HIGH COURT OF GUJARAT

UNIVERSITY GRANTH NIRMAN BOARD
Versus
UDEMPLOYEES STATE INSURANCE CORPORATIONNH TOGAJI SOLANKI

Date of Decision: 11 March 2003

Citation: 2003 LawSuit(Guj) 128

Hon'ble Judges: H K Rathod

Eq. Citations: 2003 2 GLR 1281, 2003 1 GLH 626, 2003 4 LLJ 950, 2003 3 SCT 586, 2004 2 SLR 264, 2003 1 GHJ 735, 2003 3 GHJ 735

Case Type: Civil Application; Special Civil Application

Case No: 8363 of 2002 and 8271 of 2001; 5617 of 2001

Subject: Labour and Industrial

Editor's Note:
Industrial Disputes Act, 1947 - Sec 17-B, 10 - Granting reinstatement by labour Court - Challenged before higher Form - Pendency of petition - Workman is found to have been doing some miscellaneous activities and earning of his livelihood - Gainful employment U/S 17B - Workman is having any other income with out any employment in any establishment - That cannot be considered as a gainful employment looking to language employed by the legislature while enacting said Sec 17B of Act - For denying benefits U/S 17B an employer is required to establish and prove to satisfaction of Court that the workman had been employed in any establishment and has been receiving adequate remuneration while considering question of back wages for intervening period labour Court or Industrial Tribunal has to consider as to whether workman has been gainfully employed or not during intervening period - If remuneration received by workman is not adequate - Labour Court shall have to consider aspect of back wages with-out being influenced by fact that the workman has been receiving some amount by doing miscellaneous work - Held, prayer made by petitioner for recalling order passed by earlier is rejected - Disposed

Acts Referred:
Industrial Disputes Act, 1947 Sec 17B, Sec 10

Final Decision: Application disposed

Advocates: Chudgar, Nanavati Associates, N K Majmudar

Cases Cited in (+): 8
Cases Referred in (+): 14

H. K. RATHOD, J.

[1] At the outset, this Court would like to refer certain important observations made by the Honble Apex Court in case of Consumer Education and Research Centre & Ors. v. Union of India & Ors., reported in 1996 (72) FLR 479 Paras 22 and 24 at page 18 are reproduced as under :

> 22. The jurisprudence of personhood or philosophy of the right to life envisaged under Art. 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood to sustain the dignity of person and to live a life with dignity and equality.
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> 24. The expression life assured in Art. 21 does not connote mere animal existence or continued drudgery through life. It has a much wide meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure .....

[2] Rule. Learned Advocate Mr. S. D. Suthar for Mr. N. K. Majmudar waives service of Rule on behalf of the respondent-workman.

> Heard learned Advocate Mr. Chudgar on behalf of M/s. Nanavati Associates appearing for University Granth Nirman Board-original petitioner-applicant herein and learned Advocate Mr. S. D. Suthar for Mr. N. K. Majmudar on behalf of the original respondent-opponent herein so far Civil Application No. 8363 of 2002 is concerned and vis-a-vis in respect of Second Civil Application No. 8271 of 2002.

[3] Before dealing with these two civil applications some back-ground and facts of the main petition require to be enlightened which shows that by way of main petition i.e., Special Civil Application No. 5617 of 2001, the University Granth Nirman Board-original petitioner has challenged the award passed by the Labour Court, Ahmedabad in Reference (L.C.A.) No. 1254 of 1996 dated 10th January, 2001, wherein the Labour Court, Ahmedabad has granted reinstatement in favour of the workman with continuity of service and full back wages with effect from 16th February, 1996. The Labour Court has also directed the original petitioner to implement the award in question within period of 30 days from the publication of the said award. The Labour Court has also

imposed cost of Rs. 500/- to be paid by the petitioner to the respondent-workman towards the cost of reference. This Court, while dealing with the main petition, has passed the order on date 23rd July, 2001 and issued notice to the respondent-workman returnable on 1st August, 2001 on condition that the petitioner shall have to deposit Rs. 2,500/- towards the cost of the respondent-workman before this Court. Learned Advocate Mr. Suthar has submitted that in pursuance of the order passed by this Court on date 23rd July, 2001, the original petitioner has deposited a sum of Rs. 2,500/- before this Court and thereafter, the matter has been adjourned on various occasions and ultimately, it was heard on 7th November, 2001 and this Court has admitted the main matter while issuing Rule and also granted interim relief in terms of prayer made in Para 17B subject to compliance of provisions of Sec. 17-B of the Industrial Disputes Act, 1947 (the I. D. Act for sake of convenience). Thereafter, the main matter remains pending as it is awaiting final hearing and not listed for final hearing till date and as such, no further order has been passed by this Court.

[4] It may be noted that while admitting the main matter i.e., Special Civil Application No. 5617 of 2001, though this Court has granted interim relief in terms of Para 17B of the petition directing to comply with the provisions of Sec. 17B of the I. D. Act but as such, no payment has been made to the respondent-workman. Under these circumstances, the workman - original respondent has preferred application being Civil Application No. 12823 of 2001 with a prayer to direct the opponent original petitioner to comply with the provisions of Sec. 17B of the I. D. Act and further prayed for issuance of appropriate directions on the original petitioner to pay wages to the workman-opponent herein during pendency of the petition. This Civil Application was filed by the original respondent on 5th December, 2001 wherein learned Advocate Mr. N. K. Majmudar appeared on behalf of the original respondent, whereas other side attended by learned Advocate Mr. Chudgar on behalf of the original petitioner who made a statement that since they are appearing in the main matter on behalf of the original petitioner, there is no need to issue any formal notice on the opponents therein and their name may be shown on behalf of the opponent in that Civil Application and it was ordered accordingly vide order passed on date 11-1-2002. However, on that occasion, learned Advocate Mr. Chudgar sought some time to seek instructions and the matter was thereafter adjourned on 18-1-2002. That on 18-1-2002 that Civil Application viz., C.A. No. 12823 of 2001 was taken up for hearing which was contested by learned Advocate Mr. Vimal Patel on behalf of the original petitioner Board who submitted before this Court that when this Court had already passed orders, in that case, necessary directions may be issued by this Court for compliance of such directions. On the basis of the said statement, this Court has issued directions on the original petitioner Board to pay last drawn monthly wages including maintenance allowance to the respondent- workman from 10th January, 2001 till 31st January, 2002

