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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 26th October, 2017

Pronounced on: 05th March, 2018

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W.P.(C) 17858/2004

M/S ENGINEERS INDIA LTD.

..... Petitioner

Through: Mr. Raj Birbal, Sr. Adv. with
Ms. Raavi Birbal and Mr. Govil
Upadhyay, Mr. Mohit
Daulatani and Mr. Maharshi
Kaler, Advocates

versus

PRESIDING OFFICER LABOUR COURT Respondent

Through: Mr. Vimal Kumar Mehta, in
person

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

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C. HARI SHANKAR, J.

1. The name of Vimal Kumar Mehta - the respondent-workman before us - who was, theretofore, employed as Telex-cum-Teleprinter Operator with the petitioner, was struck off from the rolls of the petitioner, *vide* communication dated 11th October, 1991. This resulted in the raising, by the respondent, of an industrial dispute, which, *vide* order of reference dated 23rd September, 1994 was

referred, by the Secretary (Labour), Government of NCT of Delhi, to the Labour Court for adjudication. *Vide* the impugned award, dated 24th July, 2004, the Labour Court directed reinstatement of the respondent, with continuity of service and full back wages with all consequential benefits from the date of his termination till the date of his reinstatement. The present writ petition has been preferred by the petitioner (M/s. Engineers India Limited) thereagainst.

2. While issuing notice on the present writ petition, on 17th November, 2004, this Court had stayed the effect and operation of the impugned award, subject to the petitioner depositing in this Court, the wages last drawn by the respondent, in terms of Section 17B of the Industrial Disputes Act, 1947 (hereinafter referred to as the “ID”). Further, *vide* order dated 19th January, 2005, litigation expenses of Rs. 10,000/- were directed to be paid to the respondent.

3. The respondent filed CM No. 4244/2005, seeking payment, to him, under Section 17B of the ID Act of the higher of the wages between minimum wages payable under the Minimum Wages Act, 1948, and the wages last drawn by him w.e.f. the date of the impugned award i.e. 24th July, 2004. The said application was taken up for hearing, by this Court, on 23rd July, 2005, on which occasion the petitioner submitted that, in terms of the earlier order dated 17th November 2004 (*supra*), up-to-date payment, based on the wages last

drawn by the respondent, stood deposited in this Court. This Court, however, expressed the opinion that, in the interests of justice, the prayer of the respondent deserved to be allowed and, accordingly, directed that he would be entitled to wages at the higher of the two rates between the last drawn wages and the wages statutorily notified under the Minimum Wages Act, 1948 w.e.f. 24th July, 2004. The petitioner was, accordingly, directed to pay arrears, in terms of the said directions, within a period of four weeks, and to continue month to month payments, to the respondent, on the same basis. The amount already deposited in this Court was directed to be released to the respondent forthwith. The respondent was also, however, directed parallally to give an undertaking to the effect that, in the event of his failing to succeed in the writ petition, he would reimburse the differential between the last drawn wages and the wages payable pursuant to the order of the Court. The said undertaking was duly submitted by the respondent, and accepted by this Court *vide* order dated 29th November, 2005 with the observation that the respondent would remain bound thereby.

4. The matter has remained pending since then, and finally heard by me over arguments which spanned three days.

The Facts

5. The respondent, who was initially appointed, on contract basis with the petitioner, as telex-cum-teleprinter operator, w.e.f. 1st December 1980, was regularized, on the same post, on 17th September, 1984. His services were to be on probation for a period of one year. The order of appointment dated 13th September, 1984 stipulated that, even after the completion of the period of probation, his services would be terminable on either side by one month's notice or payment of salary, in lieu thereof, without assigning any reason. It was also indicated, in the said order of appointment, that the service conditions of the respondent would be governed by the Personnel Policy of the petitioner, as in force from time to time.

6. According to the petitioner, w.e.f. 22nd April, 1991, the respondent started absenting himself from duty unauthorisedly without prior permission or intimation, and without any sanctioned leave. This, the petition recites, resulted in the issuance, to the respondent, of a letter dated 14th May, 1991 which read thus:

“Shri V. K. Mehta (6507),
B-366, Sudershan Park,
New Delhi-110 015

Sub : Unauthorised absence from duty

It has been reported that you are absenting yourself from duty and not coming to the office for the last 20 days without prior permission/intimation/sanction of leave.

We also find from our records that you have become a habitual absentee and in the past also on several occasions you were cautioned in this regard.

In view of the above, you are advised to report for the duty immediately but in any case not later than 27.5.91 and explain reasons for your absence without prior permission/intimation/sanction of leave to the satisfaction of your superiors.

Please note that in case you fail to resume duty by the stipulated date, appropriate action will be initiated against you in accordance with Discipline, Appeal and certain other conditions of Service Rules as applicable to your level of employees.

Sd/-
(S.C. Anand)
Personal Officer”

7. The writ petition avers that the above letter was returned by the postal authorities with an endorsement, on the envelope reading “intentionally avoid to take delivery”. A copy of the envelope, bearing the said endorsement, is on record.

8. The petitioner submits that, on 7th June, 1991, a second communication was addressed, by it, to the respondent, drawing attention to the earlier communication dated 14th May, 1991 (*supra*) and, despite the adverse postal endorsement thereon, offering the respondent another chance to report for duty on or before 20th June, 1991, and explain the reason for his earlier absence. It was also stated

that, in default, he would be exposed to the rigour of Rule 4.5 of the Disciplinary Appeal and Certain Other Conditions of Service Rules (hereinafter referred to as the “Rules”) governing the petitioner, which read as under:

“If an employee is absent beyond 21 days continuously/without prior permission or intimation he shall be deemed to have voluntarily abandoned the Company’s service and the company will notify him accordingly at his last known address.”

The letter further cautioned that, in case the respondent failed to join duty by 20th June, 1991, his name would be struck off from the rolls of the petitioner.

9. This letter, too, according to the petitioner, was received back, with the postal endorsement “*Baar Baar jane aur itla dene pur prat karta nahin milta hai – vapas jai*”. (“Despite repeated visits and informing the addressee, he has failed to appear- Returned”). However, no copy of the said envelope bearing any such postal endorsement, is on record.

10. The writ petition submits that, on 1st July, 1991, a third communication was addressed, by the petitioner, to the respondent, which read thus:

“Shri V.K. Mehta,
B-366, Sudershan Park,

New Delhi-110 015

Sub : Unauthorised absence from duty

You have not been attending office since April 22, 1991 without prior permission/intimation/sanction of leave. On getting the information from your division, a letter dated May 14, 1991 was sent to you under Registered/UPC Post, which was returned to us by the postal authorities with the remarks "Intentionally avoid to take delivery". Further, a Regd/UPC letter dated 7.6.91 was sent to you extending you another opportunity to report for duty at the earliest by June 20, 1991. Again this letter has been returned back by the postal department with the remarks " BAAR BAAR JANE AUR ITLA DENE PUR PRAAPAT KARTA NAHIN MILTA HAI - VAPIS JAI".

Please note that you are being treated on unauthorized absence from duty since April 22, 1991. We also find from our records that you have come a habitual absentee and in the past on several occasions you were cautioned in this regard. In this connection your attention is invited to Rule 4.5 of discipline, Appeal and certain Other Conditions of Service rules, as applicable to you, reproduced below:-

" If an employee remains absent beyond 21 days continuously without prior permission or intimation, he shall be deemed to have voluntarily abandoned the Company's service the Company will notify him accordingly at his last known address."

The Company would have been well within its rights to strike-off your name from its rolls as you have lost lien on your appointment in the company under the rule reproduced above. However, you are being given the final opportunity to join duty immediately, but in any case not later than July 10, 1991. In case you choose to ignore this advice and do not report for duty by the stipulate date, the company will have no other option but to strike-off your name from its rolls,

under the provision of 4.5 of the 'Discipline, Appeal & Certain other Conditions of Service rules as mentioned above, without any further notice to you.

Sd/-
(A.K. PAL)
Dy. General Manager (Pers)"

According to the petitioner, this communication provided the respondent yet another opportunity to join duty on or before 10th July, 1991 in default whereof the petitioner threatened to invoke Rule 4.5 of the Rules (*supra*). However, it is worthwhile to note that, unlike the earlier communication dated 7th June, 1991, the above communication dated 1st July, 1991 did not call for any explanation, from the respondent, regarding the earlier period of his alleged unauthorized absence.

11. No response, according to the petitioner, was received, from the respondent, to the aforementioned letter dated 1st July, 1991.

12. The writ petition next refers to a fourth communication, dated 31st July, 1991, addressed by the petitioner to the respondent, which drew attention to the earlier communications dated 14th May, 1991, 7th June, 1991 and 1st July, 1991 and which read as under:

"No. 740.6507
Shri V.K. Mehta (6507),
B-366, Sudershan Park,

New Delhi- 110 015

Sub : Unauthorised absence from duty

Ref : - Our Letter No. 740.6507 dtd. 14.5.91

- Our Letter No. 740.6507 dtd. 07.06.91

-Our Letter No. 740.6507 dtd. 01.07.91

Sir,

In spite of our repeated reminders, you did not care to response to any of our above referred letters. It has been reported that on 1.7.91 in the afternoon, you came to office and submitted Leave application alongwith medical certificates for sanction of leave upto 15.7.91. For the period of your absence from 22.4.91 to 30.4.91 neither you have submitted any leave application nor medical certificates. We have been informed by your division that you are absenting yourself from duty from 16.7.91 without any intimation/permission/sanction of leave. The above act on your part is viewed seriously by the company. In this connection you were cautioned in the past also on several occasions.

Please note that you are being treated an unauthorized absence. You are advised in your own interest to report for duty immediately but in any case not later than 12.8.91 failing which, the Company will have no other option but to strike-off your name from the rolls under the provisions of Para 4.5 of the 'Discipline, appeal & Certain other Conditions of Service rules without any further notice to you.

Sd/-

(A.K. Pal)

Dy. General Manager(Pers)''

13. A reading of the above communication dated 31st July, 1991 would indicate that the respondent had, infact, reported for duty on 1st

July, 1991 and submitted a leave application along with a Medical Certificate for sanction of leave upto 15th July, 1991, but that there was no application seeking leave, or explanation for the respondent's absence from work from 16th July, 1991 onwards. It is also not clear as to why the said letter refers to the respondent not having submitted any leave application or Medical Certificate for his period of absence *from 22nd April, 1991 to 30th April, 1991* whereas, according to the petitioner, the respondent had remained continuously absent, without any application for leave or Medical Certificate, till 30th June, 1991. In another words, a reading of the letter dated 31st July, 1991 (*supra*) would make it appear that

- (i) the respondent remained unauthorisedly absent, without applying for leave and without providing any Medical Certificate, for the period 21st April, 1991 to 30th April, 1991,
- (ii) for the period 1st July, 1991 to 15th July, 1991, the respondent applied for leave with Medical Certificate, and
- (iii) the respondent again remained unauthorisedly absent without any leave application or Medical Certificate from 16th July, 1991 to 31st July, 1991.

