JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 49 JULY-SEPTEMBER 2007 NUMBER 3

DISCIPLINARY ACTION AND POWERS OF INDUSTRIAL ADJUDICATOR: A CRITIQUE OF JUDICIAL INTERVENTION

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I Introductory: Importance of industrial discipline

INDUSTRIAL DISCIPLINE is a *sine qua non* for the well-ordered conduct of industrial activity and better productivity. Discipline is essential for the workers themselves and, in fact, the national economy depends upon the industrial output of the country. The law of industrial discipline is not strictly a branch of contract law but is more akin to the penal law. Without the law of industrial discipline, society's productive facilities could not function, just as without the penal law society itself could not function.[1] While society punishes an offender under the penal law of the land for indulging in illegal acts or omissions which jeopardize or undermine the sum total of happiness and security of the society, the employer punishes his employee under his disciplinary jurisdiction by imposing penalty, even dismissal, depending on the seriousness of the misconduct, for industrial indiscipline which has only civil consequences.[2] However, it is to be noted that the same act or omission on the part of the employee may amount to an 'offence' under the penal law as well as 'misconduct' at workplace, making him liable to be proceeded with both under the penal law by the state and disciplinary jurisdiction by the employer.

Such action taken by the employer to enforce discipline in his establishment is popularly known as disciplinary action. However, in *M. Paul Anthony* v. *Bharat Gold Mines Ltd.*,[3] the Supreme Court

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1. Alfred Avins, *Employees' Misconduct as a Cause for Discipline and Dismissal in India and the Commonwealth* v-vi (1968).

2. The employer can impose punishment of dismissal, removal, reduction in rank, withholding of increment/s, censure etc. depending upon the gravity of misconduct committed by the workman.

3. (1999) 3 SCC 679.

made it clear that on joining service a person does not mortgage or barter away his basic rights as a human being in favour of the employer. The employee on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the employer is regulated by the terms of the contract of employment or rules and regulations framed by the employer or the service rules required to be made under a statute in case of private employment and in case of persons appointed to public services and posts in connection with the affairs of the union or any state by acts of appropriate legislature[4] or by a statutory body created under a statute in case of other public appointments.

'Misconduct' to attract a penalty should have a causal connection with the place of work as well as the time at which it is committed which would ordinarily be within the establishment and during duty hours.[5] Even when the standing order is couched in a language which seeks to extend its operation far beyond the establishment, it would nonetheless be necessary to establish a causal connection between the misconduct and the employment. This causal connection must be real and substantial, immediate and proximate, and not remote or tenuous. If the power to regulate the behaviour of the workman outside the duty hours and at any place wherever they may be was conferred upon the employer, the contract of service might be reduced to a contract of slavery. Therefore, the employer can at best have both power and jurisdiction to regulate the behaviour of the workman within the premises of the establishment, or for peacefully carrying the industrial activity in the vicinity of the establishment. What constitutes establishment or its vicinity would depend upon the facts and circumstances of the each case. In *Union of India* v. *J. Ahmed*,[6] the Supreme Court cautioned that failure to attain highest standard of efficiency in the performance of duty, permitting an inference of negligence, may be sufficient ground for not considering an employee for promotion but would not constitute 'misconduct' indicating lack of devotion to duty.

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4. Article 309 of the Constitution of India. Proviso to article 309 provides that pending legislation on such matters, the President of India, or the Governor of state, or their delegates, as the case may be, are competent to make such rules. In fact, both central and state civil services are governed mainly by the rules framed under proviso to article 309. Central Civil Services(Conduct) Rules, 1964 and the Central Civil Sevices (Classification, Control Appeal) Rules, 1965 are examples of such exercise of rule making power by the President of India.

5. *Glaxo Laboratories (I) Ltd.* v. *Presiding Officer, Labour Court*, (1984) 1 SCC 1.

6. (1979) 2 SCC 286.

II Managerial prerogative

Common law position

The legal basis of the management's power to discipline his employee is founded on the contract of employment between the employer and the employee. By entering into a contract of service, an employee undertakes to render personal services to the employer under his direct control and supervision. In this respect, the employee is bound to obey the lawful orders of the employer, not only as to the work which he shall execute, but also as to the details of the work and the manner as to how the work should be executed.[7] Rules of discipline may be found couched in general language in the terms of employment or in the work rules. But a large body of law of discipline is to be found in the judge made law.

At common law the usual employment relationship is employment at will, with either party at liberty to terminate the relationship at any time and for any cause or without any cause. The prerogative of the employer to dismiss an employee on the ground of 'misconduct' was established at common law by the early and middle years of the nineteenth century. The established rule was that the employer had no obligation to give reasons for dismissal to the employee at the time of dismissal. It was considered sufficient that he should be able to satisfy the court that he was justified in dismissing the employee in case he sued the employer for wrongful dismissal.[8] But over the years, industrial law and constitutional provisions in all progressive societies have subjected the managerial prerogatives to reasonable restrictions.

Inroads made on common law position

Legislative provisions protecting workers from dismissal and discriminatory discharge are of recent origin in India. In order to make victimization an unfair labour practice on the part of the employer and not merely a breach of contract, Parliament amended in 1947 the Indian Trade Unions Act, 1926 by the Indian Trade Unions (Amendment) Act, 1947 and thereby restricted the employer's right to discharge his workers. Unfortunately, the government failed to give the amending Act the necessary notifications and it did not *per se* come into force. However, the judiciary took the clue from the lapsed amending Act and

7. *Collins* v. *Hertfordshire County Council,* 1947 KB 598 at 615, cited with approval in *Dharangadhra Chemical Works Ltd.* v. *State of Saurashtra,* AIR 1957 SC 264 at 267.

8. See Lord Reid in *Ridge* v. *Baldwin,* (1964) AC 40 at 65.

developed a body of case law to prevent unfair discharges and victimization. Subsequently, by the Industrial Disputes (Amendment) Act of 1982, a new chapter V-C was added to the Industrial Disputes Act, 1947 prohibiting unfair labour practices as defined in the fifth schedule to the Act on the part of the employer, labour and trade unions and made it an offence punishable under the Act. In the sphere of public employment law (employees employed in government corporations and government companies) in some cases where the employers had attempted to terminate services of permanent employees by resorting to termination *simpliciter* acting under duly framed rules and regulations and standing orders, the apex court protected the interests of the employees by quashing such rules as arbitrary and unconscionable.[9]

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9. In *Delhi Transport Corporation* v. *DTC Mazdoor Congress*, (1991) Supp. 1 SCC 600, a constitution bench of the Supreme Court was called upon to reconsider/ review the decision handed down by a division bench in *Central Inland Water Transport Corporation* v. *Brojo Nath Ganguli,* (1986) 3 SCC 156 wherein the court had declared that rule 9(i) of the Central Inland Water Transport Corporation Ltd. Service Discipline Appeal Rules of 1979 framed by the corporation, which conferred an absolute, arbitrary and unguided power on the state corporation, to terminate the services of a permanent employee by giving him wages in lieu of notice period, as violative of the principle of *audi alteram partem* and, therefore, violative of articles 14, 38, 39(a) and 41 of the Constitution; and also void under s. 23 of the Indian Contract Act, 1872 being against the public policy. In *Delhi Transport Corporation,* the constitutional validity of regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment & Service) Regulations, 1952 (the Regulations), giving power to the employer to terminate the services of permanent employees without holding any enquiry in certain circumstances by giving notice or pay in lieu thereof, was impugned. The relevant regulation 9 reads as under:

> 9. *Termination of service* – (a) Except as otherwise specified in the appointment orders, the services of an employee of the authority may be terminated without any notice or pay in lieu of notice:
>
> (i) During the period of probation and without assigning any reason thereof.
>
> (ii) For misconduct.
>
> (iii) On the completion of specific period of appointment.
>
> (iv) In the case of employees engaged on contract for a specific period, on the expiration of such period in accordance with the terms of appointment.
>
> (b) Where the termination is made due to reduction of establishment or in circumstances other than those mentioned at (a) above, one month notice or pay in lieu thereof will be given to all categories of employees.
>
> (c) Where a regular/temporary employee wishes to resign from his post under the authority he shall give three/one month's notice in writing or pay in lieu thereof to the Authority provided that in special cases, the General Manager may relax, at his discretion, the conditions regarding the period of notice of resignation or pay in lieu thereof.

Further, the unfettered discretion of the management to terminate the relationship by discharging an employee or dismissing him for indiscipline has now been sought to be regulated through the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947. Under the former Act, every establishment employing 100 or more workers is required to have a set of plant rules defining the conditions of employment to be maintained in the establishment.[10] These plant rules contain, among others, procedure for discharge or dismissal of employees. Often in the standing orders of an establishment, it is provided that the service of an employee can be terminated by giving him one month's notice, or salary in lieu thereof (without a charge of misconduct). Even in such cases the industrial adjudicator is entitled to know the reason for the termination of service in order to judge whether it is *bona fide*.[11] The decision of the industrial tribunal is subject to judicial review by the high courts and the Supreme Court.[12]

Affirming the decision in *Central Inland Water Transport Corporation*, the court by a majority of 4:1 held that service rules/regulations which confer powers on the authority to terminate services of permanent and confirmed employees by issuing notice or by making payment in lieu of notice without assigning any reasons in the order and without giving any opportunity of hearing to the employee before passing the impugned order, is wholly arbitrary, uncanalised and unrestricted, violating the principles of natural justice as well as article 14 of the Constitution. The majority held that regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 suffered from the *vice* of arbitrariness as there is no guidance in the regulations or in the Act as to when or in which cases and circumstances, this power of termination by giving notice or pay in lieu of notice can be exercised. Sawant J for the majority pointed out that both the society and the individual employees have an 'anxious interest' in the service conditions being well defined and explicit to the extent possible. "The arbitrary rules such as the one under discussion, which are sometimes described as Henry VIII Rules, can have no place in any service conditions", he ruled. The majority judgment held that regulation 9(b) was also void under section 23 of the Indian Contract Act as being opposed to public policy.

10. S. 4. The schedule to the Act enumerates ten subject matters in respect of which an employer is required to get standing orders certified by the certifying officer appointed under the Act and the subjects, *inter alia,* include classification of workmen, manner of intimating to workmen, periods and hours of work, holidays, pay days and wage rates, shift working, attendance, late coming, conditions procedure for grant of leave and among others includes provisions for termination of employment, notice thereof both by the employer and the workmen, suspension and dismissal for misconduct and enumeration of acts and omissions which constitute misconduct, and manner and redress for workmen against unfair treatment or wrongful exactions by the employer or his agent or servants. Powers have been given to the appropriate government to enumerate other matters in respect of which employers may be required to get standing orders certified.

11. *L. Michael* v. *Johnson Pumps Ltd.,* (1975) 1 SCC 574.

12. *Bharat Bank Ltd.* v. *Employees of Bharat Bank*, AIR 1950 SC 188.

The Supreme Court has in a number of cases held that the form of the order of termination is not conclusive of the true nature of the order, for, it is possible that the form may be merely a camouflage for an order of dismissal for misconduct.[13] It is, therefore, always open to the tribunal to go behind the form and look at the substance and if it comes to the conclusion, that though in form the order amounts to termination *simpliciter*, it is in reality a cloak for dismissal for misconduct, to set it aside as a colourable exercise of the power.[14] Before examining the action of the management, the Supreme Court has emphasized that the following two socially vital factors must inform the understanding and application of industrial jurisprudence:[15]

> The first is the constitutional mandate of Part IV obligating the State to make 'provision for securing just and human conditions of work'. Security of employment is the first requisite of a worker's life. The second equally axiomatic consideration is that a worker who wilfully or anti-socially holds up the wheels of production or undermines the success of the business is a high risk and deserves, in industrial interest, to be removed without tears. Legislation and judicial interpretation have woven the legal fabric.

The court held that in order to judge whether the action of the management amounted to discharge *simpliciter* or a disguised dismissal, it was within its powers to x-ray the order and discover its true nature. On examining the whole matter the court in *L. Michael* held that the loss of confidence in this case was an afterthought and, therefore, the order was not sustainable. The court observed:[16]

> Loss of confidence is no new armour for the management; otherwise security of tenure, ensured by the new industrial jurisprudence and authenticated by a catena of cases of this Court, can be subverted by this neo-formula. Loss of confidence

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13. *Supra* note 11.

14. *Chartered Bank* v. *Its Employees Union*, AIR 1960 SC 919 : (1960) II LLJ 222 (SC); also *L. Michael*, *supra* note 11. In *L. Michael*, a permanent employee of proved efficiency and standing was discharged *simpliciter* by the management issuing him a notice and offering one month's pay as authorized by the relevant standing orders of the company. He challenged the order as being wrongful, *mala fide*, illegal and an act of victimisation for his trade union activities. The case of the management was that it had lost confidence in him because of his smuggling out secret information of the company and that it had chosen not to proceed against him departmentally but to discharge him by issuing him order of discharge *simpliciter* which was permissible.

15. *Id.*, *L. Michael* at 577.

16. *Id.* at 581.

in the law will be the consequence of the Loss of Confidence doctrine.

Thus, it can be seen that in spite of the fact that the standing order may make provision for termination of services of a permanent employee, yet the courts have ensured that such powers are not abused and used as a cloak to shield *mala fide,* vindictive and unfair labour practices on the part of the employer. However, in a number of recent cases, the Supreme Court has under the 'new approach' to the disciplinary matters upheld the orders of dismissal of employees treating various misconducts amounting to 'loss of confidence.'[17]

III Managerial prerogative to dismiss or discharge and industrial adjudication

It is ordinarily expected of an employer before taking any disciplinary action dismissing the workman to inform the workman clearly, precisely and accurately of the specific charges levelled against him. The object is that the delinquent workman must know what he is charged with so that he has an opportunity at the very outset to place his explanation to the allegations made against him and if the explanation is satisfactory, the proposed proceeding against him is dropped at the very beginning or if the workman voluntarily accepts his guilt there may be no need to enquire into the same.[18] But if the management is not satisfied with his explanation denying the allegations in whole or in part, it may go ahead and hold a formal departmental inquiry against him in respect of the charges which he had denied in his explanation or in respect of which no explanation was given by him and the management/disciplinary authority is expected to give the delinquent workman a reasonable opportunity to defend himself so that he is not condemned unheard. It is a cardinal principle of natural justice that before imposing on the delinquent workman any punishment, an employer is ordinarily expected to conduct a proper domestic enquiry in accordance with the provisions of the standing orders, if applicable, and the principles of natural justice.[19] If that requirement is satisfied, the employer will by and large escape the attack that he has acted arbitrarily or *mala fide* or by way of victimization. If he has held a proper enquiry, normally his *bona fide* will be established.

