
(1992) 11 BOM CK 0091
In the Bombay High Court
Case No : Writ Petition No. 417 of 1989

Basu Deba Das

APPELLANT

Vs

M.R. Bhope and Another

RESPONDENT

Date of Decision : 26-11-1992

Acts Referred:

Industrial Disputes Act, 1947 — Section 11

Citation : (1993) 2 BomCR 90 : (1993) 2 LLJ 1022

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Advocate : N.M. Ganguli, for the Appellant; J.P. Cama, for the Respondent

Judgement

1. The present petition seeks to impugn the Award (Part-I) dated April 20, 1987, order dated August 21, 1987 rejecting the petitioner's application for review and the Part-II Award dated September 27, 1988 passed by the Presiding Officer of the Labour Court in Reference (I.D.A) No. 503 of 1982.

2. By the Award the action of the second respondent in dismissing the petitioner from service has been held to be justified and the reference, which was initiated at the instance of the second respondent, is rejected.

3. The petitioner was employed by the second respondent as an Assistant Cook with effect from September, 1978. An incident took place on November 26, 1980 when the petitioner allegedly assaulted a co-worker Abdul Salam. On account of the incident the second respondent on December 3, 1980 issued a charge-sheet. Charge levelled against the petitioner are as follows :

"1. For joining duties in the general shift (9.00 A.M. to 6.00 P.M.) on November 26, 1980, you visited the locker room at about 9.00 A.M. where you were changing from your personal clothes to uniform..

2. At that time, Mr. Abdul Salam Bashir Chaudhary, Asstt. Cook (T. No. 4503) who was also in the General Shift (8.00 A.M. to 5.00 P.M.) was also in the locker

room talking with another workman Shri. S. Paul Raj, Asstt. Cook (T. No. 3759)

3. As M/s Abdul Salam and Paul Raj were talking between themselves, you abused and picked up a quarrel with Mr. Abdul Salam and subsequently you abused and assaulted Mr. Abdul Salam with a cook's knife which you use during the course of your duties.

4. As a result of the assault by you, Mr. Abdul Salam sustained serious injury on his right forearm entailing profuse bleeding, which required medical treatment even after first aid.

5. Your above acts, if proved, amount to serious misconduct under the Model Standing Orders applicable to you, viz :

Clause 24(M) : riotous, disorderly or indecent behaviour on the premises of the establishment and Clause 24(1) :- Commission of acts subversive of discipline or good behaviour on the premises of the establishment.

On November 26, 1980, after the above said incident was reported, you were issued with the suspension order Ref : P.E.R. /261 of 1980 of even date at 4.00 P.M. and after it was explained to you, you refused to accept and acknowledge the same, which is also a misconduct under the Model Standing Order, viz :

Clause 24(x) :- refusal to accept a.... order or other communication served in accordance with the standing orders."

4. The petitioner thus came to be charge-sheeted for misconduct under Clause 24(k), (l), (x) of the Model Standing Orders.

5. The second respondent by his explanation Exhibit U-9 stated as under :

"On November 26, 1980 I did enter the locker room at 9.00 A.M. This is because my duty starts at 9.00 A.M. and I have been in the locker room for changing clothes. At this time Shri Abdul Salam and Shri Paul Raj were talking each other. I just casually asked him whether he is on duty or not as a co-employee asks one another. Shri Abdul Salam misunderstood my friendly question and started abusing me with filthy words, which I feel ashamed to speak about. At this juncture I tried to pacify his anger, for which, he got more annoyed, took out his cook's knife which he was carrying at the moment as he was on duty (8 A.M. to 5.00 P.M.) and was on top of me before I could utter another word. You can very well understand the situation in which I was pitted against due to some misunderstanding. In desperation I tried to save myself. The scuffle that followed led Shri Abdul Salam to bruise his right forearm with a small cut, which occurred due to his falling on the ground with the knife and scotching."

An enquiry was held against the petitioner in respect of the above charges and by an order passed on October 7, 1981 the petitioner was dismissed from service.

6. Taking exception to the order of dismissal the petitioner raised an industrial dispute. By an order passed on July 16, 1982 the dispute was referred to the

Labour Court, being Reference (I.D.A.) No. 503 of 1982. In the reference the petitioner on February 3, 1983 filed his statement of claims, (which is annexed at Exhibit-A to the petition) challenging the legality and propriety of the order of dismissal. According to the petitioner, he at the material time was working with the second respondent as an Assistant Cook. He was charge-sheeted on December 3, 1986 for picking up quarrel with another employee by name Abdul Salam on the allegation that the petitioner had assaulted him with the help of a knife. According to him, the enquiry in question was neither fair nor proper. In the enquiry the petitioner was held guilty and was dismissed from service with effect from October 7, 1981. In any event, the order of dismissal was too harsh. He prayed for an order of reinstatement with full back wages and continuity of service.

7. The second respondent filed its written statement on March 11, 1983. A copy of the written statement is annexed at Exhibit-B to the petition. According to the second respondent, the petitioner on November 26, 1980 picked up a quarrel with his co-employee Abdul Salam. The petitioner abused Abdul Salam in filthy language and assaulted him with knife. Abdul Salam received serious injuries in his right forearm. He was sent for treatment to Cooper Hospital. The petitioner was, therefore, issued a show cause notice. In the enquiry, he was found to be guilty. He was, therefore, dismissed.

8. By an order dated April 20, 1987 the learned Presiding Officer of the Labour Court was pleased to hold that the departmental enquiry held against the petitioner was neither fair nor proper. The enquiry was therefore held to be improper and therefore it stood vitiated. The second respondent by the very order was given an opportunity to lead evidence to justify its action of dismissal. A copy of the order dated April 20, 1987 is annexed at Exhibit-C to the petition.

9. It may be relevant at this stage to make reference to an application filed by the second respondent on December 19, 1984 praying for an opportunity to lead evidence to prove the misconduct alleged against the petitioner in the event of the Labour Court coming to the conclusion that the enquiry held by the Company is not fair and proper. A certified copy of the application has been produced for my perusal. The copy shows that on the very day i.e. December 19, 1984 the Presiding Officer has directed "other side to say". A further endorsement shows on the very day a copy of the application was served on the Advocate appearing for the petitioner. The copy further bears the order passed by the Presiding Officer on January 18, 1985 which is as under :

"No say filed by the other side and hence posted for hearing of the reference."

