arises out of a judgment and order dated 6.2.2004 passed by a division bench of the high court of judicature at allahabad in civil misc. Writ petition no. 23890 of 1992 dismissing the appeal preferred by the appellant herein arising out of a judgment and order dated 8th july, 1992. The appellant is an undertaking of the state of uttar pradesh. The respondent herein was appointed on 23rd july, 1984 in a project known as project peetal basti by the appellant for looking after the construction of building, cement loading and unloading. He worked in the said project from 23.7.1984 till 8.1.1987. He was thereafter appointed in non- ferrous rolling mill. By an order dated 12/13.2.1987, the competent authority of the non- ferrous mill of the appellant passed the following order: "following two persons are hereby accorded approval for appointment in non- ferrous rolling mill on minimum daily wages for the period w.e.f. Date indicated against their name till 31-3-1987.

S no. Name date

1. Sh. Hori lal 7-1-1987
2. Sh. Uday narain pandey 8-1-1987"

The services of the respondent were terminated on the expiry of his tenure. An industrial dispute having been raised, the appropriate government by an order dated 14.9.1998 referred the following dispute for adjudication by the presiding officer, labour court, uttar pradesh:

Whether the employer's decision to terminate the workman sh. Uday narain son of pateshwari pandey w.e.f. 1-4-87 was illegal and improper? If yes whether the concerned workman is entitled to the benefit of retrenchment and other benefit? The project officer of the appellant-corporation appears to have granted a certificate showing the number of days on which the respondent performed his duties. The labour court in its award dated 31.10.1991 came to the finding that the respondent worked for more than 240 days in each year of 1985-1986. It was directed:

Therefore, i reached to the decision that the employer should reinstate the concerned workman uday narain pandey son of sh. Pateshwari pandey w.e.f. The date of retrenchment i.e. 1-4-87 and he should be paid entire back wage with any other allowances w.e.f. Same date within 30 days from the date of this order together with rs. 50/- towards cost of litigation to sh. Uday narain pandey. I decide accordingly in this industrial dispute.

The appellant herein filed a writ petition before the allahabad high court in may, 1992 which was marked as civil misc. Writ petition no. 23890 of 1992 inter alia contending that as the respondent had not rendered service continuously for a period of 240 days during the period of 12 calendar months immediately before his retrenchment uninterruptedly, he was not a workman within the meaning of section 2(z) of the u.p. Industrial disputes act. It was further contended that the appointment of the respondent was on contractual basis for a fixed tenure which came to an end automatically as stipulated in the aforementioned order dated 12/13.2.1987.

An application was filed by the respondent herein under the payment of wages act wherein an award was passed. The said order was also questioned by the appellant by filing a writ application before the high court and by an order dated 12.8.1993, the high court directed it to pay a sum of rupees ten thousand to the respondent. Pursuant to or in furtherance of the said order, the respondent is said to have been paid wages upto february, 1996. By reason of the impugned order dated 6.2.2004, the writ petition was dismissed holding:

Having heard the learned counsel for the petitioners and having perused the record, i am of the opinion that the aforesaid findings recorded by the labour court cannot be said to be perverse. The learned senior counsel then contended that the petitioner no. 1 i.e. U.p. State brassware corporation ltd. Has been closed down. Be that as it may, the position of the respondent workman would be the same as that all the similar employees and this cannot be a ground to set aside the award of the labour court.

Ms. Rachana srivastava, learned counsel appearing on behalf of the appellant would bring to our notice that the appellant's industries have been lying closed since 26.3.1993 and in that view of the matter, the

