

(1993) 08 KAR CK 0021

In the Karnataka High Court

Case No : W.Ps. No's. 17495 and 17496 of 1993

Vyasya Bank Ltd.

APPELLANT

Vs

M. Namadeva Pai

RESPONDENT

Date of Decision : 02-08-1993

Acts Referred:

Constitution of India, 1950 — Article 136, 226

Citation : (1993) ILR (Kar) 3217 : (1994) 2 LLJ 954

Hon'ble Judges : A.J. Sadashiva, J

Bench : Single Bench

Judgement

A.J. Sadashiva, J.—Though the Petitions are listed for Preliminary Hearing, since the first respondent had entered Caveat, the Petitions are taken up for final disposal with the consent of both the parties.

2. These two writ Petitions are by the same petitioners against two orders passed by the second respondent in Reference No. 22/89. In W. P. No. 17495/92, the petitioner has sought for a Writ of Certiorari to quash the order dated 18.8.1992 passed by the second respondent, answering the preliminary issue against the petitioner, and, the order dated 5.3.1993 directing the petitioner to pay the first respondent 50% of gross salary with effect from 1.10.1992 as an interim-relief, is sought to be quashed in W. P. No. 17496/93.

3. Shri B. C. Prabhakar, learned Counsel for the petitioner submits that, the validity of the order impugned in W. P. No. 17496/93 is dependent upon the validity of the order impugned in W. P. No. 17495/93 by which the domestic enquiry has been set aside. Accordingly, W. P. No. 17495/93 is taken up for consideration first.

4. Sri V. Gopala Gowda, learned Counsel for the first defendant has raised a preliminary objection as to, the maintainability of the Writ Petitions. he submits that, in view of the pronouncements of the Writ Petitions. he submits that, in view of the pronouncements of the Supreme Court in the Decisions reported in

AIR 1975 SC 1990 Cooper Engineering Ltd. v. P. P. Mundhe and AIR 1984 SC 153 D. P. Maheshwari v. Delhi Administration & Ors. this Court would refuse to entertain the Writ Petitions against an order of the second respondent on a preliminary issue like the validity of the domestic enquiry.

5. Sri. B. C. Prabhakar, learned Counsel for the petitioner submits that, the pronouncement of the Supreme Court in the aforesaid cases will not have an universal application, as the Supreme Court has not held that the Writ Petitions are not at all maintainable against the order passed by the labour Court or Industrial Tribunal on a preliminary issue. it is his further submission that, the application of the aforesaid decisions of the Supreme Court, is dependent upon the facts and circumstances of each case, as the Supreme Court has observed that, in order to prevent undue delay in industrial adjudication resulting in the workmen being shuttled from Court to Court, neither the High Court nor the Supreme Court, in exercise of their jurisdiction under Articles 226 and 136 of the Constitution is required to be too astute to interfere with the exercise of jurisdiction by the Tribunals at interlocutory stage on preliminary issue. he further submits that there is no total prohibition for this Court to act in exercise of its under Article 226 of the Constitution, if the circumstances so warrants. In support of his contention Sri Prabhakar has referred me to two decisions of this Court reported in Motor Industries Co. Ltd. Vs. D. Adinarayanappa and Another, Motor Industries Co. Ltd. v. Adinarayanappa and Management of Rangaswamy and Co. Vs. D.V. Jagadish, Management of Rangaswamy & Co. v. B. V. Jagadeesh & Anr. Placing reliance on these two decisions Sri B. C. Prabhakar submits that, this Court would not reject the Writ Petition against the orders of the Tribunals on preliminary issue as not maintainable, but it would exercise its jurisdiction under Article 226 of the Constitution, depending upon the facts and circumstances of each case, as has been done by this Court in the aforesaid cases, wherein the reference was also made to the decisions of the Supreme Court. Sri Prabhakar further submits that, the order impugned in these Writ Petitions are illegal and unsustainable both on law and on, facts as the order of the second respondent is not based on any evidence, but on surmises and conjectures. He further submits that, it is not sufficient, for the second respondent to set aside the domestic enquiry, if it is shown that the enquiry is to conducted fairly and properly, it must be further proved that by improper enquiry, it has resulted in prejudice to the interest of persons against whom enquiry despite refusal to examine the witnesses afresh in the presence of the first respondent, has not resulted in any prejudice to the case of the first respondent, as he has chosen to cross-examine the witnesses in detail and he, therefore, submits that the impugned order is liable to be quashed.

