IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12829 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT STATE CO-OP AGRI & RURAL DEVELOP BANK LTD

Versus

YOGINIBEN ANILKUMAR JOSHI

Appearance:

1. Special Civil Application No. 12829 of 2000

MR MITUL K SHELAT for Petitioner No. 1-2

MR PH PATHAK for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 14/05/2004

CAV JUDGEMENT

1. In this petition, which is filed under Article 227 of the Constitution of India, the petitioners have challenged the award made by the Labour Court, Kalol

dated 1st July, 2000 in Reference (LCK) No. 348 of 1995. By the said award the petitioners have been directed to reinstate the respondent on the original post with continuity of service and to pay to her the back wages with effect from 24th December, 1997.

2.0. Relevant facts in nutshell, can be stated as under :-

2.1. Petitioner no. 1 is a cooperative bank registered under the provisions of the Gujarat Cooperative Societies Act, 1961. Respondent was appointed in the employment of petitioner no. 1 on daily wage basis by order dated 28th January, 1991. She was appointed for a period of two months. She worked till 30th January, 1991 i.e. for a period of three days. According to the respondent, her service was terminated orally without assigning any reason by the petitioners.

2.2. The respondent, in the year 1995, raised a dispute regarding termination of her service on the ground that it was illegal and she was entitled to be reinstated with full back wages. It appears that the conciliation proceedings failed and, therefore, the Assistant Labour Commissioner, Mehsana vide order dated 22nd December, 1995 referred the industrial dispute for adjudication to Labour Court.

2.3. Before the Labour Court she filed statement of claim at Exh. 5 wherein she averred that she was appointed by the petitioners in its district office as Clerk by letter of appointment dated 21st January, 1991. In response to the said letter, she reported for work on 28th January, 1991 at the said office and a report accordingly was despatched to the head office by petitioner no. 2. However, on 30th January, 1991 in the evening she was relieved from the service by oral order without any prior intimation. She was thereafter never re-employed though persons junior to her had been re-employed. According to her, her service was terminated despite order of this Court to maintain status-quo in the proceedings of Special Civil Application No. 526 of 1991. She has also averred that before relieving her from the service, no prior notice or pay in lieu of the notice or compensation had been paid to her. According to her, the termination of her service was, therefore, illegal and she was required to be reinstated on her original post.

2.4. As against that, the petitioners, while resisting the claim by filing written statement at Exh.

14 have contended that the respondent was given appointment on daily wage basis on 28th January, 1991. Thereafter the recognized workers' union of the petitioners challenged the appointment of the respondent and several other employees of petitioner no. 1 before this Court by filing petition on the ground that the said appointments were not made by the petitioners in accordance with the recruitment regulations and the requisite procedure and hence those appointments were required to be quashed. In view of the same, the respondent was relieved from service in the evening of 30th January, 1991. It was contended that as a daily wager the respondent worked only for three days i.e. 28th January, 29th January and 30th January, 1991. She therefore, did not have any right to claim reinstatement on the original post together with back wages and continuity of service. Finally it was contended that the reference was required to be dismissed.

2.5. Before the Labour Court, both the parties led oral evidence as well as produced documentary evidence in support of their respective cases. The respondent examined herself at Exh. 8 and the petitioners examined one Vasantbhai Ramshankar at Exh. 18. Apart from the documentary evidence that was produced by the parties which included the letter of appointment, the report of respondent, copy of the petition filed before this Court, the correspondence exchanged between the petitioners and the respondent, a list of employees junior to the respondent, etc., the learned advocates for the parties submitted written arguments also before the Labour Court.

3. On the strength of the material produced by the parties, Labour Court came to the conclusion that the termination of service of the respondent was illegal as no prior notice was given and also that no written order was passed assigning the reasons for termination of the service before the contract period. In the opinion of the Court the respondent was required to be reinstated on her original post with continuity of service. So far the payment of back wages is concerned, the Labour Court thought it fit to award the same with effect from 21st December, 1997 i.e. the date on which the reference appears to have been filed before the Labour Court. The petitioners have challenged this award.

