

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

LETTERS PATENT APPEAL NO. 299/2010 IN WRIT PETITION NO.4996/2009

Raymond UCO Denim Private Ltd.
 Plot No.C-1, MIDC, Yavatmal,
 Post Box No. 12, Lohara, District Yavatmal
 (MS)-445001
 [Formerly known as M/s.Raymond Ltd.(Denim Division)]
 through its Manager (HR and Admn.)

..... **APPELLANT**

...VERSUS...

Corrected as per
 Hon'ble Court's
 order dtated
 18.01.2023

1. Praful Warade,
2. Gajendra ~~Aasole~~ Aswale.
3. Nilesh Pundlik Bijawa(Bijwe).
 R/o.At Post Mahuli Jahangir, Tahsil and Dist. Amravati.
4. Ajay Ajmire
5. Maroti Tonge.
6. Prabhakar Suresh Wankhede.
 At Gram Nagepalli, Post Alapalli, Taluka Aheri,
 District Gadchiroli.
7. Bharat Lohakare
8. Vinod Raut.
9. Raju Tandra
10. Dinesh Selokar
11. Suryakant Shrawanji Kove
 At Gram Shirpur(Hore) Post Bhidi,
 Taluka Dewali, District Wardha.
12. Ashish Kubde
13. Pramod Shamkuwar

14. Amol Ramdasji Paltankar (Faltankar)
At Sankatmochan Road, Near MSEB Office,
Santaji Mandir, Tq. and District Yavatmal.
15. Dinesh Lokhande.
16. Rajpal Kishore Dongre,
c/o.Bhimijot Maland,
Frezarpura, Post Rukhmininagar,
Amravati. District Amravati.
17. Pravin Singh.
18. Sadanand Namdeo Savale(Sawale)
At Post Talkli Viro,
Taluka Shegaon, District Buldhana.
19. Vinod Lonare
20. Dilip Wanjari.
21. Sachin Gote.
22. Dinesh Chirade
23. Pramod Barase.
24. Sandeep Lonare.
25. ~~Sandeep Sahebrao Samose~~ Sandip Sahebrao Somwanshi,
At Chimnpur, Rani Amraoti,
Tah.Babhulgaon, District Yeotmal.
26. Bapurao Rupla Rathod.
At Kandali Tanda, Post Kandali (BU),
Tamsa Root, Tah. Himayatnagar,
District Nanded.
27. Narendra Khusram.
28. Uday Ashokrao Kulkarni.
At Uttam Nivas, Saraswati Colony,
Post Selu, District Parbhani.

Corrected as per
Hon'ble Court's
order dated
18.1.2023.

29. ~~Bhavesb Harparwar~~ Bhaurao Vitthal Harparwar

Corrected as per
Hon'ble Court's
order dated
11.10.2022

30. Vinod Narayanrao Zoting.
At Sarai, Post. Chikhali, Tq.Ralegaon,
District Yavatmal.
31. Kunal Chimurkar.
32. Ravindra Yenpeddiwar.
33. Amit Salunkhe.
34. Vinayak Wankhede.
35. Dhananjay Thokal.
36. Nana Kopulwar.
37. Kamaljit Dhyansingh Pawar.
Kamathwara, Post Akola Bazar,
Tq. and District Yavatmal.
38. Abasaheb Bhosale.
39. Vikas Gopal Kurkure.
Plot No.12, Survey No.57, Hanman Nagar, MIDC Area,
Shiddi Vinayak back side,
At Jalgaon, Tah. And District Jalgaon.
40. Mahesh Dhake.
41. Dinesh Bhaskarrao Warkhad
At Post Sahur, Tq. Aashti, District Wardha.
42. Ganesh Giratkar Giratkar.
43. Narayan Thakare.
44. Abhay Ganeshrao Rajgure.
At Vaibhav Nagar, Post Lohara,
Tq. and District Yavatmal.
45. Ringnath Vinayak Kalambe.
At Post Kelwad, Tq. Saoner, District Nagpur.
46. Uday Rajusingh Pawar.
At Post Gunj, Taluka Mahagaon,
District Yavatmal.
47. Sandeep Devghare.

Corrected as
per Hon'ble
Court's order
dt. 18.01.2023

48. Devnath Gadhge. Gudadhe.
49. ~~Rajesh Sonawane~~. Rajiv Sonone.
50. Dadarao Mahore.
51. Dharamraj Choudhary.
52. Rahul Doijad.
53. Surendra Rameshrao Charde.
Manikwara(Dhnaj) Tq. Ner Parsopant,
District Yavatmal.

Respondent Nos. 1, 2, 4, 5, 7 to 10, 12, 13, 15, 17, 19 to 24, 27, 29, 31 to 36,
38, 40, 42, 43, 47 to 52 are
R/o.C/o Aabahasaheb Kachru Bhosle,
C/o. Shri Avinash Navgare, Hans Apartment No.1,
Mahavir Nagar, Darwah Road,
Yavatmal-445 001.

54. Member,
Industrial Court, Godhani Road,
Manhshe Bhavan, At and Post Yavatmal.

.....**RESPONDENTS**

Shri V.R.Thakur, Advocate with Shri H.V.Thakur, Advocate for appellant.
Shri S.D.Thakur, Advocate with Shri D.S.Thakur, Advocate for respondents.

CORAM : A.S.CHANDURKAR AND G.A.SANAP, JJ.

DATE ON WHICH THE ARGUMENTS WERE HEARD : 22.07.2021

DATE ON WHICH THE JUDGMENT IS PRONOUNCED :18.08.2021

JUDGMENT (Per A.S.Chandurkar, J.)

This Letters Patent Appeal under Clause 15 of the Letters Patent raises a challenge to the judgment of the learned Single Judge in Writ Petition No.4996/2009 decided on 12th, 13th and 15th April 2010. By the said judgment the challenge raised by the appellant-employer to the judgment of the Industrial Court in U.L.P.(Complaint) No.27 of 2007 decided on 01.01.2009 was negatived. That

complaint was filed by the respondents-employees seeking the relief of permanency on completion of probationary period of three months and the same was allowed. For the sake of convenience the parties would be referred to as employer and employees hereinafter.

2. For considering the challenges raised in this appeal it would be necessary to refer to the factual aspects that are available on record. The employer is an industrial establishment which is governed by the provisions of the Maharashtra Industrial Relations Act, 1946 (hereinafter referred to as 'the Act of 1946') as well as the Model Standing Orders for Operatives framed thereunder. It is the case of the employees that initially they were appointed as trainees for a period of one year. After completion of the training period of one year, the employees were appointed on probation for a period of six months. According to them under Model Standing Order 4A the probationary period prescribed is only of three months and hence after completion of that probationary period, the employees had become permanent and regular on their respective posts. The employer however confirmed the employees in service on completion of eighteen months service and treated them as regular and permanent employees after completion of twenty four months service. Having made oral representations to the employer for grant of benefit of regularisation and permanency, the employees on 22.03.2007 filed a complaint under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, 'the Act of 1971'). In the said complaint the employees sought relief of declaration that on completion of one year training period, it be declared that they had become regular and permanent employees. In the alternate, the relief

of they having become permanent in service on completion of probationary period of three months was prayed for. Other ancillary reliefs in monetary terms was also prayed for. The complaint was filed invoking Item 9 of Schedule IV of the Act of 1971. There were 53 complainants and the complaint was supported by the affirmation of the complainant no.1.

