

(2008) 06 GUJ CK 0025

In the Gujarat High Court

Case No : Special Civil Application No. 8717 of 2008

Gujarat State Road Transport Corporation

APPELLANT

Vs

Ambaram M. Chaudhari

RESPONDENT

Date of Decision : 30-06-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Industrial Disputes Act, 1947 — Section 10, 11A, 31(1), 33, 33(2)

Citation : (2008) 06 GUJ CK 0025

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Hardik C. Rawal, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned advocate Mr. Hardik C. Rawal appearing on behalf of petitioner.

2. In the present petition, petitioner Corporation has challenged the order passed by Industrial Tribunal, Ahmedabad in Approval Application No. 720 of 2004 in Reference (IT) No. 37 of 2000 dated 10th January 2008. The Industrial Tribunal, Ahmedabad has not granted approval of dismissal order dated 30th October 2004 of approval application u/s 33(2)(b) of the Industrial Disputes Act, 1947.

3. Learned advocate Mr. Rawal appearing on behalf of petitioner submitted that respondent workman was serving as driver and because of his negligent driving, a cyclist was crushed under vehicles of ST bus driven by him on 2nd November 1989. A charge-sheet was issued on 12th April 1990 and departmental inquiry held in accordance with rules. The second show cause notice was issued on 7th May 1991 which was challenged by respondent by filing Special Civil Application No. 3529 of 1991 and interim protection was granted by this Court as Criminal Case No. 2372 of 1989 was pending. The aforesaid interim protection was vacated by this Court on 23rd April 2004. Thereafter, order of dismissal was

passed on 30th October 2004 in accordance with rules. The industrial dispute was pending before the Tribunal, therefore, for compliance of Section 33(2)(b), approval application was filed by petitioner before the Industrial Tribunal, Ahmedabad. The respondent waived the challenge of legality and validity of departmental inquiry and Tribunal did not find any infirmity in compliance of Section 33(2)(b), inspite of that facts, Tribunal has inferred with the finding given by inquiry officer which is not permissible as per recent judgment of Hon''ble Apex Court even in Reference u/s 10 of the Industrial Disputes Act, whereas, learned Tribunal Judge exercised the jurisdiction u/s 33(2)(b) of the Industrial Disputes Act, 1947 which is not available to him and therefore, Tribunal has committed gross error in rejecting the approval application.

4. Learned advocate Mr. Rawal also pointed out that after 1989, the respondent was punished for 15 times, out of which, 5 related to accident. This being a past record of the respondent. Therefore, he submitted that Tribunal should not have jurisdiction to examine the finding given by inquiry officer while considering the approval application under the provisions of the Industrial Disputes Act, 1947.

5. I have considered the submissions made by learned advocate Mr. Rawal and I have also perused the order passed by Industrial Tribunal, Ahmedabad. The Tribunal has considered after taking into account the reply filed by respondent. The Corporation has produced all the relevant record of departmental inquiry before the Tribunal along with approval application. The Exh. 10 reply was submitted by respondent. According to respondent, it was not his negligence, because, accident occurred in rear wheel of conductor side. According to respondent, two persons were sitting on the cycle and therefore, all of sudden, cyclist came in from road and dashed with the bus on rear wheel of conductor side. The bus was not driven by respondent in rash and negligent manner and therefore, according to respondent, cyclist was coming from behind portion from right side and person who was sitting behind cyclist, fell down, therefore, accident occurred on the rear wheel of the conductor side.

6. In Criminal Case No. 2372 of 1989, respondent was declared acquittal by the competent Criminal Court. Therefore, according to respondent, the Corporation has wrongly dismissed him. The documents are exhibited before the Industrial Tribunal and legality and validity of departmental inquiry was not challenged by the respondent, but, finding given by inquiry officer was challenged by the respondent and also challenged the punishment of dismissal. No evidence was led by either side before the Tribunal. Ultimately, Tribunal has framed the issue that whether Corporation has proved prima facie case against the respondent and entitled for the approval of dismissal order dated 30th October 2004 or not. The Tribunal has discussed the arguments made by both the sides and also considered the record produced by Corporation. The Tribunal has come to conclusion in Para 9/3 that notice pay was paid to workman vide Exh.28, but, whether proper procedure was followed while dismissing the workman or not and finding given by competent authority is baseless or perverse or not is to be