As stated earlier, by the order passed on April 20, 1987 the Presiding Officer offered the second respondent an opportunity to justify its action by leading evidence.

10. On August 5, 1987 the petitioner applied for review of the order dated April 20, 1987. A copy of the application is annexed at Exhibit-D to the petition. By an order passed on August 21, 1987 the Presiding Officer rejected the application. A

copy of the order is annexed at Exhibit-E to the petition. Taking exception to the order, the petitioner filed in this Court Writ Petition No. 3580 of 1987. On February 5, 1988 the petitioner was granted with liberty to withdraw the petition with liberty to challenge the order impugned, at a later stage, at the time of the passing of the final order. The parties thereafter went to trial and led evidence in support of their respective claims and by the impugned award dated September 27, 1988 the learned Presiding Officer was pleased to hold that the second respondent had proved the charges levelled against the petitioner. He further found that the charges proved against him were of a serious nature concerning the discipline of the establishment. Consequent upon the said findings the reference was rejected. A copy of the award Part-II dated September 27, 1988 is annexed at Exhibit-K to the petition.

11. Being aggrieved by the Part-I and Part-II Awards the petitioner has presented the present petition. The petition was placed for admission before my learned brother Daud, J., when the following order was passed on June 12, 1989 :

"Counsel for the petitioner advances the arguments appraised below :

First : That there was no report of the beating allegedly inflicted by the petitioner to the police. This does not mean that the company could not direct a departmental enquiry against the petitioner.

Secondly : That no doctor was examined to prove the injuries sustained by the victim. The non-examination does not wipe out the other evidence establishing injuries.

Thirdly : That the victim's admission of the mishap suffered by him being an accident had not been given due weight. The 1st respondent has considered this contention and negated it for good reasons.

Last : It is argued that the punishment of dismissal was disproportionate. A beating resulting in damage requiring 14 stitches cannot be glossed over as deserving anything less than dismissal.

The 1st respondent's verdict rests purely on an appraisal of facts. It is neither perverse nor unsupported by evidence.

A writ Court cannot interfere merely because a different view is possible

Rejected with no order for costs."

12. It would thus appear that as far as the above order goes it has affirmed the finding of the Labour Court in regard to the misconduct committed by the petitioner. It has also held that the punishment of dismissal is not disproportionate but is justified on the facts of the case.

13. The above order passed by my learned brother Daud., J., was carried in appeal being Appeal No. 835 of 1989 and the Appeal Court Coram : S. P. Bharucha & T. D. Sugla, JJ., (as they then were) on October 18, 1989 passed the

following order :

"The appellant was an employee of the 2nd respondent Company. He was issued with a charge-sheet which alleged that he had committed an assault upon a fellow worker. An enquiry was held. He was found guilty and he was dismissed. The appellant raised an industrial dispute. The Labour Court in its Part I Award held that the enquiry was vitiated not having been fair and proper. It gave the company an opportunity to lead evidence to justify the dismissal. The appellant filed an application for review of this order submitting that the permission to lead fresh evidence not having been sought at the earliest stage, it should not have been given. Reliance was placed upon the Supreme Court judgment in Shambhu Nath Goyal Vs. Bank of Baroda and Others, . The application for review was rejected as being not maintainable. The Labour Court then heard evidence and by its Part II Award upheld the dismissal of the appellant.

The appellant had impugned the Labour Court's order on the application for review by a writ petition in this Court (Writ Petition No. 3586 of 1987) and he had withdrawn it with liberty to take the contention raised therein in a challenge to the ultimate findings on the reference. In this writ petition this contentions taken (para 5 and ground C) and the Part II Award impugned. It appears from the order of summary rejection of this writ petition passed on June 12, 1989 that this contention was not urged before the learned Single judge. The learned Singular Judge rejected the writ petition on the ground that the Part II Award rested on an appraisal of facts and it was neither perverse nor unsupported by evidence. This appeal is filed against the order of summary rejection.

It appears that the company did not seek permission to lead evidence before the Labour Court in the written statement that it filed but it did so long after. Having regard to the judgment in Shambhunath Goyal's case, (supra) the validity of the permission given by the labour Court to the Company to lead evidence before it becomes arguable and, therefore, the appellant's writ petition deserves admission.

Accordingly, the order of summary rejection of the writ petition is set aside and is substituted by the following :

Rule. Expedited.

No interim relief.

No order as to costs."

14. The above order passed in appeal does not purport to set aside any of the findings arrived at by the learned Single Judge except the order of summary rejection of the petition. The finding that the Part II Award was justified in so far as it records a finding of guilt against the petitioner is not set aside in appeal. Similarly the finding that an order of dismissal is justified on the facts found proved is also not disturbed in the appeal. The appeal is allowed and the petition is admitted solely for the purpose of finding out whether the Labour Court was

justified in passing the Part I Award whereby the second respondent was permitted to justified the order of the dismissal by leading evidence even though the second respondent had not raised the contention in the written statement but had sought the prayer at much later stage. Hence strictly speaking the only controversy that is open for the petitioner to urge in the present petition is the one mentioned above. the other contentions are deemed to have been affirmed in the appeal. Though this is the only scope which is left in the petition, I have permitted Shri Ganguli, the learned Counsel appearing on behalf of the petitioner, to urge all the points taken in the petition and without being technical I propose to entertain and give my findings upon all the contentions advanced on behalf of the petitioner.

15. I will first take up for consideration the contention on which the appellant Court had admitted the petition, namely, whether the Labour Court was justified in permitting the second respondent to lead evidence and justify the order of dismissal.

