

(1997) 07 KAR CK 0024

In the Karnataka High Court

Case No : Writ Appeal No. 7 of 1996 connected with Writ Appeal No. 4362 of 1995

Abdul Gani

APPELLANT

Vs

The General Manager, Vishweshwaraiah Iron And Steel Limited, Bhadravati And Another

RESPONDENT

Date of Decision : 04-07-1997

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10, 2 (oo), 25 F, 33

Citation : (1998) 1 KarLJ 58

Hon'ble Judges : R.P. Sethi, C.J;G. Patri Basavana Goud, J

Bench : Division Bench

Advocate : Sri Tajuddin, for the Appellant; Sri M. Ravi Prakash and Sri H. Rangavittalachar, Government Advocate, for the Respondent

Judgement

1. These are the two appeals arising out of the order of the learned Single Judge dated 18-10-1995 in Writ Petition No. 9194 of 1990. Abdul Gani had been employed in the Visweswaraiah Iron and Steel Limited, Bhadravathi. Workman Abdul Gani is the appellant in Writ Appeal No. 7 of 1996, while the Management is the appellant in Writ Appeal No. 4362 of 1995.

2. Workman applied for leave for 20 days from 5-10-1971. He did not report for duty after expiry of leave. His claim that he had submitted an application on 4-11-1971 for extension of leave was disputed by the management. Taking recourse to Clause XII of the Certified Standing Orders relating to leave, management, by the memo dated 4-11-1971, intimated the workman about his having lost lien of his job leading to termination of his services. Workman raised an industrial dispute in this regard at ID No. 52 of 1981 before the Labour Court at Bangalore. Admittedly, the termination had not been preceded by any domestic enquiry. Labour Court recorded evidence on behalf of the workman and the management with regard to justification of the order of termination. By its award dated 5-8-1989, Labour Court found that the management was justified in

terminating services of the workman on the ground that he had lost his lien on his job and as such, workman was not entitled for reinstatement, back wages and other consequential benefits. Under Article 226 of the Constitution of India, workman at Writ Petition No. 9194 of 1990 sought quashing of this award. Learned Single Judge, relying upon the decision of the Supreme Court in D.K. Yadav Vs. J.M.A. Industries Ltd., , held that the principles of natural justice must be read into Clause XII of the Certified Standing Orders relating to leave, and, as such, termination of services of the workman without an enquiry could not be upheld and that the said termination by the management's memo dated 4-11-1971 should, therefore, be treated as non est. Learned Single Judge however held that the workman was not entitled to be reinstated because, before the Labour Court, the Management had justified the order of termination. Since the order of termination by the management had not been preceded by an enquiry, doctrine of relation back in relation to the termination would not come into play so as to hold that the termination, which stood justified before the Labour Court, related back to 4-11-1971 when the management initially terminated the services of the workman. Learned Single Judge held that since the termination had been justified for the first time before the Labour Court, the worker should be held entitled to back wages from the date of termination till the date of the award of the Labour Court. Even then, the learned Single Judge restricted granting of back wages during the said period from the date of termination, namely 4-11-1971, till the date of award, namely 5-8-1989 to only 50 per cent on the ground that there was no explanation on the part of the worker for the delay in making the reference till 1978. The worker is aggrieved that, his initial termination with effect from 4-11-1971 being bad, not only on the ground that no enquiry had been held but also on the ground that it amounted to retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act, 1947 ("the Act" for short), which retrenchment had been made without compliance of Section 25F of the Act, his reinstatement in service with consequential benefits should have been automatically done and the learned Single Judge erred in directing awarding of only 50 percent back wages. Management is aggrieved because, the learned Single Judge, while awarding back wages, did not consider the fact that the workman had been gainfully employed during the relevant period and that the learned Single Judge further erred in the matter of application of doctrine of relation back. Management contended that once the termination was justified before the Labour Court it related back to the Management's order of termination of services of the workman dated 4-11-1971.

3.1 Clause XII of the Certified Standing Orders inter alia provided that, if the employee, after proceeding on leave, desires extension thereof, he shall apply to the Superintendent or other person authorised by him and that, if the employee remains absent beyond the period of leave originally granted to him or subsequently extended, he shall lose his lien on his appointment, unless he returns within eight days from the date of expiry of leave and explains to the

satisfaction of the Superintendent or other person authorised by him, about his inability to return before the expiry of leave.

