

(1980) 10 DEL CK 0016

In the Delhi High Court

Case No : Letters Patent Appeal No"s. 35 and 46 of 1980

Management of Bharatkala Kendra Pvt. Ltd.

APPELLANT

Vs

R.K. Baweja and Another

RESPONDENT

Date of Decision : 09-10-1980

Acts Referred:

Citation : (1980) 41 FLR 390 : (1980) ILR Delhi 1355 : (1981) LabIC 893

Hon'ble Judges : S. Ranganathan, J;Prakash Narain, J

Bench : Division Bench

Advocate : Anand Prakash, Raj Birbal, M.K. Ramamurthi, K.M. Iyer and M.S. Menon, for the Appellant;

Judgement

S. Ranganathan, J.

(1) R.N. Chaudhry was an employee from 9th August, 1962 of M/s. Bharat Kala Kendra Pvt. Ltd. in a show-room run by the said company under the name of "Guptajee." His services were terminated by a letter dated 14th November, 1968. An industrial dispute between the parties was referred to the Labour Court. The employee filed a statement of claim and the management filed its written statement. The Labour Court framed two issues:

(1)Whether the employee Shri R.N. Chaudhry is a workman within the meaning of Section 2(s) of the industrial Disputes Act, 1947?

(2)Whether the termination of services of Shri R.N. Chaudhry is illegal and/or unjustified and, if so, to what relief is he entitled and what directions are necessary in this respect ?"

(2) On issue No. 1 the Labour Court, after going through the evidence, came to the conclusion that the employee was a workman, applying the tests laid down by the Supreme Court in the *Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others*, and the ruling of the Labour Appeal late Tribunal in the case of *Mullar & Phipps*

(India) Ltd. VI Fjr 171 (2). On the second issue the Labour Court accepted the plea of the employee that his discharge with effect from 15th November, 1968 was not a bona fide termination of service but was mala fide and unjustified. It had been passed because the employee was an office-bearer of the union in the company and the management was not happy with him. The order of discharge was passed in the context of an overstay by the petitioner beyond the leave granted to him but this was merely a way found to dispense with the service of the workman for his union activities. In view of its conclusion on the second issue the Labour Court directed the management to re-instate the employee with continuity in service. However, regarding the latter's claim for back wages the Labour Court observed that there was nothing on the record as to whether the workman made any efforts to get any work during the period subsequent to his discharge, though he stated that he had been jobless and, Therefore, directed the management that it should pay him half the back wages from the date of termination of his service till he was taken back at the rate last drawn by him. The award of Labour Court was dated 1st March, 1971.

(3) Both the employee and the management were dissatisfied with the award. The management filed C.W.P. 948/71 seeking a writ of certiorari to quash the award. The employee filed C.W.P.863/72 seeking that the award be quashed to the extent it directed the payment of only half the back wages and praying for a mandamus directing the management to pay full back wages. Both these writ petitions were heard together by a learned single judge of this court who dismissed both the writ petitions. On issue No. 1 the learned judge pointed out that the Labour Court on a consideration of the evidence had expressed the view that the writing of cash memos was clerical in nature, that the handling of pieces of cloth, measuring them and cutting them into pieces according to the requirements involved manual labour and that the order of appointment described the concerned employee as salesman and general assistant. This finding by the Labour Court was supported by valid material on record and was, Therefore, not vitiated in law. So far as the second issue was concerned the learned judge pointed out that the language of the order of termination was not decisive and that the Labour Court was entitled to look into the circumstances prevailing at the time of passing of the order of discharge. The test really was whether the act of the employer was bona fide or a colourable exercise of the power under the contract of service or statutory provisions. In the present case the Labour Court had found that the employee had been connected with the union in the company for a number of years and had been elected as the Secretary of the union in October 1968. The employee had given evidence that the managing director of the company had called him and told him to settle his accounts as he had become the Secretary of the union, and the managing director of the company had not entered the witness box to rebut this statement. There was also evidence of other witnesses which pleaded victimisation as and when they became office-bearers of the union. In this background the Labour Court appreciated the circumstances existing at the time of passing of the order