3. The employer filed its written statement opposing the aforesaid complaint. It was admitted that initially the employees had been appointed for a period of one year as trainees. Some of the complainants did not complete their training period successfully and hence their training period was extended by a period of two to three months. Thereafter the complainants were offered employment as probationers by prescribing the probation period of six months. The offer made to them to work as probationers was accepted by each complainant in writing. On completion of the probation period of six months, they were issued orders of appointment in writing and the same were accepted by them. It was then pleaded that the permanent employees on roll on 31.03.2004 were governed by the settlement dated 18.02.2005 entered into between the employer and the representative Union under Section 58 of the Act of 1946. Since the complainants became permanent after 31.03.2004 they were not governed by that settlement. It was also pleaded that the probationary period under the Model Standing Orders would not apply to the complainants in view of the contract of service between the parties prescribing probationary period of six months. It was denied that the employer had indulged in any unfair labour practice under Item 9 Schedule IV of the Act of 1971. On these counts dismissal of the complaint was sought by the

employer.

4. On behalf of the employees, the complainant no.1-Praful Warade was examined. He filed his affidavit in lieu of evidence reiterating the contents of the complaint. He deposed that the payments made to permanent employees and that made to the complainants were distinct. In his cross-examination he admitted that the complainants had joined the service after accepting the terms and conditions mentioned in the appointment orders. The probationary period was mentioned in the order of appointment. Another witness examined on behalf of the employees was Mahesh Dhake. He also deposed in terms of the complaint. In his cross-examination he admitted that he was appointed as trainee on 23.12.2004 and the offer of appointment as probationer for a period of six months was accepted by the employees. He also admitted that it was not mentioned in the appointment order that the wages as per the agreement of 2005 would be paid to them.

On behalf of the employer, its General Manager Pradip Andhare was examined. He deposed that all the employees were issued identical orders of appointment initially as trainees and thereafter as probationers. The conditions mentioned therein were accepted by the employees. In his cross-examination, he admitted that when the employees were confirmed in service the settlement of 2004 was in existence. Instead of paying the complainants wages as per the 2004 settlement, they were paid as per practice followed by the employer. There was however no fixed salary that was paid by the employer as per practice. He further admitted that it was correct that one category of employees was getting wages as per the settlement dated 18.02.2005 while another category of employees was getting

wages as per practice though all them were confirmed employees. He admitted that there was no document filed on record to indicate that salary was being paid to the employees as per any practice.

5. The learned Member of the Industrial Court after considering the evidence on record held that the employees had failed to prove that they had become eligible for confirmation in service after completion of the training period of one year. It was however held that as per the Model Standing Orders applicable the probationary period was of three months and each complainant had completed this probationary period of three months successfully. The employer was required to confirm the employees in service on completion of three months probationary period but the same was not done. It was further held that the employer had failed to show the service conditions that were applicable to the employees as per the existing practice. The complainants were held entitled to all benefits under the settlement dated 18.02.2005 as were applicable to regular employees. It was held that the employer had engaged in unfair labour practice under Item 9 of Schedule IV of the Act of 1971. After holding that the complaint was filed within limitation, the same was allowed. The complainants were held entitled to be granted permanency from the date of completion of three months from their appointment as probationers and were also entitled to all service and monetary benefits as per the agreement dated 18.02.2005.

6. This judgment of the Industrial Court was challenged by the employer before the High Court by preferring Writ Petition No. 4996/2009. The learned Single Judge after considering various decisions including the decision of the learned

Single in *Indian Tobacco Company Ltd. Vs. Industrial Court and Others 1990 (2) LLJ 236* (hereinafter referred to as *ITC-1*) which was thereafter confirmed by the Hon'ble Supreme Court in *Indian Tobacco Company Ltd., Nagpur Vs. Industrial Court, Nagpur and anr (1994) Supp. 2 SCC 484* (hereinafter referred to as *ITC-2*) held that the contention of the employer that the period of probation of six months as provided in the contract of service must prevail was misconceived and unsustainable. The probation period of three months as prescribed by Model Standing Order 4A would prevail. It was further held that the prevalent practice as pleaded by the employer was not proved and there could not be different set of service conditions for permanent employees working under the same roof. Since the employees were not given benefit of the settlement dated 18.02.2005, their grievances fell under Item 9 of Schedule IV of the Act of 1971. The learned Single Judge hence proceeded to uphold the judgment of the Industrial Court and the writ petition filed by the employer came to be dismissed. This judgment is the subject matter of challenge in this letters patent appeal at the behest of the employer.

7. In support of the appeal Shri V.R.Thakur, learned counsel for the employer made the following submissions :

(a) The Courts committed an error in holding that the service conditions of the employees were governed by Model Standing Order 4A which prescribed probation period of three months, disregarding the appointment order on probation which was accepted by each employee unconditionally and which order prescribed a probation period of six months. In view of Model Standing Order 31 it was permissible for the employer under the contract of service to prescribe probationary

period which was different from the probationary period prescribed by Model Standing Order 4A. Model Standing Order 31 being the saving clause it was permissible for the employer to prescribe a larger period of probation for its employees under the contract of service considering the nature of the industrial establishment. Each employee having accepted the appointment order on probation for a period of six months without any demur it was not permissible for them to turn around and contend that the period of probation was governed by Model Standing Order 4A. In this regard, the learned counsel placed reliance on the judgment of the Division Bench in ***Pune Municipal Corporation and others Vs. Dhananjay Prabhakar Gokhale, 2006 (4) Mh L J 66*** . It was submitted that therein Model Standing Order 4(c) prescribed completion of 240 days of uninterrupted service as a requirement for permanency in service. In the settlement between the employer and employees, completion of continuous service for a period of five years was accepted as the basis for permanency in service. The Division Bench had in the light of Model Standing Order 32 which was similar in nature to Model Standing Order 31 which was applicable to the case in hand had held that since there was a valid and lawful settlement between the employer and employees prescribing completion of five years of continuous service as the basis for permanency in service, it was not permissible for the employees to rely upon Model Standing Order 4(c) and seek permanency on completion of 240 days of uninterrupted service. In other words, it was urged that despite the fact that the settlement between the parties prescribed longer period of service for attaining permanency in service, the same was accepted by the Court in preference to Model Standing Order 4(c) which prescribed a shorter period of continuous service and which was more advantageous to the employees.

(b) In the light of the aforesaid judgment of the Division Bench in ***Pune Municipal Corporation*** (supra) recognising the right of the employer to prescribe a larger period of continuous service for seeking permanency in service than that prescribed under the Model Standing Orders, the judgment of the learned Single Judge in ***ITC-1*** (supra) holding otherwise stood impliedly overruled. It was submitted that Model Standing Order 32 which was considered by the Division Bench in ***Pune Municipal Corporation*** (supra) was also the subject matter of consideration in ***ITC-1*** (supra) by the learned Single Judge. The learned Single Judge had held that the prohibition against the operation of Standing Orders was only when better rights acquired by an employee under the contract of service were likely to be prejudiced. Since this interpretation by the learned Single Judge in ***ITC-1*** (supra) was contrary to the interpretation of Model Standing Order 32 by the Division Bench in ***Pune Municipal Corporation*** (supra), the judgment of the learned Single Judge stood impliedly overruled. The learned Single Judge therefore committed an error in relying upon the decision in ***ITC-1*** (supra) to confirm the order passed by the Industrial Court.