14. There is, however, an unexplained hiatus during the period 1st May, 1991 to 30th June, 1991 (i.e. for a complete two months). It is also worthwhile to note that the letter dated 31st July, 1991 (*supra*) advised the respondent to report for duty immediately, “but in any

case not later than 12th August, 1991”, failing which the invocation of Rule 4.5 of the Rules yet again, threatened.

15. The writ petition would assert that no response, from the respondent, was received to the above communication, dated 31st July, 1991, either.

16. On 30th August, 1991, the petitioner submits that a fifth communication – which is, in fact, the first communication of which the respondent admits receipt – was addressed, by it, to the respondent, reading thus:

“NO 740.6507
SHRI V.K. MEHTA,
B-366, Sudershan Park,
NEW DELHI : 110 015
SUBJECT : UNAUTHORISED ABSENCE FROM DUTY
Sir,

You have not been attending office since 12th August, 1991 without prior permission/intimation/sanction of leave. Prior to this, we had issued you letters dated 14th May’91, 7th June’91 and 1st July’91 giving you ample opportunities to report for duty but you did not respond. On 1st July, 1991 you came to office and submitted leave application along with medical certificates for sanction of leave upto 15.7.91. For the period of your unauthorized absence from 22.4.91 to 30.4.91 neither you have submitted any leave application nor medical certificate despite our repeated reminders. Again on 12th August, 1991 you came to office and met the undersigned and promised that you would submit the leave application for the above period alongwith medical certificate and also join the duties immediately, but you failed.

As per company's rules, the leave cannot be sanctioned for indefinite duration and leave on medical ground without the medical certificate of Medical Office. In this connection, we once again invite your attention to Rule 4.5 of Discipline, Appeal and Certain Other Conditions and Service Rules, as applicable to you, reproduced below :-

“If an employee remains absent beyond 21 days continuously without prior permission or intimation, he shall be deemed to have voluntarily abandoned the company's service and the company will notify him accordingly at his last known address”.

The Company would have been well within its rights to strike-off your name from its rolls as you have lost lien on your appointment in the Company under the rules reproduced above. However, you are, hereby once again being given the final opportunity to join duty immediately but not later than 10th September'91 failing which the company will have no other option but to strike-off your name from its rolls, under the provision of 4.5 without any further notice in this regard.

Very truly yours,

Sd/-

(A.K.Pal)

Dy. General Manager (Personnel)

17. As in the case of the earlier communication dated 31st July 1991, the above communication dated 30th August, 1991, too, is perplexing. The very first sentence of the communication alleges that the respondent had not been attending office *since 12th August 1991* – which again, results in an unexplained period from 1st August, 1991 to 11th August 1991. Again, it is seen that the earlier period of unauthorized absence without leave or Medical Certificate is stated to be *22nd April, 1991 to 30th April, 1991*, so that the period from 1st

May, 1991 to 30th June, 1991 continues to remain unexplained. This is underscored by the fact that the letter goes on to assert that, on 12th August, 1991, the respondent had come to the office and promised to submit a leave application “in the above period along with Medical Certificate”. The words “above period” would, plainly read, refer to the period 22nd April, 1991 to 30th April, 1991. What, then, of the period 1st May 1991 to 30th June 1991? Was the respondent absent from work during the said period? If so, had he submitted any application for leave or a Medical Certificate? Was his absence, for the said period impliedly condoned by the petitioner? Despite being specifically queried, in this regard, Ms. Raavi Birbal, learned counsel for the petitioner, has no ready answer to offer.

18. As would be seen from the communication as extracted hereinabove, the letter dated 30th August, 1991 again directed the respondent to rejoin duty “immediately but not later than 10th September, 1991” failing which the threat to invoke Rule 4.5 of the Rules was reiterated.

19. The confusion regarding the attendance, or non-attendance, of the respondent, in the office of the petitioner, appears to have come to an end on 10th September, 1991, when, apparently pursuant to the admonition contained in the letter dated 30th August, 1991 (*supra*) the respondent actually turned up for work in the office of the petitioner.

The petitioner avers, in the writ petition, that, even while so turning up for work, the respondent failed to provide any satisfactory reason for his previous period of unauthorized absence, and that the Medical Certificate provided by him did not cover the entire period of absence (unfortunately, the writ petition does not specifically dilate on what exactly constitutes this “entire period”). What is, however, undisputed is that, on 10th September, 1991 itself, the respondent addressed a communication to the petitioner, stating that, though he had reported for duty on the said date, and had met Mr. A.K. Pal, DGM (P) along with necessary Medical Certificate, Mr. Pal had refused to accept the said documents, and had told the respondent to leave the room, with the “usual threat” to terminate his services. The said letter further sought to allege that, though the respondent was suffering from “ankylosing spondylitis”, which could be confirmed from the resident doctor in the office of the petitioner, Mr. Pal had refused to allow the respondent to join duty. A sympathetic view was, therefore, sought.

20. The petitioner responded, *vide* letter dated 11th September, 1991 which again states that the respondent remained unauthorizedly absent *from 12th August, 1991* and that he had failed to explain the reason for such unauthorized absence when he rejoined duty on 10th September, 1991. The allegations, made by the respondent against Mr. Pal, were emphatically denied and the respondent was given another opportunity to submit medical and fitness certificates. He was also

directed to report to Dr. K. P. Jain, to have himself medically examined and obtain a medical opinion, regarding the earlier illness stated to have been suffered by him, as also regarding his fitness to resume duty, and to have his Medical Certificates reviewed and commented upon. The letter further stated that the issue of respondent's rejoining duty would be considered only pursuant to receipt of the opinion of Dr. K. P. Jain.

21. The writ petition contends that the respondent failed to comply with the above directions and that he was given another opportunity to do so, *vide* letter dated 20th September, 1991. The said letter, too, expressed the view that the actions of the respondent exposed him to disciplinary action under the Rules, and such action would, in fact, be taken, in the event of failure by him to abide by the instructions communicated to him.

22. It is further contended, in the writ petition, that the respondent did not comply with the directions contained in the communications dated 11th September, 1991 and 20th September, 1991 (*supra*) and remained on unauthorized absence without prior permission or communication or sanction of leave, resulting in the passing of the order dated 11th October, 1991 by the petitioner, striking the name of the respondent off the rolls of the petitioner company with immediate

effect. The said letter, which provoked the industrial dispute that has led to the present proceedings, deserves to be reproduced *in extenso*:

“No. 740.6507

Shri V.K. Mehta (6507),
Telex-cum-Tele-Printer Operator,
B-366, sSudershan Park,
New Delhi – 110 015

Please refer to our Registered/UPC letters of even number dated July 31, 1991 and August 30, 1991, advising you to report for duty immediately but in any case not later than September 10, 1991. You were further advised through our letter dated September 11, 1991 to get yourself medically examined and obtain medical opinion by company's Administrative Consultant, Dr. K.P. Jain. You have failed to do so. However, through our letter dated September 20, 1991, you were given another opportunity to report to Dr K.P. Jain for medical examination and submit his opinion within six days from the date of issue of our letter. It was made clear in the last communication that in case you fail to comply with the instructions contained therein, you will lose your lien on the post of Telex-cum-Teleprinter Operator in the company and your name would be struck off from the rolls of the company without any further notice in this regard.

It is regretted to note that in spite of our giving you as much accommodation as possible and affording you number of opportunities to (i) resume duty immediately; and (ii) to get yourself medically examined by Company's Administrative Medical Consultant, you have failed to do so.

Thus in accordance with the terms of your appointment as contained in your letter of appointment No. 720.10 dated September 13, 1984 duly accepted by you, read with clause 4.5 of Discipline, appeal and Certain Other Conditions of Service rules (a copy of which was duly supplied to you along with letter of appointment *ibid*), you have lost your lien on your appointment as Telex-cum-Teleprinter Operator in the

Company, the entire responsibility for which rests with you. Accordingly, your name is struck off from the rolls of the company with immediate effect.

Sd/-
(K.K. Pandey)
General Manager (Pers)”

23. This provoked the respondent to raise an industrial dispute which, as has already been stated hereinabove, resulted in reference, thereof, to the Labour Court, *vide* order dated 23rd September, 1994, with the following term of reference:

“Whether the services of Sh. Vimal Kumar Mehta, S/O Sh. N. R. Mehta, have been terminated illegally and/or unjustifiably by the management, and if so, to what relief is he entitled and what directions are necessary in this respect?”

24. Pursuant to the above reference, the respondent filed his Statement of Claim, before the Labour Court, essentially contending that the termination, of his services, by the petitioner, *vide* order dated 10th November, 1991 (*supra*) was violative of Sections 25F and 25G of the ID Act. The respondent complained that he had not been given any opportunity of hearing before his services were terminated, despite the fact that he had served for 12 years in the office of the petitioner against a permanent post.

25. The petitioner filed a written statement, in response to the Statement of Claim of the respondent, which was amended subsequently, and the respondent filed a rejoinder thereto.

26. Consequent upon completion of pleadings between the parties, the Labour Court framed the following issues, as arising for its consideration :

- “1. As per terms of reference.
2. Whether claimant Sh. Vimal Kumar Mehta has abandoned the job and has lost lien in terms of clause 4.5 of Company's Discipline, appeal and certain other conditions of Service rules?
3. Whether claimant Sh. Vimal Kumar Mehta has been rendered physically unfit to claim reinstatement?
4. Relief.”

27. Affidavits-in-evidence were filed by the petitioner and the respondent, and examination and cross examination conducted. The respondent did not produce any witness in support of his case, except himself. The petitioner filed the affidavit in evidence of Mr. S.S. Fonia, its Manager, who was cross examined.

The Impugned Award

28. By the impugned Award dated 24th July, 2004, the Labour Court held the dismissal, of the respondent, to be unjustified and consequently directed his reinstatement with continuity of services and full back wages, on the following reasoning:

(i) The fact that the respondent attended the office of the petitioner, to join duty on 10th September, 1991, was evidenced from the letter dated 11th September, 1991 (Ex. WW-1/15) as well as from the cross examination of MW-2 Mr. S.S. Fonia. It was also admitted, by Mr. Fonia, that, on the said date, the respondent had tendered certain medical certificates, for some of the period for which he remained absent. The letter dated 30th August, 1991 (Ex. WW1/14) whereby the respondent was directed to join duty, did not impose any precondition to the fact that prior to joining duty, the respondent was required to get himself medically examined by Dr. K. P. Jain, or to obtain written authorization from the Establishment Section.

(ii) The letter, dated 11th September, 1991, of Mr. A.K.Sharma, revealed that the respondent had come to the telex room on the said date and started transmitting telex messages.

(iii) The respondent had, therefore, made a genuine effort to rejoin duty on 10th September, 1991 and 11th September, 1991, but various conditions were imposed by the petitioner. The non-obtaining of the written authorization from the Establishment Section, and the default in getting his medical certificate verified from Dr. K. P. Jain, could, in the facts and circumstances be, at worst, treated as a misconduct, and did not make out any case of abandonment of duty.