4. Mr. Mitul K. Shelat, learned advocate appearing for the petitioners has submitted that the judgment and award made by the Labour Court are erroneous, because the respondent's appointment was not

only on daily wage basis, but it was for a limited period of two months. The petitioners were, therefore, entitled to terminate the same without assigning any reason. According to him action of petitioners was covered under Section 2 (oo) (bb) of the Act. He has further submitted that the petitioners were required to relieve the respondent from the service only because her appointment as well as appointments of several others were challenged by the recognized union of petitioner no. 1 before this Court on the ground that the appointments were made without following the requisite procedure. There was no extraneous consideration nor any malafide intention on the part of the petitioners in doing so. He has also submitted that since the appointment was not in accordance with the rules and regulations, the respondent had no substantive right on the post. Lastly he has submitted that the respondent has approached the Labour Court very late and on the ground to delay alone the Labour Court ought to have dismissed the reference.

4.1. As against that, Mr. P.H. Pathak, learned advocate appearing for the respondent has strongly supported the judgment and award of the Labour Court. According to him no written order of termination of service was passed nor any procedure required to be followed before terminating the service was complied with, hence the order of termination of respondent's service was illegal. He has submitted that the petitioners did not comply with provisions of section 25-G while terminating the service of respondent and Section 25-H of the Act while re-employing the retrenched workmen, read with rules 77 and 78 of the Industrial Disputes (Central) Rules, 1957 (hereinafter referred to as 'the Rules') and the respondent was entitled to be reinstated. He has further submitted that provisions of section 2(oo) (bb) will not be attracted in the present case because the appointment was for two months, whereas the service of the respondent has been terminated on the 3rd day itself and that too without following requisite legal procedure and without complying with the principles of natural justice. He has also submitted that the Labour Court has rightly not gone into the question regarding delay as the provisions of the Limitation Act do not apply to a reference u/S. 10 of the Act. He has, therefore, prayed that the petition does not have any merit and it deserves to be dismissed.

4.2. No other submissions have been made by the learned counsels. They have placed reliance on the decisions of the Apex Court as well as this Court. I will refer to them in due course.

5. Having carefully gone through the record of this petition as well as having carefully considered the rival submissions, it appears that the respondent was appointed on daily wage basis in the service of petitioner no. 1 and after she had worked for three days she was orally asked not to attend the duty. In other words on the 3rd day itself, in the evening, her service was terminated though the employment was for a period of 2 months. Ofcourse, the say of the petitioners is that there was nothing personal against her but it was only because the recognized union of petitioner no. 1 had objected to several appointments including that of the respondent on the ground that these appointments were made without following the selection procedure, her service was terminated and so also the services of about 35 other employees.

5.1. So far the reason advanced by the petitioners to terminate the service of the respondent is concerned, reliance has been placed on the copy of the Special Civil Application No. 526 of 1991 filed before this Court by the Gujarat State Cooperative Land Development Bank Ltd. Employees' Union, which is the recognized union of petitioner no. 1. Perusal of the said petition reveals that the union had strongly objected to the appointments being made on the post of Clerk, etc. by petitioners without publishing advertisement, inviting applications, holding interviews and also without calling names from the Employment Exchange. Judgment of Labour Court shows that this copy is also produced before it. There is no dispute with regard to the fact that the respondent's appointment was made without following the appropriate procedure. Atleast that is the averment made by the petitioners and it is not controverted by the respondent. Therefore, the say of the petitioners that the service of the respondent together with several others was terminated because of the writ petition before this Court appears to be true. So far the order of status-quo issued by this Court is concerned, the respondent has tried to aver that despite the order of status-quo she had been relieved from the service. The Labour Court has also proceeded on the said footing that the status-quo required the petitioners to stay their hands even from discontinuing the services of the respondent and the like employees. However, if the relief clause (A) of the said petition is perused, the prohibitory orders have been sought from this Court by the said petitioning union to the effect that the present petitioner no. 1, which was respondent in that proceeding, be restrained from confirming the service of

irregularly and illegally appointed candidates and also for directing it not to appoint any person without issuing proper public advertisement and without following the proper selection procedure. The petitioners' interpretation, therefore, appears to be that such order did not prohibit them from terminating the service of the employees whose appointment was challenged by the said union. Respondent was one of such employees. The petitioners cannot be accused of deliberately flouting the order of this Court for having discontinued the service of the respondent nor it can be a ground for the Labour Court to quash the action of the petitioners.

