
(1997) 03 BOM CK 0062

In the Bombay High Court

Case No : Writ Petition No. 3131 of 1991

Sylvester and Co.

APPELLANT

Vs

Their Workman and Another

RESPONDENT

Date of Decision : 03-03-1997

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 10(1), 11A, 2, 25F

Citation : (1997) 4 BomCR 585

Hon'ble Judges : S.H. Kapadia, J

Bench : Single Bench

Advocate : J.P. Cama, instructed by K.P. Anil Kumar, for the Appellant; S.M. Dharap, for the Respondent

Final Decision : Dismissed

Judgement

S.H. Kapadia, J.—By this writ petition, petitioner seeks to challenge the Award dated 1-9-1989 being Part-I Award as also Part-II Award dated 1-2-1991 in Reference CGIT-2/55 of 1987.

2. The facts giving rise to this petition, briefly, are as follows:-

3. Petitioner is a partnership firm carrying on business of clearing and forwarding, exporters and importers, shipping and also as commission agents. R.G. Gaikwad - workman (Respondent No. 1) was employed as dock clerk on and from 1-10-1978. Respondent No. 1 was required to go to Docks in connection with the work of clearing and forwarding. He was appointed as a dock clerk. His services were terminated with effect from July 1, 1986. He, thereafter, approached the Union which requested the Company to reinstate the workman but the Company refused to do so and, therefore, the Union raised an industrial dispute u/s 10 of the Industrial Disputes Act before the Central Government Industrial Tribunal by way of Reference CGIT-2/55 of 1987. Before the Tribunal, respondent No. 1 contended that the Company had terminated his services for acts of misconduct without holding a domestic inquiry and in the circumstances

the termination was illegal and bad in law. The workman contended that the termination was an abrupt termination. The workman contended that vague allegations were made against him vide letter dated 27-6-1986 and no domestic inquiry was held and no opportunity was given to the 1st respondent to defend himself before taking steps to punish him with the order of termination of his services. Respondent No. 1 worked for eight years. His services have been terminated on the ground of loss of confidence. The workman contended before the Tribunal that no specific charges were levelled against him and no domestic inquiry of any kind was held against him and in the circumstances the workman contended that the termination of his services with effect from July 1, 1986 was illegal and bad in law. On the other hand, the petitioner - Company filed its Written Statement alleging that respondent No. 1 was indulging in activities which could cause loss to the company. According to the Written Statement, respondent No. 1 had committed acts of fraud, cheating and insubordination and despite ample opportunities being given to the 1st respondent, he did not improve. On the contrary, he became arrogant and negligent which caused financial losses to the Company and which also caused loss of reputation to the Company. According to the petitioner, large number of instances of misconduct and negligence on the part of respondent No. 1 compelled the petitioner to discharge his services by way of simple discharge. In the Written Statement, petitioner alleged that respondent No. 1 was guilty of misbehaviour as enumerated in the reports submitted by the Officers to the Company and no useful purpose would have been served by holding a domestic inquiry as such inquiry would not have been conducive to the functioning of the Company. According to the Written Statement, the termination was not by way of punishment and no stigma was attached to the worker but since the Company had lost confidence in the 1st respondent, the Company terminated his services by way of simple discharge. According to the Written Statement, no domestic inquiry was necessary nor was such a domestic inquiry conducive to the proper and effective functioning of the Company. According to the Written Statement, the conduct of respondent No. 1 was far from satisfactory and when the Company found that he was not improved, both with regard to his style of work as well as his conduct, the Company had no option to terminate his services by way of simple discharge. In the Written Statement, the Company pleaded that it was relying upon the warning letters and also evidence showing the misconduct of the workman in discharge of his duties as a dock clerk and that the Company was ready and willing to establish the misconduct/dereliction in duties/fraud and misappropriation and also misuse of the funds by respondent No. 1. According to the Company, therefore, the services of the workman came to be terminated not by way of punishment but by way of simple discharge.

4. By Part-I Award, the Central Industrial Tribunal found that the appropriate Government u/s 2(a) of the Industrial Disputes Act was the Central Government and, therefore, Reference fell within the jurisdiction of the Central Government Industrial Tribunal. In this connection, the 1st respondent led evidence in support

of his claim that he was employed as a dock clerk and the business activities of the Company required him to perform his duties in the Bombay Port. According to the Industrial Tribunal, the Reference concerns an employee who has worked as a dock clerk in the petitioner - Company which was carrying on business of clearing and forwarding, importers and exporters and also as commission agents. According to the Industrial Tribunal, respondent No. 1 has proved before the Tribunal that in connection with the work of clearing and forwarding, he was required to go into the Dock area to do the work in connection with the activities of clearing and forwarding. Even according to the Company, respondent No. 1 was required, at times, to work in the Dock area. In the circumstances, the Industrial Tribunal found that the respondent No. 1 was a dock worker and that the reference in question fell within the jurisdiction of the Central Industrial Tribunal. No evidence was led in rebuttal by the Company. The Central Government Industrial Tribunal further found that, over the years, even the petitioner entered into Settlements with the Union in the presence of Assistant Labour Commissioner (Central) which also proved that, even according to the Company, the appropriate Government was the Central Government. In the circumstances, the Industrial Tribunal found that the reference in question fell within its jurisdiction.