dated 14th November, 1968 and reached the finding that the reason for termination was obvious, namely, that the workman was an office-bearer of the of the union and the management was not happy with him and his overstay became handy and a way was found to dispense with his services. The learned judge saw no reason to disturb that finding of fact as the view taken by the Labour Court was possible on the evidence of record. In a writ petition it was not open to a High Court to substitute its own opinion on a question of fact on the reappraisal of the entire evidence. Having thus come to the conclusion that the Labour Court's finding that the termination was mala fide could not be interfered with, the learned judge proceeded to consider the question of relief that was available to the employee. He pointed out that where a wrongful dismissal was set aside the question whether he should be reinstated or directed to be paid compensation was a matter within the judicial discretion of the Labour Court, the general rule in the absent of any special circumstances being of reinstatement. In the present case I the management had not pleaded before the Labour Court any special circumstances justifying a departure from the general rule of reinstatement. The learned judge, Therefore, did not accept the submission of the learned counsel for the management that the relief of reinstatement had been mechanically granted and that the Labour Court had no exercised judicially its discretion either to order or not to order reinstatement. One more submission urged on behalf of the management was that the Labour Court had directed the payment of half of the back wages arbitrarily and without determining the issue whether the employee had been gainfully employed in the meantime or not. On the other hand on behalf of the employee it was submitted, relying on the decisions of the Supreme Court in Hindustan Tin Works Limited 1978 I LlJ 474, (3) that the payment of full back wages was the normal rule and that the party objecting to it must establish the circumstances necessitating the departure. The learned judge found that though the case of the workman was that he did not make any efforts to get any work because he was afraid that it might prejudice his chance of reinstatement though there was no evidence as such on record as to whether the workman had made any such effort or not. With this material on record the conclusion of the Labour Court that the management should be directed to pay half the wages had been arrived at after considering the question as to whether the employee had been gainfully employed during the interval or not. The order of the Labour Court was both just and equitable and called for no interference by this court. In the result both the writ petitions were dismissed by the learned single judge.

(4) From the above judgment both the employee and the management have preferred appeals. At the outset it may be pointed out that in the appeal filed by the employee (LPA 46 of 1980) the appellant had sought for an exemption from filing the record of the writ petition along with L.P.A. (CM 313/80). Though this request was declined by the order dated 19th March, 1980 and the appellant had been directed to complete the record in accordance with the rules, no steps were taken by the appellant in this regard. It may also be mentioned that the

grievance of the petitioner in the L.P.A. was that the learned single judge should have held that the appellant was entitled to be reinstated with full back wages and should not have upheld the directions of the Labour Court for the grant of only half the back wages.

(5) In L.P.A. 35/80 filed by the management, however, an attempt has been made to contest the findings of the Labour Court and everyone of the matters in issue before it. It is contended (a) that the Labour Court's finding on the jurisdictional fact as to whether the employee was a workman within the meaning of the Industrial Disputes Act, 1947 ("the Act" for short) was erroneous and should have been quashed by the learned single judge; (b) that the finding of the Labour Court that the termination of the employee's services was mala fide, was perverse and contrary to the material on record and so should have been quashed; and (c) that in the circumstances of the case the direction of the Labour Court that the employee should be reinstated and that he should be given half the wages for the back period have been passed without a proper application of the mind to the relevant legal criteria and, Therefore, illegal and liable to be quashed. We shall consider these arguments one by one.

(6) At the outset we may point out that the question whether the employee is a workman or not is not a pure finding of fact. It is a mixed question of fact and law. In arriving at a conclusion the Labour Court has to first address itself to the various duties assigned to the workman and then draw a conclusion of law as to whether in the light of the duties assigned to him the employee would be a workman within the meaning of Section 2 (s) of the Act or not. Moreover, the very jurisdiction of the Labour Court to make an award in the dispute would depend upon a correct finding as to whether he is a workman or not. In other words this is a jurisdictional issue to be decided by the Tribunal, i.e., the Labour Court before it can assume jurisdiction to make an award in the dispute. The difference between the scope of judicial review of a jurisdictional fact and a finding of fact on the merits of the case has been explained by earlier decisions of this Court. Deshpande J. (as his lordship then was) in *Delhi Transport Corporation v. Delhi Administration and others* 1973 2nd I Delhi 838 (4) pointed out the above difference and took the view that a finding of a Tribunal on a jurisdictional fact would be fully reviewable and that in reviewing such a finding the High Court can arrive at an independent conclusion, but that, in reviewing a fact within the jurisdiction of a Tribunal, the High Court can act only if the finding is either baseless, i.e., not supported by any evidence at all or is perverse, i.e., is such as no reasonable person would arrive at but not otherwise. These observations have been referred to in *Kirloskar Brothers Ltd. v. Labour Court* 1977 (34) Flr 286 .(5) However, Anand J. in *Toshniwal Bros. (P) Ltd. v. Delhi Administration etc.*, 2nd (1976) 60 Delhi 548 (6), while agreeing that the decision of such Tribunal on jurisdictional as well as on collateral facts is subject to review by the High Court, observed that in regard to the decision of the Tribunal on a jurisdictional fact, the High Court will interfere only. if there is no evidence to support the decision at all or if the decision is one which the Tribunal

