember first thing that this management has come to me because he can't continue to work. Look upon in that way then ask yourself is it malafide. Here what is being done in tribunals first of all they say it is malafide workman will lose? Undoubtedly workman will lose but please remember that the company closes down which it will do because at the end of the day there's only so much money that they can pay, only so much money that they can borrow and give. At the end of the day if you

don't grant permission to close they will close. And then they will close, they will close illegally, you will render the employer liable for prosecution and the workers will get zero. Machines, I have seen, I have seen machines rotting workers would not agree to the closure, Machine to rot! Whose benefit? So therefore when it comes to you an application for closure comes to you under 25O(5), please look at it on the economic point also. Is there a genuine economic need the management is showing you? If there is a genuine economic need then please remember neither politics nor social philosophy will ever supersede that. Economics is economics it's on its own. Either you can afford to run or you can't afford to run. You cannot impose social wisdom on the economic necessity. So please look into that. Don't look at applications with suspicion look upon them as genuine situation where a man just can't run and remember nobody starts business to close it down. Right! Second thing is that under twenty five o five there is a mandate that the tribunals should manage to dispose of application within one month. No tribunals does that, no tribunal even takes notice of that and why? There's a reason why one month. I'll be honest with you at Bombay High Court they said no one month is not mandatory. It is directory. But look at it from the economic scenario under twenty five o you have only one year the order granting permission to close is what only for one year. If you do not dispose of that application what happens the permission lapses. What what is the advantage of your reference? Second thing is why was one month imposed? One month was imposed because the company is bleeding. The company can't afford to pay can't afford to run it therefore needs to close according to the employer. The union says no it doesn't need to close *thik hai* look into it but give it the due importance and urgency it needs. Don't treat it like any other reference. I will concede one other thing that when a workman comes to you also he so not in employment he has urgency also. But here you're dealing with a company over a hundred workman. You have more than hundred women in front of you and the company in front of you. Believe me, I know employers if they can't close they will shut down and they will go away. Nobody benefits. Therefore look into it. Consider it and give respect to that one month clause if you can. On the question of reinstatement and back wages, my sympathies are with you all the law is like the Bombay Stock Exchange, it keeps going up and down. As I was mentoring just now in the tea break you have judges. The judge comes to the Supreme Court with his own social philosophy. Without taking names it does has a social philosophy and if they are strong enough. They are able to impose a sort of philosophy. As a consequence of which you will have pro labour, anti-labor. Pro-labor,

anti-labor. Today it is pro labour, today all the benches of the Supreme Court are by and large pro-labor in their approach. But I assure you in the next five years. It will change. Now on reinstatement and back wages, what is the law? Law as it stands today as opposed to what it was yesterday. No I'll tell you. I'll explain it to you in simple terms. Earlier the law was the reinstatement on an illegal termination is not mandatory. You need not grant reinstatement. Today the lawyers say you must grant reinstatement.

Earlier the law on back wages was that it is for the employer to show *ke* man is not worked which with great respect I find absurd. Because how I am as an employer go looking around and where the person has worked and how he has worked. There after came a time when they said no no no, the employee knows whether he has worked not worked. Let the employee show and it is not the obligation of the employer and significantly the court went further to say *ke* we are changing the law, they said in writing we're changing the law. Now we have a Judgment of the Supreme Court which says *ke* all those judgments did not notice an earlier three judge bench to the contrary. So all judgement are *pari carium*, all around.. and we are back to a situation where it is the duty of the employer to demonstrate. Now as a tribunal, how do you deal with this? You are bound by Supreme Court article 141 bind you by new so right you have to say onus is upon the employer now as it stands. But give it an understanding just don't follow the word employed obligation as my learned friend mention and I think learned judge also mentioned just now a man for twenty years is out to employment his children go to school, his eldest child is in college and he says and I'm living on borrowed money. I have my self before the court in cases of transfer. We offer the person a transfer from one district of Bombay to another district of Bombay. Now it is one district or wherever and he won't go. And he won't go but he'll claim wages and the question I asked the court is, are we talking nonsense here? Here I'm giving him a job and giving him employment all he has to do is travel five more kilometers to the new job. He's not going there but he's coming to you and saying he has no no no money. That is unacceptable and should be unacceptable even to the tribunals and Labour courts. See wages... And I find is that courts grant back wages very easily because nothing goes out of their own pockets. If a judge had to pay one percent of what he ordered he would not ordered back wages as easily as he does. Its been a standing joke a mine that we should ask a Supreme Court judge and perhaps the High Court judges also to pay one percent out of their pocket for every time that they make a pass a blanket order for that of back wages. Why full back wages? Man has not worked. Look into his bank accounts he says he has

not worked he has got two children yes. How are you maintaining them? My brother is. Show me your bank account. At least that much you can do. Ask him to demonstrate how he survived. Sorry.

**Participant:** You can ask the workman file a petition asking for the statistics.

**Jamshed Cama:** Off course you can, why can't you? How does the management go to his bank? You are the judge. Can you show a direction?

**Participant:** You can file a petition asking for the documents, you can ask move the action to the court *ke* ask him to produce bank account details.

**Jamshed Cama:** Alright so so now the question is do you have a social, Do you have a legal responsibility or not? Or do you have no responsibility at? Are you just sitting there? You I'm sorry to interrupt you but let me finish and then you ask any question you want it's a very good thing he raised. You ladies and gentleman are not sitting there just yet you have also got a duty. If I as a lawyer fail in my duty is no excuse for you as a judge to fail in yours. You also have a duty. You also have a.. You are there for the purposes of doing justice. And I'm I'm only drawing to your attention the fact that this is one of the aspects that you need to look into. If you feel that employer should do it what are you saying you're saying let the employer ask me. And I will do it. The question I ask is why do you need the employer to ask you to ask? Why can't you on your own realize that it is a moral duty of yours why moral a legal duty of yours to find out really whether the man is entitled to full back wages. He's asking for full back wages. Is he entitled? Is it for the management to say that or for you to consider that? I I'm only telling you, today's topic is employer's wishes. I am putting to you the employer's wishes. The Employers wish that you also would exercise your judicial might before *Simplicitor* granting reinstatement or *Simplicitor* granting back wages because even today when the law says the onus is upon the employer to prove it is not taken away the one aspect of the matter which is, that the employee is not entitled to wages if he has worked elsewhere. Can the tribunals you are the fact finding authority. You are the final authority. Can you refuse to look into that aspect? You have to look into that aspect. Ya ya i'll complete. I'll give you a chance.

**Participant:** When Cross examination is going on at that time presiding officer cannot speak.

**Jamshed Cama:** Why? Who said?

**Justice Chandru:** No no no Presiding officer can not give in the issue about the equities. Presiding officer cannot give a hint to the either side

**Jamshed Cama:** I deal with that in my opinion, what you can do is in the question of back wages evidence has to be laid. It should be laid worker must at least make a statement that I have not earned. Now on that it is the onus upon management to prove as a Supreme Court now says it is the management must lead evidence. At that point of time what prevents them the judicial officer from asking the workman ke yes you also show. Why should you rest only on the fact that the onus is on Management. Onus is on management true enough. But you also in my respectful submission as judges have a duty to find out the truth. And in the process of finding out the truth I would propose personally feel that you all should be asking them the workman also ke yes for fourteen years you went out of employment you tell me also management is doing its job is trying to best to say but you also tell me now how did you survive? What did you do? You could always ask that question. And in my respectful submission you should ask that question. Listen I have never believed in being scared. I walk into a court. I argue what I think is the right thing. As judges you all have an obligation to do the right thing without fear. What is going to happen? High Court will say you are wrong. Why will they say you are wrong? All I'm saying is onus is upon management now. Follow the doctrine. Don't don't don't disobey Supreme Court. But at the same time ask the workman. Balance the equities. Let me tell you now all very well this court sitting in Delhi to say onus upon management. But do they really realize how difficult it is management to find out how does management find if fourteen years, what is management doing for fourteen years. And for fourteen year do you as tribunals really really really believe they've done nothing. Do you honestly as judges believe ha has done nothing for fourteen years? If you don't then should you shut your eye or should you time to make an inquiry. And my suggestion to you see I can tell you what to do. I can only make a suggestion to you that as tribunals in my opinion. You have an obligation to find out the truth. Follow the Supreme Court, put the onus on management. But also don't sit on that and try and find out the truth. And is there any particular reason why you should not ask a workman. Why should you not as a workman?

**Participant:** Allegations are illegal.

**Jamshed Cama:** See if you but then in that case, in that case.. Allegations are always why only you.. Today I tell you there are allegations against Supreme Court judges but are they not doing their duty?

**Participant:** They are immune we are not immune.

**Jamshed Cama:** So then then look. It's alright, you have to have the courage to do what is right. It Is very easy to say that I'm going to do the wrong because I'm afraid to do the right. You have taken judicial oath for the purpose because you want to do justice. And you cannot do justice by being afraid like this you do the right thing what is wrong in asking him? What you see if you were to ask the management this the chances of corruption allegations are higher. What are you doing asking the the individual workman. All you're saying is Show me how did you survive all these years? I'm sorry. If you are scared its a different issue.

**Participant:** The judge cannot sit as a silent spectator.

**Another Participant:** Yes yes that is the judgement of Hon'ble Supreme Court that judge cannot sit as silent spectator, he is an active player of the proceeding and he must participate in the proceeding. It is said by aaa Hon'ble Justice Pasayat in *Zahira Habibullah's* case.

**Jamshed Cama:** Thank you I'm I'm guessing judges have a duty also and fear is not an answer. You have taken an oath an oath to office.

**Participant:** We were just discussing the practical problems

**Jamshed Cama:** I agree. Believe me there are practical problems at any level of the judiciary. Doesn't matter do the, Do, Do your duty. Do your duty according to your, to your own conscience. You see you have.. Just now when you have judges of the Supreme Court who are either pro or anti management. When judges of the higher courts why Supreme Court loaded even High Courts. When they are pro and anti. I call I called it the judicial aa aa what is the word I want? Of the.. It's not financial corruption but judicial corruption. if I as a sitting judge of the apex court have a particular philosophy. If I believe that all managements are right and I therefore Struck down every workers case, It is judicial dishonesty it is not financial dishonesty.

**Participant:** It is modern realism according to Dicey. It is modern realism because whatever the impact on my mind or I gather from society that is that philosophy depicted in my judgement that is modern realism that is not judicial dishonesty. That is what dicey say in jurisprudence.

**Jamshed Cama:** I'm sorry; I'll tell you the difference according to me. The difference is realism means it will color your thinking. But you have an oath to the Constitution. The Constitution does not say that it is pro management or pro labor the Constitution demands as judges you take your philosophy into court by all means because you're a human being you're bound to but when you decide as a judge, in my opinion you supersede that and you do what is right. I remember a particular judge once telling me he says look I have a discretion. If there is a discretionary order between management and labor I will go with labour fair enough. That's an acceptable discretion. Because as a judge and he feels the society requires a protection of the poorer but if there is no doubt and I've seen judgments which have been culled out. Facts are wrong in the judgment why? Because a judge wanted to reach a conclusion in law which he could not reach without changing the facts. That is judicial corruption, Intellectual, intellectual corruption.

**Participant:** Sir but you cannot generalize it.

**Jamshed Cama:** I'm not I'm not generalizing it. *Arre baba* I'm talking about your case and I'm not talking general.

**Participant:** Sir I tell you in one of the recent judgement of Hon'ble apex court on 1st July i.e *Ahemdabad Municipality v. Raju bhai's* wherein last para Hon'ble Justice Deepak Mishra wrote that it is bounden duty of the labor court labour court judge to investigate and find out the real truth and facts of the matter.

**Jamshed Cama:** That's what I am saying. That's your answer. I'm grateful to you. I'm just saying it individual I concede. Not every judge has the same philosophy. But when you as a Judge sit and when you consider the law you will have your own particular you're a human being you have your own particular belief in what is right and what is wrong. But you have to suppress that in favor of the law you have to say that I believe that management is always right but on the law as it stands the worker has right in this case. That is what we expect from the judiciary. And since you all are as I said the most important part of the labour hierarchy of judges. That is what we expect from

you that is management's wish from you. Now. Sorry I'm almost done. I'm almost done. Now Settlements, the higher courts always tell us settle it, go to mediation. Somebody today suggested it. And I think the very good idea encourage settlement. You know there are times when judges will keep quiet and not speak. But those are the time when a judge would just give a gentle nudge *ke bhai* go on. This is this this is this. Why don't you consider this go and talk about it come back after 2 days and tell me. You might encourage a settlement. So a settlement is always preferred to an award. In fact there's there's a judgment that says that a settlement arrived at just before an award is passed is a settlement who supersedes the award. There'll be no award passed. So therefore all I am suggesting to you is. I'm giving you the management's wish list. We expect and request that you all will act without fear that you will also look at the management's point of view, that you will not always see the labour is right a management is wrong. You will not always flatly grant reinstatement and back wages, you will apply your judicial minds. Please remember one one fundamental that the goose that lays the golden egg is management. Management is not always right but correspondingly management is not always wrong. Thank you very much.

**Nitika Jain:** Shall we begin with the third session. The third session is relating to problems faced by the Labour courts and industrial tribunal. What we have planned in this session is that you'll be divided in a group of five, each. Two groups will be there that will have four four each. And we would like you to see the functional and the institutional problems that you all face in the daily process of the labor courts and industrial tribunals. We would request you to choose one group member, one one leader who would speak on behalf of the group members. You will be sent to separate rooms where you will have computer. Put put up there you can use the computer. You can make a power-point presentation or jot down your point whatever you have to say regarding your problems. Further we have chits prepared, there are five, there are chits relating to the room numbers, room numbers one two three four. We would request you to choose the chit and whichever chit comes up to you that will be the group. Like if it's group number. If you have a chit of room number one that will be group. That would go to room number one. So there will be five people who would go to room number one who gets the Chit of room number one. Is That fine? I would also like to request you to give a big round of applause to advocate Michael Dias and advocate Jamshed Cama. On Sir on behalf of N.J.A I would like to show my gratitude. Thank you sir for sparing your precious time and giving us your valuable inputs. Please have a big round for applause for both of them. For the team one will be. Team One will be accompanied by Sumit

Sir, team two will be accompanied by Milind team three will be accompanied by Aman and team four and five will be accompanied by us. So you may choose the chits first and then we'll proceed for the third session.

## SESSION 12

**Nitika Jain (Law Associate):** Welcome back. You all are requested to make your presentation. I'll ask, I'll request group number one to come and make your presentation please.