Referring to another judgment of the Division Bench in ***Tulshiram K. Gothad Vs. Superintendent, Mahatma Gandhi Memorial Hospital 2007(3) CLR 718*** it was urged that while interpreting Model Standing Orders it was not permissible for the Court to add any words therein. The Division Bench had held that under Model Standing Order 27 the age of retirement could be 60 years or such other age that may be agreed between the parties by an agreement. The appointment order issued to the employee therein stipulated that the conditions of service were to be governed by the service regulations which prescribed 58 years as the age of retirement. After

noting the judgment of the learned Single Judge in *Engineering Workers Association Vs. J.D.Jamdar, 2004 (3) CLR 315* decided by the learned Single Judge, it was held by the Division Bench that Model Standing Order 27 as interpreted therein was incorrect. It had been held by the learned Single Judge that the agreement between the parties would prevail over the age specified in Model Standing Order 27 only if the age of retirement specified in the agreement was more than 60 years. This judgment of the learned Single Judge was overruled by the Division Bench. Since the learned Single Judge in *Engineering Workers Association* (supra) had placed reliance on the judgment of the learned Single Judge in *ITC-1* (supra), as a consequence the decision in *ITC-1* (supra) was also impliedly overruled.

(d) The settlement under Section 58 of the Act of 1946 dated 18.02.2005 having been made applicable specifically only to those permanent employees who were on the muster roll on 31.03.2004 it was not permissible to extend the benefits under that memorandum of settlement to the employees herein. It was an admitted position that each employee had become permanent in service after 31.03.2004 and therefore was not covered by the same. Each employee having accepted the appointment initially as a trainee and then on probation for a period of six months, it was not permissible for the employees to thereafter contend that by virtue of Model Standing Order 4A, they were entitled to probationary period of only three months. Both the Courts erred in extending the applicability of the memorandum of settlement dated 18.02.2005 to the employees in the present case.

(e) Referring to the pleadings in the complaint filed under Section 28 of the Act of 1971, it was submitted that there were various shortcomings in it. There were no pleadings for invoking the provisions of Item 9 of Schedule IV of the Act of 1971

in the entire complaint. There were no averments that each complainant had “satisfactorily” completed the probationary period of three months. 54 employees had filed a common complaint that was solemnly affirmed only by the complainant no.1. There was no authorisation given to the complainant no.1 by the other complainants. Reference was made to the provisions of Chapter-VI of the Industrial Court Regulations, 1975 as well as Form 19 which prescribed the details that were necessary to be stated in the complaint. There was also no pleading with regard to any agreement or settlement between the parties or its violation to enable invocation of Item 9 of Schedule IV of the Act of 1971. No declaration had been sought that each complainant stood confirmed in service. On the basis of such sketchy complaint, the employees were not entitled to any relief whatsoever and the complaint was liable to be dismissed. Moreover, without making a proper demand with the employer the employees directly filed the complaint. In that regard the learned counsel placed reliance on the observations in paragraph 4 of the judgment in *Pune Municipal Corporation* (supra), *Siemens Limited and another Vs. Siemens Employees Union and another* 2012 (1) Mh L J 548, *Association of Engineering Workers Vs. Crompton Greaves Limited & Ors* 2001 II CLR 64, *Regional Manager, SBI Vs. Rakesh Kumar Tewari* (2006) 1 SCC 530, *Sindhu Resettlement Corporation Ltd Vs. Industrial Tribunal of Gujarat and Ors* AIR 1968 SC 529, *Prabhakar Vs. Joint Director, Sericulture Department and anr.* (2015) 15 SCC 1, *Hasmat Rai and another Vs. Raghunath Prasad* (1981) 3 SCC 103 and *Church of Christ Charitable Trust Vs. Ponniammal Education Trust* (2012) 8 SCC 706. Further, the complaint was barred by limitation and the delay as caused was not sought to be condoned. On this count also no relief could have been granted to the employees.

(f) The conduct of the employees in accepting their appointment on probation for a period of six months amounted waiver of their rights under Model Standing Order 4A. It was permissible for an individual to waive the mandatory benefit admissible to him and each employee having accepted the appointment on probation as offered by the employer for a period of six months, the rights, if any, that could accrue under Model Standing Order 4A stood waived. Reference in that regard was made to the decisions in ***General Manager, Sri Siddeshwara Co-operative Bank Limited and another Vs. Iqbal and others (2013) 10 SCC 83, Haryana State Co-operative Land Development Bank Vs. Neelam AIR 2005 SC 1843*** and ***Rukhmina Rajesh Dange Vs. Kailash Natthuji Pawar and others 2019 (5) Mh L J 168***.

(g) There could not be any “deemed confirmation” of the employees on completion of the probationary period in absence of such satisfactory completion being evinced in writing by the employer. The order of appointment on probation clearly prescribed that only after successful completion of the probation period as stated by the employer in writing could it be said that the probation period had been successfully completed. It was necessary for the employer to declare in writing that the period of probation had been satisfactorily completed. There was no material to indicate such successful completion of the probationary period after three months even under Model Standing Order 4A. When satisfactory completion of the probation period is required to be certified by the employer in writing the concept of deemed confirmation in service would not arise. The Courts committed an error in holding each employee deemed to have satisfactorily completed the period of probation without the same being certified by the employer in writing. The legal position in this regard was clear and the same was highlighted by the Hon’ble

Supreme Court in *Durgabai Deshmukh Memorial Senior Secondary School and anr. Vs. J. A. J. Vasu Sena and anr. (2019) 17 SCC 157*. Reference was also made to the decision in *High Court of M.P. Through Registrar and ors. Vs. Satyanarayan Jhavar (2001) 7 SCC 161* in that regard. On the basis of aforesaid submissions it was urged that the learned Member of the Industrial Court as well as the learned Single Judge erred in granting relief to the employees.