within two months from the date of receipt of copy of this order. This Court also further directed to the original petitioner to pay such wages under Sec. 17B of the I. D. Act including the maintenance allowance regularly each month without any default to the respondent-workman till the final disposal of this petition. This Court also directed the respondent-workman to file affidavit as required to be filed under Sec. 17B of the I. D. Act within 15 days from the date of receipt of copy of that order, if not filed so far and to serve copy of such an affidavit under Sec. 17B of the I. D. Act to the petitioner. Thus, with above observations and directions, said Civil Application came to be disposed of by this Court with no order as to costs.

[5] It may also be appreciated that in Para 3 of the aforesaid Civil Application No. 12823 of 2001 wherein averments made by the applicant therein-original respondent-workman that he is unemployed and not doing anything since last five years and his economic condition is miserable and since he is unemployed and not earning anything, he is solely dependent on his wife, and therefore, appropriate directions/orders may be issued on the opponent-original petitioner-Board to comply with the provisions of Sec. 17B of the Industrial Disputes Act. It may be noted that no affidavit in reply nor any counter has been filed by the original petitioner against said Civil Application filed on 5th December, 2001. Thus, it becomes clear that the original petitioner-Board has not controverted, nor challenged the averments by the workman made in Para 3 of said application and as such, no counter was made by the original petitioner before this Court. Not only that but the learned Advocate Mr. Vimal Patel for original petitioner has submitted that if the orders have already been passed by this Court while granting interim relief subject to compliance of provisions of Sec. 17B of the I. D. Act, then, necessary directions may be issued by this Court, and therefore, this Court vide order passed on date 18th January, 2002 has issued directions accordingly.

[6] However, it is matter of regret that the order passed by this Court in Civil Application No. 12823 of 2001 on date 18th January, 2002 has not been complied with by the original petitioner-Board till date and ultimately, this inaction on the part of the original petitioner Board, has become cause for the respondent-workman to file another application before this Court being Civil Application No. 8271 of 2001 in Spl.C.A. No. 5617 of 2001 before this Court with a prayer to vacate the interim relief granted earlier in favour of the original petitioner while staying the award passed by the Labour Court, Ahmedabad in Reference (L.C.A.) No. 1254 of 1996 dated 10th January, 2001. It is also further prayer made in Para 4(C) by the respondent-workman in that application seeking directions on the original petitioner to comply with the order passed by this Court on 18th January, 2002. In the said application, it is also averred by the respondent-workman in Para 2 in last three lines that the respondent-workman has served Affidavit to the original petitioner-Board on 25th January, 2002 as directed

by this Court. It was also specifically averred in Para 3 by the original respondent-workman that despite the petition came to be admitted and interim relief came to be granted by this Court subject to the compliance of Sec. 17B of the I. D. Act, the original petitioner has not made payment to the respondent-workman till date, and therefore, request made by the workman before this Court for issuance of directions to vacate the interim relief granted by this Court and further direct the opponent original petitioner to comply with the order passed by this Court on date 18th January, 2002. However, it may be stated that no order has been passed by this Court in this Civil Application, nor said application has been disposed of and hence, the same is pending as it is before this Court awaiting its turn for hearing.

[7] Thereafter, the original petitioner has filed Civil Application being C.A. No. 8636 of 2002 in main petition on date 14th February, 2002 with a prayer to recall the order dated 18th January, 2002 passed in Civil Application No. 12823 of 2001 so far it relates to extending benefits of Sec. 17B of the I. D. Act in favour of the opponent-original respondent-workman. It is also prayed by the applicant-original petitioner-Board to stay the implementation and operation of the order dated 18th January, 2002 passed in Civil Application No. 12823 of 2001. In this Civil Application, the original petitioner has made averments that now it has come to the knowledge of the original petitioner-Board that whatever stated by the respondent-workman in his affidavit is not true and only to get benefit of Sec. 17B of Act, a false affidavit with respect to his unemployment is filed by him. It is further averred that the respondent actually is running his Auto Rickshaw bearing registration GJ-9T-845 and is earning since more than five years. It is further stated that it has also come to their knowledge that the said Rickshaw is registered in the R.T.O. in the address of the residence is shown. Against the aforesaid averments of the original petitioner-Board made in this application, the respondent-workman has filed affidavit-in-reply dated 18th December, 2002 and a copy thereof has been served on the original petitioner on the very same day. As such, no rejoinder has been filed by the original petitioner till date. The respondent-workman has made it clear in his affidavit while denying the averments made in the civil application to the effect that he is not running auto rickshaw bearing registration GJ-9T-845 as alleged in the aforesaid application. However, it is stated that the said auto rickshaw is registered in the name of Shri Jitendrabhai Dansinh Bhatti at Ahmedabad R.T.O. It is also stated that said Jitendrabhai Dansinh has obtained the contract carriage permit in respect of the said autorickshaw and he has mentioned the address of the respondent-workman in the said contract carriage permit since said Jitendrabhai Dansinh happens to be his brother-in-law and as he is resident of Rajkot, he wanted to have the contract carriage permit in Ahmedabad. The respondent-workman has also produced a copy of the contract carriage permit and R.T.O. form before this Court along with the affidavit-in-reply produced on record before this Court.

The respondent-workman has also made it clear in his reply affidavit that earlier affidavit declaring his unemployment filed by the workman is not false nor any such false affidavit is filed declaring his unemployment to get any undue advantage of Sec. 17B of the I. D. Act. The workman-respondent has also denied the averments that he has been earning since last five years, but on the contrary, he has made clear statement in his affidavit that he is still unemployed, and therefore, his request before this Court that the Civil Application preferred by the petitioner-Board may be rejected and alternatively interim relief granted in favour of the applicant original petitioner may be vacated forthwith.