**Participant (Group 1):** Good evening Respected Sirs and their friends. There are many problems which we are facing. The first Problem is delay in getting notification. In Delhi we don't face this problem because general notification is issued. But in some states, some of my friends say that this is the problem for one month or two they don't get the notification and they are sitting idle. Notification for power under conferring power. One or two months depend upon when the government sends notification. Second problem. The reference are being sent by the government with without any documents and without complete address of the parties. Generally I've managed the reference contain the address of only the unions and many times and it comes after a long time union office is shut, So we are not able to contact the worker and the reference has to be returned back and award is to be passed incomplete address and documents. Then there is a problem of summons, serving the summons. Usually what happens in in reference cases we don't have any parties and we have to summon both the parties? And in Delhi particularly most of the workers are residing in the NCR area which comes within the jurisdiction of the other high court's and we don't have any power, any fund to send the summon through speed post. We don't get reply of through ordinary service and the District court concern court don't send any reply. So we are just unaware what has happened to summon sent by us and it takes a long time to solve the problems. So what I propose is that the labour court should have an Independent service agency which could serve the parties. Then there is a problem which everyone is facing, lack of stuff, usually we are always short of stenos particularly and other other staff also due to which work hampers. Then one one of the biggest problem which we face are the the parties those who present the parties are not qualified enough. On the one side there are union leaders and there is no qualification to becoming Union leader. Even those persons who are five class or seventh class pass they come as a union leader they don't know what is the evidences of the court, They don't know how to do the evidence and. This goes in waste. Poor assistance. And this. This also also related with poor poor drafting. Poor poor pleadings. Nothing is mentioned in the pleadings and it is very difficult to ascertain what is happening. One more problem is that the reference which the government spends most of the times they are generous centralized copy of every things, they make one single Single times. Not properly

framed, do not reflect the true dispute of the parties. Then, then there is frivolous applications by the parties because they want to delay the matters. This is the problem which is thank you

**Justice Chandru:** Group no. 2 look.

**Participant (Group 2):** Good afternoon Sir. Sir as already mentioned by my colleague, the terms of reference are not happily worded because there are so many mistakes. Or they do not truly depict what the claim was or what the dispute was because the law says the court cannot go beyond that. Or the matter incidentals there to. So therefore it is necessary that all these labour officers or the labour commissioners are Sensitized, sensitized as to how these reference are to be made. Because it is a very serious matter. As my learned colleague has already mentioned names of the parties are not properly depicted. Sometimes corrigendums are acquired. I have two matters in which corrigendum Is yet to be received after two years period they don't pay any proper attention. The court is helpless I cannot ask the labour commissioner to appear or file submit the corrigendum. I have limited powers. When the reference is made it is the duty of the responsibility of the government to apprise the parties of the making of the reference. But as my colleague has rightly mentioned that in Delhi many workers are from N.C.R. area or from UP Bihar, they come and they get employed and then there is an industry dispute. They give there address sometimes to the union trade union. But sometimes don't provide. So whatever notice is given by the union or the complaint is submitted by the union to the Labor Department those do not contain the addresses of the workman. Now what the government will do is the they would mention only Ram Lal Son of shyamlal Care of the Union address. Now when that reference. First of all it is the duty of the government to send a copy of the reference on the parties. It is difficult to say whether they actually serve the copy on the parties or not. In some of the cases management never appears it is again difficult. Than it is the part of the court how to serve that management. But where the address only of the Union has been given by the trade union to the government. It becomes very difficult to serve that notice on claimant. When, when I took over I started asking for the mode adopted by the government in service of the notice. Then tell me what you annexed to your reference, the copies of the record depicting mode of communication method adopted by you. So they have started annexing the reference, copy of the registers which indicate that in some of the cases the copies sent to the claimant by post, by ordinary post. How can I say that OK on the basis... He must have received that notice which was sent in by ordinary post. Sometimes that it was delivered by hand

but those entries do not bear signatures of any person. So this is the main problem. What it leads to is that when reference is received and it is not a case of due service upon the parties' then court notice is to be issued or not in test of this is required that we should issue court notice. So that reference is not... answered. In this way that none has appeared or filed a claim. It is very difficult. As per the reference management and the claimants are required to appear before the court within fifteen days. But when service is has not been effected in time how they can file claim within fifteen days. It is very difficult. Now the next question arises if I issue court notice to the parties. First of all I have to issue court notice to the claimants only. When address of the claimant is not there I have to get served upon the union. Now the next difficulty arises the trade union has been served but still they do not file the claim. They say that we have sent a letter to the claimant at his address of U.P. which was never provided to the courts. Now the claimant would come to know of that letter after thirty or so many days, he may be busy in his own work in his own fields or somewhere. If he comes to know if he is telephonically informed by trade union then he would come and contact. He would be told OK your reference has been made now we are to prepare a claim. Now see that the fifteen days' time it is not sufficient from the point of workman. So ordinarily we have to issue him court notice. Now court notice in case of trade union, sometimes the reports are that yes trade union office was found lying logged, they have shifted from this place and gone to some other address and that address is not available. Now how to serve that claim who was represented by the trade Union. I cannot call for a report from the Labor government whether any Union is available or not. Again the claimant suffers on that account because the address is not available. Reference has been made, time has already started. So once he comes up with the claim. I will take time my lord because these are very important issues I'm highlighting. That's so so kind of you. Once the claimant contacts the authorized representative claim is prepared. Now as I yesterday pointed out my Lord that sometimes the claim is required to be verified it should bear a verification clause, sometimes it is not verified at all because it does not require verification at all. I have not been able to understand. But I became wiser yesterday *ke* hardly matters whether it is verified or not because the claims are so drafted. My colleague has already. These are not drafted happily. So let claim is received. Now its copy is required to be sent to the management by the claimant himself. The Rules so provide. Now how the claimant would send it. What mode he would he would just deliver the go to the management establishments personally or would he send it by post or by registered post. Suppose he sends it by registered post. Then I ask him OK then provide me the receipt in proof thereof so that I may see

that you have taken your steps for dispatch of the copies to the management. Now either he has placed on record all those copies, the postal receipt. Now the question rises on the next day the management does not appear. How I am to be satisfied that management had been duly served. If I see the general clauses act they say that if you send a notice by registered post so it is deemed service. What procedure then I have to follow is that I have to issue a court notice to the management to ascertain from them *ke* gentleman whether you have received this notice or not. If you have already received notice then file File your written statement within fifteen days. Again this difficulty of service on the management of dispatch of copies. Sometimes I have to ask the claimant *ke* if you are able file registered cover so that I may send it. If you will send it the management may refuse but if you have a sense of this Court then perhaps they may appear because it would be accompanied by a copy of the process issued by the court. He cannot take your claim seriously but accept it seriously when it is accompanied by court's notice. So what I've found is that whenever a notice is sent through court hey generally do appear. But whenever they send directly the management does not appear at all. It becomes very difficult. Now this service is complete management comes and file a written statement that is OK. But the problem another problem arise my lord in case there is one claimant or two or five that is OK. But there are claims with us in which one fifty two claimants are there. In the reference one fifty two claimants. It will certainly take time to dispose of the claim of one fifty two claimants. Because they say that you have to file only one claim. But some time I suggest that why you file separate claims. So that every claim is disposed of easily and quickly. Some people agree some don't agree. But again the problem is every judge is required to give some units at the end of the month or the end of the quarter. Now my lord what happens, what happens if I dispose of that 152 two cases, claimants case. I'm given only three units. If I decide a case of of only one person even then I'm given three units. So who will take pains to take up the matter of those one fifty two claimants. Because each claimant has to step into the witness works and depose. The judge would be reluctant Honestly speaking I wrote, I made a request to the Honorable high court with due regard *Ke* please award more units in cases in which number of claimants are much more so that I may be duly adequately rewarded. But with due regard that references was rejected. So these are the problems being faced by us. At Delhi my colleagues, the other members. One of them has submitted that whenever matter is remanded by the Hon'ble high court. A writer is there that you want to dispose it of within three months or four month or six months. Either the matter remains pending before the high court for so many years. Sometimes what

happens what Sir, generally the record is called by the High Court and gone through some time the record is not called it depends upon method to method whether record is required is required or not. So whenever the, the directions can't, there is a stipulation of time of the section of the required. When the order of remand is received back we that required record has been destroyed in the meanwhile because it had been sent to the record room. Now there is another. And another point there will be a difficulty of construction reconstruction of the record. Then we have to take assistance *unki baat kar raha hun main jo mere group ke member hain* I am representing them. Not Punjab. My lord unequal distribution. My other colleague. He has said that this is there is a case of unequal distribution. One judge is having jurisdiction of only one district. There may not be so many industries. The other that Hon'ble judge has got another district where there are so many industries. So many disputes. So reference is made to that court the number of references made to that court is higher than that judge. If one judge has got 3 districts so the number of pendency is much high. So this is an unequal distribution. Labour Commissioner only has the power to transfer cases from one court to the other. But as regards districts are concerned the Hon'ble high court can exercise jurisdiction to see that there is equal Jurisdiction, Equal distribution of work. Then another member, my colleague said that in some of the states there is no mediation center where labour courts are. So incase mediation center is not there the learned judge cannot exercise the power to refer the case to mediation. In case mediation center is not there all those labours will have to go to that place where the mediation center is. This is another difficulty expressed by him. The another point was my lord pointed out that the labour courts are under the administration of the government. We are generally under the administration of the government. We are under the administration of the supervision of the high court. They say that employees provide to them in the labour courts are temporary employees. They are outsourced employees. So they are for limited period. Then the work suffers why not to appoint regular employees. These were the views of my group my lord. Thank you very much.

**Justice Sujoy Paul:** Whether group 3 is also from Delhi? What is approximate pendency in Delhi courts?

**Participant:** 14000, there are 9 courts my lord and 14000 cases.

**Participant (Group 3):** Respected my lords and my colleagues, judicial officers. So our group consisted of the judicial officers from Punjab, Bihar, Himachal Pradesh, Orissa and Kerala. So the

difficulties experience by the judicial officers in these states except Punjab is the lack of proper infrastructure. Because we are under the government, so no sufficient number of staff is deployed Lordship. The vacancies which fall vacant they are not filled up immediately. The IT infrastructure, the computer facilities are not there, staff is not properly trained and the suggestion of our group was that the training should be given to the staff by the respective Judicial Academies of the state. There are no in some states no experienced stenographers have been deployed in Kerala and Odisha there is no building of the labor Court they have rented accommodation has been hired for running of the labour courts. And no proper library, books and labour journals are there. Then the other problems are from the advocates and parties to the dispute. They take unnecessary adjournments which results in delay. Sometimes the documents like muster rolls, E.S.I registers they're not being produced by the employer despite specific direction given to them. Then there is no process serving agency, even no process server or post of process server is available in Labour courts. And from Punjab my learned colleague has stated that he has got no problem. He has got 2 stenographers, one reader, one record keepers, one class letter, two Clerk, 2 peons, 2 ushers, one drivers and he has got a four the vehicle, proper library facilities there. And three AC's are there in his court and one AC in chambers and proper government accommodation is available to him which is earmarked to the officers of Labour Court and he has got 2 gun.

**Justice Chandru:** So you suggest Punjab model should be adopted?

**Participant:** Yes yes yes. Thank You my lord.

**Justice Chandru:** Group 4

**Participant (Group 4):** With the permission of Hon'ble dignitaries on the dais I am expressing some problems of my group. My group is consist of the judges came from him MP, Gujarat, Maharashtra and Jharkhand. There are several problems which judges are facing that are sufficient staff are not provided some staff are prodded but they are not skillful and trained. No spending no funds are provided to do day to day work of the court. Just like for purchasing coolers, almira, furniture, articles for cleaning the court, courtroom therein. In some states like in Maharashtra no independent courts within the buildings are available for housing industrial and labor court. No proper accommodation is provided for judges. Even in the court No basic amenities like the the urinals are provided to the in the chambers of judges. We used to go to the urinals of the litigants

and since last more than ten years. Sufficient library is also not provided and there is no fund therefore we are not able to purchase the law books, journals and to maintain the library properly. In the state of the Madhya Pradesh no computerization in courts of some courts. Therefore they are also facing problems. Some advocates and union representatives adopts frivolous practice by making false complaints against presiding officer for getting the orders on their wish. That also cause problems to the judges and most of the complaints are taken by the superior authorities and the..the the right to hear it also not provided to the judges most of times. No mediation center is provided to the labour court. And industrial court therefore we we constraint to send the matter to the District Court for mediation process. No machinery is provided to execute the order of the court. There is a delay in approval of award by the appropriate authority of the government. Most of time unnecessary adjournments are made by the adequacy that also cause the delay in dealing the judgements. All these are the problems facing by the members of group number 4. Thank You.

**Justice Chandru:** Group 5

**Participant (Group 5):** Good afternoon. My lord at dais and my friends. Some of the problems are common which you have already narrated. I don't want to take much, much of time for that. Before coming to the labor court I was special secretary to the government. Dealing with. Drafting legislative drafting litigation justice etc. One of my friend from Delhi he pointed out that there was delay in issuance of notification. When I was there in government. One legislator raised this issue at the time of Rajasthan Industrial Dispute Amendment Bills and he he specifically pointed out that labour judges are sitting ideally for two months three months or four months and they are not doing anything. Then the minister in charge he asked what what is the solution? Principal secretary was there I told him that as soon as the High Court proposes the name you you propose the file of granting of power to that judge immediately and as soon as he assumes the chair of Labor judge he'll have the power. Same was adopted thereafter in Rajasthan. And now now as soon as the name has been forwarded by the High Court for posting as labor or industrial judge in Rajasthan a simultaneous file has been initiated by the Labor Department and before the joining of the labor judge in labor court this problem is solved and he is having that envelope of power. So its a very simple procedure, it has to be adopted. It's a very simple procedure and this we have sold in assembly and we had on the floor of assembly there was this statement. In answer to that that legislator. You see on earlier I wanted to speak on Mr. Dias few version. I agree with Hon'ble Lordship Mr. Chandru, there is

stiff registers in the society about any change in the procedure, or method of with regard to any law concerned. I have seen myself there are 80% opposition in legislative assembly while passing through five bills four Bills wherein BJP was having 163 members out of two hundred and eighty percent of they are opposing it. But the bill was seconded because of captive, it was not not of public opinion. When the bill is presented to the house first first first argument is whether this bill be sent to no public opinion. And because of majority. This, this has been disowned. They say no though majority of them want yes. But even if in view of the majority they say no anyway. In Rajasthan I'm not talking about Rajasthan because in our group we have members from Karnataka and Andhra. You see. There are few common problems. We have pointed out those only. In Rajasthan we are court of the state. And there is no control of high court. Ours are on deputation with the government and it is the duty of the government to foster us. So are being fostered by the government. And rules especially applicable to special secretary to government they are applicable to us. This is a simple procedure in Rajasthan and I feel that is better best way where in as an when government appoints anyone and even government must write in the order that all facility made available to special secretary to the government they will be available to industrial judge or labour judge. That should be the best solution for facilities are concerned because you see I've been provided with a taxi car full time taxi car. Government is paying twenty seven thousand rupees a month on that taxi. Chauffeur driven taxi I'm having a chauffeur driven taxi. My court is the oldest court in Rajasthan which is which is the first court in Rajasthan and later on this the work has been bifurcated to other courts. I am having the jurisdiction of CGIT also, I'm having the jurisdiction of appellate authority under the SO order Act. You see after nineteen eighty I decided four appeals. Though I'm eleven, I'm having tenure of eleven months. We feel that there is inadequate inadequate buildings as regard to to labor courts are concerned as majority of you have pointed out, lack of IT Infrastructure, because I feel that in days to come. We want the Labour Court Jaipur should be a paperless court and we are moving in that direction. We are searching for. Since I am. One of the members of Free Software Foundation. So I don't want to buy any software. I thoroughly I don't want to buy any software because I feel that all the commercial software guides men whereas free software is guided by men. There is a big difference between between two. So there must be IT infrastructure. IP infrastructure will help. Though In my court we have sufficient number of computers and everything is there. Inadequate staff: It is there because you see the this court basically belongs to government. It is quasi-judicial function. It's not the pure

court of high court. Now this agree to this proposition that high court should control this because else. This this. This will again be mess and it becomes a mess. Because you see if. If law has to speak it will first speak against lawyer and as and when High Court control it you see it will be rule of lawyers only. *Sir apne present ka rdiya maine app mujhse prashna pooche na isk ebaad.* Sir I am presenting my point of view you presented I heard it, have the patience, and have the patience. Patience is the first and prime thing for a judge; untrained staff: There are staff which are being recruited as peons and later on they are promoted because there is bottleneck in labour court. There is no scope of promotion. So from lower category they are being promoted. So they are untrained; Poor Library: I don't think in Rajasthan that is a problem but my other colleagues pointed out that there are not enough funds for library they want library. And one of my Kerala friend pointed out that there is Lack of sufficient funds in Kerala this.