8. Shri S.D.Thakur, learned counsel for the employees while opposing the letters patent appeal made the following submissions :

(a) In absence of any certified Standing Orders being approved by the Commissioner of Labour, the proceedings were governed by the Model Standing Orders in terms of the provisions of Section 35(5) of the Act of 1946. Referring to the Scheme of Chapter VII of the Act of 1946, it was submitted that Model Standing Order 31 could not be interpreted in a manner that would dilute Model Standing Orders 1 to 30. Attention was invited to the provisions in Chapter VIII of the Act of 1946 to urge that any such attempt would result in an illegal change as contemplated by Section 46 of the Act of 1946. It was argued that Clause 31 if read in the manner as sought to be urged by the appellant, it would render that clause illegal and beyond the provisions of the Act of 1946. Such interpretation as put-forth by the employer would defeat the object behind framing the Model Standing Orders which was not permissible. He referred to the provisions of Section 40A of the Act of 1946 to urge that the aspect as to whether the Model Standing Orders are less advantageous to the employees than the corresponding Standing Orders applicable to them has to be examined by the Commissioner of Labour. This indicated that

under the Act of 1946 a provision less advantageous to the employees gives way to a Model Standing Order that is more advantageous to them. He also referred to the provisions of Sections 106 and 107 of the Act of 1946 to urge that illegal change of any nature including a change in the Standing Orders was not permissible and contravention of a Model Standing Order applicable under Section 35 could attract penalty. The test of justness/fairness was required to be applied for considering the aspect as to whether the rights of employees were prejudiced under the garb of a contract of service that was sought to be saved by relying upon Model Standing Order 31. In view of the decision in ***Western India Match Company Ltd, ITC-1 and ITC-2*** (supra) it was clear that Model Standing Order 31 could not furnish any basis to the employer for depriving the employees of completing the probationary period after the expiry of three months. The learned counsel referred to the decisions in ***A.G.Varadarajulu and another Vs. State of T.N. and Others (1998) 4 SCC 231***, ***Additional District Magistrate(Rev.) Delhi Admn. Vs. Siri Ram (2000) 5 SCC 451*** and ***K. A. Abraham and another Vs. The General Manager, Bhilai Steel Plant 1979 M.P.L.J. 50*** in that regard.

(b) The legal position having been settled in view of interpretation of pari material Model Standing Order 32 in ***ITC-1*** (supra) as affirmed by the Hon'ble Supreme Court in ***ITC-2*** (supra), it was clear that on completion of probationary period of three months as per Model Standing Order 31, the employees stood confirmed in service. The contract of service though entered into by the employees which prescribed probationary period of six months, it could not be relied upon by applying Model Standing Order 31 inasmuch as the better rights that were conferred on the employees by Model Standing Order 4A would be prejudiced. The aforesaid

was the consistent view taken by this Court which ought to be followed. He sought to distinguish the decisions relied upon by the learned counsel for the employer in that regard. In *Pune Municipal Corporation* (supra) there was a settlement between the employees and employer therein which was not so in the present case. Similarly in *Tulshiram K. Gothad* (supra) there was neither any settlement nor award but the parties were governed by the conditions of service therein. It was urged that in view of the law as laid down in *The U.P.State Electricity Board and another Vs. Hari Shankar Jain and Ors 1978(4) SCC 16* the decision in *Tulshiram K. Gothad* (supra) did not warrant acceptance. He also referred to the decision in *Workmen of Lakheri Cement Works Ltd. vs. The Associated Cement Companies Ltd. (1970) 20 FLR 243*. In any event Model Standing Order 31 could not be read in such a wide manner to the prejudice of the employees as sought to be urged by the learned counsel for the employer disregarding the more advantageous situation contemplated by Model Standing Order 4A.

(c) Referring to the pleadings in the complaint filed under Section 28 of the Act of 1971 it was submitted that the complaint had to be read as a whole and not in a piecemeal manner. All necessary facts for invoking Item-9 of Schedule IV of the Act of 1971 as well as the facts constituting commission of unfair labour practice by the employer were present in the complaint. The employees had no knowledge or access to the agreement dated 18.02.2005 and hence no reference to the same was made in the complaint. In the light of the settled position that there could not be two different set of rules for permanent employees under the same roof, the learned Single Judge rightly noticed the same and dismissed the writ petition filed by the employer. No interference therefore called for with the impugned judgment. It was

thus submitted that the Letters Patent Appeal was liable to be dismissed.

9. The learned counsel for the employer in reply submitted that there were no pleadings in the complaint so as to challenge the validity of Model Standing Order 31 as being *ab initio* void . The said contention was being raised for the first time in the letters patent appeal which was not permissible. In absence of any specific challenge to the legality of Model Standing Order 31, the Industrial Court as well as the learned Single Judge had no occasion to deal with the same. Reliance in this regard was placed on the decisions in *Sanjay Kumar and ors. Vs. Narinder Verma and ors. (2006) 6 SCC 467* and *Md. Shahabuddin Vs. State of Bihar and ors. (2010) 4 SCC 653*. The learned counsel sought to distinguish the decisions relied upon by the learned counsel for the employees. It was further urged that with the passage of time out of 53 employees who had initially filed the complaint only 26 now remained in service. By virtue of the interim orders passed in Writ Petition No.4996/2009 the employer had deposited the amount towards monetary relief granted to the employees and that amount was still lying in deposit. Reiterating that there could not be any deemed confirmation of the employees under Model Standing Order 4A as urged to be applicable, it was submitted that the appeal deserves to be allowed as prayed for.

10. We have heard the learned counsel for the parties at length and with their assistance we have gone through the material placed on record. In the light of rival submissions, the following questions arise for consideration :-

(a) Whether the contract of service prescribing probationary period of six months can prevail over Model Standing Order 4A that prescribes probationary

period of three months ? In other words, whether the contract of service prescribing larger period of probation than Model Standing Order 4A is saved by Model Standing Order 31 ?

(b) The employer having recorded satisfactory completion of the probationary period of six months, can the same be reconciled with Model Standing Order 4A which prescribes satisfactory completion of probationary period of three months by an order in writing? In other words, could there be deemed confirmation after the period of three months ?

(c) Whether the complaint filed by the employees made out a case for invocation of Item 9 of Schedule IV of the Act of 1971 ?

(d) Whether the employees are entitled to the reliefs as granted by the Industrial Court and maintained by the learned Single Judge ?

11. Since the facts of the case require its adjudication on the basis of interpretation of the Model Standing Orders, it would be necessary to first refer to the statutory provisions in that regard. Chapter VII of the Act of 1946 pertains to Standing Orders. Under Section 35 thereof an employer is required to submit for approval to the Commissioner of Labour draft Standing Orders regulating the relations between him and his employees with regard to industrial matters mentioned in Schedule I. The manner in which draft Standing Orders have to be settled is prescribed therein and until such Standing Orders are settled, the Model Standing Orders if any, notified by the State Government in the Official Gazette would apply to such undertaking. The provisions of Sections 36 to 39 of the Act of 1946 pertain to the procedure to be followed by any person who is aggrieved by the

decision of the Commissioner of Labour under Chapter VII as well as matters pertaining to alteration in Standing Orders. Section 40(1) stipulates that Standing Orders that have been settled under Chapter VII and in operation or where no such Standing Orders are in force, the Model Standing Orders that are applicable under the provisions of Section 35(5) would be determinative of the relations between the employer and his employees. Section 40A prescribes that any Model Standing Order made and notified in the Official Gazette in respect of any additional matters included in Schedule I would apply in relation to such employees in the undertaking in respect of which Standing Orders have already been settled under Section 35 unless such Model Standing Order is held by the Commissioner of Labour to be less advantageous to the employees than the corresponding Standing Order applicable to them.

Answer to Question (a) :-

12. It is undisputed that the employer and the employees herein are governed by the Model Standing Orders for Operatives as applicable in the Vidarbha Region of the State as notified on 11.07.1967 and published in the Official Gazette on 20.07.1967. Model Standing Order 3(b) refers to a probationer as an operative who is provisionally employed to fill a permanent vacancy or post and who has not completed three months service in aggregate in that post. It may be stated that by virtue of Notification dated 07.01.1989, the Model Standing Orders came to be amended. Amongst other orders, Model Standing Order 4A came to be inserted and the same reads thus :

“4A- Confirmation of Probationers :- Every probationer who has satisfactorily completed the period of three months

uninterrupted service in the post in which he is provisionally employed shall be made permanent in that post by the Manager by an order in writing within seven days from the date of completion of such period.

