

(2006) 08 RAJ CK 0040
In the Rajasthan High Court
Case No : Civil Writ Petition No. 6716 of 1993

Rajendra Singh

APPELLANT

Vs

Labour Court and Another

RESPONDENT

Date of Decision : 22-08-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 309
Industrial Disputes (Central) Rules, 1957 — Rule 76, 77, 78
Industrial Disputes Act, 1947 — Section 11A, 2, 25F, 25FF, 25FFF
Mines and Geology Department work Charged Employees (Service Conditions) Order, 1974 — Rule 26, 27(6), 28

Citation : (2006) 4 RLW 3342

Hon'ble Judges : P.S. Asopa, J

Bench : Single Bench

Advocate : Poornima Sharma, for the Appellant; B.L. Avashti, Dy. GA, for the Respondent

Judgement

P.S. Asopa, J.—By the instant writ petition, the petitioner has challenged the award dated 25.8.1993 passed by the Labour Court, Bharatpur whereby the reference has been answered in negative.

2. The State Government referred the following dispute to the Labour Court for adjudication, which is as follows:

D;k [kfut vfHk;Urk] lokbZ ek/kksiqj }kjk vius Jfed Jh jktsUnzflag vkRet Jh jkedj.k] [kfu j{kd ?fuoklh bZljnk ftyk lokbZ ek/kksiqj? dks fnukad 4-3-86 ls fd;k lsok ls i`FkDdj.k mfpr ,oa oS/k gS\\

3. Briefly stated the relevant facts of the case are that the petitioner was appointed as Mines Guard on 2.1.1973. The petitioner has continuously worked as such till 4.3.1986 when his services were terminated after giving notice on the ground that he remained absent on 16.5.1985 & 17.5.1985 without giving any prior application and further notice of remaining absent without sanction of leave for which he was punished on earlier occasions, thus, he was habitual of availing

leave without sanction. On receipt of notice, the petitioner gave his explanation that when he was on duty, he received a message from the passenger of the Bus going towards Sawai Madhopur that his daughter is seriously ill and he had been called to the village, therefore, without giving any application he went to his village for treatment of his daughter. Further case of the petitioner is that he also fell ill, of which medical certificates were submitted on 18.5.1985 on joining the duties. The said facts have been taken by the department as contradictory facts and his earlier absence has also been taken in consideration and he has been removed under Rule 27(6) of the Mines and Geology Department work Charged Employees (Service Conditions) Order, 1974 (hereinafter to be referred as "the Order of 1974"). The petitioner has raised the dispute before the Conciliation, Officer. On submission of failure report, ultimately, his case was referred to the Labour Court, Bharatpur where it was registered as LCR 1/88.

4. The Labour Court, Bharatpur heavily relied on the Order of 1974 and held that services have been rightly terminated under Rule 26(e) read with Rule 27(6) after following procedure prescribed under Rule 28 with the further finding that the reasons given by the appellant for sanction of leave on account of illness of his daughter does not inspire confidence as the petitioner himself has thereafter given the certificate of his illness and considering past conduct of absence without getting leave sanctioned for which he was punished also, he is guilty of misconduct of habitual absence. The Labour Court, further held that the procedure followed for punishment of removal is in accordance with law.

5. In this particular case, in the order of termination dated 4.3.1986, in the last it has been mentioned that the petitioner is habitual of remaining on leave without getting sanction for which he had been punished on earlier occasions, but his said misconduct had not reduced and the same had increased. The Labour Court has also considered the earlier misconduct and gave a finding that he is habitual in remaining absent without sanction of leave. The Labour Court in para 3 & 4 of the its award dated 25.8.1993 referred the action taken by the Management in accordance with the procedure prescribed under Rule 28 for the misconduct under Rule 26(e) and passing of the order under Rule 27(6) of the Order of 197, and in the end of the said para, the Labour Court has given the finding that thus, in its opinion, the notice was given to the petitioner according to the said service rules and opportunity of hearing was also given, therefore, the order passed is in accordance with relevant service rules. Further in para 4, the Labour Court has held that the reason of leave given by the worker is contradictory and his services have been terminated after following the procedure in accordance with the law, which is valid. The Labour Court has further given the finding that the workman is guilty of misconduct. The another important aspect ignored by the Labour Court is that the petitioner was appointed on 2.1.1973 and his services were terminated on 4.3.1986, thus, he was having more than 13 years of service to his credit and the present punishment order is the result of the initiation of explanation notice of explaining his absence on 16.5.1985 & 17.5.1985. The para No. 3 & 4 of the award dated

25.8.1993 are as follows:

3 mijksDr Isok "krZ fu;e ds fu;e 26 bZ esa ;g izkof/kr gS ;fn deZpkjh vknru vuqifLFkr fcuk vodk"k jgrk gS rks ;g nqjkpj.k gksxkA fu;e 28 esa naMkns"k ikfjr djus dh izf;k of.kZr dh xbZ gS ftlds vuqlkj deZpkjh dks fyf[kr esa nqjkpj.k ds rF;ksa dh lwpuk nsuk ,oa izLrkfor dk;Zokgh dh lwpuk nsuk rFkk deZpkjh dks mRrj nsus dk volj iznRr djuk ,oa izdj.k esa izkFkhZ dks uksfVI fnukad 10-6-85 ,oa 30-9-87 fn;k x;k A izkFkhZ us fnukad 25-7-85 dks uksfVI dk mRrj Hkh izLrqr fd;k ijUrq ckn esa fn;s x;s uksfVI fnukad 30-9-88] ftlesa iwoZ esa izkFkhZ vknru fcuk vodk"k Lohd`r vuqifLFkr jgk o mldks psrkouh nh xbZ ,oa fcuk osru vodk"k Lohd`r fd;k x;k ,oa osru o`f) jksdh xbZ] ds rF;ksa dk Hkh iw.kZ fooj.k vafdr fd;k ijUrq izkFkhZ bl uksfVI esa of.kZr rkjh[k dks mifLFkr ugha vk;k ,oa dksbZ mRrj izLrqr ugha fd;k A rRi"pkr~ vkns"k }kjk IsokeqfDr dh xbZ A vizkFkhZ i{k us iwoZ esa izkFkhZ ds fo:) psrkouh vkns"k] fcuk osru vodk"k Lohd`r vkns"k ,oa osru o`f) jksdus dk vkns"k Hkh izLrqr fd;s gS A bl izdkj esjh jk; esa mijksDr Isok fu;eksa esa izkof/krkuqlkj izkFkhZ dks uksfVI fn;k x;k vkSj mls lquokbZ dk volj Hkh fn;k x;k A vr% izkFkhZ ds fo:) ikfjr vkns"k bu fu;eksa ds izko/kkuksa ds vu:i gS A