5.2. The question that would now arise for consideration is whether the termination of service of the respondent was against the provisions of the Act and in particular the provisions of section 25 G and H of the Act read with rules 77 and 78 of the Rules and whether the respondent was entitled to be reinstated on her original post with all incidental benefits. The submission of Mr. Shelat is that since the appointments were challenged before this Court, they were constrained to cancel them and discontinue such persons from service. There was no other reason for the same. In other words, in the submission of Mr. Shelat the action of the petitioners was bonafide one. He has also submitted that such termination would not amount to "retrenchment" u/S. 2 (oo) but would stand covered under exception (bb). So far Mr. Shelat's submission with regard to section 2 (oo) (bb) of the Act is concerned, it cannot be accepted. Clause (bb) is as under :-

> "(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;"

Admittedly, contract of service was for months and respondent was appointed on daily wage basis. From the judgment of Labour Court it is not at all clear what were the terms and conditions of service. Petitioner has also not produced letter of appointment of respondent on record of this petition. Only communication dated 28th January, 1991 by petitioner no. 1 to its Dist. Officer, Mehsana granting consent for appointment of respondent and one another is produced. It is for two months and on daily wage basis. It is, therefore, presumed that except this, there are no other terms or conditions on the record of the petition. There is therefore, no

stipulation to terminate the contract before expiry of its term. In the present case termination is much before expiry of term of the contract. The action of petitioners does not fall under either of the categories and hence, it is not covered under Clause (bb) of section 2 (oo) of the Act. The Labour Court's conclusion that such action of petitioners amounts to retrenchment within the meaning of section 2 (oo) is proper.

If that be so, whether the petitioners were under any legal obligation to comply with the provisions of section 25-G and H of the Act read with rules 77 and 78 of the Rules or provisions of section 25-F of the Act.

5.3. For ready reference said legal provisions are required to be stated here.

"25-F 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 for 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 or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

25G Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category or 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.

25H. Re-employment of retrenched workmen.Where any workmen are retrenched, and the employer proposes to take into his employment 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 re-employment, and such retrenched workmen who offer themselves for re-employment shall have preference over other persons."

"Rule 77. Maintenance of seniority list of workmen.- The employer shall prepare a list of all workmen in the particular category from which retrenchment is contemplated arranged according to the seniority of their service in that category and cause a copy thereof to be pasted on a notice board in a conspicuous place in the premises of the industrial establishment at least even days before the actual date of retrenchment.

Rule 78. Re-employment of retrenched workmen.(1) At least ten days before the date on which vacancies are to be filled, the employer shall arrange for the display on a notice board in a conspicuous place in the premises of the industrial establishment details of those vacancies and shall also give intimation of those vacancies by registered post to every one of all the retrenched workmen eligible to be considered thereof, to the address given by him at the time of retrenchment or at any time thereafter;

Provided that where the number of such vacancies is less than the number of retrenched workmen, it shall be sufficient if intimation is given by the employer individually to the senior most retrenched workmen in the list referred to in Rule 77 the number of such senior most workmen being double the number of such vacancies;

Provided further that where the vacancy is of a duration of less than one month there shall be no obligation on the employer to send intimation of such vacancy to individual retrenched workmen;

[Provided also that if a retrenched workman, without sufficient cause being shown in writing to the employer, does not offer himself

for the re-employment on the date or dates specified in the intimation sent to him by the employer under this sub-rule, the employer may not intimate to him the vacancies that may be filled on any subsequent occasion]

(2) Immediately after complying with the provisions of sub-rule (1), the employer shall also inform the trade unions connected with the industrial establishment, of the number of vacancies to be filled and names of the retrenched workmen to whom intimation has been sent under that sub-rule;

Provided that the provisions of this sub-rule need not be complied with by the employer in any case where intimation is sent to every one of the workmen mentioned in the list prepared under rule 77."

