
(1977) 04 GUJ CK 0011
In the Gujarat High Court
Case No : Spl. C.A. No. 1256 of 1976

Gujarat Bank Worker's Union	Vs	APPELLANT
Jamnagar Dist. Co-operative Bank Ltd.		RESPONDENT

Date of Decision : 28-04-1977

Acts Referred:

Citation : (1979) 1 LLJ 82

Hon'ble Judges : J.B. Mehta, Acting C.J.; M.P. Thakkar, J

Bench : Division Bench

Judgement

J.B. Mehta, Ag. C.J.

1. The petitioner, representative-union of the Banking Industry, has filed this petition challenging the order of the Industrial Court which has reversed the order of the Labour Court reinstating the concerned clerk, Mr. Mehta, with full back wages.

2. The short facts which have given rise to this petition are as under. Mr. J. M. Mehta, the concerned clerk, was appointed first as a daily rated clerk in the Bank on June 8, 1971 and thereafter from June 30, 1971 he was taken up as an apprentice in this opponent Co-operative Bank and thereafter by the order at Annexure 33, on September 1, 1971 with effect from September 1, 1971 he was appointed as a probationer in the relevant pay grade for a period of six months which could accordingly expire on February 29, 1972. He was posted in Kalowad Branch of the Bank as a probationary clerk. Till the expiry of the aforesaid maximum probation period fixed in this order, Ext. 33, admittedly his services were not terminated nor the probation extended. It is only by the order dated May 24, 1972 at Ext. 34 that the petitioner was given an order extending

his so called period of probation upto August 31, 1972 on the ground that his work and conduct were not satisfactory as appeared from the

reports of the authorities. The petitioner was served with the impugned discharge order dated August 14, 1972 informing him in the following terms

:

That your work conduct (behaviour) etc. has not been found to be satisfactory by the Bank. Hence the Bank no more needs your services. Your

services are, therefore, terminated with effect from August 17, 1972, after office hours which you should note and that you would be paid till this

date of termination from the pay Office for which purpose the Branch Manager is instructed"".

The copy to the Pay Office mentioned in the endorsement of this order that Mr. Mehta was to be relieved after office hours on August 17, 1972

and he should be paid his wages for the days put in by him in the current month. After this order at Ext. 36 was served on the concerned clerk,

another order was served at Ext. 39 dated September 18, 1972 that Mr. Mehta was to be treated as discharged not from August 18, 1972 but

from August 31, 1972 on a reconsideration which had been made and he was asked to take away his one month's pay and his due salary for the

period between August 17, 1972 to August 31, 1972 on giving receipt. The representative-union gave approach letters under S. 42(4) at Ext. 41

and Ext. 43 of September 13, 1972 and September 24, 1972 respectively specifically raising disputes that Mr. Mehta could not be terminated

without due process of law as he was a confirmed employee and even if he was deemed to be a probationer, the order on the alleged ground was

totally illegal and inoperative and that he had been victimised on account of strained relations between his father and the Chairman of the Bank and,

therefore, all these impugned orders were challenged. The attempt sought to regularise the original illegal order was also resisted in the second

approach and that conduct itself was treated as indicative of the unfair labour practice of the Bank. The Bank had sent replies, Exts. 42 and 44,

taking up the plea that Mr. Mehta's probation period had been extended upto August 31, 1972 and as it was not possible to continue Mr. Mehta

in service his work being not found satisfactory during the probation period, he had been duly discharged. Only a vague denial of the other grounds

was made. Thereafter the representative-union filed the application in question and for abundant caution even the individual employee, Mr. Mehta, had filed an application which would not survive in view of the scheme of this Act under which when the representative-union has acted, that application is the only competent application to be considered by the Court. That question has been concluded by both the Courts and no question has been raised in that connection by Mr. Shah. On merits the Labour Court has in a very exhaustive and a carefully considered judgment, as per the settled legal principles, interpreted this relevant clause 8 of the award which had been made specifying the maximum probation period and the clause about automatic confirmation in case of such Bank clerks in modification of the existing standing orders on an industrial dispute being raised under S. 73A. That award is in Reference (1C) No. 39 of 1965 and other group as per the consent terms on the demand Nos. 14 and 15 for probation period and confirmation dated October 10, 1967. The award is published at p. 1008 in the Gujarat Government Gazette, Part I-L dated February 27, 1969. On a true interpretation of the aforesaid award the Labour Court held that by virtue of clause 8 on the expiry of the maximum six months' period for which Mr. Mehta was appointed as per Ext. 33 of February 29, 1972 he became automatically confirmed as before the expiry of that period the probation period had not been extended. Therefore, this termination of his services for unsatisfactory work and conduct could never be done without proper inquiry after giving him an opportunity to be heard as per the relevant provisions for such penal orders. The Labour Court also held that Standing Order 20 was clearly violated because even a probationer's services could not be terminated without one month's notice or one months wages in lieu of notice as was done by the order at Ext. 26 and that illegal termination could not be rectified by the order at Ext. 39 on the plea of a mistake. The Labour Court also held on the evidence of the petitioner and his father which was not rebutted by the Chairman, Mr. K. P. Shah, going in the witness box, that the strained relations had a great bearing on the termination of services of Mr. Mehta and even though there may not be victimisation, the conclusion was obvious that the order terminating the services of Mr. Mehta was not for the true reasons stated in the order of termination at Ext. 36 and in any event as per the settled legal position in L. Michael and Another Vs. Johnson