6. Per contra Sri V. Gopala Gowda, learned Counsel appearing for the first respondent, would fairly submit that, the pronouncements of the Supreme Court in the cases of Cooper Engineering Co. Ltd. (supra) and D. P. Maheshwari (supra), may not be extended to all cases, as a general rule. However, he contends, that in cases, where the Industrial adjudication would be unduly

delayed resulting in breaking the resistance of the workmen and in cases where the infraction of any statutory provisions is not apparent, this Court should apply the principles laid down by the Supreme Court in the aforesaid cases, and refuse to exercise its jurisdiction under Article 226 of the Constitution. He would further submit that, the non-examination of the witnesses afresh in the presence of the first respondent as requested, has resulted in the very object and purpose of examination of witnesses being defeated, for there was every possibility of persuading the witnesses to make statements convenient to the management as there was none to raise objections for such persuasion and the same has resulted in denial of principles of Natural Justice. It is his further contention that, where the order suffers for non-compliance with the principles of Natural Justice, it is not necessary to prove the prejudice caused from its non-observance. In this context Sri Gopala Gowda referred me to two decisions of the Supreme Court reported in *Khardah Co. Ltd. Vs. Their Workmen*, and *S.L. Kapoor Vs. Jagmohan and Others*,

7. In view of the aforesaid rival contentions, the following questions would arise for my consideration, namely -

(a) Whether, under the facts and circumstances of this case, this Court could entertain these Writ Petitions in the exercise of its jurisdiction under Article 226 of the Constitution of India?

(b) Whether the orders of the second respondent impugned in these Petitions are perverse and without jurisdiction?

8. In order to the aforesaid controversy, it is necessary to state a few admitted facts of this case, which are as follows :

The petitioner is a Banking institution and the first respondent was working as a sub-staff in the Bank of the petitioner at Hassan at the relevant point of time. That he was kept under suspension by order dated 20.1.1984 for certain alleged misconduct. Thereafter a charge-sheet dated 12.6.1984 issued by the petitioner was served on the first respondent alleging, negligence in the performance of duties involving the Bank in likely financial loss, wilful insubordination, riotous, disorderly and indecent behaviour towards superior officer in vulgar and indecent language and threatening to assault him with chappals. The petitioner on receipt of the explanation from the first respondent ordered for an enquiry, in respect of which one K. S. Narasimha Murthy was appointed as an Enquiry Officer. That, after completing all preliminary formalities, the enquiry proper was commenced from 19.11.1984. That after due notice to the first respondent and his defence representative, the witnesses were examined on 19.11.1984, 20.11.1984 and 21.11.1984 on which days neither the first respondent nor his representative was present during the enquiry nor any representation was made on their behalf. As the Enquiry Officer did not receive any communication on behalf of the first respondent, he placed the first respondent expert and proceeded with the enquiry. However on 22.11.1984 he received a requisition from the first

respondent by post, requesting to postpone the enquiry on the ground of ill-health. A medical certificate was also enclosed with the requisition. Thereafter, at the request of the first respondent the Enquiry Officer set aside the expert order and permitted him to participate in the enquiry. That, at that stage the first respondent filed an application, he has requested for fresh examination of witnesses in the presence who have already been examined during his absence and has further urged to postpone the enquiry on the ground that the enquiry should be conducted by another Enquiry Officer as the present one is biased against him. The Enquiry Officer rejected his request and adjourned the case for further enquiry.

Feeling aggrieved by the order of rejection of his request by the Enquiry Officer, the first respondent made an appeal to the Disciplinary Authority for change of the Enquiry Officer and the said appeal came to be rejected. Thereafter the first respondent cross-examined witnesses on 13.2.1985, and 30.3.1985. The first respondent has not produced any evidence before the Enquiry Officer. The Enquiry Officer after completing the enquiry has recorded his finding that the charges against the first respondent are proved and submitted his report to the Disciplinary Authority, who accepted the same and passed the order dismissing the first respondent by his order dated 31.3.1986. The first respondent preferred an appeal against the order of dismissal and the Appellate Authority dismissed the appeal by order dated 2.12.1987.