examined by Tribunal. Therefore, Tribunal has examined that what happened after accident was occurred with ST bus. One officer who has attended the accident visited the place of accident who was Senior Depot Manager and Divisional Traffic Superintendent (D). The accident form was filled up, in which, Page 4 Traffic Inspector Mr. C.C. Patel has made endorsement that driver is responsible for the said accident which has been taken into account by Senior Divisional Traffic Officer that looking to the report submitted by a person who has attended the accident, ST driver is responsible. This endorsement was made on 9th April 1990 by Shri Mahendrabhai Pandya who has given an opinion against the driver that he is responsible for the said accident. Thereafter, the same officer Senior Divisional Traffic Officer Shri Mahendra Pandya issued a charge-sheet on 12th April 1990 to the workman. Therefore, Tribunal has taken into account a predetermination mind of the concerned officer who has issued charge-sheet to the respondent workman. The competent authority who has issued a charge-sheet has already come to conclusion that driver is responsible by endorsement and accepting the report on 9th April 1990 and on 12th April 1990, the same officer has served a charge-sheet to the workman and thereafter, the departmental inquiry was initiated against the workman. Therefore, Tribunal has taken into account of the facts that before initiating the departmental inquiry even before issuing the charge-sheet, the authority has already determined his mind that driver is responsible for accident while accepting the report of person who has attended the accident. Therefore, it caused prejudice to the workman who is having a predetermine misconduct establish believed by authority, thereafter, only formal charge-sheet was served to the respondent workman. Therefore, departmental inquiry and decision determined by authority is not independent, but, it based on predetermine by authority. The appellate authority Divisional Controller has also endorsed the said report on 10th April 1990 that driver is responsible. Therefore, according to Tribunal, everything has come to end up to the appellate authority who is appointing authority and 10th April 1990 holding that driver was responsible. Thereafter, only formal charge-sheet was served to respondent and formal inquiry was conducted against the workman. On that basis, Tribunal has examined the finding given by competent authority. Mr. C.C. Patel, who was reporter, was examined before the inquiry officer who was not eye-witness and who has not obtained any statement on the spot when he visited the place of accident. Therefore, according to Tribunal, the competent authority was not independent, having the bias against the workman on the basis of predetermination and only workman was examined before the inquiry officer where certain questions were put by competent authority which were replied by workman. Ultimately, cross-examination of workman was not challenged by Corporation and why the defence of the workman is not believed by the Corporation, for that, no independent finding was given, no discussion was there and no reasoning was given. Therefore, Tribunal has come to conclusion that finding given by competent authority is baseless and perverse.

7. The competent authority has predetermine the issue that workman is guilty

without holding departmental inquiry and without giving any opportunity, it caused prejudice and it amounts to a real bias against the workman by disclosure who has punished the respondent workman on the basis of predetermination mind. Therefore, it is a clear case of real bias caused prejudice to the workman as per case of Cantonment Executive Officer and Anr. v. Vijay D. Wani and Ors. reported in 2008 (3) SC 1. The relevant Para 7 is quoted as under:

7. Therefore, the ratio of all these cases is that a person cannot be a Judge in his own case. Once the disciplinary committee finds the incumbent guilty; they cannot sit in the judgment to punish the man on the basis of the opinion formed by them. The objectivity is the hallmark of a judicial system in our country. The very fact is that the disciplinary committee who found the respondent (herein) guilty participated in decision making process for finding the respondent (herein) guilty and to dismiss him from service is bias which is apparent & real. Consequently, the view taken by the Division Bench of the High Court cannot be faulted.

8. The Tribunal has discussed the entire finding that how the competent authority arrived at and accepted only report of the reporter who was not eye-witness and driver who was cross-examined by competent authority. There is no other evidence led to prove the misconduct against the workman who was examined by competent authority.

9. In criminal case, workman was declared acquittal by the competent Court. Therefore, Tribunal has examined that finding given by competent authority is based upon legal evidence or not, for that, Tribunal has come to conclusion that finding is baseless or perverse, because, defence taken by workman is not at all discussed and the same is not believed by competent authority. For that, no reasoning is given by competent authority, therefore, finding is declared vitiated by the Tribunal.

10. It is necessary to note that in Corporation, charge-sheet was issued by competent authority, Senior Divisional Traffic Officer who has made endorsement on the report submitted by person who had attended the accident on 9th April 1990 and same officer issued charge-sheet on 10th April 1990 and before that, appellate authority who was competent authority has also endorsed and accepted the report that driver was responsible on 10th April 1990. In Corporation, there is no separate or different inquiry officer is appointed, but, a competent authority himself work as an inquiry officer and he himself gives the finding and he himself taking the decision to punish the workman. Therefore, the person who has already come to conclusion accepting the report submitted by Mr. C.C. Patel, Traffic Inspector, holding that driver is responsible, the said officer has conducted the inquiry and come to conclusion that driver is responsible. This kind of inquiry itself is vitiated as it has violated the basic principle of natural justice and it caused prejudice to the defence of workman. The defence disclosed by the workman in cross-examination was not properly appreciated by the competent authority and why the defence of the workman was not believed, for

that, no separate independent reasoning is given by competent authority. Therefore, Tribunal has rightly come to conclusion that finding given by competent authority is vitiated as it is against the principles of natural justice and also caused prejudice to the workman in his defence.