5. On merits, Industrial Tribunal gave Part-II Award. By the said Award, the Industrial Tribunal found that, in the present matter, the Company has terminated the services of respondent No. 1 by way of simple discharge. That no retrenchment compensation was given by the Management to the 1st respondent. That the respondent No. 1 was not paid wages in lieu of notice for one month and in the circumstances termination of the services of the workman by the Management was invalid and, therefore, the Industrial Tribunal directed reinstatement in service with full back wages and continuity of service. The Tribunal found that only three day's notice was given by the Management to the 1st respondent before his services were terminated from 1-7-1986. The Tribunal concluded by holding vide para 7 of the impugned Part-II Award that the termination of services was not by way of punishment but it was by way of discharge simpliciter which amounts to retrenchment and as there was non-compliance of the provisions of section 25-F of the Industrial Disputes Act, the termination was illegal and bad in law and accordingly the Management was directed to reinstate the respondent No. 1 with full back wages and continuity of service.

6. Being aggrieved by the above two Awards, the Company has filed the above Writ Petition.

7. DISPUTE REGARDING PART-I AWARD:

Mr. Cama, the learned Counsel for the petitioner, contended that the appropriate Government as defined u/s 2(a) of the Industrial Disputes Act. Mr. Cama contended that under the Scheme of section 2(a) of the Industrial Disputes Act, in a matter involving an industrial dispute concerning a major port, the basic

question which the Tribunal ought to have considered was : whether a relationship of employer and employee existed between the respondent No. 1 and B.P.T. ? Mr. Cama contended that if a relationship of employer and employee, as in the present case, existed between the petitioner - Company and the 1st respondent then the Central Government cannot be the appropriate Government. Mr. Cama contended that, in the present case, an industrial dispute must be concerning any industry which is carried on by or under the authority of the Central Government or it may be an industrial dispute concerning any controlled industry or it must be an industrial dispute concerning a major port. Mr. Cama, therefore, contends that, in the present case, it is the petitioner who has entered into a contract of employment with the worker. That there is no contract of employment between B.P.T./Major Port on the one hand and the worker on the other hand and in the circumstances, if an industrial dispute arose in connection with such a contract then the appropriate Government cannot be the Central Government.

I do not find any merit in the above contentions advanced on behalf of the petitioner. Before the Industrial Tribunal, the employer pleaded that the Tribunal had no jurisdiction to entertain, try and dispose of the reference. In the present matter, the burden was on the Company to lead evidence and prove the nature of the work which the Company was required to do. It is not in dispute that the respondent No. 1 was appointed as a dock clerk. It is not in dispute that the Company was inter alia carrying on the business of clearing and forwarding. It is not in dispute that the Company was doing the business of imports and exports. In the circumstances, the burden was on the Company to lead an appropriate evidence regarding the business and the nature of the work which the respondent No. 1 was required to carry out as a dock worker. On the other hand, respondent No. 1 led evidence. The Industrial Tribunal found that his evidence is not being seriously challenged. The Tribunal further found that the Settlements with the Union had been entered into in the presence of the Central Government Labour Commissioner. The Tribunal further found that, even according to the written arguments submitted by the Company, the 1st respondent was required to go to Dock and his work and his duties had connection with the work of clearing and forwarding. On facts, therefore, the Industrial Tribunal has found that the reference came within its jurisdiction. The said finding is a finding of fact based on evidence and in the circumstances mentioned hereinabove, I am not inclined to interfere under Article 226 of the Constitution. Secondly, in the present case in the case of Therapeutics Chemicals Research Corporation Vs. Justice R.D. Tulpule, Presiding Officer, Commissioner of Income Tax and Another, , the Division Bench of this Court has laid down that a dock worker is a worker whose work is connected with the cargo and if his work is connected with that of loading, unloading or movement of cargo or if his work is linked with the receipt or discharge of cargo or if his work is linked with preparation of ships to carry out cargo then the work of such a worker comes within the purview of section 2(a) of the Industrial Disputes Act. In the above Judgment, also, the

Division Bench found that the Company had entered into Settlements with the Union as in the presence of the Central Government Labour Officer and taking into account the above circumstances, the Division Bench of this Court took the view that the Reference fell within the jurisdiction of the Central Government Industrial Tribunal. In view of the above decision of the Division Bench of this Court, the Central Government Industrial Tribunal was right in coming to the conclusion, on facts, that the appropriate Government was the Central Government. Mr. Cama, however, placed heavy reliance on the Judgment of the Division Bench of this Court in the case of Irkar D. Shahu and Another Vs. The Bombay Port Trust and Others, . The said Judgment has no application to the facts of the present case. One of the points which arose for determination before the Division Bench of this Court in the case of I.D. Shahu (supra) was : whether there was any conflict between the provisions of the Dock Workers Act, 1948 and the Mathadi Act, 1969. The Division Bench laid down that the Mathadi Act can cover the workers employed in the Docks in connection with loading/unloading so long as the said workers are not covered by any Scheme framed under the Dock Workers Act, 1948. I do not find any relevancy of the above Judgment of the Division Bench of this Court in the case of I.D. Shahu (supra). In the present matter, the short point is whether the Reference fell within the jurisdiction of the Central Government Industrial Tribunal whereas in the case of I.D. Shahu (supra), the point at issue was applicability of the provisions of the Mathadi Act vis-a-vis the provisions of the Dock Workers Act, 1948 and in the circumstances, the Judgment of the Division Bench of this Court in the case of I.D. Shahu (supra) has no application to the facts in hand. In the case of Tulsidas Khimji Vs. Jeejeebhoy (F.), , the Division Bench of this Court has laid down that the activity of the firm carrying business of clearing and shipping was concerning a Major Port and, therefore, the Central Government was the appropriate Government.