4- izkFkhZ us tks dkj.k vpkud fcuk vodk"k Lohd`r dj;k;s tkus dk crk;k gS og Hkh ekuus ;ksX; ugha gS D;ksafd Lo;a izkFkhZ us ckn esa viuh Lo;a dh chekj dh izkFkZuk i= is"k dj fn;k A bl izdkj izkFkhZ Lo;a dk dFku fojks/kkHkklh gSa A esjh jk; esa izkFkhZ dh IsokeqfDr fof/kor izf;k vkiuk dj dh xbZ gS tks mfpr gS rFkk miyC/k vfHkys[k ls izkFkhZ vknru vuqifLFkr jgus ds nqjkpj.k dk nks"kh gS A izkFkhZ dks iwoZ esa psrkouh Hkh nh xbZ ,oa naMkns"k Hkh fn;k x;k fdUrq fQj Hkh izkFkhZ us viuk dksbZ lq/kkj ugha fd;k A ,slh fLFkfr esa IsokeqfDr dk naMkns"k mfpr izrhr gksrk gS A

6. The respondents have not filed any reply and further contested the writ petition orally by supporting the judgment of the Labour Court and placing reliance on the Order of 1974.

7. The submission of counsel for the petitioner is that services of the petitioner have been terminated on the ground of habitual absentee, which is a misconduct and further casts stigma, therefore, the regular domestic enquiry was necessary, but without giving any charge sheet, taking reply to charge sheet, without appointing any enquiry officer and further without allowing him to produce evidence in defence etc., the said order of termination has been passed. The further submission of counsel for the petitioner is that the Order of 1974 has not been framed while exercising any statutory power nor the same has been passed in accordance with the Industrial Employment (Standing Order) Act, 1946, therefore, the same is nothing, but administrative in nature. The procedure prescribed for imposing penalty under Rule 28 without conducting enquiry is violative of basic principle of imposing of the punishment after disciplinary action which could have only been in accordance with the principle of natural justice as well as principle of reasonable, just and fair procedure. He further submits that in case of punishment on the ground of misconduct, which casts stigma, the

principle of natural justice was required to be followed by giving the reasonable opportunity to defend in a domestic enquiry. He also submits that principle of natural justice are inbuilt in Article 14 of the Constitution of India which prohibits the respondents from acting in an arbitrary manner. The alternate submission of the counsel for the petitioner is that in case the present case is not taken as a case of misconduct then the same is the case of retrenchment and removal is violative of Section 25-F of the Industrial Disputes Act, 1947.

8. Counsel for the respondents have drawn my attention to Rule 26(e), 27(6) & 28 of the Order of 1974, according to which, only explanation is necessary and no enquiry is required to be conducted, but the counsel for the respondents has not been able to point out under which provision the aforesaid Order of 1974 has been promulgated. Further, he has placed reliance on the covering page of the Order of 1974 wherein also there is no mention of any source of statutory power for enactment of the same or preparing the same under the standing order prescribed under the Industrial Employment (Standing Orders) Act, 1946.

9. I have gone through the record of the case and Order of 1974 produced by the counsel for the respondents and further considered the rival submissions of the parties.

10. Before proceedings further, it would be useful to quote covering note dated 20.2.1975, relevant provisions of Order of 1974 and other provisions of law.

Covering Note dt. 20th February, 1975:

GOVERNMENT OF RAJASTHAN

DIRECTORATE OF MINES AND GEOLOGY

RAJASTHAN UDAIPUR

No. DMG/Estt/8/F./805/72-73/93 Dated the 20th Feb. 75 The Mines and Geology Department work-Charged Employees (Service Conditions) Order, 1974, as enclosed with this order are hereby issued which shall be deemed to have come into force with effect from 15th February, 1975. These orders shall apply to all work men employed in this Mines & Geology Department, Government of Raj. On work-charged basis except those whose terms of services are regulated by the Rajasthan Service Rules, classification Control and Appeal Rules and other rules framed under Article 309 of the Constitution of India or where separate Standing Orders or Model Standing Orders are applicable on account of Statutory Obligations.

SD/-

(A.C. Mitter.)

Director of Mines and Geology,

UDAIPUR

THE MINES AND GEOLOGY DEPARTMENT WORK-CHARGED EMPLOYEES (SERVICE CONDITIONS) ORDER, 1974

PART VII DISCIPLINE:

Rule 26. Conduct and Discipline:

The following acts and commissions on the part of employees shall be treated as misconduct:

- (a) Theft, fraud or dishonesty in connection with the employer's business or property or the theft of the property of other staff or workman within the premises of the employer's establishment.
- (b) willful insubordination or disobedience whether alone or in combination with others to any lawful or reasonable order of a superior.
- (c) willful damage to or loss of employer's goods or property.
- (d) Taking or giving bribes or illegal gratifications.
- (e) habitual absence without leave or absence without leave for more than ten days.
- (f) Habitual breach of any law applicable to the establishment or department.
- (g) Habitual late attendance.
- (h) Riotous or disorderly behaviour during working hours at the establishment or department or any act sub-versive of discipline.
- (i) Habitual negligence or neglect or work including sleeping during working hours.
- (j) willful slowing down in the performance of work; or loitering during the duty hours.
- (k) Disclosing to an unauthorised person any information in regard to the process of the establishment or department which may come into the possession of the employee in the course of his work.
- (l) Gambling in the premises of the establishment or the department.
- (m) Striking work or inciting others to strike work in contravention of the provisions of any law or rules having the force of law for the time being in force.
- (n) Drinking or being found drunk during working hours at the establishment.
- (o) Action against the security of the state.
- (p) Holding meetings in the premises of the establishment without permission of the Officer-in-charge.

