(1979) 07 BOM CK 0003

Bombay High Court

Case No: Spl. C. Application No. 609 of 1975 and Spl. C. Application No. 200 of 1978

Bombay Union Dyeing and Bleaching Mills		APPELLANT
	Vs	
Narayan Tukaram More and another		RESPONDENT

Date of Decision: July 30, 1979

Acts Referred:

- Bombay Industrial Relations Act, 1946 - Section 35, 40
- Industrial Disputes Act, 1947 - Section 2(kkk), 25B, 25C, 25F, 25F
- Payment of Gratuity Act, 1972 - Section 2, 2(c), 2(c), 2(e), 4

Citation: (1980) MhLj 171

Hon'ble Judges: M.N. Chandurkar, J; D.B. Deshpande, J

Bench: Division Bench

Advocate: N.B. Shetye with Nishita Pradhan and L.V. Talavalikar in Spl. C. appln. No 609 of 1975 Dr. R.S. Kulkarni with I.A. Saiyad in Spl. C. appln. No. 200 of 1978, for the Appellant; H.K. Sowani for respondent No. 1 in Spl. C. Appln. No 609 of 1975 and B.N. Shrikrishna for respondent No. 1 in Spl. C. Appln. No. 200 of 1978, for the Respondent

Final Decision: Dismissed

Judgement

M.N. Chandurkar, J.
Both these petitions which raised a question as to the construction of the definition of "continuous service" in section 2 (c) of the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act") have been heard together and will stand disposed of by this judgment.

2. Special Civil Application No. 609 of 1975 is filed by the employer Messrs Bombay Union Dyeing and Bleaching Mills, Bombay. It arises out of an order made by the appellate authority under the Act in an appeal arising out of the order of the controlling authority under the Act on an application making a claim for gratuity by

the employee. The employee claimed gratuity on the basis that he was in employment from March 1961 till he resigned on 1st June 1973 and thus a sum of Rs. 1,243 was due from the employer by way of gratuity. The employer admitted that the period of employment of the employee was from 21st January 1963 to 1st June 1973 but took the stand that out of ten years of service the employee rendered service for 240 days in a year only during four years and that gratuity was paid to him on that basis. The Labour Court which was the controlling authority took the view that there has been no break in service as contemplated in the definition of "continuous service" so as to restrict the claim of the employee to four years during which he is alleged to have actually worked for 240 days in a year. The Labour Court, therefore, granted claim of the employee.

3. In an appeal by the employer it was contended that the employee was absent without leave for a long period in almost every year with the result that the total number of days in a year on which he actually worked came to 240 only in four years and having regard to the Explanation to the definition of "continuous service" in the Act, he would not be entitled to gratuity for the years during which he had not actually worked for 240 days in a year. The appellate authority, namely, the Industrial Court, took the view that absence without leave in the case of an employee could not be treated as a break in service and did not disentitle the employee from claiming that he has been in continuous service. With regard to the Explanation to the definition of "continuous service", it was contended before the Industrial Court on behalf of the employer that in order to claim gratuity, the employee must have actually worked and the phrase "rendered continuous service" should be interpreted as meaning actually worked for 240 days. This contention was rejected and the Industrial Court held that what "was. to be seen for the purposes of the Explanation was whether the relationship of employer and employee has been continuous and not whether the employee has actually been on work because of subsistence of jural relationship of employer and employee". The Industrial Court held that "in order that a case may be brought under Explanation I, i. e. where an employee can be said to be not in uninterrupted service, it must be shown that the relationship of employer and employee has ceased and even if it has so ceased, it can be shown that the relationship continued for 240 days and the benefit of such relationship will also qualify for claiming gratuity for that year". The Industrial Court took a positive view that whether the case was covered by the first Explanation to the definition of continuous service or the principal clause of the definition of continuous service "the employment or being employed has to be interpreted as comprising the subsistence of relationship of employer and employee and Dot necessarily rendering of actual work or being on duty or performing work." The employer is dissatisfied with this decision of the Industrial Court that even being absent without leave did not constitute interruption in continuous service and has challenged the orders of the Labour Court and the Industrial Court in this petition.

4. The other petition, namely, Special Civil Application No. 200 of 1978 is filed on behalf of 22 budli employees of respondent No. 1 Laxmi Vishnu Textile Mills Ltd., Sholapur, challenging the rejection of their claim for gratuity in respect of the period during which they had not worked for 240 days in the relevant year. The Labour Court, Sholapur, which was the controlling authority was dealing with the application of the petitioners for a claim for gratuity which was contested on behalf of the employer on the ground that in the case of the badli employees the only provision for deciding whether they were rendering continuous service was Explanation I and that in respect of those years in which they were not actually employed for 240 days, they would not be entitled to any gratuity. The Labour Court held that when the badli worker is not actually working, there is a break in his service and unless a badli worker was employed for 240 days, his employment cannot be taken as continuous.

5. In so far as the Labour Court rejected a part of the claim, appeals came to be filed before the Industrial Court which was the appellate authority. The Industrial Court held that a "badli employee''1 is not entitled to claim continuous service during the period for which he is not employee as a badli worker when such work is not available because there is no relationship of employer and employee existing on the day on which there is no work to provide to a "badli worker" and that "the expression ''continuous service'' does not mean cessation of actual work but it also means cessation of relationship of employer and employee". With regard to the definition of continuous service in the principal part of the definition, the Industrial Court held that the word ''includes'' in the definition "enumerates the situations which do not amount to interruption in continuous service". Referring to the badli workers, the Industrial Court held that on days on which the badli worker is not employed by the employer on wages, there is no relationship of employer and employee between him and the employer and the Court held that "a badli employee is not entitled to any gratuity for the year in which he does not put in actual work for 240 days on the ground that for the rest of the days in that year, though he is a badli worker, there continues to exist the relationship of employer and employee between him and his employer". The Industrial Court thus confirmed the view of the Labour Court that the badli employees were not entitled to claim gratuity for those years in which they did not put in actual work for 240 days. These orders are now challenged by the badli employees in this petition.