labour court as also the high court committed a serious error in passing the impugned judgment. The appointment of the respondent, the learned counsel would contend, being a contractual one for a fixed period, section 6-n of the u.p. Industrial disputes act would have no application.
Relying on or on the basis of the principle of 'no work no pay', it was urged that for the period the respondent did not work, he was not entitled to any wages and as such the grant of back wages by the labour court as also by the high court is wholly illegal, particularly, in view of the fact that no statement was made in his written statement filed before the labour court that he was not employed with any other concern. In any event, the respondent was also not interested in a job. In support of the aforementioned contention, reliance has been placed on ***kendriya vidyalaya sangathan*** **verses.** ***S.c. Sharma*** and ***allahabad jal sansthan*** **verses.** ***Daya shankar rai*** mr. Bharat sangal, learned counsel appearing on behalf of the respondent, on the other hand, would submit that section 2 (bb) of the industrial disputes act, 1947 applies to the workmen working in the state of uttar pradesh as there does not exist any such provision in the u.p. Industrial disputes act. It was conceded that in view of the fact that establishment of the appellant was sold out on 26.3.1993, the respondent may not be entitled to an order of reinstatement with full back wages but having regard to the fact that his services were wrongly terminated with effect from 1.4.1987, he would be entitled to back wages for the entire period from 1.4.1987 till 26.3.1993 besides the amount of compensation as envisaged under the u.p. Industrial disputes act.
Payment of back wages, mr. Sangal would urge, is automatic consequent upon a declaration that the order of termination is unsustainable for any reason whatsoever and in particular when it is found to be in violation of the provisions of section 6-n of the u.p. Industrial disputes act.
It is not in dispute that the respondent was appointed on daily wages. He on his own showing was appointed in a project work to look after the construction of building. The construction of the building, the learned labour court noticed, came to an end in the year 1988. The reference by the appropriate government pursuant to an industrial dispute raised by the respondent was made in the year 1990. A decision had been taken to close down the establishment of the appellant as far back on 17.11.1990 where for a government order, go no. 395/18 niryat-3151/90 dated 17.11.1990 was issued. In its rejoinder affidavit filed before the high court, it was contended that the said go was implemented substantially and all the employees including the regular employees save and except some skeleton staff for winding up were retrenched. The non ferrous mill of the appellant was sold on 26.3.1993. The labour court in its impugned award has not arrived at any finding that the order of appointment dated 8.1.1987 whereby the respondent was appointed afresh in the non ferrous rolling mill was by way of unfair labour practice. It is, however, true that the appellant relying on or on the basis of the aforementioned order dated 12/13.2.1987 in terms whereof the respondent's services were approved for appointment in the said mill on minimum daily wages for the period 8.1.1987 till 31.3.1987 terminated his services without giving any notice or paying salary of one month in lieu thereof. No compensation in terms of section 6-n of the u.p. Industrial disputes act was also paid. Before adverting to the decisions relied upon by the learned counsel for the parties, we may observe that although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is being taken by the court realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/ or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. It is not disputed that the respondent did not plead that he after his purported retrenchment was wholly unemployed.
Section 6-n of the u.p. Industrial disputes act provides for service of one month notice as also payment of compensation to be computed in the manner laid down therein. Proviso to clause (a) of the said

provision, however, excludes the requirement of giving such notice in the event the appointment was for a fixed tenure.

Section 25b(2)(a) of the industrial disputes act raises a legal fiction that if a workman has actually worked under the employer continuously for a period of more than 240 days during a period of twelve calendar months preceding the date with reference to which calculation is to be made, although he is not in continuous service, he shall be deemed to be in continuous service under an employer for a period of one year. The labour court although passed its award relying on or on the basis of the certificate issued by the appellant, it did not hold that during the preceding 12 months, namely, for the period 1st april, 1986 to 31st march, 1987 the workman had completed 240 days of service. Unfortunately, neither the labour court nor the high court considered this aspect of the matter in right perspective.

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of section 6-n of the u.p. Industrial disputes act.