Problems in adjudication you see, I'm a master trainer of E-court project so I point you out that at present there is CIS 1. At the time of raising dispute, workman to give personal particulars (as KYC) in his claim and file all the documents pertaining to the dispute, Management to submit all information and all the documents. Conciliation Officer to forward all the documents with failure report along with the reference. But as and when C.I.S. two point zero is implement it all labour courts and tribunals will be covered in the second phase. And in that case In that case as soon as a case is filed a necessary S.M.S. to be generated and that will be sent to that workman and to the representative of management. That your case has been listed on this and this date, you case has been adjourned or your case your your this proceeding has taken place in your case. So in that case. Like in bank. I suggest. I have read almost four or five. Countries procedure. When there was a strike in Rajasthan that was for 65 days for wherein the High Court has called us. And they said your lawyers not appearing on behalf of state. What to do now? Then we suggested that you have some kind of rule for litigation in person so that any person any individual want to come to the court and if he want to file a case or defend there must be a help desk or counsellors. And those can be assisted this procedure has been followed in California. But in Canada the procedure is the best. That is any aggrieved party. Contacts his lawyer or his representative. Then he makes a case serves a notice to the other, other reply to it. There after they exchange the documents, thereafter if they want to inspect each other's document they can inspect. And if they if they want to go to ADR they settle that they'll go to ADR. If they don't want to go to ADR they decide OK we have to go for adjudication then they file the case before the registry of that court and then after at that time they

decide the date that we are going to file. Both appear before a registry they file an after preparing the file the case goes to court all pleadings are complete. Now it is for hearing. If you go through the rules it says within 6 weeks of receiving of reference court must post for hearing. How could it be unless pleadings are completed and pleadings are basically delay in disposal? And it should be. And our suggestion would be as the dispute is raised before the conciliation officer at that time the workman should have filed his case, all documents they be served to the management, management must reply to that, must must take all defenses, must submit all documents then there must be an effective conciliation failing which the entire file, entire file along with failure report must be referred with question of reference to the court. This should be the best procedure as I feel so. Then there was one question. And which majority of you agree that a reference. At that time of reference the conciliation the government must inform to the parties by registered post with AD that we are sending the reference to that Labor court you are required to appear within 30 days. There must be embargo of two weeks. You must appear and file your claim else court must fix a date that we are serving you notice, failure which it will be decided ex-parte. Unnecessarily dragging would not serve the purpose.

Then Tenure and facilities to PO, there must be Fixed tenure to PO, Enough facilities to PO, some say there must be Independent car, Personal staff like peon at residence, Training and refresher courses at regular intervals to update their knowledge. Thanks thank you.

**Justice Chandru:** From hearing all the groups. The problem appears to be more or less common. So we can always say we are not alone. Everybody's having the same problem. And there is no ideal situation in this matter. The other all problems are not insurmountable. Some problems can be solved in a easy method, some problem can be solved in a circuitous method. The first objections or problem faced by the officers is regarding the terms of reference given by the government. Now you know most of the references are only two year dispute there are hardly five to ten percent are collective dispute. So the problem of reference mostly in collective dispute and not 2 year dispute and in two year dispute maximum they can say that whether non employment is justified or whether the dismissal is justified. If not, what relief? So there may not be much problem and in some of the states like Tamil Nadu, Andhra Pradesh, Karnataka there is a direct reference procedure has come in respect of non-employment. As soon as the conciliation report fails before a labour officer the party is expected to file a claim statement along with the failure. So it is labour court which assigns the ID number and sends notice to parties. So the question of any conclusion

doesn't arise because like a suit the plaintiff appears before the court. Like that here the worker appears along with the conciliation report. Whether his pleading are not satisfactory or Not very good that is not our concern. The first complain comes from the Labor therefore you assign a number send a notice to the parties. In respect of a collective dispute the reference there are two judgements, the earliest judgement was *State of Madras v. CP Sardi* 1953 SC, the reference by the Madras Government said the dispute between all theaters and workman of Madras city, all theaters means at that time there was about 35 theaters in Madras So all theaters and all workman of the Madras city theaters. Then the management of one theater represented by some Prabhat case, Cp Sardi. He challenged the order by saying it does not indicate the names of parties therefore it's a vague reference. For the first time such matter came to the Supreme Court and SC said that the order of refer must indicate the mind of the government as to who are the parties involved in dispute, Labour Court and tribunal can find out what are the parties. But there is no question of a reference being vague on the plea that all the names are not mentioned. So the labour courts will identify the parties to the dispute. Under Section 10(1) the government will have to only indicate its mind that this is the matter which goes for adjudication. Under Section 10(4) you are bound to answer the order of refernce and any incidental matter thereto. Now this is the first judgement. In 1968 in *Minimaxx* the court said you should not approach the order of reference in a manner you should have all the attendant circumstances including the pleadings of parties to identify the list between parties. The reference is only one sentence, whether the lock out is justified or not or whether it is a case of lock out or suspension of apprehension? So the parties will argue it's a case of lock out, management will argue its a case of suspension operation. So from the pleadings when you frame issues you'll correctly come to the conclusion what is the list between the parties. Therefore there is no need to crumble about the order of reference being very cryptic or non-application of mind. After the parties file the appropriate statement because the reference is not made in one night, the reference is proceeded by conciliation meetings and there is a conciliation failure report and there are two failure report, one is a confidential report and one is a open report. Under Section 12(4) there is a open report given to parties so you can always ask the parties to file the failure report and more often both the worker and the management file the failure report also and corresponding between parties before the conciliation officer. Therefore it is not such a difficult process that the reference orders are very vague. As you are mentioning it is not clear that it is Xerox copies. That is a different issue. But I will tell you in respect of a collective dispute the reference order is also published in the Gazette. So

you can always. In our state the government sends a free copy of the Gazette every week to the labour courts. Therefore if you are having doubt you can refer to the Gazette. As to what is actually the reference? All the reference are Gazette for the reason the the an adjudication process starts from the date when the reference order is made. It is for the purpose of making a strike illegal that is during the adjudication workers can't go on strike. When the does the adjudication starts? The day when the order of reference is made. When the adjudication does ends? The award is published in the Gazette in 30 days have elapsed. Therefore during the adjudication you can't go on a strike and therefore there is a colonial practice of publishing both the order of reference as well as award in the gazette. It's only in case of non-employment through a dispute that procedure has been dispensed with but in respect of collective dispute the whole procedure continues because the act says so. The then the next question which is mentioned is regarding the summons. Now the summons, your grievance is that enough stampage is not given or process fee is not given. These are the two grounds. Now rules can be framed by the appropriate government. It can be recommended by High Court, it can be initiated by the labour court or sometime you can even have a labour bar to make such request to the government. Now under the information technology Act even an e-mail notice is a notice. Therefore most of the managements will have a email ID and suppose under the rules the government says the notice can be send by email that takes away half the work. With reference to workers the stamps not be provided enough. The In Tamil Nadu what they do is they send it by ordinary post, the first hearing they send it by ordinary post and most of the time the worker who is following the order of reference will also see to it that he get the order and then come to the court. Now in the first hearing if there is no appearance then the method registered post is resorted to by the court. Therefore the court says money if he appears no difficulty if he doesn't appear then notice is there then management is also told to send a private notice to the party that is also we can pass a appropriate order. And and you can also resort to email notice and in cases where Union address is given more often in individual dispute They give the Union address because the union leader for two reason.. Worker may not have a regular address mostly they are migrant labour so the moment he leaves the job he goes to the United States. Therefore the address is not there therefore the union give the address. There are some union leaders who out of vested interest they don't want the worker to handle the case so he'll keep everything with the union office itself. Some secrecy is maintained in those cases you may not know the worker address in which case when the term statement is filed you can ask the union to furnish the address of the worker also. Whatever the

permanent address or temporary address. There are several cases we found after the award was confirmed to the High Court the worker is absent, union leader is dead and gone in all those cases what we did was, We called the labour commissioner's office we directed them to find out the address of the parties and then after getting the address of the parties we directed the High Court to send the order copy to the address of the workman. You'll have to do some kind of a pro-active role. Because of the procedural lapse party should not fail to recognize or realize the victory or the gain made by him .Therefore you'll have to innovate circumstances under which.. in more often what happens is labor court, regularly on the one side mostly regular lawyers are there, on the the other side also regular lawyers so we take the help of the lawyers saying that in this case worker has not come. Please inform the Union. and the union brings the worker and also these are some matters which can be sorted out at the labour and in order to save the postage stamps, you can resort to ordinary post method and thereafter if necessary RPAD and not first time RPAD, that is first thing. Secondly as some members have suggested the reference order can direct parties to file statement. Now in central government. If you see the central government order of reference it says the first party must file statement within fifteen days and the second party also must file statement within 15 days. There is no question of claim and counter because there is an order of reference between parties and it is preceded by the various conciliation method and therefore both sides what they want to say and therefore if you see the central government reference that both parties may file statement within fifteen days to the appropriate labour court. Now this practice has been there for quiet sometime but what really happens is no party ever files any claim statement as per the summons of the party. It is only when order of reference from central government goes to labour court and labour court registers the Id and thereafter sends a separate notice then the worker files claim statement like a suit and then the written statement is filed by the management. Though the summon says both must file all documents and statements simultaneously within 15 days, nobody follows and you can't make the procedure as a final thing in these matters. You'll have to have liberal thing.. and after you pass the award you are only keeping the award to the government you don't have the habit of sending it directly, it is a government who sends after passing a GO sends the award to the parties except in case of non-employment our rule says you'll have to exhibit in the notice board that award is passed then in the register it is written then copies are sent by ordinary post and not by registered post And the and Justice Sujoy Paul was mentioning in the morning that how when an order is passed there are too many claimants and there is a saying in English that 'victory has many

fathers'. As soon as somebody wins they'll say I am the party. This has happened in several cases for example. When the Ganga Yamuna cleaning plant started some of the Industries was relocated so one such industry was sent to Haryana. Now the workers were made to pay compensation, if you see the Supreme Court order, Supreme Court directed the labour commissioner to identify the workers and then only disperse the amount because nobody knows the names of workers and it is expected there can be more than one claim. Similarly when we had an award given by Justice Khalid in the matter of contract workers in the electricity board, there were eighteen thousand five workers, totally. And then it happened that there are too many people with the same name. And too many people with different names. All that is come. Therefore in the award itself Justice Khalid said one paragraph as to how to identify the parties. There were four unions. So what he did was he made the superintendent of engineer of that particular distribution circle. Then all the four unions will send one representative at the district level. These five will identify the worker and then the method of identification is also indicated, employment detail available or the identification by the respective union or finally all these methods fails. An affidavit is attained from the worker and then he is identified. So this process went for three months to identify and it so happens some of the union leaders were themselves faking names. They brought in their brother in laws, son in laws in that name. And then the vigilance police of the electricity board again went to the whole issue. That is too many dispute. But one thing is clear when the names are not available there is bound to be many claimants and. And it's one thing. Then about this staff. I think with reference to staff, library, IT infrastructure, car all these I think you have to take up the issue to the government. So if there is no labour bar create a labour bar and make some orderly plead through them. Many times what the our High Court does is they don't get reply from government, so what they do they make the registrar general to give a letter. Then the registrar letter is treated as a writ petition, suo suo moto writ petition and the chief secretaries are asked to give the reply. Then only file starts moving. This is not in one case. Each year our High Courts at least issue 100 suo motto writ petitions even to get information from the government. This method is adopted. Unfortunately you don't have writ jurisdiction. Therefore you'll have the lawyer association to take up such issues. And now you have fortunately you have right to information act therefore you can ask somebody to send a RTI quarry what happened to this demand that demand. Therefore you can find methods to get out all these issues including infrastructure issues it has to be. I'm not saying it is not, not a very serious issue. But point is that we have labour courts few and far, there are many states which are

not very much industrialized And we have Labour Court four districts and five districts and as somebody was telling about norms, why should we think of only norms, norms are only the minimum but many judges think norms are the maximum I think that may not be correct because the labor disputes can be solved in a very easy manner provided you put in conscious effort. I was a judge for seven years I had disposed of 96000 cases in seven years. Out of which ten thousand matters are labour matter alone. In your, in your group discussion you mostly concerned with the infrastructure, Funds and the processor method. Nobody brought the other issues of judging the dispute. What is that difficulty you are facing? or what is the judicial difficulty that you are facing therefore i want to mention only one or two matter I'm not going to talk long. Yesterday I mentioned about Section seven C. A labour court judge must be an independent person. What is the meaning of the word independent person? The law doesn't say so and dictionary doesn't say what is an independent person? What exactly means? In the context of the labor you see was that somebody may be a union office bearer or somebody maybe a chamber of commerce representative. He may not be independent because he is already is interfere mention outside the selection process. Therefore the law said, when you select a parson he should be independent person and not a affiliation person. Secondly, some people may have shared companies. In those cases what how do you appoint him when he's having interests. So therefore they said independent. But share doesn't mean anything. For example when the bank nationalization came, that case came before the Supreme Court. Some other judges told the attorney general that we had having some share in some other nationalized bank which were before nationalization then attorney general said oh no no sir they are very small shares. We have full faith in the judiciary. Subsequently when they found the ordinance was struck down, the act was struck down. Then the Congress party had meetings all over saying the judges are having vested interest in banks. They have shares and therefore they decided in favor of the private national banks. So these things are always there but that is not the issue. But so far as your concern I want to bring 3 incident which happened in labor court. The first incident was, there was a tribunal judge very good man. But then he belonged to a community which was running a bank. And that community bank employees brought an action for wage dispute before the tribunal and while the case was going on, the management of the bank prepared a written statement and went to the judge for the purpose getting so the judge also made corrections. He's actually the tribunal judge. He was only advising one party because it is a community bank. Then what the bank did was they could have just kept quite in the minutes book they wrote that we have consulted the

presiding judge he has okayed our written statement therefore it can be filed in the court. And the workers also belonged to the same community they also got a Xerox copy of the photocopy of the minutes book and an application was filed the case should be transferred from him to some other court because the judge was deeply interested in the case and at that time you know Section thirty three B, the power of transfer was with the government not with High Court. You can't file application with the judge you have to file before the government. Under 33B the matter was transferred from the tribunal to some other court saying that the judge was having interest. This was a very glaring example. I'm saying a record was available. Many times they may not be available. Then what happens now in particular case. The second case was a judge was a very upright judge, very honest and very sincere Christian who belongs to the Circuit effect. He has only two sets of clothes. He never take medicine because he believes in the lord and he's such a man and they have no issues also. So once there was a dispute before him there were four unions and we had that spot inquiry spot inspection. The spot inspection when we went we stayed in the guest house of the management. That guest house was a old colonial bungalow facing the beach and very nice location and very nice food was given. So after this inspection the judge came back and told his wife I went to a very good place. It's a very good *Bangla* a nice place to see the sea. Once you open the windows you can see the sea. So the wife as usual said why you don't take me to that place. If such a super.. so the judge what he did was he asked the management why don't you allow us to go for.. Management said there they are always willing. So they said you can come and stay with us. So when he went and stayed all the workers and Union came to know that the judge stayed in the guest house because the visitor's book contains an entry so they just kept quiet waiting for the award to be passed. Award went against a particular union and thereafter the union filed a case saying, they enjoyed the hospitality of the management and therefore the award is vitiated. Then when the case came before the High court judge the High court judge made a comment. It is very indiscretion on his part to go when the case is pending. Does it mean after the case you can go? That's another question, it is ethical question. But this is what HC judge said it is very in discretionary on part to go but he dismissed the writ petition by saying we have gone through the award, we find no infirmity at all therefore we are rejecting the allegation of bias. This was the order passed by the single bench. They went before a division bench and division bench judges are they know how to deal with the issue therefore the division bench asked the lawyer, ' When did you know they stayed in the guest house?' Then they said some date before the award. Therefore the order was passed saying, 'if you

