SUPREME COURT OF INDIA

Ramesh Chandra Sankla

Vs.

Vikram Cement

C.A.No.4223 of 2008

(C.K. Thakker and D.K. Jain JJ.)

08.07.2008

JUDGMENT

C.K. Thakker, J.

1. Leave granted.

2. All these appeals arise out of common judgment and order passed by the Division Bench of the High Court of Madhya Pradesh (Indore Bench) on October 31, 2006 in Writ Appeal No.353 of 2006 and companion matters and also against an order dated December 11, 2006 in Review Petition M.C.C. No. 1062 of 2006 and cognate matters. The orders passed by the Division Bench of the High Court have been challenged by both the parties i.e. employees/ workmen as also by the employer/Company.

FACTUAL BACKGROUND

3. To appreciate the controversy raised in the present appeals, few relevant facts may be noted.

4. Vikram Cement (`Company' for short) is engaged in the business of manufacturing cement of different grades and has its plant at Vikram Nagar, Khor, Madhya Pradesh. Appellants in one set of appeals are employees engaged and working in the factory of the Company. It was the case of the Company that with a view to rationalize its manpower, it introduced a Voluntary Retirement Scheme (`the Scheme' for short) on July 12, 2001 in the Cement Plant.

> "The said scheme provided voluntary retirement of workmen who had either completed 40 years of age or put in at least 10 full years of service. They were to be paid benefits as provided in the scheme. The scheme was displayed on the Notice Board and widely publicized through local press. It appears that out of 1500 employees, about 460 employees opted for voluntary retirement which was accepted by the Company and they were granted all benefits towards `full and final settlement' in terms of the scheme. This was done during July-September,

2001. According to the Company, the workmen received those benefits, issued stamped receipts in token of acceptance of the amount under the scheme and ceased to remain `workmen' of the Company. The relationship between the `employer and employee' came to an end. According to the Company, however, during September-October, 2001, some of the employees who had opted for voluntary retirement, accepted benefits under the scheme and who were no more employees of the Company approached Labour Court, Mandsour by invoking Section 31 of the Madhya Pradesh Industrial Relations Act,1960 (hereinafter referred to as `the Act'), inter alia, contending that they had not opted for voluntary retirement; they continued to remain workmen of the Company; they were pressurized, threatened and forced to accept some amount; though they were willing to work and continue as employees of the Company, they were not allowed to join duty. It was also their case that they were not paid legal and proper benefits to which they were otherwise entitled even under the scheme. The so-called payment said to have been made to them was also not adequate and `full and final settlement' of the dues in accordance with law. It was, therefore, contended by them that they were entitled to reinstatement. As they were not allowed to continue as workmen by the Company, the impugned action was in the nature of an order of `removal' or termination of service and appropriate relief, therefore, was required to be granted to them."

ORDER OF LABOUR COURT

5. Cases were duly registered by the Labour Court. Notices were issued. The Company appeared and raised preliminary objection as to the maintainability of the claim put forward by the workmen. It was contended by the Company that the workmen had accepted the scheme and received the amount towards `full and final settlement' and left the Company for ever. It was not a case of `removal' or `termination' of services and the applications were liable to be dismissed as they were no more in employment. A prayer was, therefore, made to uphold preliminary objections which were of legal nature and to dismiss cases only on that ground. The Labour Court considered objections raised by the Company and reply of the workmen. It, however, opined that there was `factual dispute' between the parties and it was not possible to dismiss cases as being not maintainable. It, therefore, directed the Company by an order dated September 16, 2003 to file written statement so that the matter may be decided on merits. The Company challenged the said order by approaching the Industrial Court, Madhya Pradesh at Indore but the said application was also dismissed by the Industrial Tribunal vide an order dated February 11, 2004. The Company then filed reply contending that the applications filed by the `so called workmen' were clearly an `afterthought', more so, when they had accepted the amounts/benefits under the scheme. Hence, the claim was wholly ill-founded. It was averred by the Company that some of the workmen had even approached the Authority under the Payment of Gratuity Act for increased amount of gratuity, thus, clearly exhibiting and admitting to the severance of relationship of master and servant between the parties. It was contended that the workmen could not be allowed to resile from the stand taken by them earlier. They were estopped from challenging the factum of voluntary retirement.

6. The Company moved the Labour Court on November 9, 2004 requesting the Court to frame three additional issues viz., 4(a), 4(b) and 4 (c) and hear them as preliminary issues. The said issues read as under:

> "4(a) Whether the application is barred by estoppel?
>
> 4(b) Whether the application filed by the applicant can be heard under Sections 31(3), 61 and 62 of MPIR Act?
>
> 4(c) Whether the application is time barred?"

7. The Labour Court accepted the request of the Company to frame issues 4(a), 4(b) and 4 (c). It, however, rejected the prayer to decide those issues as `preliminary issues' before deciding other issues on merits. According to the Labour Court, it was not advisable to decide the issues as preliminary issues without recording evidence. The application of the Company was, therefore, dismissed.

ORDER OF INDUSTRIAL COURT

8. Being aggrieved by the said order, the Company again approached the Industrial Court. It was contended that the preliminary issues raised by the Company and approved by the Labour Court were `purely legal issues' and the Labour Court was wrong in treating them as mixed issues of law and fact which required leading of evidence. The order passed by the Labour Court was, therefore, liable to be set aside.

9. The Industrial Court, however, held that the Labour Court was right in rejecting the prayer of the Company to decide issues 4 (a), 4(b) and 4(c) before deciding other issues. According to the Industrial Court, it was the case of the employees that their signatures had been taken on the applications for voluntary retirement by exercising pressure and under duress. It was also their case that they had been paid `lesser amount' than the amount declared under the scheme. Moreover, they had not accepted the amount voluntarily and with free consent but the same was paid to them under coercion. The Court also noted that the employees had given undertaking that they were ready to refund the amount received by them. The Industrial Court in the circumstances observed that the dispute could not be resolved without recording evidence. Accordingly, the prayer made by the Company to decide issues of jurisdiction and maintainability as preliminary issues was rejected by the Industrial Court.

ORDER OF SINGLE JUDGE OF HIGH COURT

10. Being aggrieved by the said order, the Company approached the High Court. The learned Single Judge of the High Court, by an order dated February 6, 2006, dismissed the writ petition observing, inter alia, that the order passed by the Labour Court and confirmed by the Industrial Court was interlocutory in nature and did not decide any

controversy. It merely deferred the decision on the question as to maintainability of claim along with other issues. Such order could not be said to be without jurisdiction so as to interfere with it in exercise of supervisory jurisdiction under Article 227 of the Constitution. No finding much less categorical finding one way or the other had been recorded and rights of the parties were yet to be crystallized by the Court. It was also observed that whether a particular issue arising from the pleading between the parties be tried as preliminary issue or not should be examined by the Court keeping in view the provisions of Order XIV of the *Code of Civil Procedure, 1908* (hereinafter referred to as `the Code'). On the facts and in the circumstances of the case, both the Courts were right in not deciding the issues as to jurisdiction and maintainability of claim as preliminary issues. No interference was, therefore, called for. Accordingly, the writ petition was dismissed.