8. DISPUTE REGARDING PART-II AWARD

Before coming to the rival contentions, the material on record before the Industrial Tribunal may be seen. As stated above, the services of respondent No. 1 came to be terminated vide notice dated 27-6-1986. A bare reading of the notice indicates that it consists of two parts. The first part deals with 13 items alleging major lapses on the part of the workman in the past i.e. during the period 1978 upto February 1983. It merely consists of the allegations relating to alleged major lapses/omissions which only refers to memos being issued during the above period 1978 upto 1983 for various alleged lapses on the part of the worker. The second part of the notice deals with alleged lapses/omissions including misbehaviour and cheating during the period 1984 upto 1986 and in the last part of the notice it is stated that on account of the alleged lapses including an unauthorized absence, dereliction in duties, misappropriation and habitual late attendance, the Company had lost confidence in the worker and the Company was compelled to dispense him from service by way of simple discharge with effect from July 1, 1986 and that he may collect his dues from the Company. This show cause notice is said to be the foundation for the Company

coming to the conclusion that respondent No. 1 was not suitable to carry on his work in the Company and on the ground of loss of confidence, as alleged by the Company, the services of respondent No. 1 have been terminated by way of simple discharge.

With the above show cause notice, the evidence on record before the Labour Court may be seen. The evidence of the Company consists of an Affidavit filed on 1-1-1990. The Deponent is Claver Paul Fernandes. In paragraph 2 of the Affidavit, Shri Fernandes had deposed that respondent No. 1 frequently absented himself from duty without prior permission and he was issued memo inter alia on October 30, 1981 and he would crave leave to refer to and rely upon the leave record when produced. In cross-examination to the said charge, Shri Fernandes conceded that the memo referred to in para 2 of his Affidavit (examination-in-chief) dated October 30, 1981 did not refer to any allegation regarding the worker remaining frequently absent. On the contrary, he has conceded that the leave was granted to the 1st respondent without payment of salary during the period 26-4-1982 upto 30-4-1982 as and by way of a special case.

In paragraph 3 of his Affidavit, by way of examination-in-chief, Shri Fernandes has deposed that the worker cheated the Company in collusion with Mukadam by falsely showing engagement of extra labour for which he was warned on November 30, 1979 and his explanation dated 29-11-1979 was not accepted by the Company as it was misleading and false inasmuch as extra labour was not required and yet it has been falsely shown that the Company was required to engage extra labour. In cross-examination, Shri Fernandes has deposed that it was the staff who had asked the Mukadam to engage necessary number of labourers. There is nothing to show that respondent No. 1 had asked the Mukadam to engage extra labourers. There is nothing to show as to what was the reply/explanation given by respondent No. 1 which has not been accepted allegedly by the Company and it is admitted in his cross-examination that no domestic inquiry was held against respondent No. 1 on this ground. In the present matter, there is no evidence on record to show as to why a domestic inquiry was not held when serious charge of cheating was levelled against the worker. There is no evidence to show as to why the Company felt that it was not conducive to hold a proper inquiry. In the absence of such evidence, the only conclusion which this Court can draw is : that the Company wanted to short-circuit the matter by not holding a domestic inquiry and the worker was right in taking up a plea that the order of termination has been passed without due process of law.

In paragraph 4 of his Affidavit, Shri Fernandes has further deposed that respondent No. 1 delayed the payment of wharfage and he also delayed taking the delivery of the consignment and, therefore, he was issued a memo on 18th March 1980 calling for explanation, his explanation dated 30-3-1980 was not accepted by the Company as it was misleading and false. A bare look at para 4 of the Affidavit indicates that Shri Fernandes has not deposed to the contents of the

explanation given by the worker and he has not deposed to the fact as to why the Company found the said explanation to be false. In cross-examination also, Shri Fernandes has not stated as to why a domestic inquiry was not held. In the above circumstances, in one goes through the charges levelled by the Company, one finds that they are merely in the nature of allegations and in the absence of any evidence, it is not possible for this Court to come to the conclusion that the Company acted as a reasonable employer in terminating the services of worker by way of simple discharge. Even if the employer is entitled to terminate the services on the ground of loss of confidence, he, actually, is atleast required to depose before the Competent Court as to the nature of the explanation given by the workman and the reason why the Company did not accept the said explanation. In the absence of the evidence, therefore, giving of memos and taking the reply of the workman on record cannot furnish a ground to the petitioner to terminate the services on the ground of loss of confidence.