Provided that, where the settled Standing Orders which prevail on the date of coming into force of this notification prescribe a probationary period longer than three months, the probationer shall complete such probationary period;

Provided further that, if the services of the probationer are found to be unsatisfactory, the Manager may terminate his services after the completion of his probationary period”.

Model Standing Order 31 which is the sheet-anchor of the case of the employer reads thus :

“31-Nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage of an agreement, settlement or award applicable to the undertaking”.

13. To recapitulate, the employees herein were initially engaged as trainees for a period of one year. Thereafter they were appointed on probation as operatives for a period of six months. This according to the employer was under the contract of service entered into with each employee which was permissible being saved by Model Standing Order 31. According to the employees they were governed by Model Standing Order 4A and the contract of service prescribing longer probation period of six months being contrary to Model Standing Order 4A was not saved by Model Standing Order 31. The savings clause could not be read in such a manner to defeat the right of the employees of being confirmed in service after completion of three months uninterrupted probationary service. For the purpose of adjudicating this aspect we may first refer to the various decisions relied upon by the parties in that regard. It is however clarified that we are not examining the legality of Model

Standing Order 31 as the same was not in issue before the learned Single Judge.

14. In *Western India Match Company Ltd* (supra), the employer had its separate Standing Orders for the Watch and Ward Staff whereunder a probationer was a workman who was provisionally employed to fill a permanent vacancy and who had not completed two months service. The employer engaged a Watchman and placed him on probation for a period of six months. After expiry of the period of probation, the employee continued in service and thereafter the employer extended the period of probation by two more months with retrospective effect. Prior to completion of the said extended probation period, his services were dispensed with. One of the questions considered was whether the special agreement prescribing the period of probation as six months was inconsistent with the Standing Orders which prescribed probationary period of two months. It was held that the special agreement was inconsistent with the Standing Orders to the extent that it prescribed additional probationary period of four months. It was observed that when the Standing Orders were in force, it was not permissible for the employer to seek a statutory modification of the same which could result in one set of Standing Orders being applied to some employees and another set for the rest of the employees. It was also held that a prior as well as posterior agreement which was inconsistent with the Standing Orders would not survive. The employer was not permitted to enforce the special agreement on the pretext that the employee had voluntarily agreed to the same.

15. The next decision is by the learned Single Judge of this Court in *ITC-1* (supra). The facts therein indicate that the employee was engaged as Sales

Representative on probation for a period of twelve months. It was the case of the employee that under the Model Standing Orders the period of probation could only be three months and hence on completion of the aforesaid probationary period of three months, the employee was deemed to have completed the said period successfully. After referring to the decision in *Western India Match Company* (supra) and in the context of Model Standing Order 4A as well as Model Standing Order 32 which is similarly worded as Model Standing Order 31 herein, it was held that the provisions contained in the Standing Orders could not operate to the prejudice of any right under the contract of service, custom or usage or agreement, settlement or award. The prohibition against the operation of Standing Orders was only when better rights that were acquired by an employee under the contract of service were likely to be prejudiced. It was found that while under Model Standing Order 4A the period of probation was three months, that under the contract of employment was twelve months. Hence the contract of employment would not be saved by Model Standing Order 32 and any interpretation which was inconsistent to the Standing Orders would be invalid and incapable of being enforced.

This decision of the learned Single Judge was the subject matter of challenge before the Hon'ble Supreme Court in *ITC-2* (supra). The Hon'ble Supreme Court examined the question with regard to interpretation of Section 38-B of the Bombay Shops and Establishments Act, 1948 and the Standing Orders issued under the Act of 1946. While upholding the judgment of the learned Single Judge as regards the interpretation of Section 38-B of the Bombay Shops and Establishments Act, 1948 in paragraph 10 it was observed as under :

“10.Thus it is held that the provisions of Section 38-B of the Shops Act applied to all establishments as if industrial establishments irrespective of the number of persons employed therein and the standing orders would apply instantly providing a period of probation of three months only. It thus appears to us that the High Court was right in importing the applicability of the Standing Orders Act and the standing orders to enable the respondent ripen his period of probation to one of regularity after the expiry of three months of successful completion. Our interpretation being in accord with that of the High Court, as also on the result achieved, we dispose of this appeal by directing that the appellant pay to the second respondent the balance of 50% back wages within a period of two months from today”.

16. We find that the learned Single Judge in ***ITC-1*** (supra) has interpreted Model Standing Order 32 to mean that the provisions contained in the Standing Orders would not operate to the prejudice of any right under the contract of service, custom or usage or agreement, settlement or award. In other words, it was held that the Standing Orders would not operate only in the event better rights acquired by an employee under a contract of service were likely to be prejudiced. Therein, Model Standing Order 4A prescribed uninterrupted service for a period of three months which a probationer was required to complete for ceasing to be a probationer. The appointment order however prescribed probation period of twelve months. It was held that the employee by virtue of Model Standing Order 4A ceased to be a probationer on completion of three months uninterrupted service and the contract of appointment as a probationer prescribing probation period of twelve months being longer than the period prescribed under Model Standing Order 4A was not valid.

Much emphasis was placed by the learned counsel for the employer on the fact that in paragraphs 1 and 8 of the decision of the Hon'ble Supreme Court in

ITC-2 (supra) the Hon'ble Supreme Court had referred to the limited scope of the appeal from the judgment of the learned Single Judge. In paragraph 10 it has been clearly observed that the High Court in *ITC-1* was right in importing the applicability of the Standing Orders so as to enable the employee to ripen his period of probation to one of regularity after the expiry of three months of successful completion of probation. These observations leave no manner of doubt that the interpretation as placed by the learned Single Judge in *ITC-1* (supra) that the term in the contract of service prescribing a larger period of probation had to yield to Model Standing Order 4A which prescribed a lessor period of uninterrupted service for being confirmed in service. In other words, Model Standing Order 4A continued to operate and the contract of service to that extent was not saved by Model Standing Order 32 as better rights acquired by the employee under Model Standing Order 4A had been prejudiced.

17. Heavy reliance was placed by the learned counsel for the employer on the judgment of the Division Bench in *Pune Municipal Corporation* (supra). It was urged that Model Standing Order 32 applicable to the facts of that case had been interpreted to mean that a valid settlement arrived at between the employer and the employees prescribing completion of five years of continuous service for claiming the right of permanency could not be ignored despite the fact that Model Standing Order 4(c) prescribed completion of 240 days of uninterrupted service for entitlement to the right of permanency and was more beneficial to the workmen. Though the settlement prescribed a larger period of five years continuous service for claiming permanency, it was preferred to Model Standing Order 4(c) that required

completion of only 240 days of uninterrupted service for seeking permanency. It was thus urged that in view of this conclusion of the Division Bench, the decision of the learned Single Judge in *ITC-1* (supra) stood impliedly overruled.