That, on the representation of the first respondent, the Central Government made a reference to the second respondent for adjudication u/s 10(1)(c) of the Industrial Disputes Act. That, in the reference the first respondent has raised a preliminary objection as to the validity of the domestic enquiry, inter alia, contending that the domestic enquiry was neither fair nor proper for non-compliance with the principles of natural justice. The second respondent has accordingly framed a preliminary issue, whether the petitioner proves that it has held the domestic enquiry in accordance with law and answered the said issue against the petitioner. Being aggrieved by the order, on the preliminary issue, the petitioner has presented this Writ Petition.

9. The second respondent during the course of the order on preliminary issue after extracting the relevant portion of the judgment of the Supreme Court reported in *Khardah Co. Ltd. Vs. Their Workmen*, has held as follows :-

From the law laid down by the Supreme Court, it is clear that in a domestic enquiry relating to an industrial dispute, the witnesses should be examined in the presence of the workman or his D. R. From the material on record, there is nothing to show that here were compelling reasons for M. W. 1 to depart from this normal rule of examining the witnesses in Disciplinary Enquiry in the presence of workman. 1 mean that M. W. 1 should have examined C. Ws. 1 to 4 afresh when a specific request was made by the workman. The fact that the expert examination-in-chief of C. Ws. 1 to 4 was made available to 1 party does not held the II Party in view of the Supreme Court Authority.

10. In view of the law laid down by the Supreme Court 1 hold that the principles of natural justice have to been followed in the Disciplinary Enquiry held by M. W. 1. The learned counsel for the II Party has relied on Antar Singh Bapu Singh Vs. State of Madhya Pradesh, This Authority has been mentioned in the argument notes and the list of authorised submitted by II Party. But the authority is not produced. Any way I have relied on the Authority of the Supreme Court". Sri Prabhakar, objects the approach of the and as such the order of the second respondent on the validity of domestic enquiry is without jurisdiction. I propose to consider this objection at a later stage.

That, before adverting to the merits of the case, it is just and proper to consider the preliminary objection raised by Sri. V. Gopala Gowda, learned Counsel appearing for the first respondent whether this Court in exercise of its jurisdiction under Article 226 of the Constitution should entertain a Writ Petition against the order of the Labour Court on a preliminary issue. The Supreme Court in the case of Cooper Engineering Ltd. v. P. P. Mundhe (supra) at para 22 of the Judgment has held as follows :-

"We are therefore clearly of the opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication, the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. on that decision being pronounced it will be for management to decide whether it will adduce any evidence before the Labour Court. It if chooses not to adduce any evidence it will not be thereafter permissible in any proceeding to raise the issue. We would also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard tot he preliminary issue, when the matter, if worthy can be agitated even after the final award. It will be also legitimate for the High Court on refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication."

This view was reiterated by the Supreme Court in the case of D. P. Maheshwari v. Delhi Administration & Ors. (Supra) The pronouncement of the Supreme court in para-1 of the said decision read as follows :-

"It was just the other day that we were bemoaning the unbecoming devices adopted by certain employers to avoid decision of industrial disputes on merits. We noticed how they would raise various preliminary objections, invite decision on those objections in the first instance, carry the matter tot he High Court under Article 226 of the Constitution and to this Court under Article 136 of the Constitution and delay a decision of the real dispute for years, sometimes for over a decade. Industrial peace, one presumes hangs in the balance in the

meanwhile. We have not before us a case where a dispute originating in 1969 and referred for adjudication by the Government to the Labour Court in 1970 is still at the stage of decision on preliminary objection. There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the sometime without trying should High Courts in the exercise of their jurisdiction under Article 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of this Court under Article 136 may be allowed to be exploited by those who can will afford to wait to the detriment of those who can well afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Article 226 and Article 226 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and Courts who are requested to decide preliminary questions must therefore ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all tribunals like industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections and journeying up and down. It is the worthwhile remembering that the nature of the jurisdiction under Article 226 is supervisory and not appellate while that under Article 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues."

11. The Supreme Court in the aforesaid Decision has held that it is legitimate for the High Court to refuse to intervene with the order on the preliminary issue in the exercise of its jurisdiction under Article 226, of the Constitution, when the matter if worthy, can be agitated even after the final award and also held that in the interest of industrial peace such further proceedings before the Labour Court should not be stalled.