duly instructed in law could not arrive at on the existing material, and that if the Tribunal has taken a view on the material which is a possible view to take it would not be open to the High Court to interfere or to embark on a judicial enquiry to see if the decision on the balance of evidence could be sustained or not. It is not necessary for the purposes of this case to examine whether the scope of review of a jurisdictional fact is as broad as stated by Deshpande J. or whether it is somewhat restricted as suggested by Anand J. as, even on an independent appraisal of the evidence, we are in agreement with the view taken by the Labour Court on this issue.

(7) On the above question the main argument of the learned counsel for the management was that he was not a workman because he was a salesman. His appointment order dated 9th August, 1962 described him as a salesman and general assistant. On 20th October, 1954 in reply to a memo issued by the company the employee had stated that "my regular duty as a salesman is only to attend customers on the counter". It is pointed out that the witnesses of the management, namely, the Manager and the Chief Accountant, had given evidence to show that the employee concerned, like other salesmen, showed the cloth to the customers and made the sales and that they neither measured the cloth nor prepared samples nor lifted the cloth in and out of the shelves. The Chief Accountant also stated that the employee used to canvass the customers and make sales and that it was incorrect to say that he maintained any account of stock. In the face of this evidence, it is submitted, the Labour Court had erred in observing that the employee did not canvass for sales, that he measured the cloth or that he packed it. It is, Therefore, contended that the duty of the employee was that of canvassing for sales which was not manual, technical or clerical work but was work which required application of mind and initiative. But in our opinion, an employee cannot be taken out from the category of a workman merely because he is described as a salesman. There are salesman and salesmen and the question in each case will have to be decided with reference to the special facts and circumstances thereof. In the case of Western India Match Co. Ltd. Vs. Their Workmen, the question arises in regard to the employees who were described as "Inspectors ,salesmen and retail salesman"" of the company at its factories. But it was found as a fact by the Tribunal that writing work took up 75 % of the time of these categories of the sales staff and the Supreme Court did not interfere with the finding of the Tribunal that the staff in question were workmen. Again sales engineering representatives and district sales representatives have been held to be workmen in the Burmah-Shell Oil Storage and Distribution Co. case. On the other hand in the May and Bakar case (supra), it was found that the employees' main work was that of canvassing and any clerical or manual work that he had to do was incidental to his main work of canvassing and could not take more than a small fraction of the time for which he had to work and, Therefore, it was held that he was not a workman. In the case of Muller Phipps (India) Ltd. VI For 171 the Labour Appellate Tribunal took the view that salesman who work on fixed pay and not on commission and who

sell goods, give cash mem

(8) On behalf of the employer, it is urged that the employee did no other work except to canvass sales. He made the sales, wrote out the bills, and passed on the bills to the cashier for payment and perhaps sometimes got the money from the customers also and paid it to the cashier. The employee himself stated in his evidence that he "used to go to the offices to display the cloth". The principal work done by the employee was. it is said that of a salesman pure and simple and some little clerical or manual work he did (even assuming that sometime when a peon was not present he lifted the cloth to and from the shelves or even measured the cloth) would not make him a workman. We are not sure whether even a person whose duty is only to sell at the counter in a cloth shop can be excluded from the category of workmen and whether his duties, on analysis, are not merely manual or clerical. It is, however, unnecessary to consider this wider question for the purposes of this case, as the evidence on record here shows that affecting sales was only a secondary and, perhaps occasional, duty discharged by the employee. Even his order of appointment describes him as a "salesman and general assistant". The Chief Accountant explained this as meaning that he could be transferred from one counter to another "to assist the sale". It, Therefore, appears that the employee was not principally a salesman for if that were so, the question of his moving from counter to counter to assist at sales could not arise. The employee in his evidence stated that "his duties were to receive the goods, enter them into the stock register after actual measurement, place the price labels on the cloth, put the pieces on the shelves and prepare the bills and challans of Government dispatches along with the estimates". He added that "if there was time still I sold the cloth at the counter and prepared the cash memo and deposited the cash with the cashier". There was no question put to the witness in the course of the cross-examination to contradict these statements. It, Therefore, appears that the job of the employee was concerned not so much with sales at the counter but with various other duties of a clerical and manual nature. Though the Chief Accountant of the company generally stated that the employee concerned did not maintain any accounts of stock, he did not specifically deny the correctness of the version given by the employee that he received the goods and entered them in the stock register. On the contrary, he admitted some portion of what was stated by the work man, namely, that when new pieces of cloth were received, they were measured under the supervision of the salesman and that the salesman used to mark the yardage on the pieces. Again, many of the sales of the company were to Government and other parties and estimates, bills and challans had to be prepared in respect of these transactions. I he Chief Accountant admitted that when goods were sent by the management outside Delhi, the challans were prepared by the salesman. Similarly when any customer demanded a sample of cloth, it had to be sent to him. Sometimes, as the Chief Accountant stated, the sample was sent with peons or tailors and sometimes the employee was also sent there with samples and so these visits to offices and factories occasionally cannot be described as a