11. Learned advocate Mr. Rawal raised contention that Industrial Tribunal, while considering the approval application, has no jurisdiction to examine the finding given by competent authority as per recent decision of Apex Court which prohibits the Labour Court from examining the finding where inquiry held to be legal and valid in a reference u/s 10 of the Industrial Disputes Act, 1947. He relied upon the two decisions of Apex Court; (i) in case of U.P. State Road Transport Corporation v. Vinod Kumar and Anr. reported in JT 2007 (13) SC 404 and (ii) in case of Employers Management West Bokaro Colliery of TISCO Ltd. Vs. Concerned Workman, Ram Pravesh Singh, . He also submitted that legality and validity of departmental inquiry was not challenged by workman and in such circumstances, finding cannot be examined by Tribunal. The contention raised by learned advocate Mr. Raval is not accepted by this Court because of the view taken by Apex Court in case of Central Bank of India Ltd. Vs. Prakash Chand Jain, where, Apex Court has, in terms, held that while deciding the approval application, Tribunal or Labour Court has jurisdiction to examine the legality and validity of finding even conciliation officer when deciding the approval application. He has also jurisdiction to decide the legality and validity of finding. The relevant Head Note is quoted as under:

Head Note: The appeal was preferred against the order of the industrial tribunal rejecting approval sought for by the appellant-bank u/s 33(2)(b) of the Industrial disputes Act. The acts of misconduct levelled against the workman were alleged to have fallen under Para. 521-A(J) of the Sastri award. The tribunal, when dealing with the application for approval, held that the enquiry held by the enquiry officer was fair, and was not vitiated by any irregularity or unfairness but refused to accord approval on the ground that the findings rendered by the enquiry officer were perverse and were not based on evidence inasmuch as most of the findings are the result of mere conjecture of the enquiry officer.

Rejecting the contention of the counsel for the appellant-bank that the tribunal, in refusing to accord approval and in disregarding the findings recorded by the enquiry officer, exceeded its jurisdiction conferred by Section 33(2)(b) of the Act and the tribunal having once held that the enquiry was fair, it had no jurisdiction to go into the correctness of the findings of the enquiry officer as an appellate Court, held that the tribunal can disregard the findings given by the enquiry officer in an application u/s 33(2)(b) of the Industrial Disputes Act only if the findings are perverse. The test of perversity is that the findings may not be supported by legal evidence. Yet another case of perversity is that when the findings are such which no reasonable person could have arrived at on the basis of the materials before him. Though in regard to certain elements of the acts of misconduct, the tribunal erred in assessing the perversity of the evidence

adduced before the enquiry officer at the domestic enquiry, and though such an enquiry officer was not bound to observe the technical rules of evidence, held in the instant case that substantive rules of evidence which would form part of principles of natural justice have been ignored by the enquiry officer, when he based his findings on hearsay evidence.

It is true that in various cases it has been held that domestic tribunals like an enquiry officer are not bound by the technical rules about the evidence in the Indian Evidence Act but it has nowhere been laid down that even substantive rules which would form part of principles of natural justice also could be ignored by the domestic tribunals. The principle that a fact sought to be proved must be supported by statements made in the presence of the person against whom enquiry is held and that the statements made behind the person charged are not to be treated as substantive evidence is one of the basic principles of natural justice which cannot be ignored on the mere ground that domestic tribunals are not bound by the technical rules of procedure contained in the Evidence Act. A domestic tribunal would not be justified in recording its finding on the basis of hearsay evidence without having any direct or substantive evidence in support of such findings. In other words, the findings recorded by the enquiry officer must be supported by legal evidence. The evidence should consist of statements made in the presence of the workman charged and exception is envisaged where the previous statements could be used after giving copies of the statements well in advance to the workman charged but with further qualifications that previous charge must be affirmed as truthful in a general way when the witness is actually examined in the presence of the workman charged.

Applying the above principles and on merits, held that the findings of this enquiry officer were not based on any legal evidence in regard to the two charges levelled against the workman even though partly the first of the charges could be held to be proved.