Section 2(oo)(bb) of the central act as inserted by industrial disputes amendment act, 1984 is as under:

"2. Definitions- in this act, unless there is anything repugnant in the subject or context, 'retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;" however, a similar provision has not been enacted in the u.p. Industrial disputes act. The contention of the appellant, as noticed hereinbefore, was that the respondent having been appointed for a fixed period was not entitled to any compensation under the provisions of section 6-n of the u.p. Industrial disputes act. But, in this connection our attention has been drawn to a 2-judge bench decision of this court in ***uttar pradesh state sugar corporation ltd.*** **Verses** ***om prakash upadhyay*** wherein it was held that in view of section 31(1) of industrial disputes (amendment and miscellaneous provisions) act, 1956, the provisions of section 2 (bb) of the central industrial disputes act would not be applicable. In that view of the matter, although no notice was required to be service in view of the proviso to clause (a) of section 6-n of the u.p. Industrial disputes act, compensation there for as provided for in clause (b) was payable. But, it is not necessary for us to go into the correctness or otherwise of the said decision as it is not disputed that before the provisions of section 6-n of the u.p. Industrial disputes act can be invoked, the concerned workman must work at least for 240 days during a period of twelve calendar months preceding the date with reference to which calculation is to be made.

However, as the question as regard termination of service of the respondent by the appellant is not in issue, we would proceed on the basis that the services of the respondent were terminated in violation of section 6-n of the u.p. Industrial disputes act. The primary question, as noticed by us herein before, is as to whether even in such a situation the respondent would be entitled to the entire back wages.

Before adverting to the said question in a bit more detail, let us consider the decisions relied upon by mr. Sangal.

In ***hindustan tin works pvt. Ltd.*** **Verses.** ***Employees of hindustan tin works pvt. Ltd.*** His court merely held that the relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It, therefore, does not lay down a law in absolute terms to the effect that right to claim back wages must necessarily follow an order declaring that the termination of service is

invalid in law. In ***hindustan tin works*** notice for retrenchment was issued *inter alia* for non availability of raw material to utilize the full installed capacity, power shedding limiting the working of the unit to 5 days a week and the mounting loss which were found to be factually incorrect. The real reason for issuing such a notice was held to be "the annoyance felt by the management consequent upon the refusal of the workmen to agree to the terms of settlement contained in the draft dated 5th april, 1974".

Laws proverbial delay, it was urged therein, is a matter which should be kept in view having regard to the fact situation obtaining in each case and the conduct of the parties. Such a contention was raised on the ground that the company was suffering losses. The court analysed factual matrix obtaining therein to the effect that a sum of rs. 2,80,000/- was required to be paid by way of back wages and an offer was made by way of settlement to pay 50% of the back wages observing: "now, undoubtedly the appellant appears to have turned the corner. The industrial unit is looking up. It has started making profits. The workmen have already been reinstated and, therefore, they have started earning their wages. It may, however, be recalled that the appellant has still not cleared its accumulated loss.

Keeping in view all the facts and circumstances of this case it would be appropriate to award 75% of the back wages to the workmen to be paid in two equal instalments."

It will, therefore, be seen that this court itself, having regard to the factual matrix obtaining in the said case, directed payment of 75% of the back wages and that too in two equal instalments.

In ***management of panitole tea estate*** **verses** ***the workmen***, a two judge bench of this court while considering the question as regard grant of relief or reinstatement, observed:

The general rule of reinstatement in the absence of special circumstances was also recognised in the case of ***workmen of assam match co. Ltd.*** **Verses.** ***Presiding officer, labour court, assam*** and has again been affirmed recently in ***tulsidas paul*** **verses** ***second labour court, w.b***. In ***tulsidas paul*** it has been emphasised that no hard and fast rule as to which circumstances would establish an exception to the general rule could be laid down and the tribunal must in each case decide the question in a spirit of fairness and justice in keeping with the objectives of industrial adjudication.

In ***surendra kumar verma*** **verses** ***central government industrial tribunal-cum- labour court, new delhi*** , this court refused to go into the question as to whether termination of services of a workman in violation of the provisions of section 25f is void ab initio or merely invalid or inoperative on the premise that semantic luxuries are misplaced in the interpretation of 'bread and butter' statutes. In that context, chinnappa reddy, j. Observed:

Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-`-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted.