6. We may at this stage mention that the employer in Special Civil Application No. 609 of 1975 has stated before us that the employer was interested only in a decision on the question of law raised in the petition and that the petitioner employer has already deposited the amount of gratuity. Mr. Shetye appearing on behalf of the petitioner employer states that the money has already been paid to the employees and the employer will not recover the money even in case the petition is allowed. No Counsel, however, appeared on behalf of the respondent and, therefore, we have only heard Mr. Shetye.

7. In Special Civil Application No. 200 of 1978 Dr. Kulkarni who appears on behalf of the petitioners has challenged the view that the badli worker is employed only on the day on which he is provided with work and that on other days he is not in employment of the employer. According to the learned counsel, there is always a employer - employee relationship between the badli worker and the employer and notwithstanding that a badli worker works only when work is given to him, he cannot be disentitled to claim gratuity merely because he has been provided with work only on certain days. Dr. Kulkarni vehemently contended that while determining the claim made by the badli worker for gratuity, his claim that he has been rendering continuous service must be tested with reference to the definition of continuous service in section 2 (c) of the Act and that failure of the employer to provide work to the badli employee does not, according to Dr. Kulkarni, result in any interruption in his service It was contended by the learned counsel that so long as there is a subsisting contract of employment and the badli work is available (or employment, he must be assumed to be rendering service and that the case of a badli worker should not be decided with reference to the provision in Explanation I in section 2 (e) of the Act. The learned counsel has cited certain reports and awards relating to badli workmen and has contended that badli workmen have been held entitled to benefits under other Acts, such as the Industrial Disputes Act, 1947, Employees'' Provident Fund Act and Employees State Insurance Act and, therefore, according to the learned counsel, there was no valid reason why a badli worker should be deprived of the benefit of gratuity under the Act.

8. Challenging the view taken by the Labour Court and the Industrial Court that a badli worker would not be entitled to gratuity unless he had actually worked for 240 days, Dr. Kulkarni vehemently contended that Explanation I was wholly inapplicable in the case of a badli worker. According to the learned counsel, the Explanation was applicable only in case of an actual break in service resulting in a discharge, termination or a retrenchment of a badli worker and if there was no such break, Explanation I did not come into the picture at all.

9. Mr. Shrikrishna appearing on behalf of the employer has contended that in all cases when an employee is not in an uninterrupted service for one year, his claim for gratuity would have to be decided only on the basis of Explanation I and unless the employee is able to show that he has actually worked for not less than 240 days in a year, he cannot be said to have rendered a continuous service as contemplated by section 4 (I) of the Act. It is contended that if continuous service was equated with a subsisting contract of employment, then the latter inclusive portion in the definition of continuous service in section 2 (c) would be otiose.

10. In the other petition Mr. Shetye arguing on behalf of the petitioner has also contended that absence of an employee without leave could not be overlooked for the purposes of determining whether the employee was rendering continuous service and according to the learned counsel, the absence of an employee without

leave resulted in an interruption in service. In the case of such an interruption of service it cannot be said that an employee is in an uninterrupted service and, therefore, according to the learned counsel, the claim for gratuity by such a person must be decided with reference to the provision in Explanation I to the definition of "continuous service".

11. In order to decide the contentions raised in these petitions, it becomes necessary to appreciate the true nature and scope of the provisions of section 4 (1) and the definition of "continuous service". Section 4(1) reeds as follows:

Gratuity shall be payable to an employee on the termination of the employment after he has rendered continuous service for not less than five years,:

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease :

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs.

Explanation.--For the purpose of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

The provisions of section 4 (1) create a right in favour of an employee and it creates an obligation upon the employer to pay gratuity to an employee on the termination of his employment in cases where the employee has rendered continuous service for not less than five years. The claim for gratuity arises on the termination of employment in any of the circumstances referred to in clauses (a), (b) and (c). A claim for gratuity may arise on superannuation of an employee; it may arise on a retirement or on resignation or it may arise on the death or disablement due to accident or disease. In the case of death of the employee, the gratuity is payable to his nominee or if no nomination has been made, to his heirs. So also in the case of death or disablement, it is not necessary that the employee should have completed continuous service of five years. Except for this exception the provisions of section 4 (1) require that an employee in order to claim gratuity should have rendered continuous service for not less than five years.

12. The word "employee" and the words "continuous service" have been defined in the Act. The relevant part of the substantive definition of employee" reads:

""employee" means any person (other than an apprentice) employed on wages, not exceeding one thousand rupees per mensem.....

The definition of "employee" thus excludes an apprentice and consequently an apprentice will not be entitled to any gratuity. Before a person can claim gratuity, he must at the outset show that he is an employee, i.e., he was a person employed on wages which did not exceed Rs. 1000 per month.

13. The definition of "continuous service" reads as follows:

continuous service" means uninterrupted service and includes service which is interrupted by sickness, accident, leave, lay-of, strike or a lockout or cessation of work not due to any fault of the employees concerned, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

Explanation I. --In the case of an employee who is not in uninterrupted service for one year, he shall be deemed to be in continuous service if he has been actually employed by an employer during the twelve months immediately preceding the year for not less than:

(i) 190 days, if employed below the ground in a mine, or

(ii) 240 days, in any other case, except when he is employed in a seasonal establishment.

