(58) Reverting back to the facts of the present case, in all there are 18 members of the Municipal Committee, Indri. As already noticed, it has 13 elected, 3 nominated under section 9 (3)(1) and two other nominated persons under section 9 (ii) and (iii). As we have already held that the nominated persons under section 9 (ii) and (iii) of the Act would have the right to participate and vote in consideration of No Confidence Motion and that the members of the Committee would include other members but exclude the nominated members under section (3)(i), thus, the total number of the members, who would matter for the purpose of consideration of motion, would be 18-3=15. 2/3rd of 15 is 10. Admittedly, the alleged No Confidence Motion was carried by 9 members voting for the motion and 4 against the motion, as such, the motion cannot be said to have been carried by the requisite majority. As is clear that the motion of No Confidence in the present case was carried by 9 members, therefore, it is not supported by the required majority of not less than 2/3rd members of the Committee and as such the resolution had failed.

(59) Consequently, we allow this petition and set aside and quash the resolution No. 62 dated 13th of July, 1995 passed by the municipality of Indiri in its special meeting held on that date under section 21(3) of the Act. The obvious result would be that the petitioners are entitled to all consequential reliefs.

(60) However, the respondents would be at liberty to act in accordance with law. Keeping in view peculiar facts and circumstances of the case, there shall be no order as to costs.

R.N.R.

Before G.S. Singhvi and B. Rai, JJ

BIMLA DEVI,—*Petitioner*

versus

PRESIDING OFFICER, LABOUR COURT, BATHINDA AND OTHERS,—*Respondents*

CWP 9606 OF 1997

2nd December, 1997

Industrial Disputes Act, 1947,—Ss.2(oo)(bb) and 25-F—Hospitals and dispensaries—Whether an industry within the meaning of Act—Unfair labour practice—Deliberate breaks in

service with a view to avoid compliance of the provisions of Act—Applicability of S.25-F.

Held that the hospitals and dispensaries fall within the definition of 'industry'. Labour Courts and Industrial Tribunals are bound to follow the law laid down by the Supreme Court and the High Courts.

(Para 3)

Further held, that the plea of the respondents that the employee had worked for a specified period and her services stood automatically terminated cannot be accepted for the simple reason that the respondents did not produce any evidence to show that the petitioner had been engaged for doing a specified job and her services came to an end on the completion of that job. There is substance in the petitioner's contention that the respondents had deliberately given break in her services with a view to avoid compliance of the provisions of the Act. (Para 4)

Further held that while interpreting and applying various parts of Section 2(oo), the competent Labour Court/Tribunal shall have to keep in mind the provisions of Section 2(ra) read with Section 25-T and U and various paragraphs of the Fifth Schedule and if it is found that the action of the employer to engage a workman on casual basis or as a daily wager or even on temporary basis for long periods of time with intermittent breaks and subsequent termination of service of such workman on the pretext of non-renewal of contract of employment or termination of contract of employment on the basis of a stipulation contained therein is an act of unfair labour practice, such an action of the employer will have to be nullified and the Court will be fully justified in rejecting the plea of the employer that termination of service of the workman does not amount to retrenchment but is covered by clause (bb).

(Para 4)

Rakesh Garg, Advocate, *for the Petitioner.*

Rupinder Khosla, Advocate, *for the Respondent.*

JUDGMENT

G.S. Singhvi, J.

(1) This is a petition to quash the award dated 22nd May, 1997 passed by the Labour Court, Bathinda in reference No. 119 of 1994.

(2) The facts necessary for deciding this petition are that the petitioner was employed as a class-IV employee under respondent No. 3 with effect from 8th September, 1992. She raised an industrial dispute challenging the termination of her services with effect from 19th August, 1993 on the ground of violation of Section 25F of the Industrial Disputes Act, 1947 (for short 'the Act') and unfair labour practice as well as the violation of the principles of natural justice. Respondent Nos. 2 and 3 contested her claim by stating that the petitioner was engaged as a part time employee and her service stood terminated on completion of the period of employment. They also contended that the provisions of the Industrial Disputes act are not applicable to her case. By its award dated 17th January, 1996, the Labour court held that the provisions of the Act are not attracted because the hospitals and dispensaries do not come within the ambit of industry as defined under Section 2(j). It also held that the temrination of the service of the workmen is covered by Section 2(oo)(bb) of the Act. That award was set aside by the high Court in C.W.P. No. 4201 of 1996. *Vide* its order dated 28th August, 1996, the High Court reversed the finding of the Labour Court that a part-time employee does not fall within the definition of 'workman'. At the same it remanded the case to the Labour Court for fresh adjudication in accordance with law. By the impugned award the Labour Court has again refused to give relief to the petitioner by holding that the termination of her service is covered by the provisions of Section 2(oo)(bb) of the Act.