Ordinarily, the action of the management is assailed, *inter alia*, on grounds of *mala fide*, want of good faith, victimization, unfair labour

17. See *infra* notes 116 to 121.

18. *Central Bank of India Ltd.* v. *Karunamoy Banerjee*, AIR 1968 SC 266: (1967) II LLJ 739.

19. *State Bank of Patiala* v. *S.K. Sharma*, (1996) 3 SCC 364.

practice, violation of the principles of natural justice. It is, therefore, necessary for the employer to hold departmental enquiry in accordance with principles of natural justice before resorting to disciplinary action.

Misconduct – meaning and scope

Unfair and wrongful discharge or dismissal of industrial workmen for a 'misconduct' as a measure of disciplinary action is one of the major questions in industrial disputes which industrial adjudication has to deal with. Workers and their trade unions regard protection against arbitrary and/or unjustified disciplinary action as one of the most important functions of the trade union activity.

The expression 'misconduct' has not been defined either in the Industrial Disputes Act, 1947 or in the Industrial Employment (Standing Orders) Act, 1946. But under the Industrial Employment (Standing Orders) Central Rules, 1946, framed under the Industrial Employment (Standing Orders) Act, the central government has prescribed the model standing orders in schedule 1, clause 14(3), which provides the acts of omission and commission which shall be treated as 'misconduct'.[20]

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20. Schedule 1, sub-clause (3) of clause 14 of the model standing orders provides thus:

(3) The following acts and omissions shall be treated as misconduct:
(a) wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior;
(b) theft, fraud or dishonesty in connection with the employer's business or property;
(c) wilful damage to or loss of employer's goods or property;
(d) taking or giving bribes or any illegal gratification;
(e) habitual absence without leave, or absence without leave for more than 10 days;
(f) habitual late attendance;
(g) habitual breach of any law applicable to the establishment;
(h) riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline;
(i) habitual negligence or neglect of works;
(j) frequent repetition or any act or omission for which a fine may be imposed to a maximum of two per cent of the wages in a month; or
(k) striking work or inciting others to strike in contravention of the provisions of any law, or rule having the force of law.
(l) Sexual harassment which includes such unwelcome sexually determined behaviour (whether directly or by implication) as-
  (i) physical contact and advances; or
  (ii) a demand or request for sexual favours; or
  (iii) sexually coloured remarks; or
  (iv) showing pornography; or
  (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

The language of this model standing order itself makes it clear that these cases of misconduct are merely illustrative and by no means exhaustive. There may be many more acts which may be directly subversive of discipline in the industrial establishment and may constitute 'misconduct'. The employers may frame their own standing orders suited to the peculiar exigencies of their industries and establishments. It is not humanly possible to provide for every type of 'misconduct' in the standing orders for justifying disciplinary action against the workman.

In *Mahendra Singh Dhantwal* v. *Hindustan Motors Ltd.*,[21] a three judge bench of the Supreme Court observed that standing orders of a company may describe only certain cases of misconduct and the same cannot be exhaustive of all the species of 'misconduct' which a workman may commit. But in *Glaxo Laboratories (I) Ltd.* v. *Presiding Officer, Labour Court*,[22] another three-judge bench has, glossing on the observations in *Mahendra Singh Dhantwal*,[23] held that these observations cannot be elevated to a proposition of law that some misconduct neither defined nor enumerated and which may be believed by the employer to be a misconduct *ex post facto* would expose the workman to a penalty. The court further pointed out that it cannot be left to the vagaries of management to say *ex post facto* that some acts of omission or commission, nowhere found enumerated in the relevant standing orders, are nonetheless acts of misconduct for the purposes of imposing a penalty.

Again in *A.L. Kalra* v. *Project & Equipment Corporation of India Ltd.*,[24] D.A. Desai J observed that since misconduct when proved entails penal consequences, it is obligatory on the employer to specify and define it with precision and accuracy so that *any ex post facto* interpretation of some incident may not be alleged as misconduct. It is submitted that, when there are standing orders certified under the Industrial Employment (Standing Orders) Act, there may not be difficulty because they define 'misconduct' broadly. But in the absence of the standing orders, or wherever Industrial Employment (Standing Orders) Act is not applicable, the question will have to be dealt with reasonably and in accordance with commonsense and what acts can be treated as acts of misconduct would depend upon the facts and circumstances of each case.[25]

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21. (1976) 4 SCC 606: (1976) II LLJ 259 (SC).

22. *Supra* note 5.

23. *Supra* note 21. The *ratio* of this case was reaffirmed in *Rasiklal Vaghajibhai Patel* v. *Ahmedbad Municipal Corpn.*, (1985) 2 SCC 35.

24. (1984) 3 SCC 316.

25. *W.M. Agnani* v. *Badri Das*, (1963) I LLJ 684, 690 (SC), per Gajendragadkar J.

Realizing that the word 'misconduct' is not capable of precise definition but after noticing the etymological definition of the expression, Ramaswamy J in *State of Punjab* v. *Ram Singh Ex-Constable*,[26] observed:[27]

> [T]hough not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgement, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve.

It can be seen that the Supreme Court has on the one hand attempted to emphasize the importance of defining as far as possible 'misconduct' with precision and clarity, as these, if proved, visit an employee with civil consequences, but at the same time accepted that it is not capable of being given a precise meaning. Cognizant of the fact that Industrial Employment (Standing Orders) Act has application only to industrial establishment employing 100 or more workmen, the court has left it for the industrial adjudicator to decide in each case whether the alleged act, in the facts and circumstances of the case, would amount to 'misconduct'. This appears to be a very pragmatic view of the matter.

Procedure for disciplinary action

No procedure as such has been prescribed for disciplinary action either under the Industrial Disputes Act or in the rules made thereunder which should be followed before inflicting any punishment on an industrial worker. Neither the trial court procedure nor the procedural safeguards crystallized under article 311 of the Constitution of India applicable in case of civil servants or those holding civil posts under the union or a state can be said to be strictly binding on the employer for taking disciplinary action against an industrial worker.[28] However, under the Industrial Employment (Standing Orders) Act, the employer

26. (1992) 4 SCC 54.

27. *Id.* at 59.

28. *UB Dutt & Co. (P.) Ltd.* v. *Its Workmen*, AIR 1963 SC 411: (1962) I LLJ 374 (SC).

is required to prescribe through the standing orders the procedure for taking disciplinary action. In this respect, the model standing orders framed by the central government under the Industrial Employment (Standing Orders) Act, are generally adopted by the employers. The procedure prescribed by the statutory bodies/corporations and government companies have laid down broad guidelines for holding departmental enquiries. Where the rules are silent about disciplinary procedure, the courts have emphasized observance of the principles of natural justice before visiting an employee with punishment. It is the judiciary in India that has infused legal formalism into the law of work-discipline and has made the industrial employers aware of the legal restriction on their common law right to 'hire and fire'.

Audi alteram partem rule

The Supreme Court has emphasized that an employer is required to follow the principles of natural justice including *audi alteram partem* rule before punishing an employee for misconduct.[29] The rule of *audi alteram partem*, in its fullest amplitude, means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto and have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him. He must be allowed to inspect documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them. Also he should be given the right to lead his own evidence, both oral and documentary, in his defence before an impartial body (enquiry officer). The principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket formula.[30] They must yield to, and change with the exigencies of, the situation. In *Syndicate Bank* v. *General Secretary, Syndicate Bank Staff Association,*[31] the Supreme Court had stated the essential elements of the principles of natural justice thus:[32]

> There are two essential elements of natural justice which are: (a) no man shall be judge in his own cause; and (b) no man

29. *Supra* notes 18 and 19.

30. *Ajit Kumar Nag* v. *General Manager (P.J.) Indian Oil Corporation Ltd.*, (2005) 7 SCC 764; also *D.K. Yadav* v. *JMA Industries Ltd.*, (1993) 3 SCC 259; *Ganesh Santa Ram Sirur* v. *State Bank of India*, (2005) 1 SCC 13 and *Kusheshwar Dubey* v. *Bharat Coking Coal Ltd.*, (1988) 4 SCC 319.

31. (2000) 5 SCC 65.

32. *Id.* at 78.

shall be condemned, either civilly or criminally, without being afforded an opportunity of being heard in answer to the charge made against him. In course of time by various judicial pronouncements these two principles of natural justice have been expanded, e.g., a party must have due notice when the tribunal will proceed; the tribunal should not act on irrelevant evidence or shut out relevant evidence; if the tribunal consists of several members they all must sit together at all times; the tribunal should act independently and should not be biased against any party; its action should be based on good faith and order (*sic*) and should act in a just, fair and reasonable manner. These in fact are the extensions or refinements of the main principles of natural justice stated above.

Exceptions to the principle of audi alteram partem

As a matter of general rule, the principles of natural justice (*audi alteram partem*) apply in all cases where an action results in civil or penal consequences against an individual except in those cases where these principles have been excluded, expressly or by necessary implication. The exceptional situations in which these principles have been expressly excluded find express mention under the second proviso to clause (2) to article 311 of the Constitution of India applicable to civil servants.[33] Under this provision, a civil servant can be removed, dismissed or reduced in rank by way of punishment without any notice or enquiry under the following circumstances:

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33. Constitution of India, article 311 reads as under:

Article 311. **Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State** – (1) No person who is a member of civil service of the Union ... or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges....

Provided further that this clause shall not apply –

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case maybe, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

a) where the person is convicted on a criminal charge;

b) where the disciplinary authority is satisfied for the reasons to be recorded in writing that it is not reasonably practicable to hold an enquiry; and

c) where the President or Governor, as the case may be, is satisfied that in the interest of the security of the state, it is not expedient to hold such enquiry.

The justifications for these three exceptions are that the *audi alteram partem* rule could not be invoked if the impact of this rule would have the effect of paralyzing the administration or becomes prejudicial to the public interest or the country. In *Union of India* v. *Tulsiram Patel,*[34] the Supreme Court, by a majority of 4:1, had held that the necessities of the situation provided above shall exclude the principles of natural justice, including the *audi alteram partem* rule. It also stated that the principles of natural justice having been excluded by a constitutional provision, namely, the second proviso to article 311(2), could not be reintroduced by the side-door providing for enquiry. The court, however, hastened to add that where the second proviso to article 311(2) is invoked on extraneous grounds, or a ground having no relation to the situation envisaged in that clause, the action would be *mala fide* and void. In such a case, the invalidating factor may be referable to article 14. The second proviso to article 311(2) was based on public policy, in public interest and for public good and it must be given effect to. The court, however, pointed out that the government servant is not wholly without any opportunity. Rules made under the proviso to article 309, or under Acts referable to that article, generally provide for a right of appeal.[35] Right to appeal would be sufficient compliance with the requirement of natural justice. The court held that, besides departmental remedies, the impugned action would also be subject to judicial review.

Before the decision in *Tulsiram Patel,*[36] the court in the sphere of industrial law did not favourably consider the standing orders carving

34. (1985) 3 SCC 398; also see *A.K. Sen* v. *Union of India*, AIR 1986 SC 335 : (1985) 4 SCC 641 and *Shivaji Atamaji Sawant* v. *State of Maharashtra*, AIR 1986 SC 617 : (1986) 2 SCC 112.

35. Except in cases where the order is one of dismissal, removal, or reduction in rank passed by the President or Governor of a state, as the case may be, the highest constitutional functionaries. There can be no higher authority to which the appeal can lie from an order passed by one of them.

In *Tulsiram Patel*, the court pointed out that in *Maneka Gandhi* v. *Union of India* ,(1978) 1 SCC 248 and *Liberty Oil Mills Ltd.* v. *Union of India,* (1984) 3 SCC 465 the right to make a representation after an action was taken was held to be a sufficient remedy. An appeal being a much wider and more effective remedy than a right of making a representation, it is wrong to say that the civil servant is without remedy.

36. *Supra* note 34.

out exceptions to *audi alteram partem* rule. In *Workmen of Hindustan Steel Ltd.* v. *Hindustan Steel Ltd.*,[37] a division bench observed that such clauses are 'archaic Standing Orders reminiscent of the days of hire and fire'. However, after the decision in *Tulsiram Patel*,[38] the position changed in the sphere of industrial law as well. The court has been upholding rules; regulations and standing orders framed *pari materia* with the second proviso to article 311(2) of the Constitution. Recently, in *Ajit Kumar Nag*,[39] a bench of three judges upheld the validity of certified standing order 20(vi) of the Indian Oil Corporation which read thus:

> Where a workman has been convicted for a criminal offence in a court of law or where the General Manager is satisfied for reasons to be recorded in writing, that it is neither expedient nor in the interest of security to continue the workman, the workman may be removed or dismissed from service without following the procedure laid down under III of this clause.

In this case, the appellant was dismissed from service for allegedly assaulting the chief medical officer. No notice was issued, no explanation was sought and no charge-sheet was served. The general manager in his order of dismissal invoked standing order 20(vi) referred to above stating that in the interest of security of the refinery such action was immediately required. The Supreme Court, considering the totality of the circumstances and the materials before it, held that the general manager, being the highest administrative head of the corporation, had validly exercised the power and the standing order in question was *intra vires* article 14 of the Constitution. The court upheld the judgment of a two-judge bench in *Hari Pada Khan* v. *Union of India*,[40] where the impugned standing order was 'more or less' similar to standing order 20(vi). The court did not approve of the observations of the division bench in *Workmen of Hindustan Steel Ltd.*[41] that such standing orders were 'archaic Standing Orders reminiscent of the days of hire and fire'.

