Before Jasbir Singh, Permod Kohli, Nirmal Yadav, JJJ.

GOBIND,—Petitioner

versus

PRESIDING OFFICER, LABOUR COURT, JALANDHAR AND ANOTHER,—Respondents

CWP 4660 of 1999

22nd May, 2008

Industrial Disputes Act 1947-S. 2(s), 25-B, 25-F, 25-G, 25-11, 2(oo) and 2(aaa)-Part-time Sweeper-Whether "workman" under the Act-Whether entitled to protection under Chapter VII of the Act?-Definition of "workman" under the Industrial Disputes Act different from that given under the Factories Act 1934.

Held, That a reading of definition of workman as contained in Section 2(s) of the I.D. Act, tentatively would mean that any person (including an apprentice) employed in any industry to do any manual, skilled, unskilled, technical, operational, clerical or supervisory work for 'hire or reward' falls within the definition of workman. Section 2(s) do not state as to whether it is necessary to have a written contract of employment between the worker and an employer. There is no mention of status, mode of selection of a worker in an industry. The worker may be regular, casual, daily wager, work charge or may be a part time worker.

(Para 16)

2 ***Industrial Disputes Act 1947-S. 2(s), 25-B, 25-F, 25-G, 25-11, 2(oo) and 2(aaa) - Factories Act, 1948 - S. 3(1) - Worker - Workman-Definition under Factories Act very vast and all inclusive as compared to definition under Section 2(s) of the Industrial Disputes Act - Cannot be applied to determine status of "workman" under the Industrial Disputes Act-Part-time worker may fall within the definition of "workman" under Section 2(s) of the Industrial Disputes Act for the limited purpose of establishing relationship of master and servant between***

workman and employee and to enforce terms of his engagement - But, whether such workman a regular/ temporary/contractual employee - Whether ratio of (2006) 4 SCC 1 Secretary of State of Karnataka versus Uma Devi (3) can be applied to the Industrial Disputes Act-Status of part-time worker not better than that of ad hoc employee/daily wager, rather worse - Employment of part-time worker contractual in nature - Hence, termination of services of contractual workman would not amount to retrenchment and he will not be entitled to benefit under Chapter V-A and V-B of the Act.

Held, that if we accept above said definition of a workman then nothing remains to be settled thereafter. However, matter is not so simple. Admittedly, a part time worker is not working for whole of the day. He is not holding any regular sanctioned post. He be at liberty to get employment with any number of employers, as per his convenience. He is not subject to any control of an employer, after his fixed period in a day comes to an end, with that employer.

(Para 17)

Further held, that prima facie, by reading above mentioned judgments of the Hon'ble Supreme Court and a Division Bench Judgment of this Court in Haiyana Power Generation Corporation Ltd.'s case (supra), it can be said that a part time worker may fall within the definition of a workman as envisaged in Section 2(s) of the I.D. Act for a limited purpose i.e. to establish relationship of master and servant between the workman and the employer and to enforce term of his engagement.

(Para 24)

Further held, that the status of ad hoc and temporary employees is of contractual nature and their services can be terminated by an employer as per exigencies at the place of work. What is true with regard to temporary workers in public employment, the same too is applicable in the private sector. In private sector also, the appointments are being made on daily wages, temporarily with a view to overcome the situation at the spot. So far as the part time worker, who works only for the part of the day, his

status cannot be better than that of an ad hoc employee/ daily wager. He is rather in a worse situation. When a part time worker enters the service, he knows nature of the work and conditions of his service. The conditions may be express or implied, the very nature of the part time employment includes in it right of an employer to terminate service of the part time workers as and when work comes to an end or otherwise. In that situation, the worker may be at liberty to enforce his rights, if any infringed, under the contract of employment (may be in writing or in oral).

(Para 34)

Further held, that however, in the case of a part time worker, there is no qualification and age prescribed; they can be engaged by the local management as per requirement; they are to work only for part of the day; may not be subject to any disciplinary control; they arc not subject to any retirement age; cannot be transferred and there is no bar to carry on any other avocation or occupation.

(Para 39)

Further held, that in view of facts mentioned above, employment of a part time worker would fall within the concept of contractual employment. If that is so, in view of provisions of clause (bb) of Section 2(oo) of the I.D. Act, termination of service of a contractual workman would not amount to retrenchment and he will not be entitled to get benefit under the provisions of Chapter VA and VB of the I.D. Act

(Para 40)

3 Definition of "Day" - Not defined under the Industrial Disputes Act - Workman entitled to benefit under Section 25-B if he works for whole of "day" (i.e., 8-9 working hours a day) - Definitions under other collateral Acts discussed - "deemed year"- What is - By treating workman as weaker part of commercial sector, beneficial provisions cannot be extended to an extent where these appear to be unreasonable.

Held, that the petitioner was working for only two hours in a day as part time Sweeper, taking normal working day @ 8/9 hours, it means that he will complete one normal working day, minimum in 4 days. In this

manner, in 175 days, as referred to above, he will work only for about 44 days in a deemed year and if it is held that by working for 44 days in a year, a part time worker is entitled to get benefits under Chapter VA and VB of the I.D. Act, that would amount to negation of the concept of striking a balance between employee and the employer. That cannot be the intention of the legislature. On sympathetic grounds, by treating the workman as a weaker part of the commercial sector, beneficial provisions cannot be extended to that extent where these appears to be unreasonable. The employer has a right to terminate the employee as and when Civil Writ Petition No.4660 of 1999 32 necessity arose or when work comes to an end or where the employer finds that worker is not suitable for the job and his work is not upto the mark.

(Para 48)

4 Part-time worker - Whether entitled to reinstatement - Held, no- Work performed by daily wager distinct from that of a part-timer - Part-timer does not even complete fictional year envisaged under Section 25-B of the Act (240 days in 12 months preceding the relevant date)

Held, that a part time worker, who works only for a part of the day, will not be in a position to complete even fictional year as envisaged under Section 25-B of the I.D. Act i.e. 240 days in 12 months preceding the relevant date. Not only this, we feel that it will be very difficult to give any benefit to a part time worker under Chapter VA and VB of the I.D. Act.

(Para 52)

5 No restriction on part-time worker to work under one employer only - May be employed by several employers at the same time - No concept of exclusive employment in this case - Thus, status of permanence cannot be granted to a part-time worker - Even though "workman" under Section 2 (s) of Industrial Disputes Act, a part-time worker will not be entitled to benefits under Chapter V-A and V-B of the Act - Mange Ram's 1998 (2) RSJ 712 (P&H) (DB) and Shimla Devi's 1997 (1) RSJ 396 (P&H) (DB) cases do not lay down the correct position of law

Held, that we have also noticed that a part time worker can get employment with as many number of employers as he wishes to. He can even work with those employers who are competing with each other. In the 0/3 case of appointment of a part time worker, concept of exclusive CCI employment, which is the most important ingredient in case of a regular employee, is completely missing.