[8] In light of this reply affidavit filed by the respondent-workman controverting the allegations of the petitioner-Board, learned Advocate Mr. Chudgar for original petitioner-Board submits that considering the documents produced on affidavit, the original petitioners are not now disputing the Affidavit filed by the respondent-workman disclosing his unemployed status. In short, the original petitioner is now not contesting the present application in respect of the claim of the workman under Sec. 17B of the I. D. Act in view of the reply affidavit filed by the respondent-workman as well as the documents which are annexed to the said reply. However, while considering this application, the most important issue which normally comes day to day before this Court that after termination, upon adjudication of Reference before the Labour Court, Tribunal or National Tribunal and after the award granting reinstatement by the Labour Court, if said award is challenged before the higher form viz. High Court or Honble Supreme Court and during the pendency of the petition, when the workman is found to have been doing some miscellaneous activities using his skill to run livelihood for workman himself and his family and the workman thereby earning for his livelihood, in that cases, whatever the workman is earning, can be considered and/or said to be in gainful employment under Sec. 17B of the I. D. Act. This aspect does not make it clear whether personal services like self-employed that of the workman during the period of pendency of proceedings before the High Court or the Supreme Court staying the award rendered in favour of the workman, involving himself in some miscellaneous works to earn his livelihood, can be said to be gainful employment under Sec. 17B of the I. D. Act, 1947.

[9] The aspect referred to above, requires elaborate considerations in light of provisions made Sec. 17B of the I. D. Act. However, before dealing with the question, I would like to refer to Chapter VI of Maxwell on the interpretation of Statutes, the chapter deals with construction to prevent evasion, which reads as under :

> I never understand, said Lord Cranworth L.C. what is meant by evading an Act of Parliament. Either you are not within the Act or you are not : if you are not within it, you are right; if you are within it the course is clear, and it cannot be said that

you are not within it because the very words of the Act may not have been violated. On the other hand, there is no doubt that the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined : quando aliquid prohibetur, prohibetur et omne per guod devenitur ad illud.

[10] In the background of above, let us consider provisions of Sec. 17B of the Industrial Disputes Act, 1947 which runs as under :-

17B. Payment of full wages to workman pending proceedings in higher Courts :-

Where in any case a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court :

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.

[11] The real effect and interpretation of Sec. 17B of the I. D. Act, 1947 is required to be considered in light of certain important observations made by the Apex Court in case of Rajinder Kumar Kindra v. Delhi Administration Through Secretary (Labour) & Ors., reported in AIR 1984 SC 1805. The relevant observations made in Para 21 are quoted as under :-

21. It was next contended on behalf of the appellant that reinstatement with full back wages be awarded to him. Mr. P. K. Jain, learned Counsel for the employer countered urging that there is evidence to show that the appellant was gainfully employed since the termination of service, and therefore, he was not entitled to back wages. In support of this submission Mr. Jain pointed out that the appellant in his cross-examination has admitted that during his forced absence from employment since the date of termination of his service, he was maintaining his

family by helping his father-in-law Tara Chand who owns a coal-depot, and that he and the members of his family lived with his father-in-law and that he had no alternative source of maintenance. If this is gainful employment, the employer can contend that the dismissed employee in order to keep his body and soul, together had taken to begging and that would as well be a gainful employment. The gross perversity with which the employer had approached this case has left us stunned. If the employer after an utterly unsustainable termination order of service wants to deny back wages on the ground that the appellant and the members of his family were staying with the father-in-law of the appellant as there was no alternative source of maintenance and during this period appellant was helping his father-in-law Tara Chand who had a coal-depot, it cannot be said that the appellant was gainfully employed. This was the only evidence in support of the submission that during his forced absence from service he was gainfully employed. This cannot be said to be gainfully employment so as to reject the claim for back-wages. There is no evidence on the record to show that the appellant was gainfully employed during the period of his absence from service. Therefore, the appellant would be entitled to full back-wages and all consequential benefits.

There are equally important observations made by the Bombay High Court in case of Standard Chartered Grindlays Bank Ltd. v. Govind Phopale & Anr., reported in 2003 (96) FLR 145. In Para 17 of the said decision at page 157, it has been observed as under :

I need not stress the fact that wage is the real content of Art. 21. If we were to take out the wage content from this Art. 21, it would be reduced to dead letter not worth even for a decoration. In the absence of the source of livelihood which is protected by Art. 21, the other fundamental rights would sound hollow and empty words and would collapse in no time as a dilapidated house. The workman and his family should not be made to starve merely on the pretext that proceedings under Sec. 33(2)(b) for approval of the action taken by employer is pending though he is told by law that the jural relationship by his empty belly. He cannot be denied the wage content of his jural relationship by drawing a fine distinction of law point that he has factually ceased to be in employment as the employer has already passed an order of dismissal/discharge though he still continues to be in the employment of the employer in law. In the case of Fakirbhai, 1986 (52) FLR 688 (SC), the Supreme Court was very much conscious of the delay in disposal of discharge/dismissal matters where the workmen concerned needed relief very badly. The Supreme Court has, therefore, considering the crucial aspect of the delay has given a great solace to the working class whose fate is covered under Sec. 33 of the Act as a whole not to be sub-divided by the sub-sections.

Similarly, in case of C.E.S.E. Ltd. v. Subhash Chandra Bose, reported in 1992 (64) FLR 247 (SC), it has been observed by the Apex Court in Para 30 at pages 355 and 356 :

> The right to social Justice is a fundamental right. Right to livelihood springs from the right to life guaranteed under Art. 21. The health and strength of a worker is an intergral facet of right to life. The aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. Right to human dignity, development of personality, social protection, right to set and leisure as fundamental human rights to common man mean nothing more than the status without means. To the tillers of the soil, wage earners, labourers, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights are mere cosmetic rights. Socio-economic and cultural rights are their means and relevant to them to realize the basic aspirations of meaningful right to life. The Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights, recognize their needs which include right to food, clothing, housing, education, right to work, leisure, fair wages, decent working conditions, social scrutiny, right to physical or mental health, protection of their families as integral part of right to life. Our Constitution in the Preamble and Part IV reinforce them compendiously as socio-economic justice, a bedrock to an egalitarian social order. The right to social and economic justice is thus a fundamental right.

