

1995 (1) G. L. H. 1037
M. B. SHAH AND N. N. MATHUR, JJ.

G. K. Bhatt ...Petitioner
Versus
State of Gujarat & Ors. ...Respondents

Special Civil Application No. 9792 of 1994 (with Special Civil Application Nos. 11114/94, 11115/94, 11146/94, 11147/94 and 1052/95)*

D/- 21-4-1995

*Petition under Art. 226 of Constitution of India for a writ of *quo warranto*

(A) Constitution of India - Art. 226 - Writ of *quo warranto* - When appointment to a public office is against statutory provisions, the Court has the power, jurisdiction and indeed duty to quash illegal appointment - Not a matter between appointing authority and the appointee - Fraud on public - Court would not deny the remedy - Writ should be issued.

(B) Service Law - Appointment to a public office - Eligibility - Qualification for - Qualifications prescribed by a [page 1037] mandatory provision - Negative language providing for disqualification for want of requisite qualification - Found ineligible - Appointment quashed.

It is established law that once a person is not qualified to be appointed to hold public office as per the statutory provision, and even then he has been so appointed, such person is a usurper of the office. It amounts to fraud on public to appoint persons with inferior qualifications in such circumstances, unless it is clearly stated that the qualifications are relaxable, and therefore, such person is required to be ousted from such public office, and for this purpose, this Court would have ample jurisdiction to issue a writ of *quo warranto*, as no court should be a party to the perpetuation of such illegality. No case of refusal by the Court of issuance of a writ of *quo warranto* where the appointment to a statutory office held under the statutory provisions is illegal has been cited. If the court refuses the remedy, it would result in perpetuating illegality. In such a situation, even if the appointing authority persisted in retaining in office a person disqualified in law, (hen the court is required to issue a writ of *quo warranto*. (Para 63)

(C) Constitution of India - Art. 226 - Delay and laches - Delay of four years in filing petition for a writ of *quo warranto* - If the appointment is illegal, every day the person acts in the office a fresh cause of action arises - There can be no question of delay - Petition not burred by delay. (Para 73)

(D) Bombay Industrial Relations Act, 1946 - S. 9(2)(b) - Labour Court -Presiding Officer of - Appointment -Qualifications - Regular appearance as a member of a trade union for not less than seven years in proceedings before any such Labour Court required - Appearance must be for conducting a case, as authorised by the B.I.R. Act, 1946 - Assisting or instructing advocates is not sufficient - Appearance before conciliation authorities irrelevant - Regularly appearing means consistently and uniformly appearing - No evidence of conducting any case - Ineligible. (Para 50)

(E) Bombay Industrial Relations Act, 1946 - Ss. 2(32), 27A, 30, 32, 33A, 80, 80A - Appearance on behalf of an employee - Provisions of the Act permit the representative of employees to appear and act in the proceedings - In the context of these provisions, appearance as a member of trade union clearly means appearance for conducting the case in substitution of a legal practitioner.

"...The phrase "appeared as a member of a trade union" in context of the aforesaid provisions, namely, S. 27 read with Ss. 30, 32 and 33 would clearly mean that the person must have appeared in the proceedings before the Labour Court or the Industrial Court for conducting the case of an employee. That means, instead of a legal

practitioner, such authorised person should have regularly appeared before the Labour Court or the Industrial Court or the Tribunal." (Para 40)

(F) Interpretation of Statutes - Bombay Industrial Relations Act, 1946 - S. 9(2) - Mandatory or directory provision - Negative language used in the section disqualifying persons not possessing the requisite qualification - Mandatory provision. (Para 16)

(G) Words and Phrases - "Appear", "appeared in proceedings", "regularly appeared", "practice", "act", "plead" - Bombay Industrial Relations Act, 1946 [@page1038] - S. 9(2)(b) - The words "...regularly appeared as a member of a trade union for not less than seven years in proceedings before any such Labour Court...." - Appearance, in the context, means appearance in place of a legal practitioner for conducting a case - Regularly appeared means consistently and uniformly appeared - In the context of Advocates Act, 1961 and Code of Civil Procedure, 1908 these words have different connotations.

"...Hence, it is apparent that the phrase 'he regularly appeared as a member of a trade union in proceedings before Labour Court or the Industrial Court' would clearly indicate that he would have appeared and conducted the case of an employee before the Labour Court or the Industrial Court. Thus, his appearance in a proceeding would be for the purpose of conducting it. Merely assisting or instructing an advocate who appears in a matter before the Labour Court would be of no relevance for determining the eligibility for being appointed as Labour Court Judge." (Para 39)

Mr. Gandhi next submitted that Mr. Patni was selected by the Gujarat Public Service Commission, on the basis of the advertisement issued by the said Commission, after holding the interview and after verification of the certificates produced by him to show that he was regularly appearing before the Labour Court and the Industrial Court. For this purpose Mr. Gandhi relied upon the certificates issued by the Labour Court Judges, as also their evidence before the learned Commissioner, to contend that Mr. Patni had regularly appeared before the Labour Courts. (Para 50)

(H) Code of Civil Procedure, 1908 -O.3, Rr. 1 and 2 - O. 9, Rr. 6 and 8 -Advocates Act, 1961 - Ss. 32, 33 - Difference between words "appear", "plead", "act", "practice" - In the context of these provisions these words have different connotations. (Para 49)

(I) Administrative Law - Natural Justice - Quasi judicial order - Order passed by Labour Court Judge cancelling vakalatnamas of advocates in 900 cases on one day - Without hearing the concerned advocates -Order arbitrary and passed with vengeance - Order quashed.

(J) Industrial Disputes Act, 1947 - S. 36 - Order passed by Labour Court cancelling vakalatnamas - Order passed without hearing advocates - Absolutely arbitrary and mala fide - Order quashed. (Para 86)

(K) *Vade mecum* - Presiding Officer of Labour Court - Judicial post within the expression "judicial service" -Government should consider to man these Courts exclusively by judicial officers and High Court having control over such appointments.

Cases Referred :

1. Santuram v. Kimatrai Printers, A.I.R, 1978 S.C. 202 (Referred) (Para 41)
 2. Hindustan Steel Ltd v. Prakashchand Agrawal & Another, A.I.R. 1970 Ori. 145 (Referred) (Para 44)
 3. Mulia Maharana v. Narayan Patra AIR 1964 Ori. 246 = (1966) 32 Cutt LT 107 (Relied on) (Para 45)
 4. Sikander Ali v. Kushal Chandra, A.I.R. 1932 Cal 418 (Referred) (Para 45)
 5. Hari Om Rajender Kumar & Ors. v. Chief Rationing Officer of Civil Supplies, A.P. Hyderabad A.I.R. 1990 A.P. 340 (Distinguished) (Para 46)
 6. University of Mysore v. C. D. Govinda Rao & Anr. A.I.R. 1965 S.C. 491 (Followed) (Para 64)
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7. State of Haryana v. Haryana Co operative Transport Ltd. & Ors. A.I.R. 1977 S.C. 237 (Followed) (Para 65)
8. District Collector & Chairman, Vizianagram Social Welfare Residential School Society & Anr. v. M. Tripura Sundari Devi, (1990) 3 S.C.C. 655 (Followed) (Para 66)
9. Kashinath v. State of Bombay, A.I.R. 1954 Bom 4.1 (Relied on) (Para 69)
10. Sonu Sampat v. Jalgaon Municipality, (1957) 59 Bom. L.R. 1988 (Relied on) (Para 70)
11. Baij Nath v. State of U.P. A.I.R. 1965 ALL 151 (Referred) (Para 70)
12. R. C. Deb Barma v. Government of Tripura A.I.R. 1976 Gau 87 (Relied on) (Para 71)
13. S. K. Mishra v. Jabalpur Municipality 1978 Lab. T.C. 294 (Relied on) (Para 72)
14. Ravinder Sharma v. State of Punjab (1995) 1 S.C.C. 138 (Followed) (Para 73)
15. Tilokchand v. H. B. Munshi A.I.R. 1970 S.C. 898 (Distinguished) (Para 74)

Appearances :

SCA No. 9792 of 1994

Mr. K. S. Nanavati, Advocate, for the petitioners

Mr. P. S. Champaneri, AGP, instructed by Mr. D. A. Bambhania, Govt. Solicitor, for respondents Nos. 1 and 2

Mr. M. B. Gandhi, Advocate for respondent No. 3

Mr. M. H. Shaikh, Advocate for respondent No. 4

Mr. Avinash Pandya, Advocate for respondents Nos. 5 to 7

Mr. N. R. Sahani, Advocate for respondent No. 8

SCA No. 11114/94 & 11115/94

Mr. K. S. Nanavati, Advocate for the petitioner

Mr. P. S. Champaneri, AGP, instructed by Mr. D. A. Bambhania, Govt. Solicitor, for respondent No. 1

Mr. M. B. Gandhi, Advocate for respondent No. 2

SCA No. 11146/94

Mr. P. M. Thakkar, Advocate for the petitioner

Mr. P. S. Champaneri, AGP, instructed by Mr. D. A. Bambhania, Govt. Solicitor, for respondent No. 1

Mr. M. B. Gandhi, Advocate for respondent No. 2

SCA No. 11147/94

Mr. M. R. Anand, Advocate for the petitioner

Mr. P. S. Champaneri, AGP, instructed by Mr. D. A. Bambhania, Govt. Solicitor, for respondent No. 1

Mr. M. B. Gandhi, Advocate for respondent No. 2

SCA No. 1052/95

Mr. Y. S. Lakhani, Advocate for the petitioner

Mr. P. S. Champaneri, AGP, instructed by Mr. D. A. Bambhania Govt. Solicitor, for respondent No. 1

Mr. M. B. Gandhi, Advocate for respondent No. 2

PER M. B. SHAH, J.:-

1. The petitioners, who are advocates, practising before the Labour Court at Rajkot, have prayed for a writ in the nature of *quo warranto* against Mr. B. G. Patni, Presiding Officer, Labour Court, Rajkot, on the ground that his appointment as Labour Court Judge was in contravention of Section 9(2) of the Bombay Industrial Relations Act, 1946, as Mr. Patni was not qualified for being appointed as a Judge of Labour Court.