part of salesmanship. Taking into account all the circumstances we are in agreement with the finding of the Tribunal that the main duties of the employee were manual or clerical in nature though it does appear that he was also assisting at sales as and when there was time. If, as contended for on behalf of the employee, it is not open to us to appraise the entire evidence ourselves, it is clear that the finding of the Labour Court on this issue has been arrived at on a consideration of the relevant material and cannot be described as baseless or perverse. We, Therefore, reject the first contention on behalf of the management.

(9) We now come to the second contention regarding the validity of the order of termination of the services of the employee. The Labour Court has approached this issue in its two aspects, one put forward by the workman and the other by the management. The workman had alleged in his statement filed before the Labour Court that though he had been in the employment of the management for about six years, the management chose to discharge him at short notice because he had been elected as secretary of the union, as the management did not approve of his trade union activities and it had been following a policy of victimisation. The management had claimed that his services were terminated bona fide because he was not found to be a satisfactory worker and his continued retention in service was not considered desirable in view of certain circumstances which will be adverted to later. The Labour Court has accepted the former and rejected the latter. Both these aspects have to be examined.

(10) We are of the opinion that the finding of the Labour Court that there was victimisation in the present case is not based on any material. The principles in this regard are well settled. Victimisation is a serious charge by an employee against an employer and must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet them. The onus of establishing a plea of victimisation will be upon the person pleading it. The mere fact that there is an employees' union and that the concerned employee is a member or an active office-bearer is not sufficient to establish a plea of victimisation. Mere allegations, vague suggestions and insinuations are not enough to establish a plea of victimisation (see *Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others*, . The fact that the relations between the employer and the employee are not happy and the workman was an active union member would by itself be no evidence to prove victimisation *Bengal Bhatdee Coal Co. Vs. Ram Prabesh Singh and Others*, . Again, it would be difficult to infer victimisation when there is no evidence on record to show that there was any strained relationship between the employee and the employer because of former's union activities (*Brooke Bond case 19661 LlJ 462* .

(11) Applying the above principles to this case, we are of opinion that the employee has failed to establish any case of victimisation at all. Some emphasis has been laid on the employee's evidence that he became the secretary of the union in October 1978 and that immediately, or soon thereafter the Managing Director called him and told him that he will have to go because he had become

the secretary of the union and the fact that the Managing Director himself did not go into the witness box and deny having said so. Counsel for the appellant invited our attention to the following observations of the Supreme Court in *Balmer Lawrie & Co. case* (1964 I Lj 380)(11) at 385 which seem to be opposite :

" THE tribunal took the view that since Sircar was not cross-examined on the question as to whether any of the said four firms are comparable to the respondent's concern, the plea of the appellants that the said firms are comparable must be rejected, in our opinion, the reason given by the tribunal in rejecting the appellant's claim is wholly unsatisfactory and the approach adopted by it in dealing with this matter inappropriate. In dealing with industrial matters, industrial adjudication should not normally encourage technical pleas and having regard to the fact that the cases are conducted before the tribunal many times by laymen, the significance or the importance of the argument that a particular question is not put to a particular witness should never be exaggerated."

That apart, we do not think that much importance can be attached to this lapse on the part of the management to put the Managing Director in the witness box, because the management's cross-examination of the workman and his other witnesses, clearly show that they challenged the very foundation of the above statement of the workmen. Their case in cross-examination was that there had been no meeting in October 1978, that there had been no election of the workmen as secretary and that the company, at any rate, had no information of any such election. The Labour Court reached the finding that the employee had been elected secretary of the union merely because there was some evidence to show that he had been previously working as the auditor of the union. But in reply to the relevant questions on these aspects in cross-examination the workman expressed his inability to produce any agenda of the meeting at which the election was held or any document to show that he was elected as secretary. Even assuming that there was no written record maintained of the election he was unable to produce even a copy of the letter by which he had informed the management in writing that he had become the secretary. He could not say who succeeded him as the secretary of the union. There was also a material contradiction between the workman and his other witness W.W.2 regarding the date of the alleged election. While the employee deposed that the election had taken place on 12-10-68, WW-2 stated that the election was in June 1968 and that the workman had been turned out by the management ten to fifteen days thereafter. According to him no President or Vice-President for the union was elected and only the employee had been elected secretary. The evidence on record, Therefore, throws genuine doubts about the workman's case that he had become the secretary of the union. That apart, assuming, as held by the Labour Court, that the employee had been an office bearer of the Union for several years and he had been allowed to continue in service, it is difficult to understand why the management should have asked him to resign or leave the employment merely because he became the secretary. There is no evidence that there was