However, in *Chief Security Officer* v. *Singh Asan Rabi Das*,[42] the Supreme Court held that the reasons given for dispensing with enquiry against a dismissed employee, namely, that at any such enquiry witnesses of security/other railway employees would suffer personal humiliation and insults and that their family members might become

37. 1984 Supp SCC 554.
38. *Supra* note 34.
39. *Supra* note 30.
40. (1996) 1 SCC 536.
41. *Supra* note 37.
42. (1991) 1 SCC 729.

targets of violence, were insufficient for dispensing with the enquiry. The court held that witnesses were like other normal witnesses who could not be said to be placed in any delicate or special position or be exposed or subjected to any danger to which other witnesses were not normally subjected. There was total absence of sufficient material or grounds for dispensing with the enquiry.[43]

It is thus the settled position both in public as well as private employment that rules/regulations/standing orders can envisage situations on the lines laid down in the second proviso to article 311(2) of the Constitution, where the employers can dispense altogether with the enquiry and summarily dismiss its employees. It may, however, be pointed out that any such order will be subject to judicial review. If it is shown that summary termination or dismissal was on extraneous grounds, the same is liable to be set aside by the courts in exercise of their power of judicial review.

Suspension

An employer can place a delinquent employee under suspension pending an enquiry against him. Right to suspend an employee is an unqualified right of the employer.[44] It has received statutory recognition under service rules framed by various authorities, including the Government of India and the state governments.[45]The order of suspension does not put an end to an employee's service. He continues to be a member of the service, though he is not permitted to work and is paid only subsistence allowance which is less than his salary. The service rules usually provide for payment of salary at a reduced rate during the period of suspension which constitutes what is called 'subsistence allowance'. If there is no provision in the rules applicable to a particular class of service for payment of salary at a reduced rate, the employer would be liable to pay full salary even during the period of suspension. The Supreme Court has held in *M. Paul Anthony*[46] that

43. *Ibid*; also see *IRCON Co. Ltd.* v. *Ajay Kumar,* (2003) 4 SCC 579.

44 *Hotel Imperial, N. Delhi* v. *Hotel Workers Union*, (1959) 2 LLJ 544; *Ram Lakhan* v. *Presiding Officer*, (2000) 10 SCC 201.

45 Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, framed under the proviso to article 309 of the Constitution of India, provides for suspension of an employee holding civil post in the central government. S. 10A of the Industrial Employment (Standing Orders) Act, which contains a provision for subsistence allowance during the period of suspension of an employee in any industrial establishment covered by the Act recognises this right. Rule 14 of the model standing orders expressly confers such right. Even under the General Clauses Act, 1897, this right is conceded to the employer by s. 16 which, *inter alia*, provides that the power to appoint includes the power to suspend or dismiss.

46. *Supra* note 3; also *O.P. Gupta* v. *Union of India,* (1987) 4 SCC 328 and *Khem Chand* v. *Union of India,* AIR 1958 SC 300.

the provision of payment of subsistence allowance made in the service rules only ensures non-violation of the right to life of the employee. The very expression 'subsistence allowance' has been held as having an undeniable penal significance. The court has likened non-payment of subsistence allowance to slow poisoning, as the employee, if not paid a subsistence allowance, would starve to death. In *State of Maharashtra* v. *Chandrabhan Tale,*[47] the Supreme Court struck down a service rule which provided for payment of a nominal amount of one rupee as subsistence allowance to an employee placed under suspension. This decision was followed in *Fakirbhai Fullabhai Solanki* v. *Presiding Officer*[48] and it was held that if an employee facing financial stringencies caused by non-payment of subsistence allowance could not undertake a journey away from his home to attend the departmental proceedings, the order of punishment, including the whole proceedings, would stand vitiated. This position was followed by the court in *M. Paul Anthony.*

Simultaneity of criminal trial as also domestic enquiry - whether violative of principles of natural justice

The issue arises whether simultaneity of criminal trial as well as departmental enquiry against an employee is violative of the principles of natural justice. The first decision of the Supreme Court on this question was in *Delhi Cloth & General Mills Ltd.* v. *Kushal Bhan.*[49] The court in this case had observed that it cannot be said that principles of natural justice require that an employer must wait for the decision at least of the criminal trial court before taking action against an employee. But at the same time, if the case is of a grave nature or involves questions of fact or law, which are not simple, it would be advisable for the employer to await the decision of the trial court so that the defence of the employee in the criminal case may not be prejudiced. This was followed by *Tata Oil Mills Co. Ltd.* v. *Workmen.*[50] The court, pursuing the line of reasoning in *Delhi Cloth & General Mills Ltd.,* observed that it was desirable that, if the incident giving rise to a charge framed against a workman in a domestic enquiry is being tried in a criminal court, the employer should stay the domestic enquiry pending the final disposal by the criminal court. This issue again came up in *Jang Bahadur Singh* v. *Brij Nath,*[51] where the court observed that the employee is free to move the court for an order restraining the continuation of the disciplinary proceedings in such a case and if he

47. (1983) 3 SCC 387.
48. (1986) 3 SCC 131.
49. AIR 1960 SC 806.
50. AIR 1965 SC 155.
51. AIR 1969 SC 30.

obtains a stay, a wilful violation of the order would of course amount to contempt of court, but in the absence of a stay order, the disciplinary authority is free to exercise its lawful powers of initiating disciplinary action against the employee. Subsequently, in *Kusheshwar Dubey* v. *M/s Bharat Coking Coal Ltd.*,[52] the Supreme Court held that it is neither possible nor advisable to evolve a hard and fast, straightjacket formula valid for all cases and of general application without regard to the particulars of individual situations as to whether there should or should not be simultaneity of the disciplinary proceedings and a criminal trial against a delinquent worker. The court, after referring to three of its earlier decisions[53] held that the view expressed in these cases seems to support the position that, while there could be no legal bar for simultaneous proceedings being taken, yet there may be cases where it would be appropriate to defer disciplinary proceedings awaiting disposal of the criminal case. In this case, the delinquent employee was subjected to disciplinary proceedings, as also a criminal trial on the allegation that he had physically assaulted a supervising officer. The Supreme Court held that since the criminal action and the disciplinary proceedings were grounded upon the same set of facts, the disciplinary proceedings could have been stayed. It held that the high court was not right in interfering with the trial court's order of granting injunction of the disciplinary proceedings pending trial which had been affirmed on appeal.

In *Nelson Motis* v. *Union of India*,[54] the court laid down that the disciplinary proceedings could be legally continued even when the employee was acquitted in a criminal case as the nature and proof required in a criminal case were different from those in departmental proceedings.

The matter again came for consideration of the court in *State of Rajasthan* v. *B.K. Meena*[55] and *Depot Manager, A.P. SRTC* v. *Mohd. Yousuf Miya*.[56] Finally, in *M. Paul Anthony*,[57] the court summarized the conclusions which were deducible from various decisions as under:

(i) Departmental proceedings and criminal proceedings can proceed simultaneously, as there is no bar in their being conducted simultaneously.

52. (1988) 4 SCC 319. For a critical evaluation see S.N. Singh,"Permissibility of Simultaneous Criminal Trials and Disciplinary Proceedings" (1990) 4 *CLA* (Mag) 20.

53. *Delhi Cloth and General Mills* v. *Khushal Bhan, supra* note 49; *Tata Oil Mills Co. Ltd.* v. *Workmen, supra* note 50; *Jang Bahadur Singh* v. *Brij Nath, supra* note 51.

54. (1992) 4 SCC 711; also see *Kendriya Vidyalaya Sangathan* v. *T.Srinivas* (2004) 7 SCC 442 : AIR 2004 SC 4127; *State Bank of India* v. *R. B. Sharma,* (2004) 7 SCC 27 : AIR 2004 SC 4144.

55. (1996) 6 SCC 417.

56. (1997) 2 SCC 699.

57. *Supra* note 3.

(ii) If the departmental proceedings and the criminal case are based on identical in similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case will depend upon the nature of the offence, the nature of the case against the employee, and the evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings and due regard must be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty, his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest.

The protracted nature of the trials that take place in our country has led the court to hold that in appropriate cases the employer can move the court for vacation of interim stay order, if any, against departmental proceedings and proceed with the domestic enquiry and pass appropriate orders in such a case. In *Food Corporation of India* v. *George Varghese*,[58] the management had stayed its hand so far as the disciplinary proceeding against the workman was concerned pending disposal of the criminal trial against him. On his conviction by the criminal court, the management dismissed the employee. On appeal, the workman was acquitted, giving him the benefit of doubt. The management, therefore, revoked the order of dismissal, reinstated the workman in service, and immediately placed him under suspension. Soon thereafter, he was served with the charge-sheet and the statement of allegation, etc. for holding the departmental enquiry against him. Upholding the action of the management, Ahmadi J observed:[59]

58. 1991 Supp (2) SCC 143.
59. *Id.* at 145.

> The appellant acted fairly by staying its hands as soon as the prosecution was initiated. It did not proceed with the departmental inquiry lest it may be said that it was trying to over-reach the judicial proceedings. If it had insisted on proceedings with the departmental inquiry, the respondent would have been constrained to file his reply which could have been used against him in the criminal proceedings. That may have been branded as unfair. After the conviction the order of dismissal was passed but immediately on the respondents being acquitted the appellant fairly set aside that order and reinstated the respondent and initiated departmental proceedings by suspending him and serving with the charge sheet and statement of allegations etc. It cannot therefore, be said the appellant was guilty of delay.

The court held that a time gap of eight months between the revocation of the order of dismissal and the service of charge sheet was not fatal. The court allowed the appeal of the management with the direction to complete the enquiry within a period of six months, provided the workman cooperated in the enquiry and did not delay the proceedings. Earlier, generally the position followed was that in the case of a clear acquittal by a criminal court, it was expedient to drop the disciplinary proceedings, but not so where the acquittal is on technical grounds.[60] But the latest trend seems to be that even acquittal on merits does not *ipso facto* warrant dropping of departmental proceedings as is discernible from the three-judge bench decision in *Ajit Kumar Nag*.[61]

Domestic enquiry

The framing of the charge sheet is the first step to be taken for initiating a domestic enquiry into the charges for taking disciplinary

60. See, *Corporation of the City of Nagpur* v. *Ramachandra C. Modak,* (1981) 2 SCC 714; recently, this legal position has been reiterated in *G. M. Tank* v. *State of Gujarat,* (2006) 5 SCC 446.

61. *Supra* note 30. In this case the employee had been dismissed from service taking shelter under the clause in the certified standing orders excluding *audi alteram partem* on the ground that the continuation of the employee in service against whom a criminal case has been registered was against the security of the corporation. He was acquitted by the criminal court and on this ground he had sought the relief of reinstatement. The Supreme Court held that the order of acquittal did not preclude the corporation from taking action if it was otherwise permissible. The court held that the two proceedings, criminal and departmental are entirely different, operate in different fields and have different objectives. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. In criminal law, burden of proof required is proving of the guilt of the accused to the hilt but in departmental proceedings a finding can be recorded against the workman on the basis of "preponderance of probability."

action against an employee/worker. The charge sheet is framed on the basis of allegations made against the employee; the charge sheet is required to be served on him to enable him to give his explanation; the explanation given by the employee is to be considered by the employer and if the explanation is found by the employer to be satisfactory, the proceedings are dropped, otherwise an enquiry is held into the charges; if the charges are not proved at the enquiry, the matter is closed giving the employee all the benefits to which he was entitled; if the charges are proved, the penalty follows.[62]

Quasi-judicial nature

In cases where the disciplinary authority decides to hold a departmental enquiry, it is ordinarily required to give a reasonable opportunity to the employee to be heard by an impartial enquiry officer before imposing disciplinary punishment upon him for an alleged misconduct.[63] The courts, being cognizant of the fact that most of the labour force in this country is illiterate and ignorant, have emphasized the fact that a domestic inquiry should not be an empty formality but an essential condition to the legality of the disciplinary order. It is well settled that the disciplinary enquiry has to be held according to the principles of natural justice and the enquiry officer has to act judicially because the charges of misconduct, if proved, will result not only in deprivation of the livelihood of the workman but will also attach stigma to his character.

Representation of parties

Whether a worker has a right to be represented by an office bearer

62. *Delhi Development Authority* v. *H.C. Khurana,* (1993) 3 SCC 196 at 201.

63. *Canara Bank* v. *V.K. Awasthy,* (2005) 9 SCC 331; also *Sur Enamel and Stamping Works Ltd.* v. *Their Workmen*, AIR 1963 SC 1914 : (1963) II LLJ 367(SC). Speaking for the court, Das Gupta J, in *Sur Enamel and Stamping Works Ltd,* pointing out that mere form of an enquiry would not satisfy the requirements of industrial adjudication to protect the disciplinary action against a workman, observed:

An inquiry cannot be said to have been properly held unless:

(i) the employee proceeded against has been informed clearly of the charges leveled against him;

(ii) the witnesses are examined – ordinarily in the presence of the employee – in respect of the charge;

(iii) the employee is given a fair opportunity to cross-examine witnesses;

(iv) he is given a fair opportunity to examine witnesses including himself in the defence if he so wishes on any relevant matter; and

(v) the inquiry officer records his findings with reasons for the same in his report.

or member of a trade union or by a lawyer in a domestic inquiry as part of the principles of natural justice has been one of the important issues that has come up for consideration before the apex court in a number of cases. To begin with, the approach of the court to the representation of the parties before the domestic tribunal was that a domestic enquiry was a managerial function and, as such, best left to the management without the intervention of outsiders and those belonging to the legal profession. This approach was based on the view that the enquiries before the domestic tribunals were of a simple nature, where technical rules as to evidence and procedure did not apply and the persons appointed to hold such enquiries were generally not lawyers. It was believed that in such informal enquiry the delinquent employee would best be able to defend himself.[64] This approach of the court is clearly discernible from three judgments of the court.[65]

In *N. Kalandi,*[66] the court observed that a workman had no right to be represented in the domestic enquiry by a representative of his union though the enquiry officer in his discretion may allow an employee to avail of such assistance. In the facts and circumstances of the case, the court held that the enquiry was not vitiated by the fact that the delinquent workman was not allowed to be represented in the domestic enquiry by a representative of his union. This line of reasoning was followed in *Brooke Bond (India) Ltd.*[67] In this case, the court held that the refusal by the enquiry officer to allow a workman to be represented by a lawyer, or by an outsider, did not vitiate the enquiry. The court insisted that before a workman could ask for such right, the same should be envisaged in the standing orders of the establishment. In the absence of any such provision, the general approach of the court was that the delinquent person himself must conduct his case. In *Dunlop Rubber Co. India Ltd.,*[68] the standing orders of the company provided that only a representative of the union which was registered under the Indian Trade Unions Act and was recognized by the government could represent a workman in the domestic enquiry. The Supreme Court held that the refusal by the enquiry officer to allow the workmen to be assisted by the workmen's own union which was not registered or recognized did not vitiate his decision. The court observed:[69]

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64. *N. Kalandi* v. *Tata Locomotive & Engineering Co. Ltd.*, AIR 1960 SC 914 : (1960) II LLJ 228 (SC); also see *Board of Trustees of the Port of Bombay* v. *Dilipkumar Raghavendranath Nadkarni*, (1983) 1 SCC 124.