We are unable to accept this contention. In *Pune Municipal Corporation* (supra) the Division Bench held that it was a settled principle of law that mere completion of 240 days service in the absence of availability of a permanent vacant post duly approved by the competent authority would not be sufficient to claim permanency. In addition, it was observed that since there was a valid and lawful settlement under which the employees had agreed that their claim for permanency would be available only on completion of five years of continuous service depending on the availability of a permanent vacant post, the claim as made under Model Standing Order 4(c) ignoring the settlement could not be entertained. While upholding the settlement prescribing a longer period of continuous service than that prescribed by Model Standing Order 4(c), the ratio of the decisions in *Western India Match Company Ltd*, *ITC-2* and *ITC-1* (supra) has not been considered. As held in *Western India Match Company Ltd* (supra), the inconsistent part of the special agreement cannot prevail over the Standing Orders.

18. In this context, we may refer to the judgment of learned Single Judge in *Ramesh Vithal Patil and others Vs. Kalyan-Dombivali Municipal Corporation and others (2010) 6 BCR 661*. The facts of the said case indicate that the employees therein were appointed on temporary basis by the employer and by virtue of the provisions of Model Standing Order 4(c) they claimed that having completed uninterrupted service of 240 days they were entitled to the relief of permanency.

The Municipal Corporation took the stand that the appointments as made were without following the procedure prescribed under the Bombay Provincial Municipal Corporation Act, 1949 and they were not made on sanctioned posts. The provisions of Model Standing Order 4(c) and Model Standing Order 32 were considered by the Court. Model Standing Order 32 is in para materia with Model Standing Order 31 as applicable to the case in hand save and except the expression “establishment” that finds place in Model Standing Order 32 as against the expression “undertaking” in Model Standing Order 31. It was held that Model Standing Order 32 operated in two parts; the first part was in relation to “any law for the time being in force” to mean a statutory enactment. As regards the second part with which we are concerned in the present case, it was observed in paragraph 32 as under :

“32The second part of Clause 32 pertains to saving any benefit that a workman may be entitled to under a contract of service, custom, or usage or an agreement, settlement or award applicable to the establishment. In other words, in the event of a workman being entitled to any higher or better rights under a contract of service, agreement, settlement, etc. than that provided in the Standing Orders, the Standing Orders shall not deprive the workman of the same.”

The judgment of the learned Single Judge in the **ITC-1** (supra) was cited and it was observed that the learned Single Judge had not observed in the said decision that the Model Standing Orders would operate in derogation of or contrary to any existing enactment.

19. In **Ramesh Vithal Patil and ors** (supra) it was urged on behalf of the employees that the decision in **Pune Municipal Corporation** (supra) was *per incuriam* as the question as to whether the Act of 1946 and the Model Standing

Orders would override the provisions of the Bombay Provincial Municipal Corporation Act, 1949 had not been considered. That submission was not accepted. However, it was observed that the judgment in ***Pune Municipal Corporation*** (supra) appeared to be *per incuriam* to the extent it upheld the settlement between the employer and the employees for claiming permanency only on completion of five years of continuous service as it was against the spirit of the judgment of the Hon'ble Supreme Court in ***Western India Match Company Limited.*** (supra). The following observations in paragraph 37 indicate the same and that paragraph reads as under :

37. "Having said that, the judgment in ***Pune Municipal Corporation Vs. Dhananjay Prabhakar Gokhale*** appears to be per incuriam to the extent of the last portion in paragraph 9 after Clause 32 of the MSO is set out in view of the judgment of the Supreme Court in ***Western India Match Co. Ltd.*** The Division Bench held that in view of the Settlement of September, 1989 between the employees and the appellants the claim for permanency could only be on completion of five years of continued service and in accordance with Clause 4-C of the Standing Orders. The judgment of the Supreme Court in ***Western India Match Co. Ltd.***, however, makes it clear that in the event of there being a conflict between the provisions of the Standing Orders and any agreement, the provisions of the Standing Orders would prevail. The attention of the Division Bench was not invited to the judgment of the Supreme Court. However, as I have already noted, the rest of the judgment in ***Pune Municipal Corporation Vs. Dhananjay Prabhakar Gokhale*** is good law and is not affected by the judgment in ***Western India Match Co.Ltd.***"

We find no difficulty in accepting the observations of the learned Single Judge in ***Ramesh Vithal Patil*** (supra) as made in paragraph 37 reproduced hereinabove that the judgment in ***Pune Municipal Corporation*** (supra) to the extent the same is against the spirit of the judgment of the Hon'ble Supreme Court in ***Western India Match Company Ltd.*** (supra) is rendered *per incuriam*. As noted above the judgments in ***ITC-1*** as well in ***ITC-2*** were not cited before nor referred to by the

Division Bench in ***Pune Municipal Corporation*** (supra). As observed in paragraph 19 of the decision in ***Sundeep Kumar Bafna Vs. State of Maharashtra (2014) 16 SCC 623***, a judgment can be *per incuriam* if the decision of the High Court is not in consonance with the views of the Supreme Court. We thus endorse the observations made in paragraph 37 of the decision in ***Ramesh Vithal Patil*** (supra) in this regard. In that view of the matter the observations in paragraph 9 of the decision in ***Pune Municipal Corporation*** (supra) permitting the settlement prescribing the right of permanency after continuous service of five years to operate instead of Model Standing Order 4(c) prescribing completion of 240 days of uninterrupted service for permanency cannot be relied upon.

20. We also find that the judgment of the learned Single Judge in ***ITC-1*** (supra) interpreting Model Standing Order 32 to mean that it was intended only to protect the better rights in favour of a workman/employee and that the Standing Orders would prevail over the terms of contract of service in case of inconsistency between the two has been consistently followed in various decisions. In ***Philipos Babu Vs. M/s. Bajaj Tempo Ltd. and anr 1996 III LLJ 666*** the workman was appointed on probation initially on temporary basis. He was subsequently given a letter of appointment in which it was stated that he would be on probation for a period of six months and at the discretion of the employer the probationary period could be extended. The workman raised a dispute contending that his services were governed by the Model Standing Orders and in view of Clause 4A thereof the probation period could not be more than six months. Since the Labour Court did not accept this contention and dismissed the complaint, the workman approached this

Court. It was held by Shri B. N. Srikrishna, J (as His Lordship then was) that Model Standing Order 32 was the subject matter of the interpretation in *ITC-1* (supra) and that the same was intended only for protecting the better rights in favour of the workmen and that the Standing Orders must prevail over the terms of contract of service in case there was inconsistency between the two. We are in respectful agreement with the aforesaid view. It was held that on expiry of three months probationary period the workman was deemed to have become permanent. Relief was accordingly granted to the workman.

21. We may now refer to the decision in *Tulshiram K. Gothad* (supra) on which considerable reliance was placed by the learned counsel for the employer. The facts therein indicate that in the appointment order it was stipulated that the employee would retire from service on completion of age of 58 years whereas under the Model Standing Orders applicable, the age of retirement fixed was 60 years. The employee filed a complaint urging that under the Model Standing Orders applicable the age of retirement was 60 years and he could not be retired at the age of 58 years. The Division Bench held that under Model Standing Order 27 the age of retirement of an employee could be 60 years or it could be such other age that may be agreed between the parties by an agreement. Since the order of appointment itself prescribed the age of retirement to be 58 years, it was held that in the light of that agreement and the service regulations prescribing the age of retirement of 58 years, the employee was rightly superannuated at the age of 58 years.