(Para 52)

Further held, that in view of ratio of the judgments, referred to above, status of permanence cannot be granted to a part time worker. To the contrary, if he/she is held entitled to get benefit under the provisions of Section 25-F of the I.D. Act, it means his service cannot be terminated, even if, he is not upto the mark, till such time retrenchment compensation is paid to him. Similarly, under Section 25-G of the Act, his service cannot be terminated until his juniors are allowed to work even though, they may be very efficient workers. In case of retrenchment, the part time worker may have right to get re-employment in view of provisions of Section 25-H of the I.D. Act. If it is held that he is entitled to all above mentioned benefits, it would amount to giving him status of permanence, which, we feel, was not intention of the framers of the Act. Accordingly, we feel that judgments, in the case of Mange Ram's case (supra) and Shimla Devi 's case (supra) do not lay down the correct law. We are in agreement with opinion expressed by a Division Bench of this Court in Ram Lakhan's case (supra).

(Para 53)

Further held, that in view of facts mentioned above, we conclude that a part time worker would fall within the definition of a workman as postulated under Section 2(s) of the I.D. Act. However, nature of his employment will be that of a contractual employee and employer be at liberty to terminate him and his termination would not entitle him to get any benefit under the provisions of Chapter VA and VB of the I.D. Act. It is further clarified that to enforce rights and obligations arising under contract of employment, may be in writing or oral, the part time worker may invoke the provisions of I.D. Act other than contained in Chapter VA and VB of the Act.

(Para 54)

Sanjiv Bansal, Addl.A.G. Haryana

A.S.Grewal, Addl.A. G. Punjab

Ashwani Bakshi, Advocate for respondent workman In CWP No.11575 of 2002 and CWP No.11592 of 2002

Arvind Mittal, Advocate

Sanjeev Sharma, Advocate for the petitioner in CWP No.15417 of 2000

S.K.Sharma, Advocate for the petitioner in CWP No.17549 of 1999

Sukant Gupta, Advocate

Naveen Daryal, Advocate

Vandana Malhotra, Advocate

JASBIR SINGH, J.

(1) The petitioner was working as a part time sweeper with respondent No.2. His service was terminated on 1.10.1994. He has filed this writ petition to lay challenge to Award dated 24.9.1996 (Annexure P/1) passed by respondent No.1 i.e. the Labour Court, vide which, his prayer to reinstate him in service, was declined.

(2) Before the Labour Court, it was case of the petitioner that he joined service with respondent No.2, as a part time sweeper, on 15.1.1993. He continued to serve upto 30.9.1994. He was getting an amount of Rs.400/- per month" towards wages. However, in a very arbitrary manner, his service was terminated on 1.10.1994 without issuance of any notice, charge sheet and he was also not paid retrenchment compensation to which he was entitled as per provisions of Industrial Disputes Act, 1947 (in short, the I.D. Act).

(3) The petitioner, by praying that the termination order be set aside and he be reinstated in service with back wages, served a demand notice on 22.2.1995. On failure of reconciliation proceedings, the Labour Commissioner, Punjab, referred the following dispute for adjudication to the Labour Court (respondent No.1):-

> *"Whether termination of service of Gobind by the employer was justified and in order? If not to what relief is workman entitled ?"*

(4) Despite notice, respondent No.2 failed to appear before the Labour Court and was ordered to be proceeded ex-parte. The petitioner appeared as his own witness and reiterated the averments made by him in his demand notice, as referred to above. The Labour Court of its own went on to adjudicate a question 'as to whether a part time worker would fall within the definition of workman as defined in Section 2(s) of the I.D.Act or not.' By taking note of ratio of a Division Bench judgment of this Court in **Ram Lakhan *versus* Presiding Officer Labour Court Chandigarh (1),** the Labour Court has observed thus:-

> *"A Division Bench of our own High Court in Ram Lakhan Singh versus Presiding Officer, Labour Court Chandigarh 1989(1) Recent Service Judgments 351 has held that a part time worker can not be considered as employee, and, therefore, period of part time work can not be considered while finding out continuous service. Hon'ble Division Bench observed that part time working implies that there is no prohibition for the worker to have employment on more than one posts; that does not exclude employment under more than one employer, further observing that literally the work begins in the morning when the worker starts work and ends by the time, he finishes the work for the day, and finally holding that the provisions of Section 25-F of the I.D Act are not applicable to such a worker."*

(5) It was held by the labour Court that the petitioner was not entitled to get protection of Section 25-F of the I.D. Act and the reference was dismissed being not maintainable. Hence, this writ petition.

(6) Before a Division Bench of this Court, it was primary contention of counsel for the petitioner that the Labour Court has erred in observing that 'a part time worker does not fall within the definition of a workman as envisaged under Section 2(s) of the I.D. Act.' It was argued that in the provision referred to above, no distinction has been made between regular worker and a part time worker. It is only needed that a worker is employed in an Industry, to do any manual, skilled, unskilled, clerical work etc., for hire or reward. By stating that the I.D. Act makes no differentiation so far

(1) 1989 (1) RSJ 351

as status of regular, permanent, temporary, daily wages, work charge, part time workers are concerned, prayer was made to quash the impugned award. To strengthen his argument, counsel for the petitioner placed reliance on judgments in the case of **Shimla Devi *versus* Presiding Officer, Labour Court, Bathinda (2),** and another Division Bench judgment of this Court in **Mange Ram *versus* State of Haryana and others (3).**

(7) Whereas to the contrary, it was stated by counsel for respondent No.2 that the petitioner being a part time sweeper, could not invoke the provisions of I.D. Act. When his service was no more required he was shunted out on 1.10.1994. It was also contended that the petitioner remained absent for the month of July 1994 and for one day in the month of august 1994. To support his claim, counsel for respondent No.2 had placed reliance upon a Division Bench judgment of this Court in *Ram Lakhan Singh's case (supra),* wherein it was held that a part time worker cannot be considered as a workman and further that he was not entitled to get benefit of the provisions of Section 25 of the I.D. Act.

(8) A Division Bench of this Court on 18.12.2000, when hearing this writ petition noticed that earlier two Division Benches in the cases of *Shimla Devi(supra) and Ram Lakhan(supra),* while giving conflicting opinion with regard to the status of a part time worker, both have relied upon ratio of judgment of Hon'ble Supreme Court in **Birdichand Sharma *versus* First Civil Judge, Nazpur and others (4).** To resolve that conflict, it was observed thus:-

> *"It is, therefore, clear that in the cases referred to above regarding regularization of the part time employees there are contradictory findings of Division Benches of this Court in the case of Simla Devi vs. Presiding Officer, Labour Court, Bhatinda (supra) and the judgment in the case of Ram Lakhan Singh vs. The Presiding Officer, Labour Court, Chandigarh and another (supra). In both the above stated judgments, the Division Benches have relied on the same judgment of the Supreme Court i.e. the case of Birdhichand*

(2) 1997 (1) RSJ 396
(3) 1998 (2) RSJ 712
(4) AIR 1961 SC 644

Sharma (supra). We, therefore, find it proper to refer this matter to the larger Bench. We, therefore, direct that the question "whether part time worker can be said to be a workman as defined in the Workmen's Compensation Act", be referred to a larger Bench."