Rule 27. PENALTIES:

The following penalties may, for goods and sufficient reasons, be imposed on an employee, namely;

1. Censure
2. Withholding of increments or promotion.
3. Recovery from pay of the whole or part of any pecuniary loss caused to the employer by negligence or breach of any law.
4. Suspension for a period not exceeding 14 days at a time (without being entitled to any wages).
5. Deduction to a lower post or grade.
6. Removal from service which shall not be disqualification for future employment.
7. Dismissal from service which shall be a disqualification for future employment.

Rule 28. Procedure for imposing penalties:

- (i) An order imposing any of the penalties specified in clauses (5)(6) and (7) of the clause 27 shall be passed except after;
- (ii) The employee is informed in writing, where possible to do so, of the proposal to take action against him, and of the allegations on which it is proposed to be taken.
- (iii) The employee is, as far as possible given an opportunity to explain the circumstances surrounding the allegations against him.
- (iv) Such explanation, if any, has been taken into consideration; provided that no person shall be dismissed from service without the orders of the competent authority.

Provide further that it shall not be necessary to follow the procedure prescribed herein where the head of the department is satisfied that it would be prejudicial to the security of the state.

(2) An order in writing referred to in sub clause (1) above shall take effect immediately on delivery to the employee, and in the event of the refusal by the employee to accept delivery of the said order served upon him, the affixing of the name on a notice board of the establishment will be deemed to be sufficient service on him.

THE INDUSTRIAL DISPUTE ACT, 1947

2. Definitions

2 (oo) "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

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation on that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health;

11A. Powers of Labour Court, Tribunal, and National Tribunal 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 the 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 materials on record and shall not take any fresh evidence in relation to the matter.

11. A bare perusal of Section 2(oo) of the I.D. Act of 1947 would reveal that retrenchment means the termination by the employer of the services of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action and then further exception has been provided. Thus, main Section itself exclude termination of service as punishment inflicted by way of disciplinary action from the ambit of retrenchment, but the question whether a particular termination is retrenchment or is by way of punishment in a disciplinary action would depend upon the facts and circumstances of each case. In the present case, the show cause notice for explaining the absence of 16.5.1985 & 17.5.1985 was given along with proposed action and subsequently, another notice was given for consideration of the past conduct of remaining on leave without sanction for which the punishment of warning, leave without pay and withholding of increment was inflicted, therefore, it is a case of punishment which is also evident from the Rule 26(e), 27(6) & 28 and the case of management through out is that the punishment order has been passed for the misconduct as per Order of 1974, therefore, same would not be covered by the definition of retrenchment.

12. The Supreme Court in case State of Punjab Vs. Jagir Singh, held that

termination of services of the workman concern for misconduct, Section 25-F would not apply. The relevant para 11 of the said judgment is as follows:

11. It is not in dispute that the workman did not perform any duty since 2.5.1979. The Labour Court made its award only on the ground that before issuing the order of termination dated 3.8.1979, no disciplinary proceeding was held in terms of the Punjab Civil Services (Punishment and Appeal) Rules and furthermore the mandatory requirements of Section 25-F of the Industrial Disputes Act, 1947 were not complied with. The findings of the Labour Court are inconsistent and selfcontradictory. If the services of the workman were terminated for misconduct, the question of payment of any retrenchment compensation or service of any statutory notice would not arise. The question of compliance with the provisions of Section 25-F of the Industrial Disputes Act would arise, if the services of the workman concerned were terminated on a ground other than misconduct.

13. The Supreme Court has also in case L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another, held that automatic discharge from service by striking off the name from the roll under the agreement would nonetheless be retrenchment, therefore, termination of service for unauthorized absent from the duties amounts to retrenchment and it is obligatory on the part of the Management to comply with the mandatory provisions of Section 25-F. The relevant para 5 & 7 of the said judgment are as follows:

5. At the outset it must at once be pointed out that the construction put by the Full Bench of the Kerala High Court on the expression "retrenchment" in Section 2(oo) of the Act that it means only the discharge of surplus labour or staff by the employer for any reason whatsoever is no more good law and in fact the decision of the Full Bench of Kerala High Court in L. Robert D'Sourza v. Executive Engineer, Southern Railway, has been specifically overruled by this Court in Santosh Gupta v. State Bank of Patiala. This Court has consistently held in State Bank of India v. N. Sundara Money, Hindustan Steel Ltd. v. Presiding Officer, Labour Court, and Delhi Cloth and General Mills Ltd. v. Shambhu Nath Mukherji, that the expression "termination of service for any reason whatsoever" now covers every kind of termination of service except those not expressly included in Section 25-F or not expressly provided for by other provisions of the Act such as Sections 25-FF and 25FFF. It was attempted to be urged that in view of the decision of this Court in Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union, the ratio of which was reaffirmed by a Constitution Bench of this Court in Hariprasad Shivshankar Shukla v. A.D. Divikar, all the later decisions run counter to the ratio of the Constitution Bench and must be treated per in-curaim. This contention need not detain us because first in Hindustan Steel Ltd. Case, then in Santosh Gupta case and lastly in Mohan Lal v. Bharat Electroics Ltd., it was in terms held that the decision in Sundara Money Hindustan Steel Ltd. v. Presiding Officer, Labour Court, and Delhi Cloth and General Mills Ltd. v. Shambhu Nath Mukherji, that the expression "termination of service for any reason whatsoever"