2. Various other serious allegations are [*@page1040*] made in the petition. Therefore, at the time of admission hearing of the matter, after hearing the learned Advocates for the parties at length, we have requested Mr. Justice B. S. Kapadia (Retd.) of this Court to accept the assignment as the Commissioner of the Enquiry

Commission to hold an enquiry into the matter and to submit his report to this Court. The relevant part of the said order dated 22nd September 1994 is as under :

"Special Civil Application No. 9792/94 is filed by five advocates who are practising before the Labour Court at Rajkot. In this petition, the petitioners have challenged the appointment of Respondent No. 3, Mr. B. G. Patni as Judge, Labour Court, Rajkot, on various grounds, raising the following questions :

(A) Whether Section 9 of the Bombay Industrial Relations Act, 1946, empowering the State Government alone to appoint person as Presiding Officer of the Labour Court is contrary to Article 234 of the Constitution of India which mandates consultations with the High Court prior to such appointment, and, therefore, is unconstitutional, invalid and illegal?

(B) Whether the Labour Courts constituted under the Bombay Industrial Relations Act, 1947 are subordinate Courts, the control of which is vested in the Hon'ble High Court under Article 235 of the Constitution of India?

(C) Whether the appointment of the third Respondent as the Presiding Officer of the Labour Court by the State Government under Section 9 of the Bombay Industrial Relations Act, 1946, is illegal and invalid in the absence of prior consultation with the Hon'ble High Court and lack of qualifications necessary for such appointment?

(D) Whether the continued functions of the third respondent as the Presiding Officer of the Labour Court is contrary to public interest as undermining the people's faith in the judiciary on account of the failure of the third respondent to uphold and safeguard the high standards and traditions of judicial service and whether it is necessary, just and proper for the Hon'ble High Court in exercise of the powers of control vested in it under Article 235 of the Constitution of India to restrain the third respondent from functioning as such forthwith and take such other and further action as may be deemed proper in the facts and circumstances of the case?

It is *inter alia* prayed that (1) by writ of *quo warranto* or by any other appropriate writ, direction or order the appointment of respondent No. 3 as Presiding Officer of the Labour Court under Section 9 of the Bombay Industrial Relations Act, 1946, be quashed and set aside, (2) respondent No. 2 be directed to hold an inquiry and impose and/or recommend punishment against respondent No. 3 within such time as prescribed by the Court.

3. For the aforesaid prayers, various contentions are raised in the present petition against respondent No. 3. Firstly, it is pointed out that respondent No. 3 was serving as an Accountant in the office of the Gujarat State Road Transport Corporation prior to his appointment as Presiding Officer of the Labour Court in 1990 and, therefore, he is not qualified for appointment as a Presiding Officer of the Labour Court under Section 9 of the Bombay Industrial Relations Act. Subsection (2) of Section 9 prescribes qualifications for appointment as Presiding Officer of Labour Court. Admittedly, respondent No. 3 is not qualified under Clause (a) of subsection (2) of Section 9. It is contended by [page1041] respondent No. 3 that he is qualified under Clause (b) which reads as under :

"(b) he has regularly appeared as a member of a trade union for not less than seven years in proceedings before any such Labour Court, Industrial Court or Tribunal and holds a degree in law of a University established by law in any part of the India."

However, it is contended by the petitioners that he is not qualified under the said clause because he has not regularly appeared as a member of a trade union for more than seven years in proceedings before any Labour Court, Industrial Court or Tribunal.

4. In our view, whether or not respondent No. 3 had appeared as a member of a trade union for more than seven years would require detailed investigation of facts and it would be difficult for this Court to undertake such exercise at the time of hearing of this petition.

5. It is further alleged that respondent No. 3 is behaving in such a manner which would undermine the prestige of Courts and the Judicial system. He is not maintaining the high standards and traditions of the Courts. For

this purpose, reliance is placed by the petitioners on the resolution passed by the Bar Association at Rajkot. It is pointed out that respondent No. 3 gives wide publicity to his own judgments and orders immediately after controversial judgments are pronounced by him and that his photographs are published in newspaper; that respondent No. 3 has evinced uncalled for interest in matters, contrary to judicial discipline, and various allegations are made to contend that his conduct is unbecoming of a judge.

6. No doubt, by filing affidavit-in-reply, respondent No. 3 has denied the said allegations. It is pointed out by him that some of the Advocates are misbehaving, they are boycotting the Court and causing obstruction in discharge of his judicial functions. According to him, this may amount to contempt of the Court. It is also pointed out that this petition is filed for ulterior motive of supporting Advocate Mr. D. C. Gandhi against whom he had passed orders. Various other statements are made in the affidavit-in-reply which require detailed investigation of facts.

7. Special Civil Application Nos. 11114/94 and 11115/94 are filed by the petitioners who are advocates practising in Labour Court at Rajkot. It is their say that the Presiding Officer of the Labour Court has cancelled the appearance by the petitioners in number of reference (about 900 cases on 31-8-1994) which are pending before him by one stroke of pen. It is their say that they are practising advocates of Rajkot since number of years and that they represent the parties to the reference as provided under Section 37 of the Industrial Disputes Act, 1947. *Inter alia* it is contended that cancellation of their vakalatnamas is mala fide for various reasons; the power to cancel appearance is exercised by the Court as a direct counterblast to filing of the petition in this Court by the Association of which the petitioners are members. In the affidavit-in-rejoinder filed in Special Civil Application No. 9792/94 it is pointed out that the Court has passed stereotype order against 20 advocates cancelling their vakalatnamas in about 900 matters on 31st August 1994.

8. Special Civil Application Nos. 11146/94 and 11147/94 are also filed by the petitioners who are also the advocates practising in Labour Court at Rajkot. It is their say that the Presiding Officer of the [@page1042] Labour Court has cancelled the vakalatnamas filed by the petitioners in number of reference which are pending before him.

9. For gathering the facts and data with regard to the complaints made against the functioning of the Labour Court presided over by Mr. B. G. Patni, Judge, Labour Court, Rajkot, and also the alleged behavior of the advocates, it would be just and proper to appoint the Commissioner. The report of the Commissioner would furnish *prima facie* evidence of the facts and data gathered by him. Considering the seriousness of the allegations made by the petitioners and the judge which affect the reputation of judiciary, it would be just and proper to appoint a responsible person who enjoys the confidence of the Court and the parties as the Commissioner to carry out the enquiry or investigation into the facts relevant to the complaints made by the petitioners and by the Judge, Labour Court. It could act upon such facts and data after giving an opportunity of hearing to the parties. We clarify that the report of the Commissioner would have great evidentiary value as regards the statements made therein.

10. We requested Mr. Justice B. S. Kapadia, retired Judge of the Gujarat High Court to accept the assignment as a Commissioner of this Court to hold an enquiry (which will be a confidential one as far as possible) into this matter and submit his report. The points (as suggested by the learned Advocates for the parties) were referred to the learned Commissioner, for enquiry and report.

11. II. After recording evidence at length, examining as many as 38 witnesses, permitting the parties to produce necessary documents and after hearing learned Advocates for the parties at length, the learned Commissioner has submitted an exhaustive and detailed report. The final conclusions of the learned Commissioner on the referred five points, are as under :

(1) Whether there is a *prima facie* case for holding an inquiry into all or any of the allegations against Mr. B. G. Patni of his having conducted himself or the Court presided over by him in any manner inconsistent with his duties and position as Labour Judge?

Ans: This point is concluded partially in the affirmative and partially in negative as in five allegations *prima facie* case is established and in seven allegations *prima facie* case is not established.

(a) The Commission held that despite the fact that Shri Patni had received the communication about the stay order from the Industrial Court, he delivered judgment in cases amounts to insubordination.