know that somebody is bias, the allegation of bias has to be raised at the first instance and not after the outcome. That is you can't use it like a trump card. If you decide in my favor I'll keep quite. If you decide against me then the trump card will be put that's not possible. Therefore the writ appeal was dismissed. But what really happened was that man was such an upright man in his life there was no complaint. Later he became very ill and within few months he died that judge, he died. I think mostly because of this allegation against him. So I feel these indiscretions are not only during the course of the case but even outside. Afterwards also you should keep from this. There was a case in Indian Airlines where they went for arbitration that a Bombay High Court judge was appointed as arbitrator and during the pendency of the case this judge and his wife was sent to New York in the Indian Airlines, Air India flight and they stayed in the guest of the Air India in New York for six days. And the matter was raised before the court and bias was made. Supreme Court said, it is not enough it is not. It is not required that actually bias must be proved. The allegation or apprehension of bias is enough to vitiate a judgment. Therefore if somebody enjoys the hospitality of of one party he may not be really corrupt but one of the party thinks it is apprehension that he's likely to be biased. Therefore it is not real bias. Even likely would have a bias can be a ground for quashing an order. In fact this happened in the in the attack on the *gurudwara* in Amritsar by the army. A suit was filed claiming some seven hundred thousand against Union of India. Then the Union of India filed a transfer application transferring the suit from Punjab to any other court in India. When that matter came Supreme Court transferred the case I think to Madhya Pradesh or some other place. Where in that the argument was do you do you disbelieve the entire judiciary in Punjab to say that likelihood of bias? The argument of the central government was the atmosphere in that state is not conducive for conducting this case. So we strongly feel that justice may not be done to the Union of India. Therefore that area that case was transferred, in that Supreme Court said, 'it is need not be actual bias must be alleged likelihood of bias is enough therefore when you decide a matter where there is a dispute between the worker and management is so wide you'll have to show certain amount of integrity and detachment. This is a first lesson that you must have. The second difficulty we had a tribunal judge who was to retire within one week. He had only one week time to retire. And the workers somehow approach the judge. It was a very heavy contested case. A Multinational company was involved, the dispute was a wage dispute Hindustan lever was the company. The worker went and got I don't know what arrangement He said I will take care of your interest. But there is only one week left it was a very heavily contested case. So what he did was

he started dictating the order in the court itself. Monday! Tuesday! Thursday! On Friday has to go and it was became inconclusive because he has to do some calling work, some administrative work, and then the dictation became inconclusive. So in the diary he said award passed in favor of workers claim proved! Diary he wrote but the award was not ready. The stenographer who took the dictation transcribed, made a fair copy went to his house got his signature. By the time he retired from service. The management came to know that something is happening because a judge unusually dictating five days in the open court no other work is.. So they filed an application before the successor in charge. There were no tribunals. Those applications was filed saying we want to know whether the fair copy of the award is in the bundle or not. So that successor gave a letter saying fair copy of the award not find at the file. If you see the section under the under the ID act the award must be signed by the presiding officer. So far as the High Court is concerned if it is dictated and tomorrow I am not in the post or I am dead and gone then the registrar can certify this was dictated in the open court and this is a judgement. And it is valid. But so far as a labour court is concerned it must be a signed award copy. So on a very technical ground High Court quashed the award. So the entire loused labour was sloshed by the this mistake that the award is not signed on the day when he admitted office. So these are all minor things which you'll have to keep in mind. Ultimately what is important is the question of ethics that we are dealing with the a very very a very very strong and sensitive dispute between parties therefore fairness requires there must be no the the justice not only be done but also appears to be done that's one issue. Second issue is that the the *audi alterm partem*, the other rule which i did not hold it applies to all judicial officers and therefore when you talk about problems, you must also think of problems of this nature. That how to be a fair judge? Why why why civil judges are asked to come and go? Why the bar and the government never agree for a labour judiciary? Is because in this area one a Man is appointed for 25 years, he'll become a labour judge or a management judge. He can't be changed at all so both sides want a state of uncertainty. Somebody comes and he's bad they go and make representation to the High Court and then he's three called. Somebody is not liked and there is some method of a constant checking on his back. And because of this these notification gets delayed. Once a proposal goes it goes to the labour department, it goes to some other department and they'll have to see whether you are qualified or not and then finally when they give order there is a gap between one or two months. There are some cases where six months gap was there and a writ petition was filed by the association and then finally Government Issue order. Now these uncertainties kept because both sides wants a

destabilized judiciary not a regular judiciary. Therefore every time when a civil judge comes he starts learning, What is a worker, what is an industry, What industrial dispute, What is 10(1), What is 11A, what is 33C(2) by the time he is very familiar then his term comes to an end. One judge asked me, one senior judge asked me, Sir I can understand non employment issue. This bonus issue is very complicated, why is that they are referring to us? We don't understand at all what is a bonus dispute. You now say add add add add then you say deduct deduct deduct. When to add when to deduct we don't know? Why don't you send this dispute to some expert party? This statement apparently made not knowing there is a provision under the act, you can appoint an expert to advise him. In how many cases you appoint experts? Suppose you see there is an accounting procedure, appoint a chartered accountant, if you see some other area where some work norms to be made, some textile appoint an expert to go into the issue, Whether how to understand this issue. Therefore the ID Act is conceived in such a way, it is not as if you are helpless. The only thing is you never exercise power. Suppose you are hard pressed for time the Act provides for appointment of commissioner to record evidence. How many cases you appointed commissioners? There's a power in you. Now you say I don't know the address, they're not sending me. You can issue notice, compel attendance of any officer of the government. Ask him to produce the GO file, you can compel him to produce the corresponding file from the commissioner's office. Therefore when you have all the power but you don't have the *garud* to advise *hanuman* how powerful he is. Thank you.

**Hon'ble Justice Sujoy Paul:** I think there is nothing; everything is covered by brother Chandru. One interesting fact which is coming out of the discussion is it will be interesting to know that the Gwalior bench of the high court is constructed on a judicial order. Not on the basis of decision of the government. The suggestion of Justice Chandru was that if your problems are not dealt with by the government the Bar Association can file a petition and that that can be taken care of on judicial side by the High Court. In Gwalior there was an earlier bench of the high court the building was very small and there was no place for, no construction of new courtrooms and government was not doing anything. Then by a judicial order the entire new high court is constructed there *toh* there are those ways also which you can.

**Nitika Jain:** On behalf of NJA I would like to thank Justice Sujoy Paul for giving such valuable inputs. Can we please have a big round of applause for Justices Sujoy Paul? Thank you sir. Thank you for sparing your time. We'll end for the day and we'll meet tomorrow morning nine o'clock. And

I request you all to please kindly fill the response pro-forma given to you and submit that tomorrow please. Thank you.

**DAY 4**  
**SESSION 13**

**Shivaraj Huchhanavar:** Very good morning. Time is up I will take one minute just one minute. I welcome you all for the first session of the last day. And I have a small announcement to make. I request all of you to send hand over that particular response pro-forma. I think you all filled the company the response Performa's and the thing is the hypothetical, I think hypothetical one hypothetical you how which shall be filled in and returned to us and more importantly today we have a very important discussion and we have very renowned persons on the topic and we have discussion on legislative recent legislative amendments. And most importantly need for unification and to deliberate upon and to guide us on this particular topic we have very renowned Professor Sharit K Bhowmik. A renowned professor of labor studies and he has working experience, he worked in a very prestigious institution called as Tata Institute of Social Science and along the side we have as usual our Lordship to guide us and to initiate discussion. And with this brief introduction I hand over the mike to to Professor Sharit K Bhowmik to initiate the discussion. Thank you very much.

**Justice Chandru:** Dear friend Good morning to all of you. I think you must be happy today that the session comes to an end because it is a very long session on a particular subject in the the in the last session that we are going to see the nature of amendments and the kind of reforms under discussion. Though you may not be directly involved in the process. Because the amendments are brought in by the parliament. By the government at Center. Nevertheless you must know the direction under which the amendments are going. Before I go in the nature of amendments, I must now tell you that each of the legislation here, in fact you know India is the country where the longest piece of labour legislation available. There are nearly about 20 to 25 central laws and each state government if you take there are about 2000 labour legislations are there. The lengthiest labour legislation we have and it has a history of about 100 years. The earliest legislation was about 1921. The first question is that these legislations did not come because government thought there must be a legislation on the subject. It is not a gift from the government, it was mostly in response to a situation. When I say response to a situation that we have a saying In our villages that only a crying baby will get milk, so if there is a group of workers organized themselves, start making demands and start applying pressure then government thinks we must have a legislation.

So you'll find for plantation workers, transport workers, then beedi cigar workers, cinema workers, Circus workers. So each segment there is some special legislation but if you see chronologically there all different periods which means a particular legislation came because of a particular workers have organized themselves and therefore there is a legislation. In fact yesterday I was telling you about the 1930 Royal Commission labour, The commission of labour coming from England, you know in England is laws always there hundred years before where and when we came to India did not want to bring any protective legislation because they wanted to have expectation of the Indian labour. But nevertheless some good elements within the legislative field of English parliament they felt at least 2 quench their conscience they must do some small little work. But the commission said, 'the best way for the workers to raise there standard of living is to get them organized. Meaning give them the scope for organizing and under collective bargaining they will be able to get some benefits which may increase the standard of living which means they were not willing to bring in all the legislation which were available in England but nevertheless allow the organization to grow so that they will have their own way of getting things done. Now in this process if you see the earliest legislation in India was the trade unions act 1926. Now in 1926 has 2 crucial provisions that is you can't have civil injunction of the strike and you can't arrest the workers on criminal conspiracy. Now why this immunity was given to the trade union? Section 18 and Section 17 if you see you can't arrest a worker under 120B because if you give a strike call you are damaging the property of the employer meaning you are bringing down his profit range. Production comes to an end therefore he lose in the market therefore the trade union buy group have criminally conspired to print in loss to the employer. So criminal conspiracy and immunity was given. The second immunity was that a civil court should not grant injunction only on the ground a Strike brings breach of contract. The other two important provision is trade unions can have general fund, they can also have a political fund. Therefore the inherent right given to the workers were to indulge in politics because by indulging in politics by electing their representatives in the Legislature they will have a certain amount of what is called as a guilt pressure. In fact when our constitution was being drafted an idea was moved out whether we should have some guild representation. For it professional guild you had a representative, in the Irish constitution there is a provision for guild representation but in India they didn't have to except in the legislative council some nomination for teachers and other other person from walk of life. We never believed in

guild representation but whereas when the trade union act came they felt that the workers should have political right and therefore the money can be spent favour of a candidate who may go to the legislative bodies so that in turn they may bring certain amount of legislations in their favour or lobby. So political lobbying was permitted. Today many people may say there are lot of politics in trade union and all this but inherently the act itself provides for political write for workers. Now if you see me period before 1926, before the act came in 1921 we had a trade union called Madras labour Union one of the earliest trade union in South India. We claim that Madras Trade union was the first trade union but that's not the issue but in South India it is the first trade union. It watch functioning in a textile mill there was textile mill owned by the British. These two mills these worker went on a strike because the the working conditions were intolerable in fact one of the worker of that period wrote a memoire saying that, 'we have never seen the sunrise and we have never seen the sunset'. Many times when I come home my child use to ask my wife who is this man who is coming to house in the evening. This is how the situation was there. There was no working hours there was no satisfactory condition. So when they went on a strike the union the Union the management filed a suit in the Madras city civil court claiming damages from the union and the city civil court at the trial decreed the suit at 200 pounds in those days the suit was decreed 200 pounds against the union leader. Then the management wanted to execute the decree against the union leaders and all the union leader were summoned and they came to the execution court. Since the amount was high it was tried by the original cell of the madras High Court. And evidence was taken in the High Court, one of the leader was a lawyer and his statement was recorded which is available now on record. He said that I am an evangelist, I get 5 Rs per week from the church. I have two sets of cloths, one I am wearing, one at home, if you want to take my property take here it self this is the only property I have but when I go with my *langota* I will continue to fight for workers. But curiously the management did not execute the decree because one of the leader who has left the agitation was extrained from entering Madras and the unwritten understanding was, he should not come back to the factory anymore. So the decree remained unexecuted but this decree sent shockwaves all over India because I am going on strike I must pay 1000's of rs. At that time 2000 pound could buy the entire national judicial academy with that amount. And the issue was raise in a conference including the labour conference held in America that how could workers be treated like this? If you think collective bargaining is the right and strike is the method by which they can exercise that right and therefore the British first time brought a legislation known as the

trade unions act and gave immunity to the workers that you can't grant injunction. Notwithstanding that our high court also grant injunction in respect of some public sector company it's an illegal strike therefore I give injunction even though Union maybe a private party since there is a statutory routine not to commit illegality therefore I'll give injunction that's all. Then the workers also define that injunction because you can't enforce injunction on 10000 workers or 20000 workers. That is why under Specific Relief Act Section 4 says an injunction should not be given in a matter where minute observance is impossible. The monitoring of the observance of such order become impossible then you restraint yourself from granting.. but that's a debate that we will not go, I am only giving this as an example that this law was not a gift by the British it was on international pleasure and there was a local situation demanded that the employers have unreasonable restriction under workers right and therefore the state intervened not with a view to help your labour to increase the service condition but a minimum right that was granted to the workman is during the colonial period and therefore the first submission is every labour legislation is a response to a situation. The second point is the legislation came. at a given point of time not earlier not later because it had some historic significance for the period which in which legislation has been made. If you see the concept of dearness allowance. The concept of dearness allowance came there was already a wage but now there is a DA. The DA becomes a very important component in any wage structure, maybe in government servant the calculation is different but for industrial worker the calculation is based upon cost of living index. Why why the DA came? Does it means there is any legislation for DA.? The DA as a concept came during world war period because during the world war, after the world war two the prices went up because food commodities became very scarce and workers started demanding to subsidize their purchase of food articles, that is why many factories started a cooperate store also where you can buy the food items.

And it was given under subsidy and workers demanded we must be given some extra wage for buying. The question of DA is now understood in such a way it is not to fill the packet but to fill the holes in the packet. The real wage the value of the real wage goes down, it gets eroded and therefore workers want some substitute wage so that they'll be able to make a living to come to factory for next day's work. In fact the very idea of wage or a increased wage is to make the workers to live so that tomorrow the labour is available and during world war time the government started issuing orders that they should be given some increase or food items should be sold on a subsidized price and that it became a regular future. How it is calculated is a very cumbersome

story that I won't go in today but it is calculated based upon cost of living index. Understanding the fact in 1936 before the world war started the prices were stable and therefore 1936 was taken as the base line and the cost of living was calculated and workers wage was linked so much praise to be given. And now this DA which was originally called as a dearness food allowance DFA became a DA. Something became dear to the worker like purchase of food commodities. Therefore it became dearness. Even today we still call it a dearness allowance because it became an inseparable part of workers wage. If you see this concept it did not come through any legislation. It came only because of workers made a demand and there was a necessity for the employers to compensate there wages wage packet. And that is how the DA came to a state. If you see bonus. Bonus Act came in 1965, before the bonus act came what was the position? The employers were making profits and the workers were why not give us some share in the profit. So demand started in each industry where there was super profits a especially during world war 2. Some of the war contractors make tons of money by supplying for the war efforts. Therefore the question came if you are going to make so much money why don't you give us some amount. That is how the bonus came as a share in the profit sharing the profit. And then they raised issue because the unrest became common all over it and therefore the matter was taken to court. And finally one such matter came to the labour appellate tribunal. Those days the tribunal award was challenged before the appellate tribunal. The labour appellate tribunal found that the demand of the workers are justified. That they can get bonus if the employer makes a profit. How to calculate the profit. You take the total profit then you deduct all the statutory payments and then if there are any surplus left then the workers are also entitled to share the surplus. This is how the bonus formula came to be known as elative formula came to be recognized as a right of the workers, it was not any mercy or settlement but it was a right the right claimed by the workers was recognized by the court and there after the demand became so common the government appointed a bonus commission and then the bonus commission recommended a legislation so that industrial hassle be reduce. In each factory there is a strike what should be the bonus and every time there is a strike industrial production gets affected, industrial unrest. Therefore bonus commission was appointed, bonus commission recommended not always adopting the elative formula as a profit sharing. The demand of the workers before the bonus commission was that it should be like a differed wage. I am getting wage the 12 months, it should be an extra wage for 13 month but the bonus commission did not recognize the idea of a deferred wage. They said it can only be a profit