(iv) The allegations against Mr. A.K.Pal, as contained in the letter dated 10th September, 1991 (Ex. PW-2/W-3) of the respondent, commended acceptance, as the said letter was written promptly and on the same date on which the respondent was prevented from joining duty.

(v) It was admitted, by MW-2, in his cross examination, that Dr. K. P. Jain had earlier examined the respondent, and opined that he was suffering from ankylosing spondylitis. The medical certificates, regarding examination of the respondent by Dr. K. P. Jain, stood exhibited as Ex. WW-1/1- to WW-1/13. In Ex. WW-1/10, Dr. K. P. Jain had opined that the respondent was suffering from ankylosing spondylitis of his right hip, for which he was advised rest and leave of two months. Again, in Ex. WW-1/12, Dr. K. P. Jain advised the respondent one month's rest, on account of ankylosing spondylitis suffered by him. In view thereof, the direction, by the petitioner to the respondent, to again get himself examined by Dr. K. P. Jain, was not rational. That apart, even if it were, the failure, on the part of the respondent, to abide by the said direction, did not justify any inference of abandonment of service on his part. At worst, it could be construed as misconduct, in which case the petitioner was required to follow due process after issuing a charge- sheet to the respondent and holding a domestic inquiry.

Any punishment imposed would also necessarily have to be proportional to the misconduct.

(vi) There was no justification for the non-production, by the petitioner, of Mr. A.K.Pal and Mr. K. K. Narula, who could have clarified the position. The statement, of the respondent, that he had been periodically intimating Mr. K. K. Narula about his absence, stood unquestioned and unchallenged. No occasion existed, therefore, to invoke Rule 4.5 of the Rules against the respondent.

(vii) Removal of an employee on the ground of overstaying of leave necessarily required holding of a prior inquiry, with reasonable opportunity granted to the employee, to show cause against the action proposed. Reliance was placed, for this purpose, on *Scooters India Ltd. v. M. Mohammad Yaqub* 2001 *LABIC* 71 and *Mafatlal Narandas Barot v. J. D. Rathod, Divisional Controller, State Transport Mehsana, AIR 1966 SC 1364*. In the present case, however, the respondent had not been afforded any opportunity to deny his guilt and establish his innocence. No charge-sheet had been issued to him, and no domestic inquiry was conducted.

(viii) In these circumstances, the termination of services of the respondent, even if relatable to Rule 4.5 of the Rules, amounted to retrenchment. It was, no doubt, open to the Management to seek permission to prove the factum of misconduct in the

proceedings of the ID Act as well. However, no such request had been made. The law requires such a request to be made at the first opportunity, i.e. in the written statement filed in response to the Statement of Claim of the workman. The evidence sought to be adduced by the petitioner, to prove the misconduct alleged to have been committed by the respondent, therefore, could not be taken into consideration.

(ix) Other employees, similarly placed, had been treated differently. Mr. G. S. Gupta, who suffered from the same decease, i.e. ankylosing spondylitis, as a result of which both of his hip joints were totally replaced, was still working with the petitioner. The respondent also deposed, in his affidavit-in-evidence, that seven Teleprinter Operators, junior to him, had been retained in service or adjusted by the petitioner in similar posts. This fact was not denied by MW-2-Mr. S.S.Fonia, either in his affidavit-in-evidence or during his cross-examination. It had been held, by the Supreme Court, that, where the employee contracted the ailment, during the performance by him of his duties, the employer was required to make an endeavour to adjust him in a suitable post keeping in view his physical condition. This position also followed from Section 47 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as “the PWD Act”). Reliance was

also placed, in this context, on judicial pronouncements, in which the argument, that the provisions of the PWD Act could not be given retrospective effect, was negated. Inasmuch as the respondent had not become incapable of serving the petitioner, he was required to be given some work, commensurate with the effort which he was in a position to put in.

Rival submissions

29. Appearing for the petitioner, Ms. Raavi Birbal drew my attention to para 70 of the impugned Award, in which the Labour Court noted the submission, of the petitioner, that the respondent had remained absent from work from May 1991 to September 1991, without responding to any of the communications sent by the petitioner. Even when he reported for work on 10th September, 1991, she points out, he did not present himself for medical examination to Dr KP Jain, as instructed. In her submission, this amounted to clear abandonment of service, on the part of the respondent, which justified his removal from service, without conducting any enquiry. Ms Birbal, further, reiterated the contention, advanced by the petitioner before the Labour Court, that termination of the services of a workman who was suffering from continued ill-health would not amount to “retrenchment” within the meaning Section 2 (oo) of the ID Act, and drew my attention, in this context, to para 87 of the impugned Award.

She submits that the question of the management applying, before the Labour Court, for permission to prove the commission of misconduct by the workman, would arise only in the case of termination consequent to holding of an enquiry, which was found to be vitiated, and not to a case where the name of the workman was struck off the rolls by invoking the applicable Rules, on the ground of abandonment. She, thereafter, took me through the various communications, addressed by the petitioner to the respondent, to which detailed allusion has already been made hereinabove. She emphasises that, though there was some discrepancy in the dates, and the period, for which the respondent was allegedly unauthorizedly absent, as reflected in the communications addressed to him by the petitioner, the letter dated 1st July 1991 *supra* clearly stated that he had been unauthorizedly absent from 22nd April, 1991. She further submitted that the respondent had failed to report for duty, by complying with the directions contained in the communication dated 11th September, 1991 *supra*, addressed to him by the petitioner. As such, she would contend that the termination, of the respondent, from service, in exercise of the authority conferred by Rule 4.5 of the Rules, on the ground that he had abandoned his services, was entirely justified on facts and in law.

30. Ms. Birbal also submits that, in any case, the post of teleprinter operator, in the petitioner-Company, stood abolished. At this stage,

therefore, she would submit, even if the impugned Award were to be upheld, it would not be possible to reinstate the respondent in service, and all that could be done would be to give him a lump-sum compensation. This, she submits, would appropriately have to be limited to the amount already paid to him under Section 17-B of the ID Act of which, she submits, the petitioner would not claim a refund, even if it were to succeed in the petition.

31. Ms. Birbal would further submit that the reference, in the letters dated 31st July, 1991 *supra* and 30th August, 1991 *supra*, to “30.4.91”, while referring to the period of unauthorised absence, of the respondent, as “from 22.4.91 to 30.4.91”, was a typographical error, and that “30.4.91” should be read as “30.6.91”, relying, for this purpose, on the earlier communication, dated 1st July 1991, from the petitioner to the respondent, which clearly alleged, in her submission, that the respondent was unauthorizedly absent till 1st July, 1991. (At this point, the respondent, who appears in person, interjected to submit that this allegation was not true, as he had, in fact, submitted a leave application covering the period till 1st July, 1991.) Ms. Birbal has also taken exception to the fact that no finding was returned, by the Labour Court, on the merits of the case. She reiterates that the post of teleprinter operator stood abolished, in the petitioner-Company. On a query from the bench, it is submitted that, at the time

of his termination, the respondent was drawing a salary of Rs. 2366/- per month.

32. Ms. Birbal places reliance on the cross-examination of the respondent, who examined himself as WW-1, in which he admitted that, though the petitioner had instructed him to meet Dr. K.P. Jain on 11th September 1991, for medical examination, to obtain an opinion regarding his earlier illness as well as his fitness to join duty, and review of the medical certificates presented by him, he did not do so, defending the said inaction by stating that he had telephoned Dr. Jain for an appointment, whereupon an appointment was given, to him, only after five days. The respondent further stated, in this connection, that he could not get himself examined, as he had to obtain the opinion of Dr. Jain within three days and, in any case, the medical certificate and fitness certificates submitted by him were in the possession of the petitioner. He further admitted, in cross-examination, that he did not, however, seek extension of time for complying with the directions issued by the petitioner, regarding obtaining of opinion from Dr. Jain. In her submission, the stand adopted by the respondent, i.e., that, as he was fit and had performed duty on 10th September, 1991, there was no occasion for requiring him to get himself medically examined once again, regarding his fitness, demonstrated his highhandedness and disentitled him to relief. Ms. Birbal also submits, in conclusion, that the respondent was guilty of

delay and latches, as he had been terminated in 1991, but issued a notice, to the petitioner, for the first time, in 1993. She also reiterates the submission that the termination of the respondent did not amount to “retrenchment” within the meaning of clause (oo) in section 2 of the ID Act.

33. Ms. Birbal has placed reliance on the following authorities:

- (i) ***Regional Manager vs Anita Nandrajog, (2009) 9 SCC 462,***
- (ii) ***Vijay S. Sathaye v Indian Airlines, (2013) 10 SCC 253,***
- (iii) ***Jitender Mathuria v Hindustan Petroleum Corpn Ltd, 2014 (144) DRJ 405,***
- (iv) ***Chief Engineer vs Keshava Rao, (2005) 5 SCC 337*** and
- (v) ***Municipal Corp of Greater Bombay v P.S. Malvenkar, (1978) 3 SCC 78.***

34. Answering Ms. Birbal, the respondent, who appeared in person, relied, in the first instance, on para 92 of the impugned Award, which records the admission, by MW-2 (S.S. Fonia), in cross-examination, that the respondent had come to office to join duty on 10th September, 1991, and had also tendered certain medical certificates, for the period of his alleged unauthorized absence. He has emphatically denied the allegation that he had been unauthorisedly absent. He emphasises the fact that, in the letter, dated 14th May, 1991 *supra*, addressed to him

by the petitioner, it was alleged that he had been absenting himself from duty and not coming to office “for the last 20 days”, which period, he points out, would commence from 24th April, 1991. He submits that it was admitted, in the communication dated 31 July, 1991 *supra*, from the petitioner to the respondent, that he had submitted medical certificates up to 15th July, 1991 and that, in fact, he was absent from work only from 16th July 1991. He also relies on the recital, in the letter dated 30th August, 1991 *supra*, to the effect that he had “not been attending office since 12th August, 1991. He points out that the said letter gave him time, till 10th September, 1991, to rejoin duty, threatening that his name would be struck off from the rolls of the petitioner in default, and that he had, in fact, rejoined duty on 10th September, 1991. He relies on two Telex messages, sent by him on 10th September, 1991, as well as on the following noting, entered by Mr. A.K. Sharma on 11th September, 1991, under the subject “Sh. VK Mehta, Telex Operator in EI Bhavan”:

“Sh. VK Mehta, Telex Operator came to Administration Dept (Communication Group) and marked attendance for 10.9.91 and 11.9.91 at about 0830 hours today. He went to the Telex Room and started transmitting telex messages without any authorisation. He was advised by the undersigned not to do so but he did not heed to the advice. The matter was brought to the notice of Senior Manager (P&A) who call Shree Mehta and advised him to report to the Establishment Section. The Senior Manager (P&A) also told he cannot be allowed to report for duty unless and until he brings written authorisation to this effect from the Establishment Section. Remittitur however, did not go to the Establishment Section and went to

the Telex Room. He also said that he has worked in the Administration Dept or about 10 years and would continue to work in Telex Room unless he has given written orders to go to Establishment Section. The Senior Manager (P&A) advised him that he cannot be allowed to join duty without following proper procedure and that he should not create any unpleasant situation. Mr. Mehta left the room of Senior Manager (P&A) and is trying to transmit messages in defiance of all advice to him.”