(b) The Commission also held that it is *prima facie* established that the BIR Application No. 5 of 1992 of Rajkot Textile Mills which was pending in the Labour Court No. 2, Rajkot was transferred by Shri Patni to his own court by taking undue interest.

(c) As regards the cases of Kalupur Commercial Co-op. Bank, the Commission concluded that the same discloses improper and illegal conduct on the part of Mr. Patni of not obeying the orders of the Superior Court and it further discloses the vindictive mind of Mr. Patni against the Kalupur Commercial Co-operative Bank on account of the fact that his son was not taken in the service of the said Bank in spite of the application made by the his son through him. [*@page1043*]

(d) The Commission further held that the petitioners have *prima facie* established the allegation regarding corrupt practices of Shri Patni.

(2) Whether the campaign against respondent No. 3 by the Advocates practising in the Labour Court, Rajkot and the allegations made against him are motivated on their part or are otherwise mala fide?

Ans: This point is concluded in the negative.

The Commission held that the allegations cannot be said to have been made out of spite or to take revenge or with mala fide intention.

(3) Whether any advocate or other person had committed any act of obstruction, insult or any act derogative to the decorum of the Labour Court or otherwise contemptuous as stated in the order dated 31st August 1994?

Ans: This point is concluded in the negative.

The Commission held that except passing the resolution on 21-6-94 and in pursuance thereof boycotting the court of Mr. Patni, no other conduct of obstructing or insulting or doing any act derogatory to the decorum of the Labour Court is established against the Advocates.

(4) Are the orders dated 31st August 1994 passed by him against appearance of the advocates concerned are mala fide?

Ans: This point is concluded in the affirmative.

The Commission held that *prima facie* the petitioners have established the misconduct on the part of Shri B. G. Patni in cancelling the Vakalatnamas of the Advocates in number of matters without giving them any opportunity of hearing.

(5) Whether Mr. B. G. Patni, Judge, Labour Court, Rajkot, has regularly appeared as a member of a trade union for not less than seven years in proceedings before the Labour Court, Industrial Court or Tribunal?

Ans: This point is concluded in the negative.

The Commission held that regarding appearance of Shri Patni in the cases before the Labour Court regularly for a period of not less than seven years is certainly not established.

12. HI. Re: Whether Mr. B. G. Patni was qualified to be appointed as Presiding Officer of Labour Court :

(i) As to whether Mr. B. G. Patni was eligible for being appointed as Presiding Officer of Labour Court, the finding given by the learned Commissioner is against him. Once it is held that Mr. B. G. Patni was not qualified to be appointed as Presiding Officer of Labour Court it would not be necessary to consider the findings given by the learned Commissioner on other points. It is also not necessary to reproduce the entire discussion made by the learned Commissioner on point No. 5 and we make it clear that we entirely agree with the said findings.

13. For deciding this controversy, it would be necessary to reproduce Section 9(2) of the Bombay Industrial Relations Act, 1946, which provides for qualification for being appointed as Presiding Officer of Labour Court. It is as under :

"9(2) A person shall not be qualified for appointment as the Presiding Officer [/@page1044] of a Labour Court unless -

(a) he has practised as an advocate or a pleader for not less than three years in the High Court or any court subordinate thereto, or in any Labour Court, Industrial Court of (*sic.*) Tribunal established in the State under this Act or the Industrial Disputes Act, 1947 XIV of 1947, or any law corresponding to any such Act, for the time being in force in the State; or

(b) he has regularly appeared as a member of a trade union for not less than seven years in proceedings before any such Labour Court, Industrial Court or Tribunal and holds a degree in law of a University established by law in any part of India; or

(c) he holds a degree in law of a University established by law in any part of India and has held an office not lower in rank than that of a Registrar of a Labour Court or an Industrial Court or of an Assistant Commissioner of Labour under the State Government, for not less than five years."

14. It is to be noted that sub-Section (2) of Section 9 was added by the Gujarat Amending Act No. 22/81 by substituting the following proviso to Section 9:

"Provided that no person shall be so appointed unless he possessed the qualifications, other than the qualification of age, laid down under Article 234 of the Constitution, for being eligible to enter the judicial service in the State of Gujarat."

15. In the present petition, it is admitted that Mr. B. G. Patni is not eligible to be appointed either under Clause (a) or Clause (c), as he has not practised as an advocate or a pleader for not less than three years as required in Clause (a), nor has he held an office not lower in rank than that of a Registrar of a Labour Court as provided under Clause (c). Admittedly he was working as 'Accountant' in the Gujarat State Road Transport Corporation. When he was appointed as Labour Court Judge on 18th January 1990, he resigned from that post of Accountant and took over the charge on the same date as Labour Court Judge.

16. Therefore, the question which would require consideration is whether Mr. B. G. Patni was qualified to be appointed as Presiding Officer of Labour Court under Section 9(2)(b) of the BIR Act. Firstly, the aforesaid subsection uses mandatory as well as negative language ('shall not be qualified') prescribing qualification for being appointed as Presiding Officer of Labour Court. Further, Clause (b) provides three requirements, for being qualified for appointment, namely :

(i) the person must have 'appeared in the proceedings' before Labour Court, Industrial Court or Tribunal;

(ii) he must have 'regularly' appeared as a member of a trade union for not less than seven years in the proceedings before such courts; and

(iii) he holds a degree in law of a University established by law in any part of India.

17. In the present case, it is not disputed that Mr. B. G. Patni is holding a degree in law. The question is, (a) whether he has appeared in the proceedings before Labour Court, Industrial Court or Tribunal; and (b) whether he has regularly appeared as a member of a trade union for not less than seven years in the proceedings before such courts. It is to be noted that the learned Commissioner has given full opportunity to Mr. Patni to produce [page1045] before him relevant documents or other evidence to prove his appearance in the proceedings before Labour Court, Industrial Court or Tribunal. But he has failed to produce such evidence before the learned Commissioner. Before the learned Commissioner, Mr. Patni has produced the record of two or three cases indicating that he has appeared in the Labour Court at Kalol and for this purpose it was pointed out that he has signed below the vakalatnama which was already signed by the learned Advocate who has appeared in the said cases. For this purpose, there is a report of the Presiding Officer of the Industrial Court, Ahmedabad, to indicate that, pending enquiry, Mr. Patni went to Kalol Labour Court by posing that he was transferred at Kalol. In the said office, he called for certain files, added something and took zerox copies thereof. This aspect we have discussed subsequently. But in any case, for appearing as a member of a trade union, under the provisions of the BIR Act, the person concerned is required to produce authority and permission to appear before the Labour Court or Industrial Court. No such evidence is produced by Mr. Patni either before the learned Commissioner or before this Court nor has he produced any judgment or order of the Labour Court or Industrial Court or Tribunal to indicate that he had appeared in the cases.

(ii) The evidence led by Shri Patni and the contentions raised on his behalf :

18. It is the say of Mr. B. G. Patni that he was regularly appearing as a member of a trade union for more than seven years in proceedings before the Labour Court or the Industrial Court as he was the Executive Member/Secretary/Joint Secretary/Vice-President of Central Office, State Transport Workers' Union, Ahmedabad. In the evidence recorded by the learned Commissioner, Mr. Patni has stated that he became Secretary of the S.T. Workers' Union affiliated with the Majoor Mahajan Sangh in 1977 and that he was holding discussions in respect of disputes arising between the employees and the Management; he was preparing charter of demands; and he was attending the conciliation proceedings before the Assistant Commissioner of Labour. He was also working and looking after the matters in the Labour Court even though assistance of a lawyer was taken. He has filed list of documents at Exh. 97. At Sr. No. 16 of the said list, he has produced the list of conciliation proceedings which he attended as trade union leader, wherein there are 21 entries of the cases.

19. For the purpose of deciding Shri Patni's qualification, the learned Commissioner has rightly arrived at the conclusion that the appearing in the conciliation proceedings, even if it is presumed to be correct, would have no bearing for being appointed as Labour Court Judge. This aspect is not challenged by learned Advocate Mr. Gandhi appearing for Mr. B. G. Patni.

