

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION NO.408 OF 2016
WITH
NOTICE OF MOTION NO.471 OF 2016
IN
WRIT PETITION NO.3063 OF 2014**

Sanjay B. Patil & Ors.

.. Applicants

IN THE MATTER OF:

Bank of Baroda

.. Petitioner

vs.

Shri Shashikant Pitale & Ors.

.. Respondents

Mr.Lancy D'souza a/w Ms.Deepika Agarwal i/b Mr.V.M.Parkar for the petitioner

Mr.H.D.Buch i/b Mr.S.K.More for the applicant in Notice of Motion No.408 of 2016

Mr.B.K.Barve a/w Mr.Sandeep Barve, Ms.Archana Lad i/b M/s.B.K.Barve & Co. for the applicant in Notice of Motion No.471 of 2016 / org.respondent no.41

**CORAM : K. K. TATED, J.
DATE : APRIL 7, 2017**

P.C.:

1 Heard the learned Counsel for the parties.

2 The two notice of motions are preferred by some of the original respondent workers under section 17-B of the Industrial Disputes Act,

1947 for directing the petitioner to pay full wages during the pendency of the Writ Petition No.3063 of 2014.

3 In the present proceeding, the petitioner removed in all 45 workmen from their establishment. Hence, those workmen applied to the Ministry of Labour and Employment for their grievances. The Government of India, Ministry of Labour and Employment by its order dated 29.9.2003 in exercise of the powers conferred by clause (d) of sub section 1 and sub section 2(A) of section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to as the said Act) had referred the dispute to the Central Government Industrial Tribunal No.2 for adjudication of the following point:

“Whether the action of the management of Bank of Baroda in terminating the services of 45 workmen list enclosed is justified?”

“If not, what relief 45 workmen are entitled to?”

4 The Industrial Court considering the pleading of both the parties framed following issues for its determination:

Sr.No.	Issues	Findings
1.	Are the workmen involved in the reference employees of the first party?	Yes
2.	Do they prove that they were illegally terminated?	Yes
3.	Are they entitled to reinstatement and full back wages?	As per order below.
4.	What order?	As per final order

5 After considering the evidence on record, the learned Presiding Officer, Central Government Industrial Tribunal No.2, Mumbai in Reference CGIT-2/64 of 2003 directed petitioner to reinstate all the 45 workmen in service with 30% back wages with all other consequential benefits and continuity of service. Operative part of the said order reads thus:

“ORDER

- (i) Reference is partly allowed with no order as to cost.
- (ii) The retrenchment of the workmen under reference is declared to be in violation of Section 25 F & G of the I.D. Act, 1947.
- (iii) The management is directed to reinstate these workmen in the service with 30% back wages and all other consequential benefits and continuity of service.
- (iv) Services of these workmen be regularised at par with the other similarly placed workmen as per their seniority and in accordance with the settlement.”

6 Being aggrieved by the said Award dated 18.6.2014 passed by Industrial Tribunal, Mumbai, the petitioners preferred the present Writ Petition. The said Writ Petition was admitted by this court on 5.8.2015 and granted interim relief in terms of prayer clause (b) which reads thus:

“(b) That pending hearing and final disposal of this petition the implementation / operation / enforcement of the Impugned Award dated 18th June, 2014, passed by the Learned Tribunal, Mumbai in Reference CGIT No.2/64 of 2003, kindly be stayed.”

7 As the petition filed by the petitioner was admitted by this court and the court had granted interim relief on 5.8.2015, the applicants preferred the present Notice of Motions under section 17-B of the said Act for direction to the petitioner to pay them their monthly wages as last drawn during the pendency of the present Writ Petition.

8 Section 17-B was introduced in the Industrial Disputes Act, 1947 to relieve the concerned workmen from the hardship caused by the delay in implementation of the award as a result of pendency of challenge to the award before the High Courts or the Supreme Court, in any case, where the Labour Court or Tribunal has directed his reinstatement. The objects and reasons for enacting the said provision were as follows:

“When Labour Courts passes award of reinstatement, these are often contested by an employer in the Supreme Court or High Courts. It was felt that the delay in the implementation of the award causes hardship to the workmen concerned. It was, therefore, proposed to provide payment of the wages last drawn by the workmen concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court / High Court.”

The Supreme Court has noted in the case of ***Dena Bank v/s. K.T.Patel 1998 1 CLR 191*** the object underlying the enactment of the provision was to give relief to the workmen in whose favour award of reinstatement has been passed and the award is challenged before the High Court or the Supreme Court. The delay caused in implementation of the award as a result of pendency of the proceedings would result into hardship inasmuch as the workmen are denied the relief of reinstatement and payment of wages.

NOTICE OF MOTION NO.408 OF 2016

9 The learned Counsel for the applicant submits that though the impugned award passed by the Industrial Court on 5.8.2015 was in favour of 45 workers, they preferred the present Notice of Motion on behalf of only 27 workers.

10 The learned Counsel for the applicant submits that the applicant tried to procure the employment during the period from 5.8.2015 as also during the pendency of the Reference (CGIT)No.2/64 of 2003 before the Tribunal, but they were not able to procure any permanent employment for the entire period of their termination and subsequent thereto.

11 The learned Counsel for the applicant submits that the applicant no.1 Sanjay B. Patil was farming for this period. He submits that the applicant no.1 in his affidavit in support of Notice of Motion dated 2.5.2016 specifically stated in paragraph 5, 6 and 7 that though he made efforts for employment, nothing materialised. During this period, he was working as a farm worker on a farm to earn his livelihood. In support of his contention, he relied on paragraph 5, 6 and 7 of applicant no.1's affidavit in support of Notice of Motion dated 2.5.2016 which reads thus:

“5. I say and submit that I tried to procure employment during the period after 5.8.2015 as also during the period prior thereto i.e. during the pendency of the Reference (CGIT) 2/64 of 2003 before the Tribunal. I say and submit that I have not been able to procure any permanent employment for the entire period of my termination and subsequent thereto. In other words till date I am

unemployed and inspite of making sincere efforts I have not been able to procure any permanent employment and at present I am working as a farm hand on a farm to earn my livelihood.

6. I further say and submit that during the entire period of my unemployment as a result of my termination I am supported financially by my family. In other words I am supported by my joint family members.

7. I therefore say and submit that I am in need of permanent employment since I am not employed in any establishment and for any fixed regular monthly or other periodic remuneration whatsoever. I therefore offer myself for employment to the petitioner above named.

12 The learned Counsel for the applicant submits that all the applicants filed affidavit in the present Notice of Motion stating that they tried for permanent employment but the same was not materialised. He submits that during the pendency of the present proceeding as well as proceeding before the Industrial Court, applicants were working as under, for their survival on meagre amount.

Sr. No.	Name	Working as on	Original Respondent No.
1	Sanjay B.Patil	Farm Hand	16
2	Prakash M. Anchan	Domestic Servant	10
3	Tukaram Keshav Mahadik	Occasional Watchman	15
4	Sunil Jangam	Sometimes temporary workmen in Bhivandi Power Loom (different)	16
5	Vijay Amrut Katale	Occasionally watchman	19
6	Rajendra P. Waigankar	Wall Painter (seasonal & festivals).	22
7	Pradeep B. Gowalkar	Odd job.Helper in masonry work	24

8	Gajanan Kale	Farm hand	25
9	Eknath D. Kadam	Barber	26
10	Shivaji Narayan More	Farm hand	28
11	Mahendra Mahakal	Wall Painter (Seasonal & Festival)	29
12	Latesh Shankar Surve	Vegetable Vendor	31
13	Sanjay C. Mohite	Helper in family's audio business	32
14	Naresh G. Pawar	Wall Painter (Seasonal & Festival)	34
15	Prashant B. Mhatre	Vegetable vendor	35
16	Sunil Bhivaji Patil	Odd jobs.	36
17	Vishwambar J. Pednekar	Free lancer Electrician	38
18	Mahesh S. Khetale	Unemployed	27
19	Sachin Bhau Ghag	Odd jobs.	43
20	Hemant M. Mhatre	Unemployed	3
21	Mahesh Pujare	Odd jobs	21
22	Rajesh Dabholkar	Unemployed	33
23	Umesh Dhruva Patil	Unemployed	39

13 The learned Counsel for the applicant submits that the Gujarat High Court in the matter of *University Grant Nirman Board v. Udesinh Togaji Solanki, 2003(2) Gujarat Law Reporter 1281* held that section 17-B of the said Act requires the employer to pay to the workmen who were directed to be reinstated, full wages last drawn by the worker inclusive of any amenities, allowances which are admissible to him under any rules, where employer prefers any proceeding against such award of reinstatement of the Tribunal or Labour Court in a High Court or the Supreme Court. During the pendency of such proceedings, however, the liability of employer will be extinguished if the workmen are employed in any establishment during such period.