16. In this connection, Shri Cama has placed before me a certified copy of an application dated December 19, 1984 filed by the second respondent before the Labour Court seeking permission to lead evidence to prove the misconduct alleged against the petitioner. this is what the second respondent has stated in the application :

"It has been stated on behalf of the workman that the enquiry held in respect of the workman is not fair and proper. However, the Company submits that if this Hon"ble Court comes to the conclusion that the enquiry held by the Company may please be allowed to lead evidence or the Company may be allowed to adduce fresh evidence as may be deemed necessary to prove the misconduct alleged against the workman."

17. The certified copy of the application bears an endorsement which indicates that the learned Presiding Officer of the Labour Court on the very day i.e. on December 19, 1984 passed an order "other side to say". The further endorsement shows that on the very day a copy of the application had been served on the advocate appearing for the petitioner. And yet further endorsement shows that on January 18, 1985 the Presiding Officer passed the following order :

"No say filed by the other side and hence posted for hearing of the reference."

It would thus appear that though the aforesaid prayer was not made on December 19, 1984 which is much prior to the passing of the Part-I Award dated April 20, 1987. It does not appear that the fact of the filing of the application was brought to the notice of the appellate Court. Atleast the order passed in the appeal does not give any indication that this fact was brought to its notice. The order in appeal shows that the second respondent though served was absent. Since the impugned award no where makes a reference to the application and the petition itself also does not make any reference to it, in all probability, the fact of the filing of the application was not brought to the notice of the Court.

Even so I am proceeding to deal with the contention on its own merits on the basis of the facts now brought to my notice.

18. In this context I will first deal with the case of Shambhu Nath Goyal v. Bank of Baroda and others, (supra) which is referred to by the appellate Court while admitting the petition. The facts of the case before the Court appear in paragraph 13 of the judgment which can be reproduced Shambhu Nath Goyal Vs. Bank of Baroda and Others, :

"It is true that in the present case an application was made by the management on February 8, 1979 when the matter was before the tribunal for the second time after it had been remanded by this Court on February 2, 1978 after rejecting the management's contention that the dispute is not an industrial dispute. That was done by the management nearly 14 years after the workman had been suspended on July 20, 1965 and nearly 13 years after the workman had been found guilty in the domestic enquiry and dismissed from service on December 28, 1965. The management took the preliminary objection which found favor with the tribunal in the first instance on October 25, 1970 that the dispute is not an industrial dispute. That objection, which was upheld by the tribunal, forced the workman to seek his remedy in this Court which rejected the objection on February 2, 1978. It is only thereafter the management filed the application dated February 8, 1979 for the first time seeking further opportunity to lead evidence before the tribunal for substantiating the charges framed in 1965. The management is thus seen to have been taking steps periodically to see that the dispute is not disposed of at an early date one way or the other.... The workman was not expected to prove the negative. In these circumstances we do not think that it would be in the interest of justice to prolong any further the agony of the workman whose power to endure the suffering of being out of employment for such a long time and to oppose the management Bank, a nationalised undertaking with all the money power at its disposal in this prolonged litigation, is very limited by allowing the Bank to have the advantage belatedly sought in the application dated February 8, 1979 in an industrial dispute which arose so early as in 1965."

In paragraph 12 of the judgment, this is what Justice Varadarajan speaking for the Court observed : (pp. 422-423) :

"We think that the application of the management to seek the permission of the Labour Court or Industrial Tribunal for availing the right to adduce further evidence to substantiate the charge or charges framed against the workmen referred to in the above passage is the application which may be filed by the management during the pendency of the application made before the Labour Court or Industrial Tribunal seeking the permission u/s 33 of the Industrial Disputes Act, 1947 to take a certain action or grant approval of the action taken by it. The management is made aware of the workman's contention regarding the defect in the domestic enquiry by the written statement of defense filed by him in the application filed by the management u/s 33 of the Act. Then if the

management chooses to exercise its right it must make a its mind at the earliest stage and file the application for that purpose without any unreasonable delay. But when the question arises in a reference u/s 10 of the Act after the workman had been punished pursuant to a finding of guilt recorded against him in the domestic enquiry there is no question of the management filing an application for permission to lead further evidence in support of the charge or charges framed against the workman, for the defect in the domestic enquiry is pointed out by the workman in his written claim statement filed in the Labour Court or Industrial Tribunal after the reference had been received and the management has the opportunity to look into that statement before it files its written statement of defense in the enquiry before the Labour Court or Industrial Tribunal and could make the request for the opportunity in the written statement itself. If it does not choose to do so at that stage it cannot be allowed to do it at any later stage of the proceeding by filing any application for the purpose which may result in delay which may lead to wrecking the morale of the workman and compel him to surrender which he may not otherwise do."

19. Justice Desai has given a concurring judgment. In paragraph 14 and 15 he has considered the submission advanced on behalf of the employer that if the employer makes an application to the Labour Court/Industrial Tribunal that in the event the domestic enquiry is found to be either improper, invalid or vitiated, the Labour Court/Industrial Tribunal should accept the application of the employer and give it an opportunity to substantial the charges imputing misconduct and leading to the termination of the service of the workman. He referred to decision in the case of Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, wherein it is observed thus (p. 206) :

"Therefore, it is crystal clear that the rights which the employer has in law to adduce additional evidence in the proceeding before the Labour Court or Industrial Tribunal either u/s 10 or Section 33 of the Act questioning the legality of the order terminating service must be availed of by the employer by making a proper request at the time when it filed its statement of claim or written statement or makes an application seeking either permission to take certain action or seeking approval of the action taken by it. If such a request is made in the statement of claim, application or written statement, Labour Court or the Industrial Tribunal must give such an opportunity. If the request is made before the proceedings are concluded, the Labour Court or Industrial Tribunal should ordinarily grant the opportunity to adduce evidence. But if no such request is made at any stage of the proceedings, there is no duty in law cast on the Labour Court or the Industrial Tribunal to give such an opportunity and if there is no such obligatory duty in law, failure to give any such opportunity cannot and would not vitiate the proceedings."