[12] The object of Sec. 17B of the Industrial Disputes Act, 1947 is also equally important while considering and understanding the language used in the said section. Said section came into force on 21st August, 1984 and the assent of the President was received on August 31, 1982. The Objects and Reasons for enacing the said Sec. 17B are as under :

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

[13] Conjoin reading of the Objects and Reasons of Sec. 17B of the Industrial Disputes Act, 1947 and the Section itself makes it clear that it is a piece of social welfare and beneficial legislation enacted with a view to ameliorate the hardships caused to the workmen who are deprived of the benefit of reinstatement awarded by the Industrial Tribunals or the Labour Courts on setting aside the wrongful and unfair termination of

service by the employers. This section requires employer to pay to the workman directed to be reinstated full wages last drawn by him inclusive of any maintenance allowance admissible to him under any rules where the employer prefers any proceedings against such award of reinstatement of a Tribunal or the Labour Court in a High Court or the Supreme Court. During the pendency of such proceedings, however, the liability of the employer will be extinguished if the workman has been employed in any establishment during such period. These provisions, therefore, specifically requires the workman to file an affidavit before the concerned Court to the effect that he has not been employed in any establishment during such period. Therefore, the employer has to prove to the satisfaction of the concerned Court that the workman had been employed in any establishment and receiving adequate remuneration. If the employer fails to establish this fact before the concerned Court, then, it is the duty and legal obligation on the part of the employer by way of statutory provision to pay the last drawn monthly wages inclusive of any maintenance allowance to the workman during the pendency of such proceedings. In such a situation, if the workman is having any other income without any employment in any establishment, that cannot be considered as a gainful employment, looking to the language employed by the legislature while enacting the said Sec. 17B of the Industrial Disputes Act, 1947. Suppose, after the dismissal of the workman concerned from the service and till the date of the award of reinstatement by the concerned Labour Court or the Industrial Tribunal as the case may be, if the workman concerned is doing some miscellaneous petty work or job or any work of self-employment such as opening of the lari galla for pan-beedi or tea stall or the work as a hawker or any such other petty work of any kind and receives any amount or income from such work, the income received from such work cannot be taken into account while deciding an application under Sec. 17B of the Industrial Disputes Act, 1947 because the language employed in Sec. 17B of the Industrial Disputes Act while enacting the said provisions is very much clear from the proviso to the said section that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part as the case may be. Thus, in view of the proviso to Sec. 17B of the said Act, if the workman is receiving adequate remuneration by way employment in any establishment, that is the only thing which can be taken into consideration and on that basis, relief under Sec. 17B can be denied to the workman concerned. In other cases like self-employment, driving of auto rickshaw, opening of the pan galla, tea stall, hawking, receiving income of rent amount from his own property, income from the agricultural field, income of the wife, son, daughter, meaning thereby, income from the family members, selling of fruits and vegetables by larry, doing the work of carpenter, mason or such work of any nature, if the workman is receiving any income, that cannot be taken into

consideration as a gainful employment of the workman for denying the statutory benefits available to the workman under Sec. 17B of the Industrial Disputes Act, 1947. This aspect has been taken into account by some of our High Courts and the view has been taken that unless and until the employer has been able to satisfy the Court concerned that the workman has been employed in any establishment and has been receiving adequate remuneration, statutory benefit which is available under Sec. 17B of the Industrial Disputes Act, 1947 cannot be denied to the workman.

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

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

7. At any rate, apart from the averment in the reply of the employer, there is no sufficient material before this Court to come to the conclusion that respondent Nos. 2, 4 and 10 have been running the alleged business. Also there is nothing to prove

that they have been receiving adequate remuneration. Once the workman has filed an affidavit to the effect that he had not been employed in any establishment during the period of pendency of the proceedings in Court, the onus is on the employer to prove to the satisfaction of the Court that the workman had been so employed and had been receiving adequate remuneration. In this case the employer has not been discharged his duty of providing to the satisfaction of this Court that the above mentioned three workmen had been employed in any establishment and had been receiving adequate remuneration during the pendency of the writ petition. Hence, I do not find any reason to deny the benefits of Sec. 17B of the Industrial Disputes Act to the workmen including respondent Nos. 2, 4 and 10.

[14] Similarly, in case of K. Jayaraman v. Quilton Gas Services & Anr., reported in 1995 (2) LLJ 1150, while examining the nature and scope of Sec. 17B as well as conditions precedent for claiming the benefits, it has been observed by the Kerala High Court in Paragraphs 6, 7, 8 and 9 as under :

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

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

8. The question whether a workman running a tea shop and earning income would be entitled to the benefits under Sec. 17B was considered in Hindustan Machine Tools Ltd. v. Labour Court, 1992 (I) LLJ 494, where the Rajasthan High Court held that to disentitle a workman, the benefit of Sec. 17B, it should be established that he was employed under an establishment and mere carrying on an activity to make both ends meet will not deprive him of the benefit. The workman who was engaged in any activity or in some avocation to eke out a livelihood, so long as it is not

employment under any establishment cannot be denied the benefit. To deny the benefit, it must certainly be established that he was gainfully employed in some establishment during the pendency of the proceedings before the High Court or the Supreme Court and during that period, he was receiving adequate remuneration.