now covers every kind of termination of service except those not expressly included in Section 25-F or not expressly provided for by other provisions of the Act such as Sections 25FF and 25FFF. It was attempted to be urged that in view of the decision of this Court in *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union*, the ratio of which was reaffirmed by a Constitution Bench of this Court in *Hariprasad Shivshankar Shukla v. A.D. Divikar*, all the later decisions run counter to the ratio of the Constitution Bench and must be treated per incuriam. This contention need not detain us because first in *Hindustan Steel Ltd. Case*, then in *Santosh Gupta case* and lastly in *Mohan Lal v. Bharat Electroics Ltd.*, it was in terms held that the decision in *Sundara Money case* was not at all inconsistent with the decision of the Constitution Bench in *Hariprasad Shukla case* and not only required no reconsideration but the decision in *Sundara Money case* was approved in the aforementioned three cases. This position is further buttressed by the decision in *Delhi Cloth and General Mills Ltd. Case* wherein striking off the name of a workman from the rolls was held to be retrenchment, it is, therefore, the settled law that the expression "termination of service for any reason whatsoever" in the definition of the expression "retrenchment" in Section 2(oo) of the Act covers every kind of termination of service except those not expressly included in Section 25-F or not expressly provided for by other provisions of the Act such as Sections 25-FF and 25-FF. Two things thus emerge, firstly, that the decision of the Full Bench of Kerala High Court under appeal has been specifically overruled by this Court in *Santosh Gupta case* and secondly, in view of the decision in *Delhi Cloth and General Mills Ltd. Case* striking off the name of a workman from the rolls without anything more constitutes retrenchment within the meaning of the expression "retrenchment" in Section 2(oo). This emerging legal position alone would be sufficient for us to allow the appeal and set aside the decision of the Kerala High Court.

7. As we are not prepared to examine the contention over again, the submission of Mr. Francis that "retrenchment" contemplates some overt act on the part of the employer, that it inheres the principle of last come first go which again requires an overt act on the part of the employer; that when retrenched workmen are required to be re-employed, first option for reemployment has to be given to the retrenched workmen, which necessitates some overt act on the part of the employer, would be beside the point and of no relevance and significance. The reference to Rules 76, 77 and 78 of the Industrial Disputes (Central) Rules, 1957, does not advance his case a step further. The definition of expression "retrenchment" in Section 2(oo) construction. Therefore, we adopt as binding the well-settled position in law that if termination of service of a workman is brought about for any reason whatsoever, it would be retrenchment except if the case falls within any of the excepted categories i.e. (i) termination by way of punishment inflicted pursuant to disciplinary action; (ii) voluntary retirement of the workman; (iii) 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; (iv) or termination of

the service on the ground of continued ill health. Once the case does not fall in any of the excepted categories the termination of service even if it be according to automatic discharge from service under agreement would nonetheless be retrenchment within the meaning of expression in Section 2(oo). It must as a corollary follow that if the name of the workman is struck the rolls that itself would constitute retrenchment, as held by this Court in Delhi Cloth and General Mills Ltd. Case. We specifically refer to this case because the fact in the case before us are on all fours with the facts in the aforementioned case and on parity of reasoning and Judicial comity the same conclusion must follow unless something to the contrary is indicated. In that case respondent S.N. Mukherji who was recruited as a labourer came to be promoted in course of time of the post of Motion Setter. On October 1, 1964, pursuant to some reorganisation in the establishment the post of Motion Setter was abolished. The Management offered employment to respondent S.N. Mukherji on any other suitable post, which was indicated to be the post of Assistant Line Fixer (Assistant Grade I) without loss of wages. He was to be on probation. The Management found him unsuitable for this post even after extending the period of probation by nine months and therefore offered him post of Fitter on the same pay which he, as a Motion Setter, used to get. The response of S.N. Mukherji to this offer was that he should be given a further opportunity to show his efficiency in his job and if he fails to improve, he would tender his resignation voluntarily. The Management did not reply to the letter with the result that the workman did not report for work at the newly offered post. On January 19, 1966, the Management wrote to the workman that his name has been struck off from the rolls with effect from August 24, 1965, for continued absence without intimation. Such termination of service was held to be covered by the expression "retrenchment" and it was struck down on the ground that the pre-condition to valid retrenchment was not complied with. It would thus appear that it is consistently held by this Court that termination of service for any reason whatsoever except the excepted categories would constitute retrenchment within the meaning of the expression in the Act. And here recall the order of termination of service of the appellant wherein it is stated that: "You have absented yourself unauthorisedly from September 18, 1974 and hence your services are deemed to have been terminated from the day you have absented yourself.." Is any other conclusion possible save and except the one recorded by this Court in Delhi Cloth and General Mills Ltd. case that this constitutes retrenchment and for non-compliance with pre-condition, it is invalid.

14. In the same case, the Supreme Court has also held that if the absence without leave constitute misconduct then it is not open to the employer to terminate the services without notice and enquiry or at any rate without complying with the principle of natural justice. Para 22 of the same is as follows:

22. Once it is held that by operation of statutory rule in the Manual the appellant had acquired a status of temporary railway servant and assuming, as contended by M. Francis, that the termination of service in the circumstances alleged does

not constitute retrenchment *stricto sensu*, would the termination be still valid? The answer is an emphatic No. On the admission of the Railway Administration, service was terminated on account of absence during the period appellant was on fast. Absence without leave constitutes misconduct and it is not open to the employer to terminate service without notice and enquiry or at any rate without complying with the minimum principle of natural justice. Further, Rule 2302 clearly prescribes the mode, manner and methodology of terminating service of a temporary railway servant and admittedly the procedure therein prescribed having not been carried out, the termination is void and invalid. Accordingly, the same conclusion would be reached even while accepting for the purpose of the facts of this case simultaneously rejecting it in law that the termination does not constitute retrenchment yet nonetheless it would be void and inoperative.