"..... without being specific, it can be said that such an application has to be examined as if it is an application for amendment of original pleadings keeping in view all the aforementioned considerations and if it does not appear to be bona

fide or has been made after a long unexplained delay or the explanation for the omission of claiming the relief in the initial pleading is unconvincing, the Labour Court/Industrial Tribunal would be perfectly justified in rejecting the same. The observation was not made to lay down a proposition of law that if and when it suits the convenience of the employer at any stage of the proceedings, it may make an application seeking such opportunity and the Labour Court/Industrial Tribunal was obliged to grant the same. *Shambhu Nath Goyal Vs. Bank of Baroda and Others*,

20. The observations of the Supreme Court have to be appreciated in light of the facts which were before the Court. The Court was dealing with a contention advanced on behalf of an employer who was found to be guilty of delaying the proceedings to a breaking point of the very back bone of the employee. The contention was that if an employer makes an application that in the event of a domestic enquiry is found to be improper or invalid as not being fair and proper, the application should be accepted and an opportunity to substantiate the charges of misconduct must be afforded to the employer. The decision, as I read it, does not lay down any hard and fast rule. Whether permission ought to be granted or refused would depend upon the facts of each individual case.

21. Reference in this context may be made to the case of *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, wherein it is observed, thus (pp. 383-386) :

"We may now refer to the propositions (4), (5) and (6) in the *Delhi Cloth General Mills*" case (supra) :

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the tribunal to try the validity of the domestic enquiry as preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be under such circumstances, it is open to the tribunal to deal, in the first instance, as a preliminary issue, the validity of the domestic enquiry. If its finding on the preliminary issue is in favor of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end...."

(5) "The management has got a right to attempt to sustain its order by adducing independent evidence before the tribunal. But the management should avail itself of the said opportunity by making a suitable request to the tribunal before proceedings are closed. If no such opportunity has been availed of, or asked for

by the management, before the proceeding are closed, the employer can make no grievance that the tribunal did not provide such an opportunity. The tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper." (6). "If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo motu the employer to adduce evidence before it to justify the action take by it."

In the Delhi Cloth and General Mills" case (supra) dealing with the case of the management's application to adduce evidence after close of arguments, although on the same day after the Court reserved judgment, the Court observed as follows :

"The appellant did not ask for an opportunity to adduce evidence when the proceedings were pending nor did it avail itself of the right given to it in law to adduce evidence before the tribunal during the pendency of the proceedings."

In The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, , this Court stated the law laid down by this court as on December 15, 1971. For our purpose we will extract from that decision only propositions 4,6,7 and 8 :

(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 in order to satisfy itself about the legality and validity of the order, has to 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 its action."

(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 after the enquiry conducted by an employer is found to be defective."

(7) "It has never been recognised that the Tribunal should straightway, 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 him self of the opportunity of adducing evidence for the first 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."

We are particularly concerned with proposition (8). What is appropriate stage was specifically adverted to in the Delhi Cloth and General Mills" case (supra) which we are now required to seriously consider whether this conclusion is correct and ensures justice to all concerned in an industrial adjudication.

Propositions (4), (6) and (7) set out above are well-recognised. Is it, however, fair and in accordance with the principles of natural justice for the Labour Court to withhold its decision on a jurisdiction point at the appropriate stage and visit a party with evil consequences of a default on its part in not asking the Court to give an opportunity to adduce additional evidence at the commencement of the proceedings or, at any rate, in advanced of the pronouncement of the order in that behalf ? In our considered opinion it will be most unnatural and unpractical to expect a party to take a definite stand when a decision of a jurisdictional fact has first to be reached by the Labour Court prior to embarking upon an enquiry to decide the dispute on its merits. The reference involves determination of the larger issue of discharge or dismissal and not merely whether a correct procedure had been followed by the management before passing the order of dismissal. Beside, even if the order of dismissal is set aside on the ground of defect of enquiry, a second enquiry after reinstatement is not ruled out nor in all probability a second reference. Where will this lead to ? This is not going to achieve paramount object of the Act, namely industrial peace, since the award in that case will not lead to a settlement of the dispute. The dispute, being eclipsed, protempore, as a result of such an award, will be revived and industrial peace will again be ruptured. Again another object of expeditious disposal of an industrial dispute (see Section 15) will be clearly defeated resulting in duplication of proceedings. This position has to be avoided in the interest of labour as well as the employer and in furtherance of the ultimate aim of the Act to foster industrial peace.

We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication, the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, There will be no difficulty. But when the matter is in controversy between the parties, the question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduced any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning if decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication."

22. In this context Shri Ganguli, the learned Counsel appearing for the petitioner-employee, relied on the case of Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, . In that case Supreme Court observed, thus (pp. 207-208) :

"Rule 15 confers power to admit or call for evidence. Rule 16 enables the Labour Court or Industrial Tribunal to administer oath. Rule 60 prescribes the form of application to be made u/s 33. The application has to be in form J or K, as the case may be, and has to be on verification. The cause-title in the prescribed form requires that the applicant and the opposite party should be specifically described in the application. These forms are more or less analogous to a plaint in a suit and the reply to be filed would take more or less the form of a written statement. Where the parties are at variance, for facility of disposal issues will have to be framed. It is open to it to frame an issue and dispose it of as a preliminary issue as held in *M/s. Dalmia Dadri Cement Ltd. v. Its Workmen*, 1970 II LLJ 416 (P&h) Parties have to lead evidence. Section 11C confers power of a Civil Court under the CPC on the Labour Court or Industrial Tribunal in respect of matters therein specified. The Labour Court or Tribunal would then proceed to decide the lis between the parties. It has to decide the lis on the evidence adduced before it. While it may not be hidebound by the rules prescribed in the Evidence Act it is nonetheless a quasi-judicial tribunal proceeding to adjudicate upon a lis between the parties arrayed before it and must decide the matter on the evidence produced by the parties before it. It would not be open to it to decide the lis on any extraneous considerations. Justice, equity and good conscience will inform its adjudication. Therefore, the Labour Court or the Industrial Tribunal has all the trappings of a Court.

If such be the duties and function of the Industrial Tribunal or the Labour Court, any party appearing before it must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The quasi-judicial Tribunal is not required to advise the party either about the rights or what it should do or omit to do. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence and lead evidence. A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained, it would tantamount to granting an unfair advantage to the first mentioned party.