In paragraph 5 of the Affidavit filed by Shri Fernandes, it is alleged that respondent No. 1 was guilty of persistent dereliction in duties and he was persistently disobeying the office instructions for which he was given a memo on 7-4-1980, 3-5-1980 and 7-5-1980 calling for explanation but no explanation, was given by the worker. However, in his cross-examination, Shri Fernandes has conceded that on 8-4-1990, respondent No. 1 did give an explanation (See para 6 of the cross-examination of Shri Fernandes). At this stage, I may state that the evidence of Shri Fernandes is totally misleading and inconsistent. In paragraphs after paragraphs, I find that the date and the contents of the memo given by the Company as indicated in the Affidavit of Shri Fernandes is at variance with his reply in cross-examination. In his Affidavit evidence, in paragraph 5, he has referred to the memo of 7-4-1980 whereas in cross-examination, he has referred to the memo of 8-4-1980. This illustration is only to show that the worker cannot be dismissed on the basis of vague allegations which allegations do not have even correct particulars. In cross-examination, Shri Fernandes has further stated that the Company has not produced a copy of the explanation given by the workman on April 5, 1980. Further, Shri Fernandes has stated in his cross-examination that the memo dated 3-5-1980 issued by the Company to the worker pertains to theft. If such a serious allegation is made against the worker, one fails to understand why a domestic inquiry on a specific charge is not held. Here also, in cross-examination, Shri Fernandes has deposed that he is not sure as to whether respondent No. 1 has filed a police complaint in respect of the theft. This cross-examination, therefore, reveals that the explanation was given by the workman and that explanation is not placed by the Company before the Court. If a worker is charged for theft then certainly he is entitled to an opportunity to prove that he was not guilty. In the present case, no such inquiry has been held and no reason has been given by Shri Fernandes as to why the inquiry into such a serious charge has not been held. The entire evidence of Shri Fernandes is vague. The contents of the memos has not been proved. In the circumstances, there is no evidence on record to show as to on what basis the

Company came to the conclusion that the workman was not suitable to carry on the work in the Company or that he was unfit to work as a dock worker. In the circumstances, the Company was not entitled to terminate the services of respondent No. 1 by way of simple discharge on the ground that the Company had lost confidence in the ability of the worker to perform or on the ground that the Company was likely to suffer losses in terms of the money and reputation. The evidence consists only of bare allegations. Hence, the only conclusion which this Court can draw is that the entire attempt was to dismiss the employee without holding a domestic inquiry and without following due process of law.

It is alleged by Shri Fernandes in his examination-in-chief that the worker was guilty of dereliction of duty and he was inefficient in his work on day-to-day basis and, therefore, he was given a memo on 2-9-1980. In his cross-examination, Shri Fernandes has deposed that the worker did not give any explanation and the Company did not hold any inquiry. However, there is nothing to indicate as to what were the contents of the said memo and there is no proof of service of the memo on the worker.

With reference to para 7 of the Affidavit filed, Shri Fernandes by way of examination-in-chief, has alleged that the respondent No. 1 defrauded the Company to the tune of Rs. 25/- by claiming an excess delivery charges and he was accordingly issued a memo on 26-11-1980 calling for his explanation but he did not submit his reply thereto. In his cross-examination, once again, Shri Fernandes has conceded that although a charge was based on fraud, no domestic inquiry was held. His only answer was that the workman did not file any reply to the memo. With regard to the said charge, contents of the memo are not proved before the Court. No reason has been given why a domestic inquiry was not held. It is not clear as to whether the said memo was received by the worker. If no explanation was given by the worker, one fails to understand as to why a domestic inquiry was not held. In the present case, it appears that the charges are concocted and in any event the evidence on record clearly indicates that no opportunity has been given to the workman to disprove the allegations contained in the said memos. In the above circumstances, this Court finds that the entire attempt on the part of the Company was to avoid holding a domestic inquiry and only on the basis of giving memos, the Company has tried to wriggle out of the provisions of the Standing Orders Act which require the employer to hold an inquiry. In the present matter, therefore, none of the alleged memos proved the loss suffered by the Company. None of the memos proved fraud on the part of the worker. Even the quantum of Rs. 25/- prima facie indicates that the charge levelled against the workman was only with a view to terminate his services on the ground of loss of confidence and without holding a proper inquiry.

In para 8 of the Affidavit of Shri Fernandes, he has further deposes that respondent No. 1 was guilty of not giving reply to the show cause notice for two months and, therefore, he was issued a memo on 29-4-1981. A bare reading of para 8 clearly indicates the mala fide intention of the Company in taking the

above action of termination of service by way of simple discharge. For each of the memos not giving reply as indicated in the earlier paragraphs of the Affidavit, the workman has been charged and yet, once again, he has been charged for not giving reply to the show cause notices as indicated in para 8. This allegation in para 8 of the Affidavit speaks volumes and it clearly evidences the mala fide intention on the part of the employer to terminate the services of the workman on one ground or the other.