(9) It is how this matter was referred to the Full Bench. When this writ petition was taken up for hearing on 5.9.2007, it was noticed that in the reference order dated 18.9.2000, probably, due to some typographical mistake, the Act's name has wrongly been mentioned as Workman's Compensation Act, whereas it is supposed to be Industrial Disputes Act, 1947. Accordingly, with concurrence of counsel for the parties, the following question of law was framed for consideration before the Full Bench:-

"Whether a part time worker can be said to be a workman as defined in the Industrial Disputes Act?"

(10) On 5.9.2007, it was further ordered that as the question of law is very important and will have its wide ramifications, the Registry was directed to put all other cases for hearing, which were admitted by giving reference of the order passed by a Division Bench on 18.9.2000. In compliance to our order, 11 more writ petitions have been put up for hearing along with this case. At the time of arguments, we have heard counsel for the petitioner(s) and the respondents in all those cases (in short, counsel for the worker and for the employer). However, for facility of dictating judgment, facts have been mentioned from this writ petition.

(11) Counsel for the worker has argued that the part time worker is fully covered in the definition of workman as envisaged in Section 2(s) of the I.D.Act. By making reference to above said provision, it was argued that no distinction was made so far as regular or part time worker is concerned. To fall within the definition of workman, it is only needed that a worker is employed in an Industry to do manual, unskilled work etc. for hire or reward. He may be working for whole of the day or part of it, that makes no difference. To retrench a part time worker, it is necessary to pay him compensation, if he fulfills the conditions as envisaged in the I.D. Act. Counsel, by making reference to the provisions of Section 25-B, 25-F, 25-G, 25-11, 2(oo) and 2(aaa) of I.D. Act argued that if a part time worker

remained in service for a continuous period of one year or six months as the case may be, as defined in Section 25-B, in case of his retrenchment, the worker is entitled to get compensation as envisaged under Section 25-F of the I.D. Act. Part time worker is also entitled to get protection of Section 25-G and re-employment as per provisions of Section 25-H of the I.D. Act. With regard to payment of compensation, counsel argued that the amount is to be paid as per provisions of Section 2(aaa) by calculating average pay drawn by the part time worker, during the period he actually worked. It was also argued that the compensation to be paid to a part time worker, will be proportionate to the work done by him, during the relevant period. It was suggested that if a part time worker is working for two hours in a day with an employer and getting a particular amount, the retrenchment compensation will be calculated in that proportion only. Counsel further argued that as the part time worker is working under the control and supervision of an employer, the employer has the power to regulate the mode/manner of work to be done by a part time worker and also has the power to punish him in case the part time worker is guilty of any misconduct. By raising above mentioned arguments, counsel stated that there always exists relationship of master and servant between a part time worker and an employer. To support his contention that the part time worker would fall within the definition of workman as defined in Section 2(s) of the I.D. Act and is entitled to get all benefits under the above said Act, besides placing reliance upon judgment in the cases of *Shimla Devi(supra) and Mange Ram (supra),* strong reliance was also placed on a Division Bench judgment of this Court in **Haryana Power Generation Corporation Ltd. *versus* Presiding Officer Industrial Tribunal-cum-Labour Court and others (5).** Counsel further argued that as the I.D. Act is labour oriented, it must be construed liberally in favour of the workman. He prayed that the question posed to the Full Bench be answered in favour of the worker.

(12) Counsel for the employer has vehemently opposed the arguments raised by counsel for the worker. By stating that as the part time worker, work only for part of the day, he would not fall within the definition of workman as defined in Section 2(s) of the I.D. Act. Counsel further argued that there exists no relationship of master and servant between a part time worker and an employer, as the part time worker is free to join

(5) 2003 Lab.LC. 2825.

any number of employers as per his convenience, after performing duty, during part of the day, a part time worker ceased to be in the employment of a particular employer. That employer has no power whatsoever to ask the worker to stay for the day and perform other duties, which he can get from a whole time/ regular worker. Counsel further argued that the 'part time workers' are not regular feature in any industry, they are being employed keeping in view exigencies in any industry or may be at times an employer may not have the requisite finances to employ a person for whole of the day. At the maximum, there may be a contractual relationship between a part time worker and an employer and if protection is given to a part time worker under the provisions of I.D. Act, it would mean to give him permanence in the establishment/ industry after a lapse / service of one year, which cannot be the intention of the legislature. If contention raised by counsel for the worker is accepted, the part time worker will attain status of a permanent worker in an industry. He cannot be removed unless his juniors are working, he has a right to re-employment and in case of retrenchment is entitled to compensation as envisaged under the I.D. Act. Counsel further argued that if we look into the provisions of Section 25-B, 25-F, 2(aaa) and 2(s) together, it makes it very clear that the legislature intended to give benefit of those provision to a worker, who was employed on regular basis and /or was working for whole of the day as may be prescribed by the employer. Counsel further argued that it is not open to the Court to add a word in the statue unless the provision is ambiguous/ is not clear. By referring to the provision of Section 2(s) of the Act, it was argued that the language of the provision is very clear and has to be interpreted in layman's language and if that is done, in that manner, it obviously means that the reference to word 'workman' in this provision refers to a worker who is a full time worker in an industry/ establishment. To support his contention, besides placing reliance on the judgment in *Rain Lakhan Singh case (supra)*, strong support was sought from the ratio of the judgments in **Indian Overseas Bank *versus* Workman (6)** and **Electronics Corporation of India Ltd. *versus* Electronics Corporation of India Service Engineers Union (7).**

(13) Counsel for the parties heard.

(6) 2006 (3) SCC 729
(7) AIR 2006 SC 2996

(14) Before we proceed further to deal with the proposition in dispute, it is necessary to note down some provisions of the I.D. Act, relevant to solve the controversy in question. Section 2(aaa) of the I.D. Act defines average pay as under:-

"(aaa) "Average pay" means the average of the wages payable to a workman-

(i) In the case of monthly paid workman, in the three complete calendar months,

(ii) In the case of weekly paid workman, in the four complete weeks.

(iii) In the case of daily paid workman, in the twelve full working days,

Preceding the date on which the average pay becomes payable if the workman had worked for three complete calendar months or four complete weeks or twelve full working days, as the case may be, and where such calculation cannot be made, the average pay shall be calculated as the average of the wages payable to a workman during the period he actually worked; "

Retrenchment has been defined in Section 2(oo) of the ***I.D.*** *Act as under:-*

"(oo)"Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include-

(a) Voluntary retirement of the workman; or

(b) Retirement of the workman on reaching the age of Superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf ; or

(bb) 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 contract being terminated under a stipulation in that behalf contained therein; or

(c) Termination of the service of a workman on the ground of continued ill-health,. "

Section 2(s) of the I.D. Act defines the workman which reads thus:-

"2(s) "Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person..."

Chapter VA defines and deals with lay off and retrenchment in an industry. Section 25-B of this chapter defines meaning of term 'continuous service', Which reads thus:-

***"25B. Definition of continuous service. -** For the purposes of this Chapter, -*

(1) A workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or as strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) Where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer. -

(a) For a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) One hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) Two hundred and forty days, in any other case;

(b) For a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than. -

(i) Ninety-five days, in the case of workman employed below ground in a mine; and

(ii) One hundred and twenty days, in any other case."