So far the provisions of section 25-F of the Act are concerned, they will not apply in the present case because the same are in relation to the workman/employee, who has completed one year's service. Here, it was discontinuance of the service of an employee who had worked only for three days. Mr. Pathak has, however, submitted that the application of sections 25-G and 25-H cannot be restricted only to one category i.e. covered under the category of "retrenched workmen", to whom section 25-F applies. According to him, irrespective of application of section 25-F, provisions of sections 25-G and 25-H can be applied effectively to the facts of the present case. He has placed heavy reliance on the decision of the Apex Court rendered in the case of Central Bank of India v/s. S. Satyam reported in AIR 1996 S.C. p.2526, wherein it is held as under :-

"9. The next provision is Section 25-H which is couched in wide language and is capable of application to all retrenched workmen, not merely those covered under Section 25-F. It does not require curtailment of the ordinary meaning of the word "retrenchment" used therein. The provision for reemployment of retrenched workmen merely gives preference to a retrenched workman in the matter of reemployment over other persons. It is enacted for the benefit of the retrenched workmen and there is no reason to restrict its ordinary meaning which promotes the object of the enactment without causing any prejudice to a better placed retrenched workman.

10. Chapter V-A providing for retrenchment is not enacted only for the benefit of the workmen to whom Section 25-F applies but for all cases of retrenchment and, therefore, there is no reason to restrict application of Section 25-H therein only to one category of retrenched workmen. We are, therefore, unable to accept the contention of Shri Pai that a restricted meaning should be given to the word "retrenchment" in Section 25-H. This contention is, therefore, rejected."

It is also held as under :-

"7. Rule 77 requires the employer to maintain a seniority list of workmen in that particular category from which retrenchment is contemplated arranged according to the seniority of their service. The category of workmen to whom Section 25-F applies is distinct from those to whom it is inapplicable. There is no practical difficulty in maintenance of seniority list of workmen with reference to the particular category to which they belong. Rule 77, therefore, does not present any difficulty. Rule 78, speaks of retrenched workmen eligible to be considered for filling the vacancies and here also the distinction based on the category of workmen can be maintained because those falling in the category of Section 25-F are entitled to be placed higher than those who do not fall in that category. It is no doubt true that persons who have been retrenched after a longer period of service which places them higher in the seniority list are entitled to be considered for reemployment earlier than those placed lower because of a lesser period of service. In this manner, a workman falling in the lower category because of not being covered by Section 25-F can claim consideration for reemployment only if an eligible workman above him in the seniority list is not available. Application of Section 25-H to the other retrenched workmen not covered by Section 25-F does not, in any manner, prejudice those covered by Section 25-F because the question of consideration of any retrenched workman not covered by Section 25-F would arise only, if and when, no retrenchment workman covered by Section 25-F is available for re-employment. There is, thus, no reason to curtail the ordinary meaning of "retrenched

workmen" in Section 25-H because of Rules 77 and 78, even assuming the rules framed under the Act could have that effect."

Normally while exercising jurisdiction under Article 227 of the Constitution of India this Court will not re-appreciate the evidence adduced before the trial Court. It is only when the submissions which are made, involve mixed questions of facts and law, some exercise in the form of verification of the material on record is required to be made to find out whether there was evidence substantiating the allegation regarding violation of aforesaid provisions. In the present case, whether compliance of section 25-G and 25-H is there, is a mixed question of fact and law and when extensive arguments have been made by the learned counsels on this aspect, it has become necessary for me to deal with the facts as they emerge from the record of this petition.

5.4. So far the provisions of section 25-G and H are concerned, though it is averred by the respondent that in the present case "last come, first go" principle has been violated and further that even while re-employing the persons those who were junior to the respondent have been taken back in the service and the respondent has been left out. The fact regarding re-employment of the juniors to the respondent is not seriously disputed by the petitioners. However, they have contended that because of the necessity and work load there was acute need to employ people in petitioner no. 1 and the Managing Director was given appropriate powers by the Board of Directors to reappoint the persons who were relieved from the service, but these persons have not been automatically re-employed, they have first applied in response to the public advertisement and then undergone the prescribed selection process.