Explanation II.--An employee of a seasonal establishment shall be deemed to be in continuous service if he has actually worked for not less than seventy-five per cent, of the number of days on which the establishment was in operation during the year;

The entire definition of "continuous service" is really in four parts. Two parts are contained in the first and the second Explanation to which we shall refer later. The first two parts are in the principal part of the definition in section 2 (c). In the first part of the definition "continuous service" is defined as meaning uninterrupted service. Then follows the inclusive part of the definition. The inclusive part of the definition refers to events which bring about an interruption in service. The causes or the events which bring about this interruption are sickness, accident, leave, lay-off, strike or a lockout or cessation of work not due to any fault of the employees concerned. Under the definition service which is interrupted by these or any one of these events is to be ignored for the purpose of deciding whether the service is uninterrupted or not. In other words, the effect of the inclusive part of the definition is that even if service of an employee is interrupted by the events specified in the inclusive part, the service is statutorily treated as not having been interrupted at all and has to be treated as uninterrupted service and, therefore, continuous service. The overall effect of this inclusive part of the definition is that uninterrupted or continuous service has been given an extended meaning and uninterrupted service will include even that period during which the employee was absent from duty for reasons specified in the inclusive part of the definition. Thus absence from duty for

the reasons specified in the inclusive part of the definition is not treated as amounting to interrupted service and, therefore, when for the purposes of section 4 (1), the controlling authority has to decide whether an employee has rendered a continuous service for not less than five years, the period during which the employee was absent from duty for the reasons specified in the latter part of the definition will have to be counted as a part of uninterrupted service.

14. Now the events which are referred to in the inclusive part of the definition cannot be said to be exhaustive of the ground on which an employee may not attend work or be available for work. One of the causes for interruption of service given in the main part of the definition is cessation of work not due to any fault of the employee concerned. In other words, cessation of work for which the employee is not responsible has been ignored for the purposes of finding out whether the employee has rendered continuous service. Conversely, there may be cases where there may be cessation of work which may be due exclusively to the fault of the employee. An employee may remain absent without leave. The question is how is such a period to be treated when the Court has to find out whether an employee has rendered continuous service or not. The Legislature has provided in the Explanation for those cases where an employee is not in uninterrupted service for one year. Putting it differently, the opening words of the first Explanation clearly show that the Explanation was intended to deal with a case of an employee whose services are interrupted. The employee dealt with by the first Explanation is obviously a person who is not covered by the main part of the definition of continuous service". The main part of the definition of "continuous service" deals with an employee in uninterrupted service, while the first Explanation deals with an employee who is not in an uninterrupted service for one year. This fact itself is sufficient to indicate that while the main part of the definition in section 2 (c) deals generally with the concept of "continuous service", the first Explanation deals only with the case of an employee who is not in uninterrupted service for one year. By that Explanation, in the case of those who are not in uninterrupted service for one year, the Legislature has introduced a fiction and by the fiction it is provided that if the employee has been actually employed by an employer within the twelve months immediately preceding the year for not less than 190 days, if employed below the ground in a mine, or 240 days in any other case, except when he is employed in a seasonal establishment, then such employee shall be deemed to be in continuous service. An artificial meaning has, therefore, been given to the words "continuous service" by fictionally treating an employee who is not in uninterrupted service for one year as being in continuous service provided he is actually employed for the number of days referred to in the Explanation. The second Explanation is also a provision for artificially treating an employee in a seasonal establishment to be in continuous service. Under the second Explanation an employee of a seasonal establishment is to be deemed to be in continuous service if he has actually worked for not less than 75 per cent of the number of days on which the establishment was

in operation during the year. Normally an employee could not be said to be in continuous service in a year by working only for a limited number of days, but the Legislature has now given an artificial meaning to the concept of continuous service.

15. It has to be remembered that the definition of ''continuous service'' has been given for the purposes of section 4 (1), a claim under which would necessarily entail an enquiry as to whether an employee has to render a continuous service. Therefore, the meaning of the words "continuous service" cannot be read in isolation and the purposes for which these words have been defined become very relevant in order to appreciate the import of the definition.

16. "Continuous service" in order to be rendered must no doubt presuppose a contract of employment. But a contract of employment between a master and servant is not the same thing as rendering continuous service. The two are not synonymous. The concept of employment has been explained by the Supreme Court in Chintaman Rao v. State of Madhya Pradesh AIR 1958 S C 388. Explaining this concept, the Supreme Court has observed as follows:

The concept of employment involves three ingredients: (1) employer (2) employee and (3j the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision.

While rendering of service by an employee would necessarily pre-suppose a subsisting contract of employment--the converse is not always true. There may be a contract of employment between an employer and employee, but it may be that during the entire period during which the contract of employment was subsisting, the employee may mot necessarily be actually rendering service. Therefore, rendering of service cannot be equated with a subsisting contract of employment. Illustration of cases where there is a subsisting contract of employment but that employee may not be rendering service is to be found in the definition of "continuous service" itself. An employee may be sick and, therefore, absent from duty. In such a case though the contract of employment subsists during the absence of the employee, he cannot be said to be rendering service during that period. An employee may be disabled as a result of an accident and he may be on leave. The contract of employment subsists, but the employee does not render service during the leave period. The same is the case where there is lay-off or strike. During lay-off or strike, the contract of employment subsists, but the employee is not rendering service. The emphasis in section 4 (1) is, therefore, not on a contract of employment being subsisting. The emphasis is on rendering continuous service. Notwithstanding that in the definition of "continuous service" interrupted service has been fictionally treated as a part of continuous service, the fact remains that the concept of "continuous service" contemplates that the employee is in fact rendering service as

distinguished from a mere subsistence of a contract of employment.