Section 25-C deals with right of a workman, laid off, for compensation. Section 25-E interprets the situation under which the workman may not be entitled to get compensation in case of lay off. Section 25-F refers to the conditions which are necessary to be fulfilled before ordering retrenchment of a workman. It reads thus:-

"25F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) The workman has been given one month's notice in writing indicating the reasons for

retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages ibr the period of the notice;

[* * * * *]

(b) The workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days ' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) Notice in the prescribed manner is served on the appropriate Government for such authority as may be specified by the appropriate Government by notification in the Official Gazette."

Section 25-FF in this chapter lays down under what circumstances a workman is entitled to get compensation in case of transfer of an undertaking. Section 25-HA mandates that before closing down any undertaking, it is necessary to serve 60 days notice upon the workman. Section 25FFF deals with compensation to the workman in case of closing down of an undertaking. Section 25-G lays down the procedure for retrenchment, which reads thus:-

"25G. Procedure for retrenchment. -Where any workman in an industrial establishment, who is a citizen of Indict, is to he retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

Section 25-H of this chapter gives right of re-employment to a retrenched workman, which reads as under:-

"25H. Re-employment of retrenched workmen. - Where any workmen are retrenched, and the employer proposes to take into his employ any persons he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for reemployment, and such retrenched workmen who offer themselves for reemployment shall have preference over other persons."

(15) Similar provisions, with some variation, exists in Chapter VB of the ID Act, which contains provision relating to lay off, retrenchment and closure in certain establishments.

(16) A reading of definition of workman as contained in Section 2(s) of the I.D. Act, tentatively would mean that any person (including an apprentice) employed in any industry to do any manual, skilled, unskilled, technical, operational, clerical or supervisory work for 'hire or reward' falls within the definition of workman. Section 2(s) do not state as to whether it is necessary to have a written contract of employment between the worker and an employer. There is no mention of status, mode of selection of a worker in an industry. The worker may be regular, casual, daily wager, work charge or may be a part time worker.

(17) If we accept above said definition of a workman then nothing remains to be settled thereafter. However, matter is not so simple. Admittedly, a part time worker is not working for whole of the day. He is not holding any regular sanctioned post. He be at liberty to get employment with any number of employers, as per his convenience. He is not subject to any control of an employer, after his fixed period in a day comes to an end, with that employer.

(18) A Division Bench of this Court in *Haryana Power Generation Corporation Ltd.'s case (supra),* has held that a part time worker is a workman and if terminated, without compliance to the provision of Section 25-F of the I.D. Act, he is entitled to reinstatement and back wages etc.

(19) Their Lordships of Hon'ble Supreme Court in **M/s Shining Tailors *versus* Industrial Tribunal II, UP., Lucknow (8),** by placing reliance upon **Birdi Chand's case** *(supra)* and **Silver Jubilee Tailoring House and others (9),** while deciding a preliminary question, as to whether reference made at the instance of a part time worker was maintainable or not, came to a conclusion that reference made at the instance of the part time worker was maintainable. However, in this judgment, there is no discussion as to what type of benefit can be extended to a part time worker.

(20) From the reading of the judgments, referred to above, it comes out that in the case of *Birdi Chand's case (supra)*, their Lordships were dealing with a dispute concerning the rights and obligations of the parties emanating under the provisions of Factories Act 1934 (in short, the Factories Act). The Hon'ble Supreme Court was dealing with a dispute as to what is the distinction between a workman and an independent contractor. Definition of 'worker' in the Factories Act reads thus:-

> *"2(1) "Worker" means a person employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process, but does not include any member of the armed forces of the Union;"*

(21) Reading of the provisions, referred to above, clearly envisages that any person employed directly or through any agency (including a contractor) whether for remuneration or not and is engaged in manufacturing process etc., would fall within the definition of worker, even if he was so engaged with or without knowledge of the principal employer. The definition of worker given in Factories Act is very vast and all inclusive as compared to definition of a workman under Section 2(s) of the I.D. Act. It is also apparent from the reading of the judgment, referred to above, that the

(8) 1983 (4) SCC 464
(9) 1974 (3) SCC 498

Hon'ble Supreme Court was dealing with a dispute as to whether worker was a contractor or not. Question of dispute regarding part time or whole time employment was not under discussion in that case. It was further said that merely because the worker, in that case, was working on piece rate basis, it will not take him out of category of a worker within the definition of Section 2(1) of the Factories Act.

(22) The ratio of the judgment in *Birdi Chand's case (supra)* was also applied by their Lordships of the Supreme Court in *Silver Jubilee Tailoring House's case (supra)*, to say that a piece rate worker/ part time servant would fall within the definition of person employed as defined in Section 2(14) of the Andhra Pradesh Shops and Establishments Act, 1951. In the above said case, the Hon'ble Supreme Court was dealing with a dispute, which has arisen under the provisions of payment of Wages Act. In the above said case, it was noted that the workers were being paid on piece rate basis, generally attend the shop every day if there is work, rate of wages was not uniform, rather it was dependent upon the expertise of a particular worker. If stitching was not as per requirement, the employer had the authority to reject the work. Workers were at liberty to come to the Factory at any time before Noon and some were also allowed to do stitching work from their houses. Their Lordships of the Supreme Court, by noting above said facts, observed thus:-

> *"33. That some of the employees take up the work from other tailoring establishment and do that work also in the shop in which they generally attend for work, as spoken to by the proprietor in his evidence, would not in any way militate against their being employees of the proprietor of the shop where they attend for work. A person can be a servant of more than one employer. A servant need not be under the exclusive control of one master. He can be employed under more than one employer. (See "The Modern Law of Employment" by G.H.L. Fridman, p. 18 and Patwardhan Tailors, Poona v. Their Workmen, (1960-1 L.L.J. 722, at 726).*
>
> *34. That the workers are not obliged to work for the whole day in the shop is not very material. There is of course no*

reason why a person, who is only employed parttime, should not be a servant and it is doubtful whether regular parttime service can be considered even prima facie to suggest anything other than a contract of service. According to the definition in S.2 (14)of the Act, even if a person is not wholly employed, if he is principally employed in connection with the business of the shop, he will be a "person employed" within the meaning of the sub-section. Therefore, even if he accepts some work from other tailoring establishments or does not work wholetime in a particular establishment, that would not in any way derogate from his being employed in the shop where he is principally employed."

(23) It is apparent from the reading of the judgment, referred to above that Hon'ble Supreme Court was not dealing with a dispute under the I.D. Act. The definition of person employed in Andhra Pradesh Shops and Establishments Act, 1951 is very vast and the same cannot be made applicable for determining status of a workman under the I.D. Act. The Hon'ble Supreme Court thereafter in *M/s Shining Tailors's case (supra),* applied ratio of the judgments in *Silver Jubilee Tailoring House's case (supra),* to say that a piece rate worker is a workman. The Hon'ble Supreme Court was dealing with a question as to whether there exists relationship of master and servant between the employee and the employer. Claim raised by the worker was rejected by the Industrial Tribunal by holding the workers as independent contractors and reference was rejected at the preliminary stage. In that case also, the IIon'ble Supreme Court was not dealing with a question as to whether the worker was entitled to get benefits under the I.D. Act, as is the dispute in the present case.