15. In a case *Chandu Lal Vs. Management of Pan American World Airways Inc.*, it was held by the Supreme Court that termination of service on the ground of loss of confidence is stigmatic in character and does not amount to retrenchment, but holding of domestic enquiry is a condition precedent, termination on such ground without domestic enquiry is illegal. The relevant para 8 of the said judgment is as follows:

8. It is difficult to agree with the finding of the Labour Court that when service is terminated on the basis of loss of confidence the order does not amount to one with stigma and does not warrant a proceeding contemplated by law preceding termination. Want of confidence in an employee does point out to an adverse facet in his character as the true meaning of the allegation is that the employee has failed to behave up to the expected standard of conduct which has given rise to a situation involving loss of confidence. In any view of the matter this amounts to a dereliction on the part of the workman and, therefore, the stand taken by the Management that termination for loss of confidence does not amount to a stigma has to be repelled. In our opinion it is not necessary to support our conclusion by reference to precedents or textual opinion as a common sense assessment of the matter is sufficient to dispose of this aspect. "Retrenchment" is defined in Section 2(oo) of the Industrial Disputes Act and excludes termination of service by the employer as a punishment inflicted by way of disciplinary action. If the termination in the instant case is held to be grounded upon conduct attaching stigma to the appellant, disciplinary proceedings were necessary as a condition precedent to infliction of termination as a measure of punishment. Admittedly this has not been done. Therefore, the order of termination is vitiated in law and cannot be sustained.

16. The Supreme Court in case *Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others*, held that in case the termination of service on account of misconduct which casts stigma then also even if enquiry does not precede the stigmatic order, the termination would not become bad if the employer justifies its stand in adjudication before the Labour Court. The relevant para 10 of the same is as follows:

10. Retrenchment as defined in Section 2(oo) of the Industrial Disputes Act and as held by this Court in several cases means termination of service for any reason whatsoever otherwise than punishment inflicted by way of disciplinary action and the other exceptions indicated therein. In the present case though no formal domestic inquiry had been held, the employer took the stand in the adjudication that termination was grounded upon loss of confidence and substantiated that allegation by leading evidence. The legal position firmly established is that if there has been no appropriate domestic enquiry or no enquiry at all before disciplinary action is taken, it is open to the employer to ask for such opportunity in the course of adjudication. In the facts of this present case, the order of separation grounded upon loss of confidence has been justified before the Labour Court and the Labour Court has come to that conclusion upon assessment of the evidence.

17. The Constitutional Bench per majority in case Delhi Transport Corporation v. DTC Mazdoor Congress and Ors. 1991 (Suppl. 1) SCC 600 held that termination of the services of a workman giving one month's notice or pay in lieu thereof without enquiry offend Article 14.

18. The Supreme Court in a case D.K. Yadav Vs. J.M.A. Industries Ltd., has followed the aforesaid judgment of Constitutional Bench and held that automatic termination under certified Standing Orders for absence without or beyond the period of sanctioned leave for more than 8 days is violative of principle of natural justice and further duty had been imposed to act in a just, fair and reasonable manner as well as in accordance with Article 14 & 21 of the Constitution of India. In the said case, the Industrial Tribunal found that the action of the Management is in accordance with the Standing Order, therefore, the workman is not entitled for reinstatement. The Supreme Court in para 12, 13 & 14 has elaborately discussed the principle of natural justice, principle of fair play, Article 14 & 21 as held by aforesaid Constitutional Bench and further held that the termination of the services of a workman giving one month notice or pay in lieu of notice without enquiry offend Article 14 and in para 15 has ultimately held that principle of natural justice must be read into the Standing Order No. 13 (2)(iv), otherwise it would become arbitrary, unjust and unfair violating the Article 14 and when so read the impugned action is violative of principle of natural justice. The para 8, 12, 13, 14, 15 & 16 are as follows:

8. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned person.

12. Therefore, fair play in action requires that the procedure adopted must be

just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allegoric to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable.

13. In *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress* this Court held that right to public employment and its concomitant right to livelihood received protective umbrella under the canopy of Articles 14 and 21 etc. All matters relating to employment include the right to continue in service till the employee reaches superannuation or until his service is duly terminated in accordance with just, fair and reasonable procedure prescribed under the provisions of the Constitution and the rules made under proviso to Article 309 of the Constitution or the statutory provisions or the rules, statutory flavour. They must be conformable to the rights guaranteed in Parts III and IV of the Constitution. Article 21 guarantees right to life which includes right to livelihood, the deprivation thereof must be in accordance with just and fair procedure prescribed by law conformable to Articles 14 and 21 so as to be just, fair and reasonable and not fanciful, oppressive or at vagary. The principles of natural justice are an integral part of the guarantee of equality assured by Article 14. Any law made or action taken by an employer must be fair, just and reasonable. The power to terminate the service of an employee/workman in accordance with just, fair and reasonable procedure is an essential ingredient of natural justice. Article 14 strikes at arbitrary action. It is not the form of the action about the substance of the order that is to be looked into. It is open to the Court to lift the veil and gauge the effect of the impugned action to find whether it is the foundation to impose punishment or is only a motive. Fair play is to secure justice, procedural as well as substantive. The substance of the order is the soul and the effect thereof is the end result.

14. It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice. In *D.T.C. v. D.T.C. Mazdoor Congress* the Constitution Bench, per

majority, held that termination of the service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article 14. The order terminating the service of the employees was set aside.