14 The learned Counsel for the applicant submits that if the workmen remains unemployed during the pendency of the petition, then he is entitled to the last drawn salary from the date of stay granted by the High Court and or Supreme Court till the hearing and final disposal of Writ Petition / stay proceeding. In support of this contention, he relies on paragraph 13, 14, 16, 18 and 20 of the authority in the matter of *University Grant Nirman Board v. Udesinh Togaji Solanki (Supra)* which reads thus:

“13. Conjoin reading of the Objects and Reasons of Section 17-B of the Industrial Disputes Act, 1947 and the Section itself makes it clear that it is a piece of social welfare and beneficial legislation enacted with a view to ameliorate the hardships caused to the workmen who are deprived of the benefit of reinstatement awarded by the Industrial Tribunals or the Labour Courts on setting aside the wrongful and unfair termination of service by the employers. This section requires employer to pay to the workmen directed to be reinstated full wages last drawn by him inclusive of any maintenance allowance admissible to him under any rules where the employer prefers any proceedings against such award of reinstatement of a Tribunal or the Labour Court in a High Court or the Supreme Court. During the pendency of such proceedings, however, the liability of the employer will be extinguished if the workmen has been employed in any establishment during such period. These provisions, therefore, specifically requires the workmen to file an affidavit before the concerned Court to the effect that he has not been employed in any establishment during such period. Therefore, the employer has to prove to the satisfaction of the concerned Court that the workmen had been employed in any establishment and receiving adequate remuneration. If the employer fails to establish this fact before the concerned Court, then, it is the duty and legal obligation on the part of the employer by way of statutory provision to pay the last drawn monthly wages inclusive of any maintenance allowance to the workmen during the pendency of such proceedings. In such a situation, if the workmen is having any

other income without any employment in any establishment, that cannot be considered as a gainful employment, looking to the language employed by the legislature while enacting the said Section 17-B of the Industrial Disputes Act, 1947. Suppose, after the dismissal of the workmen concerned from the service and till the date of the award of reinstatement by the concerned Labour Court or the Industrial Tribunal as the case may be, if the workmen concerned is doing some miscellaneous petty work or job or any work of self-employment such as opening of the lari galla for pan-beedi or tea stall or the work as a hawker or any such other petty work of any kind and receives any amount or income from such work, the income received from such work cannot be taken into account while deciding an application under Section 17-B of the Industrial Disputes Act, 1947 because the language employed in Section 17-B of the Industrial Disputes Act while enacting the said provisions is very much clear from the proviso to the said section that where it is proved to the satisfaction of the High Court or the Supreme Court that such workmen had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part as the case may be. Thus, in view of the proviso to Section 17-B of the said Act, if the workmen is receiving adequate remuneration by way employment in any establishment, that is the only thing which can be taken into consideration and on that basis, relief under Section 17-B can be denied to the workmen concerned. In other cases like self-employment, driving of auto rickshaw, opening of the pan galla, tea stall, hawking, receiving income of rent amount from his own property, income from the agricultural field, income of the wife, son, daughter, meaning thereby, income from the family members, selling of fruits and vegetables by larry, doing the work of carpenter, mason or such work of any nature, if the workmen is receiving any income, that cannot be taken into consideration as a gainful employment of the workmen for denying the statutory benefits available to the workmen under Section 17-B of the Industrial Disputes Act, 1947. This aspect has been taken into account by some of our High Courts and the view has been taken that unless and until the employer has been able to satisfy the Court concerned that the workmen has been employed in any establishment and

has been receiving adequate remuneration, statutory benefit which is available under Section 17-B of the Industrial Disputes Act, 1947 cannot be denied to the workmen.

In case of *Taj Services Ltd. v. Industrial Tribunal - I and Ors.*, reported in 2000 (1) CLR 563, the Delhi High Court has observed in Paras 6 and 7 as under :

"6. Workmen can be denied the benefits under Section 17-B of the Industrial Disputes Act only when it is proved to the satisfaction of the Court that the workmen have been employed and have been receiving adequate remuneration during the period of pendency of the writ petition. In the case of workmen other than respondent Nos. 2, 4 and 10 there is no allegation by the management that they have been employed and have been receiving adequate remuneration during the pendency of the writ petition. Even in the case of respondent Nos. 2, 4 and 10 the allegation is that they are running their own business but the said allegation is denied by the learned Counsel for the respondents. According to the learned Counsel for the respondents, even if the workmen runs some petty business for the survival of himself and his family, it will not disentitle the workmen for the benefits under Section 17-B of the Industrial Disputes Act. The learned Counsel for the respondents also contended that the proviso to Section 17-B of the Industrial Disputes Act would be attracted only in the case of employment under another employer and receiving adequate remuneration. I find force in the contention of the learned Counsel. As per Section 17-B the workmen is required to file an affidavit to the effect that he had not been "employed in any establishment". Hence under the Proviso to Section 17-B of the I. D. Act what is required to be proved by the employer is that the workmen had been employed in any establishment and had been receiving adequate remuneration from such employment. Being employed for remuneration in any establishment means employment under another employer. It is different from running one's own business or trade in order to remain alive to see the end of the litigation. Hence, I accept the contention of the learned

Counsel for the workmen that respondents 2, 4 and 10 cannot be denied the benefit under Section 17-B of the I. D. Act on the ground that they are running their own business and are receiving profit from such business.

7. At any rate, apart from the averment in the reply of the employer, there is no sufficient material before this Court to come to the conclusion that respondent Nos. 2, 4 and 10 have been running the alleged business. Also there is nothing to prove that they have been receiving adequate remuneration. Once the workmen has filed an affidavit to the effect that he had not been employed in any establishment during the period of pendency of the proceedings in Court, the onus is on the employer to prove to the satisfaction of the Court that the workmen had been so employed and had been receiving adequate remuneration. In this case the employer has not been discharged his duty of providing to the satisfaction of this Court that the above mentioned three workmen had been employed in any establishment and had been receiving adequate remuneration during the pendency of the writ petition. Hence, I do not find any reason to deny the benefits of Section 17-B of the Industrial Disputes Act to the workmen including respondent Nos. 2, 4 and 10."

"14. Similarly, in case of K. Jayaraman v. Quilton Gas Services and Anr., reported in , while examining the nature and scope of Section 17-B as well as conditions precedent for claiming the benefits, it has been observed by the Kerala High Court in Paragraphs 6, 7, 8 and 9 as under :

"6. The objects and reasons in a statute must be given its due importance. The Court cannot turn a Nelson's eye towards it. Thus, in a particular case where there is no evidence to hold that the workmen is not entitled to Section 17-B benefits, whereas the averments in his affidavit disclose the fact that the cumulative conditions under the section are really there, it is necessarily to be held that he is entitled to the benefit.

7. The proviso to Section 17-B postulates satisfaction of

the High Court or the Supreme Court that the workmen was employed and was receiving adequate remuneration during the period or part thereof of the proceedings pending before the High Court or the Supreme Court. From the proviso, it can be discerned that benefits under Section 17-B can be denied only if he had been employed and had been receiving adequate remuneration during the relevant period. Receipt of any remuneration would not be sufficient to deny the benefit. There must be evidence of adequate remuneration being received by the workmen while employed under any establishment.

8. The question whether a workmen running a tea shop and earning income would be entitled to the benefits under Section 17-B was considered in *Hindustan Machine Tools Ltd. v. Labour Court*, where the Rajasthan High Court held that to disentitle a workmen, the benefit of Section 17-B, it should be established that he was employed under an establishment and mere carrying on an activity to make both ends meet will not deprive him of the benefit. The workmen who was engaged in any activity or in some avocation to eke out a livelihood, so long as it is not employment under any establishment cannot be denied the benefit. To deny the benefit, it must certainly be established that he was gainfully employed in some establishment during the pendency of the proceedings before the High Court or the Supreme Court and during that period, he was receiving adequate remuneration.

9. Despite the counter-affidavit, there is no acceptable evidence to hold that the appellant was employed in the garment making unit of his wife. Assuming that he was so employed there is hardly any evidence with regard to the adequacy of his remuneration which he had obtained from that concern. Even if it is assumed that the appellant was getting some income from auto rickshaws as alleged in the counter-affidavit, it would not be sufficient to hold that the proviso to Section 17-B is attracted."