any serious confrontation between the union and the management at any point of time. The only allegation of the worker in his evidence was that the management wanted to finish off an award made in 1963-64 under which the workers got bonus and increment, but the employee himself admitted in cross-examination that bonus had been given to the employees for 1963-64 and 1964-65 on the basis of a compromise. It is, Therefore, not clear why the mere election of the employee as the secretary (even assuming it to be true) should have induced the management to dispense with his services. There is nothing to indicate that after becoming the secretary, the employee had indulged in certain activities or made certain demands on behalf of union which displeased the management. In the course of his evidence the worker also alleged that the union had been formed in 1963 with 47 members but that, when he left the service there were only seven because the others were turned out. He also alleged and in this he was also joined by W.W.2 that before him five employees who were elected secretaries of the union were sacked by the management. But in the course of the cross-examination he was not able to sustain these allegations. He stated that he could not produce the letters of dismissal of the five secretaries. This one could not perhaps expect him to do but he also stated that their cases were before labour courts and were compromised. A little later he stated that some of the secretaries had resigned and that there had been an enquiry against one of them. W.W.3, who claimed to be the Joint Secretary previously, stated to have been asked to go because of his union activity, admitted in cross-examination that he had not informed the management about his becoming joint secretary, that he had been retrenched and that he did not raise any dispute about the termination of his services. He referred to two persons whose services had been dispensed with by the management. Of these, he admitted that R.N. Malhotra was sick and he did not know when he left. He admitted that the other, S.C. Gupta, was not working with him and he did not know if he had received a letter of termination. W.W.4 stated that one Mohd. Shariff" who had been an active member of the union had been asked to go but this was as far back as in 1963. He also stated that SherSingh who was President had been asked to resign or leave but he did not know what he did. His services had been terminated according to him because he was a member of the union but he raised no dispute because he got a better job. He also referred to the termination of the services of one R.N. Malhotra, who he stated, had gone for conciliation but it is not known what happened thereafter. Thus, it will be seen, the allegation that five secretaries had been asked to leave for their union activities is absolutely unsubstantiated. Equally vague and wide was the allegation of W.W. 1 & W.W. 2 that the size of the union had dwindled because active members were asked to go out. W.W.3 in fact states that he was one of the people retrenched in 1964. The evidence indicates that various people had left at various points of time for different reasons but none had raised any industrial dispute at any time. In the total absence of anything to indicate that the union had raised any difficulties or that there was any strained relationship at any time, it becomes impossible to accept the very bare allegations made by

these witnesses. Reading the evidence of the witnesses on behalf of the workman, one cannot escape the conclusion that there is no evidence at all about the policy of victimisation alleged to have been followed by the employer. Apart from vague statements there is nothing to show in what circumstances some of the members or office-bearers of the union left the firm. In the case of some of them the termination was by way of retrenchment. In the case of some of the secretaries it was by way of resignation and in one or two of the cases there was either an enquiry or conciliation proceedings about the outcome of which nothing is shown. Some had left because they got better jobs. We are Therefore, of opinion that the allegations of victimisation are very vague and unsupported by evidence. One can understand a management victimizing an officer of the trade union where he is found to have been very active and putting forward embarrassing demands or otherwise making himself a thorn in the side of the management. In the present case the employee had been connected with the union, even according to him, from the very inception. No particular outstanding problem between the management and the union and no particular activity of the employee or the other members of the union which might have irked the management is brought out. We have referred to the evidence at some length just to show that the Labour Court has completely ignored substantial and relevant portions of the evidence and come to a conclusion on the issue of victimisation which it could not reasonably have arrived at. That finding, in our opinion, has to be, Therefore, quashed.