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

This aspect has also been examined by the Rajasthan High Court in case of Management, Hindustan Machine Tools Ltd. v. Labour Court, reported in 1992 (1) LLJ 494. In Para 7 of the said decision, it has been observed by the Rajasthan High Court as under :

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

mind that what is required under the provisions of Sec. 17B of the I. D. Act is that the workman had not been employed in any Establishment. Therefore, what is required is that the workman should be employed from which he receives adequate remuneration to disentitle him to receive any favourable order under provisions of Sec. 17B of the Act. Secondly, what is emphasized in this Section is that the workman should be employed but if he is carrying on some work to make his both ends meet and fill the belly of his family it will not disentitle him to get the payment as provided under Sec. 17B of the I. D. Act. It may be mentioned that this Section is a beneficial piece of Legislation which has been enacted for the benefit of the workman to see that they do not suffer on account of stay of award, which has been passed in his favour by the Labour Court. The litigation is a time consuming process and the workman cannot be made to suffer for years till the writ petition filed by the employer is disposed of finally. With a view to surmount this difficulty, the provisions of Sec. 17B were added to the I. D. Act with clear intention to give relief to the workman during the pendency of litigation in the High Court/Supreme Court. To bring about the balance of justice, proviso to this has been added, which also authorises the Court not to make payment, if it is satisfied that the workman has been employed and receiving adequate remuneration. If such satisfaction is not there, the order of payment should more or less follow automatically as provided in the section itself. The learned Counsel for the petitioner has placed reliance on S. Raju v. George Oakes Ltd., 1988 (1) WLN 127 (Mad.). This was a case in which the Management obtained interim stay of the award and the employee filed miscellaneous petition to vacate the stay and in an affidavit also claimed the monthly salary and allowances till disposal of the writ petition. The High Court while ordering interim stay to be absolute, directed that he should be paid Rs. 22,000/- within four weeks. The petitioner again filed an application under Sec. 17B for payment of monthly wages during the pendency of the writ petition.

It was held that while considering his petition to vacate the stay order, his claim to monthly wages under Sec. 17B had also been considered and only thereafter, the sum of Rs. 22,000/- was directed to be paid to him. Therefore, the workman cannot again claim that he should also be paid monthly wages till disposal of the writ petition. This authority evidently, is of no help to the petitioner. I am also fortified in my opinion by a decision of this Court in Krishi Upaj Mandi Samiti, Dholpur v. State of Rajasthan & Ors., (D. B. Civil Writ Petition No. 1081 of 1981 decided on September 23, 1987) in which also, it was held that the employment must be as an employee in an establishment and it would not cover a case where the workman carries on some private activity to make a living, because carrying on such an activity by the workman cannot be regarded as being employed in any establishment. In the present case, in reply to the application filed in Para No. 4, it

has been mentioned that the respondent No. 2 is employee in a tea shop, whereas, in the affidavit filed in support of the application, it is mentioned that he is personally running the tea shop and earning Rs. 150/- per day from the same. This shows that he has filed an affidavit in support of the reply on behalf of the petitioner that the respondent No. 2 is not employed anywhere.

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

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

[15] In view of the observations made by the various High Courts as aforesaid, it is established that for denying the benefits under Sec. 17B of the Industrial Disputes Act, 1947, an employer is required to establish and prove to the satisfaction of the Court concerned that the workman had been employed in any establishment and has been receiving adequate remuneration. In absence of such evidence in spite of any kind of income received by the workman, such benefit cannot be denied and such income cannot be considered as a gainful employment for want of any employment in any establishment.

[16] As per the dictionary meaning of the word Gainful given in Websters Encyclopedic Unabridged Dictionary, gainful would mean profitable, lucrative. As per the said dictionary, lucrative would mean profitable, money making, remunerative. Thus, as per the dictionary meaning of the said word, gainful would mean something which is lucrative and profitable and luncrative would mean profitable, money making or remunerative. Therefore, if the workman is getting profitable and lucrative amount by way of remuneration after employment in any establishment, in that case alone, such remuneration can be taken into consideration while deciding the application under Sec. 17-B of the Industrial Disputes Act, 1947. As per the said dictionary, employ would mean to use the services of (a person or persons); have or keep in ones service; to keep busy or at work; engage the attentions of; to make use of (an instrument, means etc.); use, apply; to employ a hammer to drive; to occupy or devote.

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

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

16.3 In Sec. 17B of the Industrial Disputes Act, 1947, the legislature has employed the phrase in any establishment and in proviso to the said section, the words adequate remuneration have been employed by the legislature in its wisdom. In view of that, after the affidavit is filed by the workman that he had not been employed in any establishment during such period, then it is for the employer or the Management to prove to the satisfaction of the Court concerned by way of genuine evidence that (1) the workman concerned had been employed in any establishment and (2) he had been receiving adequate remuneration. Therefore, in view of the use of the word adequate in proviso to Sec. 17B of the Industrial Disputes Act, in view of the dictionary meaning of the word adequate, employer is required to prove to the satisfaction of the Court concerned that the remuneration received by the workman is adequate, equal to the requirement or occasion; adequate would mean fully sufficient; something which is suitable or fit. Therefore, if it is not proved that the remuneration received by the workman during such period is adequate, equal to the requirement, fully sufficient for the needs of the workman, then, such remuneration cannot be considered as gainful or lucrative for the purpose of Sec. 17B of the Industrial Disputes Act, 1947 and the same has to be ignored by the Court concerned while considering an application under Sec. 17B of the Act.