(24) Prima facie, by reading above mentioned judgments of the Hon'ble Supreme Court and a Division Bench Judgment of this Court in *Haiyana Power Generation Corporation Ltd. 's case (supra),* it can be said that a part time worker may fall within the definition of a workman as envisaged in Section 2(s) of the I.D. Act for a limited purpose i.e. to establish relationship of master and servant between the workman and the employer and to enforce term of his engagement.

(25) After holding that a part time worker would fall within the definition of a workman as defined in Section 2(s) of the I.D. Act, for a limited purpose, now it is necessary to see as to what is the nature of his employment, whether he would fall within the definition of regular/ temporary employee or contractual employee. It is also to be seen whether a part time employee will be in a position to complete one year of service, in 12 months, before the relevant date, which would entitle him to get benefit under the provisions of I.D. Act, especially Chapter VA and VB of the Act.

(26) The status of ad hoc/ temporary/ casual employee(s) in public employment came up for consideration before a constitutional Bench of Hon'ble the Supreme Court in **Secretary, State of Karnataka and others *versus* Umadevi(3) and others (10).** The Hon'ble Court was analyzing a concept relating to the right if any, of employees appointed by the State or by its instrumentality on temporary or on daily wage or casual basis, to approach the High Court for issuance of a writ of mandamus directing that they be made permanent on the posts, the work of which they were otherwise doing. In that case, the employees were also claiming that even if they were not working against the sanctioned posts and may not be possessing the requisite qualification, may not have been appointed in terms of procedure prescribed for appointment or may have been engaged recently, they be allowed to continue in service and be regularized thereafter. By taking note of almost entire case law on the subject, their Lordships of Supreme Court noticed that regularization cannot be ordered in the case of such like employees as they have entered the service fully knowing that it was temporary in nature. After analyzing scope and nature of above mentioned employment, their Lordships of the Supreme Court observed as under:-

> *"45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases far a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open*

(10) 2006 (4) SCC 1

eyes. It may be true that he is not in a position to bargain—not at arm's length—since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one

that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

It was further observed as under:-

"47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission."

(27) After giving above mentioned finding, their Lordships of the Supreme Court gave a further categoric finding that "no right can be founded on an employee on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate". It was further said that such like employees even cannot invoke principle of equal wages for equal work.

(28) In *Uma Devi (3) case (supra)*, earlier judgment of the Supreme Court in **Madhyamik Shiksha Parishad U.P. *versis* Anil Kumar Mishra (11),** *(3 Judges Bench)* was also noticed with approval, swherein it was held that ad hoc appointees/ temporary employees engaged on ad hoc basis and paid on piece rate basis for certain clerical work and discontinued on completion of their task, were not entitled to reinstatement or regularization of their service even if their working period ranges from one to two years.

(29) Similar is the ratio of the judgment of Hon'ble the Supreme Court in **M.P. Housing Board and another *versis* Manoj Shrivastava (12).** In that case also their Lordships of the Supreme Court were dealing

(11) 2005 (5) SCC 122
(12) 2006 (2) SCC 702

with the status of a daily wager, whose service was terminated. By analyzing law on the subject, it was observed that "a daily wager does not hold the post unless he is appointed in terms of act and rules framed there under. He does not derive any legal right in relation thereto." It was further observed that "it is now well settled that only because a person had been working for more than 240 days, he does not derive any legal right to be regularized in service." *(emphasis supplied)*

(30) To the same effect is the ratio of the judgment of the Supreme Court in **State of MP. and others *versus* Arjunlal Rajak (13).**

(31) In **M.P. State Agro Industries Development Corpn. Ltd. And another *versus* S.C.Pandey (14),** their Lordships of the Supreme Court, when analyzing status of a temporary appointed typist, observed as under:-

> *"17. The question raised in this appeal is now covered by a decision of this Court in M.P. Housing Board v. Manoj Shrivastava wherein this Court clearly opined that: (1) when the conditions of service are governed by two statutes; one relating to selection and appointment and the other relating to the terms and conditions of service, an endeavour should be made to give effect to both of the statutes; (2) a daily-wager does not hold a post as he is not appointed in terms of the provisions of the Act and the Rules framed thereunder and in that view of the matter he does not derive any legal right; (3) only because an employee had been working for more than 240 days that by itself would not confer any legal right upon him to be regularised in service; (4) if an appointment has been made contrary to the provisions of the statute the same would be void and the effect thereof would be that no legal right was derived by the employee by reason thereof "*

(32) Now, it is to be seen whether principles laid down by their Lordships of Supreme Court, as referred to above, while deciding the disputes with regard to regularization of ad hoc/ temporary employees etc.,

(13) 2006 (2) SCC 711
(14) 2006 (2) SCC 716

in public employment, can be made applicable in the realm of labour laws/ industrial disputes under the I.D. Act or not.

(33) A similar question came up for consideration before their Lordships of the Supreme Court in **U.P.Power Corporation Ltd. And another *versus* Bifii Mazdoor Sangh and others (15),** in which their Lordships were deciding a dispute with regard to appointment of a Chowkidar on muster roll/ daily wage basis, whose service was terminated. Courts below had set aside the termination order and further directions were issued that possibility of absorbing him, on a job of a regular nature, be considered. (in fact, subsequently service of the workman was regularized) In that context, it was observed thus:-

> *"6. It is true as contended by learned counsel for the respondent that the question as regards the effect of the industrial adjudicators' powers was not directly in issue in Umadevi (3) case . But the foundational logic in Umadevi (3) case is based on Article 14 of the Constitution of India. Though the industrial adjudicator can vary the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularisation, the same cannot be viewed differently."*

(34) Reading of judgments, referred to above clearly indicates that the status of ad hoc and temporary employees is of contractual nature and their services can be terminated by an employer as per exigencies at the place of work. What is true with regard to temporary workers in public employment, the same too is applicable in the private sector. In private sector also, the appointments are being made on daily wages, temporarily with a view to overcome the situation at the spot. So far as the part time worker, who works only for the part of the day, his status cannot be better than that of an ad hoc employee/ daily wager. He is rather in a worse situation. When a part time worker enters the service, he knows nature of the work and conditions of his service. The conditions may be express or implied, the very nature of the part time employment includes in it right of an employer to terminate service of the part time workers as and when work

(15) 2007 (5) SCC 755

comes to an end or otherwise. In that situation, the worker may be at liberty to enforce his rights, if any infringed, under the contract of employment (may be in writing or in oral).