65. *Ibid*; also *Brooke Bond (India) Ltd.* v. *S. Subba Raman,* (1961) II LLJ 417 (SC) and *Dunlop Rubber Co. India Ltd.* v. *Their Workmen*, AIR 1965 SC 1392.

66. *Ibid.*

67. *Brooke Bond India (P) Ltd.* v. *S. Subba Raman, supra* note 65.

68. *Dunlop Rubber Co. India Ltd.* v. *Their Workmen, supra* note 65.

69. *Id.* at 1395-96.

> [I]n holding domestic enquiries, reasonable opportunity should be given to the delinquent employees to meet the charge framed against them and it is desirable that at such inquiry the employees should be given liberty to represent their case by persons of their choice if there is no Standing Order against such a course being adopted and if there is nothing otherwise objectionable in the said request.

The court held that there is no right to be represented in a domestic enquiry as such, unless the employer by his standing orders recognized such a right and refusal to allow representation by any union, unless standing orders confer that right, would not vitiate the proceedings. The court held that in the facts and circumstances of the case, refusal of the enquiry officer to accede to the request made by the workmen did not introduce any serious defect in the enquiry itself.

However, in *Board of Trustees of the Port of Bombay* v. *Dilipkumar Raghavendranath Nadkarni,*[70] the court, noting the narrow approach in the aforesaid decisions, brought to the fore the changing practices in the Indian industry where the delinquent employee is now pitted against legally trained minds. The court emphasized the importance of permitting a person who is likely to suffer serious civil or pecuniary consequences as a result of the enquiry to be represented by a legal practitioner as an outsider to enable him to defend himself adequately. In this case, an enquiry was ordered against the employee on a charge of misconduct. The delinquent employee made a request seeking permission to engage a legal practitioner for his defence before the enquiry opened. The chairman of the Port Trust, while rejecting his request, simultaneously appointed two legal advisors employed with the board as presenting-cum-prosecuting officers. His subsequent request for permitting his co-employee to appear in his defence was, however, allowed.After the enquiry proceeded and second out of the twenty five witnesses to be examined was in the witness box, the Bombay Port Trust Employees' Regulations, 1976 came into force. The regulations permitted the engagemant of a fellow worker or a member of the trade union to which the concerned employee belongs but the engagement of a legal practitioner was not permitted except when the presenting officer was a legal practitioner or the disciplinary authority permits otherwise on the basis of all the circumstances of the case. No action was taken on the basis of these regulations. As aresult of the enquiry, the respondent's services were terminated. He assailed the order of dismissal based on the said enquiry on the ground, *inter alia*, that he had been denied reasonable opportunity to defend himself by the refusal of his request

70. (1983) 1 SCC 124. Also see, *Bhagat Ram* v. *State of H.P.*, AIR 1983 SC 454.

to be defended by a legal practitioner of his choice. Without laying down the broader principle as to whether denial to be represented by a legal practitioner would necessarily amount to violation of the principles of natural justice, the court confined its decision to the facts of this case and observed thus:[71]

> [I]f the rules ... did not place an embargo on the right of the delinquent employee to be represented by a legal practitioner, the matter would be in the discretion of the inquiry officer whether looking to the nature of the charges, the type of evidence and complex or simple issues that may arise in the course of inquiry, the delinquent employee in order to afford reasonable opportunity to defend himself should be permitted to appear through a legal practitioner....In our view we have reached a stage in our onward march to fair play in action that where in an inquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner refusal to grant his request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated.

The aforesaid observations of the court are pertinent, especially in the case of vast labour force of this country which is illiterate and ignorant about its rights.

Subsequently, the issue of representation by a lawyer in a departmental enquiry came up for consideration before the Supreme Court in *J.K. Aggarwal* v. *Haryana Seeds Development Corporation Ltd.*[72] In this case, the court was dealing with rule 7(5) of the Haryana Civil Service Appeal Rules, 1952 which provides that if the charge or charges are likely to result in the dismissal of the person from the service of the government, such person may, with the sanction of the enquiry officer, be represented by counsel. The court observed that though rule 7(5) did vest the enquiry officer with discretion in the matter of allowing representation by a lawyer, yet in the exercise of

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71. *Id.* at 130-32.

72. (1991) 2 SCC 283; see *Board of Trustees of the Port of Bombay* v. *Dilipkumar Raghavendranath Nadkarni, supra* note 64; also see *Hindustan Wire Limited* v. *Presiding Officer, Industrial Tribunal,* (1992) Lab IC 2098 (P & H) where a division bench of the Punjab and Haryana High Court held that in the interests of justice, the workman was entitled to be represented by an advocate of his choice in an inquiry against him, when the presenting officer as well as the enquiry officer appointed by the management were law graduates, notwithstanding the fact that there was an embargo imposed by the standing orders that he could not seek assistance of an advocate.

such discretion one of the relevant factors to be taken into account was whether there was a likelihood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reason of the employee being pitted against a presenting officer trained in law. A decision has to be reached on a case to case basis on the situational pecularities and the special requirements of justice of the case. The court held that where a presenting officer was a person with legal attainments and experience, as in the present case, and the employee had no legal background the refusal of the service of a lawyer to the employee resulted in denial of natural justice. The court observed that though the employee was a senior executive capable of defending himself, yet he might tend to become 'nervous' or 'tongue tied' in doing so.

In a subsequent decision,[73] the Supreme Court has held that right of representation is not absolute and it will strictly depend upon the standing orders applicable in the concerned industrial establishment. It seems that this approach was adopted by the court because at the stage of filing objections to draft standing orders workers/trade unions have a right to file their objections and be heard before the certifying authority or the appellate authority, as the case may be, and further they can also seek modification of the certified standing orders as well. The main issue before a three-judge Bench of the Supreme Court in *Crescent Dyes* was whether the employee was entitled to be represented by an office-bearer of another trade union who was not a member either of a recognised union or of a non-recognised union functioning within the undertaking in which he was employed, in view of statutory limitations contained in section 22(ii) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 and the certified standing order. The court answered the question in the negative without taking notice of the trend in the decisions of the court[74] on the subject. Ahmadi J observed thus:[75]

> [T]he right to be represented through counsel or agent can be restricted, controlled or regulated by statute, rules, regulations

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73. *Crescent Dyes and Chemicals Ltd.* v. *Ram Naresh Tripathi*, (1993) 2 SCC 115.

74. *Board of Trustees of the Port of Bombay* v. *Dilip Kumar. R. Nadkarni, supra* note 64; see S.N. Singh "Administrative Law". XIX *ASIL* 482 at 505 (1983); *Bhagat Ram* v. *State of H.P., supra* note 70; *J.K. Aggarwal* v. *Haryana Seeds Development Corporation Ltd.*, AIR 1991 SC 1221: (1991) 2 SCC 283.

75. *Supra* note 73 at 129; the judge relied on the judgments of the court handed down between 1960 and 1965 in *N. Kalandi* v. *Tata Locomotive & Engineering Co. Ltd., supra* note 64; *Brooke Bond India (P) Ltd.* v. *S. Subba Raman and Dunlop Rubber Co.* v. *Workmen, supra* note 65.

> or Standing Orders. A delinquent has no right to be represented through counsel or agent unless the law specifically confers such a right. The requirement of the rule of natural justice insofar as the delinquent's right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent. In the instant case the delinquent's right of representation was regulated by the Standing Orders which permitted a clerk or a workman working with him in the same department to represent him and this right stood expanded on Sections 21 and 22 (ii) permitting representation through an officer, staff- member or a member of the union, albeit on being authorised by the State Government. The object and purpose of such provisions is to ensure that the domestic enquiry is completed with despatch and is not prolonged endlessly. Secondly, when the person defending the delinquent is from the department or establishment in which the delinquent is working he would be well conversant with the working of that department and the relevant rules and would, therefore, be able to render satisfactory service to the delinquent. Thirdly, not only would the entire proceedings be completed quickly but also inexpensively. It is, therefore, not correct to contend that the Standing Order or Section 22(ii) of the Act conflicts with the principles of natural justice.

In view of the above, the Supreme Court upheld the dismissal order passed against the respondent on the basis of *ex parte* domestic enquiry. It is submitted that the decision of the court in *Crescent Dyes & Chemicals Ltd.*[76] needs to be reconsidered in the light of the decision in *Dilip Kumar* and other later decisions[77] of the court which, it would seem were not brought to the notice of the court.

Again, in *Bharat Petroleum Corporation Limited* v. *Maharashtra General Kamgar Union,*[78] the core issue was whether the appellate authority was justified in certifying the draft standing orders as submitted by the employer corporation which restricted representation to a co-worker and did not extend it to the trade union of which the employee

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76. *Supra* note 73.

77. *Supra* note 72.

78. (1999) 1 SCC 626. Here in this case the draft standing order as certified by the appellate authority provided as under:

> 29.4 If it is decided to hold an enquiry, the workman concerned will be given an opportunity to answer the charge/charges and permitted to be defended by a fellow workman of his choice, who must be an employee of the Corporation. The workman defending shall be given necessary time off for the conduct of the enquiry.

was a member as provided under the model standing orders. The court after considering the matter in its entirety observed that the law in this country does not concede an absolute right of representation to an employee as part of the right to be heard in disciplinary proceedings. In the present case, it opined that the standing orders as certified by the appellate authority had not disturbed the right of representation of the workman inasmuch as it still provided that the delinquent employee can be represented in the disciplinary proceedings through an employee, the only embargo being that the representative should be an employee of the same establishment. In the opinion of the court, there appeared to be sufficient logic behind this. A co-employee would be fully aware of the conditions prevailing in the parent establishment, its service rules including the standing orders, and would be in a better position than an outsider to assist the delinquent in the domestic proceedings for a fair and early disposal. Upholding the certification of the standing orders by the appellate authority, the court observed thus:[79]

> The basic features of the Model Standing Orders are thus retained and the right of representation in the disciplinary proceedings through another employee is not altered, affected or taken away. The Standing Orders conform to all standards of reasonableness and fairness and, therefore, the appellate authority was fully justified in certifying the Draft Standing Orders as submitted by the appellant.

In *Cipla Ltd.* v. *Ripu Daman Bhanot*,[80] the court reiterated the principle laid down in *Bharat Petroleum*[81] that a delinquent employee has no right to be represented by an advocate in the departmental proceedings and that if a right to be represented by a co–worker is given to him, the departmental proceedings would not be bad only for the reason that the assistance of an advocate was not provided to him.

From the above it is clear that the court has not taken a consistent stand on the issue of representation of workers by an outsider in departmental enquiry and, therefore, there is a need for reconsideration of the entire issue in the interest of having a clear enunciation of the legal position.

Enquiry officer must be an impartial person

The guiding principle is that the enquiry should be conducted with scrupulous regard for the requirements of the rules of natural justice,

79. *Id.* at 637.
80. (1999) 4 SCC 188.
81. *Supra* note 78.

i.e. without bias and by giving the delinquent employee an opportunity for adequately representing his case as the question of validity of the action taken by the employer is at issue.[82] Apart from compliance with other requirements of natural justice, the enquiry must be held honestly and in good faith with a view to determining whether the charges against a particular employee are proved or not; care must be taken to see that these enquiries do not become empty formality. In *Associated Cement Co. Ltd.* v. *Their Workmen*,[83] the Supreme Court held that the enquiry officer must be an impartial person. But the fact that the enquiry officer is an employee or officer working in the same organisation and under the disciplinary authority does not mean that he cannot be an impartial person or cannot hold any enquiry into the misconduct of an employee of the same organisation. What is required is that he should not be biased and/or should not import his personal knowledge, or knowledge of his colleagues while considering the explanation given by the workman. He should not have relied on reports received from witnesses in another enquiry. The court in *Associated Cement Co. Ltd.* held that in these circumstances the enquiry was bad being in violation of principles of natural justice. At the same time, the court also held that the domestic enquiries do not stand on the same pedestal with the trials of actions or cases in a court; they are not governed by technical rules of evidence or procedure. An enquiry cannot be said to be held properly when the person holding it begins to rely on his own statements. Where the enquiry officer claims to have seen the misconduct having been committed by the workman, in all fairness the enquiry should be entrusted to some other person. This is based on salutary rule that justice should not only be done but must also be seen to have been done.

One who alleges must prove

The Supreme Court in *Associated Cement Co.* has emphasized that an enquiry which begins with the examination of the workman himself will be bad in law inasmuch as it would be contrary to the principle that one who alleges must prove. It is the management which has to first lead evidence against the workman in support of the alleged misconduct with right to the workman to cross-examine the witnesses of the management. Thereafter, an opportunity has to be given to the workman to present his defence with right of cross-examination to the management. The court, however, has been flexible and cognizant of

82. *Kharad & Co. Ltd.* v. *Its Workmen*, AIR 1964 SC 719 : (1963) II LLJ 452 (SC).

83. (1964) 3 SCR 652 : (1963) II LLJ 396 (SC).

the situation that where the workman has voluntarily admitted his guilt there will be nothing more for the management to enquire into and in such a case holding of an enquiry would be a mere empty formality. Normally, therefore, in the absence of clear or unambiguous admission of guilt, failure to hold domestic enquiry would constitute serious infirmity in the order of dismissal.