17. It is well known that gratuity is in the nature of a retiring benefit to those workmen who have rendered long and unblemished service to the employer and has thus contributed to the prosperity of the employer. The concept of gratuity was explained by the Supreme Court in Delhi Cloth and General Mills Co., Ltd. Vs. Workmen and Others etc., . In paragraph 18, the Supreme Court has observed as follows:

Gratuity paid to workmen is intended to help them after retirement on superannuation, death, retirement, physical incapacity, disability or otherwise. The object of providing a gratuity scheme is to provide a retiring benefit to workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer. It is one of the ''efficiency devices'' and is considered necessary for an ''orderly and human elimination from'' industry of superannuated or disabled employees who, but for such retiring benefits, would continue in employment even though they function inefficiently. It is not paid to an employee gratuitously or merely as a matter of boon; it is paid to him for long and meritorious service rendered by him to the employer".

It is this concept of reward for long and meritorious service that is incorporated in section 4 (1J of the Act. Long and meritorious service would necessarily contemplate that an employee has in fact rendered service and it was not enough to qualify for gratuity if he was merely on the muster roll of the employer under a subsisting contract of employment.

18. If the purpose for which the definition of "continuous service" has been given is appreciated, then it is obvious to us that while the substantive definition in clause (b) of section 2 enables even interrupted service in the circumstances specified in that clause to be taken into account for computing the period of continuous service, the provision in Explanation 1 requires ascertainment of the specified number of days on which the employee was actually employed in order to ascertain whether the employee has rendered continuous service during a period of twelve months. It is important to bear in mind that in Explanation I the Legislature has used the words "actually employed". If it was contemplated by the first Explanation that it was enough that there was a subsisting contract of employment, then it was not necessary for the Legislature to use the words "actually employed". One cannot attribute redundancy to the Legislature and when the Legislature has deliberately used the words "actually employed", in the context of the definition of "continuous service" it appears to be clear to us that those words contemplate that the employee who wants to take benefit of the Explanation must show that he had actually worked for 240 days during the period of twelve months immediately preceding the year in question. Giving any other meaning to the words "actually employed" would, in our view, defeat the purpose of enacting the Explanation. The purpose of enacting the Explanation, as already pointed out, is to give benefit of gratuity to a class of

employees who were not in uninterrupted service. In the case of such employees the Legislature has prescribed a minimum period for which they must render service. That period is 190 days, if employed below the ground in a mine and 240 days, in any other case, except when he is employed in a seasonal establishment. There is intrinsic evidence in the Explanation itself apart from the words used, that the words "actually employed" contemplate actual work or actual rendering of service. When clause (i) refers to 190 days, if employed below the ground in a mine, it clearly contemplates that the person is engaged to work below the ground in a mine and he is, therefore, to work for 190 days. The words "in any other case" in clause (ii) refer to employment than in a mine or in a seasonal establishment. It, therefore, appears to us quite clear that for the purpose of the first Explanation an employee must show that he has actually rendered service for the number of days specified in the Explanation.

19. Now so far as Special Civil Application No. 609 of J975 is concerned, having regard to the scope and the nature of the definition which we have set out earlier, it is obvious that the learned President of the Industrial Court has fallen in an error in holding that there was no interruption due to absence without any leave and that the employee must be taken to be in continuous service. The learned President has, in our view, misconstrued the definition of "continuous service". For the purposes of continuous service or uninterrupted service, as already pointed out, absence resulting only in the circumstances specified in the inclusive part of the definition could be taken into account. Absence for any other reason or on account of any other circumstance would clearly have the effect of interrupting the service and the moment such interruption of service occurs, the employee would clearly be one who cannot be said to be in an uninterrupted service. Once the employee falls into the category of those who are not in an uninterrupted service, then the only provision which may enable him to get the benefit of gratuity is Explanation I. Explanation I gives only one criterion for deciding whether a person is deemed to be in continuous service. That criterion is that he has to be actually employed for not less than 240 days if he is not employed in a seasonal establishment or below the ground in a mine. The employee Narayan in that case being clearly absent in each month without leave, he had to satisfy the conditions in Explanation 1. Admittedly he had not actually worked or rendered service for 240 days during certain years. He cannot, therefore, be said to have rendered continuous service as contemplated by section 4 (1) in respect of all the years. We are, therefore, unable to endorse the view taken by the learned President that in order that a case may be brought under Explanation I, it must be shown that relationship of employer and employee has ceased and even if it has so ceased, it can be shown that the relationship continued for 240 days, and the benefit of such relationship will also qualify for claiming gratuity for that year and that it was not necessary for the employee to render actual work during the said period of 240 days.

20. Now so far as the arguments so vehemently advanced by Dr. Kulkarni before us are concerned, the arguments have to be divided in two parts. The first part is that in the case of a badli worker, there is a subsisting contract of employment throughout and the question of applicability of Explanation I does not arise at all in the case of a badli worker. We have repeatedly asked Dr. Kulkarni as to when in the case of a badli worker does the contract of employment commence and how long does it continue. We have been told that having regard to the peculiar status of a badli worker, the contract of employment must be said to begin at the time when the badli worker is first given work and it must be said to continue till under the relevant standing orders he disqualifies himself for being given any work. It has been pressed upon us that the mere fact that the badli worker does not render service every day and that he renders service only on certain days when he is given work would not mean that he is not in continuous or uninterrupted service.