12. In respect to the recent decision which has been referred by learned advocate Mr. Rawal as referred above, recently, this Court had an occasion to consider these two decisions in Special Civil Application No. 6579 of 2008 dated 25th April 2008, in which, the learned advocate Mrs. Sangeeta Pahwa is appearing on behalf of petitioner and learned advocate Mr. Hardik C. Rawal is appearing on behalf of respondent. The relevant observations made by this Court in Para 17 to 23 and 25. Therefore, the same are quoted as under:

17. The aforesaid decision is considered and relied upon by Apex Court recently in case of Employers Management West Bokaro Colliery of TISCO Ltd. Vs. Concerned Workman, Ram Pravesh Singh, where, it is held that Labour Court or Tribunal had no power to interfere in the findings of domestic inquiry as an appellate court. The relevant observation made by Apex Court in Para 19 and 20 are quoted as under:

19. Tribunal has set aside the report of the Enquiry Officer and the order of

dismissal passed by the Punishing Authority by observing that the charges against the respondent were not proved beyond reasonable doubt. It has repeatedly been held by this Court that the acquittal in a criminal case would not operate as a bar for drawing up of a disciplinary proceeding against a delinquent. It is well settled principle of law that yardstick and standard of proof in a criminal case is different from the one in disciplinary proceedings. While the standard of proof in a criminal case is proof beyond all reasonable doubt, the standard of proof in a departmental proceeding is preponderance of probabilities.

20. Learned Counsel for the respondent cited two cases *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, and *The General Secretary, South Indian Cashew Factories Workers' Union Vs. The Managing Director, Kerala State Cashew Development Corporation Ltd. and Others*, , to contend that the Labour Court in exercise of its jurisdiction u/s 11A could have come to a different conclusion. There is no quarrel with this proposition of law. The Labour Court could have awarded lesser punishment in the given facts and circumstances of the case. In a case where two views are possible on the evidence on record, then the Industrial Tribunal should be very slow in coming to a conclusion other than the one arrived at by the domestic Tribunal by substituting its opinion in place of the opinion of the domestic Tribunal.

18. The net result of aforesaid two decisions which have been recently given by Apex Court as referred above after not challenging the legality and validity of departmental inquiry by workman or preliminary issue decided by Labour Court that departmental inquiry is legal and valid, then, workman is not entitled to challenge the finding given by inquiry officer to the effect that finding recorded by inquiry officer is baseless and perverse. Section 11A came into force on December 15, 1971 and not having any retrospective effect. Therefore, Section 11A is quoted as under:

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, tribunal or national tribunal for adjudication and in the course of adjudication proceedings, the labour court, tribunal or national tribunal as the case may be 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 proceeding under this section, the labour court, tribunal or national tribunal as the case may be, shall rely only on the material on record and shall not take any fresh evidence in relation to the matter.

19. Regarding Section 11A in the statement of object and reason, it is stated as follows in case of The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others,

3. Regarding Section 11A, in the Statement of Objects and Reasons it is stated as follows:

In Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen, the Supreme Court, while considering the Tribunal's power to interfere with the management's decision to dismiss, discharge or terminate the services of a workman, has observed that in case of dismissal on misconduct, the Tribunal does not act as a Court of appeal and substitute its own judgment for that of the management and that the Tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice, etc. on the part of the management.

The International Labour Organisation, in its recommendation (No. 119) concerning termination of employment at the initiative of the employer, adopted in June 1963, has recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination among others, to a neutral body such as an arbitrator, a Court, an arbitration committee or a similar body and that the neutral body concerned should be empowered to examine the reasons given in the termination of employment and the other circumstances relating to the case and to render a decision on the justification of the termination. The International Labour Organization has further recommended that the neutral body should be empowered (if it finds that the termination of employment was unjustified) to order that the worker concerned unless reinstated with unpaid wages, should be paid adequate compensation or afforded some other relief.

In accordance with these recommendations, it is considered that the Tribunal's power in an adjudication proceeding relating to discharge or dismissal of a workmen should not be limited and that the Tribunal should have the power in cases wherever necessary to set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions-if any, as it thinks fit or give such other reliefs to the workmen including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. For this purpose, a new Section 11A is proposed to be inserted in the Industrial Disputes Act, 1947....

20. Section 11A is inserted in statute book because of decision of Apex Court in case of Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen,

21. The decision of Apex Court in case of The Workmen of M/s. Firestone Tyre and Rubber Co. of India (Pvt.) Ltd., (supra), the Apex Court has considered various decisions on the issue and broadly some principles have been emerged after considering the various decisions of Apex Court in Para 32 which is quoted as under:

32. From those decisions, the following principles broadly emerge:

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

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

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

(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, had 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 his action, and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or 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 himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied

about the alleged misconduct.

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

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in *The Management of Panitole Tea Estate Vs. The Workmen*, within the judicial decision of a Labour Court or Tribunal.

32-A. The above was the law as laid down by this Court as on 15-12-1971 applicable to all industrial adjudication arising out of orders of dismissal or discharge.