sharing bonus but then the question came every employer creates 3 balance sheet one for the employer, one for the Income Tax Act and one for themselves. Then every company shows only loss so far as as concerned. Therefore the government said whether you make profit on or not you must pay one month bonus, 8.33 bonus which is indirectly accepting the workers contention. Bonus need not be linked with the, with the profits. But even if we don't make profit you must pay one month. That means today the worker gets instead of 12 months wage, 13 months wage. Now you'll find during Diwali time people start describing this as Diwali bonus. It has nothing to do with Diwali. Diwali so happens since it come in the month of October, November, but why the demand gets increased during the festival time? For two reasons one is the accounting year comes to an end on 31st march, the bonus act says bonus should be calculated and paid within eight months from the end of the accounting year. Which means if you add from March to eight months it comes to November. So the demand get increased because workers have to purchase during Diwali time some new clothes, new things for the house and therefore the demand started as Diwali bonus. There is nothing like Diwali, it is a profit sharing bonus and employer delay making that payment for 8 months. They could have paid it in April, it could be paid in March or may also. But then they have a time to keep the money with them for eight months. And therefore they pay sometime in October and therefore it became a Diwali bonus. It so happened that the employer delayed in making payment taking advantage of the statutory time limit and that's how the bonus came. Now if you see bonus how did it come? Some workers raised the issue and some tribunals approved this concept and the appellate tribunal confirmed it that once it is a legal recognition then it became a universal demand. Once it becomes a universal demand Parliament steps in and saying now let me regulate this period. So that there won't industrial assessor in every center. Now it will be there will be a formula How to calculate the bonus all that will be there. Unfortunately you you may not get money bonus disputes today because the calculation becomes difficult and it is cumbersome process to calculate. Therefore most of the places worker get satisfied with one month bonus. But there are there are industries and industries where forty percent bonus are given forty six percent bonus given , railway workers are getting forty six percent bonus though railways not included in the bonus Act, but nevertheless is because of the striking power they are able to more bonus than what is prescribed under the act. Act prescribes only twenty percent. But there are many many industries where workers get more than 20%. These issues are issues to be seen in historic concept under which these laws are made. Then the question

is that everybody now says we'll have to now amend or Change the laws. Does it mean the situation under which these laws were brought in has now change therefore you must look for a new law? The first question is a loss any more relevant or they have become irrelevant. We'll have to think of a new situation that's one question. Second question is are they all come cumbersome? Why not we we simplify these laws. That's the second question. The third question is that why the legislative protection for example in America they don't believe in protection of the giving too many protective laws. But we believe in it because we are member of the ILO even before India got independence in 1919 when India was a still a colony we were a member of ILO. We make laws based upon the second recommendation made by ILO but America do not believe in any such restricted legislation they are not members of ILO. And they will not implement any ILO. Today an American women don't have maternity protection act. They don't have. If you take a leave for maternity you'll be sacked. And if you come back after the delivery of child it is needed for the employer to take you or not. Whereas we have a maternity Protection Act, she cannot be terminated during the pregnancy prior pre delivery period and she's entitled to get wages for that period. So the Indian courts and Indian parliament are more progressive in terms of labour legislations than some of advanced western states where they believe the protection of law will not help the market economy to grow. That is why in 1973 when Supreme Court dealing with the Industrial Employment standing orders Act. The sunny days of market economy was over. We can't have the theory of hire and fire. The state has a responsibility to protect the rights of the weak and therefore the state steps in in many of these legislation to protect some conditions of workman. And this is the law even today the law which which binds all the courts. Under 141 you are bound by the Supreme Court but notwithstanding that notwithstanding the binding precedent made by the Supreme Court. There are judges and judges, there are courts and court which says no no no now these are days of market economy we are now completely go for privatization, liberalization. Whether the parliament discuss these concepts or not the judges are in advanced position to start giving certain amount of support to such theories. I can tell you one example of how how dangerous such theories can work. Now you have Child Labour Prohibition Act of 1986. This Act came why in 1986? Art 24 says you can't have Child labour but not withstanding we find child labour all over India. And then the word hazardous, what is hazardous? Who decides what is hazardous? And one judgement of the SC says we can't totally abolish child labour. The parents' needs some extra support to the family and therefore a child is

send on part time basis. So we can have part time schools, all this never work in my experience I can tell you, I can speak hours on this issue but I don't want to go in this issue but when a child labour is restricted assuming it is restricted you can't employ a child below 14 years. So what happens to this fourteen to eighteen say for example, Tamil Nadu Many of the child, many of the children mostly girls are employed in match factories, beedi cigar industries, in banyan factories. In manufacturing Number of child labourers are there assuming they are not below 14. In fact in one of the case in MC Mehta case regarding match factory in Tamil Nadu. I was appointed by the Supreme Court to go and submit the report. So myself, RK Garg, Jane and Indra Jai Singh were the four commissioner who went to the factory. So Jane asked the child what is her age. Each children start before the commissioner came and then each child said we are generally 14. That means the whole factories was only fourteen years or fifteen. So Jane got really she said what Chandru every girl is before we came they are all being tuted, so each child will say only fifteen sixteen then how to ascertain the fact? I said you change your question don't ask the age ask the child How many years you are working here? Then each child said five years, six years, and seven years. Then we submitted the report that the prevalent child labour in this industry. And and the child brought from the village made to stay in the factory all through the years. And then got back to the house next day. The bus will come into the village, they'll ring a bell, all children half sleep instead of going to school going to the bus and go to the factory. This is the situation and Supreme Court passed some order, that's another story but I won't go to that. Between the age of fourteen and eighteen you take them in beedi industry while they were doing it in a in an industrial shed. Later when the Act came in 1966, the changed to home workers the beedi leaf, the tobacco and the thread and the work is given to the house by the branch manager and the mother and the girl child. Normally boys sent to school as they are treated preciously and girls treated as secondary citizen of this country and it is mostly the girl children who are deprived of school education and they did work at home. So the factory owners knows how to get over the factory loss. If you say factories Act should be implemented, they'll do it at home. There are home workers. Then if you see that the match factory alright I'll send them to the house there are Group B factories, village factories, cottage industry, you can do it at home. The Raw material are supplied at home. So each time when you make a legislation the employer finds methods to get out of the issue. Does it mean all legislation in India have been implemented completely. There are legislations on paper and we'll now talk to you about these legislations are resistant or repugnant or resistant to growth. This is

how we are now saying. Now what happened in Tamil Nadu was these girls between the age of 14 and 18 are available for industrial work because the law does not provide it so then they can be employed in factories textile mills, there are oldest textile mills are there, then modern textile mills have come. Take the girls take them in factory and then employ in all the three shift because in textile mill it is a 3 shift process it can't be stopped. So you put them in all the three shifts then you can make money because these are all the women in rural areas. You can call them as apprentice. So the employer's found a new method what is called a marriage scheme, they'll go and tell a poor peasant send your girl, we'll give her food, we'll give her some wage, daily wage. At the end of the tenure we'll give 30000 rs which you can get the girl married. So this is called marriage scheme itself that these girls are taken from the village , taken to an urban sector put into the factory shed itself, some hostels are provided, some food is provided for which the employer deduct money and then keep the girls inside. Even the parents can see the girl twice a year and they can't go during weekends and they'll have to cook and eat and sleep in the factory campus. We are now taking the whole thing backwards. Now in this process there is a small hitch under Section sixty six of the factories act night shift is banned for women. THEN how does women work in night shift, so what this Textile management did was they filed a writ petition in the high court saying that in the name of textile worker but financed by the management her name is Vasanta, She said this Section sixty six is unconstitutional. You can have night shift for women because I am willing to work and the employer is willing to engage me. How can you stop therefore Article 14 violated, article fifteen violated, it is based on sex and one judge said it would be struck down the provision as unconstitutional But then his conscious was pricking so he made some statements that the women should be protected and they should be given them with security. All that he made so many statement he made but nothing works in real facts. Therefore we invented a new system called camcoding system. Like people were taken from India from UP, from Tamil Nadu to various sugar cane fields in the in the Pacific Ocean and in the east Africa, like that today girls are brought in. Now recently in one factory in Tamil Nadu there was allegation that there are girls have been bundled hurdled together in one shed 35 girls were there and only one toilet and not fit properly. Somehow the labour department came to know the inspected the premises, they found 35 girls. 27 from Meghalaya, 7 from Manipur, 2 from Orissa not Tamil Nadu girls in factory shed. Then the Labour department did not know how to enter the factory and remove all of them. There is no provision in the act. So what they did was they called the revenue

department, they call sub divisional magistrate. And then he issued the order under the under the bonded labor act and all the girls were removed and sent back to Nagaland. Not the situation going to improve. But the point is today this canpulley system invented by the employer and they got order from the High Court you cannot night shift. So now night shift is removed, girls are removed in the name of wedding scale. For a poor man 30000 Rs in a year is a big thing and therefore they send all the girls to textile mill but what really happen now was some of the cheques given by the employer got bounced and now what to do after 3 years. Therefore a case was filed in High Court, whether this can pulley system be supported by existing labour laws and whether these employees are entitled for wages on par with the textile workers? Under the textile awards an apprentice is given a particular wage, something like three thousand seven hundred rupees with DA. But these guys are paid ONLY thousand Rs. 30 Rs per day and therefore the high court ruled that they can't be excluded from the textile wage worker award and they should be paid the same wage as an apprentice under the textile wage settlements. Now for employer this becomes non-profitable. Because if they are going to pay the same wage then why bring the scheme and now what they do they bring people from north east because local people have become aware of their rights and that the unions are demanding closure of the the scheme and therefore each legislation has also bought a counter reaction. The employer knows how to defeat such legislation and the first success came to them under the contract labor abolition regulation Act. Till such time the contract labour engagement was also the permanent workers had a say in the matter. if it's merely construction, it is merely maintenance on merely upkeep of the factory that he might but if it is a production line workers objected that mean you are bringing somebody else to my of my See my mymy workshop and therefore arise a dispute. And courts have recognized the right of the permanent workers, right of the regular workers to say I'll say in this matter. If it is perennial if it is permanent you can abolish contract labour like you saw Standard worker. Now For the last fuck of a years in how many processes in how many industries. They have our bodies contracting. May be in some places they have said three plus have done with it. Watchmen should not be dead. Now this act came I'll also abolish, I'll also regulate. Kindly see the Act is in statute book for last 45 years. In how many processes, in how many industries they have abolished contract labour? In some places say sweeper should not be there, watchman should not be there, now watchman what happened you had what is called as security agencies. Maharashtra passed a law a separate Act for security agencies, Security guards act. At many places there are no laws also. But then some inner

course areas some notifications are given but those notifications are being quashed by the Supreme Court in Electricity case. And therefore what happens today, outsourcing has become the order of the day. It is not abolition, it is regulation.. How do they regulate? Is there any method by which to get they get the same wage? If you're going to be paid the same wage then no law says it should be the same wage, the labour commission can inspect and find and if he finds the work is of the same nature same wage should be paid. How many cases the labor commissioner visited many factory to say. They had also in the production line. They should be paid the same wage and therefore the workers are there say in the matter is taken away. There labour courts power is taken away. It is left to some appropriate government or some labour commissioners and many places it has become a rampant. i find in each industry it is one is to ten is the ratio. Only 2 minutes I'll finish this. Now today it is not Contract labour Abolition and regulation Act, it is Contract Labour preservation and conservation and continuation act. If you ask any contract labour union, they wanted to abolish, the'll say no, please continue, because you'll lose even this employee. Thanks to SAIL you have no right to get absorbed as a principal employer and therefore they want to continue and they have no method to go to the court to challenge the engagement of the contract labour. We'll come to the question of the thethewhat is the nature of amendment being proposed after and then. Thank you

**Prof. Dr. Sharit K Bhowmik:** Thank you Justice Chandru this makes my task lot easier. Now I would like to say I'm a professor of labor studies. I'm not a lawyer so I mean I am not going to details of what sections and things like that. What I intended to do with. Because this was on need for unification of labor laws. And as he said that there are a number of labor law there's a lot of bifurcation there that's true. And I think its becoming more difficult for you when people courts someone to handle these cases. But more important thing is that of late of course after the new regime started there has been move that we must try to get all the laws together and try to bring about a sort of a uniform sort of a law. So they have been cases of bunching of laws. One side. Second is that the process which was started in 1991. There's a case of liberalization has been going on and normally at the cost of labor and I think now what has become more intensive is the certain laws which gave some protection in terms of work has been taken away, has been modified. Like the amendments or the factories Act which means that now and some of the states now because it becomes difficult to pass these laws at the center because Rajya Sabha don't have Majority. So the states are allowed to pass laws so I think Rajasthan is there, I think Maharashtra

is there they come from they've amended the laws which says that a factory would be those with employing more than twenty workers and those without using out it would be forty. Another interesting part is them. All these new laws know what I'm trying to deal with is to basic things apart from the factories and all but what is being proposed. One is the there are two codes which the government has sent which is going to him. You know merge the laws one is the code for labour code for industrial relations. That bill is supposed to be passed in two thousand and fifteen. And another one is the labour code on wages. So both are supposed to be passed this year I don't know whether it will be done in winter session or not. Now on one side what they have done is labour court on one in the labour code on industrial relation says they are merging several things. Industrial disputes act and others into one single act and this labour code on wages and bonus is actually want to merge the payment of ages Act of 1936, minimum wages Act of 1948, bonus act of 1965 and the equal remuneration Act of 1976. Now the point is that this also very good but the fact is if you look into final positions of it. Now I think the point which came out which justice Chandru has said is tha Acts have come up a lot of it has come up because of from. Because of the workers' movement. People movement which has influence the legislatures He's the right because you see the first what happened to the trade unions act in one thousand twenty six in Britain a similar act the right to freedom of association. Was passed hundred two years earlier, India was still a colony but the never decided to do that here. Nineteen. It was eighteen twenty four. Which give the right of Trade unions to exist. Till then trade unions were not legal but also there was the similar case of Madras what happened was in nineteen hundred one, which is a very well-known case know as Tough wale case which is a rail road company which was having its construction in Scotland. And the similar thing happened the workers went on strike. And the company appealed to the courts and the court gave a judgement saying that they have cause loss so they have to the union has to compensate for that. And this went on to the highest court of appeal in Britain. That is the House of Lords. And the House of Lords gave a ruling in favor of the company. And that is where he said this about politics and labor. That is where the the Trade Union Congress in Britain they decided that unless we enclose the state. We cannot get anything done. 1994 they form the Labor Party. 1996 the labour party contested in elections with other. They managed to get some sort of a thing. And they managed to pass a bill granting immunity to trade unions. Now was there in 1996 and 1921 when workers in India go on strike they made to do the same thing. OK And then they need to do that amount and it was

actually B.P. Wadia who was the. I would say was the architect of the Indian trade union movement. He was a philanthropist in Madras on this theosophical society. And of course he formed the Madras labor union and all that what Justice Chandru has said is there. But another thing was that. Also another factor that in nineteen twenty. See because after 1919 second after the First World War. Because that's when the crisis took place in the labor and there's a lot of this whole issue of bonus also came up at that time. In fact Gandhi got into the trade union movement. As a result of that same Madras labor union was formed in April and then I think in August they form the Mazdoor Mahajan of the Mill workers union in Ahmedabad. Again the issue was they never called it DA at that time they called it bonus. So during the war when prices would go up. They would give them bonus as you know to overcome that. So after the war 1918 First World War the employees refused to give bonus and yet prices were very high. So then they said they want sixty percent of bonus the employees had nothing doing. Then finally they went to my Gandhi. And he said OK I'm willing to do provided I am the only arbitrator here you cannot ask anybody else. And I will say. So he suggested. I think when workers said 40 *toh* he said nothing but he suggested forty percent bonus. And then when they didn't agree he went on a fast. And then finally they were given twenty seven percent bonus. And that's how it becomes a part of of something you know it's nothing to do with profits and losses but also and later it became a DA as they said that the Dearness allowance and bonuses. So I think bonus is a very important issue for the workers and. And the. And what happens is that. As you said the in the the new wages and one bonus act has also taken that into account but what is more important let me come to this point about about the trade union act. And we do have sort of feeling and because you see I have come from a. You see I was a professor of sociology but later on I was teaching in TISS in the School of Management and labor studies. So I had a sort of an understanding of the human. You know of all the different departments which are there in the school and I did find one thing was there that there was a sort of from the management buying it especially when you had this sort of a feeling that workers and trade unions must be avoided. In fact they wanted courses to show how you can bypass trade union and come to agreements with the workers. It is of course interesting because many times trade unions can be at cross purposes. You can find them. And then you have multiplicity of trade unions this one thing. But when I go and speak on the same lines. You know because I have been until two thousand and thirteen, I use to go to university for three months in