21. Now, strictly speaking, certain reports which have been read out to us really do not seem to be very relevant in order to decide the question which has arisen before us, namely, whether Lallappa Lingappa and other petitioners in Special Civil Application No. 200 of 1973 who were admittedly badli employees had to satisfy the provisions of the first Explanation and whether there is any foundation whatsoever for the argument which is now advanced before us that they should really be treated as being in continuous service from the first day when a badli employee is given employment. We have been referred to the Standing Orders which are admittedly framed u/s 35 of the Bombay Industrial Relations Act. u/s 40 of the Bombay Industrial Relations Act, Standing Orders settled under the provisions of Chapter VI1, which deals with Standing Orders, are made determinative of the relationship of employer and employee in regard to all industrial matters specified in Schedule I. Item 1 in Schedule I reads as follows:

Classification of employees, e. g., permanent, temporary, apprentices, probationers, badlis, etc. and the manner of rifling posts becoming vacant and determining seniority of badlis, and all matters connected with the purposes aforesaid".

Dr. Kulkarni referred to us to the Standing Orders which have been said to be finally settled u/s 36 i3) of the Bombay Industrial Relations Act, 1946, for operatives in cotton textile mills. Under these Standing Orders the operatives have been classified as (1) permanent, (2) probationers, (3) badlis, (4) temporary and (5) apprentices. Then the Standing Orders define what a badli is and it is stated :

A ''badli'' is one who is employed on the post of a permanent operative or probationer who is temporarily absent".

What is contended by Mr. Kulkarni is that a ''badli'' has been included in the list of operatives and, according to him, operatives are employees of the employer and since in the definition of badli he is referred to as a person employed in the post of a permanent operative or probationer, a badli must always be treated as being in

employment and, therefore, in continuous service.

22. Now, there are two difficulties in accepting these contentions. We have already pointed out that when section 4(1) refers to a person rendering continuous service, it does not contemplate a mere subsistence of a contract of employment, but that it contemplates that a person is really rendering service or is actually doing some work and that only such a person is considered to be qualified to claim gratuity. Admittedly a badli person is not in continuous service. Indeed, the very incident of being a badli is that the workman is a substitute and as the Standing Orders point out, he is a substitute employee on the post of a permanent operative or a probationer who is temporarily absent. In other words, the employment of a badli is itself of a temporary nature and if such employment is of a temporary nature and when the permanent operative or the probationer comes back the badli is relieved of his employment, it is obvious that the service which is rendered by the badli is clearly not uninterrupted but is interrupted service. There is also nothing in the Standing Orders to show that a contract of employment is treated as subsisting even during the time when a badli worker is not working as a substitute employee. Thus a badli does not render any service when he is not actually employed as a badli worker. Therefore, a badli cannot be treated as a person who renders continuous service nor can he be said to be a person with whom there is a subsisting contract of employment beyond the period during which he temporarily acts as a substitute. We also do not find anything unusual in the Standing Orders which describe a badli as an operative. When a badli is employed as a substitute, he undoubtedly is an operative and he is a substitute operative. Indeed he becomes an operative only when he is given work as a substitute and it is only then that he really becomes a badli worker. That is why the definition describes him as a person who is employed. The classification when it refers to the badli as an operative is obviously made with reference to the period during which he is given work and is on duty as a substitute and not with reference to the time when he is idle or is not given work.

23. Our attention has been drawn to certain observations in a report of the Badli Labour Enquiry Committee, Cotton Textile Industry. This Committee was appointed to consider, inter alia, the following question :

(1) To examine the conditions of service of Badli labour and make recommendations, whether the conditions of service including enactments pertaining thereto and Standing Orders, require any modification, with a view to ensuring efficient working of the industry and a fair deal to the Badli labour.

In particular, the Committee should examine the size of the present Badli force and make recommendations regarding what should be the normal complement of badli labour in the industry and whether the badlis conform strictly with the definition of the terra "substitute workers" in the Standing Orders, and, whether rights of the badli workers under the existing statutory provisions agreements, settlements, awards and Standing Orders are adequately protected or whether they need further

protection.

24. While dealing with this question, the Enquiry Committee observed that the permanent and badli employees are also entitled to medical and sickness benefits including sick leave for 56 days under the E. S. I. Scheme in a year and a membership of the provident fund under the Employee''s Provident fund Act. The report also points out that they are also entitled to four paid festival holidays in a year.

25. Our attention has also been invited to an award made by the Industrial Court in a reference arising out of a dispute between the Rashtriya Girni Kamgar Sangh, Sholapur v. The Narswggirji Mills (U. R. S.) and three other mills at Sholapur, including the present respondent Laxmi Vishnu Textile Mills Ltd. in Special Civil Application No. 200 of 1978. Dr. Kulkarni relied on this award in order to show that the Industrial Court has held that the Factories Act makes no distinction regarding the claim for privilege leave to permanent and badli employees or even temporary employees for that matter and, therefore, there was no satisfactory reason why badli employees who put in as much amount of work as permanent employees should be denied the additional privilege leave made available to permanent employees for having worked in excess of 240 days.

26. Now, it is difficult for us to appreciate as to how the fact that the badli employees were held entitled to certain benefits under the E. S. I. Scheme and the Provident Fund Act or the claim of the badli employees who had worked for more than 240 days in most of the mills at Shotapur for privileged leave was accepted by the Industrial Court would be relevant for determining whether a badli employee can be said to be in continuous service as contemplated by the provisions of the Gratuity Act even during the period when he did not do any work as a badli worker. The question as to whether a badli employee can be said to have rendered continuous service even during the time when he is not given work as a badli worker as contemplated by section 4 of the Act, has to be decided with reference to the provisions of section 4 (1) and with reference to the provisions in section 2 (e) which defines ''"employee" and section 2 (c) which defines "continuous service". The status of the badli employees, as already pointed out, has to be determined with reference to the Standing Orders. We have already extracted above the definition of "badli in the Standing Orders and we have already pointed out that the definition deals with the person who is actually given work or is employed in the post of a permanent operative who is temporarily absent. The definition of ""badli'' in the Standing Orders indicates that before a person can describe himself as a badli--certain conditions have to be satisfied. First of all either a permanent operative or a probationer has to be temporarily absent, then a workman has to be employed on the post on which such a permanent operative or a probationer who is absent used to work. He comes to work on that post by virtue of a positive act of employment by the employer and it is only then that he gets employed, and if all these conditions