(35) Their Lordships of the Supreme Court in **Reserve Bank of India *versus* Gopinath Sharma and another (16),** dealt with a question as to whether a daily wager can get reinstatement even when he was engaged on day to day basis and it was not established that he was working on a regular post and has not established his right to hold any post. In that context, it was observed as under:-

> *"17. In our opinion, the High Court has committed a patent error in allowing the writ petition filed by the respondent herein who is a daily-wage worker when it was not established that he was working on regular basis. The High Court, in our opinion, is not justified in directing that Respondent 1 must be reinstated and appointed to a similar post."*

It was further observed as under:-

> *"22. In our view, Respondent 1 was not appointed to any regular post but was only engaged on the basis of the need of the work on day-to-day basis and he has no right to the post and that his disengagement cannot be treated as arbitrary. The High Court, in our view, has totally misdirected itself in holding that non-consideration of the name of Respondent 1 on acquiring higher qualification is not misconduct, hence, dismissal of the workman on this ground is wrongfill within the meaning of Item 3, Schedule II to the Industrial Disputes Act, 1947 without giving any reason as to how non-inclusion of name for day-to-day appointment amounts to wrongful dismissal. The High Court completely erred in relying on Section 25-G of the ID Act while not holding that the workman has been retrenched within the meaning of Section 25-F and thus misdirected itself about the applicability of the provisions*

(16) 2006 (6) SCC 221

of Section 25-G of the ID Act even if it does not involve retrenchment. The High Court also failed to consider that the inclusion of the name in the waiting list for appointment as "ticca mazdoor" on day-to-day basis does not confer any right for regular appointment or to hold any post. As already noticed, no relief can now be given to Respondent 1 especially when the system of keeping the waiting list for ticca mazdoor has been dispensed with since 23-7-1993 and at present the Bank does not maintain any list. The High Court, therefore, wrongly proceeded on the basis as if the daily-wage appointment is for a regular post on which a person can be reinstated."

(36) It was further observed that "in the absence of regular employment of the workman, the employer was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the workman regarding existence of any seniority list." (emphasis supplied)

(37) In *Indian Overseas Bank (supra),* Hon'ble the Supreme Court dealt with the status of Jewel appraisers, who were taken in service by the bank on contract basis. They were responsible for evaluating jewelry / security deposited by the customers to raise loan from the bank. The Jewel appraisers, by alleging that they were the part time workers, prayed that they he absorbed as part time clerical staff of the bank. Their Lordships of the Supreme Court declined the above said relief to them by observing thus:-

"At this juncture the distinction between jewel appraisers and the regular employees of the Bank can be noted.

Regular employees	Jewel appraisers
1. Subject to qualification and age prescribed	1. No qualification/ age.
2. Recruitment through employment exchange/ Banking Service Recruitment Board.	2. Direct engagement by the local Manager.

Regular employees	Jewel appraisers
3. Fixed working hours.	3. No fixed working hours.
4. Monthly wages.	4. No guaranteed payment. Only commission paid.
5. Subject to disciplinary control.	5. No disciplinary control.
6. Control/ supervision is exercised not only with regard to the allocation of work, but also the way in which the work is to be carried out.	6. No control/ supervision over the nature of work to be performed.
7. Wages are paid by the Bank.	7 . Charges are paid by the borrowers.
8. Retirement age.	8. No retirement age.
9. Subject to transfer.	9. No transfer.
10. While in employment cannot carry on any other occupation.	10. No bar to carry on any avocation or occupation.

Therefore, the jewel appraisers are not employees of the Bank."

(38) On similar analogy, in the case of *Electronics Corporation of India Ltd. (supra)*, the Service Engineers employed by the Corporation were held not employees of the Corporation.

(39) Analysis of the ratio of the judgments, referred to above, clearly indicates that the status of ad hoc/ temporary employees is only contractual in nature. Termination of their services on completion of the work assigned to them and as per employment contract, would not amount to retrenchment. We feel that same situation will prevail so far as part time worker is concerned. His position is rather unsecure as compared to a daily wager and temporary employees. The regular employees are required to work for a fixed and regular hours in a day, as may be prescribed by the employer or as per law on the subject. Invariably daily wager and casual employees are also supposed to adhere to working hours in a day as may be notified for a particular industry/ establishment. However, in the case of

a part time worker, there is no qualification and age prescribed; they can be engaged by the local management as per requirement; they are to work only for part of the day; may not be subject to any disciplinary control; they arc not subject to any retirement age; cannot be transferred and there is no bar to carry on any other avocation or occupation.

(40) In view of facts mentioned above, employment of a part time worker would fall within the concept of contractual employment. If that is so, in view of provisions of clause (bb) of Section 2(oo) of the I.D. Act, termination of service of a contractual workman would not amount to retrenchment and he will not be entitled to get benefit under the provisions of Chapter VA and VB of the I.D. Act. It was so held by their Lordships of the Supreme Court in **Municipal Council, Samrala *versus* Raj Kumar (17).**

(41) We can look upon the proposition from other angle also. Section 25-F of the I.D. Act incorporates the conditions which are to be fulfilled before retrenchment of a workman can be ordered. To get benefit under the above said provisions, workman is supposed to be in employment for a continuous period of not less than one year. Only then he will become entitled to get one month's notice before termination or one month's wages in lieu thereof as retrenchment compensation. Section 25-B of the I.D. Act has given a deeming fiction to the word 'year' and it mandates that in case a workman employed below ground in a mine, if he completes 190 days, it would amount to a 'complete one year' and similarly in other cases if a workman complete 240 days in service that would amount to a 'continuous period of one year' in service. Same are the conditions with regard to the completion of period of 6 months, in a seasonal industry. Amount of retrenchment compensation has to be assessed by taking average pay, payable to a workman which has been defined in clause (aaa) of Section 2 of the I.D. Act. This provision postulates that to determine average pay, X amount paid in a calendar month, complete week and 12 full working days will have to be looked into.

(42) A combined reading of three provisions referred to above, ,44 makes it very clear that only that workman would be entitled to get benefit of above said provision who work for whole of the day (i.e. 8/9 working

(17) 2006 (3) SCC 81

hours in a day) as may be notified by his employer or as mandated by the provisions of law on the subject.

(43) As to what will constitute a "day" has not been defined anywhere in the I.D. Act. In the Factories Act, Section 2(e) defines the day as under:-

"Day means period of 24 hours beginning at mid night."

(44) Clause 2(f) of the Factories Act described week which consist of 7 days beginning at midnight of Saturday night or as the other night as may be notified by the competent authority. Similar definition of 'day' was given in the Minimum Wages (Central Rule) 1950 (in short, 1950 rules). Rule 24 of the rules lays down as to how many hours of work shall constitute a normal 'working day'. It reads thus:-

> 24. Number of hours of work which shall constitute a normal working day.—
>
> (1) The number of hours which shall constitute a normal working day, shall be—
>
> (a) In the case of an adult, 9 hours;
>
> (b) In the case of a child, 4%2 hours.
>
> xxx xxxx xxx"

(45) In common man's understanding, a day would mean a full working day and not less than that. Now it is to be seen whether a part time workman will be in a position to complete 240 days to get benefit under Chapter VA and VB of the I.D. Act as laid down in Section 25-B of that Act.