..... Now if no such pleading is put forth either at the initial stage or during the pendency of the proceeding there arises no question of a sort of advisory role of the Labour Court or the Industrial Tribunal, unintended by the Act to advise the employer, a party much better off than the workman, to inform it about its rights, namely, the right to lead additional evidence and then give an opportunity

which was never sought. This runs counter to the grain of industrial jurisprudence. Undoubtedly, if such a pleading is raised and an opportunity is sought, it is to be given, but if there is no such pleading either in the original application or in the statement of claim or written statement or by way of an application during the pendency of the proceedings, there is no duty cast by law or by the rules of justice, reason and fair play that a quasi-judicial Tribunal like the Industrial Tribunal or the Labour Court should adopt an advisory role by informing the employer of its rights, namely, the right to adduce additional evidence to substantiate the charge when it failed to make good the domestic enquiry and then to give an opportunity to it to adduce additional evidence. This, apart from being unfair to the workman, is against the principles of rules governing the procedure to be adopted by quasi-judicial Tribunal, against the grain of adversary system and against the principles governing decision of a lis between the parties arrayed before a quasi-judicial Tribunal."

23. The above observations were made on the following facts which are reflected in paragraphs 2 to 6 of the judgment. The misconduct in that case was committed and the chargesheet was served on October 1, 1970. The workman was arrested on October 10, 1970 and then released on December 2, 1970. In June and July 1971 he was detained under the Prevention of Violence Act, 1970. On September 16, 1971 an enquiry was conducted ex parte while the worker was under detention. In 1971 the workman was dismissed from service. An approval was sought u/s 33(2)(b) of the Industrial Disputes Act. Between 1971-72 the worker was called from jail by the Tribunal. The worker filed written statement. No application was made by the employer to lead evidence if enquiry is found to be vitiated. On September 15, 1973 the Tribunal held that the enquiry violated the principles of natural justice and consequently refused approval. In 1973 the company filed a writ petition but no plea regarding denial of opportunity to lead evidence was taken up. The writ petition was dismissed. In 1974 L.P.A. was filed by the Company. The Calcutta High Court suo motu granted opportunity by holding that after the enquiry was held vitiated it was incumbent on the Tribunal to grant opportunity to lead evidence. In the SLP filed by the workman, while granting leave the Supreme Court limited leave to the question as to whether the principle in Cooper Engineering applies to a situation where the management seeks approval u/s 33(2)(b) of the Industrial Disputes Act. It is on these facts that the Supreme Court observed that it is not part of a duty of Industrial Tribunal or Labour Court to offer an unsolicited opportunity to the employer, after several years of delayed proceedings, to substantiate the charges against the worker.

24. Shri Ganguli next relied upon the case of Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others, , Wherein the Supreme Court observed, thus (p. 110) :

"The legal position firmly established is that if there has been no appropriate domestic enquiry or no enquiry at all before disciplinary action is taken, it is open

to the employer to ask for such opportunity in the course of adjudication."

25. The above cases, in my view, do not lay down any hard and fast rule. They do not lay down a criteria for deciding in which cases permission to lead evidence to justify the action of dismissal should or should not be granted. These cases, however, lay down broad guidelines. The guidance provide that the employer must seek for the opportunity diligently and without undue delay. It should be an application... bona fide made. It should not be made at a belated stage so as to prejudice the interest of the worker. It should not be made by an employer who is found to adopt dilatory tactics as so to break the backbone of the worker through financial stress. The application should not have the effect of further delaying the proceeding. If the application does not suffer from any of these vices ordinary an application ought to be granted. If, however, the application is shown to be tainted with any of the aforesaid defects or some such similar defects, no duty is cast upon the Labour Court/Industrial Tribunal to grant an application. The application of the employer, in these circumstances, is liable to be dismissed.

26. Let us examine the facts of the present case in the light of the observations contained in the above mentioned cases decided by the Supreme Court.

27. The incident, which has led to the instant proceedings, took place on November 26, 1980 when the petitioner is alleged to have assaulted a co-worker. On December 3, 1980 a charge-sheet is filed and a domestic enquiry is initiated. On October 7, 1981 an order of dismissal is passed against the petitioner. The petitioner raised an industrial dispute and by an order passed on July 16, 1982 the dispute is referred to the Labour Court. On February 3, 1983 the petitioner filed statement of claims. On March 11, 1983 the second respondent filed its written statement. It would thus be seen that the second respondent has filed the written statement expeditiously and without undue delay.

28. The second respondent filed its application for grant of opportunity to lead evidence to justify the order of dismissal on April 19, 1984. This was prior to the point of time of recording of evidence in the case. On the very day of the filing of the application i.e. 19th itself, the court directed the other side to say. A copy of the application is served on the advocate appearing for the petitioner. No say is filed. The Court on January 18, 1985 ordered that no say is filed by the other side and hence for hearing of the reference.

29. It is true that the second respondent has not raised the contention in its written statement. The question is whether the petitioner can be said to have been prejudiced. The application is filed prior to the commencement of the trial i.e. recording of evidence. A copy of the application is served. No reply is filed. It is, therefore, reasonable to presume that no objection was raised for grant of permission. For all practical purposes by the order passed on January 8, 1985 the permission has been granted. It will, therefore, not be open to the petitioner now at this belated stage to make a grievance about the opportunity granted to

the second respondent to lead evidence to make good its order of dismissal. The first contention, which is the only ground on which the petition was admitted, therefore deserves to be rejected.

30. Shri Ganguli next attacked the finding of the Labour Court in the part Award holding that the second respondent has proved that the petitioner was guilty of misconduct. According to him, the said finding is perverse. It is a finding, which no reasonable man would arrive at. According to him, there is no legal evidence which can justify the finding. The finding, therefore deserves to be set aside and the reference deserves to be allowed.