35. The respondent has also drawn my attention to the cross-examination of MW-2 S.S. Fonia, during which the said witness has acknowledged that it was correct that, as per the past record of the respondent, Dr. K.P. Jain had opined that the respondent was suffering from ankylosing spondylitis. He also places reliance on Section 47 of the PWD Act and relies, in conjunction therewith, on the prescriptions and medical opinions exhibited before the Labour Court as Ex WW-1/3. He states that he has been out of employment since 1991. He has relied on a number of judicial pronouncements, which would be dealt with, hereinafter, to the extent they are relevant to decide the present dispute.

36. In rejoinder, Ms. Birbal seeks to point out that the Disability Certificate, filed by the respondent before this Court, was not part of the record before the Labour Court.

Analysis and decision

37. On a holistic appreciation of the various communications addressed by the petitioner to the respondent, which have been exhibited before the Labour Court and referred to, in detail, hereinabove, I do not have the slightest doubt that the respondent had, in fact, remained absent from duty, without grant of leave, from 22nd April 1991 till 11th September 1991, when he was struck off the rolls of the petitioner. The manner in which some of the communications have been worded, no doubt, result in an impression of ambiguity, but the facts, which emerge from the documents which stand duly exhibited before the Labour Court, are stark.

38. The various communications, addressed by the petitioner to the respondent, are as under:

- (i) On 26th February, 1990, the petitioner wrote, to the respondent (Ex WW-1/M-5), drawing his attention to the fact that, since 27th December, 1989, he had neither been attending duties nor had he applied for leave. He was, therefore, directed to report for duty within 7 days and explain the earlier period of his absence. The said communication was dispatched, to the respondent, by Registered post Acknowledgement Due ("Regd.

A/D”), and a copy of the envelope, wherein it was dispatched, constitutes Ex MW-1/A.

(ii) Apparently as there was no response, by the respondent, to the above communication, another letter, dated 7th March, 1990, was issued, to him, by the petitioner (Ex WW-1/M-2), drawing his attention to the earlier communication dated 26th February, 1990 and giving him another opportunity to comply therewith, warning him that failure to report for duty on or before 15th March, 1990 would result in his name being struck off the rolls of the petitioner-company.

(iii) On 14th May, 1991, the petitioner wrote, to the respondent (Ex WW-1/M-2), stating that he had been absenting himself from duty “for the last 20 days without prior permission/intimation/sanction of leave”. It was further stated, in the said letter, that the respondent had become a habitual absentee, for which he had been cautioned, in the past as well, on several occasions. He was, therefore, advised to report for duty on or before 27th May, 1991, with explanation for his earlier period of absence, failing which action, under the Rules, was threatened. The postal endorsement, on the envelope wherein this communication is stated to have been sent to the

respondent, which was exhibited as Ex MW-1/2-A, carries the postal endorsement “Intentionally Avoid to take Delivery”.

(iv) The petitioner next wrote, to the respondent, on 7th June, 1991 (Ex WW-1/M-4), drawing his attention to the letter dated 14 May, 1991 *supra*, and the fact that he had refused to accept delivery thereof. It was pointed out that the petitioner had taken the matter very seriously, but that the respondent was being given another opportunity, to rejoin duty by 20th June, 1991, with an explanation for his past absence. The said letter also drew the attention, of the respondent, to Rule 4.5 of the Rules, on the basis whereof the respondent was cautioned that, in the event of failure, on his part, to report for duty by 20th June, 1991, his name would be struck off the petitioner’s rolls. From the envelope, wherein the said letter was dispatched (exhibited as Ex. MW-1/3-A), it appears that the said letter was not delivered to the respondent; however, the said envelope does not disclose any postal endorsement thereon.

(v) The next communication, from the petitioner to the respondent, was on 1st July, 1991, which alleged that the envelope, wherein the earlier communication dated 7th June, 1991 had been dispatched to the respondent, had been returned with the postal endorsement “*Baar baar jane aur itla dene pur*

prakatkartha nahin milta hai – vapas jai”. (However, as already noted hereinabove, the copy of the said envelope, exhibited in the proceedings before the Labour Court as Ex. MW-1/3-A, does not reveal any such postal endorsement thereon.) The letter dated 1st July, 1991 clearly stated that the respondent was “being treated on unauthorised absence from duty *since April 22, 1991*”. The attention of the respondent was, once again, drawn to Rule 4.5 of the Rules, clearly stating that while, in the facts, the petitioner was well within its rights to strike the name of the respondent off its rolls, as *he had lost his lien on his appointment with the petitioner in the light of the said Rule*, he was being given a final opportunity to join duty, not later than 10th July, 1991, failing which the petitioner would have no option but to strike his name off its rolls, applying Rule 4.5. The respondent does not, however, acknowledge having received this communication, and, unfortunately, the record of the Labour Court does not disclose any evidence having been led, by the petitioner, regarding dispatch of the said communication to the respondent either.

(vi) The record of the Labour Court reveals the next communication, from the petitioner to the respondent, to have been written on 31st July, 1991 (Ex WW-1/M-1). The said letter noted the fact that the respondent had come to office in the

afternoon of 1st July 1991, and submitted a leave application, along with medical certificates, for being sanctioned leave till 15th July, 1991. It also notes that the respondent had not submitted any leave application, or medical certificate, for the period of his absence from 22nd April 1991 to 30th April 1991. It was further noted that, from 16th July 1991 onwards, the respondent had again been absent without tendering any application for leave or submitting any medical certificates. The letter, therefore, stated that the respondent was being treated as being unauthorisedly absent from duty. The respondent was, therefore, advised to report for duty on or before 12th August, 1991, failing with he was, once again, cautioned that his name would be struck off the rolls of the petitioner-company, as ordained by Rule 4.5 of the Rules.

(vii) Next, in the array of correspondence, is the letter dated 30th August, 1991 (Ex WW-1/14), which clearly alleged that

- (a) the respondent had not been attending duty, since 12th August, 1991, without prior permission/intimation/sanction of leave,
- (b) prior thereto, the petitioner had issued letters, dated 14th May, 1991, 7th June, 1991 and 1st July, 1991, to the respondent, giving him ample opportunity to respond, but he did not do so,

(c) on 1st July, 1991, the respondent came to the office and submitted a leave application, with medical certificates, for sanction of leave upto 15th July, 1991, but did not submit any leave application, or medical certificate, for the period 22nd April to 30th April, 1991, and

(d) on 12th August, 1991, the respondent again visited the office of the petitioner, and stated that he would be submitting a leave application for the “above period” (which, plainly read, would indicate the period 22nd April to 30th April 1991), and also join duty immediately, but failed to do either.

The letter went on to admonish the respondent, stating that though, in these circumstances, the petitioner would be well within its rights to invoke Rule 4.5 of the Rules, the respondent was being given a final opportunity to join on or before 10th September, 1991, failing which the petitioner would have no option but to strike his name off its rolls.

(viii) It appears that, on 10th September, 1991, the respondent did turn up for work, with medical certificates, but that the petitioner did not condescend to take stock thereof, as they did not cover the entire period of his absence. He was asked to report to Dr. K P Jain, to have himself evaluated and his

certificates verified. He failed to do so, purportedly - as per the respondent - because he could not secure an appointment with Dr. Jain for five days and had been asked to produce the certificate of Dr Jain within three days. Needless to say, it is hardly believable that, for this sole ground, the respondent refused to consult Dr Jain. Apparently - and this, in my view, is a more plausible explanation - the respondent was peeved at being asked to re-visit Dr Jain, in view of the fact that he had earlier been consulting him, and that Dr Jain himself had diagnosed the petitioner as suffering from ankylosing spondylitis.

(ix) Ultimately, on 11th October, 1991, the petitioner, *in accordance with the terms of appointment of the respondent read with Rule 4.5 of the Rules*, struck the name of the respondent off its rolls.

39. “Abandonment”, it is trite, presages, as its *sine qua non*, the animus to abandon. Sans animus, there can be no abandonment. The framers of Rule 4.5, too, were clearly conscious of this requirement - which is why the Rule uses the word “voluntarily”. Willingness to work and voluntary abandonment are strange bedfellows, which cannot cohabit together. Abandonment, be it noted, is a positive act, deliberately and mindfully done, in the awareness and acceptance of

the consequences that ensue. Being a positive act, law always casts the onus, to prove the factum of abandonment by the employee, on the person asserting the fact. Abandonment, ordinarily, cannot be “deemed”, and, to that extent, the very *vires* of Rule 4.5 of the Rules may be questionable; it has not, however, been questioned, and I refrain, therefore, from entering into that territory.

40. It would be instructive, at this stage, to have a panoramic view of the law, as it has evolved over the years, on the issue of “abandonment of service” by an employee/workman.

41. *Buckingham and Carnatic Co. Ltd. v. Venkatiah*, AIR 1964 SC 1272 is one of the earliest well-known decisions on the issue of abandonment from service. The respondent-workman, in that case, overstayed the leave granted to him, which expired on 18th January, 1957, and continued to remain absent without any communication to the appellant company. Nearly two months thereafter, he wrote to his employer, stating that, he had in the intervening period, suffered from fever and dysentery and attached, in support of the said submission, a medical certificate, covering the period 15th January to 7th March, 1957. He was referred to the Senior Medical Officer of the appellant-company, who examined him and expressed his inability to confirm that he had been ailing for nearly two months. Acting on the said opinion, the appellant-company refused to take the respondent

employee, i.e. Venkatiah, into service, stating that his case attracted Standing Order 8(ii), applicable to the appellant company. The said Standing Order stated that any employee, who absented himself for eight consecutive working days without leave, would “be deemed to have left the company’s service without notice thereby terminating his contract of service”. Though the said clause is distinguishable from Rule 4.5 of the Rules, with which the present case is concerned, the Supreme Court, nevertheless, made relevant observations regarding the law on “abandonment of service”, which would obviously bind this Court. The following words, from para 6 of the report, merit reproduction:

“It is true that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. But where parties agree upon the terms & conditions of service and they are included in certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant. It is then a matter of construing the relevant term itself. Therefore, the, first part of Standing Order 8(ii) inevitably leads to the conclusion that if an employee is absent for eight consecutive days without leave, he is deemed to have terminated his contract of service and thus relinquished or abandoned his employment”.