This aspect has also been examined by the Rajasthan High

Court in case of Management, Hindustan Machine Tools Ltd. v. Labour Court, reported in . In Para 7 of the said decision, it has been observed by the Rajasthan High Court as under :

"7. I find force in the contention of the learned Counsel for the petitioner that in the application under Section 17-B and affidavit filed in support thereof, it has been stated that respondent No. 2 is not employed in any 'Industrial Establishment'. The requirement of the section is that the workmen has to state that he is not gainfully employed in any "Establishment". However, in the rejoinder-affidavit, it has been clearly stated that he is not employed in any tea shop, nor is running the same and earning Rs. 150/- per month and further, that he does not pay any rent, as alleged by the petitioner, regarding the premises in which tea shop is running. It may, therefore, be said that even though initially, the requirement of Section 17-B is not satisfied, the subsequent affidavit has made the matters clear. The contention of the learned Counsel for the petitioner is that since the respondent No. 2 is earning Rs. 150/- per day from a tea shop he does not deserve to be given any payment under the provisions of Section 17-B of the I. D. Act. This contention is not tenable on two grounds. Firstly, as provided in proviso to Section 17-B of the I. D. Act, it has to be proved by the petitioner to the satisfaction of this Court that the workmen has been employed and has been receiving adequate remuneration during any such period or part thereof. In this case, there is an affidavit against affidavit. There is no reason why the affidavit filed on behalf of the petitioner should be accepted. The petitioner could have obtained certified copy from the concerned department to show that the licence of tea shop is in whose name and could have also obtained information from the landlord as to who pays the rent to him, therefore, there are no documents in support of the bald allegation made in the reply to the application, in support of which, an affidavit has been filed. Apart from this I am clear in my mind that what is required under the provisions of Section 17-B of the I. D. Act is that the workmen had not been employed in any Establishment. Therefore, what is required is that the workmen should

be employed from which he receives adequate remuneration to disentitle him to receive any favourable order under provisions of Section 17-B of the Act. Secondly, what is emphasized in this Section is that the workmen should be employed but if he is carrying on some work to make his both ends meet and fill the belly of his family it will not disentitle him to get the payment as provided under Section 17-B of the I. D. Act. It may be mentioned that this Section is a beneficial piece of Legislation which has been enacted for the benefit of the workmen to see that they do not suffer on account of stay of award, which has been passed in his favour by the Labour Court. The litigation is a time consuming process and the workmen cannot be made to suffer for years till the writ petition filed by the employer is disposed of finally. With a view to surmount this difficulty, the provisions of Section 17-B were added to the I. D. Act with clear intention to give relief to the workmen during the pendency of litigation in the High Court/Supreme Court. To bring about the balance of justice, proviso to this has been added, which also authorises the Court not to make payment, if it is satisfied that the workmen has been employed and receiving adequate remuneration. If such satisfaction is not there, the order of payment should more or less follow automatically as provided in the section itself. The learned Counsel for the petitioner has placed reliance on *S. Raju v. George Oakes Ltd. (Mad.)*. This was a case in which the Management obtained interim stay of the award and the employee filed miscellaneous petition to vacate the stay and in an affidavit also claimed the monthly salary and allowances till disposal of the writ petition. The High Court while ordering interim stay to be absolute, directed that he should be paid Rs. 22,000/- within four weeks. The petitioner again filed an application under Section 17-B for payment of monthly wages during the pendency of the writ petition.

It was held that while considering his petition to vacate the stay order, his claim to monthly wages under Section 17-B had also been considered and only thereafter, the sum of Rs. 22,000/- was directed to be

paid to him. Therefore, the workmen cannot again claim that he should also be paid monthly wages till disposal of the writ petition. This authority evidently, is of no help to the petitioner. I am also fortified in my opinion by a decision of this Court in *Krishi Upaj Mandi Samiti, Dholpur v. State of Rajasthan and Ors.*, (D. B. Civil Writ Petition No. 1081 of 1981 decided on September 23, 1987) in which also, it was held that the employment must be as an employee in an establishment and it would not cover a case where the workmen carries on some private activity to make a living, because carrying on such an activity by the workmen cannot be regarded as being employed in any establishment. In the present case, in reply to the application filed in Para No. 4, it has been mentioned that the respondent No. 2 is employee in a tea shop, whereas, in the affidavit filed in support of the application, it is mentioned that he is personally running the tea shop and earning Rs. 150/- per day from the same. This shows that he has filed an affidavit in support of the reply on behalf of the petitioner that the respondent No. 2 is not employed anywhere."

This question has also been examined by this Court in case of *State of Gujarat v. Shankarbhai K. Parmar*, reported in 2001(3) GLH 461. In Para 9 of the said decision, it has been observed by this Court as under :

"9. In my view, therefore, simply because the petitioner is having some agricultural land or is cultivating the land, is no ground for denying him benefit of Section 17-B of the Act, especially when the Government has failed to show that the respondent is in employment of particular employer."

16. As per the dictionary meaning of the word "Gainful" given in Webster's Encyclopedic Unabridged Dictionary, gainful would mean profitable, lucrative, As per the said dictionary, 'lucrative' would mean profitable, money making, remunerative. Thus, as per the dictionary meaning of the said word, gainful would mean something which is lucrative and profitable and lucrative would mean profitable, money making or remunerative. Therefore, if the workmen is getting

profitable and lucrative amount by way of remuneration after employment in any establishment, in that case alone, such remuneration can be taken into consideration while deciding the application under Section 17-B of the Industrial Disputes Act, 1947. As per the said dictionary, 'employ' would mean to use the services of (a person or persons); have or keep in one's service; to keep busy or at work; engage the attentions of; to make use of (an instrument, means etc.); use, apply; to employ a hammer to drive; to occupy or devote.

16.1 As per the dictionary meaning of the word 'establishment' given in the said dictionary, 'establishment' would mean the place of business together with its employees, merchandise, equipment etc.

16.2 As per the dictionary meaning of the word 'remuneration' given in the said dictionary, remuneration would mean reward for work, trouble etc. To remunerate would mean to pay. As per the said dictionary, 'adequate' would mean equal to the requirement or occasion; adequate would mean fully sufficient; something which is suitable or fit. As per the said dictionary, adequacy would mean sufficiency for a particular purpose,

16.3 In Section 17-B of the Industrial Disputes Act, 1947, the legislature has employed the phrase "in any establishment" and in proviso to the said section, the words 'adequate remuneration' have been employed by the legislature in its wisdom. In view of that, after the affidavit is filed by the workmen that he had not been employed in any establishment during such period, then it is for the employer or the Management to prove to the satisfaction of the Court concerned by way of genuine evidence that (1) the workmen concerned had been employed in any establishment and (2) he had been receiving adequate remuneration. Therefore, in view of the use of the word 'adequate' in proviso to Section 17-B of the Industrial Disputes Act, in view of the dictionary meaning of the word 'adequate', employer is required to prove to the satisfaction of the Court concerned that the remuneration received by the workmen is adequate, equal to the requirement or occasion; adequate would

mean fully sufficient; something which is suitable or fit. Therefore, if it is not proved that the remuneration received by the workmen during such period is adequate, equal to the requirement, fully sufficient for the needs of the workmen, then, such remuneration cannot be considered as gainful or lucrative for the purpose of Section 17-B of the Industrial Disputes Act, 1947 and the same has to be ignored by the Court concerned while considering an application under Section 17-B of the Act.

16.4 In entire Section 17-B of the Act, four words would assume importance. One is 'employ'; second is 'in any establishment'; third is 'adequate' and fourth "remuneration". Thus for dissenting the workmen to claim the benefits under Section 17-B of the I. D. Act, the remuneration received by workmen concerned must be adequate.

16.5 Therefore, in view of the use of the aforesaid words in the section itself and also in view of the dictionary meaning of the aforesaid terms and words, if the workmen has been employed in any establishment and has been receiving remuneration which is adequate, from the another employment, only then, such income can be taken into consideration while considering an application under Section 17-B of the Industrial Disputes Act, 1947 and not otherwise. Except that, any kind of income from any other source just to keep the body and the soul together and not to starve with family received by the workmen concerned cannot be considered as a gainful employment or remuneration from any establishment. Therefore, such income has to be excluded from the purview of Section 17-B of the Industrial Disputes Act, 1947. Something which is earned by the workmen for his survival during the pendency of the proceedings cannot be taken into consideration while considering an application under Section 17-B of the Act. While considering such an application, miserable condition of the workmen concerned who has been dismissed from service before years together has to be taken into consideration and it has also to be kept in mind that the workmen has been claiming nothing but the wages last drawn by him

before years together. First, he was dismissed from service; then, he raised industrial dispute before machinery under the Act and then the matter was referred to the Labour Court for adjudication by the State Government, and thereafter, the Labour Court has examined the reference and for that, normally, period of at least 5 to 10 years will be consumed for deciding such reference looking to the back log and shortage of Judges and such other factors and if the award of reinstatement is made in favour of the workmen concerned, thereafter, then, the employer while challenging such an award of reinstatement before the High Court requests for stay of the award of reinstatement. In such a situation, the workmen should remain out of job for a period of more than five to ten years in which he shall have to live in the society waiting for the end of the proceedings before the Labour Court. Therefore, just to live in the society and to maintain the family during the pendency of reference, any kind of work which is available as per his experience is done by him and by doing that work, he is able to get some income for the sake of survival of himself as well as his family, and if such income has been received by him without employment in any establishment is considered to be his gainful employment, then, it would result into a premium to the employer for passing illegal order of termination. If the workmen has lived with his family and his existence has been maintained by doing some work and on that basis, a presumption of income being gainful employment, if it is drawn and the wages under Section 17-B are denied on such ground, then, what is the loss or damage caused to the employer for passing illegal order of termination? There is apparently no loss or damage to the employer in such a situation. If the employer has passed illegal order of termination as declared by the concerned Industrial Tribunal or the Labour Court, then, he shall have to pay back wages to the workmen and required to restore the original situation and position of the workmen concerned with all consequential benefits as directed by the concerned Tribunal or the Labour Court. Therefore, according to my opinion, any kind of income during the period either before the Labour Court or