(3) At the very outset, we must mention that the finding recorded by the Labour Court in its award dated 17th January, 1996 that the hospitals and dispensaries do not come within the ambit of term 'industry' is clearly perverse and is based on total non-application of mind by the learned Presiding Officer, It is indeed unfortunate that the learned Presiding Officer has ignored the declaration of law made by a seven Judges Bench of the Supreme Court in *Bangalore Water Supply and Sewerage Board* v. *A Rajappa and others,* (1), while recording the finding that hospitals and dispensaries do not come within the definition of 'industry'. We have no hestiation in recording our disapproval of the casual manner in which the learned Presiding Officer recorded finding on that issue. Being a court subordinate to the High Court under Article 227 and to the Supreme Court under Article 136, the Labour Court was bound to follow law declared by the Apex Court holding

(1) A.I.R. 1978 S.C. 548

that hospitals etc. fall within the definition of 'industry'. We hope that the learned officers who preside over the Labour Courts and Industrial Tribunals will be more careful in future while adjudicating disputes between the workmen and the employers refrain from passing lopsided awards ignoring the law laid down by the Supreme Court and the High Courts.

(4) On the issue of applicability of the provisions of the Industrial Disputes Act in the case of a part time workman, the judgment of the Division Bench in C.W.P. No. 4201 of 1996, *Simla Devi* v. *Presiding Officer (supra)* is binding on the parties. As such the plea set up by the respondents that the provisions of the Act are not applicable are not attracted in the case of the petitioner deserves to be rejected. Moreover, we find that this plea of the respondents is wholly untenable because in the written statement filed before the Labour Court, the respondents had unequivocally averred that the petitioner was engaged on monthly salary. For the first three months she was paid Rs. 476 per month. For the remaining period she was paid @ Rs. 502 per month. On the issue of total period of service, we find that the petitioner had in fact worked for 240 days in a period of 12 months preceding the date of termination of her services. The plea of the respondents that she had worked for a specified period and her services stood automatically terminated cannot be accepted for the simple reason that the respondents did not produce any evidence to show that the petitioner had been engaged for doing a specified job and her services came to an end on the completion of that job. Rather, we find substance in the petitioner's contention that the respondents had deliberately given break in her services with a view to avoid compliance of the provisions of the Industrial Disputes Act, 1947. Law in this respect must be treated to have been conclusively laid down in favour of the petitioner in *The Karnal Central Cooperative Societies Bank Limited* v. *State of Haryana,* (2), *The Haryana State Cooperative Supply and Marketing Federation Limited* v. *State of Haryana,* (3), *Bhikhu Ram* v. *Presiding Officer, Industrial Tribunal-cum-Labour Court, Rohtak and another,* decided on 28th November, 1994. In the last mentioned case the Court examined the ambit