42. *Buckingham and Carnatic Co. Ltd.* (*supra*) is also an authority for another important proposition, which arose from Standing Order 13(f). While Standing Order 8(ii), as already noted hereinabove, deemed an employee, who absented himself for eight consecutive days without leave, to have left the company's service, and the contract between such employee and the company to have automatically been terminated thereby, Clause 13(f) of the same Standing Orders treated the same act of remaining absent without leave for eight consecutive days as "misconduct". Relying on this clause, it was sought to be contended by the workman, before the Supreme Court, that the appellant company had erred in invoking Standing Order 8(ii), and was required, rather, to hold an enquiry against him, as remaining absent without leave for eight consecutive days was a defined "misconduct". The Supreme Court rejected the submission. While doing so, the Court accepted the fact that the same act, of remaining absent without leave for eight consecutive days, could either attract action under Standing Order 8(ii), or be the foundation for a disciplinary proceeding, treating it as "misconduct", under Standing Order 13(f). It was, however, held that this fact could not vitiate the decision, which vested entirely with the appellant-company, to invoke Clause 8(ii), rather than Clause 13(f), of the Standing Orders. In other words, it is no answer, to the invocation of the clause treating the act of absence as abandonment from service, to urge that the same act constitutes "misconduct" and that, therefore, the

employer ought to have proceeded by way of a domestic or departmental enquiry.

43. Another important proposition that emerges, from *Buckingham and Carnatic Co. Ltd. (supra)*, is that, where a particular act of the employee is defined as, or deemed to be, abandonment from service, under any specific Standing Order, Rule or Regulation, common law principles relating to “abandonment” would not apply, and the issue would have to be decided by interpreting the concerned Rule, Regulation or Standing Order.

44. *Buckingham and Carnatic Co. Ltd. (supra)* was invoked by another three Judge Bench of the Supreme Court, in *G.T. Lad v. Chemical and Fibre India Ltd., (1979) 1 SCC 590*, which is regarded, in a way, as a watershed decision in “abandonment jurisprudence”- if one may use the expression. At a glance, it is apparent that the plea of the employees having abandoned their service, as raised by the employer in the said decision, was totally frivolous, as the absence, of the workmen, from service, in that case, was on account of their having gone on strike. The Supreme Court, nevertheless, examined the concept of “abandonment from service” in some detail, and paras 5(a) and 6 of the report may, in this context, be usefully reproduced as under:

“5a. In the Act, we do not find any definition of the expression 'abandonment of service'. In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, *the word 'abandon' has been explained as meaning 'to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something'.* According to the Dictionary of English Law by Earl Jowitt (1959 edition) *'abandonment' means 'relinquishment of an interest or claim'.* According to Black's Law Dictionary *'abandonment' when used in relation to an office means 'voluntary relinquishment. It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an abandonment of office.*

6. From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In ***Buckingham & Carnatic Co. v. Venkatiah***, it was observed by this Court that under common law *an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus, whether there has been a voluntary abandonment of service or not is a question of fact*

which has to be determined in the light of the surrounding circumstances of each case”.

(Emphasis supplied)

45. Clearly, therefore, “abandonment” connotes “voluntary relinquishment” which has to be absolute in nature, i.e., with actual intention, on the part of the employee, to abandon and relinquish office. Temporary absence would, ordinarily, not constitute “abandonment”. Total or complete giving up of duties, so as to indicate an intention not to resume the same, was held to be a *sine qua non* for “abandonment” to be inferred. An inference of “abandonment of service” was not to be easily drawn. Abandonment, or relinquishment, of service, it was held, is always a question of intention, to be established by cogent evidence. Needless to say, the absence from duty on the part of the workmen in that case, being attributable to their having gone on strike, the Supreme Court held that no case of “abandonment” could be said to have been made out. Having thus appreciated the principle laid down in ***G.T. Lad*** (*supra*), it has, nevertheless, to be noted that the said decision did not involve any rule, regulation or Standing Order deeming any act, of the employees or workmen to amount to “abandonment” or “voluntary relinquishment” of service. The extent to which the said decision would apply, in a case where “abandonment” from service was deemed to have taken place on the basis of a Rule, Regulation or Standing Order, may,

therefore, be questionable, given the note of caution sounded, in this regard, in *Buckingham & Carnatic Co. Ltd (supra)*.

46. Reference may now be made to three decisions, which delineate the contours of “retrenchment”, as defined in clause (oo) of Section 2 [which may, for the sake of ease of reference, be referred to as “Section 2(oo)”] of the ID Act, in almost the same terms, viz. the judgement of a bench of two learned Judges in *L. Robert D’Souza v Executive Engineer, Southern Railway, (1982) 1 SCC 645*, a bench of three learned Judges in *State Bank of India v. M. Sundra Money, (1976) 1 SCC 822* and the Constitution Bench of the Supreme Court in *Punjab Land Development and Reclamation Corporation Ltd. vs. Presiding Officer, Labour Court (1990) 3 SCC 682*. These three decisions, in one voice, hold, by reversing the earlier extant view that “retrenchment” only arose in the case of laying off, of surplus labour, that the definition of “retrenchment”, in the ID Act, was expansive enough to cover termination of service of an employee *of any kind whatsoever, except in the instances specifically excepted by the statute*. This was, probably best expressed in *L. Robert D’souza (supra)*, through D.A. Desai, J. in the following words occurring in para 7 of the report:

“Therefore, we adopt as binding the well-settled position in law that if termination of service of a workman is brought about for any reason whatsoever, it would be retrenchment except if the case falls within any of the excepted categories,

i.e. (i) termination by way of punishment inflicted pursuant to disciplinary action; (ii) voluntary retirement of the workman; (iii) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; (iv) or termination of the service on the ground of continued ill health. Once the case does not fall in any of the excepted categories the termination of service *even if it be according to automatic discharge from service under agreement would nonetheless be retrenchment within the meaning of expression in Section 2(oo)*".

(Emphasis supplied)

47. These decisions, *inter alia*, were relied upon by a two-Judge Bench of the Supreme Court in ***Roltson John v. Central Government Industrial Tribunal-cum Labour Court, (1995) Supp 4 SCC 549***. The services of the appellant, in that case, were terminated under Clause 24(e) of the applicable Standing Orders, whereunder absence of a workman, beyond the period of leave granted to him, for a period of more than 10 days, would result in loss, by the workman, of the lien to his appointment. The Supreme Court set aside the decision, on the ground that the termination of the appellant-workman, from service, amounted to "retrenchment" as defined in Section 2(oo) of the ID Act, and that the said decision, consequently, stood vitiated, as it failed to comply with the requirements of Section 25-F of the said Act. This decision, therefore, supports the reliance, placed by the respondent before me, on Section 25-F, and defeats the stand, of Ms Birbal, that the striking off, of the name of the respondent, from the rolls of the

petitioner-Company, did not constitute “retrenchment” as defined in Section 2(oo) of the ID Act.

48. I may note, here, that a contention was sought to be advanced, by Ms. Birbal, to the effect that the respondent, in the present case, had been removed as he was suffering from ankylosing spondylitis, and that, therefore, such removal stood excepted from the ambit of the expression “retrenchment”, as it was attributable to the “continued ill health” of the respondent, the ailment of ankylosing spondylitis, from which he suffered, being fundamentally debilitating in nature. I am not prepared to countenance the said submission, as the communication, dated 11th October, 1991 *supra*, whereby the respondent’s name was struck off the rolls of the petitioner-Company, clearly cited Rule 4.5 of the Rules, as the basis thereof, rather than the alleged “continued ill-health” of the respondent.

49. A study of the case law that has developed on the issue, further reveals that, even where clauses, or Rules, such as Rule 4.5 in the present case, have been invoked by the employer to “deem” abandonment to have taken place, courts have insisted on the intention to abandon being proved as a positive fact, thereby blurring the distinction between abandonment simpliciter, which attracted “common law” principles, and abandonment on the basis of a

deeming fiction engrafted in the applicable statutory provisions, whether plenary or subordinate.

50. A leading, though brief, authority, in this context, is the judgement of the Constitution Bench of the Supreme Court in ***Jai Shanker v. State of Rajasthan, AIR 1966 SC 492***. On the ground of his having remained unauthorisedly absent from duty, the petitioner, in that case, was removed from service, relying, therefor, on Regulation 13 of the Jodhpur Service Regulations, which stipulated that an individual, who absented himself without permission, or remained absent without permission, for one month or longer, after the end of his leave, would be liable to be considered “to have sacrificed his appointment”. While there may be a subtle distinction between “sacrifice” and “abandonment”, the following ratio, as contained in para 6 of the report, as enunciated by Hidayatullah, J. (as he then was) is of significance:

“It is admitted on behalf of the State Government that discharge from service of an incumbent by way of punishment amounts to removal from service. It is, however, contended that under the Regulations all that Government does, is not to allow the person to be reinstated. *Government does not order his removal because the incumbent himself gives up the employment. We do not think that the constitutional protection can be taken away in the manner by a side wind. While, on the one hand, there is no compulsion on the part of the Government to retain a person in service if he is unfit and deserves dismissal or removal, on the other, a person is entitled to continue in service if he wants until his*

service is terminated in accordance with law. One circumstance deserving removal may be over-staying one's leave. This is a fault which may entitle Government in a suitable case to consider a man as unfit to continue in service. But even if a regulation is made, it is necessary that Government should give the person an opportunity of showing cause why he should not be removed.

(Emphasis supplied)

The *raison d'etre* for the said decision is tellingly expressed, towards the end of the same passage, thus:

“A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it.”

(Emphasis supplied)

51. Along the same lines, a 3-judge bench of the Supreme Court, speaking through K Ramaswamy, J, was, in ***D.K. Yadav v. J.M.A. Industries Ltd, (1993) 3 SCC 259***, concerned with a clause which was largely similar to Rule 4.5 of the Rules, with which the present case is concerned. The said Clause, figuring in the Standing Order applicable to the respondent-industry, read thus:

“If a workman remains absent without sanctioned leave or beyond the period of leave originally granted or subsequently extended, he shall lose his lien on his appointment unless

(a) he returns within 8 calendar days of the commencement of the absence of the expiry of leave originally granted or subsequently extended as the case may be; and

(b) explains to the satisfaction of the manager/management the reason of his absence or his

inability to return on the expiry of the leave, as the case may be. *The workman not reporting for duty within 8 calendar days as mentioned above, shall be deemed to have automatically abandoned the services and lost his lien on his appointment. His name shall be struck off from the muster-rolls in such an eventuality.*”

(Emphasis supplied)

The workman, in that case, was issued a communication stating that he was “deemed to have left the service of the company on (his) own account and lost (his) lien and the appointment”, on the ground that he had been unauthorisedly absent from duty for more than 8 days. The Supreme Court set aside the decision on two grounds. Firstly, it was held that the removal of the workman from service amounted to “retrenchment”, within the meaning of Section 2(oo) of the ID Act. For arriving at this conclusion, reliance was placed on the judgment of the Constitution Bench in ***Punjab Land Development and Reclamation Corp Ltd (supra)***. None of the circumstances contemplated by Section 2 (oo) of the ID Act, as excepted from the definition of “retrenchment”, viz. termination by way of punishment inflicted by way of disciplinary action, voluntary retirement, retirement on reaching the age of superannuation and termination on the ground of continued ill health, being applicable, the Supreme Court held the removal of the workman, before it, from service, to have infringed Section 25-F of the ID Act. Secondly, the Supreme Court held that the principles of natural justice, including grant of

adequate opportunity of a fair hearing, had to be read into the power, of the management, to remove the workman from service. After referring to several authoritative pronouncements on the issue, the Supreme Court expressed its view thus, in paras 11, 12, 14 and 15 of the report:

“11. The law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both.

12. Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14

has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable.

14. It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. *The order of termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice.* In ***D.T.C. v. D.T.C. Mazdoor Congress [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213]*** the Constitution Bench, per majority, held that termination of the service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article 14. The order terminating the service of the employees was set aside.

15. In this case admittedly no opportunity was given to the appellant and no inquiry was held. The appellant's plea put forth at the earliest was that despite his reporting to duty on December 3, 1980 and on all subsequent days and readiness to join duty he was prevented from reporting to duty, nor was he permitted to sign the attendance register. The Tribunal did not record any conclusive finding in this behalf. *It concluded that the management had power under Clause 13 of the Certified Standing Orders to terminate with the service of the appellant. Therefore, we hold that the principles of natural justice must be read into the Standing Order No. 13(2)(iv).* Otherwise it would become arbitrary, unjust and unfair violating Article 14. When so read the impugned action is violative of the principles of natural justice.”

(Emphasis supplied)

52. It is important to note that, even after having laid down the law thus, the Supreme Court, holding that the workman before it was himself to blame for his misfortune, restricted the relief, granted to him, to award of 50% back wages.

53. In *Uptron India Ltd v. Shammi Bhan*, (1998) SCC 538, the respondent, after having availed maternity leave till 29th January, 1995, continued to remain absent from duty, without any leave application, till 12th April, 1995, on which date the petitioner before the Supreme Court issued an order, informing the respondent that her services stood automatically terminated in terms of Clause 17 (g) of the Standing Orders. The Industrial Tribunal, to which the case was referred, held the termination of the respondent to amount to “retrenchment”, and that it had been effected in contravention of Section 25-F of the ID Act. The matter was carried, by the petitioner, up to the Supreme Court. Clause 17 (g) of the Standing Orders stipulated that “the services of a workman (were) liable to automatic termination if he overstays on leave without permission for more than 7 days.” The Supreme Court, speaking through Saghir Ahmad, J., held, at the outset, that a Clause providing for termination of the services of a permanent employee, by giving notice or pay in lieu thereof, was, *ex facie*, illegal and that, therefore, the termination of the services of the respondent was liable to be struck down even on that

ground. Further, it was noticed that Clause 17 (g) did not state that the services of a workman, who overstayed leave by more than 7 days “shall stand automatically terminated”, but that he services “are liable to automatic termination”. This wording, it was held, indicated that discretion was conferred, on the management, to terminate, or not to terminate, the services of an employee who overstayed his leave, and that the said discretion had to be exercised judiciously, not capriciously, on an objective consideration of all circumstances. Most significantly, it was held that the principles of natural justice had necessarily to be read into the said Clause, and were required to be rigidly complied with, which would imply, *inter alia*, that the employee had to be informed of the grounds on which action was proposed to be taken against him for overstaying leave. Para 25 of the report expressed this thought, in the following words:

“In view of the above, we are of the positive opinion that any clause in the Certified Standing Orders providing for automatic termination of service of a permanent employee, not directly related to “production” in a factory or industrial establishment, would be bad if it does not purport to provide an opportunity of hearing to the employee whose services are treated to have come to an end automatically.”

The judgement also reiterated the trite position in law, stated in the decisions referred to hereinbefore, that the termination of the services of the respondent, in that case, amounted to “retrenchment”, as it did not attract any of the exceptions, to the said definition, as set out in Section 2 (oo) of the ID Act.

54. That the principles of natural justice – which would involve and include grant of a fair opportunity of hearing – have necessarily to be read into any Clause, in the Standing Orders, Rules or Regulations, which deemed an employee to have voluntarily abandoned his service by remaining unauthorisedly absent for long period, was also reiterated by another two Judges bench of the Supreme Court, speaking, again, through Saghir Ahmad, J., in ***Syndicate Bank v. General Secretary, Syndicate Bank Staff Association, (2000) 5 SCC 65***. In the said case, however, the Supreme Court found that the employee had, by overt acts, unequivocally expressed his intention to abandon his services; ergo, it was held that the management could not be faulted in not holding an inquiry.

55. It is worthwhile to note, here, that ***Syndicate Bank (supra)*** dealt with a clause in the Bipartite Settlement between the Bank and its employees. In a decision rendered a little over six months after ***Syndicate Bank (supra)***, a three Judges bench of the Supreme Court, again considering the same clause of the Bipartite Settlement in ***Punjab & Sind Bank vs Sakattar Singh, (2001) 1 SCC 214***, held that exhaustive compliance with the principles of natural justice could not necessarily be read into the said Clause, *inter alia* for the reason that the Clause had been incorporated in an agreement to which the representatives of the employees unions were a party. It may not,

therefore, be always possible to apply, to other cases, the principles laid down in respect of Bipartite Settlements between Banks and their employees. Even so, *Punjab & Sind Bank (supra)*, too, held that “if the respondent had submitted an explanation regarding his unauthorised absence or placed any material before the court that he did report for duty but was not allowed to join duty, enquiry may have been necessitated but not otherwise.”

56. In *Scooters India Ltd v. M. Mohd Yakub*, (2001) 1 SCC 61, a two Judges bench of the Supreme Court, speaking through S. N. Variava, J., was concerned, as in the present case, with the striking off, from the rolls of the appellant-company, of the name of the respondent-workman, by invoking Clause 9.3.12 of the applicable Standing Orders, which read thus:

“Any workman who remains absent from duty without leave in excess of the period of leave originally sanctioned or subsequently extended for more than 10 consecutive days, he shall be deemed to have left the services of the Company of his own accord, without notice, thereby terminating his contract of service with the Company and his name will, accordingly, be struck off the rolls.”

The Supreme Court reiterated, yet again, the legal position, with becoming terseness, thus (in para 11th of the report):

“Therefore, it is clear that there could not be any automatic termination of the respondent on the basis of Standing Order No. 9.3.12. The principles of natural justice had to be complied with.”

57. While it is broadly true that the Supreme Court has, in decision after decision, been holding that the principles of natural justice would apply even in the case of deemed abandonment of service under a Clause, in Standing Orders/Rules/Regulations applicable to the employer and employee, the extent to which these principles have to be applied appears, still, to be a debatable issue.

58. I may note, here, that *Regional Manager, Bank of Baroda v Anita Nandrajog*, (2009) 9 SCC 462, on which Ms Birbal places reliance, was also a case involving the Clause in the Bipartite Settlement between the employees in the Bank, and may not, therefore, constitute a safe indicia on the basis of which to decide the present dispute. Besides, the period of absence from service, in that case, was of 416 days, which, too, distinguishes the facts of from those in the present.

59. In *Lakshmi Precision Screws Ltd vs. Ram Bhagat*, (2002) 6 SCC 52, on the workman failing to turn up for work despite intimation and warning, the management of the appellant-company (in that case) struck the name of the respondent off its rolls, invoking, for the purpose, Clause 9(f)(ii) of the Standing Orders applicable to the Company. The said Clause provided that any workman absenting

himself for ten consecutive days without leave would be deemed to have left the firm's service without notice, thereby terminating his service. (It is required to be noted that this case did not deal with abandonment from service.) The Supreme Court categorically held that the doctrine of natural justice was an "inbuilt requirement in the Standing Orders, even if not strictly provided for therein.

60. *Vijay S. Sathaye vs. Indian Airlines Ltd, (2013) 10 SCC 253*, which has been relied upon by Ms. Birbal, dealt with a situation in which the employee, who was working as Deputy General Manager in the respondent-company, sought voluntary retirement, under the Scheme floated by respondent-Company in this regard, w.e.f. 12th November 1994. On 11th November, 1994, the respondent-Company directed the petitioner to continue in service till a decision was taken on his application; however, the petitioner ceased to attend services after 12th November 1994, and, instead, joined the services of another company, i.e. Blue Dart Ltd. He, thereafter, filed the writ petition, for issuance of a writ of mandamus, to the respondent-company, to accept his application for voluntary retirement. During the pendency of the said writ petition, the petitioner was informed, by the respondent-company, that his application for voluntary retirement had been rejected. The petitioner, in the circumstances, withdrew his writ petition filed a fresh writ petition, challenging the order rejecting his request for voluntary retirement. During the pendency of the writ

petition, the petitioner attained the age of superannuation, whereupon the petitioner's writ petition was dismissed by the learned Single Judge, and the Writ Appeal, preferred by him thereagainst, was also dismissed by learned Division Bench of the High Court. It was in these circumstances that the petitioner, in that case, approached the Supreme Court. The Supreme Court held, in paras 11 and 12 of the report, as under:

“11. Even otherwise, the petitioner was asked to continue in service till the decision is taken on his application. However, he did not attend the office of the respondents after 12-11-1994. In view of the above, as the petitioner had voluntarily abandoned the services of the respondents, there was no requirement on the part of the respondents to pass any order whatsoever on his application and it is a clear-cut case of voluntary abandonment of service and the petitions are liable to be dismissed.

12. It is a settled law that *an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily* by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntary abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer.”

(Emphasis supplied)

It is an oft repeated truism that judgements are not rendered *in vacuo*, and that the facts before the court, and the controversy being adjudicated by it, have necessarily to be borne in mind while appreciating the precedential value of a decision. (This is often

paraphrased by declaring that judgements of the Supreme Court are not to be read like Euclid's theorems; one may refer to *U.O.I. v. Major Bahadur Singh, (2006) 1 SCC 368* and a host of similar authorities.) The present case is a classic example. The fact situation, obtaining in *Vijay S. Sathaye (supra)*, was the exact converse of that which arises in the present proceedings. In that case, the employee wanted to disengage himself from the services of his employer, who was steadfastly denying him the opportunity to do so; in the present case, the respondent wants to work, while the petitioner seeks to struck his name of its rolls. Paras 11 and 12 of the judgement, as extracted hereinabove, have been rendered in the background of the controversy arising in that case in which the employee was desirous of voluntarily retiring from service, and after specifically applying to the petitioner-Company for being so retired, ceased to turn up for work on and after the date with effect from which he had sought voluntary retirement, and, in fact, joined another company. It is for this reason that the Supreme Court held that an employee was not the slave of a particular employer, and had a right to voluntarily abandon service, with an employer, whenever he chose to do so and, therefore, faulted the petitioner-Company before it for doggedly holding onto an employee who had no interest in continuing to serve. In such circumstances, when the employee himself was contending that he did not want to continue in the services of the petitioner-Company, it would have been absurd to require the employee to prove the said

fact. There can, therefore, be no question of treating this judgement as an authority on the issue of whether the principles of natural Justice were required to be followed, while striking off the name of an employee, who was willing to work, from the rolls of the employer, invoking a Clause contemplating “deemed abandonment of service”. Ms. Birbal’s reliance, on this decision, therefore, has to be regarded as wholly misguided.