EARLIER SLP

11. The Company challenged the said order by filing Special Leave Petition in this Court. Notice was issued and interim stay of further proceedings was granted by this Court. The workmen appeared. On September 1, 2006, the matter was placed before the Court. During the intervening period, however, an Act known as the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 (`Adhiniyam' for short) came into force. This Court, therefore, held that it was not inclined to entertain Special Leave Petition under Article 136 of the Constitution in view of availability of intra court appeal (Writ Appeal) under the Adhiniyam and accordingly, Special Leave Petition was dismissed with liberty to the Company to approach the High Court. Interim relief granted earlier was, however, ordered to be continued for a period of two months. But it was expressly stated by this Court that the question of maintainability of intra court appeal would be decided by the High Court in accordance with law.

ORDER OF DIVISION BENCH

12. In view of the above order passed by this Court, intra court appeals were filed by the Company. The Division Bench of the High Court, as stated above, disposed of the appeals by an order dated 31st October, 2006. It was held by the Division Bench that the writ petitions filed by the Company were under Article 227 of the Constitution and the learned Single Judge was exercising supervisory jurisdiction and intra court appeals were not maintainable and were liable to be dismissed. The Division Bench, however, held that since the respondent-workmen had received the benefits under the scheme, pocketed the amount and approached the Labour Court claiming that they had not voluntarily accepted the scheme and the benefit thereunder, it would be equitable to direct each of the employees who had filed a petition under Section 31(3) of the Act to return the benefit so received to the employer, subject to the undertaking by the Company that in the event the Labour Court allows the claim and grants benefits to the workmen, the same would be restored to them by the Company with interest @ 6% per annum.

13. The workmen are much aggrieved by that part of the order which directed them to refund the amount. They filed review petitions but they were dismissed by the Division Bench on December 11, 2006. The workmen have, therefore, approached this Court by filing Special Leave Petitions in which notices were issued and the Company appeared. The Company, on the other hand, felt aggrieved by the order of the Division Bench holding intra court appeal not maintainable as also by the order passed by the Labour Court, confirmed by the Industrial Court and also by the High Court not deciding issues of jurisdiction and maintainability of petitions filed by the employees as preliminary issues before other issues are taken up for consideration. Their Special Leave Petitions were also ordered to be heard along with Special Leave Petitions filed by the workmen and that is how all the matters are before us.

SUBMISSIONS OF COUNSEL

14. We have heard learned counsel for the parties.

15. The learned counsel for the workmen vehemently contended that the order passed by the Division Bench of the High Court was without jurisdiction so far as it directed the workmen to refund the amount received by them. The counsel submitted that once the Division Bench held that intra court appeals were not maintainable, it had no power to pass any order directing a party to do or not to do something. Such direction is without authority of law, there is total lack of jurisdiction and the order is non est. No direction of refund of amount, therefore, could have been issued by the Division Bench. On that ground alone, appeals filed by the workmen deserve to be allowed. Alternatively, it was submitted that once it was the case of the workmen that they had not accepted the scheme voluntarily, they were deemed to be continued in employment. If it is so, they would be entitled to receive wages. But they were not allowed to join duty and to work. No payment of wages had been made to them by the Company. The Company, for that reason also, cannot ask for repayment of amount paid to them. At the most, the said amount can be adjusted towards payment of wages. The counsel also submitted that being aggrieved by the order passed by the Industrial Court, the Company filed a writ petition which was withdrawn. No express liberty was granted to the Company to file fresh petition on the same cause of action. Thereafter fresh petitions were filed by the Company. Such petitions were not maintainable and ought not to have been entertained by a Single Judge of the High Court. They were barred by the doctrine of constructive res judicata as also on the ground of abandonment of claim.

16. On merits, it was submitted that the workmen were not paid the dues which ought to have been paid to them. A meager amount was offered which was accepted by workmen under duress. It was less than the amount required to be paid under the scheme. The payment was made in remote past and at this stage, it would be very difficult for them to refund the amount. The High Court should not have ordered repayment of the amount to the Company and ought to have directed the Labour Court to proceed to

decide the matter on merits by expressly clarifying that the payment would abide by the final outcome of the cases before the Labour Court. On all these grounds, it was submitted that the order passed by the Division Bench deserves to be set aside by restoring the order of the learned Single Judge.

17. The learned counsel for the Company, on the other hand, supported that part of the order of the Division Bench which directed refund of amount by the workmen to the Company. It was, however, submitted that the Division Bench was not right in not entertaining, dealing with and deciding intra court appeals on the ground that such appeals were not maintainable. The counsel submitted that while deciding the issue as to whether intra court appeal is or is not maintainable, nomenclature or reference to a particular Article of the Constitution in the writ petition is not material. Similarly, observations of learned Single Judge that he is exercising the power under a particular provision of the Constitution are also not decisive. The Division Bench was required to apply its mind independently and to consider the nature of controversy raised before the Single Judge. And if it finds that the petition was under Article 226 of the Constitution, the Division Bench was enjoined to entertain intra-court appeals and to decide them on merits. The counsel alternatively submitted that even if the Division Bench felt that the writ petitions were under both the Articles, viz. Article 226 and Article 227 of the Constitution, as per settled law, no party can be deprived of right of intra court appeal merely by referring to the other Article i.e. Article 227 of the Constitution, over and above Article 226 of the Constitution under which such right is available to the party aggrieved by an order passed by a Single Judge. It was, therefore, submitted that the appeals of the Company should be allowed and the matter may be remitted to the Division Bench of the High Court so as to enable the Court to decide intra Court appeals on merits in accordance with law.

18. The learned counsel also contended that an objection as to non-maintainability of writ petitions on the ground of constructive res judicata/abandonment of claim is not well-founded. First of all, no such contention was ever advanced either before the learned Single Judge or before the Division Bench of the High Court. It is also not raised in Special Leave Petitions. Such a plea has been taken at a belated stage as an `afterthought'. Even otherwise, the contention is not well-founded and is totally misconceived. The Company filed a writ petition against more than 200 employees. The Registry of the High Court raised an objection as to maintainability of such petition. The petition was described as `defective' or under an `office objection' having `logistic problem'. The Company considered the point raised by the Office and withdrew the petition to file separate and independent petitions. Individual petitions were then filed which were decided by the Court. The objection against maintainability of writ petitions has thus no force.