Yet again, no law in absolute terms had been laid down therein. The court proceeded on the basis that there may be situations where grant of full back wages would be inequitable. In the fact situation obtaining therein, the court, however was of the opinion that there was no impediment in the way of awarding the relief. It is interesting to note that pathak, j., as his lordship then was, however was of the view:
"ordinarily, a workman who has been retrenched in contravention of the law is entitled to reinstatement with full back wages and that principle yields only where the justice of the case in the light of the particular facts indicates the desirability of a different relief."
The expression 'ordinarily' must be understood given its due meaning. A useful reference in this behalf may be made to a 4-judge bench decision of this court in ***jasbhai motibhai desai verses roshan kumar, haji bashir ahmed*** wherein it has been held:
35. The expression "ordinarily" indicates that this is not a cast-iron rule. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority, even though he has no proprietary or
Even a fiduciary interest in the subject-matter. That apart, in exceptional cases even a stranger or a person who was not a party to the proceedings before the authority, but has a substantial and genuine interest in the subject-matter of the proceedings will be covered by this rule. The principles enunciated in the english cases noticed above, are not inconsistent with it.
In ***j.n. Srivastava*** **verses** ***union of india*** again no law has been laid down in the fact situation obtaining therein. The court held that the workmen had all along been ready and willing to work, the plea of 'no work no pay' as prayed for should not be applied.
We may notice that in ***m.d., u.p. Warehousing corpn.*** **Verses** ***vijay narayan vajpayee*** and jitendra singh rathor verses. Shri baidyanath ayurved bhawan ltd. Although an observation had been made to the effect that in a case where a breach of the provisions of section 25-f has taken place, the workmen cannot be denied back wages to any extent, no law, which may be considered to be binding precedent has been laid down therein. In ***p.g.i. Of medical education & research, chandigarh*** **verses** ***raj kumar***, banerjee, j., on the other hand, was of the opinion: the learned counsel appearing for the respondents, however, placed strong reliance on a later decision of this court in ***pgi of m.e. & research chandigarh*** **verses** ***vinod krishan sharma*** wherein this court directed payment of balance of 60% of the back wages to the respondent within a specified period of time. It may well be noted that the decision in soma case has been noticed by this court in ***vinod sharma*** case wherein this court apropos the decision in soma case observed: "a mere look at the said judgment shows that it was rendered in the peculiar facts and circumstances of the case. It is, therefore, obvious that the said decision which centred round its own facts cannot be a precedent in the present case which is based on its own facts." we also record our concurrence with the observations made therein. Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. As regards the decision of this court in hindustan tin works (p) ltd. Be it noted that though broad guidelines, as regards payment of back wages, have been laid down by this court but having regard to the peculiar facts of the matter, this court directed payment of 75% back wages only.
The decisions of this court strongly relied upon by mr. Sangal, therefore, do not speak in one voice that the industrial court or for that matter the high court or this court would not have any discretionary role to play in the matter of moulding the relief. If a judgment is rendered merely having regard to the fact situation obtaining therein, the same, in our opinion, could not be a declaration of law within the meaning of article 141 of the constitution of india.
It is one thing to say that the court interprets a provision of a statute and lays down a law, but it is another thing to say that the courts although exercise plenary jurisdiction will have no discretionary