(46) I.D. Act was enacted with a view to give protection to the workman and also to ensure peace in the industrial sector. Idea was to strike 015 balance between varying faction of the employees and the employer so that neither of them can exploit the other. Ordinarily a year would mean 365 days. However, with a view to give benefit to the workman, a deeming fiction was created in Section 25-B of the I.D. Act by stating that in case workman completes 240 days in 12 months, preceding the relevant date,

he be deemed to be in service for whole of the year. By operation of statutes like Factories Act and the 1950 rules all workers in industry/ establishment are entitled to a weekly rest and also other paid holidays like national holidays and maternity leave upto 12 days. It has also been so held by their Lordships of the Supreme Court in **Sundernagar District Panchayat *versus* Dahyabhai Amarsinh (18).** Relevant extract from the judgment reads thus:-

> *"12. In the matter of Workmen v. American Express International Banking Corpn. the Court has said that the Explanation to Section 25-B is not exhaustive. It does not purport that only those days which are mentioned in the Explanation to Section 25-B(2) of the Act should be taken into account for the purpose of calculating the number of days on which the workman had actually worked though he had not worked on those days. The Court said that the expression "actually worked under the employer" is only clarificatory and cannot be used to limit the expanse of the main provision. The expression "actually worked under the employer" is capable of comprehending the days during which the workman was in employment and was paid wages by the employer and there is no reason why the expression should be limited by the Explanation.*
>
> *13. In the matter of Standard Motor Products of India Ltd. v. A. Parthasarathy this Court has said that the actual working for less than 240 days would include Sundays and other paid holidays if the workman is in employment of the employer although for less than a period of 12 months.*
>
> *14. These decisions in unambiguous words laid down that subsections (1) and (2) of Section 25-B comprehend different situations for the calculation of continuous service for not less than one year and continuous service which is less than one year but for 240 days in 12 months preceding the date of termination under an employer."*

(18) 2005 (8) SCC 750

(47) By excluding maternity leave, other rest days would come to about 65 days in a year (Sundays — 52 + approximately 13 national holidays). If above said 65 days are excluded from 240 days (deemed year) then the worker, in fact, is supposed to work only for 175 days out of 365 days (one year).

(48) As in the present case, the petitioner was working for only two hours in a day as part time Sweeper, taking normal working day @ 8/9 hours, it means that he will complete one normal working day, minimum in 4 days. In this manner, in 175 days, as referred to above, he will work only for about 44 days in a deemed year and if it is held that by working for 44 days in a year, a part time worker is entitled to get benefits under Chapter VA and VB of the I.D. Act, that would amount to negation of the concept of striking a balance between employee and the employer. That cannot be the intention of the legislature. On sympathetic grounds, by treating the workman as a weaker part of the commercial sector, beneficial provisions cannot be extended to that extent where these appears to be unreasonable. Employer has a right to employ worker on daily, casual, part time basis, keeping in view necessity at the spot and availability of the work. In that situation, worker also knows as to what is nature of the work and what are the terms and conditions. Contract for employment may be in writing or oral. If in writing, terms and conditions of the employment are expressed in words, whereas, in case of oral contract, terms of employment are implied keeping in view temporary nature of the work offered to a worker at the spot. The employer has a right to terminate the employee as and when necessity arose or when work comes to an end or where the employer finds that worker is not suitable for the job and his work is not upto the mark.

(49) In the case of work of a Bidi roller worker, proposition as to what will constitute a day and right of a worker to get wages/ amount in lieu of unexhausted leave period, came up for consideration before their Lordships of the Supreme Court in **Shankar Balaji Waje *versus* The State of Maharashtra (19).** By interpreting the provisions of Factories Act, vide majority judgment, it was observed thus:-

> *"20. Before discussing the provisions of Ss. 79 and 80 of the Act, which deal with leave and wages for leave, we would like to state that the terms on which Pandurang worked,*

(19) AIR 1962 SC 517

did not contemplate any leave. He was not in regular employ. He was given work and paid according to the work he turned out. It was not incumbent on him to attend to the work daily or to take permission for absence before absenting himself It was only when he had to absent himself for a period longer than ten days that he had to inform the management for administrative convenience, but not with a view to take leave of absence.

21. Section 79 provides for annual leave with wages and S.80 provides for wages during leave period. It is on the proper construction of the provisions of these sections that it can be said whether the appellant contravened the provisions of sub-s. (11) of S. 79 of the Act and committed the offence under S.92 of the Act.

22. Sub-section W of S. 79 reads :

"(1) Every worker who has worked for a period of 240 days or more in a factory during a calendar year shall be allowed during the subsequent calendar year, leave with wages for a number of days calculated at the rate of-

(i) If an adult, one day for every twenty days of work performed by him during the previous calendar year;

(ii) If a child, one day for every fifteen days of work performed by him during the previous calendar year.

***Explanation** 1.-For the purpose of this sub-section,-*

(a) Any days of lay-off, by agreement or contract or as permissible under the standing orders;

(b) In the case of a female worker, maternity leave for any number of days not exceeding twelve weeks; and

(c) The leave earned in the year prior to that in which the leave is enjoyed,

shall be deemed to be days on which the worker has worked in a factory for the purpose of computation of the period of 240 days or more, but he shall not earn leave for three days.

Explanation *2.-The leave admissible under this sub-section shall he exclusive of all holidays whether occurring during or at either end of the period of leave." It is clear that this applies to every worker. If it does not apply to any type of person working in the factory, it may lead to the conclusion that the person does not come within the definition of the word 'worker'.*

23. *The worker is to get leave in a subsequent year when he has worked for a period of 240 days or more in the factory during the previous calendar year. Who can be said to work for a period of 240 days.*

24. *According Cl. (e) of S.2, 'day' means a period of twenty-four hours beginning at mid-night. Section 51 lays down that no adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week, and, according to of S.54, for not more than nine hours in any day. Section 61 provides that there shall be displayed and correctly, maintained in every factory a notice of periods of work for adults, 111 showing clearly for every day the periods during which adult workers may be required to work and that such periods shall be fixed beforehand and shall be such that workers working for those periods would not be working in contravention of any of the provisions of Ss. 51, 52, 54, 55, 56 and 58.*

25. *Section 63 lays down that no adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory. A 'day' in this context, would mean a period of work mentioned in the notice displayed. Only that worker can therefore be said to work for a period of 240 days, whose work is controlled by the hours of work he is required to put in, according to the notice displayed under S.61.*

26. Pandurang was not bound to work for the period of work displayed in the factory and therefore his days of work for the purpose of S.79 could not be calculated. It is urged for the State that each day on which Pandurang worked, whatever be the period of time that he worked, would count as one day of work for the purpose of this section. We do not agree with this contention. When the section provides for leave on the 'basis of the period of working days, it must contemplate a definite period of work per working day and not any indefinite period for which a person may like to work on any particular day.