Pumps Ltd., , such an order could not be treated as termination simpliciter as it was really a masked order ingenuously to cover up the inability to

establish by an inquiry the grounds for which Mr. Mehta's services could be terminated. Therefore, the order was not held to be of discharge

simpliciter as it was not a bona fide order but a penal order. Finally, the Labour Court also considered when attempt was made to produce certain

reports against this employee that the allegations made in those reports had not been proved by any evidence whatsoever when they were

vehemently denied by the employee concerned in his evidence. The Manager, Mr. Kothari, who was examined, had no personal knowledge about

the work and conduct of Mr. Mehta and the persons who had made those reports were not examined. Therefore, even the alleged reasons were

not substantiated before the Labour Court by any evidence whatsoever. In these circumstances the Labour Court made the order of reinstatement

with continuity in service with full back wages as the concerned employee remained unemployed since August 17, 1972. The Labour Court had

mentioned that even the occupation of the employee was stated to be ""nil"" and it was not shown or even suggested that after termination of his

services, he was gainfully occupied in some profession, business or occupation or got job elsewhere. Therefore, the reinstatement order with full

back wages as per the normal rule having been passed, the Bank had gone in appeal before the Industrial Court. The Industrial Court has,

however, reversed this well considered order of the Labour Court without going into the settled principles of law on these two pertinent questions.

The Industrial Court came to the conclusion that there was no automatic confirmation and that the management had legally extended the probation.

It also held that the order was not a penal order. It also held that there was no victimisation and in view of the allegations in the various reports, the

services were duly terminated of the concerned employee. Therefore, the order of the Labour Court having been set aside in appeal by the

Industrial Court, the concerned representative-union has filed this writ petition.

3. Mr. Mehta has attacked this order of the Industrial Court on the following grounds :

(1) That the Industrial Court has not followed the settled legal position and has wrongly set aside the order of the Labour Court which proceeded

on the settled legal position on both these questions as to there being automatic confirmation in such cases where maximum probation period was

fixed by the statutory rule or mandatory standing order; and

(2) for testing whether the order was an order of discharge simpliciter or a penal order, Mr. Mehta argued that the Industrial Court has

misunderstood the settled legal basis and the whole finding was totally perverse and ignoring the material evidence which made a fundamental effect

on the ultimate conclusion.

4. Mr. Shah had rightly pointed out how the employees has raised the dispute after the Model Standing Order had been applied to these Banks by

the Government Notification published in Gujarat Government Gazette part I-L dated 22-10-64 at p. 3425. In the Model Standing Orders, the

term ""probationer"" was defined in Standing Order 3(2)(b) to mean ""an employee who is provisionally employed to fill a permanent vacancy or post

and has not been made permanent or confirmed in service"". That is why Standing Order 4 provided that every employee at the time of his

appointment, confirmation, promotion or reclassification shall be given a written order by the bank specifying his appointment, confirmation,

promotion or reclassification, as the case may be. We would also consider at this stage some of the other Model Standing Orders which we would

have occasion to consider in this matter Standing Order 20, however, provides that -

(1) The employment of a permanent employee or probationer may be terminated by one month's notice or on payment of one month's wages

(including all allowances) in lieu of notice.

(2) The reasons for the termination of service under clause (1) shall be recorded in writing and shall be communicated to him, if he so desires at

the time of discharge unless such communication, in the opinion of the manager, is likely directly or indirectly, to lay any person open to civil or

criminal proceedings at the instance of the employee.