3.2 Workman went on leave for 20 days from 5-10-1971. He was due to return for duty on 25-10-1971. According to workman, he did seek extension of leave on medical grounds by a leave letter he had sent by registered post on 5-11-1971. After expiry of initially granted leave period of 20 days and after waiting for a grace period of 8 days, during which period workman was entitled as per the said Clause XII of the Certified Standing Orders, to return and satisfactorily explain the reasons for his inability to return before the expiry of leave, the Management sent a memo with regard to services of the workman having been terminated on his losing lien on the appointment, in terms of the said Clause XII.

3.3 Admittedly, neither show cause notice had been issued to the workman, nor his explanation sought for nor any enquiry held, before the workman's services were terminated on the ground of his having lost his right of lien on the appointment under Clause XII of the Certified Standing Orders. The Supreme Court was dealing with termination of services of a workman in terms of a similar Standing Order in D.K. Yadav's case, *supra*. His Lordship Justice K. Ramaswamy, speaking for the Bench, observed that the right to life enshrined under Article 21 of the Constitution of India, would include right to livelihood, that the order of termination of services of a workman visits with civil consequences of jeopardizing not only his livelihood but also the career and livelihood of his dependents, and that therefore, before taking any action putting an end to the tenure of the workman, fairplay required that a reasonable opportunity to put forth his case be given and a domestic enquiry conducted, complying with the principles of natural justice. As in the present case, even in the case before the Supreme Court, admittedly no opportunity had been given to the workman nor any enquiry held. The Industrial Tribunal had also not recorded any conclusive finding on the workman's pleas, that despite his reporting to duty, he was prevented. The Tribunal had proceeded on the footing that the management had a power under Clause XIII of the Certified Standing Orders concerned, to terminate the services of the workman therein. The Supreme Court, therefore, held that the principles of natural justice must be read into the said Standing Order No. XIII, as otherwise, it would be arbitrary, unjust and unfair, violating Article 14 of the Constitution of India. When so read, the Supreme Court held that the impugned action was violative of the principles of natural justice.

3.4 It was in the light of the principles enunciated in the said decision of the Supreme Court that the learned Single Judge, in the impugned order, rightly held that the principles of natural justice must be read into Clause XII of the Certified Standing Orders relating to leave. So read, it was obvious that the workman's termination of services with effect from 4-11-1971 without show cause notice, without an opportunity to the workman to explain his stand, and without an enquiry, had to be treated as non est.

4.1 Order of termination with effect from 4-11-1971 also stood vitiated for non-compliance with Section 25F of the Act. Section 2(oo) of the Act defines "retrenchment" as meaning termination by the employer of the service of a workman for any reason whatsoever otherwise than as punishment inflicted by way of disciplinary action. This definition however makes exception in respect of four categories of termination like voluntary retirement, continuing ill health, etc. Order of termination for continued absence from duty of the workman without seeking extension of leave cannot be called a punishment inflicted by way of disciplinary action within the meaning of Section 2(oo) of the Act, because, there was no disciplinary proceedings initiated at all. The said termination also did not fall under any of the excepted categories mentioned in Section 2(oo). Therefore, it squarely fell within the meaning of "retrenchment" as defined u/s 2(oo). Admittedly, Section 25-F had not been complied with. On this ground also, the order of termination stood vitiated.

4.2 More than once, the Supreme Court pointed out that such termination would be retrenchment within the meaning of Section 2(oo) of the Act, and that such retrenchment, without compliance of Section 25-F, could not be upheld.

In *L. Robert D'Souza v The Executive Engineer, Southern Railways and Another*, the order of termination said that the workman concerned had absented himself unauthorisedly from 18-9-1974, and hence, his services were deemed to have been terminated from the day he absented himself and that he was no longer on the rolls of office. This was held to be retrenchment within the meaning of Section 2(oo) of the Act.