Before the Division Bench, the judgment of the learned Single Judge in *Engineering Workers Association* (supra) was relied upon. The learned Single Judge

therein by relying upon the judgment of the learned Single Judge in *ITC-1* (supra) had held that Model Standing Order 32 prescribing the age of retirement at 60 years would override the agreement between the parties which prescribed the age of retirement as 58 years. The Division Bench in *Tulshiram K. Gothad* (supra) however proceeded to overrule the judgment of the learned Single Judge in *Engineering Workers Association* (supra) on the ground that the interpretation by the learned Single Judge of Model Standing Order 27 resulted in addition of words to the said Model Standing Order which was not permissible. Model Standing Order 32 was also referred to before the Division Bench but in paragraphs 4 and 5 of its decision, the Division Bench observed that in view of the clear language of Model Standing Order 27 it was not necessary for it to consider Model Standing Order 32. The decision in *Tulshiram K. Gothad* (supra) has considered and interpreted the provisions of Model Standing Order 27 alone with which we are not concerned in the present case. In view of its clear observations that it did not find it necessary to consider Model Standing Order 32 (which is in *pari materia* to Model Standing Order 31), we are not in a position to hold that since the Division Bench in *Tulshiram K. Gothad* (supra) had overruled the judgment of learned Single Judge in *Engineering Workers Association* (supra) in which decision the judgment of the learned Single Judge in *ITC-1* (supra) had been followed, the judgment of the learned Single Judge in *ITC-1* (supra) also stands impliedly overruled. This is for two reasons namely; the interpretation of Model Standing Order 32 as arrived at by the learned Single Judge in *ITC-1* (supra) stands confirmed by the Hon'ble Supreme Court in *ITC-2* (supra). In fact, on the grant of Special Leave the doctrine of merger as explained in *S.Shanmugavel Nadar Vs. State of T.N. and another (2002) 8 SCC*

361 would apply. Secondly, the Division Bench in *Tulshiram K. Gothad* (supra) has in clear terms observed that it was not necessary for it to consider Model Standing Order 32. Thus the said contention of the learned counsel for the employer cannot be accepted.

22. Thus in the light of the ratio of the decisions in *Western India Match Company Limited, ITC-1, ITC-2* and *Ramesh Vithal Patil and others* (supra) it is held that Model Standing Order 31 cannot be interpreted to mean that it would save a contract of service prescribing a longer period of probation than that prescribed by Model Standing Order 4A. In other words, the period of probation prescribed by Model Standing Order 4A would prevail over the period of probation prescribed under a contract of service if such probationary period under the contract of service is more than that prescribed by Model Standing Order 4A. The legislative intent behind insertion of Section 40A in the Act of 1946 also supports this conclusion.

Question (a) is thus answered by holding that the contract of service prescribing probationary period of six months would not prevail over Model Standing Order 4A which prescribes probationary period of three months. Since the contract of service prescribes a larger period of probation than that prescribed by Model Standing Order 4A, the contract of service would not be saved by Model Standing Order Clause 31.

Answer to Question (b) :-

23. It was strenuously urged on behalf of the employer that that in the order of appointment on probation it was stated that only on satisfactory completion of the period of probation followed by an order of confirmation in writing, the employee

would gain the status of a regular employee. There was no scope to import the concept of deemed confirmation in service. In the absence of an act by the employer recording satisfactory completion of the period of probation after three months assuming Model Standing Order 4A was applicable, it could not be held that the period of probation of three months had been satisfactorily completed to enable the employee to get the benefit of permanency. Perusal of Model Standing Order 4A indicates that only on satisfactory completion of the period of probation of three months followed by an order in writing issued by the Manager within seven days from the completion of such period would the employee be entitled to be made permanent on the post. In *Durgabai Deshmukh Memorial Senior Secondary School* (supra) the Hon'ble Supreme Court has considered the aspect of "deemed confirmation" of a probationer in the context of the requirements prescribed by the relevant provisions. After referring to its earlier decision in *Satyanarayan Jhavar* (supra) it was observed that where the relevant rule prescribes a positive act to be done by the employer before the services of a probationer can be confirmed, there would be no occasion to hold that in the absence of such positive act by the employer the services of the employee stand deemed confirmed. Continuation of services even beyond the maximum period of probation would not entitle the probationer in such situation to be deemed to be confirmed in service. Such confirmation is only after issuance of an order to that effect by the Appointing Authority that the period of probation has been satisfactorily completed. In the facts of the said case it was noticed that the services of the probationer therein were continued beyond the maximum permissible period of probation which resulted in violation of law. It was observed that though there was no provision for deemed

confirmation, the conduct of the Management could result in other consequences including the decision as to whether the recognition of the school which violated the law should be withdrawn. The Hon'ble Supreme Court after invoking the provisions of Article 142 of the Constitution of India awarded compensation of Rs. Five lakhs to the employee therein.

24. The decision in *Durgabai Deshmukh Memorial Senior Secondary School* (supra) no doubt supports the contention of the learned counsel for the employer that in view of the requirement of Model Standing Order 4A, in the absence of any order in writing being made by the Manager on satisfactory completion of the period of probation, the services of the employees herein would not be deemed to be confirmed. It is however necessary to notice certain undisputed facts in the present case. All employees were issued orders of appointment on probation for a period of six months and they successfully completed the period of probation of six months as per the contract of service. All employees were thereafter made permanent in service by issuing orders of appointment. These are the averments in paragraph 7 of the written statement. It is not the case of the employer that the services of any of the aforesaid employees were not satisfactory or that the period of probation of six months was required to be extended further. In other words, each employee successfully completed the period of probation of six months and was thereafter made permanent in service.

25. The question to be considered in these facts is whether the benefit of permanency could be extended to these 53 employees only after satisfactory completion of probation period of six months or whether such successful completion

of the probation period of six months would enure to the benefit of the employees by relating back to the date when they completed the probationary period of three months as contemplated by Model Standing Order 4A. As noted above, the employer was not justified in issuing the order of probation for a period of six months, which was against the spirit of Model Standing Order 4A that prescribes the probationary period of three months. Model Standing Order 31 would not come to the aid of the employer in view of the fact that Model Standing Order 4A prescribes a shorter period than that imposed by the employer in the contract of service with each employee. Thus, once it is found that the employer ought to have prescribed the probationary period of three months as stipulated by Model Standing Order 4A it becomes clear that each employee having successfully completed the probation period of six months, he would be entitled to the benefits of permanency on the expiry of period of three months on the principle of “relation back”.