31. At the trial before the Labour Court the second respondent examined Shri Abdul Salam, the victim of the assault. His evidence is filed at Exhibit-F to the petition. He has deposed to the details of the incident and the attack mounted on him by the petitioner. He next examined Balraj Suppiya, who is an eye witness to the incident. His evidence is filed at Exhibit-G. He has supported the case of the assault by the petitioner on Abdul Salam. This witness is an independent witness. There is no good ground to doubt his testimony. The second respondent next examined Charles Jasinto Fernandes and Iftakar Shaikh who came to the scene of the incident soon after the incident was over. Their evidence is filed at Exhibits H and I respectively to the petition. Both removed the injured to the hospital for treatment. In my view, the above evidence is cogent and convincing. No fault can be found with the Labour Court in the finding it arrived at viz., that the second respondent has proved that the petitioner is guilty of misconduct. The learned Judge of the Labour Court has discussed the evidence in paragraph 8 onwards of his judgment. He has drawn his conclusion in paragraph 20 of his judgment. In my judgment, the conclusion are justified on the material on record. In any even I am not sitting in appeal against that finding. This is not a finding with no evidence. The finding is borne out by the evidence. Hence, no interference is called for even if I were, sitting as a trial Judge, to come to a contrary finding. Moreover, my learned brother Daud, J., vide his order dated June 12, 1989 has affirmed the finding. The said finding has not been set aside in appeal. The said finding is, therefore, binding upon me. The finding of the Labour Court that the second respondent has proved that the petitioner has been guilty of misconduct, therefore, deserves to be upheld. The second contention of Shri Ganguli thus deserves to be rejected.

32. Shri Ganguli next contended that the order of dismissal is too harsh. He submits that justice should be tempered with mercy. The fact do not call for an extreme penalty of dismissal from service which necessarily puts in a death-knell to the financial resources of a worker, which is bound to affect not only on him but all the members of his family.

33. In this context, the presiding Officer of the Labour Court has observed under :
"Though it has been alleged by the workman that the punishment of dismissal is shockingly disproportionate to the charges proved against the workman, nothing

has been brought on record so as to exonerate the workman. In view of the above mentioned authorities it will be seen that the misconduct committed by the workman were of serious nature concerning with the discipline of the establishment. Although no previous record has been produced by the opponent, the nature of the misconduct is quite serious one and, therefore, I am of the opinion that the workman has failed to prove that the punishment of dismissal is shockingly dis-proportionate to the charge proved against him."

34. In this context the observation of my learned brother Duad, J., may be recalled. He has observed that a beating resulting in damage required 14 stitches cannot be glossed over as deserving anything less than dismissal. While endorsing the above view, I proceed to add that whether a particular misconduct is sever or otherwise would depend upon the fact of each particular case. No hard and fast rule can be laid down to gauge the severity or triviality of the misconduct. A misconduct which may not be viewed, in certain circumstances, to be serious but it can be serious in another set of circumstances. A code of conduct which is expected of a workman varies from place to place. A standard of conduct expected of an employee, say in respect of a road side Dhaba or a county liquor bar will not be the same as is expected of a worker serving in a Five-Star hotel or in a permit room located in such a hotel. If the very misconduct were to have been committed in a road side Dhaba or a country liquor bar, I may have been persuaded to take a view that the punishment inflicted is on the severe side. In the instant case we are concerned with the second respondent who is running a Five Star hotel. The hotel has clientele which belongs to certain category or class of society. Clientele pay exorbitant amounts to avail of the facilities provided by the Five Star hotel. It is, therefore, natural that certain level of code of conduct is expected of the staff employment by such establishments. Though it is true that the incident in question has not taken place in the hotel itself but in its flight kitchen, the employers of the petitioner is with the second respondent. The services are transferable. Indeed he was initially working in the hotel itself, and his services were transferred to the flight kitchen. The misconduct committed by the petitioner is required to be held as grievous on this ground also. In the circumstances, the contention of Shri Ganguli that the punishment of dismissal is far too server deserves to be rejected.

35. This takes me to the last contention raised by Shri Ganguli. According to Shri Ganguli, the order of dismissal, as passed by the second respondent, was set aside by the part-I Award. The result of the decision was that there was no dismissal at all and the order was non est. It is only by the Part II Award that the order of dismissal has been upheld. Hence, according to Shri Ganguli the order of dismissal passed by the second respondent. The doctrine of "relation back" will not apply. The order will operate only prospectively and hence the petitioner will be entitled to his salary during the period between October 7, 1988 when the order of dismissal was passed by the second respondent and September 27, 1988 the date of the passing of the Part II Award.

36. In support of his contention Shri Ganguli relied upon the Supreme Court ruling in the case of *The Buckingham and Carnatic Co. Ltd., Madras Vs. The Buckingham and Carnatic Mills Staff Union and Another*, , in which it was held as follows (pp. 393) :

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

37. In this context a reference to another decision of the supreme Court in *D.C. Roy Vs. The Presiding Officer, Madhya Pradesh Industrial Court, Indore and Others*, can be usefully made. In paragraphs 12 and 13 from that judgment this is what is observed :

"12. Counsel for the appellant also relied on the decision of this Court in *The Buckingham and Carnatic Co. Ltd., Madras Vs. The Buckingham and Carnatic Mills Staff Union and Another*, but that case) is clearly distinguishable. As pointed out by this Court in *P.H. Kalyani Vs. Air France Calcutta*, , *Sasa Musa* Was a case where an application had been made u/s 33(1) of the Industrial Disputes Act for permission to dismiss the employees and such permission was asked for, though no inquiry whatsoever was held by the employer and no decision was taken that the employees be dismissed. The case for dismissal of the employees was made out for the first time in the proceedings u/s 33(1) and it was for that reason that it was held that the employees were entitled to back wages until the decision of the application filed u/s 33. Commenting on the decision in *Sasa Musa*, this Court observed in *P. H. Kalyani*'s case that the matter would have been different if in *Sasa Musa*, an enquiry had been held, the employer had come to the conclusion that the dismissal was the proper punishment and had then applied u/s 33(1) for permission to dismiss the employees.

In those circumstances the 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 removal of the ban by an application u/s 33(1)."