15. In this case admittedly no opportunity was given to the appellant and no inquiry was held. The appellant's plea put forth at the earliest was that despite his reporting to duty on December 3, 1980 and on all subsequent days and readiness to join duty he was prevented from reporting to duty, nor was he permitted to sign the attendance register. The Tribunal did not record any conclusive finding in this behalf. It concluded that the management had power under Clause 13 of the Certified Standing Orders to terminate with the service of the appellant. Therefore, we hold that the principles of natural justice must be read into the Standing Order No. 13(2)(iv). Otherwise it would become arbitrary, unjust and unfair violating Article 14. When so read the impugned action is violative of the principles of natural justice.

16. This conclusion leads us to the question as to what relief the appellant is entitled to. The management did not conduct any domestic inquiry nor gave the appellant any opportunity to put forth his case. Equally the appellant is to blame himself for the impugned action. Under those circumstances 50 per cent of the back wages would meet the ends of justice. The appeal is accordingly allowed. The award of the Labour Court is set aside and the letter dated December 12, 1980 of the management is quashed. There shall be a direction to the respondent to reinstate the appellant forthwith and pay him back wages within a period of three months from the date of the receipt of this order. The appeal is allowed accordingly. The parties would bear their own costs.

19. In the similar circumstances, this Court in a case *Nathu Ram Saini v. Hindustan Copper Ltd. and Anr.* reported in 1995(1) LLJ 421 has held that absence from duty is itself a misconduct. Single notice given to the workman cannot be equated with the enquiry in accordance with the principle of natural justice. The relevant para 20 & 21 of the same are as follows:

20. So far as the present case is concerned, it is clearly established from the record that the petitioner had rendered over 17 years of service before being removed from service by way of striking off his name from the rolls. The respondents have not come forward with the case that the petitioner was a casual or an ad hoc or a temporary employee appointed for fixed term. After having rendered 17 years of service the petitioner has been thrown out of employment without compliance with the requirements of Section 25-F. The provisions of Section 25-F have been held to be mandatory in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, . It has also been held that consequence of termination of service brought about in violation of Section 25-F is that the employee continues to be in service as if his service had never been terminated. In a large number of cases it has been held that effect of violation of Section 25-F is that the order of termination is rendered void, non est and inoperative. A lucid exposition of law on the subject can be

found in a Division Bench decision of this Court in Udaipur Mineral Development Syndicate Pvt. Ltd. v. M.P. Dave 1975 1 ILLJ 499.

21. Even otherwise, the termination of the service of the petitioner is unsustainable. The petitioner has been removed from service on the charge of having remained unauthorisedly absent from duty. Absence from duty is by itself a misconduct. Therefore, before the termination of service of the petitioner could have been brought about on the allegation of unauthorised absence from duty, it was incumbent on the respondents to have made an inquiry by giving a charge sheet to the petitioner and by holding an enquiry into the allegations of misconduct. Simple notice given to the petitioner that if he does not specifically explain his absence, he will lose his job cannot be equated with an enquiry held in accordance with the principles of natural justice. Giving of a specific charge-sheet and recording of finding of guilt ought to have preceded the valid termination of service of the petitioner for his alleged absence. In *L. Robert De Souza's* case (supra), their Lordships of the Supreme Court declared that termination of service of the petitioner for absence without leave amounts to misconduct and since no inquiry was held, termination of the workman was liable to be quashed on the ground of violation of the principles of natural justice.

As a result of the above discussion, it is held that:

(i) termination of service of the petitioner with effect from August 29, 1984 by way of striking off his name from the rolls of the company amounts to "retrenchment" u/s 2(oo);

(ii) the provisions of Section 25-F have not been complied with and, therefore, the termination of the service of the petitioner is void ab initio.

20. Similar view has been taken by the Andhra Pradesh High Court in case of *P. Ramesh Babu v. Andhra Pradesh State Road Transport Corporation* and Anr. 1994 Lab I.C. 1199 and *Smt. Nanda R. Rao Standing Counsel APSRTC v. Sri G. Vidya Sagar* 2001 (4) LLN 895.

21. As regard his case is concerned, the termination of service is for availing the leave without sanction of this time and earlier occasions was taken as habitual absentee, which is a misconduct casting stigma on the services of the petitioner, therefore, in such type of cases giving of simple notices will not meet the requirement of principle of natural justice and regular enquiry is necessary.

22. According to Rule 27 of the Order of 1974, there are 7 penalties, out of which the procedure has been prescribed for penalty No. 5, 6 & 7. Here in the instant case, penalty No. 6 removal from service was inflicted on the petitioner. Penalty No. 5, 6 & 7 clearly reveal that the said penalties have been taken as major penalties. Otherwise also, in all the service rules, such penalties have been described in the category of major penalty. On the basis of same analogy, other penalties are minor penalties. As per Rule 28(ii) procedure for imposing of penalty, the employee is required to be informed in writing of the proposed

action to be taken against him and all the allegations on which it was proposed to be taken. As per Rule 28(iii), an opportunity to explain the circumstances surrounding the allegation against him is to be given and after consideration of the said circumstances, as per Rule 28(iv), penalty is to be imposed. The habitual absence is a misconduct which casts stigma on the services of the petitioner and for which the penalty of removal has been imposed, therefore, the domestic enquiry in accordance with the principle of natural justice is essential. Where a show cause notice for proposed penalty is to be given and then after consideration of explanation, the penalty is to be imposed, is the last stage of the enquiry, but there is no provision for;

- (a) issuing charge sheet to ask the delinquent to file reply;
- (b) after consideration of reply, Disciplinary Authority is to decide whether enquiry is to be dropped or initiate;
- (c) if enquiry is to be initiated, the enquiry officer is to be appointed and then Presenting Officer be appointed, an opportunity to appoint the defence nominee is to be given to the workman;
- (d) documents be allowed to be inspected or supplied on demand;
- (e) then the department may be asked to prove the charge by producing either oral or documentary evidence,
- (f) if oral then right of cross examination is to be given to workman;
- (g) right to produce oral as well as documentary evidence, if oral evidence then right to cross examine to the Management and
- (h) right to receive the copy of the enquiry report and submit the explanation.