5.5. It may be noted here that the documentary evidence that has been produced by respondent includes only the list of persons who are junior to respondent and who have been re-employed by the petitioners. There is no material to show that persons who were similarly situated i.e. whose appointment was made for temporary period without following the selection procedure; and who were junior to the respondent, had been retained in service while terminating the service of the respondent. Admittedly, there was enbloc termination of services of 35 employees who were irregularly appointed by petitioner no. 1. There does not appear to be any violation of "last come, first go" rule and thereby provisions of section 25-G of the Act.

5.6. Further the record shows that from time to time in accordance with the necessity, public advertisements have been issued and proper procedure for making appointment has been resorted to. If that be so, the respondent could have, like the other employees, responded to the advertisement issued by the petitioners and could have, through proper channel, got selected for appointment. But it appears that she has not done so. Instead after waiting for about four years she has chosen to raise this dispute. When the entire issue arose with regard to illegal appointments, one would not expect the petitioners to burn their fingers again by re-employing the respondent without following any procedure. From the record it appears that everybody was given equal chance to get the employment by issuance of public advertisement and holding due selection process. One can understand that if the respondent, despite having cleared all the requirements for getting selected for the appointment on the post of the Clerk, was not given appointment and her juniors were preferred, this grievance could have been legitimate one. But now the things are not equal. When the opportunity that was extended to all concerned was not seized by the respondent, she now cannot agitate that her juniors have been appointed and she has been left out. Section 25-H would come into play only if all things were equal and other similarly situated junior employees had been reappointed without following due procedure or the selection process by the petitioners and the respondent had been left out. But that does not appear to be so in the present case. Publication of advertisement inviting applications was good enough to give intimation to all concerned regarding intention of petitioner no. 1. So far rules 77 and 78 are concerned, obviously the requirement prescribed therein are to be complied with when the appointments are made in accordance with the due procedure, rules and regulations and after complying with the selection process. As stated above, it is almost an admitted position that in the case of respondent as well as 35 other employees this was not done and Special Civil Application No. 526 of 1991 came to be filed to challenge such appointments. Even assuming that there is noncompliance of rules 77 and 78 by the petitioners, at the most it will entail penal consequences as contemplated in rule 79 of the Rules, since, as observed earlier there is no violation of provisions of Section 25-G and H of the Act. It is pertinent to note that there is not even whisper in the pleadings regarding noncompliance of the said provisions. This being a question of fact, it ought to have been raised before the Labour Court. The submission of Mr. Pathak based on the provisions of section 25-G and H read

with rules 77 and 78 cannot be accepted.

5.7. From the record it appears that so far the petitioner no. 1 is concerned, the procedure for appointment is issuance of public advertisement, inviting applications, holding interviews and selecting the persons of merit. This procedure has not been followed in the matter of appointments of the respondent and several other employees. When the appointments are made without any advertisement for making application and without holding due process of selection, such appointments would not confer any right upon the appointees. They even cannot claim for any equitable relief from any Court. The Apex Court in the decision rendered in the case of Nazira Begum Lashkar v. State of Assam reported in A.I.R. 2001 S.C. p.102 has held as under :-

" ..... As has been stated earlier, while the matter was pending before the Division Bench, the Court was persuaded to appoint an Inquiry Committee, in view of the allegations of gross irregularities and illegalities committed in the matter of appointment of teachers in different primary schools in different Districts. The said Committee has gone into details and recorded findings that the provisions of the Recruitment Rules have not at all been followed. The High Court even has gone to the extent of recording a finding that there has been no selection, no interview or even fake or ghost interviews and there has been tampering of records and fabricating of documents. Since the appointments to the posts are governed by a set of statutory rules, and the prescribed procedure therein had not been followed and on the other hand appointments have been made indiscriminately, immediately after posts were allotted to different Districts at the behest of some unseen hands, such appointments would not confer any right on the appointee nor such appointee can claim even any equitable relief from any Court. The apart, the appointments stood annuled hardly after six months from the date of appointments and the appointees cannot claim to be continuing for an unusual long period, so as to claim a humanitarian consideration in their case. The decision cited by Mr. Parikh, in support of his contention, not only do not support his contention but on the other hand, appears to us to be against his contention. In Ashwani Kumar's

> case , 1997 (2) S.C.C. 1, this Court in no uncertain terms held that as the appointments had been made illegally and contrary to all recognised recruitment procedures and were highly arbitrary, the same were not binding on the State of Bihar. This Court further went on to hold in the aforesaid case that the initial appointments having been made contrary to the statutory rules, the continuance of such appointees must be held to be totally unauthorised and no right would accrue to the incumbent on that score. The Court had also held that it cannot be said that principles of natural justice were violated or full opprotunity was not given to the employees concerned to have their say in the matter before their appointments were recalled and terminated......."