22. What would be the effect of Section 11A has been discussed by Apex Court in case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd.*, (supra) in Para 36, 37 and 40 which are quoted as under:

36. We will first consider cases where an employer has held a proper and valid domestic enquiry before passing the order of punishment. Previously the Tribunal had no power to interfere with its finding of misconduct recorded in the domestic enquiry unless one or other infirmities pointed out by this Court in *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, existed. The conduct of disciplinary proceeding and the punishment to be imposed were all considered to be a managerial function which the Tribunal had no power to interfere unless the finding was perverse or the punishment was so harsh as to lead to an inference of victimisation or unfair labour practice. This position, in our view, has now been changed by Section 11A. The words "in the course of the adjudication proceeding, the Tribunal is satisfied that the order of discharge or dismissal was not justified" clearly indicate that the Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer established the misconduct alleged against a workman. What was originally a plausible conclusion that could be drawn by an employer from the evidence, has now given place to a satisfaction being arrived at by the Tribunal that the finding of misconduct is correct. The limitations imposed on the powers of the Tribunal by the decision in *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, case can no longer be invoked by an employer. The Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct; but also to differ from the said finding if a proper case is made out. What was once largely in the realm of the satisfaction of the employer, has ceased to be so; and now it is the satisfaction of the Tribunal that finally decides the matter.

37. If there has been no enquiry held by the employer or if the enquiry is held to be defective, it is open to the employer even now to adduce evidence for the first time before the Tribunal justifying the order of discharge or dismissal. We are not

inclined to accept the contention on behalf of the workmen that the right of the employer to adduce evidence before the Tribunal for the first time recognised by this Court in its various decisions, has been taken away. There is no indication in the section that the said right has been abrogated. If the intention of the legislature was to do away with such a right, which has been recognised over a long period of years, as will be noticed by the decisions referred to earlier, the section would have been differently worded. Admittedly there are no express words to that effect, and there is no indication that the section has impliedly changed the law in that respect. Therefore, the position is that even now the employer is entitled to adduce evidence for the first time before the Tribunal even if he had held no enquiry or the enquiry held by him is found to be defective. Of course, an opportunity will have to be given to the workman to lead evidence contra. The stage at which the employer has to ask for such an opportunity, has been pointed out by this Court in *Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*, No doubt, this procedure may be time consuming, elaborate and cumbersome. As pointed out by this Court in the decision just referred to above, it is open to the Tribunal to deal with the validity of the domestic enquiry, if one has been held as a preliminary issue. If its finding on the subject is in favour of the management then there will be no occasion for additional evidence being cited by the management. But if the finding on this issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence justifying his action. This right in the management to sustain its order by adducing independent evidence before the Tribunal, if no enquiry has been held or if the enquiry is held to be defective, has been given judicial recognition over a long period of years.

40. Therefore, it will be seen that both in respect of cases where a domestic enquiry has been held as also in cases where the Tribunal considers the matter on the evidence adduced before it for the first time, the satisfaction u/s 11A, about the guilt or otherwise of the workman concerned, is that of the Tribunal. It has to consider the evidence and come to a conclusion one way or other. Even in cases where an enquiry has been held by an employer and a finding of misconduct arrived at, the Tribunal can now differ from that finding in a proper case and hold that no misconduct is proved.

23. Therefore, in case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd.*, (supra), the Apex Court has held that Labour Court while exercising the power u/s 11A may also differ from the said finding if a proper case is made out, meaning thereby that, what was once broadly in the realm of the satisfaction of the employer has ceased to be shown and now, it is the suggestion of the Tribunal that finally decides the matter.

25. Therefore, Labour Court is entitled to go into the question of examining the legality and validity of finding and in case, if, finding is declared vitiated, perverse and baseless, employer is entitled to have permission from Labour Court to justify his dismissal. Therefore, the whole issue which relates to

departmental inquiry in industrial law having a different procedure based upon various decisions of Apex Court being an unwritten law as in case, order passed by Labour Court on preliminary issue either to held inquiry is valid or not, but, either party has no justification to challenge before the High Court and High Court is not having any discretionary power to entertain such challenge or if encourage on the basis of discretionary power under Article 226 of the Constitution of India when ratio decided by Apex Court in case of The Cooper Engineering Ltd., (supra), then, such observation and decision becomes meaningless in the eyes of law.

13. Recently, subsequent to the aforesaid two decisions, the Apex Court has examined this issue in detail in case of Mavji C. Lakum Vs. Central Bank of India, , where, the judgment of learned Single Judge of this Court and the judgment of Division Bench of this Court has been set aside by the Apex Court restoring the judgment of Tribunal, where, the relief has been granted in favour of workman upheld. The relevant Para 19 & 20 from the aforesaid judgment are quoted as under:

19. In our opinion u/s 11-A of the Industrial Disputes Act the Tribunal was quite justified in using its discretion. The scope of Section 11-A has been explained by this Court from time to time in Life Insurance Corporation of India v. R. Dhandapani (2006) 13 SCC 613 ; Employers, Mgmt., M. Colliery, BCCL Ltd. Vs. Bihar Colliery Kamgar Union through Workmen, and Madhya Pradesh Electricity Board Vs. Jagdish Chandra Sharma, . Lastly, this Court has held that in L and T Komatsu Ltd. Vs. N. Udayakumar, that assaulting or giving abuses to the superior would justify the dismissal. We have carefully examined the facts in all the above cases and find that the appellant's case nowhere comes near the one described in all the above four cases. After all the Tribunal has to judge on the basis of the proved misbehaviour. In this case we have already recorded that the Tribunal was firstly correct in holding that the misbehaviour was not wholly proved and whatever misconduct was proved, did not deserve the extreme punishment of discharge.