are satisfied, then only a person can properly be described as a badli. On the terms of the Standing Orders the term "badli" is, therefore, indicative of the status of a person only when he is actually employed in a temporary vacancy of a permanent operative or a probationer. The moment he ceases to be employed, he ceases to be described as a badli. Merely because a person holds, what is described as a badli card, it does not necessarily make him a badli under the Standing Orders. It is to be noted that the definition of "badli" is not with reference to a person holding what is called a badli card, but the definition is with reference to a person actually being employed in a temporary vacancy for a temporary period of time till a permanent operative or a probationer who is temporarily absent resumes work. The Standing Orders, therefore, clearly contemplate an employment for a limited period of time, the time being limited by the absence of the person in whose place a person works as badli. The contract of employment is thus limited to that period alone and when the person ceases to work as badli, it must necessarily result in the contract of employment being terminated. A fresh employment will be in pursuance of a fresh contract of employment which a worker may or may not accept. Therefore, merely because under certain other welfare measures certain additional facilities are provided for the badli workers, those considerations cannot be brought in while construing the provisions of the Gratuity Act. In order to be entitled to the benefits of the Act, the conditions set out in the Gratuity Act must alone be fulfilled or satisfied and since in the case of a badli there is no continuous contract of employment much less is there a continuous rendering of service, it is clear that the service of a badli worker could not be described as continuous service as contemplated by section 2(c). Similarly, the definition of "employee" also indicates that it refers to a person employed on wages. If a person is intermittently employed on wages, that will also indicate that for the purposes of the Act he is an actual employee only during the period during which he is employed on wages. We, therefore, do not find anything unusual in a badli not being held entitled to gratuity unless he satisfies the requirements of the Explanation and unless he has actually worked for a period of 240 days in a year.

27. We may point out that though in Delhi Cloth Milt''s case cited supra, the Supreme Court was not dealing with the Gratuity Act, it dealt with the propriety of a provision regarding gratuity in an award relating to the badli workmen. The provision in the award in dispute in that case with regard to badli workmen was as follows:

Gratuity shall be paid for only those years of badli service in which the employee has worked for not less than 240 days.

This part of the award was challenged on the ground that the Tribunal had committed an error in providing that gratuity shall be paid to badli workmen for only those years in which a workman has worked for 240 days. There also the argument was that the employee is required to be present at the gate every day.

Apart from the fact that we have not been pointed out any binding provision in the Standing Orders which necessarily requires a badli workman to present himself at the gate every day, the Supreme Court has pointed out that this was wholly irrelevant so far as the question of gratuity was concerned. In paragraph 38 of the judgment the Supreme Court has observed as follows :

It was urged that a Badli workman has to register himself with the management of the textile unit and is required every day to attend the factory premises for ascertaining whether work would be provided to him, and since a Badli workman has to remain available throughout the year when the factory is open, a condition requiring that the Badli workman has worked for not less than 240 days to qualify for gratuity is unjust. We are unable to agree with that contention. If gratuity is to be paid for service rendered, it is difficult to appreciate the grounds on which it can be said that because for maintaining his name on the record of the Badli workmen, a workman is required to attend the Mills he may be deemed to have rendered service and would on that account be entitled also to claim gratuity. The direction is unexceptionable and the contention must be rejected.

28. The above observations of the Supreme Court clearly, in our view, are authority for the proposition that being merely present at the gate every day and being registered with the employer is not equivalent to rendering service and this would be a complete answer to the contention which is raised on behalf of the petitioners. There is not only the absence of continuous contract of employment, but there is also an absence of a continuous rendering of service, with the result that the time during which a badli employee is not employed as contemplated under the Standing Orders, he could not be said lo be rendering continuous service as contemplated by section 4 (1) of of the Act.

29. In order to show that mere break in service in the sense of rendering continuous service would not result in a break in employment, the learned counsel for the petitioners has relied on three decisions, namely, J air am Sonu Shogafe v. New India Rayon Mill Company, Ltd. (1958) I L L J 28, Jeewanlal (1929) Ltd., Calcutta Vs. Its Workmen, , and Valiabadus Kanji (P) Ltd. v. Esmail Koya and others 1978 Lab. I C 809. In Jairam Sonu Shogale''s case this Court was dealing with the provisions of sections 25B and 25F of the Industrial Disputes Act, 1947, and the question was whether absence on the ground of taking part in an illegal strike causes a break in continuity of service for the purpose of determining a claim for retrenchment compensation u/s 25F of the Industrial Disputes Act.

30. Before we go to the facts, it is necessary to point out the wording of section 25F, the relevant part of which reads as follows : -

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be "retrenched by that employer until:

(a).....

(b).....

(c).....