Right to lead evidence and cross-examine witnesses

The rules of natural justice require that the workman proceeded against should be informed clearly of the charges leveled against him; witnesses should be normally examined in his presence in respect of such charges; if statements taken previously and given by witnesses are relied on, they should be made available to the workman concerned; the concerned workman should be given a fair opportunity to examine witnesses, including himself in support of his defence. After the management leads its evidence in support of the allegation against the workman with right to the workman to cross-examine the management witnesses and the right of the workman to lead evidence and the management having availed its right to cross-examine the witnesses of the workman, the enquiry officer has to submit his fact finding or enquiry report based on the evidence so adduced to the disciplinary authority for consideration.[84]

In *G.R. Venkateshwara Reddy* v. *Karnataka State Road Transport Corp.*[85] the Karnataka High Court has laid down the following requirements of reasonable procedure, subject to any special provision relating to procedure in the relevant rules, regulations, standing orders or a statute, to be followed in a departmental enquiry:

i) The employee should be informed of the exact charges which he is called upon to meet.

ii) He should be given an opportunity to explain any material relied on by the management to prove the charges.

iii) The evidence of the management witnesses should be recorded in the presence of the delinquent employee and he should be given an opportunity to cross-examine such witnesses.

iv) The delinquent employee shall either be furnished with the copies of the documents relied on by the management or be permitted to have adequate inspection of the documents relied on by the management.

84. *Supra* note 18.

85. (1995) 1 LLJ 1011 at 1020 (Kant).

v) The delinquent employee shall be given an opportunity to produce relevant evidence – both documentary and oral which include the right to examine self and other witnesses; and to call for relevant and material documents in the custody of the employer.

vi) Where the enquiry authority is different from disciplinary authority, the delinquent employee shall be furnished with a copy of the enquiry report and be permitted to make a presentation to the disciplinary authority against the findings recorded in the enquiry report.

Report of the enquiry officer must be based on material on record

The enquiry officer's report should be based on materials on record and must reflect the application of mind by the enquiry officer to the pleadings and the evidence adduced before him by the parties. Being a document of vital importance, the report must show the reasons for the conclusion. It cannot be an *ipse dixit* of the enquiry officer.[86] Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency.[87] It goes without saying that the whole object of holding a domestic enquiry against the delinquent workman is to enable an enquiry officer to decide upon the merits of the dispute before him and such enquiries must conform to the basic requirements of natural justice. One of the essential requisites of a proceeding of this nature is that when the enquiry is over, the officer must consider the evidence and record his conclusion and reasons therefor. It is of course not necessary that the report must be elaborate. However brief the report may be, it should indicate in a broad way the conclusion of the officer and his reasons. The standard of proof required in a domestic enquiry is only preponderance of probabilities. The findings of the enquiry officer must be supported by legal evidence.[88] Perversity vitiates disciplinary proceedings. In *Delhi Cloth and General Mills Co. Ltd.* v. *Ludh Budh Singh*,[89] the Supreme Court pointed out that a finding reported by an enquiry officer ignoring the material admissions made by the party in favour of the workman is not a question of mere appreciation of evidence, but really recording evidence contrary to that

86. *Anil Kumar* v. *Presiding Officer*, (1985) 3 SCC 378.
87. *Mahavir Parsad Santosh Kumar* v. *State of UP*, (1970) 1 SCC 764.
88. *Central Bank of India* v. *P.C. Jain* ,(1969) 1 SCR 735.
89. (1972) 1 SCC 595 : AIR 1972 SC 1031.

adduced before him. Therefore, in a case where the findings of fact are based on no legal evidence and the conclusion is one to which no reasonable man would come, it would be a case of perversity and not of appraisal of evidence.

Supply of enquiry officer's report to delinquent employee - if part of principles of natural justice

A new dimension to the principles of natural justice in service matters has been added by *Union of India* v. *Mohd. Ramzan Khan.*[90] In this case, the Supreme Court has drawn a distinction between the disciplinary enquiry conducted by a disciplinary authority and an enquiry made by an enquiry officer. The court held that in case the enquiry was conducted by an enquiry officer, principles of natural justice demand that the report, on the basis of which the authority is going to take its decision about the delinquent employee, be made available to him and he be given an opportunity to make a representation against adverse findings/remarks, if any, in it. In case, however, the disciplinary authority itself conducts the enquiry, no report is prepared and, therefore, this rule does not apply.

In *Managing Director, ECIL, Hyderabad* v. *B. Karunakar*,[91] a constitution bench of the court further clarified and strengthened the law laid down in *Ramzan Khan.* The court held that, though the 42nd Amendment of the Constitution had abolished the second opportunity of hearing to be given before imposition of penalty to a delinquent civil servant, reasonable opportunity even under the post-amendment law required that the disciplinary authority must supply a copy of the enquiry officer's report to the civil servant for his observations and comments before the disciplinary authority considers the report. Non-observance of this procedure amounts to denial of reasonable opportunity required under article 311(2). However, such non-observance does not result in automatic invalidation of the order of disciplinary authority by the reviewing court or the tribunal. The court or the tribunal will have to see whether the observance of the requirement would have made

90. (1991) 1 SCC 588.

91. (1993) 4 SCC 727; also see *State of U.P.* v. *Harendra Arora*, AIR 2001 SC 2319 and *NTC (WBAB&O) Ltd* v. *Anjana K. Saha*, (2004) 7 SCC 581. In *Anjana K. Saha* the court restated that non supply of copy of enquiry report to the delinquent after conclusion of the enquiry and before passing order of punishment (dismissal in this case) is violation of the rule of fair hearing procedure as developed by the Supreme Court in *Managing Director, ECIL* v. *B. Karunakar*. The court in this case ordered formal reinstatement of the employee for the limited purpose of enabling the employer to proceed with the enquiry from the stage of furnishing him with the copy of the enquiry report.

any difference in the decision. The court observed thus:[92]

> It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment.

The court also stated that the above propositions laid by it as part of the general law founded on the principles of natural justice were not confined only to the services strictly covered by article 311. They applied to all public or private employments. The court, however, applied this decision only prospectively so that matters concluded and decided could not be reopened and unsettled.

Disagreement of disciplinary authority with findings of enquiry officer

The findings of the enquiry officer are not binding on the punishing authority which has to finally decide whether the materials at the enquiry have established the charges and, if so, what punishment should be awarded. If the enquiry officer has held that the charges, or part of the charges, are not proved, the disciplinary authority may differ from the said findings on the basis of evidence led before the enquiry officer. In the event of disagreement with the enquiry officer, the disciplinary authority is bound to state reasons for disagreement to enable the employee concerned to make representation against such disagreement to persuade the disciplinary authority not to disagree with the conclusions reached by the inquiry authority for the reasons given in the enquiry report or he may offer additional reasons in support of the finding by the inquiry officer. In the absence of any ground or reason in the show cause notice it would amount to an empty formality which would cause grave prejudice to the delinquent employee resulting in injustice to him. The mere fact that in the final order some reasons were given to disagree with the conclusions reached by the disciplinary authority cannot cure the defect.[93]

Conclusion of disciplinary proceedings

The disciplinary proceedings commence with the issuance of the charge sheet and conclude with the decision of the disciplinary authority either to exonerate or punish the employee, which decision has to be based on relevant materials and the punishment, if imposed, has to be

92. *Id.* at 758.

93. *Ram Krishan* v. *Union of India*, (1995) 6 SCC 157, 161; also see *Punjab National Bank* v. *Kunj Behari Mishra*, (1998) 7 SCC 84; *Yoginath D. Bagde* v. *State of Maharashtra*, (1999) 7 SCC 739 and *State Bank of India* v. *K.P. Narayanan Kutty*, (2003) 2 SCC 449.

commensurate with the seriousness of the misconduct. Imposing of punishment is the last stage in the disciplinary action. [94]

Scope of powers of the industrial adjudicator to interfere with order of dismissal or discharge

Position prior to enactment of section 11A

In the absence of statutory provision in the Industrial Disputes Act, as it originally stood, dealing with the scope of the powers of the industrial adjudicators in the matter of dismissals and discharges, the Supreme Court, taking clue from the principles laid down by the labour appellate tribunals which existed for a short period of time from 1950 to 1956, in appeals against the awards of labour courts and labour tribunals, authoritatively pronounced that the power of the management was not unlimited and was liable to be interfered with by industrial tribunals and 'to see whether the termination of service of a workman is justified and to give appropriate relief'. Pointing out the legal position under the industrial law in India, the Supreme Court in *Indian Iron and Steel Company Ltd.* v. *Their Workmen*[95] observed:[96]

> Undoubtedly, the management of a concern has power to direct its internal administration and discipline; but the power is not unlimited and when a dispute arises, the Industrial Tribunals have been given the power to see whether the termination of service of a workman is justified and to grant appropriate relief.

The court, however, pointed out that this jurisdiction of an industrial tribunal to interfere with the managerial prerogative of taking disciplinary action is not of appellate nature, as the 'legislature has not chosen to confer such jurisdiction upon it'.[97] Hence, it could not substitute its own judgment for that of the management. The court, however, held that the industrial tribunal could interfere with the disciplinary action taken by the employer:

(i) when there was want of good faith;

(ii) when there was victimisation or unfair labour practice;

(iii) when the management had been guilty of a basic error or violation of the principles of natural justice; or

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94. *Supra* notes 62 and 91.

95. AIR 1958 SC 130.

96. *Id.* at 139.

97. *Bisra Stone Lime Co. Ltd.* v. *Industrial Tribunal,* (1970) I LLJ 626 (SC) at 628.

(iv) when on the materials, the finding was completely baseless or perverse.

The decision of the court in *Indian Iron and Steel Ltd.* became classic for the justification of the tribunal interference with the disciplinary sanctions of discharge or dismissal imposed by industrial employers on delinquent workmen.

The Supreme Court likewise insisted that in the matter of inflicting punishment also the employer should act fairly. If the punishment is so shockingly disproportionate to the act of misconduct as no reasonable man would ever impose, that itself may lead to an inference of *mala fide*, victimisation or unfair labour practice. In such cases, the court/ tribunal will be justified in setting aside the order of punishment. In *Hind Construction & Engineering Co. Ltd.* v. *Their Workmen*,[98] the Supreme Court pointed out that even if the enquiry was proper and valid, if the punishment was shockingly disproportionate, the tribunal might treat the imposition of such punishment as itself showing victimisation or unfair labour practice.

It is important to note here that the choice before the industrial adjudicator in such a case was either to sustain the order of punishment of dismissal, or if found shockingly disproportionate, to set aside the order of dismissal. But the industrial adjudicator did not have the power to reduce the punishment or substitute it with one which it thought to be just and fair.

The Supreme Court recognized the right of the management to ask for permission to adduce evidence for the first time before the tribunal to justify its action in cases where either no enquiry was held by the management, or the same was found to be defective by the industrial adjudicator on reference under section 10. The court equated defective enquiries with no enquiry and held that in either case the tribunal had jurisdiction to go into the merits of the case on the basis of the evidence adduced before it by the parties, but in such cases the entire matter would reopen before the tribunal which will have jurisdiction to satisfy itself on the facts adduced before it by the employer whether the discharge or dismissal was justified and the employer would have to justify on the facts as well that its order of discharge or dismissal was proper.[99] In cases of no enquiry or defective enquiry, the satisfaction of the management with respect to proof of the misconduct was substituted by the satisfaction of the labour court. The court emphasized that this opportunity had to be sought at the earliest by the

98. AIR 1965 SC 917: (1965) I LLJ 462 (SC).

99. *Workmen of the Motipur Sugar Factory Pvt. Ltd.* v. *Motipur Sugar Factory Pvt. Ltd.*, AIR 1965 SC 1803: (1965) II LLJ 162 at 170.

employer both in case of no enquiry or a defective enquiry after the tribunal had as preliminary issue held that the enquiry was in violation of the principles of natural justice.

The legal position laid down through judicial activism prior to December 15, 1971 has been summarised by the Supreme Court itself in *Workmen of Firestone Tyre & Rubber Co. of India Pvt. Ltd.* v. *Management*[100] thus:[101]

(1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.

(2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgement over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or malafide.

(4) Even if no enquiry has been held by an employer, or if the enquiry held by him is found to be defective, the Tribunal must, in order to satisfy itself about the legality and validity of the order, give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced

100. (1973) 1 SCC 813. The newly inserted provision *i.e.* s.11A of the Industrial Disputes Act, 1947 which came into force with effect from 15.12.1971 enlarged the scope of the power of interference by the industrial adjudicator in the matters of dismissal and discharges referred to it u/s 10 of the Act.

101. *Id.* at 827-29.

before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action, taken only if no enquiry has been held or enquiry conducted is found to be defective.

(7) It has never been recognized that the Tribunal should straightaway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved, either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in *The Management of Panitole Tea Estate* v. *The Workmen* [(1971) 1 SCC 742], within the judicial discretion of a labour court or tribunal. The above was the law as laid down by this court as on December 15, 1971 applicable to all industrial adjudication arising out of orders of dismissal or discharge.

In sum, the position, emerging from the judicial decisions prior to the incorporation of section 11A in the Industrial Disputes Act, was that the adjudicatory jurisdiction dealing with disciplinary cases was confined merely to see whether the employer did not act *mala fide*, or as a measure of victimisation or unfair labour practice in the manner of initiating action and inflicting the punishment, and the enquiry officer had not violated the rules of natural justice and his findings were not

baseless or perverse. In the absence of these infirmities, it was beyond the reach of the tribunal to interfere with the managerial action. The issues, whether the material before the enquiry officer was adequate or not, or whether a particular witness upon whom reliance was placed by the enquiry officer should have been believed or not, were for the consideration of the enquiry officer alone. Similarly, the legal position was well settled that punishment was the 'managerial prerogative' and could not normally be interfered with for examining its propriety or adequacy, except in cases where the punishment was shockingly disproportionate to the act of misconduct committed by the delinquent workman. Further, in the case of defective enquiries or no enquiry, the management had the right to adduce evidence for the first time before the tribunal in which case it was the satisfaction of the tribunal, that was conclusive, and not that of the management, as to whether a misconduct was proved or not. This opportunity to adduce evidence had to be sought at the earliest. This position considerably changed, as will be noticed below, after the powers of the industrial adjudicator were enlarged by the legislature by incorporating section 11A in the Industrial Disputes Act.