61. Before parting company with *Vijay S. Sathaye (supra)*, it is necessary to note that there is an observation, in para 14 of the said decision, to the effect that abandonment of service cannot be termed as “retrenchment”. The said observation has, however, been returned, by the Supreme Court, by placing reliance on *State of Haryana v. Om Prakash, (1998) 8 SCC 733*, and a perusal of *Om Prakash (supra)* reveals that, in the said case, the employer did nothing, whatsoever, towards disengaging the employee, who, of his own volition, never reported for work and, thereafter, sought to raise an industrial dispute on the ground of “retrenchment”. The Supreme Court, in order to return the finding that it did, essentially relied on the opening words of Section 2(oo) of the ID Act, which contemplated “retrenchment” as an act done *by the employer*. Where, therefore, the employer did nothing, and the employee voluntarily never chose to report for work, the Supreme Court held that the question of invoking Section 2(oo) did not arise at all.

62. Where, however, the employer does the positive act of terminating the workman from service, by striking the name of the workman off its rolls or otherwise, it would tantamount to “retrenchment”, unless and until one or the other of the exceptions, statutory engrafted in Section 2(oo) of the ID Act, could be legitimately pressed into service by the employer.

63. Having thus presented a fair panorama of certain leading decisions of the Supreme Court, on the question of “deemed abandonment” of service, the following guiding principles may, safely, be said to emanate therefrom:

(i) Common law principles, on the issue of abandonment from service, would not apply, where the abandonment is by way of regulatory fiat, invoking any applicable Clause which contemplates “deemed abandonment”. In such cases, the clause itself would have to be interpreted, to discern whether a case of “deemed abandonment” can be said to have been made out, or not.

(ii) Intention, or animus, to abandon, is the necessary *sine qua non*, for any case of “abandonment” to be said to exist. In the absence of intention, there is no abandonment. Any clause contemplating “deemed abandonment”, even if it exists, cannot

be so interpreted as to deem abandonment to have taken place, even where intention to abandon is not apparent.

(iii) Whether intention to abandon exists, or not, is a question of fact, to be determined in each case.

(iv) Termination, or removal, from service, is a positive act of the employer; *per contra*, abandonment is a positive act of the employee.

(v) The fact that the act, which, per Rule, Regulation or Standing Order, is deemed to amount to “abandonment of service”, also constitutes “misconduct”, within the said applicable rules or regulations, is not a ground to contend that the employer necessarily had to treat the act as “misconduct” and proceed against the employee by way of a domestic inquiry or disciplinary proceeding; the discretion, in this regard, vests with the employer.

(vi) Any evidence, to indicate that the employee, or workman, desired to join duty, but was prevented from doing so, would, by itself, militate against any presumption of “abandonment”.

(vii) Unless and until it could attract one or more of the exceptions statutorily engrafted in Section 2(oo) of the ID Act, striking, of the name of a workman, off the rolls of an establishment, on the ground of the workman having

“abandoned” his services, would tantamount to “retrenchment” within the meaning of the said Act.

(viii) The principles of natural justice have, in all cases, to be observed before treating an employee to have abandoned his service, even if the Rule, or Clause, deeming “abandonment” to have taken place, does not expressly contemplate compliance with any such principles. At the same time, if an employee unequivocally expresses his desire to abandon the services of the employer, by entirely failing to turn up for work or otherwise, then, no notice, prior to removal of the name of the employee from the rolls of the employer, would be necessary, as any such notice would only be an empty formality.

(ix) Exclusion, from the ambit thereof, of the principles of natural justice, would render the provision of “deemed abandonment”, itself unconstitutional.

(x) Cases of abandonment, by invocation of the provisions of Bipartite Settlements, between Banks and their employees, may stand on a different footing, as they are based on an inter se, between employer and employee (s), and have to be examined separately. The present case not being one such, I do not propose to enter into the said arena.

64. Before concluding the assessment of case law on the issue, reference may be made to two judgements, of Division Benches of

this Court, which are fairly enlightening, insofar as the dispute in controversy in the present case is concerned. The first is a somewhat recent decision in ***Hindustan Times Ltd. v. Arun Kumar* 2016 (230) DLJ 194**, authored by S. Ravindra Bhat, J., which squarely addresses the issue of abandonment from service, invoking the provision for “deemed abandonment” provided in the applicable Standing Orders. Significantly, this decision, at the very outset, holds that it was not open to the employer to alternatively plead “abandonment” and “misconduct”. Para 11 of the said judgement specifically rules, on this aspect, thus:

“This court is in agreement with the reasoning of the learned Single Judge and of the opinion that the employer could not take two contradictory pleas of the employee having voluntarily abandoned his services and that his services were terminated on account of misconduct.”

Any necessity, to examine the contention of Ms. Birbal, in the present case, that the alleged “unauthorised absence”, of the respondent-workman, constituted “misconduct”, therefore, stands entirely obviated, and I do not propose to enter into the said issue. Having issued the above admonition, this Court proceeded, in para 13 of the report, to set out the law, as it emerged from earlier rulings of the Supreme Court on the issue, clearly and unequivocally, thus:

“The cases relied on by the appellant to submit that a Labour Court can look into the question of misconduct when there is no departmental enquiry held by the employer or where the enquiry has been vitiated but the employer adduces evidence

to establish misconduct at the first instance before the tribunal, lend no support to the appellant's case. The first is the issue of whether the workman could have been visited with a dismissal order in the manner the management did in the circumstances of this case. Now, *it is well established that even when there are stipulations in the conditions of service of a workman or employee, in the form of standing orders, stating that delay in reporting for duties or absence from duties beyond a point without explanation results in a deemed forfeiture, loss of lien or deemed abandonment of service, nevertheless requires compliance with the rules of natural justice as an essential precondition to what in effect is a termination order.* The Supreme Court also in ***D.K. Yadav v. J.M.A. Industries Ltd*** has held that even where the standing orders of the employer provide for dismissing the workman from service for unexplained absence, the same has to be read with the principles of natural justice and without conducting domestic inquiry and without giving an opportunity of being heard, termination of service on the said ground cannot be effected. The same view was reiterated in ***Lakshmi Precision Screws Ltd. v. Ram Bahagat***. Again, in ***V.C. Banaras Hindu University v. Shrikant***, AIR 2006 SC 2304, it was held that although laying down a provision providing for deemed abandonment from service may be permissible in law, it is not disputed that an action taken thereunder must be fair and reasonable.”

(Emphasis supplied)

Following this clear exposition of the law, it can hardly be argued, any further, that it is permissible to strike the name of an employee, or workman, off the rolls of the employer, by invoking a Clause deeming abandonment in service, by the employee or workman, to have taken place, without complying with the principles of natural justice.

65. Finally, one may refer to the decision of a Division Bench of this Court, in ***B. G. Saraswat v Engineers India Ltd, 1996 (36) DRJ 539***, the facts of which are early mirror similar to those obtaining in the present case. In that case, too, the petitioner was appointed as an Assistant Engineer with the petitioner before me, i.e. M/s. Engineers India Ltd (EIL). He was sent on deputation to the State Trading Corporation (STC), where he stopped attending to his duties w.e.f. 07th July, 1990, resulting in his repatriation, to EIL where, too, he did not report for duty for more than a month after his repatriation. The employee was issued a letter, by EIL, requiring him to join duty within 21 days, cautioning him that, in default, his name would be struck off the rolls of the EIL. The employee did not respond, resulting in his name being struck off, the rolls of the EIL, *vide* letter dated 30th November, 1990. The employee petitioned this court, contending – as in the present case – that he had been unable to attend duty owing to prolonged illness and that, therefore, he could not be regarded as being unauthorisedly absent. He contended that intimation, of his illness, had been sent, by him, telephonically, as well as by way of telegram. This Court, in para 14 of the report, found that the employee had not brought, on record, any material to show that he had ever made any application for leave on the ground of illness or otherwise, and that the said plea was being raised by him, only before this Court. Having so observed, Paras 15 to 17 of the report ruled thus:

“15. Whether or not the petitioner had abandoned the service of the respondent is a matter of inference to be drawn from the facts and circumstances of the case. *Unless there is material available to show intention on the part of the petitioner to totally give up duties, it will not be possible to arrive at the conclusion that the petitioner would have abandoned the service of respondent No.1. This was a matter which could be gone into by the respondent if the petitioner was afforded an opportunity of being heard.* On behalf of the respondent it was contended that a notice dated 24.9.1990 was sent to the petitioner on his last known address wherein it was notified to him that he was continuously absent unauthorisedly and after he failed to report by 15.10.1990 as notified he was to deemed to have abandoned the service of the respondents and thereby sufficient opportunity to show cause was given.

16. But the petitioner has denied having received any such letter. Except an averment to this effect made in counter affidavit no documentary proof has been placed on record to show that such a letter had actually been sent or served on the petitioner inspire of the fact that an opportunity was also given to the respondent to produce relevant postal receipts but the respondent has come up with the Explanation that the records being old have been weeded out. Again no material has been brought on record to show when such records had been weeded out and why such records were not preserved when the present proceedings were pending where postal receipts were likely to be required. In the absence of any proper material on record it is not possible. to come to the conclusion that the letter dated 24.9.1990 had actually been sent or delivered to the petitioner. From the material it cannot be said that the petitioner would have abandoned the service.

17. *As already noticed under Service Rules prolonged absence from duty without permission or sufficient cause is 'mis-conduct' and undoubtedly the name of the petitioner has been struck off the rolls because of his prolonged absence. In*

that case in the absence of a finding based on material that the petitioner had abandoned the service of respondent No. 1 inference necessarily would be that the service of the petitioner had been terminated by way of removal or dismissal from service on account of 'misconduct'. Such a penalty could be imposed after holding due inquiry as provided under Rule 7.7 of the Service Regulations. Admittedly, no such inquiry was held by the respondent and the petitioner was not given an opportunity to show cause if he had good or sufficient cause for being absent. For this reason also the impugned order which entails removal from service without following the procedure prescribed by Service Rules is illegal."

(Emphasis supplied)

The above decision - which seems to have escaped the notice of this case of both sides in this case - rendered, as is, by a Division Bench of this Court, binds me, especially in view of the stark - similarity, of the facts obtaining therein, with the facts in the present case.

66. It would only be fair, before concluding the discussion of case-law, to deal with three other decisions, cited by Ms. Birbal, viz. ***Chief Engineer (Construction) v. Keshav Rao (2005) 11 SCC 229, Municipal Corporation of Bombay v. P.S. Malvankar, (1978) 3 SCC and Jitender Mathuria v. Hindustan Petroleum Corporation Ltd. (2014) 144 DRJ 405 (Del-DB)***

67. ***Keshav Rao*** (*supra*) was a case in which the workman, who was employed as a casual labourer with the Railways, had allegedly

abandoned his work on 1st November, 1971, and never reported for duty thereafter. On the expiry of five weeks' continued absence, on the part of the said workman, the Railways deleted his name from its rolls, invoking, for the purpose, Rule 2505 of the Railway Manual, which contemplated automatic termination of engagement of the employee in such circumstances. The Railways sought to contend that the workman had voluntarily abandoned his service. The Industrial Tribunal upheld the termination of the workman, and endorsed, thereby, the stand of the Railways that the workman had abandoned his services. The High Court, petitioned their against, however, reversed the decision of the Tribunal on the ground that, a year and five months after his alleged termination from service, the workman had issued a legal notice to the Railways, claiming reinstatement. This, according to the High Court, indicated absence of intention, on the part of the workman, to voluntarily abandon service. It was in such circumstances, that the Supreme Court was moved, at the instance of the Railways.