before the High Court in the writ petition has been received by the workmen concerned cannot be considered to be gainful employment of the workmen except that he had been employed in any establishment and received adequate remuneration from the other employer. If that is not so, then, any kind of income cannot be considered to be the gainful employment for denying back wages of interim period or denying statutory benefits which are available under Section 17-B of the Industrial Disputes Act, 1947. If such income is considered as gainful employment and if such income is considered as adequate remuneration, then, it would amount to giving a premium to the wrong-doer employer. This is not the aim and object of Section 17-B of the Act and this is not the language employed in Section 17-B of the Act. The language in Section 17-B is very clear and it is required to be understood in its right spirit keeping in view the objects and reasons thereof.

16.6 The law is not compelling the workmen not to do any work during the intervening period and starve with his family during the intervening period. On the contrary, the law is permitting the workmen to do something, to do any kind of work and not to starve and to maintain the family for getting the fruits of the result of the pending proceedings either before the Labour Court or before the High Court. Therefore, save and except the adequate remuneration received by the workmen from any establishment, any other income or amount received by the workmen cannot be taken into consideration while considering an application for wages under Section 17-B of the Industrial Disputes Act, 1947.”

“18. In view of these observations made by the Apex Court and various High Courts as referred to above, meaning of "Gainful Employment" is required to be clarified. What is the meaning of gainful employment as normally used in the High Courts, looking to the bare reading of Section 17-B of the I. D. Act, it is very clear that the workmen is entitled to last drawn full wages inclusive of any maintenance allowance admissible to him under any rule if the workmen had not been employed in any establishment during such period and an affidavit by such workmen had been filed to that effect in

such Court, meaning thereby, such employee must not have been employed with any establishment. Similarly, in proviso also, it is made clear that such workmen had been employed and had been receiving adequate remuneration during such period or part thereof. It also suggests that the workmen should have employed and receiving adequate remuneration but not any such amount by employment must be getting adequate remuneration means salary or "wages" from the employer. Therefore, if the workmen during the pendency of the petition where reinstatement has been stayed by this Court and thereafter if the workmen is doing any labour work, miscellaneous work and thereby receiving any income from any source, namely agricultural income, interest part or any other activities wherein the workmen is getting some amount without being employed in any establishment and not receiving any remuneration from the employer, then such amount that may be received by the workmen during such period which is not received by him on the basis of the employment in any establishment or as remuneration from the employer, then said amount which has been received by the workmen doing any miscellaneous work, such as labour work, interest amount and income from the agricultural field or any other activities wherein the workmen is getting some amount even by way of rent, that cannot be considered to be gainful employment of the workmen concerned because Section 17-B is very clear that employer shall have to prove that the workmen is employed in any establishment and receiving "adequate remuneration" from the employer. If this fact is not established by the employer before this Court, then other amount except the adequate remuneration out of employment received by the workmen but any other amount received by using his personal skill or experience that cannot be considered to be the gainful employment. Therefore, even in facts of this case, the allegations against the workmen that he is driving auto rickshaw registered in his name. Even if the workmen is driving the auto rickshaw and getting some amount by way of fare from the passengers, looking to Section 17-B of the Act, according to my opinion, such amount that may be received by the workmen by driving the auto rickshaw, cannot be said to be gainful employment as per the meaning of Section 17-B of the I. D. Act, 1947. Therefore, the meaning of gainful employment requires to be understood in light of the provisions and language used in

Section 17-B of the I. D. Act, 1947. The language is very clear that if the workmen is employed in any establishment during such period and receiving adequate remuneration during any such period and the part thereof, while remaining in employment then that amount can be taken into consideration for deciding application under Section 17-B of the I. D. Act. The other amount that may be earned by using personal skill by doing labour and miscellaneous work or by receiving some amount in the form of interest, such amount and the like amount from rent income of the properties that may be received by the workmen during such interregnum period pending petition before the High Court cannot be said to be an emoluments generated from the employment nor the same can be termed as adequate remuneration from the employment, and therefore, such amount cannot be said to be gainful employment and the same requires to be excluded from the definition of "gainful employment" because ultimately during pendency of the petition, the workmen and his family is required to be survived and for that, they should have to do some miscellaneous work so that they may receive some amount and by that they can maintain the family, and therefore, that cannot be termed as gainful employment and this is not the object of the Section 17-B of the I. D. Act. The object of Section 17-B of the Act is clear that the workmen may not get a double benefit being the employee in any other establishment and receiving adequate remuneration from the employer and even though claiming last drawn wages from the old employer and that is how Section 17-B of the Act has been enacted with a clear object that if the workmen remains unemployed during such period, then workmen is entitled to last drawn wages inclusive of maintenance allowance admissible to him under any rule. Therefore, unemployment means not employee of any establishment that does not mean that not to receive any amount during such period. Thus, both these things are entirely different and both have to be separately required to be understood while deciding the application under Section 17-B of the I. D. Act.”

“20. I have considered at length the scope and ambit of Section 17-B of the Industrial Disputes Act, 1947 while keeping in view the object and reasons of Section 17-B of the Act. I have also kept in view the language used in Section 17-B of the I. D. Act, 1947. I have also considered the various

decisions of the Apex Court and High Courts. According to my opinion, any amount of income received by the workmen during the pending proceedings from any source like (1) to receive rental income from the property; (2) to receive income from the properties of the family; (3) to receive interest or dividend on the investments made; (4) to receive income from the agricultural field; (5) to receive income from the family members; (6) to receive income from doing any kind of miscellaneous work like hawking and selling of fruits, vegetables, tea stall, stall of Pan Galla or any kind of work by way of self-employment; (7) income received by driving auto rickshaw or taxi or any other vehicle and the amount received by way of begging/Bhiksha Vrutti, such income cannot be considered to be the gainful employment of the workmen and such income has to be excluded from the zone of consideration while considering an application under Section 17-B of the I. D. Act, 1947.

What has to be taken into consideration while considering an application under Section 17-B of the I. D. Act is the income received by the workmen during such period of his employment in any establishment and that too only if such income or remuneration is adequate as per the proviso to Section 17-B of the I. D. Act. Such income has to be taken into consideration while considering an application under Section 17-B of the I. D. Act, 1947. Therefore, for denying such benefit, employer shall have to prove or to establish to the satisfaction of the Court concerned that the workmen had been employed in any establishment and receiving adequate remuneration from the other employer. In absence of such evidence or proof, the workmen is entitled for such statutory benefit as a matter of legal or statutory right to have statutory benefit under Section 17-B of the I. D. Act, 1947. In such cases, the workmen concerned shall have to file an affidavit to the effect that he has not been employed in any establishment and he has not received any adequate remuneration from the other employer. Therefore, except that, remuneration or any other income from any other source like the one referred to hereinabove in detail has to be excluded and has not to be taken into consideration as a gainful employment of the workmen concerned.

15 The learned Counsel for the applicant submits that it is not necessary for the worker to file affidavit in a particular format stating that during the pendency of the proceeding he was unemployed. In support of this contention, the learned Counsel for the applicant relies on the judgment of the Division Bench of this court in the matter of ***U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union, 2008(2) BCR 619***. He submits that Division Bench of this court in this authority held that no format has been provided under the Act or under the Rules framed thereunder, but still this affidavit should be true and correct declaration of the required facts. He relies on paragraph 18 which reads thus:

“18. The other case relied upon by the respondent is Rajinder Kumar Kindra v. Delhi Administration through Secretary (Labour) and Ors. on the basis of which it was contended by the respondent that though the workmen during the relevant period was helping his father-in-law in coal depot and was living with him as he had no other source of income, he could not be said to be gainfully employed and was entitled to full back wages. This judgment was decided on its own facts and did not lay down any absolute proposition of law. In fact, the court in that case had found that the termination of the workmen was unjustified and keeping in view the evidence on record, the court had granted back wages. Firstly, that is not the question before us and in any case, whether during the relevant period the workmen was gainfully employed or not, is a question of fact which would have to be determined keeping in view the evidence on record and the court cannot lay down a straight jacket formula which would apply to all cases. In the present case, affidavit had been filed by the workmen clearly stating that an award had been made by the Labour Court, Thane on 21st September, 2005 and also as required under Section 17-B of the Industrial Disputes Act the workmen declared that he was not gainfully employed in any other establishment since the date of the award and even from the date of his termination. Identical affidavits have been filed on behalf of the other workmen. It was expected

that these affidavits should have been more elaborate and definite in their content. As already discussed, the intention of the legislature to provide statutory interim protection is dependent upon workmen not being employed in any establishment and his filing of an affidavit to that effect. To that extent, provisions of Section 17-B would have to receive a liberal construction as the protection to the workmen is dependent upon his gainful employment including self-gainful employment. No doubt, no format has been provided under the Act or under the Rules framed thereunder but still this affidavit should be true and Page 0455 correct declaration of the required facts. It will be unfair to restrict the affidavit in its contents. It may not help to further the intent of legislature. If a workmen during the relevant period was gainfully employed, he would not be entitled to the benefit of Section 17-B. "employed in any establishment during such period" is an expression of wider magnitude and scope. If the workmen was not employed or self-employed, then alone, the provisions of Section 17-B would operate. To give it a technical or restricted meaning and treat an affidavit as complete disclosure of correct facts by merely saying that he was not employed in any establishment, would not be substantive and sufficient compliance of Section 17-B. The affidavit so filed by the workmen has also not to be unnecessarily elaborate stating other factors which are not contemplated under Section 17-B. In the present case, the affidavit was filed only stating that the workmen was not employed with any establishment since the date of making the award and also was not gainfully employed in any establishment since wrongful termination of service. Filing of such affidavit may not be construed as a sufficient compliance of the statutory requirements but in the present case, Management opted to file a vague reply affidavit giving no particulars. It had made no definite allegation in regard to the workmen being employed in any establishment or engaged gainfully even in self-employment. It produced on record not even an iota of evidence to show that the affidavit filed by the workmen was factually incorrect and Management was entitled to the benefit of the exception made out by the legislature under proviso to Section 17-B of the Act. The learned Single Judge while accepting these affidavits of workmen as compliance of Section 17-B of the Act also held that the application could not be dismissed

because the workmen does not disclose in his affidavit as to how he subsists. May be, in view of vague plea taken by the Management, such a finding may not call for interference but it will be difficult to accept the same as a general proposition of law. The affidavit of workmen essentially must state that the workmen was not employed with any establishment during the relevant period and was not gainfully employed including self-employment during the same period. The purpose of filing of an affidavit is to grant statutory interim protection to the workmen and to avoid hardship resulting from nonpayment of wages. The onus is on the workmen and he must discharge such onus by filing affidavit in definite terms and disclosing the correct facts. Whenever and wherever the Management places before the court apparent material to show the employment in an establishment or gainful self-employment of the workmen during the relevant period then the workmen will also be expected to show that his affidavit was correct and the question as to how he subsisted during that period would also become relevant. However, in the present case, vague stand was taken by the Management and the Management having failed to discharge its own onus and opted to take vague stand in terms of proviso to Section 17-B, cannot claim any benefit and find fault in the order impugned in the present appeals.”

16 The learned Counsel for the applicant submits that the petitioner bank filed their Affidavit in reply to the present Notice of Motions. He submits that the petitioner mainly relied on the evidence recorded by the Industrial Court during the pendency of the reference. He submits that some of the applicants have stated in their evidence that, they were working on temporary basis, doing farming work and or painting etc. He submits that on the basis of that evidence, Industrial Court held that applicants are entitled to only 30% back wages. He submits that after passing of the award dated 18.6.2014, the applicants have the right of re-employment as well as full wages. He submits that, that evidence cannot be considered at the time of deciding the present

Notice of Motions.

17 The learned counsel for the applicant submits that it is not necessary for the applicant to prove each and every fact in support of their case of being unemployed. In support of this contention, he relies on the judgment of this court in the matter of ***S.S.Sayyad alias Saiyed vs. Hindustan Aeronautics Ltd., 2012 II CLR 1008***. He relies on paragraph 16, 17 and 18 which reads thus:

“16 The bare reading of the section 17-B of the said Act shows that the requirements for revoking this section are:

- i) The Award of the Tribunal should have directed reinstatement of the workman on setting aside the order of the dismissal or unfair termination of service.
- ii) The Employer should have preferred proceeding against such Award before High Court or Supreme Court.
- iii) The workman should not have been gainfully employed in any establishment during the pendency of the proceedings, and
- iv) As a proof of that, the workman should have filed an affidavit before the court before which the proceeding has been preferred.”

“17 Once these requirements are satisfied, the workman becomes entitled to the wages as contemplated by these provisions and no order of the court before which the proceedings are pending is necessary for entitling him to such wages as the statute itself creates the right. If after the workman files the affidavit of non-employment, the employer fails to pay the wages to the workman as required by the section, the workman may file an application before such court for direction to the employer to make such payment. In the present case, the Applicant filed Civil Application claiming the benefit of section 17-B of the said Act. In the said Application, the Applicant specifically stated that he tried to get employment but not succeeded. He remain

unemployed during this period and therefore, he is entitled for the benefit as per section 17-B of the said Act.”

“18 It is to be noted that the Respondent-Company failed to produce any contrary evidence on record to show that the Applicant was gainfully employed. Though the Respondent had filed certificate of Talathi showing that Applicant was getting sum of Rs. 50,000/- from his agricultural land, the same is not reliable because neither the Respondent in their affidavit-in-reply nor the Talathi in the said certificate stated under which provision he issued such certificate and on what basis he calculated that the Applicant was getting sum of Rs.50,000/- per annum. There is no basis for coming to the conclusion that the Applicant was getting income of Rs.50,000/- per year. Not only that the Applicant placed on record the mortgage deed showing that he had to mortgage the property to meet the requirements of his family members. Thus, the Applicant’s statement that he did not set agricultural income finds support from the recitals of the mortgage deed duly executed by him and even if he got some income from the land of the area of 49 Ars, he was getting the same even when he was in the service and on that basis it cannot be held that he was gainfully employed during the period was out of service.”

18 The learned Counsel for the applicant submits that some of the applicants were helping their family members to do their business. That do not amount to gainful employment. In support of this contention, he relies on the judgment in the matter of ***Lumax Automotive Systems Ltd. and Its Workmen, Hindustan Engineering & General Mazdoor Union and Others, 2012 (133) FLR 241***. He further submits that in this authority Delhi High Court held that it is not necessary for the applicant to disclose in detail his income for claiming the benefit under section 17-B of the said Act. He relies on paragraph 3, 4 and 5 of the said judgment which reads thus:

“3. In view of the facts noted in the order dated December

22, 2011 it is apparent that small time petty business run by family members of the respondents No. 2 and 3, in which business the said respondents participated on account of being jobless, would not affect their right to the enforcement of Section 17-B of the ID Act, 1947.”

“4. Learned Counsel for the appellant relies upon the decision reported as *Niranjan Cinema v. Prakash Chandra Dubey and another*, 2008(116) FLR 172 (SC) to urge that gainful employment would include self-employment.”

“5. Having perused the said decision, all we have to say is, that self-employment would be gainful employment, if sufficient income is generated through self employment. The measure of sufficient income could be the minimum wages fixed under the Minimum Wages Act.”

19 The learned Counsel for the applicant submits that Gujarat High court in the matter of *Executive Engineer, Saurashtra Branch Canal Div., Dhrangadhra v. Ayubhai Ladharbhai*, 2011(1) CLR 411 held that in the absence of evidence of gainful employment of the workmen concerned to be brought by the management, there cannot be any presumption about the receipt of adequate remuneration by the workmen and hence, in view of the mandatory provisions of section 17-B of the said Act, the workmen are definitely entitled to full wages last drawn by them during the pendency of the proceedings before the Higher Court or the Supreme Courts. (Part of paragraph 4 reads thus).

“Dealing with the above argument, learned Single Judge has, in the impugned order, relied upon several judgments of this Court and held that it is for the employer to show that the workmen concerned are gainfully employed and they are receiving remuneration during the pendency of the petitions. It is observed that merely because the original applicants own agricultural land abutting on a canal, they could not be denied the benefit of Section 17-B of the Act. Adding to that, learned counsel, Mr.Rathod appearing for the respondents,

submitted that the lands shown to have been held by the respondents are also clearly held with many other members of the family and such joint holding of the lands cannot by itself be the evidence of any gainful employment or receipt of any income or remuneration out of such lands. He further submitted that the respondents were always ready to serve under the appellant pursuant to the awards of the Labour Court but after the petitions of the appellant being admitted and injunction being granted against the impugned awards, the respondents were neither offered any job or work nor were they paid the last drawn salary which made it difficult for the respondents to survive.”

20 The learned Counsel for the applicants also relies on the judgment of the Delhi High Court in the matter of *Kiran Uppal (Mrs.) Prop. M/s.CLAS v. Ashok Kumar & Ors. 2012 II CLR 638*. Paragraph 18 of the said judgment reads thus:

“In the present case, the workmen have established their case that they have not been in an employment during this period, and to this effect they have filed affidavits also.”