19. On merits, the counsel contended that the Labour Court, Industrial Court and the learned Single Judge of the High Court were in error in not deciding the issue as to maintainability of claims as preliminary issue. It was an admitted fact that the scheme was introduced by the Company, it was accepted by the workmen and payment was made to

them. Once these facts are admitted, there remained no relationship of master and servant between the Company and the workmen. It is not even the case of the workmen that they have not been paid. In view of these facts, the Company was right in requesting the Labour Court to decide that the question whether claim petitions filed by the workmen were maintainable. The question was pure question of law. It did not require investigation of facts. The issue, therefore, ought to have been heard as preliminary issue. According to the counsel, the fact whether the claimants were workmen or not was a `jurisdictional' fact. The Labour Court was having `limited jurisdiction' under the Act. It was, therefore, obligatory on the Labour Court to decide whether the jurisdictional or preliminary fact which could confer jurisdiction on the court was present. By not doing so, it had committed jurisdictional error which was required to be corrected by the High Court in certiorari-jurisdiction. But the High Court also committed the same error. Hence, this Court may interfere with the said order by directing the Labour Court to decide issues 4 (a), 4(b) and 4(c) as preliminary issues. Even if intra court appeals are held not maintainable, the Company is before this Court under Article 136 of the Constitution and an appropriate order, therefore, may be made by the Court.

MAINTAINABILITY OF INTRA COURT APPEAL

20. So far as intra court appeals are concerned, the learned counsel for the Company strenuously urged that the Division Bench of the High Court was in error in holding that intra court appeals were not maintainable. He submitted that Adhiniyam conferred such right on the party aggrieved by a decision of a Single Judge of the High Court. It was also submitted that this Court at the time of hearing of Special Leave Petition considered the fact that intra court appeal was available to the aggrieved party under the Adhiniyam and disposed of Special Leave Petition by giving liberty to the appellant to approach the Division Bench of the High Court though notice was issued and interim relief was also granted earlier. It was also urged that the petition filed by the petitioner-appellant was under Article 226 and Article 227 of the Constitution and, hence, a right of intra court appeal could not be taken away. According to the counsel, a statement by a Single Judge in the judgment that he was exercising power of superintendence under Article 227 of the Constitution is not final and conclusive. It was, therefore, prayed that the appeals be allowed by remitting all the matters to the Division Bench of the High Court to decide them on merits.

21. We are unable to persuade ourselves to uphold the contention of the learned counsel. The Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 (Act XIV of 2006) received the assent of the President on March 28, 2006. The Act was published in the Madhya Pradesh Gazette (Extraordinary) on April 05, 2006 and was brought into force "on the 1st day of July, 1981" [sub-section (2) of Section 1]. The Preamble of the Act states that it is an Act to provide for an appeal from a judgment or order passed by one Judge of the High Court in exercise of original jurisdiction to a Division Bench of the same High Court.

22. Section 2 is relevant and reads as under:

"2. Appeal to the Division Bench of the High Court from a Judgment or order of one Judge of the High Court made in exercise of original jurisdiction.--(1) An appeal shall lie from a Judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, to a Division Bench comprising of two judges of the same High Court: Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

(2) An appeal under sub-section (1) shall be filed within 45 days from the date of order passed by a single Judge:

Provided that any appeal may be admitted after the prescribed period of 45 days, if the petitioner satisfies the Division Bench that he had sufficient cause for not preferring the appeal within such period.

Explanation.--The fact that the petitioner was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this sub- section.

(3) An appeal under sub-section (1) shall be filed, heard and decided in accordance with the procedure as may be prescribed by the High Court."

23. Section 3 enables the High Court to make Rules under the Act for carrying out purposes of the Act. Section 4 repeals the *Madhya Pradesh Uchcha Nyayalaya (Letters Patent Appeals Samapthi) Adhiniyam, 1981*.

24. Bare reading of sub-section (1) of Section 2 of the Act, quoted above, leaves no room for doubt that it allows a party aggrieved by a decision of a Single Judge of the High Court to appeal to a Division Bench of the High Court if a Single Judge has rendered a judgment or passed an order in exercise of original jurisdiction under Article 226 of the Constitution. Proviso to sub-section (1) expressly declares that no such appeal shall lie against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution.

25. It is, therefore, clear that if the order is passed by a Single Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution, an intra court appeal would lie. If, on the other hand, a Single Judge exercises power of superintendence under Article 227 of the Constitution, intra court appeal would not be competent.

26. Precisely, this was the position under different Letters Patents. For instance, Clause 15 of the Letters Patent as applicable to High Courts of Calcutta, Madras and Bombay (Chartered High Courts), conferred such right of Letters Patent Appeal. It read as under:

"15. Appeal to the High Court from Judges of the Court.--And We do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the

judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made on or after the first day of February One thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided."

27. The said clause (Clause 15) came up for consideration before this Court in several cases. We may, however, refer to only one leading judgment on the point in *Umaji Keshao Meshram & Ors. V. Radhikabai, Widow of Anandrao Banapurkar & Anr.*[1]. In that case, proceedings had been initiated under the *Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958*. A person aggrieved by an order passed by Appellate Authority under the Act preferred revision before the Revenue Tribunal which was allowed. The order of the Tribunal was challenged in a writ petition under Article 227 of the Constitution before the High Court of Bombay (Nagpur Bench). A Single Judge allowed the petition. The order passed by the Single Judge was then challenged by the aggrieved party by filing Letter Patent Appeal before the Division Bench under Clause 15 of the Letters Patent. The Division Bench of the High Court dismissed the appeal as not maintainable. The said decision was challenged by the appellant in this Court.

28. This Court observed that the High Court of Judicature at Bombay was established by Letters Patent dated June 26, 1862 issued by the British Crown pursuant to the authority conferred on it by the *Indian High Courts Act, 1861* (24 and 25 Vict., c. 104). The Letters Patent also conferred right to institute an appeal to the Division Bench of the High Court against the `judgment' rendered by a Single Judge of the same court in certain cases.

29. Considering the history, tradition and development of Letters Patent amended from time to time, the Government of India Acts, 1915 and 1935 and the provisions of the Constitution, this Court ruled that in case a Single Judge of the High Court has given a judgment or passed an order in exercise of jurisdiction under Article 226 of the Constitution, remedy of Letters Patent Appeal is available to the aggrieved party. Madon, J. who delivered the

judgment for the Court proceeded to observe that when the facts justify the party to invoke Article 226 or 227 of the Constitution and he chooses to institute a petition under both the Articles, he should not be deprived of right of appeal available under Clause 15 of the Letters Patent.