Germany to teach and they used to be quite surprised when you say the trade unions are not recognize. There's no law recognizing trade unions in India. I found the same thing in Amsterdam. They said how can it be possible. Because for Europeans means of yet actually in that likely that with the American system. But if you look at all the developed countries especially in Europe and the more developed in Europe or the most European countries for them trade unions is a mandatory thing without that you cannot go in for negotiations. In some countries like France where right to strike is a constitutional right. So I mean. And yet. Productivity is very high. They have more holidays than we have. We always complain that too many holidays. In Germany, if there's a public holiday on Tuesday or on or on on Thursday. Nobody goes to work on Friday or on Monday as it is the Easter time. So you have these different holiday than they normally fall and there's the this thing. And the Including factory workers. I went to visit a factory there in Castle it's an Industrial Hub they said don't come on Friday because Thursday is what it is called the day of That is called Pentecostal you know when this thing. So that is the day it's a public holiday. And there won't be anybody on Friday. And so then what do do then if you're going to have four days weekend that time. They said then the rule is that you work for one extra hour every day in the week and you make it up. Your wages are not cut. I mean the whole dilemma is when we look at state of labor laws. Are we trying to restrict or be trying to encourage? They have been to work, I mean on one side you can say that labour productivity can be improved only if there is insecurity that's why you must have contracts. Contract. This thing. You must not have, I mean World bank keeps telling us that there is too much of security and if you have too much security of labor then you will not get more employment. People are not going to come here. But how is it that Europe the same thing happens? How does it happen in France how does it happen where there is so much of security given? In fact here we see laws are too much, there they give you the actual thing, they say when the person comes to repair my house the plumber or electrician there are laws and rules and these are stated this thing statute which says, 'what exactly he has to do, what is the type of equipment he must have, what is the protective equipment he must have and in order to just fix even the light bulb. That he has to be in good rubber thing..And all these things are by law. So whether then having too much of explanation is right or wrong, don't know because lot of it becomes discretion is left to others, of for them to realize. That is one part. The second thing is that that. You know the. You know I go back again to 1920 when the trade union, the first Federation you had Mahatma Gandhi thing of course he was never a part of any federation.,

Majur Mahajan was an independent union but you also had a large number of trade unions coming together and they decided that this should be some sort of public pressure. So I think it was 31st October, 1920 the All India Trade Union Congress was formed which is the first Federation, Lala Lajpat Rai was the president, later on union leaders like Netaji Subhash Chandra Bose, Jawahar Lal Nehru, they were all the presidents of AITUC later on and then until say forty seven. So it was an umbrella organization to all trade unions. Result of it also can be seen in 1924, you had the Trade Union's Act. It is true international pressure internal pressure also brought about the trade union that. Then also you had the the third factories Act 1931 which for the first time regulated hours of work for men. 18 hours I think it was. So I think these were also you know legislations which were brought about because of movements which came then. It's not just labor but also movements of civil society which tried to bring about changes which were for protection. But I think one of the problems we have I don't know if you can raise this, is that we do have a lot of good legislations. But what is the violation for it. What can the Court do about it? I know I'll give you an example because I've been studying plantation labor over several years. The plantation Labor Act, it's a very unique act, first act for one million workers who might be the poorest and most marginalized in the organized sector. They are organized sector workers because you have all the other acts covering that. But today also the wages of plantation labor in West Bengal and Assam which is the seventy five percent of produces 75% percent of India's tea is less than hundred fifty rupees a day, West Bengal is hundred twenty two which is a landmark thing because till I think February this year it was ninety five rupees and that was increased to hundred and twenty two and fifty and fifty paise and in Assam it was actually hundred and fourteen. But then the government gave an order that you have to make it hundred forty six, much of the reluctance of the plantation owners. This that they refused and all that. But that is one part, The plantation Labor Act grants for certain social and cultural development, it is exactly the same thing happened when Indian labor was taken as endangered labor to these places like Fiji and various others. Same way the same laborers in plantations were brought from central India or some in Darjeeling in the case of Darjeeling Nepal. They were facing a lot of crisis at that time and they and they went there as migrant labor and they settled there over the years. And this was interesting you always want migration like you said you have labor from Tamil Nadu going all over but if you go to the tea plantation of Tamil Nadu you'll not find Tamil labor. You'll have Tamil Labour in the plantation of Sri Lanka in I think rubber plantation of Malaysia. Why because if you take local labour have

greater rights, so they take migrants who have and you put them into these housing conditions like this and do that. Now the plantation labour Act comes up as a major thing, it regulates work and various things it does. But the question is like say for housing is mandatory the employers have to provide for housing because this an isolated area they cannot get everything and they are migrants. But and several other violation and things are there. But the question violation of this clause what does it mean? First offence, one thousand five hundred rupees. I'm telling because I've seen this myself. Second offense of subsequent offence is one hundred one thousand rupees, I am sorry first is one thousand second is one thousand five hundred. This is till 2010, the Act had not been from 1951 till 2010 the act was there. So what happens I have seen myself in the court, you have the manager whose there and he says yes yes my lord guilty 1500 instead of building 10 houses which would cost maybe 1 lakh each with their houses. You pay fifteen hundred and get over with that and again, there is no provision once when collector has said that deputy commissioner then in a meeting, that there should be a provision that they should be jailed after second or third. There was an uproar in the plantation community the people that how can you do that. It's so unfair to jail someone for this but if you're going to keep paying fines.. Same thing is with industrial disputes Act, what is fine for lockout? 50 rs a day I think. So even if Tata Steel goes and fine and he says is illegal lock outs. Yes fifty Rs. Workers lose their wages in both cases if it's an illegal strike workers lose their wages, if it is illegal lockout the workers lose their wages. So unless some sort of a. You know. So we don't look at the, at the other side of it. The. And now the labour court, industrial litigation tries to change that by saying that if the lockout is illegal you'll have to pay a fine of between 20000 to 50000 for illegal lock out. That is what the court says but at the same time court says also that if there's an illegal strike the penalty will be the same for the workers and not only that any worker participate in the strike illegal will have to pay a fine of five thousand rupees. Number one. That means if hundreds of workers strike then each of them will have to be five thousand. I'm sorry fifteen thousand. Any other person who is leading the strike who's not a worker. Because the Trade Union Act also says up to three or five percent of the members. Three percent of the members of a trade unions can be non-workers not there. This means outside leaders. They would get provision for that. They will also have to pay a fine a fifteen thousand. Third thing is which is not clear in the act in anybody supporting the strike any other person outsiders supporting will again have to pay the same fine. Now what does that mean I mean if a husband is on strike and the wife is supporting that I

mean she has to pay the letter in the law says that. It also obviously means that other workers should not create a fund to help the striking workers. So I think on one side you give something and take back much more. See that's another point about trade union which I would like to bring about is that you have the Trade Union's Act 1926 which again been amended I think in 2010 or 15 na? Which increases it to fifty, minimum is 50 or 10 percent of the workers. But though it gives you immunity in civil and criminal cases. There is no act which says How to recognize the trade union. That is left totally to the management and that's exactly what happens in strike the management will immediately.. I've seen the case of Tata Motors I have seen in the case of Unilever immediately they'll derecognize the union which may 80 to ninety percent membership union. But there's no which prevents it. Of course the law says the trade unions themselves responsible it is not so much of the other because every time you try to bring about a law for recognition I believe it is the INTUC which keep saying that how do you recognize a trade union. Most trade unions in national federations they all say it should be through a secret ballot. Whereas INTUC says it should be through membership. But I think in spirit if the government really wanted it had the political will to do it, they could have brought it on the case. But anyway this is one part of it so unless the recognition of trade unions is there. It I don't know how far it becomes possible to have a trade union act. The third part is I was saying is we talked about this question is of ofof this. The other one is on on. on the the labor court is that it says that that you know as far as wages and all are concerned and then you have the minimum wages Act of 1948 you have payment of wages act. But actually nowhere does it say what the minimum wages are. The Act just say if the minimum wages are declared you have to pay it. Though there is a criteria even the latest one there is a code on wages, labour code on wages does not talk about it. Nineteen fifty seven 15 Indian labor Congress conference had actually, it's a tripartite body so all three parties employers, trade unions and government had agreed in that thing that they should be the minimum wage a need based minimum wage comprises the minimum needs of three units of consumption. That is two adults and two children. That should be the minimum wage and then mentioned in details. I think. Eighty percent of the minimum wage and in terms of calories they said that will be one thousand. I'm sorry it is two thousand seven hundred calories, then proteins some 80 grams per unit, then clothing seventy two yards per year. All of that was given in detail. 1991 I think it was the case of Supreme Court *Unnik v. State of Kerala* so there the Supreme Court said that... So what the minimum wage stands is eighty percent will be for food

and clothing and twenty percent of the minimum wage should cover fuel and house rent. 1991 the Supreme Court says it should be 25 percent of the minimum wage must cover education and others and pension you know benefits you know because many of them don't get that, and also for sudden expenditure like births, marriages, deaths all these things. So now we have something which is called a minimum wage which is legally accepted. Nowhere does it say what should be the how do you calculate the minimum wage? As a result what happens? Because see when they said that twenty two. Soon after that in 1957 by 1960 twenty two minimum wages commissions were pointed covering all the industries how does one takes that forward if there is no law which actually justifies it or says that that this should be the composition. But actually when you're calculating the minimum wage these are the factors one has to take into account. That's why you have different things Assam has a minimum wage of 146 Rs daily on what basis we don't know. Maharashtra will be some 350 or something, Kerala its 500 or 600 Rs. But you know can cost of living can be at such variants that you have it. Because a lot of other factors come into the minimum wage. Local pressure are there, all these things are. But unless one tries to codify so these things when you're trying to merge laws you're overlooking these factors. This is the state was whatever the state declares there must be a minimum wage commission The first part second thing which both these acts do Is that undermining the right to appeal of the thing. Second thing is withdrawal because of self-certification. Throughout the government also has been talking about self-certification that you know we must we must trust the employers to this thing. Now what is happening the Labor Department becomes ineffective. In fact Maharashtra has made it very clear that under the new factories Act, the amended factories act no inspectors can, no labour officer can inspect the factory without the permission of the chief inspector factories and the chief minister said very clearly on that. We have introduced this because now we are sure that the number of complaints will decrease. What is the workload of the labour tribunals now and after this comes in its going to increase, there's no mention about whether the number judges will be will be increased or not but it's going to be a very tough job. And like you said many times they don't go to that because it's a very long cumbersome process. So I think these are issues. And secondly I found even in the in the in this new code of wages and bonus Section fifty one says, 'there's a bar on suits No court can entertain any suit for recovery of wages. So who is going to do it it's among them it's between employers and this thing and and and then. And you says it is the Labor Department is not that. If there's a violation on that for any for recovery of that. I mean this is what the court

says this section, I mean it hasn't been passed as yet, it's new. Because this has merged four laws together. Existing laws. So the whole role of Judiciary is undermined in the name of self-certification. I mean I'm quoting from his speeches in Hindu. I'm just ending I know I can see the. So I think. I think what is relevant here is the whole role of judiciary and you know if it is get out then what will be the result of labour because judiciary is also one form of protecting labour, it has been doing that and its been passing laws it's true. A lot of laws have been passed which are against child labour and all. But this is also a way of appealing where you can overcome or you can go in for the higher court of appeal. But if here you are going to debar these things from a court from taking up these cases then I don't know what is going to be the result of of this. I mean you know because. Of of these you know the the acts which I mean the fate of the people. So. So I think these are the the main things which I said was that the. That's all I think thank you.

**Shivaraj Huchhanavar:** In the next session we'll take up the questions from the participants and it'll be a sort of open decisions so it will not be so boring for you. We'll take the questions in the next session from the participant

## SESSION 14

**Shivaraj Huchhanavar:** Time is up please resume to the seats. Let us take the last session. Let us make this particular last session very interesting. I request all the participants to ask as many as questions you have relating to the recent legislative changes that is amendments brought into the labor law as well as issues relating to the unification. These are the two very very important issues I believe. So you might have many n number of questions and doubts relating to the especially recent amendments, for example 2010 amendment in the ID Act and now a small factories Act 2014 is coming up. So I think you will how many issues and doubts relating to the recent legislative amendments that implication on the labour and industrial relations, Labour and employer relations. So I request to pose doubts as well as questions relating to the legislative amendments as well as the unification; Issues and concerns relating to the unification. Thank you

**Justice Chandru:** Ya ya.

**Prof Sharit K. Bhowmik:** I said the key points if you look at the act for, the bill which is there for Industrial relations. The main things I thought you know with the as you come to the Industrial dispute Act. Now you, it's a merger of that now one of them is what you call the works committee is going to be changed. I mean you'll have a Works Committee. But you know under the ID Act the Works Committee has a certain power and you know dealing with it should have equal representation of both sides all that is there but it does not, it's not specifically is supposed to deal with matters relating to trade unions whereas the new act says this will deal with withwith issues which lead to harmony between management and labor. So I mean wages and all can also come into that this works committee so far talks about lighting and canteen facilities and which are the holiday which should be there all these things but now this is also a part. Second thing I found is a grievance committee is there has been put up there under this act. I mean the new bill. And the grievance committee will have equal representation like this and they keep changing you know from one from the president if it's from the employer then vice president will be from the from the labour side and it'll change. But the fact is that the grievance committee if any worker has a grievance it has to go to a grievance committee. When the grievance committee also when it fails then you cant go to any other judicial this thing. Then it has to be the employer who'll be the final management will be the final decision maker. Now I think it's a bit interesting here because the grievance may be against a management so the management become a judge and accused both

put together and that will be final and they've written that within one month you have to give the the grievance committee must give its report within two months and final thing the management must give the report within one month. Again no bar from going to legal aspect. So a lot of things have been debarred on that way I think that is one of the issues. The other I said as the Trade Unions and various other issues that is recognition of Trade union not recognition its registration. All trade unions have to be registered and of course one positive side is they have said even those trade unions of the self employed where employers are not clearly defined that means street vendors maybe waste pickers if they have trade unions then this can be registered under the Trade Union Act. But the the interest but the other part once you register Trade Union and this if you'd not if you fail to you know submit your your return on time hen you'll be fined fifteen thousand rupees. And if there's no particular officer who is responsible official in the the trade union who is responsible for this, he'll be fined. If that is not there then all the all members of the committee will be fined. So I mean these are ways you know which would sort of defer deter trade unions from taking action. You're blending the movement. On one side you say ya all trade union must be registered because now there's no compulsion for registration of a trade union. In fact I believe most of the national federations are not registered. Because registration only gives you that immunity from from civil and criminal cases but otherwise it doesn't guarantee recognition na, so if it was guaranteeing recognition then people would go in for registration but it is. But that is not the case and that has not been solved in this act either. So these are the major some of them issues. Now I said them in bonus and this payment of wages act also. It doesn't define what the minimum wage is. I mean it says minimum wages are those which will be defined by given by the state. But what is the basis of the minimum wages. Because some states may say because it's possible because when minimum wages act came when they first decided on that is a two thousand seven hundred calories. Some states at that time said two thousand seven hundred for a country like India is too much it should be two thousand two hundred. Then later on our former deputy chairman of the Planning Commission also says even fourteen hundred is sufficient for India. In fact I want to point out that is one act which officially recognizes child labour till thousand and ten. Because it says very clearly that there are four categories of workers males, female, adults over 18, then you have adolescent between fifteen and eighteen and then I was under the impression that between twelve and fifteen is child labour but in the act it says those below 15 are children So even five year old can be employed as a child labor. And this was allowed. But again

I said that the other party what is the, what are the fines and deterrent for this? 50000 ok you have increased but in the case of suggestions were made earlier remember I was in a committee in Maharashtra where they said in terms of bonus I believe Andhra used to had done that that you know when when there's an illegal lockout then the employees use to deposit the salary with the treasury and later on you know when the decision comes then it is released. So that is a deterrent for the employer to just you know frivolously declare lockout. Like in the plantation have sought... The other day I was telling him that when workers are not doing much the man I tell them that look I'm going to declare lock out and you lose your wages. But any form of treat you can say could be lead to lock out. Now that may be prevented if if this was done but it is not but anyway they've increased the fine. There is one thing for which might in some ways deter the lockout. All the Act they have just kept the thing going but some of the points have been changed here. And especially I am worried about that part, I am sorry and this is last part which I am worried about is that this whole thing of going for legal redressal, that in many cases have been just kept out. They say it has to be internal dissent that will be the final authority and not. And if you at all you go it goes directly not the labour Department but you go straight to the tribunals. Now the point is that this will lead to the number of cases in the Labor tribunals and whether you are labour tribunals cans handle such backlog you know is the main thing unless because it doesn't talk about changing the tribunal or the number of people and all that the act. That's all thank you.