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

16.5 Therefore, in view of the use of the aforesaid words in the section itself and also in view of the dictionary meaning of the aforesaid terms and words, if the workman has been employed in any establishment and has been receiving remuneration which is adequate, from the another employment, only then, such income can be taken into consideration while considering an application under Sec. 17B of the Industrial Disputes Act, 1947 and not otherwise. Except that, any kind of income from any other source just to keep the body and the soul together and not to starve with family received by the workman concerned cannot be considered as a gainful employment or remuneration from any establishment. Therefore, such

income has to be excluded from the purview of Sec. 17B of the Industrial Disputes Act, 1947. Something which is earned by the workman for his survival during the pendency of the proceedings cannot be taken into consideration while considering an application under Sec. 17B of the Act. While considering such an application, miserable condition of the workman concerned who has been dismissed from service before years together has to be taken into consideration and it has also to be kept in mind that the workman has been claiming nothing but the wages last drawn by him before years together. First, he was dismissed from service; then, he raised industrial dispute before machinery under the Act and then the matter was referred to the Labour Court for adjudication by the State Government, and thereafter, the Labour Court has examined the reference and for that, normally, period of at least 5 to 10 years will be consumed for deciding such reference looking to the back log and shortage of Judges and such other factors and if the award of reinstatement is made in favour of the workman concerned, thereafter, then, the employer while challenging such an award of reinstatement before the High Court requests for stay of the award of reinstatement. In such a situation, the workman should remain out of job for a period of more than five to ten years in which he shall have to live in the society waiting for the end of the proceedings before the Labour Court. Therefore, just to live in the society and to maintain the family during the pendency of reference, any kind of work which is available as per his experience is done by him and by doing that work, he is able to get some income for the sake of survival of himself as well as his family, and if such income has been received by him without employment in any establishment is considered to be his gainful employment, then, it would result into a premium to the employer for passing illegal order of termination. If the workman has lived with his family and his existence has been maintained by doing some work and on that basis, a presumption of income being gainful employment, if it is drawn and the wages under Sec. 17B are denied on such ground, then, what is the loss or damage caused to the employer for passing illegal order of termination? There is apparently no loss or damage to the employer in such a situation. If the employer has passed illegal order of termination as declared by the concerned Industrial Tribunal or the Labour Court, then, he shall have to pay back wages to the workman and required to restore the original situation and position of the workman concerned with all consequential benefits as directed by the concerned Tribunal or the Labour Court. Therefore, according to my opinion, any kind of income during the period either before the Labour Court or before the High Court in the writ petition has been received by the workman concerned cannot be considered to be gainful employment of the workman except that he had been employed in any establishment and received adequate remuneration from the other employer. If that is not so, then, any kind of income cannot be considered to be the gainful

employment for denying back wages of interim period or denying statutory benefits which are available under Sec. 17B of the Industrial Disputes Act, 1947. If such income is considered as gainful employment and if such income is considered as adequate remuneration, then, it would amount to giving a premium to the wrong-doer employer. This is not the aim and object of Sec. 17B of the Act and this is not the language employed in Sec. 17B of the Act. The language in Sec. 17B is very clear and it is required to be understood in its right spirit keeping in view the objects and reasons thereof.

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

[17] The Apex Court has considered Sec. 17B of the Act in the well known decision in case of Dena Bank v. K. T. Patel, reported in 1997 (2) GLH 946. Relevant observations made in Para 22 of the said decision are reproduced as under :

As indicated earlier Sec. 17-B has been enacted by Parliament with a view to give relief to a workman who has been ordered to be reinstated under the award of a Labour Court or the Industrial Tribunal during the pendency of proceedings in which the said award is under challenge before the High Court or the Supreme Court. The object underlying the provision is to relieve to a certain extent the hardship that is caused to the workman due to delay in the implementation of the award. The payment which is required to be made by the employer to the workman is in the nature of subsistence allowance which would not be refundable or recoverable from the workman even if the award is set aside by the High Court or this Court. Since the payment is of such a character Parliament thought it proper to limit it to the extent of the wages which were drawn by the workman when he was in service and when his services were terminated, and therefore, used the words full wages last drawn. To read words to mean wages which would have been drawn by the workman if he had continued in service if the order terminating his services had not passed since it has been set aside by the award of the Labour Court or the Industrial Tribunal would result in so enlarging the benefit as to comprehend the relief that is not refundable or recoverable in the event of the award being set aside it would result in the employer being required to give effect to the award during the

pendency of the proceedings challenging the award before the High Court or the Supreme Court without his being able to recover the said amount in the event of the award being set aside. We are unable to construe the provisions in Sec. 17B to cast such a burden on the employer. In our opinion, therefore, the words full wages last drawn must be given their plain and material meaning and they cannot be given the extended meaning as given by the Karnataka High Court in Vishveswaraya Iron & Steel Ltd. (supra).

In Para 24 of the said decision, it has been observed by the Honble Apex Court as under :

As regards the powers of the High Court and the Supreme Court under Arts. 226 and 136 of the Constitution, it may be stated that Sec. 17B by conferring a right on the workman to be paid the amount of full wages last drawn by him during the pendency of the proceedings involving challenge to the award of the Labour Court, Industrial Tribunal or National Tribunal in the High Court or the Supreme Court which amount is not refundable or recoverable in the event of the award being set aside, does not in any way preclude the High Court or the Supreme Court to pass order directing payment of a higher amount to the workman if such higher amount is considered necessary in the interest of justice. Such a direction would be de hors the provisions contained in Sec. 17B and while giving the direction the Court may also give the direction regarding refund or recovery of the excess amount in the event of the award being set aside. But we are unable to agree with the view of the Bombay High Court in Elpro International Ltd. (supra) that in exercise of the power under Arts. 226 and 136 of the Constitution an order can be passed denying the workman the benefit under Sec. 17B. The conferment of such a right under Sec. 17-B cannot be regarded as a restriction on the powers of the High Court or the Supreme Court under Arts. 226 and 136 of the Constitution.

The High Court and the Honble Apex Court have power to grant even higher wages under Sec. 17B of the I. D. Act, 1947 as per the view taken by the Honble Apex Court in case of Regional Authority, Dena Bank v. Ghanshyam, reported in 2001 LLR 641. In Paras 12 and 13 of the said decision, it has been observed by the Honble Apex Court as under :

12. We have mentioned above that the import of Sec. 17B admits of no doubt that Parliament intended that the workman should get the last drawn wages from the date of the award till the challenge to the award is finally decided which is in accord with the Statement of Objects and Reasons of the Industrial Disputes (Amendment) Act, 1982 by which Sec. 17B was inserted in the Act. We have also pointed out above that Sec. 17B does not preclude the High Courts or this Court from granting

better benefits - more just and equitable on the facts of a case - than contemplated by that provision to a workman. By interim order the High Court did not grant relief in terms of Sec. 17B, may, there is no reference to that section in the orders of the High Court, therefore in this case, the question of payment of full wages last drawn to the respondent does not arise. In light of the above discussion, the power of the High Court to pass the impugned order cannot but be upheld so the respondent is entitled to his salary in terms of the said order.