(12) In coming to its conclusion on the aspect put forward by the management the Labour Court has been influenced by its finding on the question of victimisation. We shall, Therefore, first consider this aspect, of the matter independently and then see what impact the allegations of victimisation will have thereon. The management led evidence to show that the order of termination was the result of such persistent conduct on the part of the workman as rendered it necessary to terminate his services, it was pointed out that in the course of the few years during which the employee was in their service, he had been in the habit of over staying his leave. Very often he went on casual leave to Amritsar and then used to obtain extensions on one pretext to other. In July, 1966, during the busy period of stock taking, he had gone away from duty for twelve days though the casual leave available to him was only to the extent of 7-1/2 days. In May 1968 he went on casual leave and then overstayed the leave by four days. When he came back he asked for extension pleading the illness of his wife and sought for privilege leave again for 10th and 11th June, 1968. The management (granted the extension and leave pointing out his lapses, told him to be careful in future and warned him that any further repetition would entail action without any leniency. In spite of this the employee who went on three days casual leave from 31st October to 2nd November 1968 reported for duty only on 7th November, 1968, after sending a telegram requesting extension of leave by two days. The management, in view of the previous history of the case, called for an Explanation. This was found to be vague and unsatisfactory and he

was asked to give a more detailed Explanation. In the mean time on 8th November, 1968 he had left his show room at 12.55 P.M. with permission for five minutes to meet some friends but did not return till lunch time. He was called upon to explain this also. In response to these notices for Explanation the employee took up a strange attitude. Taking advantage of the fact that the employer's notices had been issued on the letter head of M/s. Guptajee, he wrote what can only be described as an impertinent reply on 13th November, 1968. By this reply he called for a series of clarification from the management : (a) whether he was an employee of the company or of M/s. Guptajee or of both the firms; (b) whether the management could quote any statutory provision by which an incorporated company could be the proprietor of a registered firm: and (c) whether his provident fund contributions were being made by the company or the firm. He also stated that on receiving these clarifications he would place the matter before his legal counsel for appropriate drafting. Apparently, annoyed by this letter, the management terminated the services on 14th November, 1968. It is in the context of these circumstances that the order of termination has to be considered.

(13) It is not in dispute that there is a contractual right in an employer to terminate the services of an employee. If the employee is covered by the Delhi Shops & Establishment Act (as he is here) this cannot be done without giving one month's notice or wages in lieu thereof (vide Section 30). However it has been held in a large number of judicial decisions, in the context of an ostensible termination of the services of a temporary Government servant, that the court can be behind the tenor of the order and, if it is found in fact that the foundation of the order was an allegation of some misconduct of the employee. for which he is sought to be punished, the court can interfere and enforce the safeguards available to such a person under article 311 of the Constitution. The same principle would equally apply in the like context in industrial law and it will be open to the parties to urge that what purports to be a simple order for termination is really an order passed by way of dismissal for alleged misconduct without going through the procedure of an enquiry or an order which is otherwise liable to challenge on grounds of malafides. victimisation, unfair labour practice or the like. These propositions are not in dispute before we and, as rightly pointed out by Mr. Ramamurthy, cases show that the basic question for consideration in such cases is whether the action is bona fide or colourable and it could be said to be colourable if the step has been taken to avoid the consequences of an enquiry with the safeguards implied therein.

(14) We are unable to see any material on which the Labour Court could come to the conclusion that the termination of services was malafide. The Labour Court has said that if the management had complaints against the workman it should have instituted disciplinary proceedings against the employee. Mr. Ramamurthy also supports this line of reasoning. However we do not think that that is the correct approach in this case. It ignores the basic difference between a case of misconduct and a case of dissatisfaction with the overall performance of a

worker. As pointed out by the Supreme Court in *Air India, Corporation v. Rebellow* (1972-1 SC814)(12) while it is true that the employer cannot "hire and fire" workman on the basis of an unfettered light under the contract of employment, there is also, on the other hand, no provision like Article 31 of the Constitution requiring consideration in the case of an industrial workman. So long as the order is bona fide, it is open to the employer to dispense with the services of his employee without assigning any reason therefore. No doubt, there must always be a reason but it can clearly fall short of misconduct for the imputation of which an enquiry is called for. Such reason may, inter-alia be want of full satisfaction with the overall suitability or the overall result of the performance of his duties by the employee. Once there is a bona fide loss of confidence or once the opinion formed by the employer about the unsuitability of the employee for the job even though erroneous, is bona fide, it is final and not subject to review. Such opinion may legitimately induce the employer to terminate the employee's services : but such termination can on no rational grounds be considered to be for misconduct. This is clearly a case of that type. The employer did not want to make any charge of misconduct against the employee : all that they said was that they did not need his services any longer. The antecedent facts set out earlier on which we need not expatiate clearly show that they had a bona fide reason for this and whether their decision was right or wrong, their action is not open to challenge. As we have already said to a large extent the Labour Court was influenced by its conclusion on the question of victimisation and we have already held that this finding cannot be sustained. But, even assuming that there were certain activities on the part of the employee on behalf of the Union and that the employer was not happy because of these activities, can this be said to vitiate the order of termination where it is passed in the sequence of the events which we have set out earlier.