20. on this backdrop when we see unusually long judgment of the learned Single Judge, it comes out that the learned Single Judge held firstly that the Tribunal had exceeded its powers vested in it under the provisions of Section 11-A of the Industrial Disputes Act. The learned Judge, as regards, Section 11-A, after quoting the same, observed:

Though the Tribunal was equipped with the power to come to its own conclusion whether in a given case the imposition of punishment of discharge or dismissal from the service is justified. It is for that purpose that the Tribunal is authorized to go into the evidence that has been adduced before the Inquiry Officer in details and find out whether the punishment of discharge or dismissal is commensurate with the nature of charges proved against the delinquent.

So far the finding of the learned Single Judge appears to be correct. However,

the whole thrust of the judgment has changed merely because the Industrial Tribunal had found the inquiry to be fair and proper. The learned Judge seems to be of the opinion that if the inquiry is held to be fair and proper, then the Industrial Tribunal cannot go into the question of evidence or the quantum of punishment. We are afraid that is not the correct law. Even if the inquiry is found to be fair, that would be only a finding certifying that all possible opportunities were given to the delinquent and the principles of natural justice and fair play were observed. That does not mean that the findings arrived at were essentially the correct findings. If the Industrial Tribunal comes to the conclusion that the findings could not be supported on the basis of the evidence given or further comes to the conclusion that the punishment given is shockingly disproportionate, the Industrial Tribunal would still be justified in re-appreciating the evidence and/or interfering with the quantum of punishment. There can be no dispute that power u/s 11-A has to be exercised judiciously and the interference is possible only when the Tribunal is not satisfied with the findings and further concludes that punishment imposed by the Management is highly disproportionate to the degree of guilt of the workman concerned. Besides, the Tribunal has to give reasons as to why it is not satisfied either with the findings or with the quantum of punishment and that such reason should not be fanciful or whimsical but there should be good reasons. In our opinion the reasons given by the Tribunal were correct and the treatment given by the Tribunal to the evidence was perfectly justified. The Tribunal committed no error in observing that for good long 30 years there was no complaint against the work of the appellant and that such a complaint suddenly surfaced only in the year 1982. The Tribunal was justified in appreciating the fact that the charges were not only trivial and were not so serious as to entail the extreme punishment of discharge. Here was the typical example where the evidence was of a most general nature and the charges were also not such as would have invited the extreme punishment. It was not as if the appellant had abused or had done any physical altercation with his superiors or colleagues. What was complained was of his absence on some days and his argumentative nature. Though the learned Judge had discussed all the principles regarding the exercise of powers u/s 11-A of the Industrial Disputes Act as also the doctrine of proportionality and the *Wednesbury's* principles, we are afraid the learned Judge has not applied all these principles properly to the present case. The learned Judge has quoted extensively from the celebrated decision of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, however, the learned Judges seems to have ignored the observations made in para 32 of that decision where it is observed that:

The words "in the course of adjudication proceeds, the Tribunal is satisfied that the order of discharge or dismissal was not justified" clearly indicate that the Tribunal is now clothed with the power of re-appraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer establishes the misconduct alleged against a workman. What was

originally a plausible conclusion that could be drawn by an employer from the evidence, has now given place to a satisfaction being arrived at by the Tribunal that the finding of misconduct is correct.... The Tribunal is at liberty to consider not only whether the finding of misconduct recorded by an employer is correct but also to differ from the said finding if a proper case is made out.

We are surprised at the following observations of the learned Judge in para 7.1:

Nowhere during the course of the judgment the Tribunal appears to have followed the aforesaid guidelines or the Wednesbury test. When it was re-appreciating evidence and on the strength of it, was reaching to different conclusions and ultimately it has substituted the punishment, it was incumbent upon it to follow aforesaid guidelines. It was only upon finding that the decision of the authority was illegal or that it was based on material not relevant or relevant material was not taken into consideration or that it was so unreasonable, that no prudent man could have reached to such decision or that it was disproportionate to the nature of the guilt held established so as to shock the judicial conscience, the Tribunal could have substituted the penalty. The entire text of award of the Tribunal does not indicate this.

We are unable to agree with these observations.