68. The Supreme Court held that a year and five months could not be regarded as reasonable time for asserting right to employment. On merits, the Supreme Court observed that the Industrial Tribunal had returned findings of fact, on the basis of the evidence available on record, to hold that the workman had never reported for duty after 1st November, 1977. These facts, seen in juxtaposition with the fact that

the workman had made no effort to seek reinstatement, or complained against the action of the management to anyone, compelled the Supreme Court to hold that a case of abandonment from service, on the part of the workman, was made out.

69. It is obvious that the facts in *Keshav Rao (supra)* have no similarity with those in the present case. The main factor which weighed with the Supreme Court in refusing to interfere was the delay of a year and five months, before the workman asserted his right to be taken back by the management. Secondly, but equally importantly by the Supreme Court relied on the fact that the Tribunal had returned a finding of fact, to the effect that the workman had ceased to report for work after 1st November, 1977, and that he had not, in fact been prevented from doing so by the management. In the case before me, the situation is the opposite, in that the finding of the Labour Court is, clearly, that the respondent had, in fact turned up for work on 10th and 11th September, 1993, but had not been allowed to do so by the petitioner. No case, for disturbing the said findings of fact exists, in my view.

70. *P.S. Malvankar (supra)* and *Jitender Mathuria (supra)* were not cases of abandonment from service at all, but, rather, cases where the services of the workman had been terminated after holding a

domestic enquiry. The said decisions need not, therefore, detain the present judgment.

71. Applying the law that emerges from the decisions cited hereinabove, I am of the view that the order, dated 11th October, 1991 *supra*, whereby the respondent was struck off the rolls of the petitioner-Company, cannot sustain the scrutiny of law. The said removal amounted to “retrenchment”, within the meaning of Section 2(oo) of the ID Act, and was required to conform to Section 25-F thereof – which, it is not disputed, it did not. Of the various communications, stated, by the petitioner, to have been sent, by it, to the respondent, the respondent admits receipt only of the communication dated 30th August, 1991, denying receipt of any of the earlier communications. The contention, of the petitioner, that the earlier communications had, in fact, been dispatched to the respondent, and had been refused by him, is not borne out by the material, in the form of the copies of the envelopes (wherein the said communications were sent), which have been exhibited before the Labour Court, except in the case of the letter dated 14th May, 1991 *supra*. There is no dispute about the fact that the respondent was, in fact, suffering from ankylosing spondylitis, or that the said ailment was debilitating in nature. The various medical records, submitted by the respondent and exhibited before the Labour Court, are from reputed institutions, including the All India Institute of Medical

Sciences and the Sir Ganga Ram Hospital, as well as from Dr. K.P. Jain himself, and, therefore, inherently merit acceptance. Unfortunately, the petitioner has not condescended to accorded credence, or value, to any of the said medical records. No Rule or Regulation, requiring, in such circumstances, the employee to submit himself, all over again, to medical examination, before he is allowed to join work, has either been placed on record, or brought to my notice during arguments. It is difficult – nay, impossible – therefore, to subscribe to the view, so assiduously canvassed by Ms. Birbal appearing for the petitioner, that the respondent had voluntarily abandoned his services. Any presumption of such abandonment would also, to an extent, stand belied by the fact that the respondent did, in fact, present himself in the office of the petitioner on 1st July 1991, 12th August 1991, 10th September 1991 and 11th September 1991. The use of the word “deemed”, in Rule 4.5 is significant, in this context. A deeming fiction can survive only so long as reality does not indicate otherwise. This also follows from the general principle that facts alone can be “deemed”, not the consequences that follow, in law, from such facts. True, the respondent appears to have been too clever by half, and, as in the case of the workman in ***DK Yadav (supra)***, largely responsible for the predicament in which he finds himself; nevertheless, it is not possible, in law, to hold that the respondent had willfully abandoned his services and, thereby, attracted the wrath of Rule 4.5 of the Rules. The invocation, by the

petitioner, of the said Rule, against the respondent is, therefore, declared to be illegal and unjustified.

72. What, exactly, was the period for which the respondent remained absent, with or without application, in 1991? The letter dated 14th May, 1991, states that the respondent had been absenting himself “for the last 20 days”, without prior permission/intimation/sanction of leave. The letter dated 1st July, 1991 states that the respondent was “being treated on unauthorised absence from duty since 22nd April 1991”. The letter dated 31st July, 1991 states that the respondent had presented himself in the office of the petitioner on 1st July, 1991 and had submitted a leave application, for being sanctioned leave till 15th July, 1991, but had not submitted any application, or medical certificate, *for the period 22nd April, 1991 to 30 April 1991, or for the period of his absence starting 16th July, 1991. The impression that one gathers, from this recital, is that the leave application, submitted by the respondent on 1st July 1991, covered the period from 1st May 1991 till 30th June 1991.* The next communication, dated 30th August 1991, refers to the respondent absenting himself, without prior permission/intimation/sanction of leave, since 12th August, 1991. It appears that the said absence, of the respondent from work, continued till 10th September, 1991, and that, after attending office on 10th and 11th September 1991, the respondent again remained absent till his name was struck off the rolls on 11th

October, 1991. In my opinion, when dealing with an employee who, in the perception of the employer, has behaved in a manner which would justify discontinuing him from service, the employer cannot afford to be ambivalent or vague. Ms. Birbal herself, candidly accepted, that there were various inaccuracies, in the communications addressed by her client, to the respondent, especially as regards the period for which he was being regarded as having been unauthorisedly absent from duty. The respondent, as the employee being charged therewith, is undoubtedly entitled to be extended the benefit, flowing from these ambiguities. Ultimately, it appears that the period of “non-condonable” absence, of the respondent from duty, has been treated to be 22nd to 30th April 1991 and 12th August 1991 to 11th October 1991.

73. In this connection, I have already noted hereinbefore, that the Labour Court, in the impugned award, accepted, as correct, factually the fact that (i) the respondent attended the office of the petitioner, to join duty, on 10th September, 1991. (ii) on the said date, the respondent tendered certain medical certificates, covering some of the period for which he remained absent, (iii) the letter dated 11th September, 1991, of Mr. A.K. Sharma, revealed that the respondent had come to the telex room on the said date and transmitted telex messages, (iv) the respondent had made a genuine effort to rejoin duty on 10th September, 1991 and 11th September, 1991, but various conditions were imposed by the petitioner, (v) non-obtaining of

written authorisation from the Establishment Section, and not getting his medical certificates verified from Dr. K.P.Jain could, at worst, be regarded as acts of misconduct, and did not make out any case of abandonment of duty and (vi) the allegations levelled by the respondent against Mr. A.K. Pal, as contained in the letter dated 10th September, 1991, commended acceptance. These are findings of fact, which cannot be characterized, in any manner as perverse, and do not, in my view called for any interference, at the hands of this Court, in exercise of its limited jurisdiction under Article 227 of the Constitution of India, which stands circumscribed by the well known parameters of *certiorari* jurisdiction as enumerated in the following passages from ***Syed Yakoob vs. K.S. Radhakrishnan, AIR 1964 SC 477***, which have, since, become *locus classicus*:

7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or in properly, as for instance, it decides a question without giving an opportunity to be heard, to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the

Court exercising it is not entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised. 8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should

be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconducted or contravened.”

74. The period for which the respondent remained absent from duty, without any sanctioned leave was, however, considerable, and the respondent cannot seek to evade all responsibility therefor. On the flip side, it cannot be gainsaid that the present writ petition has remained pending since 2004, and the order striking the name of the respondent off the rolls of the petitioner-company dates back a further eleven years. A quarter of a century has, therefore, elapsed, since the petitioner and respondent parted ways. Following the course of action

adopted by the Constitution Bench of the Supreme Court as far back as in *Buckingham & Carnatic Co. Ltd (supra)*, and by the Division Bench of this Court in *Hindustan Times Ltd (supra)*, I, therefore, deem it proper to accord a quietus to the controversy, by directing an appropriate lump sum compensation, to be paid to the respondent-workman - a course of action which was also advocated by Ms. Birbal, though, needless to state, by way of demurrer.

75. Before parting with the judgment, it would be necessary to comment on the reliance placed, by the respondent, on Section 47 of the PWD Act, especially, as the Labour Court has placed reliance on the said provision, to justify the impugned award. Section 47(1) of the PWD Act, which alone could be relied on by the respondent, reads as under:

“47. Non-discrimination in Government employments –
(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.”

On the face of it, it is not possible to interpret the above extracted provision literally, as any such literal interpretation would amount to granting absolute immunity, to an employee, in an organization, who suffers disability while working in the organization, from ever being removed or reduced in rank, irrespective of the justification for such a decision. If, for example, an employee commits a serious misconduct, warranting imposition of a major penalty on him, such as reduction in rank or removal, it would not, in my view, be a defence, to such action, for the employee, to assert that he had incidentally suffered a disability during the course of his employment, even if the disability has nothing to do with the reason for his removal or reduction in rank. In order to save Section 47(1) from the vice of arbitrariness and consequent unconstitutionality, I am of the view that the said provision can be pressed into service only where there is some nexus between the disability suffered by the employee and the decision, by the employer, to remove him from service or reduce his rank, or where the decision to remove the employee or reduce his rank is otherwise found to be without any justifiable reason at all. In any event, Section 41(1) of the PWD Act need not detain this judgment any further, as, even if the benefit of the said provision were available to the respondent, it would only justify his being placed in another suitable post. As I have held that the decision, of the petitioner-Company, to strike the name of the respondent off its rolls cannot sustain, either factually or legally, and that the interests of justice

would be met by awarding, to the respondent, lump sum compensation, the necessity of examining Section 47(1) of the PWD Act any further, stands obviated.

76. In the circumstances, I deem it appropriate to dispose of the present writ petition in the following terms:

(i) The decision to strike the name of the respondent off the rolls of the petitioner, as communicated to the respondent *vide* letter dated 11th October 1991, is declared as illegal, and is accordingly quashed.

(ii) The impugned Award, dated 24th July 2004, passed by the Labour Court, is modified by directing the petitioner to pay, to the respondent, 30% of the wages which he would have drawn, had he continued till superannuation. This would be *over and above* the amount paid, by the petitioner, to the respondent, pursuant to orders of this court, under Section 17-B of the Industrial Disputes Act, 1947, or otherwise, which, needless to say, *would not be recovered or adjusted* in the payment so directed. Payment, as so directed, shall be made, by the petitioner to the respondent, within a period of 8 weeks from the date of receipt, by the petitioner, of a certified copy of this judgment.

77. There shall be no order as to costs.

**C.HARI SHANKAR
(JUDGE)**

MARCH 05th, 2018
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