In para 9 of his Affidavit, by way of examination-in-chief, Shri Fernandes has deposed that the workman did not submit the accounts on incidental expenses and, therefore, he was given a memo on 22-4-1982 calling for his explanation; that his explanation was misleading and false. In his cross-examination, Shri Fernandes has not deposed as to what was his explanation. In his cross-examination, Shri Fernandes has not stated as to why the Company came to the conclusion that the explanation given by the workman was false and at the same time Shri Fernandes has conceded that no domestic inquiry was held. This is one more instance which indicates that although the workman was charged with a serious misconduct of not submitting accounts and although the workman gave an explanation, there is no evidence to show as to why the Company treated the said explanation as false and misleading and if the Company treated his explanation as false and misleading then one fails to understand as to why a domestic inquiry was not held. The above facts clearly indicate that the Company was guilty of committing unfair labour practice and the charges were levelled one after the other only in the form of allegations. In the circumstances, there is no basis even prima facie to hold that the Company was justified in coming to the conclusion that the workman was unsuitable to perform his work in future.

Shri Fernandes has deposed by his Affidavit vide para 10 that the respondent No. 1 misbehaved with the foreman of Stevedores and he gave misleading information and, therefore, he was given a memo on 11-8-1982 but no explanation was submitted by the workman. It is surprising that in his cross-examination Shri Fernandes has conceded that there was no written complaint from the foreman and a memo was given to the workman only on the basis of an oral complaint made by the foreman and in any event even with the above misbehaviour, as alleged, no domestic inquiry was held by the Company. In other words, the workman had no opportunity to put in his say or to prove that he was not guilty of the above charges.

In para 14 of his Affidavit Shri Fernandes has further deposed that the workman failed to register the containers at Manganese Ore Depot inspite of specific instructions and, therefore, the Company incurred demurrage for which the respondent No. 1 was given a memo on 19-9-1994 but no reply or explanation came to be given. In his cross-examination, Shri Fernandes has conceded that the Company did not take any steps to recover demurrage incurred by the Company on the above consignment from the salary of respondent No. 1 although he did not even allegedly reply to the memo given by the Company on

19-9-1984 and here also no domestic inquiry was held.

Shri Fernandes in his Affidavit vide paras 15 to 19 alleged that the worker had wrongly despatched sample fibres to various transporters without keeping office copies of the challans for which he was given a memo on 17-7-1985. He was also given a memo for making a false claim in respect of the over time work on 13-7-1985 and 13-8-1985. He was also given a memo for wilfully neglecting to trace the containers and he was also given a memo for remaining absent from 23-5-1986 without prior intimation and submitting post-leave application along with medical-cum-fitness certificate which, according to the Company, was prima facie doubtful. These are the allegations made in the Affidavit vide paras 15 to 19. In his cross-examination, Shri Fernandes has conceded that although the accounts were not submitted by respondent No. 1, no domestic inquiry was held. No amount was deducted from his salary and at the same time he has conceded that an amount of Rs. 200/- was, in fact, returned by the workman to the Company for which the Company did not give any receipt to the workman. Even a documentary evidence showing that the Company had given Rs. 500/- to the workman to be accounted for later on, has not been produced and in his cross-examination Shri Fernandes has conceded that whenever the workman returned the amount to the Company, no receipt came to be issued by the Company to the workman. In the present case, the evidence, indicates that the workman had accounted for the moneys received by him from the Company and he has paid the balance amount to the Company and yet he has been wrongly charged for not giving the full accounts to the extent of Rs. 500/- to the Management.

9. Now in the light of the appreciation of the above evidence on record, this Court is required to consider the contentions advanced on behalf of the Company. Mr. Cama, the learned Counsel for the petitioners, contended that proving a misconduct before the Industrial Tribunal is not the same thing as proving the case of simple discharge. According to the learned Counsel for the Company, if the employer has sufficient material on record which would indicate suspicion of involvement into the alleged incident, the employer could terminate the services of a workman by way of simple discharge on the ground of loss of confidence. According to the learned Counsel, giving of above memos for eight years indicate that the worker has not improved in his work and he continued to be negligent and in the circumstances the Company was entitled to terminate the services of the workman by way of simple discharge. According to Mr. Cama, the respondent No. 1 could not have been retained in service because he was not suitable or because he was incompetent and according to the learned Counsel the above instance clearly indicated that the Company had tolerated the workman for eight years and ultimately when there was no sign of improvement, the Company had no option but to terminate the services of the workman by way of simple discharge. Mr. Cama conceded that, in the present matter, the Company has not complied with the preconditions of Standing Order 23(1). He conceded that the Company has not paid wages as per the above Standing Order 23(1). Mr. Cama further contends that, in the present case, the Company has not