In *Delhi Cloth and General Mills Ltd. Vs. Shambhu Nath Mukherji and Others*, , the Management wrote to the workman just to the effect that his name had been automatically struck off the rolls under the provisions of the Standing Orders with effect from 24-8-1965 for continued absence without any intimation. In Paragraph 14 of the judgment, the Supreme Court held that striking off the name of the workman from the rolls by the management is termination of services, and that such termination of service is retrenchment within the meaning of Section 2(oo) of the Act, that there was nothing to show that Section 25-F of the Act had been complied with and as such striking off was invalid.

4.3 The order of termination of the services of the workman with effect from 4-11-1971 amounted to retrenchment within the meaning of Section 2(oo) of the Act, and Section 25F of the Act admittedly not having been complied with, the said termination could not be sustained.

5.1 On the grounds discussed above, the order of termination not being sustainable, the resultant position was that the workman had to be necessarily reinstated in service with consequential benefits including back wages. But it so happens, that when the workman raised an industrial dispute with regard to termination of his services, and when the said dispute was referred to the Labour Court u/s 10 of the Act, both the parties to the dispute led evidence -- oral and

documentary before the Labour Court, the worker in respect of his contention that he had sought extension of leave, and the employer in justification of its order of termination. On appreciation of the evidence on record, the Labour Court held that there was no material to show that any extension of leave had been sought. Workman had stated on oath that he had requested his neighbour to send his leave application on 4-11-1971 by registered post and that the neighbour had told him that he had sent the leave letter by registered post on 5-11-1971, which the Authorities of the Management had to receive on 6-11-1971. The Personnel Officer of the establishment stated on oath that no letter for extension of leave had been received from the workman. Workman, having admitted in cross-examination that he did not go to work from 25-10-1971, maintained that he had produced the acknowledgment before the Assistant Labour Commissioner for having sent leave application on 5-11-1971 but the same had not been produced before the Labour Court. Even to show that such acknowledgment had been produced before the Assistant Labour Commissioner, there was no evidence, and before the Labour Court also, there was no such acknowledgment produced. A specific suggestion was made to him in the cross-examination that he had not produced any such acknowledgment before the concerned Assistant Labour Commissioner/Conciliation Officer. Workman's neighbour, examined as MW-2, speaks to have given a postal receipt to the workman after the said leave extension letter had been sent by registered post. Even this postal receipt was not produced. It was on appreciation of this entire evidence that the Labour Court found that the management had justified the termination of services of the workman. Learned Single Judge, in paragraph 5 of the impugned order, has dealt with this aspect and has chosen to accept the conclusion of the Labour Court, not finding it perverse or arbitrary, though not stated in so many words. Thus, we have justification of the termination of services of the workman as done by the management before the Labour Court, though the initial order of termination of service could not be sustained for the reasons already stated.

5.2 Even where no enquiry had been held before the services of workman were terminated and in respect of such termination, where a dispute has been raised and the said dispute referred to the Labour Court for adjudication u/s 10 of the Act, the question is, whether the employer should be permitted by the Labour Court to adduce evidence to justify the termination. This was one of the questions that arose before the Supreme Court in *Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*, . Referring to its earlier decision in *Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory*, , this is what the Supreme Court held:

"52. In the case of *Workmen of Motipur Sugar Factory*, supra, this Court had again to consider the nature of the jurisdiction exercised by a Tribunal. The management therein had terminated the services of some of its workmen without holding any enquiry as required by its standing orders. The legality of termination of the services of the workmen was referred for adjudication to the

Industrial Tribunal under the Act. The management let in evidence before the Tribunal justifying its action in terminating the services of the workmen for misconduct. The workmen also let in evidence contra. The Tribunal after consideration of the evidence adduced before it held that the action of the management in terminating the services of the workmen was proper. Before this Court it was urged on behalf of the workmen that as the management had given no charge-sheets and had held no enquiry as required by the standing orders, it was not open to the management to justify before the Tribunal its order discharging the workmen and that the Tribunal had no jurisdiction to consider the claim of the management on merits. The contention of the workmen was rejected by this Court as follows:

It is now well-settled by a number of decisions of this Court that where an employer has failed to make an enquiry before dismissing or discharging a workman, it is open to him to justify the action before the Tribunal by leading all relevant evidence before it. In such a case the employer would not have the benefit which he had in cases where domestic inquiries have been held. The entire matter would be open before the Tribunal which will have jurisdiction not only to go into the limited questions open to a Tribunal where domestic enquiry has been properly held (*Indian Iron and Steel Company v Their Workmen*), but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. We may in this connection refer to *Sasa Musa Sugar Works (P) Ltd. Vs. Shobrati Khan and Others*, *Phulbari Tea Estate v Its Workmen* and *Punjab National Bank Limited v Its Workmen*. These three cases were further considered by this Court in *Bharat Sugar Mills Limited v Shri Jai Singh*, and reference was also made to the decision of the Labour Appellate Tribunal in *Shri Ram Swarath Sinha v Belsund Sugar Company*. It was pointed out that "the important effect of the omission to hold an enquiry was merely this: that the Tribunal would not have to consider only whether there was a prima facie case but would decide for itself on the evidence adduced whether the charges have really been made out". It is true that three of these cases, except *Phulbari Tea Estate's* case, were on applications u/s 33 of the Industrial Disputes Act, 1947. But in principle, we see no difference whether the matter comes before the Tribunal for approval u/s 33 or on a reference u/s 10 of the Industrial Disputes Act, 1947. In either case, if the enquiry is defective or if no enquiry has been held as required by standing orders, the entire case would be open before the Tribunal and the employer would have to justify on facts as well that its order of dismissal or discharge was proper. *Phulbari Tea Estate's* case, was on a reference u/s 10, and the same principle was applied there also, the only difference being that in that case, there was an inquiry though it was defective. A defective enquiry in our opinion stands on the same footing as no enquiry and in either case the Tribunal would have jurisdiction to go into the facts and the employer would have to satisfy the Tribunal that on facts the order of dismissal or discharge was proper.

If it is held that in cases where the employer dismisses his employee without

holding an enquiry, the dismissal must be set aside by the Industrial Tribunal only on that ground, it would inevitably mean that the employer will immediately proceed to hold the enquiry and pass an order dismissing the employee once again. In that case, another industrial dispute would arise and the employer would be entitled to rely upon the enquiry which he had held in the meantime. This course would mean delay and on the second occasion it will entitle the employer to claim benefit of the domestic enquiry. On the other hand, if in such cases the employer is given an opportunity to justify the impugned dismissal on the merits, the employee has the advantage of having the merits of his case being considered by the Tribunal for itself and that clearly would be to the benefit of the employee. That is why this Court has consistently held that if the domestic enquiry is irregular, invalid or improper, the Tribunal may give an opportunity to the employer to prove his case and in doing so the Tribunal tries the merits itself. This view is consistent with the approach which industrial adjudication generally adopts with a view to do justice between the parties without relying too much on technical considerations and with the object of avoiding delay in the disposal of industrial disputes. Therefore, we are satisfied that no distinction can be made between cases where the enquiry has in fact been held. We must, therefore, reject the contention that as there was no enquiry in this case it was not open to the respondent to justify the discharge before the Tribunal".

XXX XXX XXX XXX XXX. "58. Workmen of Motipur Sugar Factory"s case was an instance where no enquiry at all had been held by the management as per its standing orders before terminating the services of the employees. But evidence was adduced before the Tribunal by the management justifying its action and that evidence was accepted by the Tribunal. The contention of the workmen that as no enquiry had been held by the management before passing the order of termination, it was not open to the management to adduce evidence before the Tribunal justifying its action, was rejected by this Court.

xxx xxx xxx xxx xxx".

"61. From the above decisions the following principles broadly emerge:

(1) If no domestic enquiry had been held by the management, or if the management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straight away adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider that evidence so adduced before it on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

xx xx xx xx xx. (7) The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference u/s 10 or by way of an application u/s 33 of the Act".

5.3 It was thus permissible for the management to lead evidence and to justify its order of termination of services of the workman which it has done to the

satisfaction of the Labour Court. The conclusion of the Labour Court in this regard is not found by the learned Single Judge to be arbitrary or perverse. In view of this justification of the termination of services of the workman, the workman is not entitled to reinstatement. The question that next arises is as to doctrine of relation-back.