(2) 1995 (1) R.S.J. 817
(3) 1995 (4) R.S.J. 369

and scope of Section 2(oo) along with its various clauses including clause (bb) and Section 25-F of the Act and after making reference to the decisions of the Supreme Court in *Hariprasad Shivshankar Shukla* v. *A.D. Divakar,* (4) *Anakapalla Co-operative Agricultural and Industrial Society Ltd.* v. *Workmen,* (5), *Workmen of Subong Tea Estate* v. *The Outgoing Management of Subong Tea Estate and another,* (6), *Delhi Cloth and General Mills Ltd.* v. *Shambhu Nath Mukherjee and others* (7), *State Bank of India* v. *Shri N. Sundra Dey,* (8), *Hindustan Steel Ltd.* v. *The Presiding Officer, Labour Court,*(9), *Santosh Gupta* v. *State Bank of Patiala,* (10), *Mohan Lal* v. *Management of M/s Bharat Electronics Ltd.* (11), *Surendra Kumar Verma* v. *Central Government Industrial Tribunal-cum-Labour Court,* (12) *L. Robert D'Souza* v. *Executive Engineer, Southern Railway and another,* (13), *Management of Karnataka State Road Transport Coporation, Bangalore* v. *M. Boraiah,* (14), *Gammon Indian Ltd.* v. *Niranjan Dass,* (15), *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh* v. *Presiding Officer, Labour Court, Chandigarh and others,* (16), and Sections 2(ra), 25-T, 25-U as well as Fifth Schedule (Part-I), the Court held as under :—

> "Paragraphs 5 and 10 of the Fifth Schedule show that termination of service of workman by way of discharge or dismissal will be treated as unfair labour practice, if it is established that the same has been brought about by way of victimization or where the employer's action is not in good faith but is in the colourable exercise of the employer's rights or where termination is for patently false reason or where there is an utter

(4) R.S.J. 369 (4) A.I.R. 1957 S.C. 121
(5) 1963 Suppl. (1) S.L.R. 730
(6) 1964 (5) S.C.R. 602
(7) 1978 (1) S.L.R. 591
(8) A.I.R. 1976 S.C. 1111
(9) 1977 (1) S.C.R. 586
(10) A.I.R. 1980 S.C. 1219
(11) A.I.R. 1981 S.C. 1253
(12) A.I.R. 1981 S.C. 422
(13) A.I.R. 1982 S.C. 854
(14) 1984 (1) S.C.C. 243
(15) 1984 (1) S.C.C. 509
(16) J.T. 1990 (2) S.C. 489

disregard or principles of natural justice in the conduct of enquiry or where the misconduct is of minor or technical nature. Similarly, where the employer engages workmen as "badli", casual or temporary and continues *them in the same capacity for years together with the object of depriving them of the status and privileges of permanent workmen, the employer's action would be termed as unfair labour practice.*

Therefore, while interpreting and applying various parts of Section 2(oo), the competent Labour Court/Tribunal shall have to keep in mind the provisions of Section 2(ra) read with Section 25-T and U and various paragraphs of the Fifth Schedule and if it is found that the action of the employer to engage a workman on casual basis or as a daily-wager or even on temporary basis for long periods of time with intermittent breaks and subsequent termination of service of such workman on the pretext of nonrenewal of contract of employment or termination of contract of employment onthe basis of a stipulation contained therein is an act of unfair labour practice, such an action of the employer will have to be nullified and the Court will be fully justified in rejecting the plea of the employer that termination of service of the workman does not amount to retrenchment but is covered by clause (bb). In the context of various paragraphs of the Fifth Schedule, clause (bb) which is an exception to the principal section will have to be given a narrow interpretation. This clause has the effect of taking away a right which was vesting in the workman prior to its insertion. Therefore, the same cannot be allowed to be used as a tool of exploitation by the employer who, as already observed above enjoys a position of dominance as against the workman. The employer is always in a position to dictate the terms of service *vis-a-vis* the workman or to be workman. The employer can unilaterly impose oppressive and unreasonable conditions of service and the workman will be left with little choice but to accept all such conditions. The employee cannot possible protest against the incorporation of arbitrary unreasonable and even unconsciounable conditions of service in the contract of employer. Any such protest by the employee or a to be employee will cost him job or a

chance to enter employment. *In respect of a work of permanent or continuing nature, the employer can always give an employment of fixed term or incorporate a condition in the contract of employment/appointment letter that the employment will come to an end automatically after a particular period or on the happening of a particular event. In such a situation, if the Court finds that the conditions are arbitrary and unreasonable and the employer has forced these conditions upon a workman with the sole object of avoiding his obligation under the Industrial Disputes Act, a bald plea of the employer that the termination of service is covered by clause (bb) will be liable to be rejected."*

(emphasis supplied)