20. Mr. Patni has also produced a list at Sr. No. 15 mentioning eight cases in which he appeared before the Labour Court. According to him, the said list is prepared on the basis of diary maintained by him. These details are at page 1471 (Exh. 98) of the report of the Commission. The said details along with other relevant evidence are as under:

Sr. No.	Case No.	Workman	Advocate	Evidence	Exh. No.	Report Page No.
1.	Ref 47/85 (Old) A'bad transferred to Kalol New - Ref. 660/85	Vithalbhai Prajapati	K. C. Shah	K. C. Shah R. S. Shukla No documentary evidence filed by Mr. Patni to prove his appearance	206 136(C)3	45,51,52 [page1046]
2.	Ref. 84/84 A'bad Labour Court	A. Kanunga	K. C. Shah Vakalatnama at	K. C. Shah D. V. Joshi Entire case	206 136(B)	42,43

	Presiding Officer D. V. Joshi		pg. 1761 Exh. 202	papers produced Exh. 170 pg. 1740		
3.	Recovery APP No. 1381 of 1989 A'bad L. C. Presiding Officer B. G. Patni	G. M. Brahmbhatt	K. C. Shah	K. C. Shah Entire case papers produced Exh. 227 pg. 1895	206	56,57,58
4.	Ref.No.743/79 (Old) A'bad Presiding Officer A. B. Patel Ref. No. 5/79 (New) Kalol	Kashiram Patel	Nikhil Mehta with Salve	A. B. Patel Kashiram Patel Pilviker Mr. Patni has produced xerox copy of Vakaltnama Exh. 97 Sr. No. 21	136(A) 188 174	53
	Recovery 740/85 A'bad L.C. Presiding Officer	Nathubhai Parmar	H. K. Rathod Advocate & G. K. Rathod Sec. of Insafi Kamdar Mandal	No documentary evidence		52 54
	Rec. 2875/86 A'bad L.C. Presiding Officer	Rathilal N. Vadia	H.K. Rathod Adv. & G. K. Rathod Sec. of Insafi Kamdar Mandal	No documentary evidence		52
	Ref 353/78 A'bad L.C. Presiding Officer Mr. A. B. Patel	J. D. Brijvasi	Nihil Mehta	A. B. Patel Award in terms of settlement produced at pg. 172 of the petition Patni's name does Not appear.	136(A)	41,42
	Ref. 713/78 A'bad L.C. Presiding Officer Mr. A. B. Patel	A. M. Patel	Nihil Mehta Authority	A. B. Patel Award in terms of settlement produced at pg. 173 of the petition. Patni's name	136(A)	53 [<i>@page1047</i>]

				does not appear.		
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21. It is to be noted that Mr. Patni has admitted that he has not conducted any cases before the Labour Court, Industrial Court or Tribunal. It is his contention that he had "*regularly appeared*" as a member of a trade union for more than seven years in the proceedings before such courts and had taken part in the proceedings before such courts. Therefore, he is eligible to be appointed under Clause (b) of sub-Section 2 of Section 9 of the Act.

22. At this stage, we would refer to some portion of the evidence of B. G. Patni, recorded by the learned Commissioner, which is at Ex. 104A. In his deposition, Mr. Patni has stated that he was appointed as Judge of the Labour Courts at Ahmedabad on 18-1-1990. He further stated that before he was appointed as a Judge, he was working with the S.T. Corporation as accountant. He was also working for the Union of the S.T. Employees and that he became the Secretary of the S.T. Workers' Union affiliated with the Majoor Mahajan Sangh in 1977. With regard to his appearance before the Labour Court, Mr. Patni has stated as under:

"For the purpose of getting guidance we were taking assistance of lawyers. We were keeping only one lawyer all through out the State. When I was working as , Secretary and looking after the lab. cases I have taken assistance of lawyers, namely, Mr. Patadia, Mr. H. K. Rathod and lastly I took the assistance of Adv. Mr. Kirit Chandulal Shah.

As per the legal requirement it is necessary to file our appearance when we appear as union representatives. We were not filing such appearance because we had already filed our appearance before the Asstt. Lab. Comms. In spite of the aforesaid practice I have filed my appearance in number of cases in Lab. Court whenever I have appeared as a representative of the Union."

"In all there are eight cases in the list of cases at Sr. No. 15" (Emphasis supplied.)

23. In cross-examination he has stated that he prepared the list of cases which he appeared before the Conciliation Officers and the Labour Commissioner on the basis of the entries made in his diary and not only on the basis of his memory. However, admittedly he has not produced on record the said diary, even though he stated that he would produce it. In further cross-examination, he has stated that Ex. 98, which is the list of cases in which he appeared, was prepared by him on the basis of his memory.

24. Further, Mr. Patni, in support of his case, has examined Mr. S. S. Pathak, who is carrying on union activities of the Central Office of State Transport Workers' Union. In examination-in-chief, he stated that, in the case pending in the Labour Court, Mr. Patni was assisting the advocates by briefing them. In cross-examination, Mr. Pathak has stated as under:

"It is true that Advocates S/Shri H. K. Rathod, G. K. Rathod and K. C. Shall were conducting the cases in the High Court and Industrial Tribunal.

It is true that Advocates were preparing the statement of claims on the basis of instructions of the leaders of the trade unions. At times we were also preparing the statement of claims and giving to the advocates. I do not know whether the advocates were making any additions and alterations in the statements of claim prepared by the unions. [*@page1048*]

It is true that advocates were also advising us for the purposed of necessary documents in the court.

I am shown the certificate produced in the file at page 176. It bears my signature. Contents thereof are correct. It is at Exh. 196."

25. The above admission made by Mr. Pathak, witness of Mr. Patni, clearly destroys the case of Mr. Patni that he was appearing on behalf of the employees before the Labour Court.

26. Further, from the aforesaid list, which is sought to be relied upon by Mr. Gandhi for proving that Mr. Patni was appearing in cases before the Labour Court, it is apparent that in those cases, advocates were appearing and conducting the cases and not Mr. Patni. In the report submitted by the learned Commissioner, this aspect is discussed in detail by the learned Commissioner. Therefore, we need not reproduce the entire appreciation of evidence in this judgment because at the time of hearing of these petitions, Mr. Gandhi, learned Advocate for Mr. Patni has confined his contention mainly on interpretation of the phrase '*appearance in proceedings*' by contending that, even giving instructions to the advocates would be sufficient appearance before the Labour Court and , the Industrial Court. Still however, we would consider some relevant part of the evidence in brief.

27. Before the Commission, Mr. Patni has produced record of cases or copies thereof in Reference Nos. 1381/89, 84/84 and 743/89, to establish that he has participated in the said cases. It is to be noted that in the aforesaid cases, one Mr. K. C. Shah, Advocate appeared. He was examined as a witness before the Commission at Exh. 206. It is his say that he was practising in the Labour and Industrial Courts since 1982, and that he was appearing on behalf of all S.T. Corporation Unions, in the Labour and Industrial Courts. It is his say that he was knowing Mr. Patni, and he was the office bearer of the Central Office State Transport Workers' Union. It is his further say that he was daily going to the office of the Federation with which all Unions of the S.T. Corporation are affiliated. He has specifically stated that wherever there is a case of individual worker, he would call him in the office and take instructions from him, and thereafter he would personally draft the statement of claim or other necessary papers. He has stated that at no point of time, he needed the help of Mr. Patni, even when he was working in the Accounts Department of the S.T. Corporation. He further stated that even in his absence, whenever any date of hearing is to be obtained or any documents are to be produced, his clerk would do that job.

28. After seeing the list (1) Ex. 98, he has stated that in (i) Reference No. 47/85 (new No. 660/85) of Vithalbhai Prajapati, (ii) Recovery Application No. 1381/89 of G. M. Brahmhatt and (iii) Reference No. 84/84 of A. Kanunga, he had appeared and except him nobody had appeared in the Labour Court. He has specifically stated that at no point of time, Mr. B. G. Patni had appeared in any case in which he had filed vakalatnama.

29. Considering the aforesaid evidence, in our view, the learned Commissioner has rightly observed that the evidence of Advocate Mr. K. C. Shah who has appeared before the Labour Court as admitted by Mr. Patni, totally contradicts the evidence of Mr. Patni, on the point of his appearing in the three cases in which Mr. K. C. Shah has actually appeared. [*@page1049*]

30. The Commission has also considered the evidence and found that in Recovery Application No. 1381/89, Mr. B. G. Patni as a Judge of the Labour Court has passed an order on 6-4-1993, for issuing show cause notice on the point as to why steps for contempt of court proceedings should not be issued, and also fixing the matter on 13-4-1992. It is alleged by Mr. Patni that in the said case, in the vakalatnama, along with advocate Mr. K. C. Shah, he has put his signature.

31. Apart from the aforesaid evidence, the Commission has rightly appreciated the evidence of (1) Mr. Kashiram M. Patel (Exh. 188), (2) Mr. R. T. Mishra (Exh. 156), (3) Mr. D. C. Sinhali (Exh. 166), (4) Mr. Satyavan Adishwaran (Exh. 167), (5) Mr. Dahyabhai B. Pilwaikar (Exh. 174), (6) Mr. N. M. Chauhan (Exh. 187), and (7) Mr. S. S. Pathak (Exh. 194) upon which Mr. Patni has placed reliance for establishing that he had appeared in the Labour Court. This is discussed by the Commission in paragraphs 57 to 70 of the report.

32. From the aforesaid evidence, Mr. Gandhi, learned Advocate for Mr. Patni, was not in a position to point out that Mr. Patni was appearing in the proceedings before the Labour Court, because the aforesaid evidence only shows that Mr. Patni was assisting or giving instructions to the advocates who were appearing in the Labour Court.