12. Sri B. C. Prabhakar, learned counsel appearing for the petitioner would submit, that these two Decisions cannot be extended to and apply to all cases as a rule. He further submits that this Court shall not refuse to exercise its jurisdiction under Article 226 of the Constitution against an order of a Labour Court on preliminary issue, if the circumstances of the case, so warrants. Considering the facts and circumstances of this case, this Court is not precluded from exercising its jurisdiction under Article 226 of the Constitution with respect to an order on preliminary issue. In this context he drew my attention to two judgments of this Court, wherein this Court had exercised its jurisdiction under Article 226 of the Constitution, inspite of pronouncements of the Supreme Court

in the aforesaid cases. Placing reliance on the judgments of this Court, he submits that there is no prohibition for this Court to interfere with the impugned orders.

13. In the case of Motor Industries Co., Ltd. v. Adinarayanappa and Anr. (supra) this Court interfered with the order of the Tribunal on domestic enquiry. In that case, the question-

"Whether a domestic enquiry held by the management, which was valid in all respect is invalid on the ground that before holding enquiry an opportunity of answering the charges should be given to the delinquent employees" came up for consideration before this Court. In the said case, the Labour Court held that the domestic enquiry was invalid on the ground that as, before holding the enquiry, the written explanation of the first respondent was not called for, on the charges levelled against him, the domestic enquiry was in violation of the principles of Natural Justice and also the standing orders.

14. This Court on considering the judgment of the Supreme Court in the case of Varanasaya Sanskrit Vishwavidyalaya and Another Vs. Dr. Rajkishore Tripathi and Another, and also standing order No. 22 of the Company has held as follows :-

"Therefore the question for consideration in this case whether the interpretation placed by the Labour Court on the aforesaid standing order is reasonably possible. I am of the opinion that on a plain reading of the Standing Order, the view that written explanation should be called for on the charges levelled against an employee before giving him an opportunity in domestic enquiry is impossible. In fact the standing order in question incorporates the very principle of Natural Justice which is required to be ensured in holding a domestic enquiry against a delinquent employee. As held by the Supreme Court that informing the delinquent employee of the specific charges levelled against him in writing and giving him an opportunity to defend himself in an enquiry fulfills the requirement of principles of natural justice that before holding an enquiry, an earlier opportunity of furnishing reply to the charges should be given to a delinquent employee. The standing order also in unambiguous terms provides that the employee concerned should be informed in writing of the misconduct alleged against him and he should be given an opportunity of defending himself. A domestic enquiry held against a workman in which the documentary as well as oral evidence against him is adduced in his presence and he is given fully opportunity of giving his explanation with reference to the documentary evidence and also opportunity of cross-examining the witnesses and adducing evidence in his defence fully satisfies the requirements of opportunity as contemplated in the standing order. It is not disputed that the 1st respondent was informed in writing of the misconduct alleged against him and that a regular enquiry was held against him giving full opportunity to defend himself. The procedure adopted by the management in this case, therefore was not only in conformity with the principles of natural justice as held earlier, but also complied with the requirements of the standing order. Therefore the view taken by the Labour

Court that before giving opportunity to meet the charges in a regular enquiry, there should have been an earlier opportunity of informing the employee in writing of misconduct alleged against him and that he should have been called upon to furnish his reply, is totally perverse. As the interpretation placed by the Labour Court on the standing order is reasonably impossible, I hold that the decision of the Supreme Court relied on for the 1st respondent is clearly inapplicable to this case."

This Court while disposing of the aforesaid case has also considered the observation of the Supreme Court -

"... That there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy can be agitated even after the final award. It will also be legitimate for the High Court to refuse to intervene at this stage."

made in the case of *Cooper Engineering Ltd. v. P. P. Mundhe* (supra) and has held-

"It is no doubt true that in the aforesaid portions of the judgment, the Supreme Court has observed that there is no justification for any party to stall a final adjudication of the dispute by a Labour Court by questioning its decision in a preliminary issue and the same should be allowed to be agitated after the final order. The Court further observed that it would be legitimate for the High Court to refuse to interfere on the decision of the Labour Court on the preliminary issue. By the observations made as aforesaid, the Supreme Court has certainly cautioned the High Court against the interference on the decision of a Labour Court on the [preliminary issue. But at the same time, it should be noticed that the reason which prompted the Supreme Court to make the aforesaid observation are set out in the last sentence wherein it is stated that the Supreme Court was making those observations in their anxiety and there is no undue delay in industrial adjudication. Therefore it is clear that if in a given case the refusal to interfere against the order of the Labour Court is itself going to defeat the purpose for which the Supreme Court to interfere even; against an order of the Labour Court is contrary to the law laid down by the Supreme Court itself. It is also significant to note that what the Supreme Court has observed is that it would be legitimate for the High Court to refuse to interfere against the order of the Labour Court on a preliminary issue if it were to result in delay in industrial adjudication, and not that it would not be legitimate for the High Court to interfere in a given case even if there is justification for interference at that stage."