**Participant:** My lord I have two three queries. Whether any amendment is going to be made regarding the definition of workman, Industry, Retrenchment and the powers of the labor court or whether they are divesting the labour commissioners or the labor department of any powers and investing those powers in the labour court? These are this is my complicated question actually your Lordship can enlighten us.

**Justice Chandru:** When we when we talk about amendments to labour law and also simplification or codification of the various laws. Certainly codification or amendments, they may not have much impact in terms of the existing power of the tribunal or labour court but suppose you filter the number of cases that may come to court, suppose you take away right of a workman then you have no power to adjudicate also. It is in that sense that what are the amendments now sought to be made. The amendment sought to be made are not of the original provisions. You see Income Tax Act, number of provisions are there. Say two hundred thirty nine a. Yes A So many. When you

have as suffix of an alphabet which means it's a new provision. Not in the old Act. The finance minister last week said we are going to simplify the Income Tax Act. Does it mean the income tax are going to come down or the law which is so cumbersome they want to make it simple. One is a structural change. The other one is a procedural change. Like wise if you see the ID Act by making the Income Tax Act simple they're not going to reduce the rate of the income tax. Maybe marginally they may reduce but the rate will be same because finance is important to the government. So many provisions you see one may ask question why so many suffixes are made to sections. Make it into a small one that's alright. Similarly the changes that are took place in the ID Act for the last sixty eight years the changes you can see the sections which are having suffix 2 (a), 9(a), 11A, 33A, then 25M, 25N, so these are by the look of it you'll know there are amendment to the act. The amendment as i told you in the beginning they came to get over a situation. Everybody expected both parties to work the law in a healthy manner, in a bonafide manner, when they found that people are trying to over reach the law. Parliament said I will bring this law or that law. When labour courts cannot be overburdened with cases related to retrenchment and lay off they brought a law fixing rate of compensation, rate of lay off. That is how it the 25 A, 25B, 25C all that came. Even thereafter managements are resorting to lay off, retrenchment and closures not for any bonafide reasons but business reasons. They felt there must be some check some get pass should be there, the government must have a say. It is not completely private it also should have some social control. Now amendments again came 25 M, 25 N. Now the employers, The Chamber of Commerce are now seeking not for amendment of the old provisions because they know how to get over the old provisions. They're only interested in repealing sections which are brought later. So the major demand of the employer is repeal chapter five B. What they want to take away is lack of judicial review on such actions, meaning going back to market economy. I will now decide I can convert this into monetary compensation. Take 11A a serious objection is taken on 11A, in fact some people are saying if I want to take money and go away who can stop. In any contract you can always enter into a contract if I am stuck this will be the quantifying damages so you know Section 74, 73 of the contract but here the labour is considered to be weak, and secondly employment is all important, money can just go away like that. And therefore in a given case the labour court can order reinstatement even though the employer do not want the labour you can put him back. This was the position of law i 1950, 49. Yesterday the day before Kaul was mentioning and the earliest case where they decided what is

the power of the labour court? It is the court of special contract and not for bear contract. It is not a civil court but a special court of a special contract meaning a broken contract you can you can ask bring the contract and put it back in a place meaning the employer will not have any say. You can say against the interest of the employer, you can put somebody back. That is how the labour courts work. Now employer say if money is the criteria increase the compensation, retrenchment compensation make it 45 days or closure compensation make it 60 days but I must have a say in re organizing my labour. In 1970 Supreme Court said reorganization of business is a prerogative of employer. That was in 1970 but the amendment which came in 1976 and 1982 said it is not prerogative because we are now talking about social control, you are talking about national economy. In such circumstances parliament stepped in to say we can't allow the employer final say in this matter. we'll have a social control of a production so it is it is this conflict should there be a social control or should it be private control is the amendments. So everybody who is now suggesting we'll remove 25M, we'll remove 25m they are not talking about the alternative the alternative is they are talking about is giving the power back to management but increase the quantum of compensation. Tomorrow somebody will say 11A don't reinstate give five times back wages, give back wages up to retirement. Then what do you do with that situation? Does it mean employee take money and reimburses some other company or start a new company? So therefore this is a conflict of not merely employer employee is also the conflict of policy making. We were following a particular policy, today there is a shift in the policy. The question is is the shift authorized by the constitution? If you see article 38 and 39 it has got a particular direction given to the state. Now the state wants to deviate from that direction. Somebody says we can't have a doctrinaire approach, we cant have a philosophical approach. But then you must have a constitutional approach to the issue. Constitution is the basic document which gives us. Now the entire debate is not on whether labour court should have power or not. Now the power labour court was sort to be converted in terms of money. Everything is now only money and therefore the amendments have to be seen in that context. What does the employer want? They want the restriction to be removed they want all the suffix section to be taken away. Then we'll give compensation 9a, when I want to bring a change why I should ask somebody else. Yesterday somebody was saying some machine has to be tightened he doesn't go to the section. He doesn't do that work. If he does the work without anybody's instruction he may be in trouble also. How do we know? Therefore 9a said If you want to change the rules of discipline, if you want to change

the nature of work you must do notice. Employer feels very must constrain. So it is this conflict the the Industrial Disputes Act went through a process of change to get over some provisions. The labour court's power is taken away by the government because they want to have some control so that the labour courts are not clogged with these litigations. Now what happened is again labour courts are given power whether the government's decision is right or wrong? Under 25M they have a power of review. Now the employer says neither the government nor the labour court should have a say in the matter please make a quantified damages, increase the quantum. So this is the basic conflicts on the on the issues that are being discussed. Now suddenly all these amendments are not brought in. So they take the weakest state Rajasthan, Madhya Pradesh where not much industries are there whereas the stronger state trade union are West Bengal, Tamil Nadu, Maharashtra where they don't experiment this because there'll be immediately reaction of that. So you make it as a testing lab, if it is suitable to Rajasthan extend it to others. There was a time every change was discussed in a tripartite conference. Now nothing is discussed. There was a time when the Labour minister had the third or fourth in the cabinet rank, VV Giri was the labour minister, he became the president of India, he was a trade Union leader But today you'll find the labour ministers are only state ministers, many people don't even know who is the labour minister because slowly the power of labour is sort to be reduced not only in terms of law even in terms of policy making they are trying to make it appear its a redundant. Whether it is redundant or not is a fundamental question. If the laws are valid, the laws have stood the test of time. In fact all these section 25M, 25N, 25O all were challenged by employer and more all the three cases were challenge by textile management. They are most affected by these provisions. The every elm of an industry can't be put on the labour. Now some some people make it appear it is because of labour there is industrial recession or under growth there are other economic reasons also. The every every industry is linked to a world global economy. Something happens somewhere suddenly the market will fall. These pink slips are coming not because of the worker it is also you take Tirpur, OCRE Top export market suddenly exports are stopped then the retrenchment, layoff follows and rest. Therefore unconnected with the labour for reason which are beyond the control of labour there are so many changes are there. But the employer wants to have a free economy. Now when they invite foreign labour, foreign investment they also give them assurance that we'll remove the protectionism so when I met some of the German judges they were telling that unless you change these protective laws our investment will stop. One of the strong

investment base is Germany but there are smaller countries like Korea. Now these people say there are no trade unions at all. We'll not have trade union here, you can't even have a union flag, so some wrong notions are given like these laws will be exempted from investment. Does it mean that our sovereignty will be given a pledge to the foreign investment? When a law is developed to over 100 years due to historical reason you'll say these laws will remain. Now this is the conflict that we are faced with not not a real discussion. Now what happens is there is a are you appoint a commissioner labour. Now the first labour commission was Gajendra Gadkar known to be a very liberal judge and a very good observation. In fact one of the judgment yesterday they circulated Bharkunda colonies case where the Supreme Court extensively referred the report from the Labor Commission. Now the problem with us is if I am a judge of the High Court I'll apply the law and i try to be very very strict in the application. When I made as a commission which report may be accepted may not accepted. I'm very liberal in handing over all kinds of recommendations do this do that. Now in this case the National Commission it found that the existing laws are enough. Only thing is it requires a codification into a Industrial relation Not the industrial dispute because a dispute means they'll always be dispute, relation means they will come together. This is very simple way of looking at the nomen clature. If you see particularly Justice Gajendra Gadkar, I have nothing against him but in 1963 he dealt with a case of Fizer Company the demand of the worker was reduction of the working hours and increasing weekly holidays. The factories Act talks about 48 hours as the weekly hours. Many Western countries it is only upto thirty five or forty hours. But in India it is forty eight plus even if you ask them to do overtime and there is no ceiling overtime. So the worker can be made to work round the clock provided he gets double wages and permission is obtained. Now the demand of these workers was to reduce the working hours so the matter went to the Tribunal, went to the Supreme Court under article 136 appeal and Justice Gajendra Gadkar says he's also constrained at that time you know 1963 means immediately after the India China conflict there was a national emergency. So he writes in the order that this is not the time to seek reduction in working hours, national economy is important, what we require is a more number of work and national economy must grow and we can't have a country of holidays, these are all there in the judgement, you can read the judgement. And subsequently he was made as National commissioner of labour after his retirement. If you see the national Commission report a very good report, there is a chapter on leave on holidays where he says, 'our Indian labour is the most hard working creatures in the world, there is a time to reduce the working hours so that there

personality is preserved. He recommended reduction of working hours and reduction of the, increasing the holidays. Now As a judge binding under 141, I'm not willing to give anything but as a recommendatory body I'm willing to recommend anything. So this is the standard that we have. On the one hand everybody talks about labour the contribution of the labour on the other hand people talk about liberalizing these laws. These laws do they have a real a study on these issues. Now Manmohan Singh said we are having inspector raj. There are too many enforcement mechanisms. And therefore there is a lot of corruption. Now the problem is to deal with the corruption not with the law. And now it says is should simplify the laws alright all the laws you jumble. All that make into single law. Nobody's going to question it. Make simpler sections. But the point is not the simplification, the point is take the heart and soul of the act and then make the workers go back to the square one that is the issue, hire and fire is a only issue they are talking about. If I want to engage 10 workers i'll have 10 workers i want only 2 worker no court should inquire into the matter. This is the situation that we are now faced. If you see the amendment to the Apprentice Act, the Act requires some employers to train some workers, it is a human resource development now the apprentice are to be paid by management, The new amendment made by The Rajasthan and and followed by the central government says we will now subsidize a payment of the apprentices. Which means every change is tuned to make the employer to get more wealth. Whether if he gets more wealth it is going to the national economy or to the national resource we don't know but the point is the policy frame is now tuned to in according the concept which are alien to our constitution, which are alien to the history of labour history, which are also contrary to the interest of the labour. That is how the change is. Therefore when you say do the labour court are going to have some new power they may be have the old power not the new power. From 11A go back to Indian iron and steel case, even if the charges are proved I'll reappreciate the evidence come to different conclusion and in case of disproportionality order reinstatement or impose a lesser punishment. These powers they want to take away. If at all you may lose the power and not gain any power.

**Prof. Sharit K Bhowmik:** I just want to add just briefly that what he was saying is actually coming up in the new labour bill Industrial Relations bill where they are trying to merge everything and it's written very clearly that employers if you remove anybody from from the employment then you have to pay 45 days wages wages per year as compensation. but it doesn't talk about appeal, that when a worker can appeal. So again I think it is being it's going to be your

whole thing in the name of simplification a lot of these things will come into effect. About this 45 days thing there in the draft labour code, it is going to come up in the parliament as a bill which says you have to pay 45 days. So those things are there but you know it doesn't talk about appeal you know it doesn't say that so as it says the hire and fire again with the employer. Again this issue of hire and fire how far is this correct? I mean you know today's atmosphere is created in such a way they say that too much security is bad in fact everybody is talking, even today also I was seeing in the paper this morning that you know how we have not taken after liberalization thing as yet because out laws are still quite this thing so not much.. So is investment going to come in just because we have cheap labour or we'll become like I mean we are India if we have cheap labour. A lot of investment comes in because of that and secondly I am going back to this labour, the the whole thing of wages, Three units of consumption. Why was it said because wages should be high to increase that? If you don't have that then what will happen but here we are talking about employment and not wages. So if you talk about increase in employment without minimum wages it is possible in fact I would say you'll get more employment if you lower wages. Why? We just consider a case like in a family. Let's say in the city I come from Mumbai or in Chennai minimum for someone living even in a slum. Minimum would be thousand rupees a month if you're living even in a slum, a family. Now if that person is a security guard or working in a small industry the mean earner getting some seven or eight thousand rupees a month how do you fill up the gap. Wife will work as a domestic worker, rag picker or home based workers. If that is not sufficient you pull your children out and make them work as child labour somewhere which will fulfill the gap. And then our economics will tell us look there is full employment. I mean is this the type of employment we want. I think that is a basic thing of this need based over wage, why it becomes important/ Then unless wages increase because just to say that we are increasing employment. See you have the textile industries come down government to Maharashtra said, textile industry is to employ two thousand five hundred workers. After the strike it came down to one lakh twenty five or twenty five thousand. Now you have hardly thirty three thousand in the fact whereas power loom sectors giving employment to five hundred thousand workers. But the whole problem is that power loom section they're working for 10 to twelve hours a day earning 70 paisa per meter of the cloth. And what was the textile sector and organized sector and what is the productivity of that as compared to the power loom but for us what is more important is they cut down the wages. Let more people work and give them subsistence wages. I

think that becomes an and there'll be no way of intervening in this fact as to intervention will be allowed on this. So I think that is the main thing which is which is in store I don't know. I mean I'm sure something will happen because it cant.. I was telling him this whole we were discussing over tea. This whole issue of insecurity leading to much more productivity, I think there's nothing better than looking at ancient times slave society in Greece. See the slavery, the slave is a machine with the rice and the biggest threat he had is that his life could be taken away anytime and he used to work very hard because of that. So four of the seven wonders were built during that period, but even that have you seen it? After some time they over threw the order, there was a slave revolt and things like that. So I mean insecurity can go on for sometime. After sometime it's going to boomerang it might be even worse. Our growth rate is falling to seven percent and that leads to poverty because it leads t trickle down effect. What happens in Brazil? I've been there. I mean I've been several times and its a very expensive places by the way, Four percent growth, and the government said nobody's going to starve in this country Three meals a day! And if you don't have money if you don't have employment they have this cash transfer thing. He said we have increased the purchasing power. I use to joke with the Portuguese when I went there, I said this is one case where the colony has the highest end of living than the. I mean the. Yeah. Then the colonizer, Portuguese people find it more expensive in Brazil. This is what this commission had also talked about this National Commission on the un-organized sector with this it said we have everything. Two hundred billion dollars is our foreign exchange our per capita income is increased after liberalization, our national income is increased one hundred twenty five percent. All sorts of things, but seventy seven percent of the population that is in actual terms that is eight hundred thirty seven six million people spend less than twenty rupees a day less than haan not 20 rs a day. The whole idea is that unless we have laws which directs towards these people. It's not going to happen. I don't know I mean whether you know because they have to be some change, maybe the judiciary was one factor of that. If that is going to be taken away I don't know what's going to happen. Thank you.