(5) The Division Bench also referred to general principles of law relating to *ad hoc* appointments and after taking note of the decisions of the Supreme Court in *State of Haryana* v. *Piara Singh,* (17), *Manager, Government Branch Press* v. *D.B. Balliappa,* (18), *E.P. Royappa* v. *State of Tamil Nadu* (19), *Central Inland Water Transport Corporation* v. *Brojonath Ganguly* (20), it held as under :—

"Though the principle laid down by the Supreme Court in cases relating to public appointment cannot strictly be applied to the cases of workmen, who are governed by the provisions of the Industrial Disputes Act, it is perfectly legitimate to take the view that the rationale of the principle laid down in those cases can certainly be applied to the cases arising under the Act. It is interesting to note that rule of 'last come first go' has been statutorily recognised in the cases of industrial workers by virtue of Section 25-G. Likewise, the duty imposed on the employer to make an offer of re-employment to a retrenched employee in terms of Section 25-H of the Act shows that another facet of equality clause has been incorporated in the act. *By treating the employer's action of dismissal or discharge*

(17) 1992 (4) S.C.C. 118
(18) A.I.R. 1979 S.C. 429
(19) A.I.R. 1974 S.C. 555
(20) A.I.R. 1986 S.C. 1571

brought about in colourable exercise of the employer's rights of where there is want of good faith as unfair labour practice of termination of service for patently false reasons or other similar acts of the employer enumerated as acts of unfair labour practice. the legislature has indirectly incorporated the Equality Clause in the Act. The new dimension given to the provisions of Article 14 by the apex Court in Maneka Gandhi v. Union of India, AIR 1978 SC 597 and further extension of those principles in Shrilekha Vidyarthi v. State of Uttar Pradesh, AIR 1991 SC 537, virtually find their reflection in various paragraphs of the Fifth Schedule. In fact, what is implicit in the 'equality clause' enshrined in Articles 14 and 16 has been made explicit in the Fifth Schedule.

Therefore, in every case of termination of service of a workman, where the workman claims that he has worked for a period of 240 days in a period of twelve months and termination of his service is void for want of compliance with the requirement of Section 25-F and where the employer pleads that termination of service has been brought about in accordance with the terms of contract of employment or termination is as a result of non-extension of term of employment the Court will have to carefully scrutinise all the facts and apply the relevant provisions of law. *It will be the duty of the Court to determine the nature of employment with reference to the nature of duties performed by the workman and the type of job for which he was employed. Once the employee establishes that he was employed for a work of permanent/continuous nature and that employer has arbitrarily terminated his service in order to defeat his rights under the Industrial Disputes Act or other labour legislations, a presumption can appropriately be drawn by the Court that the employer's action amounts to unfair labour practice. In such a case, burden will lie on the employer to prove that the workman was engaged to do a particular job and even though the employee may have worked for 240 days such employment should be treated as covered by the amended clause because the service was terminated on the completion of the work. A stipulation in the contract that the employment would be for a specified period or till the completion of a*

particular job may legitimately bring the termination of service within the ambit of clause (bb). However, if the employer resorts to methodology of giving fixed term appointment with a view to take it out of the Section 2(oo) and terminate the service despite the continuity of the work and job requirements the Court may be justified to draw an inference that the employer's action lacs bona fide or that he has unfairly resorted to his right to terminate the service of the employees."

(Emphasis supplied)

(6) The Court also made reference to Judgments of the various High Court in *Shailendra Nath Shukla* v. *Vice Chancellor, Allahabad University and others* (21), *Dilip Hanumantrao Shirke* v. *Zila Parishad, Yavatmal* (22), *K. Rajendran* v. *Director, P. and E. Corporation of India Ltd., New Delhi* (23), *Jayabharat Printers and Publishers Pvt. Ltd.* v. *Labour Court, Kozkhikode and others* (24), *Balbir Singh* v. *Kurukshetra Central Cooperative Bank Ltd.* (25), *Raj Bahadur* v. *General Manager, Food Specialities Limited* (26), *Haryana State Federation of Consumers Co-op. Wholesale Stores Ltd.* v. *Presiding Officer, Labour Court* (27), *Kurukshetra Central Cooperative Bank Ltd.*, v. *State of Haryana* (28), *J.J. Shrimali* v. *District Development Officer, Zila Panchayat* (29), *Chakardhar Tripathy* v. *State of Orissa* (30), *Ram Prasad* v. *State of Rajasthan* (31) M. *Venugopal* v. *The Divisional Manager Life Insurance Corporation of India* (32) and then held as under :—