However, we may note that Mr. Patni has examined Mr. Kashiram Patel, at Exh. 188, to prove that in Reference No. 743/79, Mr. Patni appeared on his behalf before the Labour Court. According to this witness, Mr. Patni was at times accompanying him to the court, and was remaining present in all the proceedings of the case, wherein Mr. Nikhil Mehta was the Advocate. The Commission has considered the evidence and observed that this witness does not know whether his case was at any time before the Kalol Labour Court or not. From

the evidence which was produced on record, the Commission held that on perusal of the original record, and the final order dated 7-9-1987, passed by the Labour Court, it is clear that G.S.T. Corporation, Mehsana was directed and ordered to reinstate Kashiram M. Patel to his original post of conductor.

34. Apart from the aforesaid aspect, with regard to the abovementioned cases, a complaint was made before the Commission that after going to Kalol pending the inquiry, Mr. Patni has added something in the records of Reference Cases No. 47/85 and 5/79, and in that connection, the report dated 14-12-1994, submitted by the President of the Industrial Court, Gujarat State, was called for by the Commission. That report was submitted to the Additional Secretary, Labour & Employment Department, Gujarat State, wherein it is *inter alia* stated that on 3-12-1994, Mr. B. G. Patni, went to Kalol by stating that he was transferred as a Judge of the Labour Court at Kalol; there he saw to it that the chamber of the Labour Court Judge was opened, and after occupying the chamber, he directed the employees to place the records of Reference Cases No. 47/85 and 5/79 before him. It is also reported that Mr. Patni had made a false statement to the employees of the Labour Court at Kalol that he was transferred to Kalol and unauthorisedly called for the records of certain cases, and it appears that he interpolated some records, and got the same Xeroxed. The said report was submitted after recording the statements of the employees of the Labour Court at Kalol. On the basis of the said report, the State Government has called for the explanation of Mr. B. G. Patni. In any case, this would be a matter for investigation by the competent authority. [@page1050] Therefore, it is not required to be dealt with any further in this judgment.

35. But, from the evidence, it is apparent that Mr. Patni has failed to establish *that he had conducted any case before the Labour Court or the Industrial Court, much less that he has regularly appeared before such courts.* Even presuming that he had assisted the advocates or had given instructions to the advocates in the abovementioned eight cases, it can never be said that it was a regular appearance by him in the proceedings before the Labour Court for more than 7 years. Further, the words 'regularly appearing' would indicate that he must have consistently and uniformly appeared for more than 7 years.

(iii) Contention with regard to meaning of the phrase 'appearing in the proceedings before the Labour Court' :

36.

Considering the limited controversy in the present case, the question would be what meaning can be assigned to the phrase "he has regularly appeared as a member of a trade union x x x x in proceedings before any such Labour x x x" used in Section 9(2)(b) of the BIR Act. It is the contention of Mr. Gandhi, learned Advocate for Mr. Patni, that once a person appears before the Labour Court as a member of a trade union in the proceedings and assists the advocate in conducting the matters, it would be sufficient for being qualified to be appointed as Presiding Officer of a Labour Court, because, admittedly, in the present case, Mr. Patni holds a degree in law.

37. In our view, this contention cannot be accepted mainly because phrase '*appearing in proceedings*' would clearly mean that he has appeared in proceedings before the Labour Court for conducting a case as authorised under the provisions of the Labour Laws.

38. For this purpose, we would first refer to the relevant provision which empowers the representative of employees to appear or act in the proceedings before the Labour Court. Relevant provision is Section 2(32) of the Bombay Industrial Relations Act, 1946. It reads as under:

"2(32) 'representative of employees' means a representative of employees *entitled to appear or act as such under Section 30.*"

Section 27 (*sic.* 27A) provides that save and provided under Sections 32 and 33A no employee shall be allowed to appear in any proceedings under the Act except representative of the employees. Section 30 provides list of persons who are entitled to appear or act before the Labour Court. As per Section 30, the

following persons are entitled to appear or act in the order of preference specified as the representative of employees -

- (i) a Representative Union for such industry;
- (ii) a Qualified or Primary Union of which the majority of employees directly affected by the change concerned are members;
- (iii) any Qualified or Primary Union in respect of such industry authorised in the prescribed manner in that behalf by the employees concerned;
- (iv) the Labour Officer if authorised by the employees concerned;
- (v) the persons elected by the employees in accordance with the provisions of Section 28 or where the proviso to sub-Section (1) thereof applies, the employees, themselves;
- (vi) Labour Officer.

Section 32 empowers Conciliator to [@page1051] permit an individual to appear in any proceedings before him or it. Similarly, Section 33 empowers the Industrial Court or Labour Court to permit an employee or a representative of union to appear through any person before it on an application being made in that behalf. The other relevant provisions is Section 80 which prescribes procedure for holding an enquiry. The relevant portion reads as under:

80. Labour Court to give notice to parties affected and permit appearance of parties: On an application under Section 79 the Labour Court shall issue a notice to all parties affected by the dispute in the manner provided by rules under Section 85. *Subject to the provisions of Chapter V, the Labour Court may permit the parties so affected to appear in the manner provided by the provisions of Sections of 80-A to 80-C.* The Labour Court shall then hold an inquiry.

80A. Procedure to be followed in an application under Section 79 by an employer when employees affected are numerous - (1) Where an application is filed under Section 79 by an employer or the Labour Officer for the decision of the Labour Court and the employees affected *are* numerous persons having the same interest, *the Court may permit one or more of such employees to appear and to defend application on behalf of the employees so interested.*

- (2) x x
80-B x x
80-C x x
80-D xx" (Emphasis supplied.)

39. Considering the aforesaid provisions, in our view, a person would be entitled to appear in proceedings only if he is a representative of the employees, i.e. representative of union of such industry as provided in Section 30 and subject to permission granted by the Labour Court as provided in Sections 33 and 80. Hence, it is apparent that the phrase 'he is regularly appeared as a member of a trade union in proceedings before the Labour Court or the Industrial Court' would clearly indicate that he would have appeared and conducted the case of an employee before the Labour Court or the Industrial Court. Thus, his appearance in a proceeding would be for the purpose of conducting it. Merely assisting or instructing an advocate who appears in a matter before the Labour Court would be of no relevance for determining the eligibility for being appointed as Labour Court Judge.

40. It is true that the proviso to sub-Section (9) which provided that no person shall be appointed as Labour Court Judge unless he possesses qualification laid down under Article 234 of the Constitution or eligible to enter judicial service in the State of Gujarat, is deleted on the basis of the Report submitted in the year 1994 by the Labour Law Review Committee. That would not mean that a person who has not conducted any case before the Labour Court or Industrial Court or under the Industrial Disputes Act, 1947, would be eligible to be appointed merely because he was a member of a Labour union or that he had been giving some instructions to an advocate who was appearing in a matter before a Labour Court. The phrase "appeared as a member of a trade union" in context of the aforesaid provisions, namely, Sections 27 read with Sections 30, 32 and 33 would clearly mean that the person must have appeared in the proceedings before the Labour Court or the

Industrial Court for conducting the case of an employee. That means, instead of a legal practitioner, such authorised person should have regularly appeared before the Labour Court or the Industrial Court or the Tribunal. [/@page1052]

41. While dealing with the question regarding right of individual employee who had appeared or acted in proceedings under the Bombay Industrial Relations Act where representative union had entered appearance as representative of employee, the Supreme Court in the case of Santuram v. Kimatrai Printers, reported in AIR 1978 Supreme Court 202, considering the scheme of the aforesaid sections, has observed that a plain reading of the above section which was substituted for the original Section 80 by the Bombay Act 49 of 1955 makes it clear that the *Labour Court can permit the parties affected by the dispute to appear in the manner provided by Sections 80-A to 80-C of the Act* but the discretion conferred on the Labour Court has specifically made subject to the provisions of Chapter V which deals with 'representation of employees and employers and appearance on their behalf' and contains amongst other provisions Section 27-A. The Court further observed that *general rule prohibits the grant of permission to an individual employee to appear or act in any proceeding under the Act except through the representative of employees.*

42. From the above discussion, it can be held that the Labour Court can permit the parties affected by the dispute to appear in the manner provided by Sections 80-A to 80-C of the BIR Act. As a general law, individual employee is prohibited from appearing in proceeding under the Act except through the representative of the employees. The result would be that, when a representative of union appears through an advocate to defend the case of an employee, it cannot be said that the representative of the union also appears in the proceedings. Hence, the phrase "he has regularly appeared as a member of a trade union for not less than seven years in the proceedings", used in Section 9(2)(b), in context of other provisions of the BIR Act, would mean that the person must have appeared and conducted regularly some cases as a representative of the employees before the Labour Court, the Industrial Court or the Tribunal for not less than seven years. Simpliciter assisting an advocate in conducting the case or visiting such courts would not make a person qualified for being appointed as Presiding Officer of a Labour Court.

43. Further, the phrase "appeared in proceedings" would only mean that the party or the person authorised on his behalf must be present for the purpose of conducting the case before the Labour Court and mere physical presence of the party, unless he is there for the purpose of conducting the case, is no appearance in the proceedings.