* * *

(6) An order relating to discharge or termination of service shall be in writing and shall be signed by the manager

Standing Order 21 defines ""misconduct"" by providing that any of the following acts and omissions on the part of an employee shall amount to

misconduct :

(i) wilful insubordination or disobedience of any lawful and reasonable order of a superior :

* * *

(vii) absence without leave or overstaying sanctioned leave, without sufficient grounds or proper or satisfactory explanation;

(viii) late attendance on not less than four occasions within a month or habitual absence from the appointed place of work;

(ix) repeated breach of any law applicable to the Bank or any rules made thereunder or of standing orders;

* * *

(xvi) commission of any act subversive of discipline or good behaviour on the premises of the Bank;

(xvii) habitual neglect of work, or habitual gross negligence, or negligence involving or likely to involve the Bank in serious loss;

Thereafter the two relevant provisions are in Standing Orders 22 and 23. Standing Order 22 provides for various penalties which can be imposed

when an employee is guilty of misconduct. The penalties are -

(a) warning or censure;

(b) fine;

(c) dismissal without notice by an order in writing signed by the Manager.

The elaborate procedure of dismissal is there provided in Standing Order 22. So far as the minor penalty or warning or censure is concerned,

Standing Order 23 provides for those acts and omissions which are considered as minor offences, as for example :

(a) absence without leave without sufficient cause;

(b) late attendance;

(c) negligence in performing duties;

(d) neglect of work;

(e) absence without leave or without sufficient cause from the appointed place of work;

(h) breach of any rule of business of the Bank or instruction for the running of any department.

These were the Model Standing Orders which applied even to this Bank admittedly. The representative-union which is also the approved union,

seems to have raised the dispute which under S. 73A with the non obstante clause had been referred to the Industrial Court where the Demands

Nos. 14 and 15 related to fixation of probation period and confirmation. It was these demands which had been specifically disposed of by this

consent award by this relevant clause 8 as under :

(1) Ordinarily probation period will not exceed six months. Management may extend the period for further three months, without stating reasons;

however, in case of extending probation period beyond nine months, management may extend the same for further three months (i.e. total period

of probation may thus be one year) but for such extension of last three months, the management shall give reasons in writing for such extension to

the concerned employee. On the expiry of the probation period, unless the service is terminated by management prior to expiry of probation

period, the employee shall be automatically considered as confirmed and shall be entitled to get his confirmation order from management.

If we keep this historical background in mind, the evil which was sought to be remedied and for which purpose this industrial dispute had been

raised was the fact that under the Model Standing Order the probation period was unlimited and the probationer did not automatically become

permanent on expiry of any maximum period fixed under these Standing Orders which under S. 40 was determinative of the relations between the

parties. That is why the probationer remained at the mercy of the employer to give him a proper security of tenure, this concept of maximum

probation period along with automatic confirmation clause had been introduced by this industrial adjudication process, of course, by consent

award. The terms of clause 8 have to be interpreted bearing in mind the relevant decisions which had made this distinction at that time as to the

effect of such clause.

5. In *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, the Supreme Court had to consider whether

once the six months" probation period expired, the probationer continued as a probationer or not. Their Lordships held that the settled position of

law was that an employee appointed on probation for six months continued as

probationer even after the period of six months if at the end of the period his services had either not been terminated or he was confirmed. It was observed :

It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service

of an employee before six months had expired except on the ground of misconduct or other sufficient reasons in which case even the services of a

permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services,

because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the

employee continues to be in service as a probationer"".

In view of this position the Bank under the Model Standing Orders could take advantage of the insecurity of tenure of the employee merely

because no confirmation order was passed after the probation period had expired. There being nothing more in the Standing Order fixing any

maximum period of probation or providing automatic confirmation, the legal position would have been governed by this principle that even the

employer would have no right to terminate the services before the six months period had expired except on the ground of misconduct or other

sufficient reasons and it is only at the end of that six months period that the employer could either confirm him or terminate his services because the

service was found unsatisfactory. The fact, however, remained as per the settled position that if no action is taken by the employer either by way of

confirmation or by way of termination, the employee continues to be in the same status as a probationer. That is why the industrial dispute was

raised to provided for the maximum period and for the automatic confirmation clause. In the context of such new clause, the whole position would

be different as pointed out by the Constitution Bench of five Judges in State of Punjab Vs. Dharam Singh, it was pointed out as under :

This Court has consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is

allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his

post as a probationer only in the absence of any indication to the contrary in the

original order of appointment or promotion or the service rules. In

such a case, an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is

allowed to continue in the post after the expiry of the specified period of probation it is not possible to hold that he should be deemed to have been

confirmed. This view was taken in *Sukhbans Singh Vs. State of Punjab*, , G.S. Ramaswamy and Others Vs. Inspector-general of Police, Mysore,

Accountant-General Madhya Pradesh, Gwalior v. Beni Prasad Bhatnagar, Civil Appeal No. 548 of 1962, Date 22-1-1964 (S.C.) *D. A. Lyall v.*

Chief Conservator of Forests, U.P. Civil Appeal No. 259 of 1963, D/- 24-2-1965 (S.C.) and *State of U. P. v. Akbar Ali AIR 1966 Sic. 1842* .