power at all in the matter of moulding the relief or otherwise give any such reliefs, as the parties may be found to be entitled to in equity and justice. If that be so, the court's function as court of justice would be totally impaired. Discretionary jurisdiction in a court need not be conferred always by a statute. Order vii, rule 7 of the code of civil procedure confers power upon the court to mould relief in a given situation. The provisions of the code of civil procedure are applicable to the proceedings under the industrial disputes act. Section 11-a of the industrial disputes act empowers the labour court, tribunal and national tribunal to give appropriate relief in case of discharge or dismissal of workmen.
The meaning of the word 'discharge' is somewhat vague. In this case, we have noticed that one of the contentions of the appellant was that the services of the respondent had been terminated in terms of its order dated 12/13.2.1987 whereby and whereunder the services of the respondent herein was approved till 31.3.1987. The industrial disputes act was principally established for the purpose of pre-empting industrial tensions, providing the mechanics of dispute-resolutions and setting up the necessary infrastructure so that the energies of partners in production may not be dissipated in counter-productive battles and assurance of industrial justice may create a climate of goodwill. [see ***lic* verses *d.j. Bahadur*** industrial courts while adjudicating on disputes between the management and the workmen, therefore, must take such decisions which would be in consonance with the purpose the law seeks to achieve. When justice is the buzzword in the matter of adjudication under the industrial disputes act, it would be wholly improper on the part of the superior courts to make them apply the cold letter of the statutes to act mechanically. Rendition of justice would bring within its purview giving a person what is due to him and not what can be given to him in law.
A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an industrial court shall lose much of its significance. The changes brought about by the subsequent decisions of this court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalization, privatization and outsourcing is evident.
In ***hindustan motors ltd.* Verses *tapan kumar bhattacharya***, this court noticed **raj kumar** and ***hindustan tin works*** but held:
As already noted, there was no application of mind to the question of back wages by the labour court. There was no pleading or evidence whatsoever on the aspect whether the respondent was employed elsewhere during this long interregnum. Instead of remitting the matter to the labour court or the high court for fresh consideration at this distance of time, we feel that the issue relating to payment of back wages should be settled finally. On consideration of the entire matter in the light of the observations referred to supra in the matter of awarding back wages, we are of the view that in the context of the facts of this particular case including the vicissitudes of long-drawn litigation, it will serve the ends of justice if the respondent is paid 50% of the back wages till the date of reinstatement...
The court, therefore, emphasized that while granting relief application of mind on the part of the industrial court is imperative. Payment of full back wages, therefore, cannot be the natural consequence.
The said decisions were, however, distinguished in ***mohan lal* verses *management of m/s. Bharat electronics ltd.*** Desai, j. Was of the opinion:
17. But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits. No case is made out for departure from this normally accepted approach of the courts in the field of social justice and we do not propose to depart in this case. In ***allahabad jal sansthan* verses *daya shankar rai***, in which one of us was a party, this court had taken into consideration most of the decisions relied upon by mr. Sangal and observed:

A law in absolute terms cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The labour court and/or industrial tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. It is not in dispute that respondent 1 herein was appointed on an ad hoc basis; his services were terminated on the ground of a policy decision, as far back as on 24-1-1987. Respondent 1 had filed a written statement wherein he had not raised any plea that he had been sitting idle or had not obtained any other employment in the interregnum. The learned counsel for the appellant, in our opinion, is correct in submitting that a pleading to that effect in the written statement by the workman was necessary. Not only no such pleading was raised, even in his evidence, the workman did not say that he continued to remain unemployed. In the instant case, the respondent herein had been reinstated from 27-2-2001.
It was further stated:
16. We have referred to certain decisions of this court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realised that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.
Yet again in ***general manager, haryana roadways*** **verses** ***rudhan singh***, a 3-judge bench of this court in a case where the workman had worked for a short period which was less than a year and having regard to his educational qualification, etc. Denied back wages although the termination of service was held to have been made in violation of section 25f of the industrial disputes act, 1947 stating: a host of factors like the manner and method of selection and appointment i.e. Whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. From the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.
The only question is whether the respondent would be entitled to back wages from the date of his termination of service till the aforementioned date. The decision to close down the establishment by the state of uttar pradesh like other public sector organizations had been taken as far back on 17.11.1990 where for a go had been issued. It had further been averred, which has been noticed hereinbefore, that the said go has substantially been implemented. In this view of the matter, we are of the opinion that interest of justice would be sub served if the back wages payable to the respondent for the period 1.4.1987 to 26.3.1993 is confined to 25% of the total back wages payable during the said period. The judgments and orders of the labour court and the high court are set aside and it is directed that the

respondent herein shall be entitled to 25% back wages of the total back wages payable during the aforesaid period and compensation payable in terms of section 6-n of the u.p. Industrial disputes act. If, however, any sum has been paid by the appellant herein, the same shall be adjusted from the amount payable in terms of this judgment. For the reasons aforementioned, the appeal is allowed in part and to the extent mentioned hereinbefore. However, there shall be no order as to costs.

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