14. Thereafter, Apex Court has also examined the same issue in case of Usha Breco Majdoor Sangh v. Management of Usha Breco Ltd. and Anr. reported in 2008 (3) SC 217. The relevant Para 16 to 20 are quoted as under:

16. Keeping in view the diverse opinion rendered by different High Courts which had been noticed by this Court in Delhi Cloth & General Mills Co. (supra), the Parliament inserted Section 11-A in the Act by Act No. 45 of 1971 which came into force with effect from 15.12.1971.

17. In the statement of objects and reasons for inserting Section 11-A of the Act, it was stated:

In Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen, the Supreme Court, while considering the Tribunal's power to interfere with the management's decision to dismiss, discharge or terminate the services of a workman, has observed that in case of dismissal on misconduct, the Tribunal does not act as a Court of appeal and substitute its own judgment for that of the management and that the Tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice, etc., on the part of the management. The International Labour Organisation, in its recommendation (No. 119) concerning termination of employment at the initiative to the employer, adopted in June 1963, has recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination among others, to a neutral body such as an arbitrator, a court, an arbitration committee or a similar body and that the neutral body concerned should be empowered to examine the reasons given in the termination of employment and that other

circumstances relating to the case and to render a decision on the justification of the termination. The International Labour Organization has further recommended that the neutral body should be empowered (if it finds that the termination of employment was unjustified) to order that the worker concerned, unless reinstated with unpaid wages, should be paid adequate compensation or afforded some other relief. In accordance with these recommendations, it is considered that the Tribunal's power in an adjudication proceeding relating to discharge or dismissal of a workman should not be limited and that the Tribunal should have the power in cases wherever necessary to set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit or give such other reliefs to the workman including the award of any letter punishment in lieu of discharge or dismissal as the circumstances of the case may require. For this purpose, a new Section 11-A is proposed to be inserted in the Industrial Disputes Act, 1947.

18. We may, however, notice that new Section 11-A was not noticed by this Court in *Delhi Cloth & General Mills Co.* (supra) although the same was inserted on 15.12.1971.

19. Interpretation of Section 11-A of the Act came up for consideration before this Court in *Firestone Tyre and Rubber Co.* (supra). It was opined that Section 11-A of the Act had brought about a complete change in this behalf. This Court, despite insertion of Section 11-A, not only conferred jurisdiction on the Tribunal to alter the quantum of punishment imposed upon a workman, but also held that it can enter into the merit of the matter so far as determination of the proof of misconduct or otherwise on the part of the workman is concerned.

Two extreme views, viz., that the entire law has been re-written and despite insertion of Section 11-A, the Management neither could raise the legality or validity of the Domestic Enquiry as a preliminary issue or request the Tribunal to allow it to adduce evidence before it even if no enquiry has been held or as to whether such a right can still be exercised by the management came up for consideration in *Firestone Tyre and Rubber Co.* (supra).

One of the questions posed by Vaidialingam, J. was as to whether Section 11-A has made any changes in the legal position as regards the principles which had emerged from various decisions and as noticed in *Delhi Cloth & General Mills Co.* (supra). Rejecting both the extreme contentions and starting on the premise that the Act is a beneficial piece of legislation enacted in the interest of the employees, it was held that although the legal right of the Management to raise such a preliminary issue and in the event the same was determined in favour of the workmen to lead evidence for the first time before the Tribunal/Labour Court could not be denied, opining:

The Tribunal is now at liberty to consider not only whether the finding of misconduct recorded by an employer is correct; but also to differ from the said finding if a proper case is made out. What was once largely in the realm of the

satisfaction of the employer, has ceased to be so; and now it is the satisfaction of the Tribunal that finally decides the matter.

It was furthermore held:

40. Therefore, it will be seen that both in respect of cases where a domestic enquiry has been held as also in cases where the Tribunal considers the matter on the evidence adduced before it for the first time, the satisfaction u/s 11-A, about the guilt or otherwise of the workman concerned, is that of the Tribunal. It has to consider the evidence and come to a conclusion one way or other. Even in cases where an enquiry has been held by an employer and a finding of misconduct arrived at, the Tribunal can now differ from that finding in a proper case and hold that no misconduct is proved.

[See also *United Bank of India v. Tamil Nadu Banks Deposit Collectors Union and Anr.* 2007 (13) SCALE 681]

20. The legal principle, in our opinion, is neither in doubt nor in dispute. The question is that of its application.

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15. Thereafter, Apex Court has also examined the same issue in another case of *Management, Essorpe Mills Ltd. v. Presiding Officer, Labour Court and Ors.* reported in AIR2008 SCW 3455.