In this regard we seek to draw support from the principle of law laid down in *G.P.Doval and others Vs. Chief Secretary, Government Uttar Pradesh and others (1984) 4 SCC 329* wherein it was held that on confirmation in service by the Authority having power and jurisdiction to make the appointment, it would relate back to the date on which the first appointment was made and entire service would have to be computed in reckoning the seniority according to the length of continuous officiation. This decision of the Hon’ble Supreme Court was subsequently followed in *L.Chandrakishore Singh Vs. State of Manipur and others, (1999) 8 SCC 287* where in paragraph 15 it was observed as under :

“15. It is now well settled that even in cases of probation or officiating appointments which are followed by a confirmation unless a contrary rule is shown, the service rendered as officiating

appointment or on probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Where the first appointment is made by not following the prescribed procedure and such appointee is approved later on, the approval would mean his confirmation by the authority and shall relate back to the date on which his appointment was made and the entire service will have to be commuted in reckoning the seniority according to the length of continuous officiation. In this regard we fortify our view by the judgment of this Court in G.P.Doval v. Chief Secy, Govt. of U.P.”

Though these decisions pertain to the aspect of reckoning seniority, the observations that the period spent in successfully completing the probation period cannot be excluded are relevant.

26. We thus accept the contention made on behalf of the employer that in the light of the requirement of Model Standing Order 4A, satisfactory completion of the period of probation has to be specifically acknowledged by the employer by an order in writing. However, in the light of the facts of the present case wherein each employee successfully completed his period of probation after six months which was duly followed by issuance of fresh order of appointment on permanent basis, the employees would be entitled to the benefit of completion of probationary period at the end of three months in the light of Model Standing Order 4A. Such interpretation in these facts would be in consonance with the spirit of Model Standing Orders 4A and 31 being construed harmoniously. It would also be in accord with the observations in *ITC-2* (supra) wherein the Hon'ble Supreme Court while considering Model Standing Order 4A affirmed the course followed by this Court in *ITC-1* (supra) of permitting the employee therein “to ripen his period of probation to one of regularity after the expiry of three months of successful

probation.” To hold otherwise would amount to granting premium on the conduct of the employer of issuing the order of appointment on probation for a period of six months which was “to the prejudice” of the employees. Having found that the probation period could have been only three months, the employees cannot be deprived of the benefit of successful completion of the probationary period only on the ground that the employer on completion of the probationary period of six months found their services to be satisfactory. Since there could be no estoppel against law, the acceptance of appointment on probation for a period of six months would not defeat the rights of the employees under Model Standing Order 4A. The observations in paragraph 12 of the decision in *Western India Match Company Limited* (supra) support this conclusion. The ratio of the decisions in *General Manager, Sri Siddeshwara Co-operative Bank Limited and another, Haryana State Co-operative Land Development Bank Ltd.* and *Rukhmina Dange* (supra) would not be applicable in such situation.

Question (b) is accordingly answered by holding that that on the principle of “relation back”, each employee would be entitled to the benefit of permanency on completion of probationary period of three months that has been prescribed by Model Standing Order 4A.

Answer to Question (c) :-

27. As regards the contention of the learned counsel for the employer that the provisions of Item 9 of Schedule IV of the Act of 1971 were neither applicable in the facts of the case as pleaded by the employees nor did the complaint make out a case in that regard, the same does not deserve acceptance. Paragraphs 11 to 13 of

the complaint indicate that the employees had relied upon the Model Standing Orders framed under the Act of 1946 to contend that in breach thereof they had been denied the benefits of regularisation and permanency. It was also pleaded that the Model Standing Orders constituted an “agreement” under the Act of 1971 thus constituting an unfair labour practice. In reply to these paragraphs, the employer relied upon the exception carved out in the Model Standing Orders to justify the probationary period of six months. It was admitted that the Model Standing Orders framed under the Act of 1946 constituted an “agreement” between the parties. It was denied that the employer had engaged in an unfair labour practice.

The aforesaid pleadings clearly indicate that while the employees had relied upon Model Standing Order 4A to urge that the probationary period ought to have been three months, the employer had relied upon the acceptance of the probationary period of six months as mentioned in the appointment orders which amounted to a contract to the contrary as saved under Model Standing Order 31. The complaint was prosecuted on these pleadings which is also clear from Issue No.3 framed by the Industrial Court. It therefore cannot be said that no case of unfair labour practice at the instance of the employer so as to attract Item 9 of Schedule IV of the Act of 1971 was pleaded by the employees. The ratio of the decisions in *Siemens Limited and another, Regional Manager, SBI, Hasmat Rai and Church of Christ Charitable Trust* (supra) cannot be made applicable to the case in hand. This aspect has been dealt with by the learned Single Judge in paragraph 41 of the impugned judgment and there is no reason to take a different view.

It was sought to be urged by the employer that the complaint was filed beyond the period of limitation and hence it ought not to have been entertained by

the Industrial Court. The learned counsel however fairly stated that this contention had not been urged before the learned Single Judge. Similarly, the contentions of lack of proper demand being made by the employees before filing the complaint and verification only by complainant no.1 on behalf of all the complainants do not appear to have been raised before the learned Single Judge. In that view of the matter we are not inclined to go into these aspects.

Question (c) is accordingly answered by holding that the provisions of Item 9 of Schedule IV of the Act of 1971 were invoked by the employees in the complaint filed by them.

Answer to question (d) :

28. It was strenuously urged on behalf of the employer that in view of the fact that the settlement dated 18.02.2005 had been made applicable to permanent employees of the company as on 31.03.2004 and as admittedly the present employees were made permanent after that date, the present employees were not entitled to the benefits under the said settlement. In this regard, it is found that the learned Single Judge in paragraphs 35 to 40 has considered this aspect. It has been found that it was the specific pleading of the employer in its written statement that the employees herein were to be paid by the employer as per prevailing practice. It is then found that the employer could not produce on record any evidence whatsoever to indicate the prevalent practice or any other service conditions that could be made applicable to the employees herein on the premise that the terms of the settlement dated 18.02.2005 would not be applicable to them. It is in the absence of any such “prevailing practice” that was sought to be relied upon by the

employer that the Industrial Court and thereafter the learned Single Judge found that there could not be different service conditions for employees under the same roof. The cross-examination of Pradeep Andhare examined by the employer is also relevant. Despite the pleading that there was some practice other than the settlement dated 18.02.2005, there was no evidence brought on record. It in that context that the finding has been recorded that even those employees who became permanent after 31.03.2004 were entitled to the benefits of the settlement dated 18.02.2005. In the light of the reasons assigned in paragraphs 35 to 40 in the impugned judgment, we find that no other view is possible and hence for the said reasons the challenge as raised by the employer to the applicability of the settlement dated 18.02.2005 to the employees herein does not deserve to be accepted.

We find that the learned Judge of the Industrial Court and the learned Single Judge have taken into consideration all relevant aspects and have thereafter found the employees entitled to the reliefs as granted. We do not find any reason not to affirm those findings.

Question (d) stands answered accordingly.

29. Before parting with the judgment, we place on record our appreciation for the able assistance rendered by the learned counsel for the parties in their attempt to substantiate their respective contentions.

30. As a result of the aforesaid discussion, we do not find any reason to interfere with the judgment of the learned Single Judge in Writ Petition No. 4996/2009. The letters patent appeal is accordingly dismissed leaving the

parties to bear their own costs.

The amount lying in deposit in this Court with accrued interest be made over to the representative of the respondent nos.1 to 53 on behalf of all the respondents after a period of six weeks from today.

JUDGE

JUDGE

Andurkar..