13. It must, however, be pointed out that while passing an interlocutory order the interests of the employer should not be lost sight of. Even though the amount paid by the employer under Sec. 17B to the workman cannot be directed to be refunded in the event he loses the case in the writ petition (See Dena Banks case (supra)) any amount over and above the sum payable under the said provision has to be refunded by him. It will, therefore, be in the interest of justice to ensure, if the facts of the case so justify, that payment of any amounts over and above the amount payable under Sec. 17B to him, is ordered to be paid on such terms and conditions as would enable the employer to recover the same.

The Karnataka High Court has also considered this aspect in case of Hind Plastic Industries v. Labour Court, Bangalore & Ors., reported in 1993 (3) LLJ 624. Relevant observations made in Para 3 of the said decision are reproduced as under :

3. It is too late in the day to contend that the burden is on the workman or the dismissed employee who has obtained the award in his favour to prove that he was not gainfully employed since his dismissal/suspension etc. till the award was made in his favour. Section 17B is a beneficial piece of legislation intended to benefit the workman who shall not suffer the stay of award in his favour by the Labour Court, Tribunal or the Board as the case may be. If the High Court or the Supreme Court tends to grant stay of such an award made by the Court, Tribunal or the Board, it is duty cast upon the High Courts and the Supreme Court to ensure that during the pendency of the Litigation before it, either the concerned High Court or the Supreme Court ensures payment of last wages drawn by the workman employee. The benefit of legislation therefore, must flow in favour of the workman. The proviso to the section becomes operative by the employer satisfying the Court concerned that the workman had been employed and had been receiving adequate remuneration during any such period or part thereof. The Court concerned must direct that wages shall not be paid by the employer to the workman for the period. In all other cases, the payment of last drawn wages during the pendency of the proceedings in the High Court must automatically follow on the affidavit of the workman. Such last wages drawn, the section makes it clear, shall include the

maintenance allowance admissible under any rule applicable to the workman subject to only that an Affidavit must be filed by the workman to that effect. We, therefore, see no justification to interfere with the learned single Judges order. Appeal rejected.

[18] In view of these observations made by the Apex Court and various High Courts as referred to above, meaning of Gainful Employment is required to be clarified. What is the meaning of gainful employment as normally used in the High Courts, looking to the bare reading of Sec. 17B of the I. D. Act, it is very clear that the workman is entitled to last drawn full wages inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court, meaning thereby, such employee must not have been employed with any establishment. Similarly, in proviso also, it is made clear that such workman had been employed and had been receiving adequate remuneration during such period or part thereof. It also suggests that the workman should have employed and receiving adequate remuneration but not any such amount by employment must be getting adequate remuneration means salary or wages from the employer. Therefore, if the workman during the pendency of the petition where reinstatement has been stayed by this Court and thereafter if the workman is doing any labour work, miscellaneous work and thereby receiving any income from any source, namely agricultural income, interest part or any other activities wherein the workman is getting some amount without being employed in any establishment and not receiving any remuneration from the employer, then such amount that may be received by the workman during such period which is not received by him on the basis of the employment in any establishment or as remuneration from the employer, then said amount which has been received by the workman doing any miscellaneous work, such as labour work, interest amount and income from the agricultural field or any other activities wherein the workman is getting some amount even by way of rent, that cannot be considered to be gainful employment of the workman concerned because Sec. 17B is very clear that employer shall have to prove that the workman is employed in any establishment and receiving adequate remuneration from the employer. If this fact is not established by the employer before this Court, then other amount except the adequate remuneration out of employment received by the workman but any other amount received by using his personal skill or experience that cannot be considered to be the gainful employment. Therefore, even in facts of this case, the allegations against the workman that he is driving auto rickshaw registered in his name. Even if the workman is driving the auto rickshaw and getting some amount by way of fare from the passengers, looking to Sec. 17B of the Act, according to my opinion, such amount that may be received by the workman by driving the auto rickshaw, cannot be said to be gainful

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

[19] Before parting with this judgment, the mention of the observations made by the Apex Court in respect of the role of judiciary in case of Rupa Ashok Hurra v. Ashok Hurra, reported 2002 (3) GLR 2139 (SC) is required to be made as they are important and material in the facts of the present case. Therefore, the observations made in Para 41 of the said decision are reproduced as under:

> 41. At one time adherence to the principles of stare decisis was so rigidly followed in the Courts governed by the English jurisprudence that departing from an earlier precedent was considered heresy. With the declaration of the practice statement by the House of Lords, the highest Court in England was enabled to depart from a previous decision when it appeared right to do so. The next step forward by the

highest Court to do justice was to review its judgment inter partes to correct injustice. So far as this Court is concerned, we have already pointed out above that it has been conferred the power to review its own judgments under Art. 137 of the Constitution. The role of the judiciary to merely interpret and declare the law was the concept of a bygone age. It is no more open to debate as it is fairly settled that the Courts can so mould and lay down the law formulating principles and guidelines as to adapt and adjust to the changing conditions of the society, the ultimate objective being to dispense justice. In the recent years, there is a discernible shift in the approach of the final Courts in favour of rendering justice on the facts presented before them, without abrogating but by passing the principle of finality of the judgment. In Union of India v. Raghubir Singh, 1989 (2) SCC 754 Pathak, C.J., speaking for the Constitution Bench aptly observed :

10. But like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for readjustment in a changing society, a readjustment of legal norms demanded by a changed social context. This need for adapting the law to new urges in society brings home the truth of the Holmesian aphorism that the life of the law has not been logic, it has been experience [Oliver Wendell Holmes : The Common Law], and again when he declared in another study [Oliver Wendell Holmes : Common Carriers and the Common Law, 1943 (9) Curr LT 387, 388] that the law is forever adopting new principles from life at one end, and sloughing off old ones at the other. Explaining the conceptual import of what Holmes had said, Julius Stone elaborated that it is by the introduction of new extra-legal propositions emerging from experience to serve as premises, or by experience-guided choice between competing legal propositions, rather than by the operation of logic upon existing legal propositions, that the growth of law tends to be determined [Julius Stone : Legal Systems & Lawyers Reasoning.]