Position after the enactment of section 11A

The International Labour Organisation (ILO) in its recommendation No.119 concerning 'termination of employment at the initiative of the employer' adopted in June, 1963 had recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination, among others, to a neutral body such as an arbitrator, a court, an arbitration committee or a similar body, and that neutral body concerned should be empowered to examine the reason given for the termination and the other circumstances relating to the case and to render a decision on the justification of his termination. The ILO further recommended that the neutral body should be empowered (if it finds that the termination of employment was unjustified) to order that the worker concerned, unless reinstated with unpaid wages, should be paid adequate compensation or afforded some other relief. The Government of India in accordance with these recommendations considered that the tribunal's powers in adjudication proceedings relating to discharge or dismissal of a workman for an alleged misconduct should not be limited and that the tribunal should have the power, wherever necessary, to set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it may deem fit or give such other relief to the workman, including the award of any lesser punishment in lieu of dismissal or discharge as the circumstances of the case may require.

For this purpose, a new section 11A was inserted in the Industrial Disputes Act, 1947 by the Industrial Disputes (Amendment) Act 1971 (Act No. 45 of 1971) which came into force with effect from 15th December 1971.

The Supreme Court pointed out the significant changes brought about by section 11A in *Firestone Tyre & Rubber Co.*[102] The court pointed out that it had the effect of altering the law laid down in this respect by abridging the right of the employer, inasmuch as it gives power to the tribunal for the first time to differ both on the findings of the misconduct arrived at by the employer as well as the punishment imposed by him. The tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the evidence relied upon by the employer established the misconduct alleged against a workman. What was originally a plausible conclusion that could be drawn by an employer from the evidence has now given place to a satisfaction being arrived at by the tribunal that the findings of misconduct are correct. What was earlier largely in the realm of satisfaction of the employer, ceased to be so and now it is the satisfaction of the tribunal that finally decides the matter. As stated earlier, under section 11A, though the tribunal may hold that the misconduct is proved, it may nevertheless be of the opinion that the order of discharge or dismissal for said misconduct is not justified. Elaborating on this issue, the court observed:[103]

> In other words, the Tribunal may hold that the proved misconduct does not merit punishment by way of discharge or dismissal. It can, under such circumstances, award to the workman only lesser punishment instead. The power to interfere with the punishment and alter the same has been now conferred on the Tribunal by Section 11A.

The court held that the position, however, remains unchanged in cases where there is either no enquiry held by the employer or if the enquiry is held to be defective, and it is open to the employer even now to adduce evidence for the first time before the tribunal justifying the order of discharge or dismissal. Of course, an opportunity will have to be given to the workman to lead evidence contra.

The employer has to ask for such an opportunity at the stage of filing of its reply to the statement of claim or by moving an application for leading such evidence and that must be before the tribunal decides as a preliminary issue the validity of the enquiry proceedings, if held. The procedure may be time-consuming, elaborate and cumbersome,

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102. *Supra* note 100.
103. *Id.* at 832.

but this right of the management to sustain its order before the tribunal in case no enquiry has been held, or if the enquiry is held to be defective, has been given judicial recognition over a long period of years for obvious reasons. The reasons for giving recognition to such right is to do justice between the parties without relying too much on technical considerations and with the object of avoiding delay of industrial disputes. It is submitted that this approach of the court is consistent with the object of the Act that there should be no prolixity and inordinate delay in adjudication of the disputes. The court in *Firestone*,[104] cognizant of the fact that such wide powers have now been conferred on tribunals, pointed out that the legislature obviously felt that some restrictions have to be imposed regarding what matters could be taken into account by the tribunal. Such restrictions are found in the proviso to section 11A. The proviso emphasizes that the tribunal has to satisfy itself one way or other regarding misconduct, the punishment and the relief to be granted to workmen only on the basis of the 'materials on record'. The court held that materials on record before the tribunal by and large are:

(1) the evidence taken by the management at the enquiry and the proceedings of the enquiry, or

(2) the above evidence and in addition, any further evidence led before the tribunal, or

(3) evidence placed before the tribunal for the first time in support of the action taken by an employer as well as the evidence adduced by the workmen contra.

The court held that the expression 'fresh evidence' which the tribunal cannot take into account by virtue of the proviso has to be read in the context in which it appears, namely, as distinguished from 'materials on record' explained above. If so read, according to the court, the proviso does not present any difficulty at all.

In subsequent cases, the court has by and large followed the aforesaid explanation of 'materials on record'. However, the explanation of 'materials on record' given in *Firestone* and also the phraseology used in the proviso to section 11A are far from satisfactory.

Issues relating to section 11A

Constitutional validity:-The constitutional validity of section 11A came under challenge in *Delhi Cloth & General Mills Co. Ltd.* v.

104. *Supra* note 100.
105. 1989 Lab IC 490 (Raj).

Shriram Fertilizers Karamchari Union, Kota[105] on the ground that it confers wide and unguided powers on labour courts and industrial tribunals to interfere with the findings of enquiry officers. A division bench of the Rajasthan High Court upheld its constitutional validity observing that the object of enacting section 11A was to provide a remedy of reappraisal of the employers' action by an independent authority in order to ensure fairness. The interference by such an authority is to be made only on the satisfaction that employer's action is not justified. The court held that sufficient guidelines were given to the adjudicating authority for discharging its functions. The correctness of the decisions of the adjudicating authority can be tested on these guidelines for which remedy is available by way of writ petition before the high court, or direct appeal to the Supreme Court by way of special leave petition. Therefore, it could not be said that wide powers conferred on the labour court and industrial tribunal under section 11A were arbitrary and violative of the Constitution.

'Arbitrator' empowered to exercise powers under section 11A:– An important aspect relating to the powers of the voluntary arbitrators appointed under section 10A of the Industrial Disputes Act that engaged the attention of the court was with respect to the interpretation to be given to the word 'tribunal' under section 11A of the Act and to examine whether the powers exercised by the labour court and industrial tribunals under section 11A over the disciplinary jurisdiction of the management were also available to a voluntary arbitrator at par while dealing with industrial disputes in respect of managerial actions of dismissal and discharge. This issue came up for consideration of the Supreme Court in *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha.*[106]

The court in *Gujarat Steel Tubes* had to pronounce on the question whether section 11A did clothe the arbitrator with powers similar to that of the industrial tribunals/labour courts. The court, by majority, held that it did, despite the doubt created by the abstruse absence of express mention of 'arbitrator' in section 11A. The court considering the genesis of section 11A noted that this provision was introduced in the statute book in purported implementation of the ILO recommendations, which expressly referred, *inter alia*, to arbitrators. The court observed that the entire scheme, from its ILO genesis through the objects and reasons for introduction of the provision fits in with arbitrator being covered by section 11A for the greater purpose of imparting industrial justice. The court held that every reason for clothing tribunals with section 11A powers applies *a fortiori* to the arbitrator.

106. (1980) 2 SCC 593.

Further, if an arbitrator fulfils the functional role of imparting judicial functions and he does so, how can he be excluded from the scope of the expression? The omission of the word 'arbitrator' was a case of *casus omisus*. The court preferred to be liberal rather than lexical when reading the meaning of industrial legislation which develops on a day to day basis in the growing economy in India. Keeping in view that the ILO recommendations were accepted by India and incorporated in the objects and reasons of the amending Act, there was no doubt that it was intended that section 11A applied to arbitrators and they have the power to examine whether the punishment imposed was excessive.

Thus, it can be seen that the court heavily relied on the ILO recommendations as accepted by India as the basis for putting arbitrators at par with industrial tribunals and labour courts empowered to exercise wide powers under section 11A of the Act to achieve uniformity, *inter alia*, in the matter of exercising powers thereunder and encourage parties to resort to voluntary arbitration as an industrial dispute resolution mechanism in the matter of exercise of managerial prerogative in disciplinary matters of dismissal and discharge.

Reformative judicial perception:– In *Scooters India Ltd., Lucknow* v. *Labour Court*,[107] the labour court, in a reference under section 4K of the U.P. Industrial Disputes Act, 1947 (corresponding to section 10 of the Central Industrial Disputes Act), was satisfied that the departmental enquiry held by the public sector concern against the workman was fair, lawful and its findings were not vitiated in any manner for violation of the principles of natural justice. Although the charges against the workman stood proved and his conduct, though motivated by ideals had been far from satisfactory, yet, in the circumstances of the case, it substituted the order of termination of service of the workman by an order of reinstatement, together with seventy-five per cent of back wages. This award of the labour court was sustained by the Allahabad High Court. On special leave appeal preferred by the management, the Supreme Court held that it could not be said that the labour court had exercised its power under section 6(2A) of the Act (same as section 11A of the Industrial Disputes Act) in an arbitrary and non-judicial manner. The court observed: [108]

> The labour court had taken the view that justice must be tempered with mercy and that the erring workman should be given an opportunity to reform himself and prove to be a loyal and disciplined employee of the petitioner company. It cannot,

107. 1989 Supp (1) SCC 31: AIR 1989 SC 149.

108. *Id.* at 34. S. 6(2A) of the U.P. Industrial Dispute Act, 1947 is analogous to s.11A of the Central Act.

> therefore, be said that merely because the labour court had found the enquiry to be fair and lawful and the findings not to be vitiated in any manner, it ought not to have interfered with the order of termination of service passed against the respondent on exercise of the powers under section 6(2A) of the Act.

The court hoped that in the light of the reformatory approach adopted by the labour court, the workman will conduct himself in a manner as to prove himself to be a worthy employee of a public sector concern and will along with other employees perform his duties in such manner as to promote the interest and welfare of the employer.

In *Assistant General Manager, SBI* v. *Thomas Jose*,[109] however, the court did not adopt completely the reformist approach it had adopted in *Scooters India*. The court thought it appropriate to interfere with the finding of the industrial tribunal which had held that though the misconduct was proved, the punishment of dismissal of the employee was too harsh and had ordered his reinstatement without back wages. The Supreme Court held that the appropriate order in the present case would be reinstatement without back wages and denial of any increments for a substantial period of ten years to run from the date of its judgement, with cumulative consequences. The court distinguished a public sector undertaking, such as *Scooters India Ltd.*,[110] from a public sector bank. The bank deals with public money and misappropriation by an employee of the bank is misappropriation of public money which must be treated seriously.

In the recent judicial decisions, however, this reformist/lenient attitude has been completely overlooked in favour of discipline in industry. The court has emphasized the importance of discipline and strived to strengthen the fundamental principles of disciplinary jurisprudence as evolved by it in recent years. The court has advocated a deterrent policy in awarding punishment, especially where employees are responsible for creating a law and order problem or indulged in insubordination or were unauthorizedly absent or resorted to violence or were guilty of misappropriation or where the employer had lost confidence in the employee.[111]

The Supreme Court has made it clear that in view of the change in economic policy of the country it might not be proper to allow the employees to break the discipline with impunity.[112] The court has further observed that India being governed by rule of law, all actions

109. (2000) 10 SCC 280.

110. *Supra* note 107.

111. *Infra* notes 116 to 121.

112. *Hombe Gowda Educational Trust* v. *State of Karnataka,* (2006) 1 SCC 430.

taken must be in accordance with law. Also, the law declared by the Supreme Court being binding on all courts and tribunals in the country under article 141 of the Constitution, it directed the tribunals not to normally interfere with the quantum of punishment imposed by the employers unless an appropriate case was made out for doing so. It ruled that the tribunals could neither ignore the *ratio* laid down by court nor refuse to follow the same. The court once again emphasised the importance of maintenance of discipline in a workplace and referred to some of its earlier decisions[113] under the Industrial Disputes Act, to bring home the fact that the recent trend in the decisions of the court is intended to strike a balance between the present need and the earlier approach of the court to the industrial relations where only the interest of workman was sought to be protected. According to the court, the earlier approach made discipline at the workplace suffer a set back. The change in its approach in recent decisions is intended to achieve the avowed object of faster industrial growth of the country.

It is submitted that merely because article 141 makes law declared by the Supreme Court binding on all courts and tribunals it does not mean that the court should circumscribe the power of the industrial tribunals that lawfully belongs to them under express provisions of section 11A of the Act. Section 11A confers on them wide powers to interfere with the quantum of punishment in appropriate cases, not necessarily confined only to cases where punishment is disproportionate to the misconduct, as is being asserted by the court in a number of decisions.[114] The court has in its attempt to advocate strict discipline in the industry departed from the express statutory language of section 11A and the judicial decisions holding that even where misconduct is proved, the industrial tribunal or labour court can in appropriate cases reduce the punishment.

The court has now ruled that the power to reduce punishment has to be exercised only in cases where the punishment is totally disproportionate to the misconduct as to shake the judicial conscience. To emphasize that industrial tribunal or labour court can interfere with the punishment of removal or dismissal only in cases of disproportionate punishments, the court has been relying on its earlier decisions rendered in appeals arising out of judgments from decisions of the Central Administrative Tribunal (CAT) or high courts in matters not covered by Industrial Disputes Act, or where the employees concerned had exercised the choice of not seeking reference of their disputes under the Act, but by approaching the high court or the CAT challenging the

113. *Infra* notes 116 to 121.
114. *Ibid.*

order of removal or dismissal.[115] The classic example in this line of cases is the judgment given in *Mahindra & Mahindra.*[116]

New judicial perception:– In recent years the perception of the court in disciplinary matters has seen a departure from the reformative theory advocated in *Scooters India Ltd.* to the deterrent theory in the matter of maintaining industrial discipline and circumscribing the discretion of the industrial tribunal or labour court and high courts in cases involving loss of confidence,[117] unauthorized absence,[118] misconduct involving

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115 See *Union of India* v. *Parma Nanda*, AIR 1989 SC 1185. For a critical analysis see S.N. Singh, "Power of Administrativwe Tribunals to Alter Punishment" *CLA* (Views & Reviews) 226-232(1989)

116. *Mahindra and Mahindra Ltd.* v. *N. B. Narawade* ,(2005) 3 SCC 134.