The reason for the conclusion is that where on the completion of the specified period of probation the employee is allowed to continue in the post

without any order of confirmation, the only possible view to take in the absence of anything to the contrary in the original order appointment or

promotion or the service rules, is that the initial period of probation has been extended by necessary implication.

That is why all those cases were distinguished by holding that the conditions of service of the employee permitted extension of the probationary

period for an indefinite time and there was no service rule forbidding its extension beyond a certain maximum period. Further proceeding their

Lordships considered whether Rule 6(3) forbade extension of the period of probation beyond three years. In that context Their Lordships

observed as under -

Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an

employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation

without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an

implication is negative by the service rule for bidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it

is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been

confirmed in the post by implication"".

In that context it had been held in that case as the employee had continued beyond the maximum period of probation even though no formal order of confirmation had been passed, he must be treated as duly confirmed and, therefore, the employee had a right to hold the post. The impugned orders terminating the services deprived them of this right and therefore, the termination order clearly amounted to removal from service by way of punishment.

6. If this settled legal position is borne in mind and is applied to the facts of the present case it is obvious that the entire mischief was sought to be remedied by raising an industrial dispute and by changing the phraseology of the relevant standing orders by introducing this provisions of security of services of the probationers in relevant Clause 8 of this consent award, which categorically lays down the maximum period of probation and automatic confirmation clause. Therefore, Mr. Shah could never urge in the face of this entire settled legal position and in view of the well advised change in language adopted in Clause 8 that there would be no automatic confirmation till the confirmation order is passed by the Bank as per Standing Order 4. That extreme contention of Mr. Shah ignores the fact that the award will prevail so far as standing orders are silent. The Standing Orders having not provided the maximum period of probation and also having not provided any automatic confirmation, that matter has been now provided by an industrial award in Reference under S. 73A, whose scope is in the widest terms by the opening non-obstante clause as notwithstanding anything in the Act." When the relevant Model Standing Order were considered both by the employers and the employees as not giving a fair tenure of security of the concerned probationers, these consent terms are arrived at to provide for the security of tenure, and such an interpretation must be put as gives effect to that intention and not one which defeats that intention.

7. In the light if we read this clause 8, the very first opening sentence provides that "ordinarily probation period will not exceed six months". That is a mandate of this clause 8, that the maximum probation period ordinarily cannot exceed six months, that is to say, six months maximum probation period is the normal mandate of this clause 8 of the award. Once this mandate was provided fixing a maximum period, which would ordinarily

apply, the relevant clause further provides for some exceptional cases by giving a right to the employer to make two extension : one extension of three month's further period without stating reasons, while the other for additional three months, that is to say, upto one year, by an order in writing stating reasons and communicating the same to the concerned employee. That, however, is a clause in the nature of an exception departing from the ordinary maximum which is provided in the opening clause only of six months' period. That is why the exception has to be strictly proved by the employer that he had duly extended the probation period before it expired by passing the order strictly as contemplated by this exception, that is to say, of three months without giving any reasons or a further three months with reasons. The whole power of extension by its very nature would be till the person continues on probation. It is in that context that the further lines have now to be considered which are of the nature of a general provision -

On the expiry of the probation period, unless the service is terminated by management prior to expiry of probation period, the employee shall be automatically considered as confirmed and shall be entitled to get his confirmation order from management".

This deemed fiction of automatic confirmation even though no formal confirmation order is passed is to be read in the context that this relevant clause provides for the maximum probation period of six months. That is why unlike the case in Express Newspaper, here a provision had to be made in this automatic confirmation clause for the right of the employer by specifically providing that unless the service is terminated by management, prior to the expiry of probation period. The words "prior to the expiry of the probation period" have been deliberately used departing from the settled line or decisions because then alone this scheme of a maximum period with automatic confirmation clause could properly apply. The employer would lose his right to terminate unless he exercises the option before the maximum probationary period expired because thereafter the employee was automatically considered as confirmed. There would be no question of terminating his services as a probationer thereafter when he was automatically confirmed. That is why the option which the employer had, either to terminate or to extend the probationary period, was to

be exercised only prior to the expiry of the probationary period, which under the opening clause could not normally exceed six months period. It is

this maximum six months" period which gives the whole clue to the right interpretation of this clause 8 that the employer must exercise his right

either to extend the probationer before the expiry of this maximum period of six months, failing which the employee is automatically deemed to be

confirmed. Thereafter the formal order of confirmation is a matter of right for the employee and a duty for the employer but the status of the

employee no longer depends on the whim or caprice of the employer not to pass the formal confirmation order.