44. In support of his contention that the phrase "appeared in proceedings" would mean the person was authorised to appear in proceedings for conducting it, Mr. Nanavati, learned Counsel, relied upon the decision rendered by the Orissa High Court in the case of *Hindustan Steel Ltd. v. Prakash Chand Agarwal & Anr.*, AIR 1970 Orissa, 145. In paragraph 7 of the said report, the Court observed as under:

"The word 'appearance' has a well-recognised meaning and implies that the party is present at the trial either in person or through a pleader properly authorised on his behalf, and in either case, the party or the person authorised on his behalf must be present for the purpose of conducting the case. The mere physical presence of the party unless he is there for the purpose or conducting the case is not 'appearance' as contemplated in the rule nor does the presence of his pleader who had been instructed to appear on previous occasions constitute [/@page1053] an appearance, unless he is instructed to represent him on the occasion in question and attends for that purpose.

45. The question as to what constitutes appearance has been discussed fully by G. K. Mishra, J. (as he then was) in *Mulia Maharana v. Narayan Patra*, (1966) 32 Cut LT 107 = (AIR 1964 Orissa 246), where his Lordship after reviewing the case law on the subject accepted the following dictum of a Bench of the Calcutta High Court in *Sikandar Ali v. Kushal Chandra*, AIR 1932 Cal 418 as laying down the correct law on the subject. This is what their Lordships stated:

"The word 'appear' in this Rule (O.9 R. 8) apparently means 'appearing in the suit'. A party may be present in the precincts of the Court or he may be found present in the Court room but if he does not take part in the suit it cannot be said that he has appeared. This is what is meant by Order 9, Rules 6 and 8. If a plaintiff comes to

Court and files an application for adjournment and when the application is refused he retires from the suit, though he may not have physically retired from the Court he is not to be considered any longer to be present in the suit and any order passed in such circumstances must be taken to be an order passed *ex parte*."

We are in respectful agreement with this view." (Emphasis supplied).

46. As against this, Mr. Gandhi, learned Advocate, relied upon the decision of the Andhra Pradesh High Court in the case of *Hari Om Rajender Kumar and Others v. Chief Rationing Officer of Civil Supplies, A.P., Hyderabad*, AIR 1990 Andhra Pradesh, 340. for contending that the word, which is used in Section 9(2) is "appearance", and not "practice", and therefore, it would be sufficient if a person appears before the Labour Court or the Tribunal for instructing the advocate in conducting the matter. For this purpose, he relied upon paragraph 11 of the aforesaid judgment, which is as under:

"11. From the aforesaid provisions, it is clear that the 'practice before the Courts, Tribunals and Authorities can be only by advocates and not by other persons unless specially authorised by the Courts in that behalf. It has to be noticed that Section 33 of the Act uses the word 'practice' while Section 32 uses the word 'to appear' in the Courts, etc. The words 'practice' or 'appear' have not been defined in the Act. The special significance of the above words can be understood if one refers to the provisions of O. 3, Rr. 1 and 2, C.P.C. Order 3, Rule 1 says that any appearance, application or act in any Court required or authorised by law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party-in-person or by his recognised agent or by a pleader appearing, applying or acting, as the case may be, on his behalf provided that any such appearance shall, if the Courts so directs be made by the party in person. Order 3, Rule 2, C.P.C. refers to the class of persons who could be treated as recognised agents of parties by whom shall appearances, applications and acts may be made or done and includes persons holding powers of attorney. It is, therefore, clear that the provisions of O. 3 R. 1 which permit appearance, applications or acting in any Court are subject to any other law and this includes the provisions of the Advocates Act, 1961 and in particular Sections 32 and 33. It is further clear that so far as the signing or verifying or doing other acts are concerned, these could be done by the Power of Attorney duly authorised therefore but so far as [*@page1054*] appearing or practising in Court are concerned, they are subject to the provisions of Sections 32 and 33 of the Advocates Act. The right to appear in Court and plead for a principal as also the right to practice in Courts have to be distinguished from the other acts, which a power of attorney can perform under O. 3 R. 1 C.P.C. So far as the right to appear and plead for a principal in Court as also the right to practice are concerned, these are governed by Sections 32 and 33 of the Advocates Act."

47. The aforesaid judgment of the Andhra Pradesh High Court mainly deals with the provision of Order III Rule 1 of the Code of Civil Procedure, which *inter alia* provides that any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such court, may except where otherwise expressly provided by law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing on his behalf.

48. In that context, the court has observed that the words appear, plead, 'act' and 'practice' have different connotations, that too, particularly in the context of Section 33 of the Advocates' Act, 1961 which empowers only an advocate enrolled under the Advocates Act, to practice before the court, and Section 32, which is an exception, which provides that any court, authority or person may permit any person not enrolled as an advocate under the Act to *appear* before it or him in any particular case.

49. Under the provisions of the BIR Act, representatives of trade unions are empowered to appear before the court and conduct the cases for the employee. This would mean that they are entitled to appear or, act and plead for the employee. For conducting the cases, they are substitutes for the advocates in cases which are conducted by the Labour Court, the Industrial Court or the Tribunal. Hence the phrase 'appeared in proceedings' in the context of BIR Act would mean taking part by appearing, acting and pleading in the case before the Labour Court or Industrial Court.

(iv) Selection by Gujarat Public Service Commission :

50. Mr. Gandhi next submitted that Mr. Patni was selected by the Gujarat Public Service Commission, on the basis of the advertisement issued by the said Commission, after holding the interview and after verification of the certificates produced by him to show that he was regularly appearing before the Labour Court and the Industrial Court. For this purpose Mr. Gandhi relied upon the certificates issued by the Labour Court Judges, as also their evidence before the learned Commissioner, to contend that Mr. Patni had regularly appeared before the Labour Courts.

51. This aspect is also discussed in detail by the learned Commissioner, in his report.

52. Before the Commission, Mr. Patni has led the evidence of Mr. A. S. Patel, who is at present working as a Member of the Industrial Tribunal at Ahmedabad. His evidence is at Exh. 136A. Mr. Patel has admitted that he has issued certificate Exh. 105. Mr. Patel has stated that Mr. Patni was coming to the court as a union representative, *but he had not conducted any case before him, and that he had not filed any authority letter in any case, before him.*

53. In re-examination, Mr. Patel has stated that the words "that he was remaining present here in Ahmedabad [*@page1055*]" since last 7 years" mentioned in certificate Ex. 105 are correct, and that only indicate that he was remaining present in cases as stated above in the Labour Court.

54. The next evidence on this point is of Mr. D. V. Joshi, who has been examined at Ex. 136-B, who is at present working as a Member of the Industrial Tribunal. He has issued certificate Ex. 137 stating that Mr. B. G. Patni was practising as a union representative in his court since 1981.

55. In cross-examination, Mr. Joshi has admitted that at no time, Mr. B. G. Patni had not conducted any case before him. He has also admitted that he was not having any personal knowledge about Mr. Patni's appearances in cases in the Labour Courts and that he had not verified the record about the appearances of Mr. Patni before issuing the certificate.

56. In re-examination, Mr. Joshi has specifically admitted that "normally when an advocate has filed vakalatnama on behalf of the worker, union representative does not remain present in the court". He has also stated that if any office-bearer of the Labour Union appears on behalf of the worker, he files authority letter.

57. The third witness examined by Mr. Patni is Mr. R. S. Shukla, who is also working as a Member of the Industrial Tribunal. He has stated that he was knowing Mr. Patni because he was remaining present as Union representative in number of cases. He has also given a certificate to Mr. Patni, which is produced on the record of the inquiry at Ex. 106. In the said certificate, it is stated by Mr. Shukla that Mr. Patni was remaining present in the Labour Court at Ahmedabad as representative of the Central Office State Transport Workers' Union, and that he was having good knowledge of Gujarati language.

58. In cross-examination, Mr. Shukla has admitted that Mr. Patni had neither appeared nor conducted any case before him at any time.

59. From the aforesaid evidence of the witnesses examined by Patni, it is evident that Mr. Patni had not appeared as union representative in, or conducted any case before the Labour Court or the Industrial Court. The evidence of the aforesaid judges establishes that Mr. Patni has not appeared or conducted any case before them and that, before issuing the certificates, they have not verified any record about the appearance of Mr. Patni and the certificates of M/s. A. S. Patel and Shukla nowhere indicate that Mr. Patni had appeared or conducted any case. Mr. Patni has not filed any authority letter in any case, and that normally when an advocate has filed vakalatnama on behalf of the employee, the union representative does not remain present in the court.