It will be immediately apparent that the phraseology in section 25F is different from the words used in section 4 (1) of the Act. For applicability of section 25-F, it is enough that a workman has been in continuous service. The Gratuity Act does not use the words "has been in continuous service", but the words used are "has rendered continuous service" and once the difference in these two concepts is appreciated, it is easy to understand that the decision in Shogale''s case is not of much assistance. In that case the workman had been in employment since January 1945 to 15th October 1954 when he was retrenched and admittedly he had taken part in a strike between 6th October 1951 and 24th of November 1951 and the question was whether during the period during which the workman had taken part in the strike which was assumed to be illegal for the purposes of the decision there was no break in service and the strike notwithstanding, the workman continued to be in the service of the employer. The Division Bench in that case pointed out that taking part in an illegal strike amounted to a misconduct and for the misconduct of the employee he would invite an order of dismissal; but unless an employee is dismissed from service, the Division Bench held that it was difficult to see how there could be no continuity of service so far as an employee is concerned. The argument that after the strike the workman was reemployed was rejected because, according to the Division Bench, this would imply that there was an order of dismissal made by the employer and the workman was reemployed upon a fresh employment after the dismissal. Referring to the provisions of section 25B of the Industrial Disputes Act which defined one year of continuous service, the Division Bench held that continuity of service does not necessarily mean that a workman must have one completed year of service in a year and it is sufficient that continuity of service exists and arises even if a workman works for 240 days in any particular year of twelve calendar months. A provision parallel to the Explanation in the definition of "continuous service" in the Gratuity Act was made in sub-section (2) of section 25B which defined "continuous service". The relevant clause read as follows :

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer:

(a) for a period of one year if the workman, d using period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-,

(i) one hundred and ninety days in the cases of workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worker under the employer for not less than -

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

31. The ratio of the judgment of the Division Bench thus was that if a workman establishes that he has put in continuous service for not less than one year, he would forthwith be entitled to get retrenchment compensation for every completed year of service and this would be so notwithstanding that in any particular calendar year he has worked only for 240 days.

32. It will thus appear that considering the words "continuous service" in section 25B and section 25F of the Industrial Disputes Act, 1947, a distinction was made by the Division Bench between a contract of employment and rendering actual service and the concept of continuous service was equated with the subsistence of a contract of employment. The same is the position in the decision in Jeewanlal''s case where the Supreme Court was no doubt dealing with a gratuity scheme, according to which, an employee was entitled to gratuity "on the termination of his service by the company after five years'' continuous service". Construing this clause the Supreme Court pointed out that "continuous service" in the context of the scheme of gratuity framed by the tribunal postulated the continuance of the relationship of master and servant between the employer and his employees. In that case the employee concerned was absent for a period of about eight and a half months from 14th February 1945 to the end of October 1945 and it was contended on behalf of the employer that the employee was not entitled to any gratuity under the scheme framed by the award. The Supreme Court held that merely because an employee was absent without obtaining leave that would not bring to an end the continuity of his service. It is also observed in that case that if an employee continues to be absent from duty without obtaining leave and in an unauthorised manner for such a long period of time, an inference may reasonably be drawn from such absence that by his absence he has abandoned service, and then such long unauthorised absence may legitimately be held to cause a break in the continuity of service. Therefore, even the Supreme Court equated the concept of continuity of service with the subsistence of a contract of employment. But it is important to remember that the concept which was being considered in that case is materially different from the concept which is incorporated in the Gratuity Act in the form of an eligibility clause. The insertion of the word "rendered" before the words "continuous service" makes a substantial difference to the concept and while continuity of service may be equated with a subsisting contract of employment, in a case where the concept is one of rendering service, not only must there be a contract of employment, but the employee must also render service which obviously he does not do on days when he is absent for reasons or in circumstances which do not fall within the events

enumerated in the main part of the definition of "continuous service".

33. It is also difficult for us to see how the third decision in Ismail Koya''s case is of any assistance to the petitioners in support of their contention that badli employees should be treated as being in continuous service and employment, even on days when they are not provided with any work. It has not been possible to ascertain the entire facts of that case from the decision. It appears that the employer there was the owner of an oil mill and the factory was engaged in copra crushing, pepper garbling and processing. Copra crushing was seasonal in nature and even during the season of copra crushing unit worked only intermittently. The employee in that case was a cooper in the copra crushing unit attending to coopering work on such of those days on which there was availability of such work. He was getting only 6 to 7 days'' work in a month and he was being paid on piece rate basis. Another employee was a tinker who also used to work only on certain days in a month. Their claim to gratuity was being contested by the employer on the ground that they did not have continuous work so much so that they could not claim gratuity on the plea that they had the minimum service which entitled them to the payment of gratuity. The provision in the Explanation was being considered in that case. Rejecting the contention of the employer, the Kerala High Court observed as follows:
It appears to me that when once it is shown that a person is employed on wages as contradistinction to being engaged on wages the Payment of Gratuity Act applies to such person because the period of service including the period during which he was given no work due to no fault of his would be a period of continuous service.

34. Now, these observations of the Kerala High Court indicate that the employees were in service even during the time when they were not given any work, that is to say that they were under a contract of employment, but that they were working only when they were given work and that if they had no work, it was not due to their fault. In that context referring to the period during which these employees who were in employment but were not given work, the Kerala High Court pointed out that if the employee was willing to work but work was not given to the employee, the period when he had no work cannot be considered as period of interrupted service. Dealing with the concept of "continuous service", the High Court observed as follows :

Continuous service means uninterrupted service. Supposing a person is employed but is given work on some days only of the month could it be said that his service is interrupted? If his service is interrupted by sickness, accident, leave, lay-off, strike or lockout the period concerned is not excluded as a period of interrupted service. These periods are part of the period of uninterrupted service. Similar is the case where cessation of work is not due to any fault of the employee concerned. If the employee was willing to work but work was not given to the employee the period when he had no work cannot be considered as period of interrupted service. There must be an element of volition in absenting from work on the part of the workman.

If not, the service would be continuous. That is what the section contemplates. It is possible that a person may work only for a few days in a month and nevertheless he may be said to be in continuous service provided the days when be did not work were days when he was either on leave or lay-off or such absence is explained by one or other of the circumstances mentioned in section 2 (c) of the Act including the cessation of work not due to the fault of the employee.... If he is an employee then the fact that he did not work would be material if cessation of work was due to fault on his part. If he is an employee and he did not actually work because work was not given to him the period during which he did not work for no fault of his will also be taken into account for reckoning continuous service just as the period of leave or the period of strike or that of lay off.