The aforesaid steps are the part of principle of natural justice as well as reasonable, just and fair procedure which has been held to be inbuilt part of Article 14 & 21 of the Constitution of India.

23. The up shot of the above discussion is that the Supreme Court and other High Courts as well as this Court has held that automatic termination/striking off the name from the roll after simple notice or pay in lieu of notice or without notice as per Standing Order for absence beyond a certain period is retrenchment and compliance of Section 25-F of the I.D. Act is necessary. Simultaneously, it was also held that the willful absence/availing leave without getting the sanction/over staying the leave and termination on the same ground is misconduct casting stigma for which domestic enquiry as per principles of natural justice which are part of Article 14, is required to be conducted. The termination/removal/dismissal was held invalid and the workmen were reinstated either by High Court or Supreme Court. Here in the instant case, the facts are slight different. The case of the Management through out is that the services of petitioner were terminated on account of misconduct after seeking explanation and consideration of the same. Thereafter, notice for consideration of past

conduct was also issued and considered as per Order of 1974. The said Order of 1974 as detailed out hereinabove deals with the last stage of the domestic enquiry and not the earlier stage from the memo of charge sheet to enquiry report as indicated above, therefore, the same is violative of principle of natural justice as well as reasonable, just and fair procedure to be adopted in accordance with the Article 14 & 21 of the Constitution of India. The Supreme Court in case of D.K. Yadav (supra) after following the Constitutional Bench judgment has held that before taking any action putting an end to the tenure of an employee/workman, fair play require that a reasonable opportunity to put forth his case be given in a domestic enquiry conducted complying with the principle of natural justice and principle of natural justice must be read into Standing Order (13.2 iv.), otherwise it would become arbitrary, unjust and unfair violating Article 14 when so read the impugned action is violative of principle of natural justice.

24. In the instant case, admittedly no domestic enquiry was conducted and I am of the view that giving simple two notices will not fulfill the requirement of the principle of natural justice and just, reasonable and fair procedure to be adopted to put an end and tenure of an employee.

25. In view of above, the order of termination is held to be violative of principle of natural justice, just, reasonable and fair procedure which is required to be read into Rule 28 of the Order of 1974, otherwise, the Order of 1974 would become arbitrary, unjust and unfair so also the action.

26. The present writ petition was earlier dismissed in limine on 23.11.1993 by Single Bench and an appeal was filed before the Division Bench, which was registered as DB Special Appeal (W) No. 544/1994. The Division Bench while remanding the matter on 21.1.2004 to Single Bench observed that prima facie, we are satisfied that even if it is taken that the appellant has committed the alleged misconduct of remaining absent wilfully, the punishment of his dismissal from the services appears to be disproportionate and this aspect of the matter has not been considered by the learned Labour Court as well as learned Single Judge. The relevant paragraph of the Division Bench judgment dated 21.1.2004 is reproduced hereunder:

Having gone through the award of the learned Labour Court, prima facie, we are satisfied that even if it is taken that the plaintiff appellant has committed the alleged misconduct of remaining absent wilfully, the punishment of his dismissal from the services appears to be disproportionate. This aspect of the matter has not been considered by the learned Labour Court as well as by the learned Single Judge. The learned Single Judge by passing a non-speaking order dismissed the writ petition in limine. In case the order of the learned Single Judge is allowed to stand, it will occasion failure of justice to the petitionerappellant.

27. The Labour Court has lost sight of the fact that the workman was having more than 13 years of service and the first notice was of explanation of two days leave without sanction for which the explanation was also given by the petitioner

that he has gone to his village on hearing that his daughter is not well from the Bus passenger and thereafter submitted leave application of his own illness of said two days, but which version was correct is also a subject matter of domestic enquiry, which was admittedly not held. Normal rule in case of no enquiry and defective enquiry in case of charge of misconduct leveled against the workman, is to remand the matter to Labour Court/Industrial Tribunal as the case may be, but here in this case, exceptional circumstances exist to decide the case finally by this Court on the basis of material on record, which are as follows:

(1) The termination order was passed in this case on 4.3.1986 i.e. more than 20 years ago.

(2) The reference was answered in negative by the Labour Court and the present writ petition was filed against the award of the Labour Court and was dismissed on earlier occasion in limine on 23.11.1993. On filing of DB special appeal by the workman, the matter was remanded to the Single Bench to consider the issue of disproportionate punishment even if it is taken that the plaintiff appellant has committed the alleged misconduct of remaining absent wilfully.

(3) Even if now the matter is further remanded to the Labour Court for enquiry in respect of termination order passed 20 years ago, it would also not be proper because the parties will not be in a position to either prove or disprove the charge on account of long lapse of time.

(4) The litigation will be further prolonged and increased the mental agony of the workman by start of fresh inning. The workman who was

39 years old at the time of filing of writ petition in 1993 is presently of 54 years of age may attain superannuation age of 60 years.

(5) No material is available on record that the respondent State has taken objection in its reply to the claim to prove the charge before the Labour Court, in case the enquiry is held to be not fair.

(6) Material on record includes some of the undisputed facts like; earlier two minor punishments; conversion of leave without pay; availing of two days leave without application etc.

In view of above, remand will not be in the interest of parties and justice.

28. Thus, I deem it proper to decide the case finally on the basis of material on record to save the time, trouble and more expenses which will be incurred by the parties in the further litigation. The Supreme Court in case of Federation of Small and Medium Industries and Anr. etc. v. Their Workmen and Ors. 1972 LAB I.C. 1275 has considered the fact of long lapse, more expenses and trouble to the parties on account of remand and decided the matter finally without remanding the case. The relevant portion of para 4 of the said judgment is as follows:

4... Under such circumstances, the proper thing would have been to remit the matter for reconsideration to the tribunal. But, as so many years have elapsed

and as a remand will only entail more expenses and trouble to the parties concerned, we ourselves have considered the matter in the light of the material on record. On such materials, we have come to the conclusion as to what would be a reasonable basis to be adopted in the matter of fixing wages and dearness allowance.