6.1 According to the learned Counsel for the employer, though the employer's order of termination dated 4-11-1971, is held to be bad not only on the ground that it had not been preceded by an enquiry but also on the ground that it was a retrenchment without compliance of Section 25-F of the Act, nevertheless the said termination having been found justified as per the award of the Labour Court, the termination related back to the initial order of 4-11-1971, and, as such, no back wages needed to be paid to the workman. On the other hand, the contention on behalf of the workman is that initially no enquiry having been held and the termination having been justified for the first time before the Labour Court, if at all, it could only be the date of the award of the Labour Court that could be taken as the termination of services of the workman and that, from 4-11-1971 till the date of the award i.e., 5-8-1989, the workman must be deemed to have been in service entitling him to full back wages for that period. Of course, learned Counsel for the workman Sri Tajuddin strenuously urged that the order of termination of 4-11-1971 being bad in law and not being able to be sustained, workman must be reinstated in service. Now that it is found that the employer nevertheless could lead evidence before the Labour Court to justify the termination, and that the Labour Court, on evidence so led, having found the termination to be justified, the workman cannot be said to be entitled to reinstatement. The question therefore is, whether the date of termination should be taken as 4-11-1971 as contended on behalf of the employer, or whether it should be taken as the date of the Labour Court's award dated 5-8-1989 as contended on behalf of the workman. Learned Single Judge, in paragraph 6 of the impugned order, has dealt with this aspect and has held, rightly in our opinion and for the reasons to be presently stated, that the termination must be held to have taken place only when it is justified by the employer before the Labour Court i.e., as on the date of the award dated 5-8-1989 and as such the worker would be entitled to back wages till that date.

6.2 In *P.H. Kalyani Vs. Air France Calcutta*, , the Supreme Court considered the dismissal of the workman on the charge of misconduct which had held to have been proved in a domestic enquiry. Since an industrial dispute had been pending before the Tribunal, employer filed an application u/s 33 of the Act before the Tribunal for approval of the order of dismissal. In the meantime, workman also complained to the Tribunal u/s 33A of the Act. Labour Court found the domestic enquiry to be defective in the sense that there was violation of principles of natural justice. Labour Court, however, went into the evidence tendered before it and accorded approval to the action taken by the employer in the matter of dismissal of the workman. It was urged before the Supreme Court that as the domestic enquiry was defective, there could be no approval of the action taken in

consequence of such enquiry, and that the Labour Court, even if it had held that dismissal was justified, should have ordered dismissal from the date its award would become operative. The Supreme Court held thus:

"..... The presents a case where the employer has held an inquiry though it was defective and has passed an order of dismissal and seeks approval of that order. If the inquiry is not defective, the Labour Court has only to see whether there was a prima facie case for dismissal, and whether the employer had come to the bona fide conclusion that the employee was guilty of misconduct. Thereafter, on coming to the conclusion that the employer had bona fide come to the conclusion that the employee was guilty i.e, there was no unfair labour practice and no victimisation, the Labour Court would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If the inquiry is defective for any reason, the Labour Court 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 evidence adduced before it that the dismissal was justified its approval of the order of dismissal made by the employer in a defective inquiry would still relate back to the date when the order was made".

The Supreme Court further observed thus:

".....In the present case an inquiry has been held which is said to be defective in one respect and dismissal has been ordered. The respondent had however to justify the order of dismissal before the Labour Court in view of the defect in the inquiry. It has succeeded in doing so and therefore, the approval of the Labour Court will relate back to the date on which the respondent passed the order of dismissal. The contention of the appellant therefore that dismissal in this case should take effect from the date from which the Labour Court's award came into operation must fail".

6.3 In the course of arguments in the above said Kalyani's case, on behalf of the workman, an earlier decision of the Supreme Court in Sasa Musa Sugar Works case, was relied upon to contend that the dismissal would take effect from the date the Labour Court's award became operative. In particular, the following observations of the Supreme Court in Sasa Musa Sugar Works case, were referred to:

".....as the management held no inquiry after suspending the workmen and proceedings u/s 33 were practically converted into the inquiry which normally the management should have held before applying to the Industrial Tribunal, the management is bound to pay the wages of the workmen till a case for dismissal was made out in the proceedings u/s 33".

Distinguishing these observations in Sasa Musa Sugar Works case, the Supreme Court observed thus in Kalyani's case.