60. Mr. Gandhi, next contended that even the Gujarat Public Service Commission has considered 'appearance' only to mean that the person must have participated in the proceeding before the Labour Court. For this purpose, he relied upon the advertisement issued by the GPSC for appointment of Labour Court Judges. The copy of the advertisement is produced at Ex. 103 in the inquiry before the Commission. It is true that the phrase 'regular appearance' is translated as. This would mean that the person concerned must have taken part in

the proceedings before the Labour Court, Industrial Court or Tribunal as a member of the trade union regularly for 7 years. Taking part in the proceedings would certainly not mean instructing the advocates who are appearing in the matters before the Labour Court. It would only mean [/@page1056] participating in the proceedings as representative of the union, as authorised by law for conducting the case.

61. Further, presuming that translation of words "regular appearance" mentioned in Section (2) of the B1R Act by the GPSC is incorrect, it would not confer any right on Mr. Patni to hold the said post if he is otherwise not qualified to hold it. On the contrary, it can be said that if the contention of Mr. Gandhi that the phrase would mean only participating in the proceedings or remaining present before the Labour Court for giving instruction to the advocate, is accepted, the entire procedure for making appointment to the said post would be illegal. In our view, the said contention cannot be accepted because in the said advertisement, it is specifically mentioned as.

62. In view of the aforesaid facts, there is no evidence on record to establish that Mr. Patni was qualified to be appointed as a Labour Court Judge under Section 9(2)(b) of the Act.

(v) Whether we should exercise jurisdiction to issue Writ of *quo warranto*:

63.

It is established law that once a person is not qualified to be appointed to hold public office as per the statutory provision, and even then he has been so appointed, such person is a usurper of the office. It amounts to fraud on public to appoint persons with inferior qualifications in such circumstances, unless it is clearly stated that the qualifications are relaxable, and therefore, such person is required to be ousted from such public office, and for this purpose, this court would have ample jurisdiction to issue a writ of *quo warranto*, as no court should be a party to the perpetuation of such illegality. No case of refusal by the court of issuance of a writ of *quo warranto* where the appointment to a statutory office held under the statutory provisions is illegal has been cited. If the court refuses the remedy, it would result in perpetuating illegality. In such a situation, even if the appointing authority persisted in retaining in office a person disqualified in law, then the court is required to issue a writ of *quo warranto*,

64. While considering the jurisdiction of the High Court to issue writ of *quo warranto*, under Articles 226 and 227 of the Constitution, the Supreme Court, in the case of *The University of Mysore v. C. D. Govinda Rao and Another*, AIR 1965 S.C., 491, has observed that the procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; in some cases persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of connivance of the executive or with its active help, and in such cases, if the jurisdiction of the court to issue writ of *quo warranto* is properly invoked, the usurper can be ousted. In such a situation, the court is required to inquire as to whether the appointment of the said alleged usurper has been made in accordance with the law or not. The relevant discussion is in paragraph 7 of the report, which is as under :

"An information in the nature of a *quo warranto* took the place of the obsolete writ of *quo warranto* which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise [/@page1057] might be determinate." Broadly stated, the *quo warranto* proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of *quo warranto* ousts him from that office. *In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to*

continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of *quo warranto* is property (*sic.*) invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. *It is thus clear* that before a citizen can claim a writ of *quo warranto*, he must satisfy the court, *inter alia*, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

65. Learned Advocate Mr. Nanavati relied upon the decision in the case of *The State of Haryana v. Haryana Cooperative Transport Ltd. and Ors*, AIR 1977 S.C. 237. In that case, one Mr. Hans Raj Gupta was appointed on June 4, 1965, as the Presiding Officer of the Labour Court, Rohtak. In a Reference, he has passed Award. That award was challenged before the High Court by *inter alia* contending that Mr. Hans Raj Gupta was not qualified to hold the post of a Judge of the Labour Court, and therefore, the award was without jurisdiction. After discussing the various contentions, the Court observed as under:

"Accordingly, it is open to the High Courts in the exercise of their writ jurisdiction to consider the validity of appointment of any person as a chairman or a member of a Board or Court or as a Presiding Officer of a Labour Court, Tribunal or National Tribunal. If the High Court finds that a person appointed to any of these offices is not eligible or qualified to hold that post, the appointment has to be declared invalid by issuing a writ of *quo warranto* or any other appropriate writ or direction. To strike down usurpation of office is the function and duty of High Courts in the exercise of their constitutional powers under Arts 226 and 227."

66. Similarly, in the case of *District Collector & Chairman, Vizianagaram Social Welfare Residential School Society & Anr. v. M. Tripura Sundari Devi*, (1990) 3 SCC, 655, the Supreme Court has observed as under:

"It must further be realised by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard to the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. *It amounts to a fraud on [page 1058] public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact.*" (Emphasis supplied.)

(vi) Delay in filing the Writ Petitions:

67. Lastly, learned Advocate Mr. Gandhi contended that this petition is filed after lapse of four years and, therefore, this court should not exercise its jurisdiction for issuing the writ of *quo warranto*. He further contended that, in any case, by this time, Mr. B. G. Patni has acquired the necessary qualification. He, therefore, submitted that on the ground of delay and subsequent acquisition of necessary qualification, these petitions should be rejected.

68. In our view, this contention cannot be accepted. It is found that on the basis of statutory provision, Mr. B. G. Patni was not qualified to be appointed as Judge of a Labour Court. If he is permitted to act as Labour Court Judge, it would be perpetuating the illegality every day. Every day he acts in that responsible public office, a fresh cause of action arise. Therefore, in such a situation, the delay would not defeat the cause nor would it cure the disqualification. This is an established principle of law.

69. For this purpose, learned Advocate Mr. K. S. Nanavati has rightly relied upon the judgment of the Bombay High Court in the case of *Kashinath v. State of Bombay*, AIR 1954 Bombay 41 wherein it is observed as under:

"The Advocate General says that inasmuch as opponent No. 2 has been acting as '*de facto*' president, we should not, interfere at this stage by issuing a writ of *quo warranto*. In our opinion it is the duty of the Court, as soon as its attention is drawn to the fact that a person who is not qualified is holding a public office, to declare that he is not entitled to that office and to prevent him from acting as such."

70. He has further relied upon judgment rendered by the Division Bench of the Bombay High Court in the case of *Sonu Sampat v. Jalgaon Municipality*, reported in (1957) 59 Bombay Law Reporter p. 1988, dealt with the similar question and negated it. In that case, the petition was filed by two elected Councilors of the Jalgaon Borough Municipality, challenging a resolution of the municipality appointing the Chief Officer of the Municipality for a period of two years. Dealing with the contention of delay, the Court observed as under:

"Now, this petition is in the nature of a writ of *quo warranto* where the very right of respondent No. 2 to act in the responsible post of Chief Officer of the municipality has been questioned; and if his appointment is illegal, every day that he acts in that office a fresh cause of action arises and there can be no question of any delay in presenting a petition."

The aforesaid case was followed by the Allahabad High Court in the case of *Baij Nath v. State of U.P.* reported in AIR 1965 Allahabad, p. 151.

71. Further, in the case of *R. C. Deb Burma v. Government of Tripura*, reported in AIR 1976 Gauhati 87, the Court has followed the case of *Baij Nath v. State of U.P.* (supra) and observed as under:

"But as has been held in the decisions reported in AIR 1965 All 151, *Baij Nath v. State of U.P.* I and in *S. B. Roy v. P. N. Banerjee*, (1968) 72 Cal WN 50, delay in presenting a petition for a writ of *quo warranto*, in which the right of a person to function in a certain capacity is challenged, cannot be a ground for rejecting it. In such a case it was held, everyday the person so acts in that capacity, a fresh cause of action arises. We are in respectful agreement with this view. In the instant case if the petitioner succeeds in establishing before us that the respondent No. 2 has no jurisdiction to hold the post of Administrator, the delay in presenting the petition will not defeat his cause."

72. Same view is taken by the Madhya Pradesh High Court in the case of *S. K. Mishra v. Jabalpur Municipality* reported in 1978 LAB I.C. p. 294. The Court held that so far as the argument regarding laches is concerned, it is sufficient to say that in a case of *quo warranto* the usurper in office continues to be usurper each day that he remains in office and, it would be inappropriate for this reason alone to dismiss the petition, assuming that there was any such delay.

73. In the case of *Ravinder Sharma v. State of Punjab*, reported in (1995) Supreme Court Cases 1.38, the Court held that where the appointment was clearly against regulations, it was liable to be set aside. That being so, no question of estoppel would ever arise. In that case, Smt. Ravinder Sharma was appointed as a clerk in the Punjab Public Service Commission on 8th June 1967. At that time, she possessed the educational qualification as Matriculate III Class while the rule required Matriculate I Class. Later on, she qualified from the Subordinate Service Selection Board and was appointed as a clerk on regular basis on 28th August 1968. She was promoted as Assistant on 1st February 1974. Subsequently, the Public Service Commission recommended to the Government that the qualification required under Regulation 7 be relaxed in the case of the appellant. The Government declined to accede to the request. By an order dated 26th April 1977 she was informed by the Public Service Commission that in the circumstances she cannot be continued as clerk in the Commission without fulfilling the initial qualification. The High Court, on a consideration of arguments, dismissed the petition by holding that the petitioner did not conceal the qualification but it would not validate the appointment when such appointment was not in conformity with the Regulation 7 of the Regulations. That judgment is confirmed by the Supreme Court by holding that when the appointment was against the Regulations, it was liable to be set aside and that there would not be any question of estoppel. From the facts stated above, it is clear that the appointment dated 8-6-1967 was set aside in 1977.