In the case of *Management of Rangaswamy & Co. v. B. V. Jagdeesh & Anr.* (supra) another decision of this Court upon which Sri Prabhakar placed reliance is a case in which whether a Labour Court could award interim relief without deciding the issue relating to the relationship of workmen and management,

came up for consideration. In the said case, the I party claimants have raised a dispute u/s 10(4) of the Industrial Disputes Act before the Labour Court. In the dispute the I party claimant has sought for a declaration that the order removing him from service is null and void and to reinstate him. The II Party Management after entering appearance disputed that the I Party was a workman of the Management. The Labour Court without deciding the same has granted the interim relief to the I Party. When the matter came up before a Division Bench of this Court by way of a Writ Appeal, a preliminary objection was raised on behalf of the I Party workman that in view of the judgment of the Supreme Court in Maheshwari's Case (supra) this Court would refuse to exercise its jurisdiction under Article 226 of the Constitution. Dealing with the said contention this Court in Para-13 of the Judgment has held -

"13. Similarly, in the instant case, the jurisdiction of the Labour Court to decide the dispute, depends upon the decision on the question whether the 1st respondent is a "workman". Therefore, the Labour Court ought to have decided the issue as a preliminary issue if it was required to consider the interim relief sought for by the 1st respondent. Wherefore, in a case where no interim relief is sought for or is required to be granted the issue affecting the jurisdiction can also be tried along with the other issues. However, we should like to make it clear that, it all depends upon the facts and circumstances of each case as to whether an issue touching the jurisdiction of the Labour Court or Industrial Tribunal should be tried as a preliminary issue or not. Even in D. P. Maheshwari v. Delhi Administration and others (AIR 1984 SC 153) the Supreme Court has not held that an issue touching jurisdiction should not be tried as a preliminary issue. No doubt, the Supreme Court has expressed that the recording of findings on preliminary issues and challenging the same in the High Court and at the Supreme Court would consume lot of time and in the meanwhile, it is further observed by the Supreme Court that in such cases, normally the jurisdiction under Articles 226 and 227 should not be exercised and the matter should be allowed to be decided on merits. Regarding an issue touching the jurisdiction should be tried as a preliminary issue, it is observed thus :

Tribunals and Courts who are requested to decide preliminary questions must therefore ask themselves whether such threshold part adjudication is really necessary and whether such threshold part adjudication is really necessary and whether it will not lead to other woeful consequences."

Therefore, we have already pointed out that it would depend upon the facts and circumstances of each case and the Tribunal or the Court seized of the matter has to decide whether in a given case, the issue raised touching the jurisdiction should be tried as a preliminary issue."

15. This Court, in the case of L. Ratnabai and Others Vs. State of Kerala and Others, has held as follows"-

"It is now well settled that the Industrial Disputes Act is a legislation that favours

the workman and meant for his beneficial welfare. In construing its provisions the Courts lean in favour of workman. Similarly in the procedure to be adopted for resolving the disputes between the employer and the workman, the procedure which is favourable to the workman who is the weaker of the two parties should be adopted."

In the light of these judgments, it is to be examined whether under the facts and circumstances of this case, this Court could entertain these Writ Petitions in the exercise of its jurisdiction under Article 226 of the Constitution of India.

16. That, from an analysis of the decisions aforementioned, it is clear that, this Court in exercise of its jurisdiction, under Article 226 of the Constitution, shall refuse to intervene at the stage of adjudication on preliminary issue, except in exceptional cases. It is clear that generally whenever an order on preliminary issue, like, the validity of domestic enquiry is entertained, the proceedings before the adjudicating authority will be stalled, which results in undue delay. This prolonged litigation will choke the voice of protest besides Court has interfered with the orders on preliminary issue as they relate to jurisdictional issue. It is significant to note that the facts in the cases which came up for consideration before the Supreme Court and the cases which came up for consideration before this Court are distinguishable. This Court would refuse to exercise jurisdiction under Article 226 of the Constitution on the validity of domestic enquiry as the management can challenge the very order, if worthy, even after the final award.