"13. The second contention must also fail. 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 pretense of an enquiry. The inquiry in the instant case does not suffer from the 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 *Kalyani*'s case as to exclude from its operation at least that class of cases in which under the facade of a domestic enquiry, the employer passes an order gravely detrimental to the employee's interest like the 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."

38. A further reference can be had to the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, wherein it was held in paragraphs 149, 150 and 151 as under : (P/175) :

"149. We are mindful of the submission of Shri Tarkunde urged in the connected appeal by the Sabha that where no enquiry has preceded a punitive discharge and the Tribunal, for the first time, upholds the punishment, this Court has in D.C. Roy Vs. The Presiding Officer, Madhya Pradesh Industrial Court, Indore and Others, taken the view that full wages must be paid until the date of the award. There cannot be any relation back of the date of dismissal to when the management passed the void order."

"150. Kalyani was cited to support the view of the relation back of the award to the date of the employer's termination orders. We do not agree that the ratio of Kalyani corroborates the proposition propounded. Juries-prudentially approval is not creative but confirmatory and, therefore, relates back. A void dismissal is just void and does not exist. If the Tribunal for the first, passes an order recording a finding of misconduct and thus breathes life into the dead shell of the management's order, per-dating of the nativity does not arise. The reference to Sasa Musa in Kalyani enlightens this position. The latter case of D. C. Roy v. Presiding Officer, Madhya Pradesh Industrial Court, Indore and others (Supra) Specifically refers to Kalyani's case and Sasa Musa's 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 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 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."

"151. We agree that the law stated in D. C. Roy (Supra) is correct but nor that the termination orders are being set aside, the problem does not present itself directly."

39. My attention is also drawn by Shri Cama to a Supreme Court's Judgment in the case of Union of India (UOI) and Another Vs. R.C. D'souza, and relied upon para 13 of the judgment which reads as under : (p.513)

"The position that emerges from the above quoted decision of this Court may be stated thus. In proceedings u/s 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held : (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic Tribunal is made out (iii) whether the employees had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and not intended to

victimise the employee regard being had to the position settled by the decision of this Court in (Bengal Bhatdee Coal Co. Vs. Ram Prabesh Singh and Others, Titaghar paper Mills Co. Ltd. v. Ram Naresh Kumar 1961 I LLJ 511 : Hind Construction and Engineering Co. Ltd. Vs. Their Workmen, , The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, ; Eastern Electric & Trading Co. v. Baldev Lal 1975 LI.C. 1435 (SC); that thought generally speaking the award of punishment for misconduct under the standing Orders is a matter for the management to decide and the tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe, yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, sever unconscionable or shockingly disproportionate punishment (iv) whether the employer has paid or offered to pay wages for one month to the employee, and (v) whether the employer has simultaneously or within such reasonable short time as to from part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him. If these condition are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If, however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have find out on its own assessment of the evidence adduced before it whether there was justification of dismissal and if it so finds it will grant it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him."

40. Reference is also made to the Desh Raj Gupta Vs. Industrial Tribunal IV, U.P., Lucknow and another, wherein it is observed as follows. (p.122)

"The second ground urged in support of the appeal appears to be well founded. The learned Counsel is right in relying on the observations in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, , that if the order of punishment passed by the management is declared illegal and the punishment is upheld subsequently by a Labour Tribunal, the date of dismissal cannot relate back to the date of the illegal order of the employer. The appellant is, therefore, entitled to his salary from August 16, 1976 to July 20, 1980 and the entire amount should be paid by the respondent Bank within a period of three months from today. If the amount is not paid or offered to the appellant as directed, the respondent Bank will be liable to pay interest thereon at the rate of 12% per annum for the future period commencing on the date of expiry of three months from today till the same is realised."

41. My attention is also drawn of the case of Indian Cork Mills Pvt. Ltd. v. p. Unnikrishnan and others, reported in 1988 (II) C.L.R. 620, decided by learned brother Daud, J. In the case, it is observed as follows :

"The employer and worker put forth their respective cases vis-a-vis an enquiry allegedly held prior to the passing of the dismissal order. The preliminary issue was decided against the petitioner, the second respondent holding that there was no enquiry and that if what was done be held to be an enquiry the same was not proper and fair. The company then led evidence to prove the alleged misconduct. According to the Labour Court the workers was guilty to gross negligences resulting in serious monetary loss to the employer and that the dismissal was justified. The employer's action could not be given retrospective approval and the employee could not be given reinstatement with back wages. The via media the Court chose was an award of 65% of the wages that the workman could have got between January 4, 1974 i.e. the date of dismissal to January 30, 1981 i.e. the date of award. The legality of this award is questioned by the petitioner.

Petitioner's contention is that the workman's misconduct having been established and the penalty of dismissal found to be apposite, the 2nd respondent should have applied the rule of relation back and rejected the claim in its entirety. The key to unravel the complexities of the problem posed lies in D. C. Roy's case, (supra). The Court, in that case considered 4 earlier decisions on the subject of the doctrine of relation back vis-a-vis a dismissal preceded by the absence of an enquiry or a defective one. The result of the survey is set out in the penultimate para of the judgment, the relevant portion for the purpose of this case reading thus :

"We would, however, like to add that the decision in P.H. Kalyani Vs. Air France Calcutta, , is not to be construed as a charter for employers to dismiss employees after the pretense of an inquiry. The inquiry in the instant case does not suffer from defect 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 excluded 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 employees' interest blatantly and consciously violating principles of natural justice which may will be equated with the total absence of an inquiry so as to excluded the application of the relation-back" doctrine.

The principles deducible from the foregoing may be enumerated thus :

1. The character of the misconduct viz., an imputation of moral turpitude or of negligence etc., ascribed to the employee is of great importance in the application of the principle.
2. The precise degree of imperfections in the enquiry held has to be investigated and categorised.
3. The theory of relation back is no rigid and inflexible formula to be applied to every case where the misconduct ascribed is established in the course of adjudication.

It is only after the 1st two stages are over that the Court proceeds to determine

the relief awardable."