8. If Mr. Shah's contention is to be accepted that the last clause applies only when twelve months" period expires, the employee would be left in a

totally insecure condition after the maximum six months" period expires because the employer may not pass any extension order even. There is no

implication of twelve months" period as such being the maximum period and if the language really means what it says, the maximum period is only

of six months ordinarily subject to the employer exercising his right to extend the same by three months further by extension without reasons or still

further three months extension with reasons. In any event, the option has to be exercised by the employer before this ordinary maximum six

months" period expires. The employer has already exercised his choice in the present case of fixing the maximum period by fixing in the very

appointment order at Ext. 33 itself the six months" period. When the appointment order itself provides for the maximum six months" probation

period the employer does not give any extension nor exercise his right of termination at all before this maximum probationary period expires, the

relevant clause in the concluding part of clause 8 automatically comes into operation and the employee must be treated as automatically confirmed.

That right which was crystallized of this concerned employee can thereafter never be defeated by the employer can thereafter never be defeated by

the employer seeking to exercise that right at any time thereafter during subsequent six months. In the present case the purported letter of extension

at Exhibit 34 was written for the first time on May 24, 1972 extending the probation till August, 31, 1972. The maximum probationary period as

per the appointment order, Ext. 33, of six months from September 1, 1971 had already expired on February 29, 1972. The implied power which

Mr. Shah wants us to spell out would mean that this extension order has a retrospective operation by reviving the probation which had already come to an end on February 29, 1972, so as to defeat his vested right which he had acquired under the concluding part of clause 8 of being already confirmed. In a confirmed employee no question of such power of extending the probationary period could arise. Therefore, the interpretation put by Mr. Shah and which is adopted by the Industrial Court is one which clearly defeats the whole object of this consent award which was to provide security of tenure to these probationers who would become automatically confirmed on the expiry of the ordinary maximum period of six months unless the employer chose to exercise his option of extending the probation or terminating the services before the expiry of this maximum period. Therefore, the Labour Court had arrived at the only correct interpretation of this clause as per the settled legal position and the Industrial Court, without considering even the settled legal position and the entire history of this clause, has interfered with this just interpretation. This is not a case where the question is of two interpretations but the question is of not giving effect to the terms of the award, as held in Shri Ambica Mills Co. Ltd. Vs. S.B. Bhatt and Another, which act would amount to an illegal change and, therefore, the view of the Labour Court must be upheld that this concerned employee Mr. Mehta had already become a confirmed employee on the expiry of this maximum six months' period stipulated in the appointment order Ext. 33 itself from March 1, 1972, after which the employer could not purport to extend this probation by the impugned order at Ext. 34 of May 24, 1972. Therefore, on this main ground itself the termination of the services of this employee depriving him of his right to hold this confirmed post without following any procedure whatsoever on mere unsubstantiated allegations and in plain violation of the relevant standing orders would be clearly a penal order ultra vires the provisions of the standing orders.

9. Even on the second question to determine when the order is a penal order or one of discharge simpliciter, the tests are very well settled even in

the context of Government servants, where even the motive inducing the order is held to be not material. The larger Bench of seven Judges have in

the decision in Samsher Singh Vs. State of Punjab and Another, , considered this question. It is held that no abstract proposition can be laid down

that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are

terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of

misconduct, or inefficiency or for similar reason without a proper enquiry, the order would be a penal order. The ratio in *The State of Bihar Vs.*

Gopi Kishore Prasad, was in terms approved where it was held that if the Government proceeds against the probationer in the direct way without

casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. However, instead

of taking the easy course, if the Government choses the more difficult one of starting proceedings against him and branding him as a dishonest and

incompetent officer, the order would be a penal order. The same was the ratio in *Jagdish Mitter Vs. The Union of India (UOI)*, , where a

statement in the order of termination that the temporary servant was undesirable was held to import an element of punishment. In the concurring

judgment of his Lordship Iyer, J. at pages 2231 and 2232, the same decision in *Gopi Kishore* has been approved by relying on the third

proposition in that decision that where the termination of service puts a stigma on the competence of the officer, the order is by way of punishment.