29. Section 11-A of the Industrial Disputes Act, 1947 was inserted by Act No. 45 of 1971 and was made effective from 15.12.1971. The said section gave a discretionary power to the Labour Court/Industrial Tribunal and National Tribunal to give any lesser punishment in case of discharge or dismissal. Prior to enactment of said Section 11-A, the Supreme Court has interfered with the punishment in case Hind Construction and Engineering Co. Ltd. Vs. Their Workmen, when the same was found shockingly disproportionate on the ground of victimisation, malafide and unfair labour practice. Subsequent to the enactment of Section 11-A, the Supreme Court has held that power conferred on the Industrial Tribunal/Labour Court is to be exercised judiciously and not capriciously and arbitrarily and the said power is also available to the High Court under Article 226 of the Constitution, though, it was qualified with the limitation that while seized with this question as a writ court, interference is permissible only when the punishment/penalty is shockingly disproportionate. In other words, it can be said that no reasonable employer would ever impose in like circumstance, inflict such punishment. The Supreme Court in a case, where the Labour Court has interfered u/s 11-A, of a Conductor, who had been in a drunken state demanded money from the Assistant Cashier and on his refusal abused and threatened to assault him, has held that Labour Court acted arbitrarily and capriciously in awarding the lesser punishment in such type of serious misconduct. The Supreme Court further held in many cases that in case of embezzlement, using abusive language and assault on a senior official/ subordinate official etc., the order of reinstatement passed by the Labour Court u/s 11-A is not justified and the same is misplaced sympathy. Power of Industrial Tribunal or the Labour Court or the High Court to interfere with the quantum of punishment is, no longer, *res integra*. The aforesaid position of law has been explained by the Supreme Court in case U.P. State Road Transport Corporation Vs. Subhash Chandra Sharma and Others, . The relevant para 6 of the same is as follows:

Whether it is open to the Industrial Tribunal or the Labour Court or the High Court to interfere with the quantum of punishment is, no longer, *res integra*, as the question has been answered by this Court several times in its various decision. In B.C. Chaturvedi v. Union of India a three-Judge Bench of this Court has held that Section 11-A of the Industrial Disputes Act, 1947 confers power on the Industrial Tribunal/Labour Court to apply its mind on the question of proportion of punishment or penalty. It was held that this power is also available to the High Court under Article 226 of the Constitution, though it was qualified with a limitation that while seized with this question as a writ court, interference is permissible only when the punishment/penalty is shockingly disproportionate.

Again, a three-Judge Bench of this Court in *Colour-Chem Ltd. v. A.L. Alaspurkar* relying upon an earlier decision in *Hindi Construction & Engg. Co. Ltd. v. Workmen* laid down as under:

Consequently it must be held that when looking to the nature of the charge of even major misconduct which is found proved if the punishment of dismissal or discharge as imposed is found to be grossly disproportionate in the light of the nature of the misconduct or the past record of the employee concerned involved in the misconduct or is such which no reasonable employer would ever impose in like circumstances, inflicting of such punishment itself could be treated as legal victimisation.

30. In a latest judgment three Judges Bench of Supreme Court in case of *Mahindra and Mahindra Ltd. Vs. N.B. Naravade etc.*, , has held that discretion by the Labour Court can be exercised in case of penalty disproportionate to the gravity of misconduct, existence of any mitigating circumstances, past conduct which may persuade the Labour Court to reduce the punishment. The relevant para 20 of the said judgment is as follows:

It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the Labour Court/ Industrial Tribunal in interfering with the quantum of punishment awarded by the management where the workman concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to hereinabove and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised u/s 11-A is available only on, the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which require the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot be way of sympathy alone exercise the power u/s 11-A of the Act and reduce the punishment. As noticed hereinabove at least in two of the cases cited before us i.e. *Orissa Cement Ltd.* and *New Shorrock Mills* this Court held: "Punishment of dismissal for using of abusive language cannot be held to be disproportionate." In this case all the forums below have held that the language used by the workman was filthy. We too are of the opinion that the language used by the workman is such that it cannot be tolerated by any civilised society. Use of such abusive language against a superior officer, that too not once but twice, in the presence of his subordinates cannot be termed to be an indiscipline calling for lesser punishment in the absence of any extenuating factor referred to hereinabove.

31. The Labour Court has justified the punishment of removal on the ground that the stand taken by the workman regarding his absence of two days is contradictory and further there are two punishments of warning and withholding one grade increment without cumulative effect and one leave without pay, but

has ignored the aspect that the petitioner workman was having 13 years of service and earlier two minor punishments and one conversion of leave without pay and further absence of two days without leave application are taken together then also the cumulative effect of all the aforesaid misconduct was of minor nature, is not of so much magnitude, which will convert misconduct into gross misconduct of habitual absentee and warrants major punishment of removal and further no reasonable employer would ever impose In such circumstances, the punishment of removal, therefore, the Labour Court has acted arbitrarily in not invoking the power of Section 11-A judicially in favour of workman. The present case is not of gross/grave misconduct and imposing of the punishment of removal on a workman having 13 years of service in respect of minor nature of misconduct as stated above, is shockingly disproportionate to the gravity of the charge leveled against the petitioner, therefore, it is a fit case for invoking the power u/s 11-A of the I.D. Act, 1947.

32. In the aforesaid facts and circumstances, I am of the view that ends of justice would be met in case the petitioner is reinstated and 50% back wages be withheld by way of penalty.

33. Considering all the above mentioned aspects of the matter, the writ petition is partly allowed. The termination order dated 4.3.1986 is quashed and the award dated 25.8.1993 passed by the Labour Court is modified to the extent that the petitioner be reinstated with 50% back wages and all other consequential benefits.