17. It is admitted that the case before me is a case where the dispute originated on 20-01-1984 and referred for adjudication by the Government to the second respondent in 1989 is still at the stage of decision on preliminary objection. The first respondent is out of job for the 8 1/2 years, and in case the proceedings before the Labour Court is stalled the first respondent can "ill afford" to wait, whereas the petitioner can "well afford" to wait. It is too much for the petitioner to subject the first respondent to such agony in order to silence respondent to such agony in order to silence his voice of protest, and Article 226 of the Constitution is not meant for this purpose.

18. In the result I hold that, in the facts and circumstances of this case, this Court would refuse to entertain this Writ Petition. Hence I decide the first point in the negative.

19. In view of my finding on the first point, it may not be necessary for me to consider the second point. However, in view of the submissions of Sri Prabhakar, that the second respondent has wrongly applied the judgment of Supreme Court to the facts of the case, I think it is just and proper to consider his contentions on merits also.

20. Sri B. C. Prabhakar, learned Counsel appearing for the petitioner would further submit that, on the facts and circumstances of the case, the order impugned in these writ petition is unsustainable. It is his further contention that the second respondent has wrongly applied principles enunciated by Supreme

Court in the case of M/s. Khardah and Company Ltd. v. The Workmen (supra) and committed an error in not placing reliance on the judgment of the High Court of Antar Singh Bapu Singh Vs. State of Madhya Pradesh, . In this regard it is material to extract the relevant portion of the Judgment of the Supreme Court reported in Khardah Co. Ltd. Vs. Their Workmen, which is extracted by Labour Court at para-9 of its order. It reads as under :-

"Normally, the evidence on which the charges are sought to be proved must be led at such an enquiry in the presence of the workman himself. Recording evidence in the presence of the workman concerned serves a very important purpose. The witness knows that he is giving evidence against a particular individual who is present before him and therefore, he is cautious in making his statement. Besides, when the evidence is recorded in the presence of the accused person, there is no room for persuading the witness to make convenient statement, and it is always easier for an accused person to cross-examine the witness if his evidence is recorded in his presence. Therefore the Court would discourage the idea of recording statements of witnesses expert and then producing the witness before the employee concerned for cross examination after serving him with such previously recorded statements even though the witnesses concerned make a general statement on the latter occasion that their statements already recorded correctly represent what they stated. Unless there are compelling reasons to do so the normal procedure should be followed and normal procedure should be followed and all evidence should be recorded in the presence of workman who stands charged with the commission of acts constituting misconduct."

In the case of Antharsingh Bapu Singh v. State of Madhya Pradesh (supra) the Madhya Pradesh High Court has held-

"Shri Daji, counsel for the petitioner, has suggested slightly modified form of the original argument. It may be that the witnesses were called again for cross-examination and the petitioner did cross-examine. But if the witnesses had been examined expert, that is, in the absence of the petitioner, then even if there was cross-examination subsequently, the inquiry is not a fair inquiry. I do not accept the argument for two reasons, on the facts, there is no clear averment on affidavit that the examination-in-chief of the witnesses was made by the inspector behind the back of the petitioner. Secondly, even on the assumption that the examination-in-chief was made expert the opportunity to cross-examine given subsequently, with access to the content of the examination-in-chief is sufficient for the purpose of the inquiry. The point is not whether the petitioner is physically present at the time of the examination-in-chief, then undoubtedly, it would be very convenient for everybody concerned. The point is whether he is given opportunity to cross-examine the witnesses with reference to the examination in-chief and certainly, to adduce evidence of his own. It would certainly be unfair for the inquiry officer to examine witnesses behind the back of the petitioner, then, seal up the record of examination-in-chief and call up the

petitioner to cross-examine. That is not the allegation here. If the petitioner is allowed to cross-examine with access to the record of the examination-in-chief, I certainly fail to see where the irregularity is. The mere fact that all the elements of a criminal trial are not reproduced would not make any difference. Thus, as long as it is not shown (in this case, not even alleged) that the petitioner was called upon the cross-examine without being shown or given a copy of the record of examination-in-chief, there is no irregularity."