16. Recently, this Court had an occasion to consider the scope of Section 33(2)(b) and power as well as jurisdiction of approval authority under the provisions of the Industrial Disputes Act, 1947 in case of *Ahmedabad Municipal Transport Service Vs. Budhabhai Atmaram*, decided on 4th April 2008. The relevant Para 8, 9, 11 and 12 from the aforesaid decision are quoted as under:

8. Provisions of Section 33(2)(b) of the ID Act, 1947 are mandatory in nature. Said provisions require three actions simultaneously. Industrial Tribunal has jurisdiction to consider the application for approval of the action u/s 33(2)(b) of the ID Act, 1947 while keeping in mind three conditions and then to consider as to whether these three conditions are satisfied or not. One is the dismissal order. Second is the approval application and third is payment of one month wages to the workman. These three conditions must be the part of one transaction, meaning thereby, that the date of approval application, date of dismissal and date of payment of one month notice pay/wages should be simultaneous as one transaction. Breach of any one of these conditions is enough for the industrial Tribunal to reject the approval application u/s 33(2)(b) of the ID Act, 1947 [See: (1) 1998 III LLJ 398 AP (2) *Balkrishna Bhiva Vs. Industrial Tribunal (Syed Taki Bilgrami)* and Another, (5) *Dinesh Khare Vs. Industrial Tribunal and Others*, (6) *N. Rarichan Vs. The Industrial Tribunal and Others*,

9. Powers of the Industrial Tribunal while dealing with the approval application have been examined by the Hon''ble apex court in *Lalla Ram Vs. Management of*

D.C.M. Chemical Works Ltd. and Another, . In the said judgment, the apex court has observed as under in para 12 of the judgment:

12. The position that emerges from the above quoted decisions 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 employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the position settled by the decisions of this Court in Bengal Bhatdee Coal Co. Vs. Ram Prabesh Singh and Others, : Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar 1961) 1 Lab LJ 511 (SC); 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, , and Management of Eastern Electric and Trading Co. Vs. Baldev Lal, that though 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, severe, 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 reasonably short time as to form 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 conditions 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 to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds 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.

11. As regards the submission of learned Advocate Mr. Munshaw that the payment of ten years back wages to the workman would create unnecessary financial burden upon the petitioner Transport Service, and, therefore, some clarification in that regard should be made. If the petitioner transport service has violated mandatory provisions of Section 33(2)(b) of the ID Act, then, question of heavy financial burden of back wages on the petitioner is totally irrelevant for the Court because the Court cannot pass any order in violation of the mandatory provisions of Section 33(2)(b) of the ID Act, 1947 as per the law laid down by

the larger Bench of the Hon'ble Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, In the said decision, the apex court has held that the mandatory provisions must have to be complied with by the employer in case when the workman is dismissed from service and at that time, industrial dispute is pending before the tribunal, then, approval application must have to be filed in time with simultaneous compliance of said three conditions as one transaction and if the approval application is rejected, then, order of dismissal is not approved by the tribunal and whatever consequences thereof arising, that must have to be followed in accordance with law. The workman has remained out of job for a period of about ten years and while facing unemployment, he approached the age of retirement and, therefore, in view of these facts and non compliance of mandatory provisions by the petitioner in particular, contention raised by learned Advocate Mr. Munshaw is not acceptable and the same is, therefore, rejected.

12. The Apex Court has recently considered identical case in United Bank of India v. Siddharth Chakraborty reported in (2007) 7 SCC 670. Para 6 and 7 are quoted as under:

6. In Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, it was inter-alia observed as follows: (SCC pp 252-53, para 13)

13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further, any employer who contravenes the provisions of Section 33 invites a punishment u/s 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 1000 or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed u/s 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b)

affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2) (b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

7. As has been noted in the said judgment, the proviso to Section 33(2)(b) of the Act affords protection to a workman to safeguard his interest and it is in the nature of a shield against victimization and unfair labour practice by the employer during pendency of an industrial dispute. That being so, the judgment of the learned Single Judge as affirmed by the Division Bench does not suffer from any infirmity.

See: 2007 Lab IC 2947 Delhi; 2007 (6) SC 3; 2007 III LLJ 289 Bom; 2008 I CLR 148 Delhi.

17. Therefore, in light of aforesaid subsequent decisions of Apex Court, the decisions relied upon and cited by learned advocate Mr. Rawal cannot be relied and accepted by this Court in view of the recent decisions of Apex Court on the subject as considered by this Court. Therefore, while deciding approval application, the Tribunal has power and jurisdiction to examine the legality and validity of finding even though legality and validity of departmental inquiry is not challenged by the workman. Therefore, contentions raised by learned advocate Mr. Rawal is rejected.

18. I have considered the reasoning given by Tribunal and also considering the detailed facts given by learned advocate Mr. Rawal, according to my opinion, Tribunal has not committed any error while rejecting the approval application, for which, no interference is required by this Court under Article 227 of the Constitution of India.

19. Hence, there is no substance in the present petition. Accordingly, present petition is dismissed with no order as to costs.