(Question and Answers)

**Shivaraj Huchhanavar:** We'll take up next questions.

**Participant's Question:** This question raised on yesterdays discussion on 36(4) of the ID Act about lawyer representation. The question is, What is the constitutional validity of Section

36(4) of 9-D-Act 1947, after the Judgment passed by the Court in *Hygienic Foods vs. Jasbir Singh & others?* (a) Whether till final disposal of disposal by the Apex Court we have to follow Sec. 36(4) or we will think that it is not in the statute?

**Justice Chandru:** Now that judgment which is a judgment which does not refer to the earlier judgment which is binding precedent. It can't be judgement because it become *a parin quorum* now in one paragraph the order say that this 19(1)g is violated and article 14 violated. Now the the Port Trust case reported in 1977 AIR went into the entire issue and then held the restriction imposed on lawyers appearance is in valid. They also referred to section 30 of the advocates Act and said notwithstanding section 30 the lawyers can appear only with the consent of other side based upon the police and ID Act is there. Now there are some attempt to get over this provision by an indirect method and not a direct method but this *Jasbir Singh's* case one paragraph as usual Justice Markandey Katju said its all invalid and nobody seem to be following that. There is a there are two cases pending in the Supreme Court one is directly challenging the constitutional validity of 36(4), secondly other one is appeals taken from various other High court. Until the Supreme Court decide that case article 141 requires that you should follow the judgement of the Supreme Court as it stands today and not experiment with this because any any deviation from the settled legal position, any deviation from the binding precedent of Supreme Court, Supreme Court has held in that *Giri's* case that in 1979 that such an award is a nullity that if you try to disregard a legal provision or try to disregard the Supreme Court precedent or a High Court precedent, they say it is a nullity. It should be struck down therefore while we should be proactive but in areas where we can't be active we have to go by *status quo* only. Therefore try to attempt 3 methods which you mentioned try to talk to both parties, or try to arrange some workable solution or try to see whether any imbalance created. In such circumstances you may have discretion but not directly disobey the provision.

**Participant's Question:** What's change in procedural aspect in ID ACT? What are changes in procedural aspect in ID Act required?

**Justice Chandru:** Now this requires a separate seminar but I can tell you several things. There are enough precedents of high courts and Supreme Court. As I told you there are 10 law journals are there and thousands of judgments are coming. In some of the judgments the courts have recommended amendments one way or the other. The courts feel this amendment is necessary, that

amendment is necessary, For example, the Karnataka High Court said why have Section 33 and Sec 10(1)? Suppose there is a reference under 10(1) and under sec 33 employer seeks permission under 33(2)B, the procedure is limited, summary procedure. In 33A equitant to reference under 10(1), complain procedure. Now suppose a worker gets lost in 33(2)B application nothing prevents him again raising a dispute under 10(1). The findings given by the labour court in 33(2)B, are not binding on a labour court which hears a reference under 10(1). So what Karnataka High Court said was this duality leads to unnecessary complications. Therefore when a management wants to dismiss a worker let him first file an application to the labour court, let evidence be taken by the labour court and then decide the matter meaning his power under the contract law to decide an issue is now delegated to the labour court. So labor court instead of being appellate court will be presided like original court, so charges are proved what punishment should be given will be decided b the labour court. So whatever the intention of Karnataka High court was that 33(2) and 10(1) should not be coming as a dual provision. therefore make the power under 33(2)B as regular reference power. There are number of amendments have been suggested by the court. If you take all the High Court suggestion, all the Supreme Court suggestion there may be 50 60 amendments will be required but governments are not bothered , no amendments are brought in by the parliament on this issue. the amendment which they are now seeking is not what the labour wanted, it is not on the question of simplifying the procedure or increasing the avenues for litigation, the issue is of control who should control the actions of the employer. Therefore when we now talk about amendments, yesterday many people said about process, then accommodation or staff being there, funds crunge or process serving, these are all procedural amendments substantive amendment are already there by way of judicial interpretation. in fact if at all there is one litigation which is completely flourishes over the year is a labour litigation and we have enough precedents to decide this matter therefore the larger structural change i think requires a a seperate discussion as to what could be changes possible.

**Participant's Question:** Will it be wise step to undermine judiciary in the name of simplification?

**Justice Chandru:** Now the question will be other way round. We administer law as it is, we are not pro active we are not power to strike down a law therefore whatever the law is there we are going to be the judges under the law. In fact in Pakistan every time judge is appointed they'll have to take the oath 'I'm bound by the Martial law degree also'. There is a written constitution like

us then they have to sign a undertaking even the martial law degree we are following which mean most disgracing for judges to continue like that. So the other option is to get out of the judiciary but then that may be for a constitutional court but for a statutory court what ever statutes are there you are going to follow, you are not going to say the law should be different, that may be your view but ultimately the law as it stands or made by the parliament or state legislature you are going to follow the law.

**Participant's Question:** Then the next question is a problem; 5 workers were transferred from place 'A' to place 'B', however they did not went to join at new place. They went on strike – The management dismissed them on the ground of misconduct without holding nay enquiry. An industrial dispute was raised. The matter came up before the labour court. The management move an application before the labour court for proving misconduct.

Question: Whether going on strike is misconduct & whether the workman can be dismissed on this ground?

**Justice Chandru:** Answer is there found in several judgement. The, the in the, in the *Firestone* case in 1973 Supreme Court. The argument was yesterday also justice Sujoy Paul was mentioning. Now what is the difference between a case of no inquiry and a case of a vitiated inquiry. The argument was as he was selling in a service matter under article 311, the High Court finds inquiry is bad, it puts back the worker and say conduct the new inquiry where as in the 11A you are asked to take evidence, now this issue was argued in *Firestone*, Daftari argued that in a service matter we set aside the order and then put the worker back with liberty to inquire but when it comes to labour court he doesn't get back. The dispute continues for recording evidence. Does it mean premium on employer's lawlessness? Supreme Court gave 2 answers, they said a no inquiry and vitiated inquiry stands on same footing suppose we put a worker back it will only aggravate industrial undress because the issue is not decided. Whether he is guilty of misconduct or not? The industrial courts are created for the purpose of ensuring industrial peace. Therefore only final award is deemed to bring industrial peace. Therefore you must real evidence and give final relief. Maybe in article 226 same workers may come with five writ petitions on the same non employment. But in industrial law he comes only one dispute and it should settle all issues together. Therefore they rejected the argument of the Daftari and Indra Jai Sing saying that it should be treated like government servant. To bring in Industrial peace you must finally adjudicate the issue.

Therefore the employer can lead evidence to prove whether misconduct is valid or not. Then whether strike is a misconduct or not? Undoubtedly the ID Act every strike is a illegal strike there is no legal strike except in a very small way where a strike followed by illegal lock out is valid strike, there is only way. Or in a non public utility service where there is no requirement of a notice you can go on strike. The Act says what is a PSU and every six months every state government or central government issues a fresh notification. There cant be a legal strike at all, now there are two types of judgement in *Jawahar Mills* Supreme Court said can there be a illegal strike but justified action? Or can there be a strike justified perceived as illegal, now Jawahar Mill says, ' Everything is illegal perceived unjustified'. You can't think of a justified action when in the law it is illegal. But in Gujarat Steel tubes Supreme Court took a careful path by saying not all strikes will automatically because they are illegal, it will also be unjustified but then it can't get over Jawahar mill case. So what Supreme Court said was there can't be a collective misconduct, a strike can be a collective action but misconduct is always individual. So each workers role should be mentioned in the charge sheet. They use the word Dumb driven cattle. The ordinary workers followed by *neta's* they say follow the strike. There maybe leaders who plan the strike plan, the destruction of the employers property. So between those who led the strike and those who are merely follows? Make a distinction. if mere participation then it is not misconduct notwithstanding it is illegal strike you can grant relief. Matter was taken to Supreme Court said. Even an arbitrator under 136 can be challenged. So it is in that context the court said the end was dismissal is never contemplated. So in para 52 Supreme Court says in the matter of dismissal employers cannot employers and employees cannot have a hide and seek game. Dismissal means based upon misconduct which is always individual and not a collective misconduct. So the identification of individual role is important it is in that basis. Those who were mere participants in the strike they were all directed reinstated with a percentage of back wages. Then the question came how to judge these these matters. You see page thirty three the the Supreme Court said, 'valuation of Indian Industry jurisprudence constitution of India Article thirty nine, forty one, forty two forty three A and the golden rule of judicial resolution of an industrial dispute. This court though in very different context has drawn attention of the Gandhian guideline, whenever you are in doubt Discourse in very different context was drawn the attention of the gun the engaged lane. Whenever you are in doubt apply the following test , recall the face of the poorest and the weakest man whom you have seen and ask for yourself the step you contemplate is going to be of

any use to him?' It is apt here, this perspective informs our decision. the broad basis is that workers are weaker although they are they producers the struggle to better there lot as the sanction of the rule of law. Unions and strikes are no more conspiracies, then professions and political parties are and being far weaker, part 4 of the constitution read with article 19 sows the seed of this jurisprudence. The Gandhian code at the beginning of this judgment sets the tone of the economic equity in industry. Therefore when you take evidence you'll have to see whether evidence is available against all workers or only against some. Make a distinction and apply Gujarat Steel Tubes case and grant relief.

**Participant's Question:** 1) what is latest view on protected workman?

**Justice Chandru:** I think the view has not changed because section 33(3) talks about protected workman and how much workers can be declared as protective workman and in case there is a dispute between unions the labour department resolves. But then what is the protection he actually gets? Only when there is a dispute pending in a court then you must seek prior permission it does not bar imposing penalty. He is treated like any other worker but in case of a protected workman the punishment imposed on him or order passed against him must have the prior sanction of court that's all, there is no greater protection given to workman and the law is the same.

2) Approval Applications can be converted after dismissal as from permission application?

No there is no conversion contemplated because there are two types of approval. One is the prior approval, other one is the post approval. In section 33(2)1 the approval is a prior permission, in 33(2)B the approval is a post approval. But Supreme Court has now held prior approval or post approvals both are same. In one it takes before the other one takes afterwards, but SC says since it has got the sanction of law, violation visit with the penalty, its mandatory condition precedent. And if the employer fails to seek permission even the post facto sanction then order of dismissal is void ab initio. Now Supreme Court says court may not go into the merits of the case the moment there is an infraction of 33 it vitiates the order. Therefore the question of conversion doesn't arise because in one case you must seek approval to see whether principles of natural Justice have been followed, whether there is any illegal evidence. But incase of a reference the question is a larger question where you become an appellate court, not a supervisory court.

**Participant's Question:** Whether the apex court is in favour of ordering punitive compensation instead of ordering reinstatement which is considered as a normal rule?

**Justice Chandru:** As I told you in the beginning this is a court of special contract, from a ordinary contract we have now moved into a special contract, the only difference is in a normal contract 73, 74 takes care of damages where there can be normal damage there can be quantified damage, there can be punitive damage but here the question does not arise its not the question of damages. It's a question so court replacing against the wishes of employer back to reinstatement. Therefore reinstatement may follow either as a fresh employment or with or with out backwages or if backwages what is the percentage of back wage. The question of granting punitive compensation does not arise. Rota's case where workers were given punitive damages for going on illegal strike, Supreme Court said you must find solution within the Act not out side the Act. What applies to worker will apply to management. So therefore you can't give punitive damage but you may have cost of the litigation. Beyond that I don't think you can grant anything more. You can grant interest on the back wages, that's possible not beyond that.

**Participant's Question:** Managements often find it difficult to substantiate their contention that the workman was gainfully employed by adduces satisfactory evidence whether in the case of such workman is it permissible to infer that there is every possibility of gainful employment as he is an able bodies or skilled person?

**Justice Chandru:** In this country even able bodied persons are losing employment. In Tamil Nadu in the last 10 years One hundred thousand industries small and medium industries have been closed. There are nearly Two point five million workers who have been rendered jobless. Therefore being jobless is not his lack of skill or skill. But one judge of the Madras High Court held if he's ten years unemployed then in future also he is unfit to be employed. if he is actually employed then he'll lie before the court his unemployment. This is what he says, After 17B the employers are very clever they go to the private detective agency and explore all possibilities because 17B says incase he's gainfully employed he can be denied 17B. Now the worker is asked to file an affidavit before the High Court that he is not gainfully employed which means yesterday somebody asked perjury case. Certainly there are perjury cases Madras High Court pursued perjury case against worker. he is asked to return the money with interest also.

Therefore ours are the courts to monitor whether somebody is gainfully employed or not. And the employers are not helpless in finding out whether he is gainfully employed or not. one the present workers are his neighbors, they can always find out and they have got this spy system, the personal manager will ask some workers what is happening and they'll get to know you don't know how the HR department works. Every worker is spied even in the toilet and restrooms they are spied what they are doing. Some worker was reading some union literature in the toilet. Then next day personal manager ask him which which news paper you are reading, so the worker was shocked and there are nothing which the worker does which is not known to the management. In fact you must see Charlie Chaplin's movie on modern time. Even in the restroom they'll be C.C.T.V what he does and then two minutes more, he'll be asked to get back there'll announcement coming, Get back to work like that. So there are the system also knows how to insulate itself. In fact it is the first time when seventeen B was brought in Madras High Court took the view at three judge bench not in the every case there should be monitory payment. In case of an award which is nullity we can't respect the award. Supreme Court said this is the statutory requirement for maintaining a writ petition therefore pay monthly salary. But some of the public sector now says you come back to work. You maybe a bad worker yesterday but i need your service please come back to work, in Transport Corporation, in electricity Board they get back to work also thanks to Seventeen. So seventeen b is some kind of a disincentive to the employer to litigate internally because you'll have to pay once he wins the case. So it is in that sense first employers are not helpless. Secondly in many cases employers filed application to cancel Seventeen B on the basis of deductive report. then the High Court sent the matter back to the Labour Court asked for a findings from the Labour Court whether he's gainfully employed or not/ Thirdly not all workers are dishonest to say that there is every possibility of gainful employment. Fourthly many High Courts Kerala, Madras, Karnataka, and Assam have said merely because he does some small odd jobs that iss not gainfully gainful employment has got a connotation that he's in a better situation than this. Because if he is a skilled worker he'l immediately gets employment some other place. A worker has to sustain himself to live. And therefore that is not the gainful employment. That he's talked about it should be some other equal employment that he's elsewhere employed, that he's as a disincentive for making a double claim. In case he makes a perjury, In case the High Court find these gainfully employment then the monetary benefit is removed. Then there is a third question in case of a breach of contract there is a mitigation of damages the other party must prove they did everything

best to keep the contract going. But the mitigation of damages are unknown to labour law. A worker need not prove i did my best, I went and did all this. Therefore you please reduce this amount from my backwards. So mitigation of damages never accepted as part of the law. Recently S started applying that principle in indirect fashion saying that we can't give hundred percent back wages. That's a premium.. Therefore making seventy five make it fifty percent, that is again left to the discretion of the judges but. There is no uniform law. Thank you

**Shivaraj Huchhanavar:** Well before we break for the tea there after we have another session that is feedback and evaluation session. We will back at 12 o clock. Before that I have two request to make number one your submission relating to that particular hypothetical I request all of you to submit your write ups on the hypothetical questions we have provided on the second day I think. And as regard to yesterday's presentations you have made wonderful presentations as regard to group five I have handouts. As regards to other four groups I request all of you to provide your write ups. So that I can just you know make it in the form of report and we can use it for academic purpose. And before we break for tea I request the entire participant to give a big round of applause to Sharit Bhowmik as well as his lordship as regard to his lordship in all these four days you r lordship was like a backbone for this particular entire seminar. So far His Lordship we must you know give a big round of applause once again.

**Justice Chandru:** Only thing is he can call me comrade and not Lordship.

**Shivaraj Huchhanavar:** Let us break for the tea and we'll be back in the next session and we'll allow both our resource person to take rest and we'll come back because it will be a conversation between national judicial academy and the participants. So we'll allow the resource person to take rest. Thank you

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