In the industrial field, this doctrine of discharge simpliciter is now finally considered, in *L. Michael and Another Vs. Johnson Pumps Ltd.*, . The

decision in *Management of Murgugan Mills Ltd. Vs. Industrial Tribunal Madras and Another*, and other decisions have been in terms considered

for the settled legal position that the form of the order is not conclusive. In that case the form of the order had no foul trace, but before the Tribunal

dereliction of duty and go-slow tactics having been disclosed as the inarticulate reasons, the order was held to be a penal order for misconduct

and, therefore, the relevant procedure of dismissal provided in the Standing Orders having not been followed, the order was held to be in

colourable exercise of the power to terminate services of the workman under the relevant Standing Orders. At page 666, the whole ratio of the

decision is summarized as under :

The above study of the claim or rulings brings out the futility of the contention that subsequent to *Management of Murgugan Mills Ltd. Vs.*

Industrial Tribunal Madras and Another, colourable exercise of power has lost validity and loss of confidence has gained ground. The law is simply

this : The Tribunal has the power and, indeed, the duty to X-ray the order and discover its true nature, if the object and effect if the attendant

circumstances and the ulterior purpose be to dismiss the employee because he is evil to be eliminated. But if the management, to cover up the

inability to establish by an enquiry, illegitimately but ingenuously passes an innocent-looking order of termination simpliciter, such action is bad and

is liable to be set aside. Loss of confidence is no new armour for management; otherwise security of tenure, ensured by the new industrial

jurisprudence and authenticated by a catena of cases of this Court, can be subverted by this neo-formula. Loss of confidence in the Law will be the

consequence of the Loss of Confidence doctrine"".

Therefore, so far as industrial law is concerned, the Labour Court and the Industrial Court were bound, in view of this settled legal position, to X-

ray the order as a bounden duty and discover its true nature, if the object and effect, if the attendant circumstances and the ulterior purpose had

been really to dismiss this employee because he was considered an evil to be eliminated. The management could not cover up its inability to

establish by an enquiry the alleged reasons by passing an innocent-looking order of termination by taking shelter under the so called doctrine of

discharge simpliciter. In view of the aforesaid settled legal principles, the Labour Court was wholly right in treating this order as a penal order on

the very face of it. The wordings of Ext. 36 are categorical and eloquent, as the order states in terms that this employee's ""work, conduct

(behaviour -) etc."" had not been found to be satisfactory by the Bank and hence the Bank did not need his service and his service were, therefore,

terminated. The whole foundation and basis of the order itself casts a stigma brandishing this employee as incompetent and his conduct as

unsatisfactory. The reasons are also widened by the expression, ""etc"". after work and conduct being unsatisfactory because it was intended to cast

a wider stigma on this employee. Even if the attendant circumstances were looked upon, the resolution which is produced of the management

dated August 12, 1972 also states that the work and (conduct) behaviour etc. were unsatisfactory of this employee as per the report of the

Manager and superior officers and on a consideration thereof the employee was not to be confirmed and he was to be immediately relieved from the services of the Bank. This is the decision on the file of the management, and when it is communicated as per the relevant Standing Order 20 to the employee by passing the impugned order at Exhibit 36, the employee is merely stigmatized by stating that his work, behaviour, etc. being unsatisfactory that is the reason for which his services have been terminated. Besides there being stigma in the order itself, there is another intrinsic evidence that the order is penal order and that is why the procedure of discharge simpliciter as required under Standing Order 20 was not followed when Exhibit 36 was passed. The relevant Standing Order 20 provides as earlier pointed out in clause (1) that the employment of a permanent employee or probationer can be terminated only by one month's notice or on payment of one month's wages in lieu of notice. Otherwise the termination of employment on grounds of such conduct, behaviour and incompetence would be only under Standing Order 22 by way of punishment. Admittedly this procedure of one month's notice or one month's notice pay was not followed before terminating the services by Ext. 36. The said default was sought to be cured by fresh order, Exhibit 39, of September 18, 1972 that on reconsideration this employee was treated as discharged from August 31, 1972 and that he should collect his one month's pay and the wages due for the period from August 18, 1972 to August 31, 1972. The services of an employee could not be twice terminated. Once the services were sought to be terminated by the impugned order at Ext. 36 and that order was clearly a penal order, this so-called rectification by Exhibit 39 was wholly inconsequential to change the nature of the original order until he was duly reinstated and a fresh order was passed. Therefore, that factor also was rightly taken into account by the Labour Court for treating this order as a penal order and which has completely escaped the notice of the Industrial Court. Besides, the very reports which are made the basis or foundation for terminating the services of these authorities are too eloquent as to the misconduct attributed to the concerned employee. The Manager has admitted that these were the only reports which had been relied upon and which existed during the entire service of this employee.