21 The learned Counsel for the applicant submits that bare reading of the affidavit filed by all the applicants shows that they were doing petty works for their survival. He submits that maximum applicant used to get seasonal work only. Therefore as per the provisions of section 17-B of the said Act and judgment in the matter of *University Grant Nirman Board v. Udesinh Togaji Solanki*, (Supra) and in the matter of *U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union* (Supra), applicants are entitled for a direction to the petitioner to pay to the applicants full last drawn salary per month from 5.8.2015 when this Hon'ble Court granted interim relief in favour of petitioner restraining the applicants from executing the award dated 18.6.2014. He submits that if Notice of Motion is not allowed,

irreparable loss and injury will be caused to them.

NOTICE OF MOTION NO.471 OF 2016

22 The learned Counsel for the applicant submits that this Notice of Motion No.471 of 2016 is preferred by original respondent no.41 Mr.Damodar Janardhan Thool under section 17-B of the said Act directing petitioner to pay to the applicant full last drawn salary from the date of admission of Writ Petition and from the stay order dated 5.8.2015.

23 The learned Counsel for the applicant submits that he is adopting the arguments made by the learned Counsel for the applicant in Notice of Motion No.408 of 2016.

24 The learned Counsel for the applicant submits that the applicant in the present Notice of Motion filed affidavit in support of Notice of Motion dated 17.11.2016. He submits that the applicant specifically stated in his affidavit that he is unemployed. He further submits that the applicant tried to procure employment during the pendency of the reference (CGIT) 2/64 of 2003 before the learned Tribunal. However, he was not able to procure any employment for the entire period of his termination and subsequent thereto. He further submits that the applicant specifically made averments to that effect in his affidavit in support of Notice of Motion in paragraph 2, 5, 6 and 8 which reads thus:

“2. I further say that during pendency of litigation inclusive of above Writ Petition, I am not employed anywhere and hence during the pendency of the above Writ Petition, I

am seeking urgent relief by way of permitting me to work in the Petitioner Bank and earn wages for my livelihood and / or seeking directions to pay wages during pendency of the above Writ Petition under the provisions of Section 17-B of Industrial Disputes Act. Hence, I have filed the above Notice of Motion for the aforesaid relief and in support thereof I am filing this Affidavit.

5. I further say and submit that this Hon'ble Court was pleased to admit the Writ Petition challenging the said Award and this Hon'ble Court granted interim relief in terms of prayer (b) of the petition thereby staying the operation of the Award. In view of the said interim order, pending the above petition I am being employed of Petitioner Bank is entitled to be paid wages in accordance with the provisions of the section 17-B of the Industrial Disputes Act, 1947. Thus, in order to protect my interest as well as to provide financial assistance for my livelihood I humbly pray to this Hon'ble Court to direct the Petitioner Bank to pay wages to me under the provisions of section 17-B of the Industrial Disputes Act, 1947, be directed to be paid during the pendency of the Writ Petition.

6. I say and submit that I tried to procure employment during the period after 5.8.2015 as also during the period prior to 5.8.2015 i.e. during the pendency of the Reference (CGIT) 2/64 of 2003 before the Ld.Tribunal. However, I am not been able to procure any employment for the entire period of my termination and subsequent thereto. In other words till date I am unemployed and inspite of making sincere efforts I have not been able to procure any employment.

8. I therefore respectfully say and submit that I am in need of permanent employment, since I am not employed in any establishment and for any fixed regular monthly or other periodic remuneration whatsoever, I therefore offer myself for employment to the Petitioner abovenamed on such terms and conditions as this Court may deem fit and proper during pendency of the above Petition.”

25 The learned Counsel for the applicant on the basis of above

mentioned facts submit that the applicant made out a case for direction to the petitioner to comply with the provisions of section 17-B of the said Act during the pendency of the present Writ Petition. He submits that if petitioner is not directed to pay to the applicant last drawn salary from 5.8.2015, irreparable loss and injury will be caused to him. He submits that it is very difficult for him to maintain himself as well as his family for day to day expenses. He submits that in the interest of justice this Hon'ble Court be pleased to allow the present Notice of Motion and direct the petitioner to comply the provisions of section 17-B of the said Act.

26 On the other hand, the learned counsel for the petitioner vehemently opposed the present Notice of Motions. He submits that in both the Notice of Motions though the applicants filed their affidavit but they failed and neglected to disclose true facts. He submits that the applicants made incorrect statement on solemn affirmation. Hence, they are not entitled to any relief from this court. He submits that the affidavits filed by each and every applicant shows that applicants were gainfully employed during the pendency of this litigation and hence, they are not entitled to any benefit under section 17-B of the said Act.

27 The learned Counsel for the petitioner submits that the advocate for the applicants filed affidavit of several workers claiming the benefit under section 17-B of the said Act. He submits that at the time of claiming the benefit under section 17-B, the applicant suppressed several facts from this court. Apart from that, they also made incorrect statement on solemn affirmation. He submits that all the applicants in paragraph 5 of their affidavit, stated that they could not secure employment after 5.8.2015 as well as during the pendency of the

reference before the Tribunal. In the evidence recorded before the Tribunal all the applicants except applicant at Serial No.9, 23 and 26 have stated that they were employed and or were doing some work as indicated in their cross-examination. The applicants at Serial No.23 and 26 have stated before the Tribunal that they have never applied anywhere for employment. However, in their affidavit before this court they have averred that they tried to procure employment but did not succeed. The applicant Makesh K. Pujare in his affidavit of evidence before the Tribunal has not made any averment about his unemployment. The learned Counsel for the petitioner filed synopsis of averments made by the applicant on gainful employment in their affidavit in reply by the petitioner bank which is as under:

S. No.	Name of Applicant	Contents in Affidavit of Notice of Motion Para 5	Evidence before the Tribunal filed along with Bank's Affidavit in Reply
1.	Mr.Sanjay Patil	<u>Page No.13-14</u> Working as a farmhand to earn livelihood	<u>Page 132</u> Working in agricultural land with annual income of Rs.50,000/- as on 02.08.2012.
2.	Mr.Prakash M. Anchan	<u>Page No.18-19</u> Doing odd jobs to earn livelihood and presently working as a domestic servant	<u>Page 143</u> Working as a badli worker and getting a monthly payment of Rs.1200/- to 1500/- as on 24.05.2011
3.	Mr.Tukaram Keshav Mahadik	<u>Page No.22-23</u> Occasionally worked as a watchman in societies and presently doing odd jobs for livelihood	-----

4.	Mr.Sunil R. Jangam	<u>Page No.26-27</u> Presently working as a temporary workmen in different power loom mills in Bhiwandi to earn livelihood.	Page 157 - Para 16 Working as agricultural labourer at native place as on 07.09.2011.
5.	Mr.Vijay Amrut Khatale	<u>Page No.30-31</u> Occasionally worked as watchman in societies and presently doing odd jobs for livelihood	<u>Page 167 - Para 16</u> Working on agricultural land and also as a mason and earning Rs.80/- per day as on 02.05.2012.
6.	Mr.Rajendra P. Waingankar	<u>Page 34-25</u> Working as wall painter and gets work only during seasons or during festivals.	<u>Page 177 - Para 16</u> Worked in Hariom Enterprises for 6 months thereafter assisting brother in his business and earning Rs.10,000/- per month as on 02.08.2012.
7.	Mr.Pradeep B. Govalkar	<u>Page 38-39</u> Doing odd jobs and working as a helper in masonry work (kadia).	<u>Page 187 - Para 18</u> Worked as helper and get Rs.125/- per day as on 22.06.2012.
8.	Mr.Gajanan Kale	<u>Page 42-43</u> Working as a farmhand.	<u>Page 196 - Para 17</u> Working as an agricultural labour and getting an income of 1000 to 2000 per month as on 04.04.2013

9.	Mr.Eknath B. Kadam	<u>Page 46-47</u> Working as a barber.	<u>Submissions of the Bank:</u> (Haircutting saloons are covered under the minimum wages Act, 1948, and an unskilled worker gets a basic wage of Rs.6,500 and in addition a special allowance of Rs.2,576/- as on 31.12.2016)
10.	Mr.Shivaji Narayan More	<u>Page 50-51</u> Working as a farmhand.	<u>Page 210 - Para 18</u> Working on agricultural land as on 02.08.2012.
11.	Mr.Mahendra Mahakal	<u>Page 54-55</u> Working as wall painter gets work only during seasons or during festivals.	<u>Page 220 - Para 20</u> Working as pandal decorator and earning Rs.3000 to 3500 per month as on 29.02.2012.
12.	Mr.Latesh Shankar Surve	<u>Page 58-59</u> Working as vegetable vendor.	<u>Page 229 - Para 17</u> Working as a hawker with monthly income of Rs.2,000/- as on 20.02.2013.
13.	Mr.Sanjay C. Mohite	<u>Page 62-63</u> Helping in family's audio video business.	<u>Page 240-Para 16</u> Has his own newspaper stall outside Mulund Rly. Station and earns Rs.3,000/- to 3,500/- per month as on 17.08.2011.
14.	Mr.Nagesh G. Pawar	<u>Page 66-67</u> Working as a wall painter and gets work only during seasons or festivals and not more than 10 to 15 days in a month.	<u>Page 250 - Para 16</u> Assisted brother in business on a payment of Rs.100/- per day as on 02.08.2012.