charged the workman with any specific misconduct and on the contrary the Company has stated in its Written Statement that no stigma is sought to be levied by the Company in passing the impugned order of termination. In any event, Mr. Cama contends that in view of the Judgment of the Supreme Court in (Pan American Case)⁴, reported in Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others, , since every order of termination based on loss of confidence amounts to a stigma then, in that event, the Tribunal should have given an opportunity to the Company to lead evidence and prove the misconduct as in the case of section 11-A of the Industrial Disputes Act and since the Industrial Tribunal did not give that opportunity to the Company, the matter may be remanded back to the Tribunal with a direction to give to the Company an opportunity to lead evidence and prove the misconduct. Mr. Cama contends that it is well settled that in cases where the Industrial Tribunal finds that a domestic inquiry was required to be held or if a domestic inquiry is found to be defective then the Industrial Tribunal can grant an opportunity to the Company/ employer to lead evidence and prove the misconduct. Mr. Cama contends that, in the present case, the Industrial Tribunal has found merit in the contentions of the workman that the order of termination was not by way of simple discharge but it was by way of dismissal and, therefore, the Industrial Tribunal was bound to given an opportunity to the Company to lead evidence for proving misconduct and since that opportunity has not been given, the matter should be remanded back to the Industrial Tribunal.

10. I do not find any merit in the above contentions advanced by Mr. Cama. Large number of decisions have been cited by the learned Counsel appearing on behalf of the Company in support of his above contentions. At the very outset, I wish to point out that in the present matter there is nothing to indicate as to under which Standing Order the Company claims the power to terminate the services of respondent No. 1 by way of simple discharge. In various Judgments cited before me, it was not in dispute that under the Standing Orders the Company had an option either to terminate the services by way of simple discharge or by way of dismissal. However, according to Mr. Cama the learned Counsel for the petitioner, since loss of confidence attaches stigma as laid down by the Judgment of the Supreme Court in the case of Pan American, the above difference between a Standing Order empowering the Company to terminate the services by way of simple discharge and a Standing Order empowering the Company to terminate the services by way of dismissal stands obliterated. I do not find any merit in this last contention of the learned Counsel appearing for the petitioner. However, both the learned Counsel argued on the assumption that the Company had an option either to proceed to dismiss an employee pursuant to a domestic inquiry and by way of order of dismissal or it had an option to terminate the services by way of simple discharge. It is on this assumption that the entire matter was argued before me and, therefore, I am not going into the larger aspect of the matter as to whether the Company had the power to terminate the services of an employee by way of simple discharge on the ground

of loss of confidence.

11. In a dispute of the above nature, the catena of decisions indicates that an employer can dismiss an employee after holding a domestic inquiry or an employer can discharge the services of an employee by way of simple discharge. In cases of dismissal, the Industrial Tribunal has a limited jurisdiction initially. If the Industrial Tribunal finds that the domestic inquiry was not held or that it was defective only then the limited jurisdiction of the Tribunal stands expanded and in such a case the Industrial Tribunal will get the jurisdiction to decide all points including misconduct and propriety of the order of the dismissal. If the Tribunal finds that the domestic inquiry was held properly then the only question before the Industrial Tribunal u/s 11-A of the Industrial disputes Act is to decide the propriety of the order of dismissal. If the findings of the Inquiry Officer are recorded after giving proper opportunity to an employee and if the findings are based on the evidence on record then the only question which the Tribunal is required to decide is a question of propriety of the order of punishment. If, however, a domestic inquiry is found to be defective then the Tribunal gets jurisdiction to decide the entire matter including the question of propriety of the order of dismissal. However, in cases of simple discharge, it has been held that such orders of simple discharge are not conclusive and when such an order is passed which gives rise to an industrial dispute, the Industrial Tribunal shall examine the substance of the matter and ascertain whether the termination is in fact discharge simpliciter or dismissal and the nomenclature will not be decisive and if the Industrial Tribunal is satisfied that the impugned order is punitive or mala fide or is made to victimize the workman or it is passed in colourable exercise of the power under the contract of service or the Standing Orders then the Industrial Tribunal can discard the order and direct the reinstatement of the workman. This is the basic test laid down by the Supreme Court in the case of The Tata Engineering and Locomotive Co. Ltd. Vs. S.C. Prasad and Another, . In that matter, one of the employees was dismissed by the Company by resorting to Standing Order 47 which empowered the Company to discharge the services of an employee by way of simple discharge. The name of the workman was Shri Dubey. It was contended on behalf of Shri Dubey that the Company was duty bound to hold a domestic inquiry and that the Company had wrongly exercised its power of discharge under Standing Order 47 which rendered the order as mala fide. In the light of the above controversy, the Supreme Court was required to decide on facts as to whether the services of Shri Dubey were rightly discharged by resorting to Standing Order 47. On facts, the Supreme Court found that Shri Dubey was closely connected with a communal organization and he was collecting funds for that organization. On facts, the Supreme Court found that certain workers of the Company had participated in communal riots. On facts, the Supreme Court found three important circumstances against Shri Dubey which were undisputed, namely, that a person by name Kurup was assaulted on 4-3-1964; that in that connection the Police had chargesheeted Dubey and on 17-2-1965 pursuant to the order passed by the Magistrate