Sri B. C. Prabhakar would submit that this case, in all fours is applicable to the facts of the case on hand. It is true that the facts in the case are similar in both the cases. But that itself, is not sufficient for me to hold that the second respondent has exceeded its jurisdiction in not relying on the judgment of the High Court of Madhya Pradesh (supra). The second respondent has rightly placed reliance on the judgment of the Supreme Court is binding on this court and all other Courts. In addition, the Supreme Court has considered the scope and object of examination of witnesses in the presence of the delinquent employee. It is significant to note the observations of the Supreme Court :

"Recording evidence in the presence of workmen concerned serves a very important purpose. The witness knows that he is giving evidence against a particular individual who is present before him and, therefore he is cautious in making his statement. Besides, when the evidence is recorded in the presence of the accused person, there is no room for persuading the witness to make convenient statement."

It is clear from the judgment of the Supreme court that in an enquiry before the Enquiry Officer, witnesses shall be examined in the presence of the delinquent employee and non-examination of the witnesses in the presence of delinquent employee amounts to denial of principles of Natural Justice by which the delinquent employee suffers irreparable loss. There is every possibility of delinquent employee losing his job by which he and the members of his family would be subject to starvation. Dealing with such a situation the Supreme Court has held that the witnesses shall be examined in the presence of a delinquent employee, the object behind this is to see there is no possibility of persuading the witnesses to make convenient statement.. It is significant to note that the Madhya Pradesh High Court has not considered this aspect.

21. Admittedly in the instant case, the witnesses were examined by the Enquiry Officer in the absence of the first respondent. It is the case of the petitioner that the Enquiry Officer has no option but to proceed with the enquiry, when the first respondent failed to appear before the Enquiry Officer.

22. It is his further contention that the second respondent has committed an error in finding fault with the Enquiry Officer for not allowing the request of the first respondent for examination of the witnesses afresh in his presence and holding the domestic enquiry is not fair and proper, even though the first respondent has cross-examined the witnesses. It is significant to note that the

first respondent filed an application before the Enquiry Officer requesting him to examine the witnesses afresh in his presence and to postpone the enquiry, alleging bias against him, and on rejection of his prayer, he filed an appeal before the Disciplinary Authority for change of Enquiry Officer on the ground of bias and only after the rejection of his appeal, cross-examined the witnesses. The first respondent cross-examined the witnesses only after his request for fresh examination of the witnesses was refused both by the Enquiry Officer as well as by the Disciplinary Authority. There was no alternative for the first respondent but to cross-examine them. In these circumstances, the point to be considered is, whether the Enquiry Officer was right in refusing the request of the first respondent to examine the witnesses afresh in his presence. As has been held by the Supreme Court in *Khardah & Co. (supra)* case the procedure must be scrupulously followed. Where the procedure necessitated examination of witnesses in the presence of the first respondent and where a request was made by the first respondent for examination of the witnesses afresh in his presence and particularly where an allegation of bias is made against the enquiry Officer the enquiry Officer should have followed the procedure scrupulously in order to remove the suspicion from the mind of those concerned, particularly of the first respondent that the witnesses were persuaded to make convenient statement. The rejection of the request of the first respondent by the Enquiry Officer as well as by the Disciplinary Authority has resulted in the denial of principles of Natural Justice.

23. The second respondent has also observed that there is an element of bias in the conduct of the Enquiry Officer in respect of which I do not want to express any opinion as the entire domestic enquiry is set aside.

24. Another contention raised by Sri Prabhakar is that it is not sufficient for the first respondent to show that the enquiry was not conducted fairly and properly, he must further establish that by such improper enquiry, it has resulted in prejudice to his interest. In this context the learned Counsel for the first respondent has brought to my notice a decision of the Supreme Court in the case of *S. L. Kapoor v. Jagmohan (supra)* The relevant Head Note B reads as follows :-

"The principles of natural justice of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary."

I do not want to elaborate on this point for the pronouncement of the Supreme Court is self-explanatory.

25. For the reasons stated above, I hold the second point also in the negative.

26. In the result, I do not see any good ground to interfere with the order of the second respondent on Domestic Enquiry. Hence I reject W. P. No. 17495/93.

27. W. P. No. 17496/93 : In view of the order passed in W. P. No. 17496/93

rejecting the same, holding that the order of the second respondent on the validity of the domestic enquiry is legal and valid there is no need to consider the contentions raised in this writ petition as the order impugned in this writ petition is only a consequential order to the order impugned in W. P. No. 17495/93. When once the domestic enquiry is set aside, the workman is entitled for all benefits and the Labour Courts has awarded only 50% of the last drawn gross salary with effect fro the date of application i.e., 1.10.1992. There is no infirmity in the order. The writ petition is accordingly rejected.