15.	Mr.Prashant B. Mhatre	<u>Page 70-71</u> Presently working as vegetable vendor.	<u>Page 260 - Para 17</u> Sold vegetables grown on owned land and from others land and gets an amount of Rs.100-150 per day as on 22.05.2012.
16.	Mr.Sunil B. Patil	<u>Page 74-75</u> Doing odd jobs. Occasionally works as watchman in Navi Mumbai	<u>Page 269 - Para 17</u> After termination worked for a catering company for a monthly income of approx.Rs.4,000/- to 5,000/- as on 04.04.2013.
17.	Mr.Vishambar J. Pednekar	<u>Page No.78-79</u> Working as a Freelance electrician for about 20-21 days in a month	<u>Page 280 - Para 18</u> Since August, 2008, working on the agricultural fields at his native place as on 02.11.2011.
18.	Mr.Mahesh S. Khetle	<u>Page No.82-83</u> Unemployed throughout	<u>Page 289 – 290 -Para 16</u> Working for Space Co., for recovery of Vodafone bills for last three years and earning Rs.2,500/- per month, as on 06.07.2011.
19.	Mr.Sachin B. Ghag	<u>Page No.86-87</u> Doing odd jobs.	<u>Page 301 - Para 15</u> Working as collecting/verification agent on a salary of Rs.3,000/- and conveyance allowance of Rs.700/- p.m. as on 24.05.2011.
20.	Mr.Hemand Mhatre	<u>Page No.90-91</u> Unemployed throughout.	<u>Page 310 - Para 15</u> Dealing in family vegetable business and earning Rs.100-150 per day as on 16.11.2011.

21.	Mr.Mahesh K. Pujare	<u>Page No.95-95</u> Doing odd jobs.	<u>Page 318</u> - Affidavit of Evidence – No averments stating that he was unemployed.
22.	Mr.Rajesh J. Dabholkar	<u>Page No.98-99</u> Unemployed throughout.	<u>Page 331 - Para 17</u> Doing milk deliveries from 2 years and earning Rs.2,500/- per month as on 07.09.2011.
23.	Mr.Umesh Dhruv Patil	<u>Page No.102-103</u> Tried to procure employment. Unemployed throughout.	<u>Page 341 & 342 - Para 21</u> Did not try to procure employment.
24.	Mr.Santosh D. Kalambe	<u>Page No.106-107</u> Doing seasonal work of internal household repairs.	<u>Page 352 - Para 16</u> Working in an engineering workshop since Sept.2008, on an average income of Rs.3500/- p.m. As on 02.11.2011.
25.	Mr.Chandrakant C. Mohite	<u>Page 110-111</u> Doing odd jobs.	<u>Page 362 - Para 16</u> Since 2002 dealing in milk business and getting Rs.50/- per day (Rs.3,000/- p.m.) as on 02.11.2011.
26.	Mr.Sachin R. Lokhande	<u>Page 114-115</u> Tried for employment but remained unemployed.	Never applied anywhere for employment after his termination (Copy of affidavit filed along with separate list).
27.	Mr.Madhukar S. Godke	<u>Page 118-119</u> Doing odd jobs like housekeeping, cleaning of office premises and serving tea.	<u>Page 377 - Para 21</u> Working as helper since 2002 for Rs.50/- to 60/- per day as on 17.08.2011.

28 The learned Counsel for the petitioner submits that the Apex

Court in the matter of **North East Karnataka Road Transport Corporation v. M. Nagangouda**, 2007(1) CLR 939 held that gainful employment would also include self-employment wherefrom income is generated. Income either from employment in an establishment or the self employment merely differentiates the sources from which the income is generated, the end use being the same. Paragraph 14 to 17 of this authority reads thus:

“14. It was sought to be urged that after coming to a finding on the basis of the evidence of the respondent himself that the during the period of termination of his services, he was engaged in agriculture and that he was receiving certain amounts therefrom, it was not open to the Labour Court to observe that "gainful employment" would not include such income from agriculture. It was urged that income from any source, whether from employment in an establishment or from self-employment, would have to be treated as income for the purposes of deciding whether the respondent would be entitled to receive full back wages. It was urged that both the Tribunal and the High Court erred in taking a view to the contrary and the orders passed on the basis thereof were liable to be set a side.

15. On behalf of the respondent the stand taken before the Labour Court and the High Court was reiterated and it was contended that engaging in agricultural work would not amount to being gainfully employed and hence the orders passed by the Tribunal as affirmed by the High Court for payment of full back wages to the respondent, did not call for any interference.

16. We have carefully considered the submissions made on behalf of the respective parties in the backdrop of the facts of the case. Since the finding on the issue as to whether the domestic enquiry had been fairly and properly held had been decided in favour of the respondent and had not been challenged by the appellant, the only issue which was remitted by the High Court to the Tribunal was whether the respondent would be entitled to full back wages from the

date of his dismissal till the date of the award, with continuity of service and consequential benefits.

17. On the said question, we are unable to accept the reasoning of the Labour Court that the income received by the respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self-employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated, the end use being the same. Since the respondent was earning some amount from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment".

29 The learned Counsel for the petitioner submits that even the Gujarat High Court in the matter of *University Grant Nirman Board v. Udesinh Togaji Solanki*, (Supra) held that object of section 17-B of the said Act is clear, that the workmen may not get a double benefit being the employee in any other establishment and receiving adequate remuneration from the employer and even though claiming last drawn wages from the old employer. That is how section 17-B of the Act has been enacted with a clear object that if the workmen remains unemployed during such period, then workmen is entitled last drawn wages. He relies on paragraph 18 of the said Authority. He submits that in the case in hand, the applicant specifically admitted in cross-examination before the Industrial Court that they were doing job and were earning. Hence, there is no question of allowing their application under section 17-B of the said Act.

30 The learned Counsel for the petitioner submits that the affidavits

filed by the applicant in support of these two Notice of Motions clearly shows that they failed and neglected to disclose source of income. He further submits that they failed and neglected to disclose how much amount they were earning and since when. He submits that the judgment of the Division Bench of this court on which the applicant is relying i.e. in the matter of ***U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union*** (Supra) specifically held in paragraph 18 that the intention of the legislature to provide statutory interim protection is dependent upon workmen not being employed in any establishment and his filing of an affidavit to that effect. It is also held that even the self gainful employment also covers for rejecting the workmen applicant under section 17-B of the said Act. He submits that the Division Bench of this court held that the affidavit of workmen essentially must state that the workmen were not employed with any other establishment during the relevant period.

31 The learned Counsel for the petitioner submits that the applicants have claimed the benefit of section 17-B of the said Act contending that they have not been able to secure any permanent employment during the pendency of the proceeding before the tribunal or during the pendency of the proceeding before the High Court. He submits that section 17-B does not contemplate permanent employment as a criteria for receiving last drawn wages. Hence, the very claim of the applicant is based on misconception of the provisions of Section 17-B.

32 The learned Counsel for the petitioner submits that the applicant in paragraph 5 of their affidavits have conferred that they have been working either as a farm worker or watchman in Societies or vendors

etc. None of the applicant disclosed the income earned by them. The Division Bench of this court in the matter of ***U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union*** (Supra) relied upon by the applicant, at paragraph 18 page 628 held that the purpose of filing affidavit is to grant statutory interim protection to the workmen and to avoid hardship resulting from non payment of wages. He submits that the Division Bench further held that the onus is on the workmen. He must discharge such onus by filing affidavit in definite terms and disclosing the correct facts.

33 The learned Counsel for the petitioner submits that applicants in paragraph 6 of their affidavit in support of Notice of Motion have averred that during the entire period of their unemployment they were supported financially by their family members. He submits that those are vague averments and do not give any specific details about the financial support allegedly received from their family members. The judgment of the Division Bench of this court in the matter of ***U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union*** (Supra) relied upon by the applicant at paragraph 18 on page 628 state that the workmen will have to be expected to show that his affidavit was correct and the question as to how he sustained during that period would also become relevant.

34 The learned Counsel for the petitioner submits that the Division Bench of this court in the matter of ***U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union*** (Supra) in paragraph 18 page 627 held that the terms “employed in any establishment during said period” is an expression of wider magnitude and scope. If the workmen were not employed or self-employed then

alone the provisions of section 17-B would operate.