74. However, learned Advocate Mr. Gandhi relied upon the decision of the Supreme Court in the case of *Tilokchand v. H. B. Munshi*, reported in AIR 1970 SC 898. In our view, this judgment is hardly relevant to the present case as it deals with the discretion to be exercised by the Court while exercising jurisdiction under Article 32 or 226 of the Constitution of India.

(vii) Finally, learned Advocate Mr. Gandhi submitted that Mr. B. G. Patni suffered because of wrong appointment given by the State Government or by the Gujarat State Public Service Commission because he

resigned from his service. He-submits that, at present, he would be jobless and, therefore, the State Government should be directed to absorb him on some other suitable post. In our view, this submission cannot be accepted in this petition for quashing and setting [@page1060] aside his appointment order as Presiding Officer of Labour Court. Further, considering the report of the Commission, it would not be proper for us to make any such suggestion. However, it would be open to him to make a representation to the State Government in this behalf.

75. In the result, Special Civil Application No. 9792 of 1994 is required to be allowed and a writ of *quarantanto* is required to be issued holding that Mr. B. G. Patni was not eligible to be appointed as Presiding Officer of Labour Court on the ground that he was not qualified as provided under Section 9(2) of the Bombay Industrial Relations Act, 1946.

76. Now we would deal with the other petitions wherein the order dated 31st August 1994 passed by Mr. B. G. Patni cancelling vakalatnamas of advocates in 900 cases, is challenged.

Special Civil Application No. 11114/94

77. This petition is filed by Mr. Girish K. Bhatt, Advocate, Rajkot, challenging the order dated 31st August 1994 cancelling his 1.26 vakalatnamas in the cases pending before the Labour Court at Rajkot.

Special Civil Application No. 11115/94

78. This petition is filed by Mr. S. B. Gogiya, Advocate, Rajkot, challenging the order dated 31st August 1994 cancelling his 650 vakalatnamas in the cases pending before the Labour Court at Rajkot.

Special Civil Application No. 11146/94

79. This petition is filed by Mr. K. M. Paul, Advocate, challenging the order dated 31st August 1994 cancelling his vakalatnamas in the cases pending before the Labour Court at Rajkot.

Special Civil Application No. 11147/94

80. This petition is filed by Mr. D. S. Nandani, Advocate, Rajkot, challenging the order dated 31st August 1994 cancelling his vakalatnamas in the cases pending before the Labour Court at Rajkot.

Special Civil Application No. 1052/95

81. This petition is filed by Mr. Haydevbhai G. Shukla, Advocate, challenging the order dated 31st August 1994, cancelling his vakalatnamas in the cases pending before the Labour Court at Rajkot.

82. In all these petitions, it is the contention of the petitioners that the aforesaid order dated 31st August 1994 cancelling vakalatnamas in about 900 cases passed by Mr. B. G. Patni was mala fide and with a view to victimise the petitioners who are representing the concerned parties. It is further contended on behalf of the petitioners that -

- (i) the concerned parties were being represented with the consent of them and the Labour Court without any objection which consent need not be in writing or express but can be implied and inferred from the conduct;
- (ii) the orders were passed mala fide inasmuch as they were passed for oblique purposes and motives and to ventilate a personal grudge against the petitioners;
- (iii) the orders suffer from the vice of non-application of mind and without taking into consideration the relevant facts and circumstances of each case prior to cancellation of vakalatnamas;
- (iv) a consolidated order in all the references, in which parties were represented by the petitioners, other [@page1061] advocates and union representatives, was passed;
- (v) there is a gross breach of principles of natural justice; and the order is passed without hearing. It was also contrary to public interest and would shake the people's faith in the judiciary and the legal system;

(vi) Mr. B. G. Patni did not purport to act under the law and is flouting the mandatory requirements in the exercise of power and is assuming jurisdiction where he has none for the purpose of wreaking his ire on persons who are concerned with the filing of the writ petitions.

83. In the deposition before the Commission, Mr. B. G. Patni has stated as under:

"I had not given any written notice to hear the advocates whose vakalatnamas were cancelled, but I had given oral intimation to obtain no objection of the other side before I passed order for cancellation of appearances. I have cancelled the appearances of ten advocates out of 200 advocates appearing before me at Rajkot and Gandhidham. *I was compelled to do so because on account of political reasons they were not maintaining dignity and decorum of the Court.*

I told them that there will not be loose administration. I had said so in the open court and I had not called them individually in my chamber for giving intimation.

It is true that I have passed the order of cancellation of appearances on one single date.

(Witness volunteers that he had passed the aforesaid orders after working on that issue for couple of months.)"
(Emphasis supplied).

84. Learned Advocate Mr. Gandhi, on instruction, states that Mr. B. G. Patel has no objection if the aforesaid order dated 31st August 1994 is set aside.

85. Considering the aforesaid deposition of the witness and the way in which he has acted, the order dated 31st August 1994 cancelling the vakalatnamas in 900 cases requires to be set aside with a note that the aforesaid order was absolutely arbitrary, uncalled for and with vengeance.

86. In the result, -

These petitions are allowed.

The appointment of Mr. B. G. Patni as Presiding Officer of Labour Court requires to be quashed and set aside and a writ of *quo warranto* be issued holding that Mr. B. G. Patni was not eligible to be appointed as Presiding Officer of Labour Court on the ground that he was not qualified as provided under Section 9(2) of the Bombay Industrial Relations Act, 1946. The State Government is directed to pass the necessary orders forthwith. Mr. B. G. Patni is further restrained from discharging any of the functions, rights or duties of the aforesaid post.

(iii) Order dated 31st August 1994 passed by Mr. B. G. Patni cancelling 900 vakalatnamas is also quashed and set aside.

In each petition, Rule made absolute to the aforesaid extent.

Re: Costs

87. It should be noted that the Commission was required to carry out the work of examining number of witnesses and was required to work nearly for five months, as requested by this Court. The Advocates' Association has deposited [*@page1062*] costs of the Commission as directed by this Court. Mr. Nanavati, learned Advocate, submitted that the State Government should be directed to bear the said expenses. It is his say that the Advocates' Association have deposited in all Rs. 1,07,000/- towards costs as directed by this Court. The said amount is disbursed towards remuneration of the learned Commissioner and other clerical staff as per our order dated 1st April 1995. He, therefore, submitted that the State Government should be directed to reimburse the said amount to the Advocates' Association, because it was the fault on the part of the State Government firstly to appoint Mr. B. G. Patni without verifying his qualification and secondly, the State Government has failed to take appropriate action in spite of agitation for a just cause by the advocates against Mr. B. G. Patni, Presiding Officer of Labour Court at Rajkot. For this purpose, he heavily relied upon the

findings given by the learned Commissioner. As stated earlier, we have not discussed other findings given by the Commission because of finding on the first point. In our view, it would be open to the State Government to take appropriate action on the basis of the said report, if required. But considering the findings given by the Commission, it is ordered that the State Government shall bear half of the costs borne by the petitioners, i.e. the State Government shall reimburse Rs. 53,000/- (fifty-three thousand five hundred only) to the petitioners towards costs of the Commission. The State Government shall deposit the said amount in this court before 1-7-1995.

88. Before parting with the judgment, we may state that, in view of the report submitted by the learned Commissioner, Mr. Justice B. S. Kapadia (Retd.), learned Advocate Mr. K. S. Nanavati has not pressed the contention with regard to the constitutional validity of the provisions of Section 9 of the BIR Act.

89. However, we may state that, in our opinion, the functions of the Labour Court are essentially civil in nature. The Labour Court is under the control and supervision of the Industrial Court, which position is akin to the District Court and, therefore, appointment of Presiding Officer of the Labour Court is to a judicial post and within the expression 'judicial service'. The work of Labour Court is virtually of a judicial nature. True that the union representative is entitled to represent cases of the industrial employees as provided in the Act. Still however, the decision making process is a judicial one and that too in accordance with the statutory provisions. It is stated that large number of labour matters are pending in various Labour/ Industrial Courts. If a person, who *is* not judicially trained, is permitted to discharge judicial work, then incidents like ones which have happened in the present case, are likely to recur. To avoid such a situation, it is for the State Government to consider whether Labour Courts be manned exclusively by judicial officers in service, by sending Judicial Officers on deputation and the High Court having control over such appointments. This is the practice in the States of Rajasthan, Delhi and some other States.

90. The instant case is only a tip of the iceberg. To keep control over the matter, it is expected that the Legislatures may take notice of the abovestated facts and do the needful accordingly.

(AKC) Rule made absolute to the extent indicated. [*@page1063*]