"From the above, it is clear that termination of service of a workman who has worked under an employer for 240 days in a period of twelve months preceding the date of termination of service will ordinarily be declared as void

(21) 1987 Lab. I.C. 1607
(22) 1990 Lab. I.C. 100
(23) 1992 Lab. I.C. 909
(24) 1994 (11) L.L.J. 373
(25) 1990 L.L.J. 443
(26) 1991 (1) P.L.R. 631
(27) 1991 (1) S.C.T. 697
(28) 1993 (1) S.C.T. 109
(29) 1989 Lab. I.C. 689
(30) 1992 Lab. I.C. 1813
(31) 1992 Lab. I.C. 2139
(32) J.T. 1994 (1) S.C. 281

if it is found that the employer has violated the provisions of Section 25-F(a) and (b). If the employer resists the claim of the workman and invokes Section 2(oo)(bb), burden lies on the employer to show that though the employee has worked for 240 days in twelve months prior to termination of his service, such termination of service cannot be treated as retrenchment because it is in accordance with the terms of the contract of employment or on account of non-renewal of the contract of employment. It has also to be shown by the employer that the workman had been employed for a specified work and the job which was being performed by the employee is no more required. *Only a bona fide exercise of right by an employer to terminate the service in terms of the contract of employment or for non-renewal of the contract will be covered by the clause (bb). If the Court finds that the exercise of rights by the employer is not bona fide or the employer has adopted the methodology of fixed term employment as a conduit or mechanism to frustrate the rights of the workman, the termination of the service will not be covered by the exception contained in clause (bb). Instead the action of the employer will have to be treated as an act of unfair labour practice, as specified in the Fifth Schedule of the Act. The various judgments rendered by the different High Courts and the Supreme Court clearly bring out the principle that only a bona fide exercise of the powers by the employer in cases where the work is of specified nature or where the temporary employee is replaced by a regular employee the action of the employer will be upheld. In all other cases, the termination of service will be treated as retrenchment unless they are covered by other exceptions set out hereinabove."*

(7) Applying the law laid down in the above mentioned decision, we hold that the impugned award passed by the Labour Court suffers from an error of law apparent on the face of it because the Labour Court has failed to apply itself to the background in which the services of the petitioner were terminated on the pretext of non-renewal of contract of service/non-extension of the term of employment.

(8) In the result, we allow the writ petition and set aside the award Annexure-P.5. Reference is answered in favour of the

workman insofar as the issue of reinstatement is concerned. However, for back wages, the petitioner would be at liberty to avail the remedy under Section 33-C(2) of the Industrial Disputes Act, 1947, in view of the judgment of the Supreme Court in the *Managing Director, U.P. Warehousing Corporation and others* v. *Vijay Narayan Vajpayee* (33). It is also made clear that as and when the petitioner makes an application for back wages, the respondents shall be free to plead and prove that she was gainfully employed during the intervening period and as such she is not entitled to whole or part of the back wages.

S.C.K

Before Sat Pal, J

MEHARBAN AND ANOTHER,—*Petitioners*

versus

PUNJAB WAKF BOARD AND ANOTHER,—*Respondents*

C.R. No. 2372 of 1997

30th March, 1998

Code of Civil Procedure, 1908—Order 14, Rl.2—Issue of resjudicata—Such issue requiring evidence—Whether can be treated as preliminary issue.

Held, that a persual of order 14 Rule 2 makes it clear that if the Court is of the opinion that the case or part thereof may be disposed of on an issue of law only it may try that issue first if that issue relates to either jurisdiction of the Court or a bar to the suit created by any law for the time being in force.The issue with regard to *resjudicata* can be treated as a preliminary issue even if it involves production of evidence by the parties.

(Para 5)

R.K. Battas, Sr. Advocate with Mr. Munish Jolly, *for the Petitioners*

Harkesh Manuja, Advocate, S.C. Kapoor, Sr. Advocate with Ashish Kapoor, Advocate *for the Respondents.*

(33) A.I.R. 1980 S.C. 840