35. We have no hesitation in concurring with the view taken by the Kerala High Court. The observations extracted above will show that the Kerala High Court was dealing with a case where the employees were in service, i. e., there was a subsisting contract of employment and the employees were on duty but they did not work on some days because the employer did not provide work for them. Even in such a case we have no doubt that the employee must be said to have rendered continuous service. In order that there should be a break in the rendering of continuous service and for such break to amount to interruption of service, the break must be due to something done on the part of the employee, subject of course to the fact that if the absence is due to the reason specified in the definition of "continuous service", that period will have to be treated as a part of continuous service. For the purposes of section 4(1), therefore, mere subsistence of the contract of employment is not enough though it is also necessary.

36. We may usefully refer to a decision in In re Cole 1919 I Ch. D. 218, where the difference between being in employment and rendering actual service has been highlighted. At page 223, Sargant J. observed :

Now it seems to me that the question whether he is in the employment of the company is not the same thing as the question whether he is in fact rendering actual service to the company. Suppose that he had fallen ill, and he had to be away for a year, or two, or three years. Under those circumstances, the company might be justified in dismissing him, and very likely would dismiss him, and in that case he would certainly cease to remain in the company''s employment. But, on the other hand, it is quite possible that the company, valuing his services, would desire to retain him in its employment, and would make arrangements under which that employment should continue, although no actual services were rendered. and whether or not they paid him salary during that time would not be in any way conclusive; it would only be one of the indicia from which one might gather whether the employment did continue or did not.

37. We may at this stage refer to a decision of the Gujarat High Court relied upon by Mr. Shrikrishna reported in Girdharlal Laljibhai Vs. Nagrashna M.N. and Another, ,

where the Gujarat High Court was dealing with the right of a badli worker under the standing orders in which the definition of badli was similar to one referred to by us. The petitioner before the Gujarat High Court had filed an application u/s 33C of the Industrial Disputes Act, 1947, claiming lay-off compensation for days on which, according to him, he was laid off. It was not disputed that he had put in a continuous service of more that one year and that his name was borne on the muster rolls of the industrial establishment. The application was rejected by the Labour Court and the question before the High Court was whether a badli worker who had completed one year''s continuous service could claim lay-off compensation on the days on which he could not be employed as no permanent workman or a probationer had remained absent on the days in question. In that context dealing with a right of a badli worker, the Division Bench observed as follows:

'''A badli'' is one who is employed in the post of a permanent operative or a probationer, who is temporarily absent. It is, therefore, clear that a badli worker''s right of employment is dependent on there being some temporary vacancy of a permanent employee or a probationer. He has no right to get work everyday. Therefore, if a badli worker is not able to get employment on a particular day because no permanent worker or a probationer was absent on that day, it could not be said to be a case of lay-off of that badli worker on that day in question for some reason which was beyond the control of the employer. It is implicit in the definition of the word May off'' that the workman must have a right to get work or employment on the day in question and he must have been refused employment on that day for any of the reasons falling u/s 2 (kkk)".

With these observations the High Court confirmed the order of the Labour Court holding that from the very nature of the employment a badli workman was not entitled to work unless a permanent workman or a probationer was absent and that the question of refusal or failure to give employment could only arise when a permanent workman or a probationer was absent. These observations clearly support the view which we have taken earlier that the contract of employment in the case of a badli workman is limited only to a period during which he is given work on account of the temporary absence of a permanent employee or a probationer.

38. Mr. Shrikrishana has also referred to a decision of the Madras High Court in the The Management of Sree Meenakshi Mills Ltd. Vs. The Presiding Officer, Labour Court, Madurai and Another, . The Madras High Court in that case was dealing with a case of lay-off''. The mills were required to reduce their production at all levels on account of a power-cut between 1st November 1965 and 22nd April 1966 The question whether the badli workmen who had worked for more than 240 days in a year were entitled to lay-off compensation was considered. Explanation to section 25C of the Industrial Disputes Act defined "badli workman" as follows :

''Badli workman'' means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the

establishment, but shall cease to be regarded as such for the purposes of this section, if he has completed one year of continuous service in the establishment.

As already pointed out, section 25B, the definition of continuous service provided that a workman who had put in 240 days in a calendar year would be treated as being in continuous service. Dealing with the question of payment for lay-off, the Madras High Court held that the lay-off had been spread over the whole of the mills and "it is not possible to relate the badli workmen who would have been employed if the permanent workers who had been laid off had not been so laid off ". Consequently it was held that the badli workmen were not entitled to any lay off compensation.

39. Thus having given our anxious consideration to the right of a badli worker having regard to the express provisions in the Standing Orders, since we are of the view that a badli worker has no right to ask for work and there is no subsisting contract of employment during the time when he is not given work, he cannot be said to be rendering continuous service merely on account of the fact that he stands registered with the employer as a badli worker and he attends at the gates in the expectation that he may get an employment. Consequently such a badli worker must necessarily qualify under the Explanation if he has to substantiate his claim for gratuity. On the finding recorded by the Labour Court, none of the petitioners in Special Civil Application No. 200 of 1978 had put in 240 days of employment during the year in question.

40. Having regard to the view which we have taken, Special Civil Application No. 609 of 1975 must be allowed and the order of the learned President of the Industrial Court in Appeal (PGA) No. 40 of 1974 is quashed.

41. There is no reason to interfere with the order of the learned President of the Industrial Court impugned in Special Civil Application No. 200 of 1978 and that petition must stand dismissed.

42. There will, however, be no order as to costs in both these petitions. Spl. C. A. No. 609 of 1975 allowed. Spl. C. A. No, 200 of 1978 dismissed.