When that is the situation, the illegal appointment and that too on daily wage basis for a period of two months would not confer any right in favour of the respondent. She cannot make any complaint with regard to infringement of her any right or violation of principles of natural justice by the petitioners.

5.8. Thus, to summarise, the judgment and award which are completely based on the finding regarding violation of provisions of section 25-H are erroneous. Though the Labour Court has not mentioned the relevant section, its discussion and appreciation of evidence have proceeded on the said line. Further Mr. Pathak's submissions regarding violation of sections 25-G and H of the Act read with rules 77 and 78 of the Rules cannot support the judgment. Further dehors the violation of aforesaid provisions, respondent has no right to claim the relief regarding reinstatement together with all other incidental benefits when her own appointment was not in accordance with due process of selection. For these reasons alone, the judgment and award are required to be quashed and set aside. However, both the learned advocates have extensively made submissions on the aspects of delay and violation of principles of natural justice, hence, I will now proceed to consider the same.

6. It is to be seen that as and when the necessity arose, petitioner no. 1 had issued public advertisement and after observing the selection process, had appointed some persons which included even employees junior to the respondent. These employees have stood the test of scrutiny by going through the selection process and got selected for a regular appointment. These people

seem to have been already appointed and discharging their duties on various posts. If at all the respondent was serious about the employment with petitioner no. 1, she would have also responded to the advertisement or at least challenged termination of her service at the earliest. She has chosen to wait for 4 years. In the meanwhile several persons who may be junior to her have been appointed after following the due procedure. If her appointment after several years is to be made, most probably it would mean that one of the duly selected persons will have to make way for her, which cannot be permitted especially when such person is not a party to the present proceedings. The aspect of delay has been brought to the notice of the Labour Court by the petitioners. The Labour Court has simply turned it down on the ground that the petitioners had failed to raise this issue in the conciliation proceedings. The submission of Mr. Shelat with regard to delay has been hotly contested by Mr. Pathak and he has placed heavy reliance on the decision rendered by the Apex Court in the case of Ajaib Singh v. Sirhind Cooperative Marketing-cum-Processing Service Society Ltd. reported in AIR 1999 S.C. p.1351. It is laid down by the Apex Court as under :-

> "10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the Tribunal, Labour Court or board, dealing with the case can approximately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned counsel for the respondent - management on the full bench judgment of the Punjab and Haryana High Court in Ram Chander Morya v. State of Haryana, (1999) 1 SCT 141 is also of no help to him. In that case the High Court nowhere held that the provisions of Article 137 of the Limitation Act were

applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases. " However, it went on further to say that "reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay." We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under Section 37-C of the Act to be adjudicated. It is not the function of the Court to prescribe the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do now make laws. Personal view of the Judges presiding the Court cannot be stretched to authorize them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the Courts/Boards and tribunal under the Act.

11. In the instant case, the respondent management is not shown to have taken any plea regarding as is evident from the issues framed by the Labour Court. The only plea raised in defence was that the Labour Court had no jurisdiction to adjudicate the reference and the termination of the services of the workman was justified. Had this plea been raised, the workman would have been in a position to show the circumstances preventing him in approaching the Court at an earlier stage or even to satisfy the Court that such a plea was not sustainable after the reference was made by the Government. The learned Judges of the High Court, therefore, were not justified in holding that the workman had not given any explanation as to why the demand notice had been issued after a long period. The findings of facts returned by the High Court in writ proceedings, even without pleadings were,

> therefore, unjustified. The High Court was also not justified in holding that the Courts were bound to render an even handed justice by keeping balance between the two different parties. Such an approach totally ignores the aims and object and the social object sought to be achieved by the Act. Even after noticing that "it is true that a fight between the workman and the management is not a just between equals," the Court was not justified to make them equals while returning the findings, which it allowed to prevail, would result in frustration of the purpose of the enactment. The workman appears to be justified in complaining that in the absence of any plea on behalf of the management and any evidence, regarding delay, he could not be deprived of the benefits under the Act merely on technicalities of law. The High Court appears to have substituted its opinion for the opinion of the Labour Court which was not permissible in proceedings under Articles 226/227 of the Constitution."