35 The learned Counsel for the petitioner submits that the Hon'ble Supreme Court in the matter of **North East Karnataka Road Transport Corporation v. M. Nagangouda** (Supra) in paragraph 17 has held that the income received from agricultural activities is same as from gainful employment in any establishment. The Supreme Court held that gainful employment would also include self employment where from the income is generated. In support of this, he also relies on the judgment of the Supreme Court in the case of **Metropolitan Transport Corporation v. V. Venkatesan, AIR 2010 SC 206**. In paragraph 12 of the said judgment Hon'ble Supreme Court has held as follows:

“12. Secondly, and more importantly, in view of the fact that respondent was enrolled as an advocate on December 12, 2000 and continued to be so until the date of his reinstatement (June 15, 2004), in our thoughtful consideration, he cannot be held to be entitled to full back wages. That the income received by the respondent while pursuing legal profession has to be treated as income from gainful employment does not admit of any doubt. In the case of *North East Karnataka Road Transport Corporation v. M. Nagangouda*, (2007) 10 SCC 765, this Court held, that "gainful employment" would also include self-employment. We respectfully agree.”

36 In the case of **North East Karnataka Road Transport Corporation v. M. Nagangouda** (Supra) this court held that the “gainful employment” would also include self employment.

37 The learned Counsel for the petitioner submits that the judgment of the Hon'ble Gujarat High court **University Grant Nirman Board v.**

Udesinh Togaji Solanki (Supra) relied upon by the applicant held that the self employment or engaging in agriculture would not amount to employment in any establishment. He submits that same would not be a good law in view of the ruling of the Supreme Court in the case of **North East Karnataka Road Transport Corporation v. M. Nagangouda** (Supra).

38 The learned Counsel for the petitioner submits that the Division Bench of Bombay High Court in the matter of ***U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union*** (Supra) has held that the provisions of section 17-B would operate, if the workmen was not employed or self employed. Hence, the view taken by the learned single Judge of the Hon'ble Gujarat High Court cannot be applied to the present case in hand.

39 The learned Counsel for the petitioner submits that all the applicants have thus made incorrect averments about the unemployment during the pendency of the proceeding before the Tribunal and have also not disclosed their income. He submits that in the case of ***S.P. Chengalvaraya Naidu (dead) by L.R.s vs. Jagannath (dead) by L.R.s. And others, AIR 1994 SC 853*** at paragraph 2 and 8 it has been held that if a litigant withholds the vital document in order to gain advantage from the other side, than he would be guilty of playing fraud on the Court as well as on the opposite party. The Supreme Court further held that a person whose case is based on false statement, has no right for any order from the court and same can summarily be dismissed.

40 The learned Counsel for the petitioner submits that in the present

Notice of Motion, the applicant has not disclosed their income before this Hon'ble Court despite the specific pleading been taken by the petitioner bank in its Affidavit in reply. (Paragraph 4 of the respective affidavit) and such non-disclosure would tantamount wilful suppression of facts and thus the ruling of the Supreme court in the case of *S.P. Chengalvaraya Naidu (dead) by L.R.s vs. Jagannath (dead) by L.R.s. And others* (Supra) would squarely apply.

41 The learned Counsel for the petitioner submits that in view of the above mentioned facts, authorities and particularly non disclosure of material facts before this court, the Notice of Motions preferred by applicants are required to be dismissed.

FOR NOTICE OF MOTION NO.471 OF 2016

42 The learned Counsel for the petitioner submits that even the Notice of Motion No.471 of 2016 preferred by original Respondent No.41 is required to be dismissed for making incorrect statement in their affidavits. He submits that the applicant in this Notice of Motion in paragraph 6 of affidavit in support of Notice of Motion stated that he tried to procure employment, remained unemployed, whereas in the evidence before the Tribunal in paragraph 17 stated that since 2000 he was working as a hawker for Rs.30/- to 40/- per day. That statement was made by the applicant on 20.2.2013. These facts were not disclosed by the applicant in affidavit in support of Notice of Motion. Hence, the present Notice of Motion is required to be dismissed on this ground only.

43 The learned Counsel for the petitioner submits that the applicant

in Notice of Motion No.471 of 2016 has claimed the benefit of section 17-B contending that he has not been able to secure any permanent employment during the pendency of the proceeding before the Tribunal or during the pendency of the proceeding before this Hon'ble Court. He submits that Section 17-B do not contemplate to obtain permanent employment as a criteria for receiving last drawn salary. Thus, the very claim of the applicant is based on misconception of the provisions of section 17-B.

44 The learned Counsel for the petitioner submits that the applicant in Notice of Motion No.471 of 2016 in paragraph 6 of the affidavit in support of Notice of Motion has averred that during the entire period of his unemployment, he was supported financially by his family members. He submits that these averments are vague and do not give any specific details about the financial support allegedly received and from which family members. The judgment of the Division Bench of the Bombay High Court in the case of ***U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union*** (Supra) relied upon by the applicant at paragraph 18 page 628 state that the workmen will also be expected to disclose all facts.

45 As the applicant in Notice of Motion No.471 of 2016 failed and neglected to comply the provisions of section 17-B of the said Act, he is not entitled to any relief and same is required to be dismissed with costs.

46 I have heard both the sides at length. After considering the pleadings on record and submissions made by both the counsel, the following point arise for my consideration in the present Notice of

Motions :

“Whether the applicants made out a case for claiming benefit under section 17-B of the Industrial Disputes Act, 1947?”

47 It is to be noted that as stated hereinabove for claiming the benefit under section 17-B of the said Act it is a duty of the workman / employee to state true facts on affidavit. He has to state whether he was employed any where during this period or not? If he is employed, how much he was earning? Whether the said employment was continued or not? If not, when that was discontinued? If continued, how much amount / wages/ salary he was getting from employer?”

48 In the present proceeding, applicants before the Industrial Court in their evidence admitted that after termination of their service, they used to do some odd work as well as working as badli workers etc. The applicants made incorrect statement in affidavit in support of Notice of Motions. Some of the applicants in their affidavit in support of Notice of Motions filed before this court, categorically made a statement that neither they were employed during the pendency of the reference before the Industrial Court nor after admission and stay granted in the present Writ Petition. Bare reading of the synopsis in the form of table reproduced hereinabove, which was filed by the counsel for the petitioner clearly shows that applicants suppressed the material fact about their employment during the pendency of the present Writ Petition. If there has been any incorrect statement made, then the applicants are not entitled to any relief from this court.

49 Apart from that, applicants admitted in their evidence before the

Industrial Court and also before this court that they are doing petty work, badli work, agricultural activities and working in salon etc. Though they admitted about their employment, self employment, they failed and neglected to disclose how much amount they are getting. Not a single applicant in their affidavit, made a statement about their income from petty works. On this ground also applicants are not entitled any relief under section 17-B of the said Act.

50 In the authorities cited hereinabove by the advocate for the petitioner clearly shows that even a self employment and or agricultural activities can be said as a gainful employment. Therefore, the submission made by the learned Counsel for the applicant about self employment not to be treated as employment, is not acceptable in view of the Apex Court judgment in the matter of **North East Karnataka Road Transport Corporation v. M. Nagangouda** (Supra).

51 The authorities cited by the applicant workmen are not applicable in the facts and circumstances of the present case.

52 Even the Gujarat High Court in the matter of ***U.P. State Bridge Corporation Limited vs. Maharashtra General Kamgar Union*** (Supra) in paragraph 18 specifically held that the object of Section 17-B of the Act is clear that workmen may not get double benefit being the employee in any other establishment and receiving remuneration from the employer and also under section 17B of the said Act. Section 17-B of the said Act has been enacted with a clear object that if the workmen remains unemployed during the said period then only workmen is entitled to last drawn wages.

53 Even the Division Bench of our High court in the matter of ***U.P State Bridge Corporation Limited vs. Maharashtra General Kamgar Union*** (Supra) held that self gainful employment be considered at the time of deciding the application under section 17-B of the said Act.

54 Even Delhi High Court in the matter of ***Lumax Automotive Systems Ltd. and Its Workmen, Hindustan Engineering & General Mazdoor Union and Others*** (Supra) in paragraph 5 held that self employment would be gainful employment, if income is generated through the same. The measure of sufficient income could be the minimum wages fixed under the Minimum Wages Act. In the case in hand, the applicant failed to disclose how much amount they were getting from self employment, job as a badli work and or were doing farming work.

55 In view of the above mentioned facts and the law laid down by the Apex Court, I am of the opinion that the applicant failed to make out a case for claiming the benefit under section 17-B of the said Act. Hence, following order is passed:

- a) Both the Notice of Motions preferred by the applicant workmen stand rejected.
- b) Considering the fact of the present case, hearing of Writ Petition is expedited.
- c) Office is directed to place Writ Petition for final hearing in the weekly board commencing from 12.6.2017.

d) No order as to costs.

JUDGE