27. Section 80 provides for the wages to be paid during the leave period and its subs. (1) reads:

> *"For the leave allowed to him under Section 79, a worker shall be paid at a rate equal to the daily average of his total full time earnings for the days on which he worked during the month immediately preceding his leave, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the confessional sale to the worker of foodgrains and other articles. The question is how the daily average of his total full time earning for the days on which he worked during the month immediately preceding his leave is to be calculated. It is necessary for the calculation of the rate of wages on leave, to know his total full time earnings" for the days he had worked during the relevant month. What does the expression 'total full time earnings ' mean? This expression is not defined in the Act. It can only mean the earnings he earns in a day by working full time on that day, the full time to be in accordance with the period of time given in the notice displayed in the factory for a particular day. This is further apparent from the fact that any payment for overtime or for bonus is not included in computing the total full time earnings.*

28. 'Full time', according to Webster 's International Dictionary, means 'the amount of time considered the normal or standard amount for working during a given period, as a day, week or month'.

29. In words and Phrases, permanent Edition, Published by est publishing Co., Vol.17, with regard to the expression 'Full time" it is stated :

> *"In an industrial community, term full time' has acquired definite significance recognized by popular usage. Like norms 'part time' and over time., it refers to customary period of work; and all these terms assume that a certain number of hours per day or days per week constitute respectively a day's or week's work within a given industry or factory."*

It is also stated at page791:

> *"Full Time' as basis for determination of average weekly wages of injured employee means time during which employee is offered employment, excluding time during which he has no opportunity to work."*

We are therefore of opinion that there can be no basis for calculating the daily average of the worker 's total full time earnings when the terms of work be as they re in the present case and that therefore the wages to be paid for the leave period cannot be calculated nor the number of days for which leave with wages can be allowed be calculated in such a case. It does not appear from the record, and it is not likely, that any period of work is mentioned in the notice displayed under S.61, with respect to such workers who can come at any time they like and go at any time they like and turn out as much work as they like."

(50) In its latest judgment **Uttaranchal Forest Hospital Trust *versus* Dinesh Kumar (20),** their Lordships of the Hon' ble Supreme Court have noticed distinction between the work to be done by a daily

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wager and a part time worker. In the above said case, reinstatement ordered by the High Court of a part time worker, was in dispute. Their Lordships of the Hon'ble Supreme Court, by taking note of working hours of a part time worker and comparing it with the working hours of a daily wager, have observed that reinstatement in service, of a part time worker, was not justified. It was observed thus:-

> *"6. It is undisputed that the work of cleaning the hospital has been given to a contractor w.e f 17.8. 1996. Materials were placed before the Labour Court to show that the workman was engaged for doing a part-time job and that he had worked for a few days in several months. The Labour Court itself on consideration of the documents and records produced noted as follows :*
>
> > *"It is evident that the workman had worked in August 1996 — 16 days, July 1996 — 30 days, May 1996 — 30 days, April 1996 — 30 days, March 1996 — 29 days, February 1996 — 29 days, January 1996 — 31 days, December 1995 — 31 days, November 1995 — 20 days (full), October 1995 — 19 days (full), September 1995 — 25 days (full) @ 35 per day. In addition to this, in November 1995 — 3 days, October 1995 — 9 days @ Rs.20 per day towards part-time work and in September 1995 - 3 days part-time @ Rs.5 per day, had worked."*
>
> *7. The basic difference between a person who is engaged on a part-time basis for one hour or few hours and one who is engaged as a daily wager on regular basis has not been kept in view either by the Labour Court or by the High Court. The documents filed clearly establish that the claim of having worked more than 240 days is clearly belied.*
>
> *8. The stand of the appellant that the respondent was called for work whenever work was available, as and when required and that he was not called for doing any work when the same was not available has been established. The Labour Court itself noted that the workman was engaged in work by others as he was working in the appellants'*

establishment for one hour or little more on some days. It is also seen from the documents produced before the Labour Court that whenever the respondent was working for full period of work he was being paid Rs. 35 per day and on other days when he worked for one hour he was getting Rs. 5.

9. In the aforesaid position, the inevitable conclusion is that the Labour Court and the High Court were not justified in directing the reinstatement with partial back wages."

(51) In paragraph No.6 of the judgment, referred to above, if we calculate the number of days on which the part time worker had worked, it comes to more than 240 days in 12 months preceding the date of his termination. But by noting that the worker had worked only for one or two hours in a day, the Hon Supreme Court has virtually said that claim of the worker, to say that he has worked for 240 days, to claim benefit under the I.D. Act, was not justified.

(52) In view of facts mentioned above, we can safely say that a part time worker, who works only for a part of the day, will not be in a position to complete even fictional year as envisaged under Section 25-B of the I.D. Act i.e. 240 days in 12 months preceding the relevant date. Not only this, we feel that it will be very difficult to give any benefit to a part time worker under Chapter VA and VB of the I.D. Act. As in the present case, the petitioner was working only for two hours in a day with the respondent -employer, there is no restriction and he can work with any number of 71 years, during rest of the day. As per established law, as discussed in earlier part of the judgment, an employee can be asked to work only for 48 hours in a week i.e. 8/9 hours in a day. For the sake of discussion, if we presume that a part time worker, who works only for two hours with one employer, after working with four employers, engaged himself with the 5th and 6th employer for the work and if 5th and 6th employers terminate his service, it will not be possible for the Labour Court to reinstate him in service because with those employers, he was working beyond the period prescribed. Furthermore, as per provisions of Factories Act and 1950 rules, an employee is entitled to get extra wages if he works beyond the number of hours prescribed in a day. When a part time worker engages himself beyond the period of 8/9 hours in a day, from that employer

at what rate he will get the wages, whether at the normal rate or at the rate which is fixed for working over time. We have also noticed that a part time worker can get employment with as many number of employers as he wishes to. He can even work with those employers who are competing with each other. In the case of appointment of a part time worker, concept of exclusive employment, which is the most important ingredient in case of a regular employee, is completely missing.

(53) In view of ratio of the judgments, referred to above, status of permanence cannot be granted to a part time worker. To the contrary, if he/ she is held entitled to get benefit under the provisions of Section 25-F of the I.D. Act, it means his service cannot be terminated, even if, he is not upto the mark, till such time retrenchment compensation is paid to him. Similarly, under Section 25-G of the Act, his service cannot be terminated until his juniors are allowed to work even though, they may be very efficient workers. In case of retrenchment, the part time worker may have right to get re-employment in view of provisions of Section 25-H of the I.D. Act. If it is held that he is entitled to all above mentioned benefits, it would amount to giving him status of permanence, which, we feel, was not intention of the framers of the Act. Accordingly, we feel that judgments, in the case of *Mange Ram's case (supra)* and *Shimla Devi 's case (supra)* do not lay down the correct law. We are in agreement with opinion expressed by a Division Bench of this Court in *Ram Lakhan's case (supra).*

(54) In view of facts mentioned above, we conclude that a part time worker would fall within the definition of a workman as postulated under Section 2(s) of the I.D. Act. However, nature of his employment will be that of a contractual employee and employer be at liberty to terminate him and his termination would not entitle him to get any benefit under the provisions of Chapter VA and VB of the I.D. Act. It is further clarified that to enforce rights and obligations arising under contract of employment, may be in writing or oral, the part time worker may invoke the provisions of I.D. Act other than contained in Chapter VA and VB of the Act.

(55) Question posed is answered in above mentioned manner.

(56) This writ petition stands dismissed.

S. Gupta