There cannot be any dispute with the aforesaid propositions. But, so far the present case is concerned, the facts on record show that plea regarding delay was raised before the Labour Court and it was not raised for the first time before this Court. Secondly that delay is not the only ground on which this matter is being decided and there are other reasons also for not granting the reliefs claimed by the respondent. Further the Apex Court has no-doubt observed that the concerned High Court was not justified in holding that the Courts were bound to render an even handed justice by keeping balance between the two different parties because such an approach totally ignores the aims and object and the social object sought to be achieved by the Act. These observations are made by the Apex Court keeping in view two factors, namely that Article 137 of the Schedule to the Limitation Act, 1963 is not applicable to a reference u/S. 10 of the Act and secondly that the High Court had made aforesaid proposition of equity after observing "it is true that a fight between the workman and the management is not a just between equals." According to the Apex Court it was not proper for the High Court to make them equals while returning the findings. In the instant case apparently it may appear that it is a fight between petitioner no. 1 and respondent but in reality it will have its repercussions on the person of the level of respondent only. If reinstatement is to be granted, most probably, one of the juniors will have to go on the

basis of 'last come, first go' principle. When the delay is being considered to weigh the equities between two equals certainly the aspect of prejudice is required to be seen vis-a-vis employee who is likely to suffer adversely with the reinstatement of the respondent. It is evident from the record that those who have been taken subsequently in the employment including the persons junior to the respondent, have secured employment subsequently by going through the legal process. Respondent has not done so. Further it has to be noted that the respondent was relieved from service vide order dated 30th January, 1991. It is also clear from the judgment that the complaint regarding alleged illegal termination was made after a period of 4 years and the reference was thereafter made by order dated 22nd December, 1995, wherein the averment has been made that juniors have been accommodated in the employment, but she has been left out by the petitioner and thereafter the award is made on 1st July, 2000. It is, therefore, clear that between the date of her relieving from the service and the date of the reference the juniors have been accommodated. This is an undisputed fact. It is to be further noted that the respondent has not rendered any explanation before the Labour Court why she took 4 years to raise the demand. In light of this background, it is very clear, even if it is not specifically pleaded by the petitioner that prejudice is certainly likely to be caused to the junior employee, who will be required to quit the job with a view to accommodate her. Certainly the aims and object and the social object sought to be achieved by the Act does not contemplate a situation where the legally appointed employee should be asked to make way for granting back-door entry to a person who once upon a time was his or her senior and that too without affording any opportunity of hearing to such person.

6.1. Thus, when the equities are weighed between two equals, reliance can easily be placed on the decision rendered by the Apex Court in the case of Union of India v. Kishorilal Bablani reported in AIR 1999 S.C. P. 517. Although in the facts of that case the Apex Court had taken view in favour of the concerned employee and had declined to take away the benefit which the said employee had obtained under the orders of the Tribunal, on the aspect of delay certain observations that have been made by the Apex Court are required to be reproduced here :-

"6..... Delay defeats equity is a well known principle of jurisprudence. Delays of 15 and 20

years cannot be overlooked when an applicant before the Court seeks equity. It is quite clear that the applicants for all these years had no legal right to any particular post. After more than 10 years, the process of selection and notification of vacancies cannot be and ought not to be reopened in the interest of the proper functioning and morale of the concerned services. It would also jeopardies the existing positions of a very large number of members of that service. ....."