30. His Lordship stated:

> "Petitions are at times filed both under Articles 226 and 227 of the Constitution. The case of *Hari Vishnu Kamath v. Syed Ahmad Ishaque and Ors.*[2], before this Court was of such a type. Rule 18 provides that where such petitions are filed against orders of the tribunals or authorities specified in Rule 18 of Chapter XVII of the Appellate Side Rules or against decrees or orders of courts specified in that Rule, they shall be heard and finally disposed of by a Single Judge. The question is whether an appeal would lie from the decision of the Single Judge in such a case. In our opinion, where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226".
>
> (emphasis supplied)

31. (We may observe at this stage that Chinnappa Reddy, J. expressed his inability to opine on the issue being `unfamiliar' with the history, tradition and the law of the city of Bombay).

32. In our judgment, the learned counsel for the appellant is right in submitting that nomenclature of the proceeding or reference to a particular Article of the Constitution is not final or conclusive. He is also right in submitting that an observation by a Single Judge as to how he had dealt with the matter is also not decisive. If it were so, a petition strictly falling under Article 226 simpliciter can be disposed of by a Single Judge observing that he is exercising power of superintendence under Article 227 of the Constitution. Can such statement by a Single Judge take away from the party aggrieved a right of appeal against the judgment if otherwise the petition is under Article 226 of the Constitution and subject to an intra court/Letters Patent Appeal? The reply unquestionably is in the negative [see *Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors.*[3]].

33. In our considered opinion, however, on the facts and in the circumstances of the present case, the petitions instituted by the Company and decided by a Single Judge of the High Court could not be said to be original proceeding under Article 226 of the

Constitution. We are clearly of the view that the learned Single Judge had decided the petitions in exercise of power of superintendence under Article 227 of the Constitution.

34. We have already referred to the facts of the case. According to the Company, voluntary retirement was accepted by the employees. They thereafter challenged the action on the ground that the acceptance was not voluntary but they were compelled to opt for the scheme and were paid some amount which was not in consonance with law and the action of not allowing them to continue in the employment amounted to removal from service. They, therefore, approached Labour Court for an appropriate relief. The Labour Court entertained complaints and issued notice. The Company appeared and raised preliminary objections. Issues were framed and a prayer was made by the Company to decide `issues of law' as preliminary issues which prayer was rejected by the Labour Court. The Company approached Industrial Court which also did not interfere with the order of the Labour Court. That order was again challenged by the Company by filing petitions in the High Court and the learned Single Judge dismissed the petitions. In view of the aforesaid facts, we have no doubt that the learned Single Judge was exercising power of superintendence over a Court/Tribunal subordinate to it under Article 227 of the Constitution. Obviously, a remedy of intra court appeal was not available. We, therefore, hold that the Division Bench was right in coming to the conclusion that intra court appeals filed by the Company were not maintainable. We see no infirmity in that part of the order. The contention of the appellant Company is, therefore, rejected.

MAINTAINABILITY OF WRIT PETITIONS

35. It was urged on behalf of the workmen that the writ petitions filed by the Company for quashing and setting aside the orders passed by the Labour Court and confirmed by the Industrial Court were barred by constructive res judicata as also under Order XXIII, Rule 4 of the Code. The argument proceeds thus: The Company filed a Writ Petition No. 3471 of 2005 under Article 227 of the Constitution in the High Court for quashing and setting aside an order dated March 14, 2005 passed by the Labour Court and an order dated August 8, 2005 passed by the Industrial Court. On December 14, 2005, the Company withdrew the petition. It, however, filed fresh petition in respect of the same cause of action. No permission or leave of the Court was sought, nor it was granted by the Court when the writ petition was withdrawn to file fresh petition by the petitioner in respect of the same cause of action. Fresh petitions were, therefore, not maintainable.

36. The learned counsel for the Company, however, submitted that the objection raised by the workmen is not well-founded. Firstly, it was urged that no such contention was raised by the workmen in reply to the writ petitions filed by the Company, nor it was taken before the learned Single Judge at the time of hearing of petitions. Nor such argument was raised in this Court when earlier Special Leave Petition was filed by the Company in this Court. It was also not taken when the Company filed intra court appeals before the Division Bench of the High Court after disposal of Special Leave Petition by this Court. Even in Special Leave Petition filed in this Court by the workmen, no such point has been raised. A question whether a petition is barred by res judicata or under Rule 4 of Order XXIII of the

Code is not a `pure' question of law. It is a question of fact or at any rate, a mixed question of law and fact. In absence of pleadings and necessary materials in support of such plea, petitions cannot be dismissed on the bald assertion by a party that they were not maintainable.

37. Let us consider legal position on this issue.

38. In the leading case of *Daryao v. State of U.P.*[4] a Constitution Bench of this Court was called upon to decide whether withdrawal of a writ petition would operate as res judicata. The Court held that an order of withdrawal would not constitute res judicata inasmuch as there is no decision on the merits by the Court. The Court, however, proceeded to observe that when a petition is withdrawn by the party without obtaining liberty from the Court to file fresh petition on the same subject matter, as a general rule, the petitioner is precluded from filing a fresh petition or an appeal against such an order because "he cannot be considered to be a party aggrieved by the order passed by the Court permitting withdrawal of the petition".

39. In *Sarguja Transport Service v. State Transport Appellate Tribunal*[5] the Appellate Tribunal set aside permit granted in favour of the petitioner by the Regional Transport Authority to run a stage-carriage. The petitioner filed a writ petition under Article 226 of the Constitution in the High Court of Madhya Pradesh against the order of the Tribunal but withdrew it. Then he filed a fresh petition. The High Court dismissed it holding that after the withdrawal of the first petition, the second petition was not maintainable. The aggrieved appellant approached this Court.

40. Dismissing the appeal and considering the ambit and scope of Order XXIII of the Code and distinguishing it from the doctrine of res judicata under Section 11 of the Code, this Court observed:

> "The law confers upon a man no rights or benefits which he does not desire. Whoever waives abandons or disclaims a right will loose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in Sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication

of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in Sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in Sub-rule (3) in order to prevent the abuse of the process of the Court". (emphasis supplied)

41. In *A.K. Bhattacharya v. Union of India*[6] the petitioner filed a writ petition in the High Court of Gauhati under Article 226 of the Constitution seeking Selection Grade in Tripura Civil Service and also promotion to the IAS cadre. A statement was made by the Advocate General that the case of the petitioner would be considered for Selection Grade in Tripura Civil Service. The petitioner, in view of the said statement, did not press the second relief. Subsequently, however, the petitioner prayed for that relief by filing a petition in this Court under Article 32 of the Constitution.