Similarly, the Honble Apex Court had an occasion to consider the obligation upon the Court to satisfy the aspiration of the citizen because the Courts and law are for the people and expected to respond to their aspirations. This aspect has been examined by the Honble Apex Court in case of M. S. Garewal & Anr. v. Deep Chand Sood & Anr., reported in 2001 (8) SCC 151. Relevant observations made in Paras 27 and 28 are reproduced as under :

27. The decision of this Court in D. K. Basu v. State of W.B. comes next. This decision has opened up a new vista in the jurisprudence of the country. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits

stands extended since Anand, J. (as His Lordship then was) in no uncertain terms observed : (SCC p. 439 para 45)

The Courts have the obligations to satisfy the social aspirations of the citizens because the Courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim. Civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to the life of the citizen is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread-winner of the family.

28. Currently, judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system - affection of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the Civil Courts obligation to award damages. As a matter of fact, the decision in D. K. Basu has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the current trend of justice oriented approach. Law Courts will lose their efficacy if they cannot possibly respond to the need of the society technicalities there might be many but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice.

[20] I have considered at length the scope and ambit of Sec. 17B of the Industrial Disputes Act, 1947 while keeping in view the object and reasons of Sec. 17B of the Act. I have also kept in view the language used in Sec. 17B of the I. D. Act, 1947. I have also considered the various decisions of the Apex Court and High Courts. According to my opinion, any amount of income received by the workman during the pending proceedings from any source like (i) to receive rental income from the property; (2) to receive income from the properties of the family; (3) to receive interest or dividend on the investments made; (4) to receive income from the agricultural field; (5) to receive income from the family members; (6) to receive income from doing any kind of miscellaneous work like hawking and selling of fruits, vegetables, tea stall, stall of Pan Galla or any kind of work by way of self-employment; (7) income received by driving auto rickshaw or taxi or any other vehicle and the amount received by way of begging/Bhiksha Vrutti, such income cannot be considered to be the gainful employment of the workman and such income has to be excluded

from the zone of consideration while considering an application under Sec. 17B of the I. D. Act, 1947.

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

[21] The question which has been examined by this Court in the facts and circumstances of the case is also equally applicable to the case wherein the Labour Court or the Industrial Tribunal is considering the question of back wages for the intervening period while making the award of reinstatement. There cannot be any other logic or the reason except the one provided in Sec. 17B of the I. D. Act, 1947. While considering the question of back wages for the intervening period, the Labour Court or the Industrial Tribunal has to consider as to whether the workman has been gainfully employed or not during the intervening period and whether the amount received by him during the intervening period has been adequate or not. Therefore, the Labour Court or the Industrial Tribunal concerned shall have to consider the same principles while considering the question of back wages while making the award of reinstatement as to whether the workman concerned has been employed in any other establishment or not and if the answer to such question is in the affirmative, then, it shall have to consider further as to whether the remuneration received by the workman concerned during such intervening period is adequate or not and if such employment of the workman concerned is not gainful or if the remuneration received by the workman is not adequate, then, the Labour Court shall have to consider the aspect of back wages without being influenced by the fact that the workman has been

receiving some amount by doing some miscellaneous work, in light of the facts and circumstances of a particular case.

[22] Therefore, in the facts and circumstances of the present case, the allegations made in the application which has been filed by the original petitioner that the workman has filed false affidavit before this Court, that he has remained unemployed but in fact, he is having his own auto rickshaw and driving the same and thereby he is getting income and his auto rickshaw is registered in his name in R.T.O. have been denied by the workman by producing R.T.O. Certificate wherein the name of the brother-in-law of the workman has been shown as the owner and the contract carriage permit has also been issued in the name of the brother-in-law of the workman. Merely because the address of the respondent herein is shown as the address of his brother-in- law in the R.T.O. Certificate as well as in the contract carriage permit, it cannot be said that he is owning the auto rickshaw and the petitioner has failed to prove that he is owning the auto rickshaw. The petitioner has also failed to prove that the workman has been employed in any establishment and has been receiving the remuneration adequate to his requirement as per proviso to Sec. 17B of the Industrial Disputes Act, 1947. Even otherwise, even if it would have been proved that the respondent-workman has been earning something by driving the auto rickshaw, that would not have fallen in the definition of the term "in any establishment" as discussed earlier and in that event also, petitioner has failed to prove that the amount or remuneration earned by the respondent-workman by driving such auto rickshaw has been adequate and therefore, in the facts of the present case, the petitioner is duty bound to comply with the earlier order passed by this Court and the respondent-workman is entitled for the benefits of Sec. 17B of the Industrial Disputes Act, 1947, and therefore, prayer made by the petitioner for recalling the order passed earlier is required to be rejected. Therefore, there is no substance in the present application.

[23] However, it is made clear that till date the original petitioner has not paid any amount to the concerned workman but for which the ground pleaded by the learned advocate Mr. Chudgar is pendency of this civil application before this Court. However, since this Court has rejected the Civil Application preferred by the original petitioner-Board, it is directed to the original petitioner to pay the last drawn monthly wages including the maintenance allowance to the respondent- workman with effect from 10th January, 2001 till 31st March, 2003 within period of two months from the date of receiving the copy of this order. It is further directed to the petitioner to pay such wages under Sec. 17B of the I. D. Act, 1947 including the maintenance allowance regularly each month without any default to the respondent-workman till final disposal of this petition. Therefore, present application filed by the original petitioner is rejected and Rule stands discharged accordingly.

In light of above observations and directions made by this Court, Civil Application No. 8271 of 2002 preferred by the respondent- workman stands disposed of accordingly.