(15) If an employer does not like to continue an employee who shows consistent indifference to work and discipline and gets annoyed when he is asked to give an Explanation he cannot be said to be unjustified. A more sympathetic employer may have given the employee more chances to improve, but if he thinks that enough is enough this decision cannot be interfered with on grounds of malafides. That being so can an employee claim any better right merely because he happens to be an office bearer of the Union? In this context, the following observations of the Supreme Court in the *The Tata Engineering and Locomotive Co. Ltd. Vs. S.C. Prasad and Another*, are quite opposite :

".. . .those officers had reported that Dubey was terror in that division and that it. was not in the interests of the company to retain him in its service. In these circumstances it is manifestly wrong to say that the company acted mala fide or to victimise Dube because he was a leading member of the dissident group. To hold as would be tantamount to saying that even if an employer were to be satisfied that it was prejudicial to the interests of his concern to continue a workman in his service merely because that workman was an active union worker the order of discharge against him must be deemed to be mala fide or

passed to victimise him. Certain workers who had participated in communal riots were, it is true, reinstated after some time while Dubey in spite of his applications was not. But from this fact it would not follow that the management had the intention to victimise him or that the order of discharge was a colourable exercise of the power to discharge under the standing orders."

(16) We, Therefore, do not think that malafides or victimisation can be attributed to the order of termination passed in the above context of the employee's behavior. There is no material to support the inference that in the present case the order of termination was passed by the management malafide either with a view to avoid a departmental enquiry for misconduct or with a view to victimise an employee because of his legitimate "trade union activities". The order of the Labour Court setting aside the order of termination has, Therefore, to be quashed.

(17) In view of our above conclusion, it is not necessary to discuss in detail the issues of reinstatement and the entitlement of the employee to back wages fully or in part. Normally, we would have quashed the order of the Labour Court ordering the reinstatement of the workman as a logical consequence and allowed the employer's appeal. However, a difficulty has arisen in adopting this course on account of a last-minute stand taken up by Mr. Ramamurthy on behalf of the workman. He seeks leave to take up a fresh ground that the termination of the employee's service amounts to "retrenchment" within the meaning of Section 2 (00) of the Industrial Disputes Act, 1947 and that since the retrenchment has been affected without fulfilling the conditions precedent stipulated Therefore in Section 25 of the above Act, the same is illegal and deserves to be set aside. In order to appreciate the argument it is necessary to refer to Sections 2(00) and 25 F. Section 2(00) reads :

"2(00)"Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include

(A)voluntary retirement of the workman; or

(B)retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(C)termination of the service of a workman on the ground of continued ill-health:"

Section 25 F is in the following terms :

"25-F.Conditions precedent to retrenchment of workmen. No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until

(A)the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman

has been paid in lieu of such notice, wages for the period of the notice :

PROVIDED that no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service;

(B)the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days" average pay for every completed year of continuous service or any part thereof in excess of six months; and

(C)notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

While clause (c) is only directory and can be treated as a condition subsequent (see *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*,), the other two clauses embody conditions precedent (See *Delhi Cloth and General Mills v. B.M. Mukherjee* 1978 1 Lj 1, S.C. (15) , the non-compliance with which will invalidate the retrenchment. In this case, the employee has been given the wages in lieu of notices under clause (a) but has not been paid the compensation under the clause (b) and this invalidates the retrenchment order vide : *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, . It is contended that, the factual position being clear from the order of termination itself, we should hold the order to be invalid for non-compliance with the provisions of Section 25 F.

(18) On merits, the contention is clearly well-founded. Though there were some doubts earlier as to whether, notwithstanding the generality of the language of Section 2(00) and the exclusion from its purview of only four types of orders of termination, the expression should not be given a somewhat narrow connotation, the matter has now been settled authoritatively. It is sufficient to extract a portion of the headnote from *Santosh Gupta v. State Bank of India* (1980-2 Lj 72x17):

"If the definition of "retrenchment" is looked at unaided and unhampered by precedent, one is at once struck by the remarkably wide language employed and particularly by the use of the words "termination....for any reason whatsoever". The definition expressly exclude termination of services as a "punishment inflicted by way of disciplinary action". The definition does not include, so it expressly says, voluntary retirement of a workman or retrenchment of the workman on reaching the age of superannuation or termination of the service of the workman on the ground of continuous ill-health. Voluntary retirement of a workman or retrenchment of the workman on reaching the age of superannuation can hardly be described as termination, by the employer of the service of a workman. Yet the Legislature took special care to mention that they were not included within the meaning of "termination by the employer of the service of a workman for any reason whatsoever".