117. See *Regional Manager, Rajasthan SRTC* v. *Sohan Lal* ,(2004) 8 SCC 218. In this case, the court upheld the award of the tribunal sustaining the order of termination of the workman taking serious note of the misconduct committed by the workman which had not only led to monetary loss to the corporation, but the corporation losing confidence in the said workman. The court held that it was not the normal jurisdiction of the superior courts to interfere with the quantum of sentence, unless the said sentence was wholly disproportionate to the misconduct proved. The court was quite emphatic that since the misconduct proved was one of dishonesty, the quantum of loss was immaterial. It was the loss of confidence in him that mattered; also see *Divisional Controller, KSRTC (NWKRTC)* v. *A.T. Mane*, (2005) 3 SCC 254. Here the court observed that one should bear in mind the fact that it was not the amount of money misappropriated that becomes a primary factor for awarding punishment, but the loss of confidence. The court observed that when a person is found guilty of misappropriating the corporation's funds, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding the punishment of dismissal.

118. See *Delhi Transport Corpn.* v. *Sardar Singh*, (2004) 7 SCC 574. Here, the Supreme Court held that ample material was produced before the tribunal in each case to show that how the employees concerned were remaining absent for long periods which affected the work of the employer. The employees concerned were required to show as to how their absence was on the basis of sanctioned leave and as to how there was no negligence. The court held that the burden is on the employee who claims that there was no negligence and to establish it by placing relevant material. The court held that the conduct of the employees in this case was nothing but irresponsible in the extreme and could hardly be justified. The charge in this case was misconduct by absence. The court held that keeping in view the standing orders governing the employees, unauthorised leave could be treated as misconduct; also see *State of Punjab* v. *Jagir Singh*, (2004) 8 SCC 129, where the court took serious note of the misconduct of the workman who had been absenting himself from duty without applying for leave which affected the work of the management. He had not applied for leave; even when asked to report for duty by a registered letter, he did not comply with the request. He did not resume duty even when asked to do so by publication of notice in a newspaper requiring him to report for duty by a specified

driving in drunken state,[119] violence,[120] participation in illegal

time-limit. When he failed to do so, the state government terminated his service on the ground of his being absent from duty. The court held that reliance by the workman on *Scooters India Ltd.* v. *M. Mohd. Yaqub*, (2001) 1 SCC 61 had no application in the present case as opportunity had been granted to the workman to resume duty. The court observed that principles of natural justice could not be put in a straight jacket. The court held that even if it was assumed that it was obligatory on the part of the state to comply with the statutory rules of Punjab Civil Service (Punishment & Appeal) Rules, the workman, having regard to the totality of the situation, was not entitled to back wages. Since the workman had already been reinstated and had since retired, the court did not consider it necessary to go into the correctness or otherwise of the award directing reinstatement of the workman.

119. See *U.P. State Road Transport Corporation* v. *Subhash Chandra Sharma,* (2000) 3 SCC 324. Here, the charge against the workman, a driver, was that he alongwith his conductor had in a drunken state gone to the cashier in the cash room of the corporation and demanded money from him. When the cashier refused, he abused him and threatened to assault him. This charge was found fully established in the enquiry held against him. Consequently, he was removed from service. On reference the labour court held in its award that though the departmental enquiry did not suffer from any infirmity, the punishment of removal was excessive. It consequently set aside the order of removal and substituted it by stoppage of one increment and payment of 50 per cent of the back wages. The high court upheld the award. On appeal by the corporation, the Supreme Court held that the conduct of the workman was certainly a serious charge of misconduct and in such circumstances the labour court was not justified in interfering with the order of removal from service, when the charge stood proved. The discretion exercised by the labour court in the circumstance of the present case was capricious, arbitrary and certainly not justified. It could not be said that the punishment awarded to the workman was in any way 'shockingly disproportionate' to the charge found proved against him. The high court had failed to exercise its jurisdiction under article 226 and had not corrected the erroneous order of the labour court which, if allowed to stand, would certainly result in miscarriage of justice. S. 11A of the Act, no doubt, vests the labour court with discretion to substitute the order of discharge or dismissal of a workman into an order of reinstatement on such terms and conditions as it may deem fit, or to give such other relief including the award of lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require, but the present case is not a fit case for exercise of such a discretion where the workman has certainly committed a serious act of misconduct. The court set aside the impugned judgement of the high court and the award of the labour court.

120. See *Krishnakali Tea Estate* v. *Akhil Bharatiya Chah Mazdoor Sangh,* (2004) 8 SCC 200. In this case, the court took strong notice of the fact that the workers had come in a mob to the bungalow of the manager at night armed with lethal weapons and *gheraoed* the manager to force him to accede to their demand for bonus at a higher rate. It was alleged by the manager that they had forcibly extorted his signatures on blank papers. The Supreme Court held that the labour court was justified in holding that all those workmen who participated in the alleged incident were proved to be guilty of misconduct. The charges were grave enough to warrant the punishment of dismissal even without the aid of the charge of extortion.

strikes[121] and insubordination.[122]

The judgment of the Supreme Court in *Mahindra & Mahindra*[123] cannot be faulted insofar as the concern of the court is to have a disciplined workforce. The acts of insubordination and use of filthy language against superiors need to be severely dealt with and no fault can be found with the action of the management. The action of the disciplinary authority of ordering dismissal of the workers who are proved to have used filthy language against their superiors without any provocation cannot be faulted. But *Mahindra & Mahindra* cannot be and should not be treated as a good law on the true scope of the powers of the labour court/industrial tribunal under section 11A. The serious infirmity that this judgment suffers from is the failure of the court to appreciate the distinction between the powers exercised by CAT under the Administrative Tribunals Act, 1985 in the disciplinary matters and the high court in the writ jurisdiction under article 226 of the Constitution on the one hand and the powers of the labour court/ industrial tribunal under section 11A of the Industrial Disputes Act, on the other. The powers that CAT under the Administrative Tribunals Act exercises are the same as were and are exercised by the high court under article 226 of the Constitution *i.e.* supervisory powers. Only on limited grounds can the CAT or for that matter the high court interfere with the punishment order passed by the employer. But such limitations do not apply in case of labour court/industrial tribunal under section 11A where the powers exercisable by the labour court/industrial tribunal are much wider inasmuch as the satisfaction of the management both in respect of proving of the misconduct and quantum of punishment

121. See *Ranbaxy Laboratories Ltd.* v. *Sewa Singh*, (2000) 10 SCC 600. Here, the role attributed to the respondent/workmen was that they had instigated and actually participated in an illegal strike. For this misconduct they were dismissed from service. However, the high court felt that the punishment of dismissal from service was harsh and ordered reinstatement with 50 per cent of back wages. This order was assailed by the management before the Supreme Court in the special leave petition. (The order of the labour court/industrial tribunal is not given in the judgment). The Supreme Court observed that even if the high court felt that the punishment of dismissal from service was harsh, it was difficult to state how the management could be directed to pay 50 per cent by way of back wages inspite of the misconduct of the employees. The court observed that workers should be subjected to loss of wages for the period in question, as it would deter them from indulging in such activities in future. If they persisted in such misconduct it would be taken as an aggravated misconduct and might have to be dealt with accordingly. The court modified the order of the high court by deleting the order regarding payment of 50 per cent back wages, but directed the management to reinstate the workmen concerned within the prescribed time.

122 *Supra* note 116.

123. *Ibid.*

imposed by the management is substituted by the satisfaction of the labour court/industrial tribunal. This legal position is well settled by a catena of decisions of the Supreme Court.

Therefore, the judgment of Hedge J, on behalf of a division bench of three judges, is contrary to the legal position settled earlier by coordinate benches of the court of equal strength. Hedge J relied mainly on the judgments where the Supreme Court had not dealt with the scope of powers under section 11A but had dealt with the powers exercisable by the CAT under the Administrative Tribunals Act and the high courts under article 226 of the Constitution. The court in *Mahindra & Mahindra* explained the legal position on the scope of section 11A as under:[124]

> The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which require the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment.

The above observations relating to the scope of section 11A are stated to have been culled out from the opinion of Hansaria J in his concurring judgment in *B.C. Chaturvedi* v. *Union of India*[125] which, it is submitted, have been read out of context especially when section 11A was not at all in issue before the Supreme Court in that case. Hansaria J in his concurring judgment in *B.C. Chaturvedi*[126] had observed that section 11A confers power on the industrial tribunal/ labour court to apply its mind on the question of proportionality of punishment or penalty and that, even if there was no victimization or unfair labour practice on the part of the employer, the power to go into the question of proportionality of the punishment was still within the realm of the powers of the industrial adjudicator. He further observed that this power was also available to the high court under article 226 of the Constitution, though it was qualified with a limitation that while seized with this question as a writ court, interference is permissible only when the punishment/penalty is shockingly disproportionate. These observations by Hansaria J without appreciating the context, which

124. *Id.* at 141-142.
125. (1995) 6 SCC 750.
126. *Ibid.*

was to highlight the distinction in powers of the industrial adjudicator in comparison to the powers of the high courts and the CAT in the matter of disciplinary proceedings, cannot be said to militate against the wider scope of the powers of industrial adjudicator under section 11A to interfere with the findings and quantum of punishment in disciplinary proceedings.

In *B.C. Chaturvedi*, the court was dealing with an appeal arising out of the judgment of CAT wherein disciplinary action taken against an income tax officer (engaged in sovereign functions of the state and thus outside the scope of the Industrial Disputes Act), whose integrity had come under a cloud was impugned. The issues that came up for consideration in this appeal had no relationship with the scope of the powers conferred on the labour court/industrial tribunal under section 11A. In fact, there is no reference to section 11A of the Industrial Disputes Act in the entire judgment of K. Ramaswamy J, delivered for himself and Jeevan Reddy J. The court held that the scope of judicial review by the high court under article 226 of the Constitution or the CAT under the Administrative Tribunals Act was very limited. Neither the high court nor the CAT could interfere with the quantum of punishment imposed by the disciplinary authority, where the enquiry had been held in accordance with the principles of natural justice and the misconduct of the employee was proved in the departmental enquiry, except where the quantum of punishment imposed was completely disproportionate so as to shock the conscience of the court.

The other judgment referred to in *Mahindra & Mahindra* was *U.P. State Road Transport Corp.* v. *Subash Chandra Sharma*.[127] In that case, the court held that the punishment could not be held to be shockingly disproportionate where charges of indulging in grave misconduct of serious criminal assaults had been proved against the workman. But the court in this case did not hold that the industrial adjudicator could interfere with the punishment only when the punishment was 'shockingly disproportionate'. It held that the high court had failed to exercise its jurisdiction under article 226 of the Constitution and did not correct the erroneous order of the labour court, which, if allowed to stand, would certainly result in a miscarriage of justice. This judgment cannot be said to have departed from the settled principles of law.

In *Kailash Nath Gupta* v. *Enquiry Officer*,[128] another case relied on in *Mahindra & Mahindra*, the disciplinary action by way of removal was against an officer in a bank (who was out of the scope of the

127. (2000) 3 SCC 324.
128. (2003) 9 SCC 480.

definition of 'workman' under the Industrial Disputes Act), who had assailed the same before the high court and, therefore, reference to the said case in the matter of exercise of jurisdiction under section 11A by industrial adjudicator was not proper. It is submitted that in none of the judgments referred to in *Mahindra & Mahindra* was the scope of the powers of the industrial adjudicator in issue directly before the court.

As stated earlier, the court rightly held that the language used by the workman in *Mahindra & Mahindra* was such that it could not be tolerated by any civilized society and the use of such language against a superior officer, and that too not once but twice in the presence of his subordinates, could not be termed as an indiscipline calling for lesser punishment in the absence of any extenuating factors. But the court in the instant case and other similarly decided cases has been over-zealous in narrowing the powers of the labour court and industrial tribunal to interfere with the quantum of punishment only in cases of disproportionate punishment. This is neither supported by the language of the statute nor by the earlier judgments of the court on the scope of the powers of labour court and industrial tribunal under section 11A of the Industrial Disputes Act.

The need for disciplined labour force is paramount, but to say in the face of clear legislative provision, that the industrial tribunal can interfere only in cases where the punishment is shockingly disproportionate is not a correct appreciation of the legal position. The proper course is to amend the law through a legislative provision to the effect that where the workman has been dismissed or removed from service after a proper and fair enquiry on charges of violence, sabotage, misappropriation, loss of confidence or assault and if the labour court comes to the conclusion that the grave charges have been proved then it will not have the power to order reinstatement of the delinquent worker. This is also one of the recommendations that has been made by the Second National Commission on Labour.[129]

Principle of relate-back:– A question of considerable importance that has engaged the attention of the courts is the point of time to which the order of dismissal will relate back for the purposes of computing back wages. A constitution bench of the Supreme Court in *P.H. Kalyani* v. *M/s. Air France*[130] held that where the industrial adjudicator reached the conclusion that the employer had held the domestic enquiry in accordance with the principles of natural justice and the same appeared to be justified, the order

129. *Report of the Second National Commission on Labour,* Chapter VI, para. 6.96 at 357-58 (2002).

130. AIR 1963 SC 1756.

of dismissal if sustained by the industrial adjudicator, would relate back to the date from which the employer had ordered dismissal. If the enquiry was defective, the adjudicator would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of the evidence adduced before it that the dismissal was justified, its approval of the order of dismissal made by the employer in the defective enquiry would still relate back to the date when the order was made. This case arose under section 33(1) of the Industrial Disputes Act.[131] The court made a distinction between a case where no enquiry had been held and another in which the enquiry held was defective for any reasons whatsoever. The court referred to, and distinguished, its earlier judgment in *Sasa Musa Sugar Works (P) Ltd.* v. *Shobrati Khan.*[132] In *Sasa Musa,* the court had dealt with a situation where no enquiry at all had been held. The employer had suspended certain workmen on the charge of indulging in go-slow without holding any enquiry into the charges and made an application to the tribunal before which some connected disputes were pending for grant of permission to dismiss the employees under section 33(1) of the Industrial Disputes Act. In the proceedings before the tribunal, the employer justified the proposed action of dismissal by adducing relevant evidence before it. In this situation, the court held that the workmen taking part in go-slow were guilty of serious misconduct and the employer was entitled to get permission to dismiss the workmen. The court observed that the management was bound to pay the wages of the workmen till the tribunal gave its permission under section 33(1). According to this view, the order of dismissal took effect only from the date of the order of the tribunal granting permission to the employer to dismiss the workmen.