committing the case to the Sessions Court, the Company was entitled to come to the conclusion that Dubey was connected to the assault. The Supreme Court found that there may not be enough evidence for conviction of Dubey in Criminal Court but the Management can always come to the conclusion on the above disputed facts that it was no longer possible to continue Shri Dubey in service because it was prejudicial to the interest of the Company. It is in the light of the above undisputed facts that the Supreme Court came to the conclusion that the action of the Company in discharging the services of Shri Dubey was not mala fide. This case clearly indicates that, as a general rule, a domestic inquiry is required to be held by an employer before passing an order of termination but in cases where circumstances are so self evident that it gives rise to a suspicion in the mind of the employer regarding involvement of the worker in the alleged incident then in such cases services can be discharged on the ground of loss of confidence. In the above Judgment of the Supreme Court in TELCO's case (supra), the Supreme Court also observed at page 808 that the Company had two options, either to act under Standing Order 47 or to take disciplinary action and hold a domestic inquiry. But the latter course would have meant that the Company would have to launch into an inquiry almost parallel to the one which was going on before the committing Magistrate and in the above circumstances, if the Company preferred to invoke the Standing Order 47 and terminate the services of Shri Dubey by simple discharge, it cannot be said that the Company had acted mala fide. In the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, , the Supreme Court laid down that if the basis or the foundation for the order of termination is rooted in misconduct then a domestic inquiry is warranted but in cases where a suspicion of the employer is well founded and he may not like to investigate or take the risk of continuing a dubious servant then such a case will not fall within the category of dismissal but it will come within the category of termination simpliciter. Ultimately, it will depend upon the substance of the matter. In the case of Dinkar Bali Palekar v. Bharat Forge Ltd, & ors., reported in (1996) 1 C.L.R. 649, the entire law has been once again discussed by the learned Single Judge (B.N. Srikrishna, J.). In the above judgment, it has been laid down that where an employer has two options, referred to hereinabove, the order of simple discharge does not become mala fide if such a power is otherwise properly exercised. In other words, the basic test is : whether the employer has exercised his authority to opt for one of the two options in a proper manner. The learned Single Judge has further laid down on the basis of the Judgment of the Supreme Court in TELCO's case that the mala fides of the action must be independently demonstrated by the workman and it cannot be inferred only from the fact that the employer has chosen an easier option of discharge simpliciter. In that matter, incident of arson had taken place inside the factory. That incident was not in dispute. On facts, the Court came to the conclusion that there was material on record which connected the chargesheeted workman with the incident and it gave rise to a suspicion of the workman's involvement in the mind of the employer and the material was such that it could have been accepted by any

reasonable employer as indubitable. In that matter, the Police arrested five workers including Palekar in connection with the incident of arson on 29-9-1981 and the Police informed the Company that Palekar had been arrested in connection with the said incident. In the meantime, the Company also received a report from one Ashok Tukaram Jadhav, an employee of Contractor, working in the factory which connected Palekar to the incident of arson. On facts, the Court found that subsequently Ashok Jadhav was afraid of disclosing the name of Palekar. In the light of the above facts, this Court took the view that the Company had rightly exercised its option of terminating the services by way of simple discharge because the self evident material on record clearly indicated a connection between Palekar and the incident of arson. In this connection an objective test has also been laid down by this Court, namely, whether under the above circumstances, the Company acted as a reasonable employer because, on undisputed circumstances, it was clear that any reasonable employer would suspect Palekar being involved in the above incident of arson. In the light of the above judgments, therefore, the basic and ultimate test is : whether the employer, on facts, was justified and whether he acted in a bona fide manner in discharging the services of an employee on the ground of loss of confidence. In the above Judgments, one finds that the basic and preliminary facts are well established. In the above Judgments, one finds that the holding of inquiry was prejudicial to the interest of the Company. In such cases, the courts have taken the view that when the Company terminates the services by way of simple discharge, the employer should have acted in a reasonable and bona fide manner.

12. Applying the above tests to the facts of the present case, I find that the evidence on record in the present case clearly indicates that the workman is faced with serious charges of misappropriation, fraud, cheating, wilful insubordination and unauthorized absenteeism. The charges are only in the nature of allegations. The notice terminating the services of the workman merely recites the list of memos and in certain cases explanations being given by the workman. The workman has categorically denied those allegations. As stated hereinabove, the memos are vague. As stated hereinabove, the contents of the memos are not even spelt out in evidence. The reasons for not accepting the explanation are also not given by the employer. As stated above, there is even a conflict between the Affidavit of Shri Fernandes in examination-in-chief and his statements in cross-examination. The evidence has been discussed by me thread-bare and most important fact is that, in the present case, there is no evidence on record to show as to on what basis the Company has stated that holding of a domestic inquiry was prejudicial to its interest. No evidence has been led in that regard. In the above circumstances, I am satisfied that the rules of natural justice have been violated. That no opportunity has been given to the workman to disprove the allegations. That the Company, even before the Industrial Tribunal, did not seek any opportunity to lead evidence to prove misconduct and the opportunity which the Company sought was only to place before the Industrial Tribunal above memos and the explanation only to show that the

employer has acted in a bona fide manner and the Company has not sought any permission to prove the misconduct alleged against the workman. It is one thing to say that the Company wanted to place the evidence on record before the Tribunal to show that it was justified in passing the order of discharge simpliciter. It is quite different for the Company to move the Tribunal and say that no domestic inquiry was held and if the Tribunal comes to the conclusion that the inquiry was warranted then an opportunity had given to the Company to prove the misconduct. In the present case, the Company has not acted in a bona fide manner and in the guise of simple discharge the Company has taken an action founded on misconduct and for this reason I hold that the action of the Company amounted to wilful breach of the rules of natural justice by not holding a domestic inquiry and the entire attempt was to evade the provisions of the Standing Orders.