IF due weight is given to the words "the termination by the employer of the

service of a workman for any reason whatsoever" and if the words "for any reason whatsoever" are understood to mean what they plainly say, it is difficult to escape the conclusion that the expression "retrenchment" must include every termination of the service of a workman by an act of the employer. The underlying assumption, of course, is that the undertaking is running as an undertaking and the employer continues as an employer but where either on account of transfer of the undertaking or on account of the closure of the undertaking the basic assumption disappears, there can be no question of "retrenchment" within the meaning of the definition contained in S. 2(00). This came to be realised as a result of the decision of the Court in Hariprasad Shivshankar Shukla v. A.D. Divikar (1957) S.C.T. 121. The Parliament then stepped in and introduced Ss. 25FF and 25FFF by providing that compensation shall be payable to workman in case of transfer of undertaking or closure of undertaking as if the workmen had been retrenched, we may rightly say that the termination of the service of a workman on the transfer or closure of an undertaking was treated by parliament as "deemed retrenchment". The effect was that every case of termination of service by act of employer even if such termination was a consequence of transfer or closure of the undertaking was to be treated as "retrenchment" for the purpose of notices, compensation etc. Whatever doubts might have existed before Parliament enacted Ss. 25FF and 25FFF about the width of S. 25F, there cannot be any doubt that the expression "termination of service for any reason whatsoever" now covers every termination of service except those not expressly included in S. 25F or not expressly provided for by other provisions of the Act such as Ss. 25FF and 25FFF."

The court followed *The State Bank of India Vs. Shri N. Sundara Money, and Hindustan Steel Ltd. v. Labour Court* 1977-1 Scr 556(19) and distinguished certain other decisions. This argument being unassailable learned counsel turn the company took up the objection that the workman should not be allowed to take this contention at this late stage. He points out that, if this objection had been raised at the initial stages it could have been remedied by suitable action and that, if it is only the question of compensation that worries the workman the company is quite ready and willing to pay the requisite amount to him. On the other hand, on behalf of the workman, it is pointed out that he has also preferred a writ petition and an appeal and that a purely legal contention like this had been allowed to be raised at a late stage in both *Delhi Cloth & General Mills* and *Santosh Gupta*, referred to earlier. It was also contended, alternatively, that he should be allowed to use this argument (if not to get greater relief) at least to support or sustain the order of the Labour Court the validity of which is herein impugned as he is also the respondent in the employer's appeal.

(19) After having considered the pros and cons of these arguments and the interests of justice, we are of opinion that the alternative argument of the learned counsel for the workman should be allowed to prevail. We have earlier pointed out that the appeal filed by the workman was defective and that he has not complied with the direction of this court in this regard. That apart, even in

this appeal, he had only taken the point that the termination of his services having been held to be unjustified he is entitled to reinstatement with full back wages. The validity of the termination order was not challenged on the ground of non-compliance with Section 25 F. The order of the Labour Court was passed in March 1971 and there is force in the employer's contention that, if this ground had been raised even then, the employer could have set the position right by immediate appropriate action. In these circumstances, we do not think that the workman should be allowed to raise this point after such a long time to get a relief which he has not got so far. At the same time, there is force in the plea of Mr. Ramamurthy, that the workman should not be deprived of his rights as a respondent in the company's appeal. He should, we think, be entitled to contend that despite our conclusion on the validity of the order of termination, we should allow to retain the relief granted to him under the order of the Labour Court. In other words, though he cannot make use of this argument to seek reinstatement and full back wages, as if there had been no termination at all, he must succeed in his plea that the order of the Labour Court and the Learned single judge to the extent they are in his favor should not be upset.

(20) For the above reasons, Therefore, we are of opinion that both the Letters Patent Appeals before us should be dismissed and we direct accordingly. We also make order as to costs.

(21) Before parting with the case, we would like to record our appreciation of the able and lucid arguments of Mr. Raj Birbal who argued the case for the company in the absence, for some time, of Dr. Anand Prakash and also the objective and fair presentation of the point of view of the workman by Mr. K.S. Ramamurthy who appeared as "legal aid" counsel in the matter.