In *D.C. Roy* v. *Presiding Officer, M.P. Industrial Tribunal,*[133] a case which arose under the M.P. Industrial Relation Act, 1960, a division bench of the Supreme Court applied the *ratio* of *P.H.*

131. S. 33 of the Act is intended to put some restrictions on the managerial prerogatives of the employer so that he does not abuse them and resort to unfair labour practices during the pendency of disputes raised by workmen. Under s. 33(1)(b) of the Act, no employer shall dismiss or discharge any workman in connection with a dispute pending with the conciliation or adjudication authority save with the express permission in writing of the authority before which the proceeding is pending whereas u/s 33(2)(b) in cases of misconducts not connected with pending disputes the employer can do so but the action so taken is subject to the approval of the authority before whom the dispute is pending.

132 AIR 1959 SC 923.

133. (1976) 3 SCC 693.

Kalyani[134] thus: [135]

> In the instant case the domestic enquiry was held to be in violation of principles of natural justice. But the employer led the evidence before the labour court in support of the order of dismissal and on a fresh appraisal of the evidence, the labour court found that the order of dismissal was justified. The ratio of *Kalyani's* case would therefore, govern the case and the judgment of the labour court must relate back to the date on which the order of dismissal was passed.

Having applied the principles laid down in *P.H. Kalyani,* the Supreme Court in *D.C. Roy* added a note of caution when it stated: [136]

> We would however, like to add that the decision in *P.H. Kalyani's* case... is not to be construed as a charter for employers to dismiss employees after the pretence of an inquiry. The inquiry in the instant case does not suffer from defects so serious or fundamental as to make it non-est. On an appropriate occasion, it may become necessary to carve an exception to the ratio of *Kalyani's* case so as to exclude from its operation at least that class of cases in which under the facade of a domestic inquiry, the employer passes an order gravely detrimental to the employee's interest like an order of dismissal. An inquiry blatantly and consciously violating principles of natural justice may well be equated with the total absence of an inquiry so as to exclude the application of the relation back doctrine. But we will not pursue the point beyond this as the facts before us do not warrant a close consideration thereof.

Later in *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha,*[137] a majority of three judges held that the law laid down in *Kalyani* and followed in *D.C. Roy* was correct. While referring to the note of caution expressed in the latter, the court observed:[138]

> The latter case of *D.C. Roy* v. *Presiding Officer, M.P. Industrial Court, Indore* specifically refers to *Kalyani* case and *Sasa Musa* case and holds that where the Management discharges a workman by an order which is void for want of an enquiry or for blatant violation of rules of natural justice, the relation back doctrine cannot be invoked. The jurisprudential difference

134. *Supra* note 130.
135. *Supra* note 133 at 698.
136. *Ibid.*
137. *Supra* note 106.
138. *Id.* at 650.

> between a void order, which by a subsequent judicial resuscitation comes into being de novo, and an order, which may suffer from some defects but it is not still-born or void and all that is needed in the law to make it good is a subsequent approval by a tribunal which is granted, cannot be obfuscated.

The court in *Gujarat Steel Tubes* having held that the impugned orders of termination were illegal, did not have to directly give effect to the observations made above in the factual matrix of the case at hand. These observations of the court, however, were strongly relied upon in *Desh Raj Gupta* v. *Industrial Tribunal, IV Lucknow,*[139] in support of the claim of the workman that the dismissal could not relate back to the date of order of dismissal in a defective enquiry. In this case, the industrial tribunal had held that the domestic enquiry was not conducted in accordance with the principles of natural justice and therefore, asked the management to justify its action on merits. On the basis of evidence led by the parties before it, the industrial tribunal held that the charges against the workman-appellant were proved and, therefore, the order of dismissal was in order and he was not entitled to any relief. This award of the industrial tribunal was upheld by the high court in what was described by the Supreme Court as "a well discussed judgment." Before the Supreme Court, the workman assailed the judgment of the high court on the ground, *inter alia,* that the domestic enquiry having been held to be vitiated on account of violation of principles of natural justice, his dismissal could not relate back to the date of the order of dismissal, but could operate only from the date of the award of the industrial tribunal which on the basis of additional evidence adduced for the first time by the management upheld the action of the management and, therefore, he was entitled at least to the relief of getting his salary for the period from 16.8.1976 (the date of the order of dismissal) to 20.7.1980 (the date of the award of the tribunal). The Supreme Court held the above argument of the workman "well founded" in view of the principles laid down in *Gujarat Steel Tubes Ltd.*[140] The court in the instant case held that the workman was entitled to his wages/salary for the period from the date of the order till the date of the award.

In *Ram Babu Vyankuji Kheragade* v. *Maharashtra Road Transport Corporation,*[141] the domestic enquiry against the workman was held to

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139. (1991) 1 SCC 249. Ss. 6, 6E and 6F of the state Act are analogous to ss. 10, 33 and 33A, respectively of the central Act (ID Act).

140. *Supra* note 106 in which the court held that if the order of punishment passed by the management was declared illegal and the same was subsequently upheld by the labour court/tribunal, the date of dismissal could not relate back to the date of the illegal order of the employer.

141. 1995 (Supp) 4 SCC 157.

be unfair by the labour court. It gave another opportunity to the corporation to prove the charge against him. The labour court thereafter upheld the dismissal of the appellant on the basis of evidence produced before it. The Supreme Court held that the enquiry held against the workman by the corporation in the instant case did not suffer such serious and fundamental defect as to render the same *non-est*. The court held that the observations relied on by the workman from the judgment of the court in *D.C. Roy*,[142] did not apply to the case at hand. In *R. Thiruvirkolam* v. *Presiding Officer*,[143] the sole point in issue was whether the workman was justified in claiming that his dismissal should take effect from the date of the order of the labour court and not from the date of the order of dismissal passed by the employer. A division bench of the court observed that the observations in *Gujarat Steel Tubes* referred to above were not in line with the decision in *Kalyani* which was binding, or with *D.C. Roy*. The court, however, observed that in *Desh Raj Gupta,* the observations in *Gujarat Steel Tubes* were relied on for taking a different view without any reference to either *Kalyani* or *D.C. Roy* which appears to have been overlooked. The court held that in these circumstances, the decision in *Desh Raj Gupta* could not be treated as an authority on the point. The observations in *Gujarat Steel Tubes* case were contrary to the decision in *Kalyani* and, therefore, were *per incuriam* and not binding. In the present case, according to the court, the defect in the domestic enquiry having been cured by proof of misconduct on the basis of evidence adduced before the labour court, there was no reason to hold that the dismissal could operate only from the date of the labour court's award and not from the date of the dismissal order. Subsequently, in *Punjab Dairy Development Corporation* v. *Kala Singh*[144] on a reference, a three judge bench of the court was called upon to decide the correctness of the decision of the court in *Desh Raj Gupta.* The court held that *R. Thiruvirkolam* had correctly brought out the legal position and accordingly overruled *Desh Raj Gupta.*

To sum up, the doctrine of relation back does not apply in cases where there has been no enquiry or where there is only the facade of pretence of a domestic enquiry and the employer passes an order gravely detrimental to the employee's interest like an order of dismissal. Not all defective enquiries make the doctrine of relate-back inapplicable.

142. *Supra* note 133.
143. (1997) 1 SCC 9.
144 (1997) 6 SCC 359.

IV Conclusion

Industrial law as evolved by the judiciary and the legislature providing protection to workers and the constitutional provisions providing protection to civil servants have made inroads on the principle of the common law, *i.e.* that the employer is under no obligation to state reasons to the employee for his dismissal at any time. Now the concept of social justice underlies the principles laid down by the judiciary as well as the statutory rules and the constitutional provisions. The inherent right of the employer to discipline his employees has been subjected to many restrictions in order to be fair to the employee and to protect him against any arbitrary, vindictive or capricious action on the part of the employer.

The Supreme Court has consistently stressed the importance of holding of departmental enquiry before punishing an employee by way of dismissal or discharge and underlined the importance of adhering to the principles of natural justice in departmental enquiry. The court has in clear terms held that holding of a departmental enquiry should not be an empty formality more so when majority of the workforce in India is illiterate and ignorant of their rights. Balancing the equities, the court has held that if for one reason or the other the management has failed to hold departmental enquiry or the departmental enquiry held is found to be defective by the industrial adjudicator, the management has a right to adduce evidence for the first time before it in support of the accusation with a right to the worker to cross-examine the witnesses of the management and with a further right to lead evidence in support of his defence. However, the request to this effect has to be made at the earliest appropriate stage. In the interest of administrative expediency, it is now the settled legal position both in public as well as private employment that rules/regulations/standing orders can envisage situations on the lines laid down in the second proviso to article 311 of the Constitution, where the employer can altogether dispense with the enquiry and summarily dismiss its employees. However, any such order is subject to judicial review and the summary order of termination is liable to be set aside if it is shown that it was passed on extraneous grounds.

The court has also brought out clearly the distinction between criminal trial and a departmental enquiry: in the former the guilt of the accused has to be proved to the hilt as personal liberty of the accused is involved while in the latter which may at best entail civil consequences the guilt has to be proved only by preponderance of evidence. Therefore, if the charge in a criminal trial and the misconduct in a departmental enquiry are founded on the same facts, an acquittal in a criminal trial does not *per se* mean that the worker can plead that he cannot be

proceeded departmentally for the misconduct. The court has on the issue of representation of the workman by an outsider in a departmental enquiry, not taken a consistent stand. The approach of the court, to begin with was against representation by an outsider but gradually it recognised that right even by a lawyer, if facts so warranted, notwithstanding the rules to the contrary. But of late it has again held that the right of representation is not absolute.[145] Hence, there is a need for reconsideration of the entire issue in the interest of having a clear enunciation of the legal position.

The majority judgment in *Gujarat Steel Tubes*[146] has, by holding that 'voluntary arbitrator' appointed under section 10A of the Act is included in the definition of 'tribunal' in section 11A, adopted an activist approach and gave effect to ILO's recommendations that an employee should have a right to be heard by a neutral appellate body in matters of dismissal or discharge, though this interpretation may not be strictly in accordance with the language used in section 11A. This judgment was intended to give impetus to the institution of voluntary arbitration as an alternate dispute resolution mechanism in preference to the compulsory adjudication which, even though cumbersome and time-consuming, is resorted to as the primary dispute settlement mechanism for the settlement of industrial disputes in India.

In the past, the court has in a number of cases gone behind the order of termination to decipher the true reasons of termination of the services of the employees by adopting the corporate law principle of 'lifting the veil'. This has been done to ensure that the security of employment is not put in jeopardy or frustrated at the whims, caprices and fancies of the employer. The court has even tested the reasonableness of the rules governing public employment and also the grounds of termination on the anvil of articles 14, 16 and 21 of the Constitution and also section 23 of the Indian Contract Act, 1872. It has, in appropriate cases, struck down not only the rule/terms of employment itself being unconscionable, arbitrary, discriminatory and contrary to public policy but also the action taken under them. At the same time, the court has time and again stressed the importance of discipline in the industry to ensure higher productivity.

The judicial activism of the court was clearly visible prior to incorporation of section 11A in the Industrial Disputes Act when the Supreme Court built up a body of law defining the scope of powers of industrial adjudicator to interfere in disciplinary matters relating to dismissal or discharge. The court consistently held that where the industrial adjudicator came to the conclusion that dismissal or discharge

145 *Supra* notes 130,131 & 133.

146. *Supra* note 106.

was based on unfair labour practice of the employer, or the same was an act of victimisation of the workmen, or that there was violation of principles of natural justice, or that the punishment was disproportionate to the misconduct of the employee, it was within its powers to interfere with the action of the management and set it aside. Section 11A, which was inserted in 1971, had the effect of widening the scope of powers of industrial adjudicators to interfere with the action of the management in matters of dismissal and discharge spelt out by the court prior to its incorporation in the Act.

In the earlier years, the court adopted a reformatory approach while dealing with disciplinary matters and held that it was within the realm and scope of the powers of industrial adjudicators under section 11A to differ with the findings of the enquiry officer in a disciplinary proceeding and also award lesser punishments than the one imposed by the disciplinary authority if the facts of the case so warranted even when the misconduct of the employee was proved in a departmental enquiry or before the industrial adjudicator in a reference under section 10 of the Act. However, in recent years, the court has discarded the reformatory approach and has adopted rather a deterrent approach to bring discipline in the industry which in its view has been lacking in the workforce. In this attempt, the court has, unfortunately, circumscribed the powers of the industrial adjudicators to interfere with the quantum of punishment even in the face of clear language of the statute (S. 11 A) empowering them to do so in appropriate cases.

As a general rule, the Supreme Court has viewed employment relationship in industrial law on a footing totally different from that of public service, given the fact that the nature, objects and purposes of two classes of service differ materially. While the procedure for termination of contract of employment in respect of the industrial employees is prescribed under the Industrial Disputes Act read with Industrial Employment (Standing Orders) Act and the guiding rules laid down by the courts, article 311 of the Constitution of India lays down, *inter alia*, the procedure for dismissal and removal of civil servants. Even the remedies and relief in case of wrongful dismissal are different for the civil servants as compared to industrial employees. The industrial workers including civil servants who qualify as 'workmen' on the basis of being engaged in activities which are covered by the definition of 'industry' and who make a choice of forum under the Industrial Disputes Act, have the benefit of adjudication by the industrial adjudicators which enjoy much wider powers than those of the central or state administrative tribunals, and the high courts while dealing with cases of civil servants under article 311. It is submitted that over the years, this fundamental distinction between industrial employment and

public employment has suffered gradual erosion because of the Supreme Court having overlooked this finer distinction in recent judgments.

It is submitted that in order to have a consistent approach in respect of the powers of the industrial adjudicators, it is desirable to spell out in clear terms through a legislative amendment to section 11A as to in which category of misconducts should the industrial adjudicators not interfere with the punishment of dismissal if awarded by the management.