13. Before concluding, an argument was advanced by Mr. Cama, the learned Counsel appearing for the Company that in the case of *Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others*, , the Supreme Court has laid down that the cases involving termination on the ground of loss of confidence, amounts to stigma. Mr. Cama, therefore, submits that if an order of termination is passed on loss of confidence which amounts to a stigma then in every matter which comes before the Industrial Tribunal an opportunity must be given to the employer to lead evidence and prove the misconduct if the Industrial Tribunal comes to the conclusion, as in the present case, that a domestic inquiry was required to be held because the impugned order was not an order of simple discharge but an order of dismissal. In this connection Mr. Cama has placed reliance on the Judgment of the Supreme Court in the case of *Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others*, . In that matter, the Management undertook a preliminary inquiry as the Management suspected Lakshman being involved in a smuggling activity. On facts, the Supreme Court found that termination of services of Lakshman came to be made by the employer as being founded upon stigma and in the circumstances if a domestic inquiry has not preceded the prejudicial order then the order could be justified even in the course of adjudication before the appropriate Tribunal under the Industrial Disputes Act. There is no controversy with regard to the legal position. On facts of the present case, the Industrial Tribunal gave the above opportunity to the petitioner - Company to lead evidence and prove that the Management was justified in terminating the services of respondent No. 1 by way of simple discharge. The question is only as to whether the Company has succeeded in proving before the Industrial Tribunal the justification for discharging the workman by way of simple discharge. As stated hereinabove, the order of simple discharge by itself does not prove the mala fides. As stated hereinabove, mala fides, unfair labour practice, violation of the rules of natural justice and such other grounds which vitiate the order of simple discharge stands outside the impugned order. Mala fides or unfair labour practice cannot be inferred merely from the fact that the employer has chosen an easier

option by way of discharge simpliciter. However, when the employee pleads colourable exercise of power by the employer or if the employee pleads violation of the rules of natural justice then the Court is required to ascertain as to whether the Company acted in a bona fide manner. This is because the order of simple discharge is not conclusive as laid down by the Supreme Court in TELCO's case (supra). In such cases, an employer has two options, namely, serving a charge-sheet on an employee and dismissing him after disciplinary inquiry or terminate the services of the employee suspected of involvement in deleterious activity by an order of discharge simpliciter. In the later case, the onus is on the employer to prove that he has exercised the power in accordance with contract of service or in accordance with the Standing Orders and in accordance with the rules of natural justice. It is for this reason that the Supreme Court has laid down in TELCO's case (supra) that the mala fides, victimization, unfair labour practice etc. must be independently demonstrated and they cannot be inferred merely from the fact that the Company has chosen an easier option of discharge simpliciter. In the present matter, the Company pleaded before the Industrial Tribunal to give the Company an opportunity to prove that it has acted in a bona fide manner. As stated hereinabove, the employer has merely given a list of memos and explanation submitted by the workman and on that ground it is contended that the Company was entitled to terminate the services of the employee by way of simple discharge. If the argument of the Company is accepted, it would mean that the employer is given a licence not to make a domestic inquiry. It would permit the employer only to furnish a list of memos and on that basis the Company would plead justification for terminating the services by way of simple discharge. That cannot be permitted. In such cases, as stated hereinabove, the employer is required further to prove that holding of a domestic inquiry was prejudicial to the interest of the Company or that the material facts were undisputed or self evident and it is for this reason that the objective test of a reasonable employer is required to be applied to the facts of each case. In the above matter, I am satisfied that the Company has acted in a manner which is prejudicial to the interest of the worker by not following the procedure of holding a domestic inquiry. In the present matter, the Company sought permission of the Labour Court only to prove that it acted bona fide. It has not applied to the Labour Court to lead evidence to prove the charges. The Company has chosen an easier option with mala fide intention of short-circuiting the provisions of the Standing Orders. In the above circumstances, I do not find any merit in this writ petition.

14. Accordingly, Writ Petition fails. Rule is discharged. The petitioner - Company is directed to pay costs of this petition to the workman, namely, respondent No. 1. The costs which the petitioner is required to pay to the respondent No. 1 is fixed at Rs. 1500/-.

Since the Rule is discharged with costs, interim orders passed this Court stand vacated. Respondent No. 1 would be entitled to reinstatement with full back wages. The amount deposited by the Company at the interim stage will be paid

over by the Prothonotary to the workman within four weeks from the 1st respondent furnishing a copy of this order to the Office.

It is clarified that the Company would be entitled to credit and set off regarding the amounts paid by it to the workman during the intervening period and also to the extent of the amount which the respondent No. 1 is allowed to withdraw from the Office of the Prothonotary and the said adjustments will be effected while calculating the back wages of the worker.

Office is directed to act on the ordinary copy of this order duly authenticated by the Associate of this Court.