10. In the first report, Ext. 80, of February 7, 1972, the assistant inspector has stated that the employee committed mistakes in posting ledger

entries and during bank hours he was loitering and he was negligent in the discharge of his duties and his behaviour in his talks was not satisfactory.

In the second report, Ext. 81, dated March 22, 1972 by the Administrative Officer, it is mentioned that while this employee worked in the

Despatch Section, he was not regularly discharging his duties and carrying out satisfactorily the work entrusted to him. He was habitually loitering

and without leave leaving the place of his work and loitering or talking with the other employees. He was committing often-times acts of indiscipline

with the co-employees. His attendance was irregular and the work was unsatisfactory and he tried to fasten the blame on other employees.

Therefore, both his work and conduct were not all satisfactory. The third report, Ext. 82 of April 1, 1972 by the Loan Officer mentioned that in

the loan section his work and behaviour were not proper as he was habitually loitering and not carefully discharging his duties. He disobeyed the

order of helping another dispatch clerk. He had become naughty and had been insolent. His whole conduct from the beginning had been of this

type. The Branch Manager's report of May 15, 1972 at Ext. 83 also was to the same effect that the work and behaviour were not satisfactory and

he committed errors in ledger postings. Therefore, Mr. Shah could not argue that these allegations were merely of unsatisfactory work and there

was no allegation of any misconduct. All the aforesaid allegations were clearly of serious misconduct falling within various clauses of the aforesaid

Standing Orders which we have enumerated above. If the alleged incidents were found to be trivial so as to justify only a minor punishment under

Standing Order 23, it would be a different matter, which would depend on the proof of the alleged incidents. At present when these antecedent

circumstances are looked at, it could hardly lie in the mouth of the Bank to say that the order terminating the services was one of discharge

simpliciter when misconduct was the very foundation and basis of the order and the order itself stigmatized this employee and the relevant

alternative procedure for order of discharge simpliciter under Standing Order 20 was not followed when the services were terminated. Therefore,

the Industrial Court was wholly in error in reversing the conclusion of the Labour Court based on these relevant considerations as per the settled

legal position by holding that this had only reference to work and this was not a penal order in case of a probationer.

11. The Labour Court also rightly pointed out that the management even when it availed of the opportunity to lead evidence for showing that the

discharge order was for the reasons alleged had failed to establish even any of the allegations. Except producing these alleged reports which were

never communicated to this employee, no evidence worth the name was led before the Labour Court to prove these allegations and substantiate

the alleged reasons even as an order of discharge simpliciter.

12. After the decision in Bareilly Electricity Supply Co. Ltd. Vs. The Workmen and Others, , even in industrial law it is the settled legal position

that even though all technicalities of the Evidence Act may not strictly be applicable, it is inconceivable that an Industrial Tribunal could act on what

was not evidence such as hearsay, nor could it justify the Tribunal in basing its award on copies of documents when the originals which were in

existence were not produced and proved by one of the methods either by affidavit or by witness who had executed them, if they were alive and

could be produced. It was in terms held that if a letter or other document was produced to establish some fact which was relevant to the enquiry

the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenged the fact. That

was both in accord with principles of natural justice as also according to the procedure under Order XIX CPC and the Evidence Act both of

which incorporate these general principles. Therefore, when a balance sheet was sought to be produced with the profit and loss accounts statement

it did not by its mere production amount to proof of it or of the truth of the entires therein when the entries were challenged. In the present case the

employee challenged all these allegations and his case was that not a single warning has been given to him. When the alleged reports were never

communicated to him, the employer could only prove those allegations by examining the officers concerned who had made the alleged reports;

otherwise, it remained only at the stage of allegations. Mr. Shah vehemently relied on the fact that in the approach letter and in the written statement

the employer had stated these facts but Mr. Shah forgets that allegations in replies or in written statement do not amount to proof. That is why the

Labour Court was wholly justified as per the settled legal principles of industrial law that in this case the employer's allegations had remained

unsubstantiated even after the availed of the opportunity to lead evidence. That aspect was material because the Labour Court rested its finding

also on the ground that the alleged reasons were not substantiated at all and, therefore, it was a groundless order besides being a penal order.

Therefore, the principle of a bona fide order of discharge simpliciter could never be pressed in aid in such a gross case.