"We are of opinion that those observations cannot be taken advantage of by the

appellant. That was a case where an application had been made u/s 33(1) of the Act for permission to dismiss the employees and such permission was asked for though no inquiry whatsoever had been held by the employer and no decision taken that the employees be dismissed. It was in those circumstances that a case for dismissal was made out only in the proceedings u/s 33(1) and therefore the employees were held entitled to their wages till the decision of the application u/s 33".

6.4 The above said view was reiterated in D.C. Roy Vs. The Presiding Officer, Madhya Pradesh Industrial Court, Indore and Others, , to which the learned Single Judge had made reference in paragraph 6 of the impugned order. Even in the said case of D.C. Roy, earlier decisions in Sasa Musa Sugar and Kalyani cases were referred to and the view earlier taken in Kalyani and the manner in which the decision in Sasa Musa Sugar's case, had been distinguished, were all followed.

6.5 This very question once again arose recently before the Supreme Court in R. Thiruvirkolam Vs. Presiding Officer and another, . In fact, the workman concerned in the above case had been dismissed from service on proof of misconduct after holding a domestic enquiry. Labour Court found the domestic enquiry to be defective and permitted the management to prove the misconduct before it. On the basis of the evidence led, the Labour Court, concluded that the misconduct was proved and that the punishment imposed was justified. The question that arose before the Supreme Court in respect of which question leave had been granted, is set out in paragraph 2 of the decision of the Supreme Court. It is whether the dismissal takes effect from the date of order of the Labour Court, namely December 11, 1985, or whether it would relate to the date of the order of dismissal passed by the employer i.e., November 18, 1981. Referring to earlier decisions of the Supreme Court in Kalyani's case and B.C. Roy's case, and observing that the decision of the Constitution Bench in Kalyani was the binding authority on the point, his Lordship Justice Verma, as he then was, speaking for the Bench, observed that only point involved for the decision in the appeal concerned stood concluded against the appellant workman by the Constitution Bench decision in Kalyani and that the order of punishment operated from November 18, 1981 when it was made by the employer, and not from December 11, 1985, the date of Labour Court's award.

6.6 In the case of Kalyani decided by a Constitution Bench, as also in other two cases, namely D.C. Roy and Thiruvirkolam, domestic enquiry had been held, and on proof of misconduct, punishment inflicted. The domestic enquiry in each case having been found to be defective and the evidence adduced before the Labour Court in justification of proof of misconduct and punishment inflicted, the Labour Court found that the misconduct had been proved and punishment inflicted had been justified. It was in this back ground that the question of relation back was dealt with and it was held that justification related back to the initial order passed by the employer. This is how his Lordship Justice Verma, as he then was,

held in Thiruvirkolam:

"..... In Kalyani, it was held that the defect found in the domestic inquiry is nullified by proof of misconduct on the basis of evidence adduced before the Labour Court so that there is no ground available for the Labour Court to set aside the order of punishment. The question before the Labour Court is whether the order of punishment should be set aside on any ground, and when the Labour Court ultimately reaches the conclusion that even though the inquiry was defective, there is material to justify the punishment awarded, it rejects the challenge to the order of punishment which continues to operate. It is not as if the order of punishment becomes effective only on rejection of the challenge to its validity. Unless set aside by a Competent Court on a valid ground, the order of punishment made by the employer continues to operate. The operation of the order of punishment made by the employer does not depend on its confirmation by the Labour Court to make it operative. Unless set aside by a Competent Authority, the order of punishment made by the employer continues to be effective. Obviously this is the ratio of the decision of Kalyani".

While this would be the position, where there was a domestic enquiry which was found defective and the justification made in the Labour Court, herein, in the present case, the service of the workman had been terminated without there being an enquiry. It was for the first time before the Labour Court that the employer, on leading evidence, justified the termination of services of the workman. Such a case ought to be covered by the principle enunciated in Sasa Musa Sugar case. As earlier noted, the Constitution Bench in Kalyani, while referring to the relevant observations in Sasa Musa Sugar Works case, pointed out as to how there had been no previous enquiry whatsoever that had been held by the employer, and as to how the case for dismissal had been made out for the first time in the proceeding u/s 33 before the Labour Court. It was in those circumstances that the Constitution Bench noted that the employees in Sasa Musa Sugar case, would be entitled to their wages till the decision on the application u/s 33 i.e., till the decision by the Labour Court. While making this distinction, the Constitution Bench in Kalyani also observed that the matter would have been different if, in that case, an enquiry had been held, and if the employer had come to the conclusion that the dismissal was the proper punishment and had thereafter applied for permission u/s 33(1). The Constitution Bench observed that in those circumstances, that permission would have related back to the date when the employer came to the conclusion after an enquiry, that the dismissal was the proper punishment and had applied for the removal of the ban by an application u/s 33(1). In other words, if circumstances similar to Sasa Musa Sugar case, existed, i.e., if the order of termination is without an enquiry as in the present case, then, until termination is justified before the Labour Court culminating in the award of the Labour Court, the workman concerned would be entitled to wages. This is the position duly recognised in Kalyani and B.C. Roy also, when the circumstances relating to Sasa Musa Sugar Works were distinctly set out and Sasa Musa Sugar Works was