42. Dismissing the petition, this Court commented:

"He (petitioner) cannot, in this petition under Article 32 of the Constitution, ask for the same relief which he had himself given up in the High Court".

[See also *State of Gujarat v. Bhaterdevi Ramnivas Sanwalram*[7],]

43. In *Murtujakhan v. Municipal Corpn. Of Ahmedabad*[8] a petition was filed under Article 226 of the Constitution challenging the constitutional validity of the *Bombay Town Planning Act, 1954*. The respondents appeared, filed affidavits and contested the petition on merits. Ultimately, however, the petition was withdrawn by the petitioner since the point raised in the petition as to validity of the Act was covered by the decisions of this Court and as such nothing survived. Then again a fresh petition was filed by the petitioner challenging the validity of the Act.

44. Dismissing the petition and applying the general principle of res judicata, the Court observed:

"The consequence of the withdrawal of the said writ petition in the eye of law was that it stood dismissed on merits albeit on a concession made by or on behalf of the petitioner to the effect that the question of the constitutional validity of the Act was no longer open in view of the decisions of the Supreme Court. In other words, the effect of the dismissal by withdrawal was that the challenge of the petitioner to the actions of the respondents under the Act on the ground that the said Act itself was ultra vires stood concluded by an adverse decision of this Court based on his own concession. ...

45. The Court proceeded to state; [T]he petitioner having himself abandoned without reservation the previous writ proceeding initiated in this very Court with eyes open and after due deliberation cannot now be allowed to pick up the thread after a lapse of five years and to start a fresh proceeding to re-agitate the very point which he expressly gave up in the previous proceeding. He had set the machinery of law in motion but

solemnly brought it to an abrupt halt, indeed forsaken it in midstream, in proclaimed obeisance to the decisions of the Supreme Court. He cannot be permitted to resume it now after a number of years and be heard to say that despite his earlier proclamation, he still wishes to persist in raising the same point in this litigation. Courts moved upon a prerogative writ are not the forum to flog a dead horse or to resuscitate a ghost already laid to rest". (emphasis supplied)

46. In *Bakhtawar Singh & Anr. v. Sada Kaur & Anr.*[9] this Court observed that if the plaintiff withdraws the suit and there is no evidence to show that the suit was bound to fail by reason of some `formal' defect or there were sufficient grounds for allowing the plaintiff to institute a fresh suit in respect of the same subject matter and for the same relief, after the withdrawal of the earlier suit, the action of filing fresh suit would be barred under Order XXIII of the Code.

47. In *K.S. Bhoopathy & Ors. V. Kokila & Ors.*[10] this Court stated that the Court has to discharge the duties mandated under the provisions of the Code in taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation for the same cause of action.

48. We may also refer to a recent decision of this Court in *Sarva Shramik Sangathan (KV), Mumbai v. State of Maharashtra & Ors.*[11]. In that case, an application under Section 25-O of the Industrial Disputes Act, 1947 was filed by the employer for closure of undertaking. The application was, however, withdrawn since attempts were made for settlement of the matter. The efforts were not successful and hence, the management filed fresh application. It was contended by the Union that since earlier application filed by the employer was withdrawn, the second application was hit by Order XXIII of the Code. The Union relied upon Sarguja Transport Service.

49. Negativing the contention, holding the application maintainable and distinguishing Sarguja Transport Service, this Court held that the action of the Management of withdrawal of first petition was bona fide. It was not a case of Bench-hunting with a view to avoid an adverse order likely to be passed against it. Sarguja Transport Service had, therefore, no application. It was also observed that provisions of the Code of Civil Procedure do not strictly apply to industrial adjudication. The second application was, therefore, held maintainable.

50. From the above case law, it is clear that it is open to the petitioner to withdraw a petition filed by him. Normally, a Court of Law would not prevent him from withdrawing his petition. But if such withdrawal is without the leave of the Court, it would mean that the petitioner is not interested in prosecuting or continuing the proceedings and he abandons his claim. In such cases, obviously, public policy requires that he should not start fresh round of litigation and the Court will not allow him to re-agitate the claim which he himself had given up earlier.

51. In Sarguja Transport Service, extending the principles laid down in Daryao, Venkataramiah, J. (as His Lordship then was) concluded;

> "[W]e are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission". (emphasis supplied)

52. On the facts of the case, however, we are unable to uphold the argument on behalf of the workmen that the Company did not want to prosecute the petitions and had given up its claim against the order passed by the Labour Court and confirmed by the Industrial Court. The record reveals that the Company filed one writ petition against one employee which was registered as Writ Petition No. 3060 of 2005. It also filed another petition against the remaining employees (236) which was registered as Writ Petition No. 3471 of 2005. Since the other petition was against several employees, the Registry of the High Court raised an objection that it was under `defect'. It was, therefore, not placed for admission-hearing. In an order, dated October 3, 2005, the Court noted that the learned counsel for the Company prayed for time "to remove the defects pointed by the office". The prayer was granted. It also appears that according to the Registry, there were practical difficulties and logistic problems since the petition was against more than 200 employees. The learned counsel for the Company, therefore, on December 14, 2005, did not `press'the petition and petition was accordingly dismissed`as not pressed'. The said order was passed on December 14, 2005. Immediately thereafter, in January, 2006, separate petitions were filed by the Company against the workmen. It is thus clear that it was not a case of abandonment or giving up of claim by the Company. But, in view of office objection, practical difficulty and logistic problem, the petitioner Company did not proceed with an `omnibus' and composite petition against several workmen and filed separate petitions as suggested by the Registry of the High Court.

53. There is an additional reason also for coming to this conclusion on the basis of which it can be said that the Company was prosecuting the matter and there was no intention to leave the matter. As is clear, Writ petition No. 3060 of 2005 which was filed against one employee was very much alive and was never withdrawn/'note pressed'. If really the Company wanted to give up the claim, it would have withdrawn that petition as well. Thus, from the circumstances in their entirety, we hold that the objection raised by the learned counsel for the workmen has no force and is rejected.

MAINTAINABILITY OF CLAIM PETITIONS

54. The learned counsel for the Company contended that the courts below committed an error in not deciding the issueas to maintainability of claim petitions as preliminary issue and in rejecting the prayer of the Company. It was submitted that the workmen accepted the scheme, received the payment thereunder and separated from the Company. The relationship of master and servant came to an end on acceptance of voluntary retirement and payment of dues thereunder. It was thereafter not open to them to invoke the provisions of the Act by instituting claim petitions. The relationship of master and servant is sine qua non or condition precedent for the exercise of power under the Act by the Labour Court. It is thus a `jurisdictional fact' or `preliminary fact' which must exist before a Court assumes jurisdiction to entertain, deal with and decide the claim.