13. Mr. Shah, however, vehemently relied on the fact that the Industrial Court is the final Judge of facts and the findings of facts by the Industrial

Court could never be interfered with in writ jurisdiction. When the Industrial Court has reversed a finding of fact arrived at by the Labour Court

after applying the settled legal principles of the industrial law as laid down by the highest Court of the land ignoring all the material facts, which

made fundamental difference in the ultimate result and on applying such wrong tests, the finding could never be characterised as a finding which

could not be interfered with in writ jurisdiction, because the finding was completely perverse of the Industrial Court and one arrived at on a

complete mis-conception of the true legal position as held in *Hind Trading Co. v. Union of India* AIR 1970 S.C.1863.

14. Mr. Shah also argued that the Industrial Court had in terms held and even the Labour Court agreed that there was no victimisation. Mr. Shah

while relying on this aspect ignores why the Labour Court had considered those facts about the strained relations of the father as having a bearing

on the termination of the services of this employee as earlier stated. Both the father of this employee who had been examined in the Court and this

Chairman, K. P. Shah, were in the same political party, one as the Secretary and the other as the President and their relations were friendly when

this concerned employee was employed in service of this Bank. The relations were strained from January, 1972 and the relations got completely

strained in April, 1972 when even in open meeting this father criticized this Chairman. If the alleged reports which are unsubstantiated by evidence

are to be seen, they are all of this relevant period when the relations were completely strained between the Chairman and this employee's father.

Victimisation may not be necessarily inferred but the fact is so eloquent that the Labour Court had rightly given due weight to these circumstances

while judging the bona fides of this alleged discharge simpliciter order. Therefore, Mr. Shah could hardly urge that a finding of fact is sought to be interfered with, because it is not necessary to go to that extent to find any positive case of victimisation. It is the cumulative effect of all these attendant circumstances which had to be considered for X-raying this order and the conclusion is inescapable that on these facts no reasonable man can hold this order to be a bona fide order of discharge simpliciter. It was wholly a penal order visiting this employee with evil consequences terminating his confirmed job, stigmatising him and in flagrant violation of the provisions of the Standing Orders and when examined in the light of the entire background, such an arbitrary order could never be upheld in industrial adjudication.

15. Mr. Shah had only argued these points before us. Once on both these points the Labour Court is found to be right, the conclusion is

inescapable that the normal relief of reinstatement with full backwages must follow, as was done by the Labour Court. We have elaborately

considered this question in Special Civil Application No. 783 of 1976 decided on 16/17th March, 1977 (Navinchandra Shankerlal, v. Manager

Ahd. Co-op. Dept. Stores Ltd. 19 G.L.R. 108) and we need not reiterate those reasons. In fact in Western India Match Company Ltd. Vs.

Workmen, , Their Lordships had considered the question in a similar setting. The Standing Orders in that case were held to prevail over the special

agreement and so the probationer was deemed to be confirmed on the expiry of two months and he had not to wait till the expiry of six months as

per the special agreements which were inconsistent with the binding Standing Orders. When the question was agitated as to the relief of

reinstatement with back wages, Their Lordships in terms held that the employer had led no evidence to prove the alleged unsatisfactory work of

this probationer. When the relief of reinstatement granted by the Tribunal with back wages was challenged, Their Lordships pointed out that it is

settled law now that the Labour Court may interfere with the order of discharge where it is satisfied that it was mala fide or as a measure of unfair

labour practice. It had also been held that the Labour Court could interfere with the order of discharge if it found that the order was arbitrary or

capricious or so unreasonable as to lead to the inference that it was not made bona fide. As the employer had not led evidence to show that this

probationer's work was unsatisfactory the conclusion was obvious that the order of discharge was arbitrary. Therefore, the relief of reinstatement

with full back wages could not be interfered with and the order was confirmed by their Lordships. In view of this settled legal position Mr. Shah

rightly did not raise any question as regards the relief granted by the Labour Court.

16. In the view of the matter, this petition must be allowed by making the rule absolute by setting aside the order of the Industrial Court and by

restoring the order of the Labour Court of reinstatement with full back wages, with the only modification that the Bank shall reinstate this

concerned employee and pay all the arrears within a period of one month from to-day. Rule is accordingly made absolute with costs.

17. Mr. Shah asks for a certificate for appeal to the Supreme Court under Art. 133(1) of the Constitution and there is no substantial question of

law of any general importance involved in this matter which, in our opinion, can be certified as fit for appeal to the Supreme Court as we have

disposed of this matter only as per the settled legal principles laid down by Their Lordships. The request is, therefore, summarily rejected.