distinguished.

6.7 In view of the above, we have to hold that the order of termination in respect of the workman concerned herein, took effect only from the date of Labour Court's award, namely 5-8-1989.

7. Learned Counsel for the employer urged that while awarding back wages, the fact that the workman had been gainfully employed during the relevant period, needed to be taken into consideration which, according to the said learned Counsel, has not been done in the present case. A reference is made in this regard to the admission in the cross-examination of the workman to the effect that he was doing business in tender coconuts and was running a cycle shop for three years. The question is whether this could be said to be a gainful employment to deprive the workman of the back wages. In *Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others*, , referring to a similar argument of the employer therein that the workman concerned had been staying with his father-in-law and had been helping him in his coal depot, Supreme Court pointed out that if that could be called gainful employment, the employer can contend that the employee, in order to keep his body and soul together, had taken to begging, and that would as well be a gainful employment. Their Lordships observed that the gross perversity with which the employer had approached the case had left them stunned. The present case is no different. Here, the workman, who had been working as cabin operator cum guide setter of combined ban and red mills department in the Iron and Steel Mills at Bhadravathi, has been reduced to eke out his livelihood by vending tender coconuts and repairing cycles. Not much discussion is needed to reject the contention of the employer that the workman had been gainfully employed during the relevant period.

8. The result of the above discussion and the conclusion thereon should lead to our holding that the workman is entitled to full back wages from 4-11-1971 to 5-8-1989. Learned Single Judge, however, referring to Supreme Court's decision in *D.K. Yadav's* case, *supra*, has held that though the workman is entitled to back wages during this period, he is entitled only to fifty per cent of back wages and not full back wages. Learned Single Judge so holds after concluding that there was no explanation by the workman for the delayed reference. This observation of the learned Single Judge, in our view, overlooks the evidence on record in this regard. The workman stated on oath before the Labour Court that he approached the Labour Commissioner for conciliation, after the employer failed to reply to his representation for reinstatement. Even the witness examined on behalf of the employer, namely the Personnel Officer, admitted in course of his evidence that the Conciliation Officer had given a failure report. u/s 12(4) of the Act, it was incumbent upon the appropriate Government to consider that report and take a decision thereon u/s 12(5) of the Act. If it decided against making reference, it was required to record its reason thereof and communicate the same to the parties. On the other hand, if, on consideration of the said report

under sub-section (4) of Section 12, the appropriate Government was satisfied that there was a case for reference, then, it had to make a reference. The fact that the appropriate Government in this case has made reference to the Labour Court at ID No. 52 of 1981, itself suggests that the Government had acted on the report of the Conciliation Officer under sub-section (4) of Section 12 and found the dispute fit enough to be referred for adjudication u/s 10. In between the failure report of the Conciliation Officer u/s 12(4) and the decision of the appropriate Government u/s 12(5), which decision eventually led to making of reference, there was delay, if the workman hardly had any role to play in this regard, and if at all, it was the Government which had to be blamed for the said delay. Workman could not be blamed for the delay unlike in D.K. Yadav's case, where the Supreme Court categorically held that the workman also was to be equally blamed.

9. In the result, Writ Appeal No. 4362 of 1995 is dismissed with costs.

Writ Appeal No. 7 of 1996 is partly allowed with costs.

Impugned order is modified. While confirming the denial of the relief of reinstatement, the worker Adbul Gani is held entitled to full back wages for the period from 4-11-1971 to 5-8-1989.