6.2. Further I am fortified in forming aforesaid opinion by yet another judgment of the Apex Court rendered in the case of Central Bank of India v/s. S. Satyam [supra], wherein the Apex Court has held as under :-

"11. The other submission of Shri Pai, however, merits acceptance. All the retrenched workmen involved in the present case were employed for short periods between 1974 to 1976. It was only in 1982 that a writ petition was filed by them to claim this benefit. The order persons employed in the industry during the intervening period of several years have not been impleaded. Third party interest have arisen during the interregnum. These third parties are also workmen employed in the industry during the intervening period of several years. Grant of relief to the writ petitioners (respondents herein) may result in displacement of those other workmen who have not been impleaded in these proceedings, if the respondents have any claim for reemployment. The laches leading to the long delay after which the writ petition was filed in 1982 is sufficient to disentitle them to the grant of any relief in the writ petition. Moreover, there is not even a suggestion made or any material produced to show that on the construction we have made of Section 25-H, the respondents would be entitled to get any relief in the highly belated writ petition after a lapse of several years by way of preference over any person employed during the intervening period. In our opinion, this alone was sufficient for the High Court to decline any relief to them. It was urged by learned counsel for the respondents that only a limited relief has been granted to the respondents which need not be disturbed. In our opinion, the lapse of a long period of several

years prior to the filing of the writ petition is sufficient to decline any relief to the respondents."

Mr. Pathak has, however, tried to distinguish this principle laid down by the Apex Court regarding "delay defeats equity" by contending that it has been laid down in the writ petition proceedings under Article 226 of the Constitution of India and not in a proceeding arising from respondent u/S. 10 of the Act. Anyhow the principle laid down in any proceedings with regard to prejudice that may be caused on account of delay would remain the same, irrespective of the nature of the proceedings.

6.3. Mr. Pathak has placed reliance on the following decisions :-

(i) Samishta Dube v/s. City Board, Etawah reported in AIR 1999 S.C. P. 1056 in support of the contention that the last come first go principle will apply in the case of daily wager also. However, as stated above, in the present case all those who were illegally appointed, their services were terminated enbloc, the respondent being one of them. Therefore, there was no question of retaining any similarly situated junior while terminating her service. So far the re-employment is concerned, it has been adequately discussed above that she cannot find any fault on that count with the petitioners, since her juniors have been reappointed in accordance with the procedure laid down. Similarly he has also placed reliance on (ii) G.E.B. v/s. N.K. Bhamre reported in 2002 (3) G.L.R. p. 2717, (iii) Union of India v/s. Bachu Badia reported in 2001 (3) G.L.R. p. 2734 and (iv) S.M.N. Sahkari Bank v/s. Mamtaben reported in 2002 (1) G.L.R. p.755. For the reasons stated above, these decisions will not apply to the facts of the present case. He has also placed reliance on the decision rendered in the case of Sub-Divisional Soil Conservator Officer, Idar v. M.M. Saiyed reported in 1990 (1) G.L.R. at page 495 wherein the Division Bench of this Court has, while confirming the judgment of the learned Single Judge, held that since the service of the temporary Government servant could be terminated only after due notice or by paying salary for the notice period in accordance with rule 33 (1)(b) of the Bombay Civil Services Rules, 1959 and that had not been done while terminating the service of the respondent of that Letters Patent Appeal who was a temporary servant. The Division Bench held that the termination was bad in law and the aforesaid rule was fully applicable. While

deciding the said appeal the Division Bench had placed reliance on the decision of the Apex Court rendered in the case of Raj Kumar v/s. Union of India reported in AIR 1975 S.C. p.536 wherein identical rule 5 (1) (a) of the Central Services (Temporary Service) Rules, 1965 was interpreted by the Apex Court. It is, therefore, very clear that the said decision is totally based on the provisions of Bombay Civil Service Rules, and in particular rule 33 (1)(b). In the instant case the petitioner is a cooperative bank incorporated and registered under the provisions of the Gujarat Cooperative Societies Act. The provisions of Bombay Civil Service Rules would not apply to the instant case. The respondent has also not shown any similar rule or bye-law by which the administration of the said bank is being governed. In absence of such provision, this decision will not apply to the present case.

7. In view of the aforesaid, this petition deserves to be allowed. The judgment and award rendered by the Labour Court in Reference (LCK) No. 348 of 1995 are quashed and set aside. Rule made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

* Pansala.