The Court in the light of the above principles proceeded to hold as follows :

"Tested in the light of the above what we find is that the employee was guilty of negligence of a gross nature. A workman so remiss could not inspire confidence in the employer to warrant a direction for continuance in service. Neither could it be forgotten that his remissness has cost the employer a pretty penny. But the company had tried to cut corners by not holding an enquiry or in the alternative, holding one which was parody of even the elementary requirements of justice. This then was a mixed case and the Court had a duty to strike the middle path. The employee had done the unforgettable, though not the unforgivable. The employer had resorted to a violation of the basic rights of the workman. The theory of relation back could not apply wholly. In the circumstances the worker was given 65% of the wages and upto the date of award. I see no error. In fact the order is eminently fair. For that reason also the writ jurisdiction is uninvokable."

42. The principle that can be deducted from the above cases is that it is the holding of an enquiry or the non-holding of it which will determine the doctrine of "relation back". It would depend on facts of a particular case. There may be cases where there may be no enquiry at all before an order of dismissal is passed. There may be cases where there is merely a facade of enquiry, an enquiry in blatant violation of principles of natural justice. In such cases doctrine of relation back will not apply. There may be yet another set of cases where an enquiry is held and an order of dismissal is passed. The enquiry may not suffer from blatant violation of the principles of natural justice but may suffer from some defects which renders the order of dismissal bad. In such cases the order of dismissal is not one which is still-born or void. Such an order can be made good by evidence and subsequently approved by the Labour Court/Industrial Tribunal. In such a case the doctrine of "relation back" will apply. In addition the character of misconduct ascribed to the employee plays an important part in the application of the principle of relation back.

43. Let us now examine the facts of our present case in the light of the principles that emerge from the above cases. In the departmental enquiry the petitioner examined himself. He replied to the questions of the Enquiry Officer and insisted that his representative Mr. Tari should be present and unless he is present he will not speak anything. Mr. Tari was not available as he had left the services of the second respondent. At one stage the enquiry was fixed to be held at 11.00 A.M. on August 31, 1981. The Enquiry Officer was not present at that time. According to the Enquiry Officer he had telephonic talk with the petitioner and had intimated that he will come at 3.00 P.M. The petitioner did not turn up. The Enquiry Officer proceeded with the enquiry. According to Presiding Officer of the Labour Court, the Enquiry Officer should have adjourned the enquiry and should not have recorded the statements of other witnesses behind the back of the petitioner. He, therefore, opined that the workman was not given full and

reasonable opportunity to defend himself. He, therefore, proceeded to hold that the enquiry was not fair and proper.

44. In my judgment this is not a case of no enquiry or facade of an enquiry. This is a case where an enquiry was held. In the enquiry the petitioner asked for several adjournments on the ground that he wanted to be represented by a particular co-worker Mr. Tari. The said worker was not available as he had left service. The petitioner refused to co-operate in the enquiry. He declined to be represented by another co-worker and insisted that the enquiry should not be conducted till the services of Mr. Tari were made available. It is true that the Enquiry Officer was not present at the scheduled time of the enquiry i.e. at 11.00 A.M. on August 31, 1981. According to the Enquiry Officer he had informed the petitioner on telephone that he will come at 3.00 P.M. The petitioner absented himself. In these circumstances the Enquiry Officer proceeded to examine other witnesses. This lacuna in the enquiry has led the Labour Court to hold that the enquiry was defective inasmuch as it was held ex parte and behind the back of the petitioner. The petitioner was, therefore, not given proper opportunity and therefore there was breach of the principles of natural justice. This is the reason why the enquiry was held as being not fair and proper.

45. In my view, this is not a case of no enquiry or a facade of an enquiry. An enquiry is held. The same is not in blatant breach of the principles of natural justice. But the enquiry suffers from a defect. It has failed to give a full and proper opportunity to the petitioner to put up his case. The Enquiry Officer ought to have adjourned the enquiry and not proceeded ex parte. But the approach of the petitioner in the enquiry is seen to be far from reasonable. He is seen to have insisted on being represented by a particular co-worker only. The co-worker having left the job was not available. He took several adjournments and refused to proceed with the enquiry in his absence. It is in these circumstances that the enquiry officer was persuaded to proceed ex-parte. This is, therefore, not a case of no enquiry or a facade of an enquiry but a case of a defective enquiry. In the circumstances, I am of the view that the doctrine of "relating back" will apply in the instant case.

46. There is one more ground on which I find that the petitioner is not entitled to the wages claimed. Section 11-A of the Industrial Disputes Act gives Labour Court/Industrial Tribunal powers to give appropriate relief in the case of discharge or dismissal of the workman. The relevant portion of Section 11-A reads as follows :

"11A. Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen.

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court..... for adjudication and, in the course of the adjudication proceedings, the Labour Court.... is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order

of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

Provided that in any proceedings under this section the Labour Court shall rely on the materials on record and shall not take any fresh evidence in relation to the matter".

With this insertion of the section, the Legislature made a departure from the law that was in force and empowered the Labour Court or Tribunal to satisfy itself as to whether the misconduct is proved, in spite of the fact that the enquiry held was proper and also to interfere with the punishment imposed by the employer. The Court can differ from the employer both with regard to the finding of misconduct arrived at by it as well as the punishment imposed.

47. It will thus be seen that the power of the Labour Court/Industrial Tribunal is wide enough to grant or refuse to the workman at a stage when the Labour Court/Industrial Tribunal comes to a finding that the order of dismissal is or is not justified. In the instant case the petitioner is found guilty of misconduct. The nature of misconduct can undoubtedly be taken into account. He is an employee of the second respondent which runs Five Star Hotels. The petitioner is shown to have indulged in hooliganisms. He has used abusive language and has severely assaulted a co-worker on the premises of his work-place. I have already found the misconduct as a serious misconduct. In my judgment, having regard to all the facts and circumstances of the case, I hold that the petitioner is not entitled to the wages for the period between October 7, 1981 the date of order of dismissal passed by the second respondent and September 27, 1988 the date of the the Part-II Award. The last contention of Mr. Ganguli is also liable to be rejected.

48. For the foregoing reasons, I find the present petition is devoid of merit and the same is dismissed. Rule is discharged.

49. There shall, however, be no order as to costs.