55. A `jurisdictional fact' is one on existence of which depends jurisdiction of a Court, Tribunal or an Authority. If the jurisdictional fact does not exist, the Court or Tribunal cannot act. If an inferior Court or Tribunal wrongly assumes the existence of such fact, a writ of certiorari lies. The underlying principle is that by erroneously assuming existence of jurisdictional fact, a subordinate Court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.

56. The counsel referred to a recent decision of this Court in *Arun Kumar v. Union of India*[12]. Speaking for the Court, one of us (C.K. Thakker, J.) observed: "A `jurisdictional fact' is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses".

57. It was further observed: "The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction".

58. Drawing the distinction between `jurisdictional fact' and `adjudicatory fact', the Court stated: "[I]t is clear that existence of `jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of `jurisdictional fact', it can decide the `fact in issue' or `adjudicatory fact'. A wrong decision on `fact in issue' or on `adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present".

59. The principle was reiterated in *Carona Ltd. v. Parvathi Swaminathan & Ors.*[13].

60. The learned counsel for the workmen, on the other hand, supported the view taken by the Courts below. He submitted that the issues sought to be raised by the Company are mixed issues of law and fact. It is the allegation of the workmen that they had not voluntarily accepted the scheme but they were compelled to accept it under duress and coercion. Moreover, it is their case in the claim petitions that they were not paid full amount even under the scheme. They, therefore, did not cease to be workmen of the Company and the relationship of master and servant between the parties continued. If it is so, an action not allowing them to work would amount to termination of service or removal from employment. In that eventuality, remedy under Section 31 of the Act is available and accordingly they had filed claim petitions. The question will have to be decided by the Labour Court on the evidence adduced by the parties and the issue as to maintainability cannot be decided in isolation and as preliminary issue as suggested by the Company.

61. It was also submitted that this Court has held that statutory Tribunals must decide all issues raised by the parties. This is particularly true to industrial disputes. Strong reliance was placed on *D.P. Maheshwari v. Delhi Administration*[14]. Dealing with a similar argument, this Court said:

> "There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes Where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Article 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of this Court under Article 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Article 226 and Article 136 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and Courts who are requested to decide preliminary questions must therefore ask them selves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections journeyings up and down. It is also worth while remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by

special tribunals at interlocutory stages and on preliminary issues". (emphasis supplied)

62. Reference was also made to *S.K. Verma v. Mahesh Chandra & Anr.*[15]. In that case, this Court commented that there appears to be three preliminary objections which have become quite the fashion to be raised by all employees. Firstly, there is no industry. Secondly, there is no industrial dispute. Thirdly, the workman is `no workman'.

63. The attention of the Court was also invited to *National Council for Cement & Building Materials v. State of Haryana*[16], wherein the Court deprecated the practice of the management to raise preliminary issues with a view to delay adjudication of industrial disputes.

64. In our considered opinion, in the present case, it cannot be said that the Courts below have committed any error of jurisdiction in not deciding the issue as to the maintainability of claim-petitions as preliminary issue. It is well settled that generally, all issues arising in a suit or proceeding should be tried together and a judgment should be pronounced on those issues.

65. Before more than hundred years, the *Privy Council in Tarakant v. Puddomoney*[17] favoured this approach.

66. Speaking for the Judicial Committee, Lord Turner stated:

> "The, Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points". (emphasis supplied)

67. The above principle has been consistently followed. This Court dealing with the provisions of Order XIV Rule 2 (prior to the amendment Act of 1976), in *Major S.S. Khanna v. Brigadiar F.J. Dillion*[18] stated;

> "Under Order 14 Rule 2, Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no

jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court; not to do so, especially when the decision on issues even oflaw depend upon the decision of issues of fact, would result in a lop-sided trial of the suit". (emphasis supplied)

68. The Law Commission also considered the question and did not favour the tendency of deciding some issues as preliminary issues. Dealing with Rule 2 of Order XIV (before the amendment), the Commission stated;

> "This rule has led to one difficulty. Where a case can be disposed of on a preliminary point (issue) of law, often the courts do not inquire into the merits, with the result that when, on an appeal against the finding on the preliminary issue the decision of the Court on that issue is reversed, the case has to be remanded to the Court of first instance for trial on the other issues. This causes delay. It is considered that this delay should be eliminated, by providing that a court must give judgment on all issues, excepting, of course, where the Court finds that it has no jurisdiction or where the suit is barred by any law for the time being in force". (emphasis supplied)

69. Apart from the fact that the provisions of Code do not stricto sensu apply to `industrial adjudication', even under the Code, after the *Amendment Act, 1976*, the normal rule is to decide all the issues together in a civil suit. In the case on hand, the contention of the workmen is that the acceptance of the scheme was not with free consent, and even otherwise they were not given all the benefits to which they were entitled under the scheme. Therefore, they continued to remain employees of the Company. The Labour Court felt that the controversy raised by the workmen can only be decided in the light of the evidence before it. The said decision has been confirmed by the Industrial Court as well as by the learned Single Judge. We find no illegality in this approach which deserves interference under Article 136 of the Constitution. We, therefore, see no substance in the contention of the Company.

OPTION FOR RETIREMENT : WHETHER VOLUNTARY?

70. The learned counsel for the Company contended that the workmen had opted for and accepted voluntary retirement under the scheme floated by the employer and had received all the benefits thereunder. Thereafter it was not open to them to turn round and challenge the action of the Company. The workmen cannot `blow hot and cold', `fast and loose' or `approbate and reprobate'. The counsel, in this connection, referred to a number of decisions on the general principle of estoppel as also cases relating to acceptance of voluntary retirement by employees.

71. The learned counsel for the workmen urged that the case of the employees was that they had not opted for the scheme and the `so called' voluntary retirement is no retirement in the eye of law. The phrase `voluntary retirement scheme' itself presupposes that acceptance of retirement should be voluntary and must have been opted by employees with `free consent'. The counsel submitted that the workmen never accepted the scheme with free

consent but it was thrust upon them and under compulsion, duress and coercion, they were forced to submit to the illegal action of the Company. That was the reason for the workmen to approach Labour Court by filing claim petitions.

72. We would have gone into the larger question had it been decided by the Courts below in the light of the decisions of this Court. But as stated above, in the present appeals, we are not called upon to consider the merits of the matter. The claim petitions are pending before the labour Court. The present proceedings are against interlocutory orders. Any observation, one way or the other, may cause prejudice to one or the other party. We, therefore, refrain from entering into allegations and counter-allegations by granting liberty to both the parties to raise all contentions available in law. We also direct the Labour Court to consider the matter on merits and pass an appropriate order in consonance with law.

ORDER TO REFUND AMOUNT

73. The learned counsel for the workmen contended that the order passed by the Division Bench of High Court directing refund of amount received by the workmen to the Company was illegal, unlawful and without jurisdiction. It was submitted that once the Court held that intra court appeals instituted by the Company were not maintainable, it ought to have dismissed them without passing any order as to refund.

74. The Division Bench, in paragraph 7, stated; "Learned counsel has further submitted that the respondent-employee is estopped from challenging the VRS and seeking reinstatement as the employee has already pocketed the money and received the other benefits in accordance with the said Scheme. Since the employees who have approached the Labour Court claiming that by deceitful means or coercion, they were made to accept the voluntary retirement and received the benefit thereunder, it would be equitable to direct that any employee who wants to maintain a petition under Section 31 (3) of the M.P.I.R. Act against the said VRS and to seek reinstatement, should return the benefits received to the employer, subject to the condition and undertaking as offered by the learned counsel fort he appellant, that in the event, the Labour Court refund of the amount and other benefits to the employee concerned, the same would be restored to the employee with interest at the rate of six per cent per annum. It is made clear that the Labour Court shall decline to proceed with the application of the employee who doesnot refund the amount to the employer as hereinabove directed. The learned counsel for the respondents has no objection to the benefits being refunded to the employer during the pendency of the case before the Labour Court subject to the result of the case".

75. The learned counsel in this connection referred to a leading decision of this Court in *Kiran Singh v. Chaman Paswan*[19]. Dealing with the provisions of Code of Civil Procedure, 1908 and jurisdiction of Civil Courts, this Court stated;

> "It is fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up

whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction ...strikes on the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties." (emphasis supplied)

76. Reference was also made to a recent decision of this Court in *Harshad Chiman Lal Modi v. DLF Universal Ltd. & Anr.*[20]. Referring to Kiran Singh as also several other decisions, it was held by this Court that if the Court has no jurisdiction toentertain a particular claim or matter, neither acquiescence nor express consent of the parties can confer jurisdiction upon it. An order passed by a Court having no jurisdiction is nullity and non est. It was submitted that even otherwise the learned Single Judge was right in not issuing an order for refund of amount.

77. The learned counsel for the Company submitted that the direction of refund of amount is proper, fair and in consonance with principles of justice, equity and good conscience. If the case of the workmen is that they had never accepted retirement voluntarily; that it was imposed upon them under duress and they were forced to receive payment under Voluntary Retirement Scheme under pressure, compulsion or coercion and were constrained to approach Labour Court asserting that they continued to be workmen of the Company, it was expected of them even in absence of any order or direction to refund the amount received by them. They could not have resiled from the position by retaining the benefits which they never wanted but were thrust upon them against their will. The workmen could not have best of both the worlds, i.e. to contend that they are still workmen of the Company but at the same time, they would not part with the amount received by them for leaving the Company for ever. The High Court, balancing equity between the parties, issued direction to return the amount received under the scheme which calls for no interference by this Court in exercise of equitable jurisdiction under Article 136 of the Constitution.

78. It was also submitted that even if it is held that Letter Patent Appeals were not maintainable, the Company has approached this Court and considering that circumstance also, the direction may be upheld if the Court is of the view that Claim Petitions filed by the workmen should be considered on merits and should be decided by Labour Court in accordance with law. The counsel also submitted that when the claims were lodged by the workmen, they themselves had stated that they were ready and willing to refund the amount which they had received under the `purported' Voluntary Retirement Scheme. It was, therefore, submitted that the order as to refund of amount needs no interference.

79. Since we have held that the decision of the Labour Court, confirmed by the Industrial Court as well as by the High Court in not deciding issues Nos. 4(a), 4(b) and 4(c) as preliminary issues cannot be said to be illegal or contrary to law and those issues will be decided by the Labour Court along with other issues on merits, the Labour Court will consider whether the Company was right in contending that the workmen accepted retirement voluntarily and there was cessation of relationship of master and servant between them and the Claim Petitions were not

maintainable. In the circumstances, it would not be proper for this Court to express any opinion at this stage on merits. A short question which remains to be considered is whether on the facts and in the circumstances of the case, the direction of the High Court can be said to be unjust, unfair or unreasonable?

80. Now, it is well settled that jurisdiction of High Courts under Articles 226 and 227 is discretionary and equitable. Before more than half a century, the High Court of Allahabad in the leading case of *Jodhey v. State*[21] observed;

> "There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein." (emphasis supplied)

81. The power of superintendence under Article 227 of the Constitution conferred on every High Court over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised ex debito justitiae, i.e. to meet the ends of justice. It is equitable in nature. While exercising supervisory jurisdiction, a High Court not only acts as a court of law but also as a court of equity. It is, therefore, power and also the duty of the Court to ensure that power of superintendence must `advance the ends of justice and uproot injustice'.

82. In *Roshan Deen vs. Preeti Lal*[22] dealing with an order passed by the High Court setting aside an order of Commissioner for Workmen's Compensation, this Court stated;

> "Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law". (emphasis supplied)

83. In *Gadde Venkateswara Rao v. Government of Andhra Pradesh & Ors.*[23] a Primary Health Centre was formerly inaugurated at village `A' subject to certain conditions. Since those conditions were not satisfied, it was resolved by Panchayat Samithi to shift it to village `B'. The Government set aside the said resolution without giving notice to the Samithi. Subsequently, however, the Government reviewed the said order without giving opportunity of being heard to the affected persons. The action was challenged in the High Court. The High Court held that the order passed by the Government on review was bad. It, however, did not interfere with the order on merits. In this Court it was contended that an order passed on review by the

Government was illegal since no opportunity of hearing was afforded and the High Court was wrong in not setting aside the said order. This Court, however, did not interfere with the order passed by the High Court observing that "if the High Court had quashed the order passed by the Government, it would have restored an illegal order and would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi". In the opinion of this Court, therefore, the High Court was right in refusing to exercise discretionary power in the circumstances of the case.

84. In *Commissioner of Income Tax, Madras v. Vinod Kumar Didwania*[24] certain prohibitory orders under the Income Tax Act, 1961 were passed against the assessee in connection with removal of goods. By filing a petition under Article 226 of the Constitution, the assessee challenged the legality of those orders. He obtained ex parte interim injunction, removed the goods and thereafter withdrew the petition. The Revenue challenged the said action by approaching this Court. The Court held that the assessee had abused the process of law and he could not be allowed to retain undue benefit received by him.

85. In *Chief Settlement Commissioners v. Ram Singh*[25] this Court held that an order of allotment of land in excess of lawful entitlement does not allow such allottee to insist that excess land should not be taken away from him.

86. In *Mohammad Swalleh v. Third Additonal District Judge, Meerut*[26] an erroneous order was passed by the Prescribed Authority refusing to grant eviction of the tenant under the relevant law. It was set aside by the District Court in appeal though no such appeal was maintainable. When the matter reached this Court, the Court refused to interfere with the order since justice had been done "though technically the appellant had a point that the order of the District Judge was illegal and improper".

87. The learned counsel for the Company placed heavy reliance on *Shangrilla Food Products Ltd. v. Life Insurance Corporation of India*[27]. In a suit by A, an order was passed by the Estate Officer against B holding that it was in unauthorized occupation and was liable to be evicted under the *Public Premises (Eviction of Unauthorised Occupants) Act, 1971*. He also ordered B to pay damages of Rs. 12 lakhs. An appeal was filed by B against the order and the Appellate Authority confirmed the order of eviction. The High Court, however, felt that an opportunity ought to have been afforded to B to prove that it was a lawful sub-tenant. The matter, therefore, required remand. At that stage, A prayed that in that case, the matter be remanded as a whole to be decided afresh considering the question of payment of rent/damages also. The High Court upheld the plea, negativing the contention of B that A had never challenged the order setting aside the direction as to payment of damages. B approached this Court.

88. Dismissing the appeal, confirming the order of the High Court and adverting to substantial justice, this Court stated;

> "It is well-settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognizance of the entire facts and circumstances of the

> case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief. What precisely has been done by the learned Single Judge is clear from the above emphasized words which be re-read with advantage. The question of claim to damages and their ascertainment would only arise in the event of the Life Insurance Corporation, respondent, succeeding to prove that the appellant Company was an unlawful sub-tenant and therefore in unauthorised occupation of public premises. If the finding were to go in favour of the appellant Company and it is proved to be a lawful sub-tenant and hence not an unauthorized occupant, the direction to adjudge the claim for damages would be rendered sterile and otiose. It is only in the event of the appellant Company being held to be an unlawful sub-tenant andhence an unauthorised occupant that the claim for damages would be determinable. We see therefore no fault in the High Court adopting such course in order to balance the equities between the contestants especially when it otherwise had power of superintendence under Article 227 of the Constitution in addition. We cannot be oblivious to the fact that when the occupation of the premises in question was a factor in continuation the liability to pay for the use and occupation thereof, be it in the form of rent or damages, was also a continuing factor. The cause of justice, as viewed by the High Court, did clearly warrant that both these questions be viewed inter-dependently. For those who seek equity must bow to equity". (emphasis supplied)

89. From the above cases, it clearly transpires that powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the Court must take into account balancing interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. As observed by this Court in *Shiv Shankar Dal Mills v. State of Haryana*[28] Courts of equity should go much further both to give and refuse relief in furtherance of public interest. Granting or withholding of relief may properly be dependent upon considerations of justice, equity and good conscience.

90. In our considered opinion, taking into account facts and circumstances in their entirety, the order passed and direction issued by the Division Bench of the High Court was in furtherance of justice. Not only it has not resulted in miscarriage of justice, in fact it has attempted to put status quo ante by balancing interests and leaving the matter to be decided by a Competent Authority in accordance with law.

91. Even otherwise, according to the workmen, they were compelled to accept the amount and they received such amount under coercion and duress. In our considered opinion, they cannot retain the benefit if they want to prosecute Claim Petitions instituted by them with the

Labour Court. Hence, the order passed by the Division Bench of the High Court as to refund of amount cannot be termed unjust, inequitable or improper. Hence, even if it is held that a `technical' contention raised by the workmen has some force, this Court which again exercises discretionary and equitable jurisdiction under Article 136 of the Constitution, will not interfere with a direction which is in consonance with the doctrine of equity. It has been rightly said that a person "who seeks equity must do equity". Here the workmen claim benefits as workmen of the Company, but they do not want to part with the benefit they have received towards retirement and severance of relationship of master and servant. It simply cannot be permitted. In our judgment, therefore, the final direction issued by the Division Bench needs no interference, particularly when the Company has also approached this Court under Article 136 of the Constitution.

92. For the foregoing reasons, in our opinion, the order passed by the Division Bench of the High Court deserves to be confirmed and is hereby confirmed. The payment which is required to be made as per the said order should be made by the applicants intending to prosecute their claims before the Labour Court, Mandsour. In view of the fact, however, that the said period is by now over, ends of justice would be served if we extend the time so as to enable the applicants to refund the amount. We, therefore, extend the time up to December 31, 2008 to make such payment. We may, however, clarify that Claim Petitions will not be proceeded with till such payment is made. If the payment is not made within the period stipulated above, the Claim Petitions of those applicants will automatically stand dismissed. The Labour Court will take up the claim petitions after December 31, 2008.

93. Before parting with the matter, we may clarify that we have not expressed any opinion on the merits of the case one way or the other. And as and when the matter will come up before the Labour Court, Mandsour, (if the conditions referred to above have been complied with and refund of payment is made), the Labour Court will consider the Claim Petitions on their own merits without being influenced by any observations made in this judgment. All contentions of all parties including the contention as to maintainability or otherwise of Claim Petitions are kept open. Civil Appeals stand disposed of accordingly. On the facts and in the circumstances of the case, however, there shall be no order as to costs all throughout.

[1]1986 Supp SCC 401 *[2](1955) 1 SCR 1104:AIR 1955 SC 23* *[3](1998) 5 SCC 749*
[4](1962) 1 SCR 574 *[5](1987) 1 SCC 5* *[6]1991 Supp (2) SCC 109*
[7](2002) 7 SCC 500 *[8](1975) 16 Guj LR 806* *[9](1996) 11 SCC 167*
[10](2000) 5 SCC 458 *[11](2008) 1 SCC 494* *[12](2007) 1 SCC 732*
[13](2007) 1 SCC 559 *[14](1983) 4 SCC 293* *[15](1983) 4 SCC 214*
[16](1996) 3 SCC 306 *[17](1866) 10 MIA 476* *[18](1964) 4 SCR 409*
[19](1955) 1 SCR 117 *[20](2005) 7 SCC 791* *[21]AIR 1952 All 788*
[22](2002) 1 SCC 100 *[23](1966) 2 SCR 172* *[24]AIR 1987 SC 1260*
[25](1987) 1 SCC 612 *[26](1988) 1 SCC 40* *[27](1996) 5 SCC 54*
[28](1980) 1 SCR 1170