Gujarat Steel Tubes Ltd. and Others

Vs

Gujarat Steel Tubes Mazdoor Sabha and Others

Civil Appeals Nos. 1212, 2089 and 2237 of 1978

(V.R. Krishna Iyer, D.A. Desai, A.D. Koshal JJ)

19.11.1979

JUDGMENT

KRISHNA IYER, J.–

1. Every litigation has a moral and these appeals have many, the foremost being that the economics of law is the essence of labour jurisprudence.

The case in a nutshell

2. An affluent Management and an indigent work force are the two wings of the Gujarat Steel Tubes Ltd. which manufactures steel tubes in the outskirts of Ahmedabad City and is scarred by an industrial dispute resulting in these appeals. The industry, started in 1960, went production since 1964 and waggled from infancy to adulthood with smiling profits and growling workers, punctuated by smoldering demands, strike and settlements, until there brewed a confrontation culminating in a head-on collision following upon certain unhappy happenings. A total strike ensured, whose chain reaction was a wholesale termination of all the employees, followed by fresh recruitment of workmen, de facto breakdown of the strikes and dispute over restoration of the removed workmen. This cataclysmic episode and its sequel formed the basis of Section 10-A arbitration and award, a writ petition and judgment, inevitably spiralling up to this Court in two appeals - one by the management and the other by the union - which have been heard together and are being disposed of by this common judgment. The arbitrator held the action of the Management warranted while the High Court reversed the award and substantially directed reinstatement.

The Jural perspective

3. A few fundamental issues, factual and legal, on which bitter controversy rages at the bar, settled the decisional fate of this case. A plethora of precedents has been cited and volumes of evidence read for our consideration by both sides. But the jural resolution of labour disputes must be sought in the law-life complex, beyond the factual blinkers of decide cases, beneath the lexical littleness of statutory texts, in the economic basics of industrial justice which must enliven consciousness of the Court and the corpus juries. This Court has developed labour law on this board basis and what this Court has declared holds good for the country. We must first fix the founding faith in this juristic branch before unraveling the details of the particular case.

4. Viewing from this vantage point, it is relevant to note that the ethical roots of jurisprudence, with economic overtones, are the elan vital of any country's legal system. So it is that we begin with two quotations - one from the Old Testament and the other from Gandhiji the Indian New Testament - as

perspective-setters. After all, industrial law must set the moral-legal norms for the modus vivendi between the partners in management namely, Capital and Labour. Cain retired when asked by God about his brother Able, in the Old Testament, : 'Am I my brother's keeper ? ' 'Yes' was the implicit answer in God's curse of Cain. In the fraternal economics of national production, worker is partner in this biblical spirit. In our society, Capital shall be the brother and keeper of Labour and cannot disown this obligation, especially because Social Justice and Articles 43 and 43-A are constitutional mandates.

5. Gandhiji, to whom the Arbitrator has adverted in passing in his award way back in March 1946, wrote on Capitalism and Strikes in the Harijan :

> How should capital behave when labour strikes ? This question is in the air and has great importance at the present moment. One way is that of suppression named or nicknamed 'American'. It consists in suppression of labour through organised goondaism. Everybody would consider this as wrong and destructive. The other way, right and honourable, consists in considering every strike on its merits and giving labour its due - not what capital considers as due, but what labour itself would so consider and enlightened public opinion acclaims as just (SOCIALISM OF MY CONCEPTION (M. K. Gandhi) by Anand T. Hingorani, Bhartiya Vidya Bhavan) ...

In my opinion, employers and employed are equal partners, even if employees are not considered superior. But what we see today is the reverse. The reason is that the employers harness intelligence on their side. They have the superior advantage which concentration of capital brings with it, and they know how to make use of it . . . . Whilst capital in India is fairly organised, labour is still in a more or less disorganised condition in spite of Unions and Federation. Therefore, it lacks the power that true combination gives. (ibid)

Hence, my advice to the employees would be that they should willingly regard workers as the real owners of the concerns which they fancy, they have created (ibid) . . . .

6. Tuned to those values are the policy directives in Articles 39, 41, 42, 43 and 43-A. They speak of the right to an adequate means of livelihood, the right to work, humane conditions of work, living wage ensuring a decent standard of life an enjoyment of leisure and participation of workers in management of industries. De hours these mandates, law will fail functionally. Such is the value-vision of Indian Industrial Jurisprudence.

The matrix of facts - A Preview

7. The nidus of fact which enwomb the issues of law may be elaborated a little more at this stage. In the vicinity of Ahmedabad city, the appellant is a prosperous engineering enterprise which enjoys entrepreneurial excellence and employs over 800 workmen knit together into the respondent Union called the Gujarat Steel Tubes Mazdoor Sabha (the Sabha, for short). Fortunately, the industry has had an innings of escalating profits but the workmen have had a running complaint of raw deal. Frequent demands for better conditions, followed by negotiated settlements, have been a lovely feature of this establishment, although the poignant fact remains that till the dawn of the seventies, the gross wages of the workmen have hovered around a harrowing hundred rupees or more in this thriving Ahmedabad industry.

8. The course of this precarious co-existence was often ruffled, and there was, now and then, some

flare-up leading to strike, conciliation and even reference under Section 10. When on such reference was pending, another unconnected dispute arose which, after some twists and turns, led to an industrial break-down and a total strike. The episodic stages of this bitter battles will have to be narrated at length a little later. Suffice it to say that the management jettisoned all the 853 workmen and recruited some freshers to take their place and to keep the wheels of production moving. In the war of attrition that ensued, labour lost and capitulated to Capital. At long last, between the two, a reference to arbitration of the disputes was agreed upon under Section 10-A of the Industrial Disputes Act, 1947 (the Act, for short). The highlight of the dispute referred for arbitration was whether the termination orders issued by the Management against the workmen whose names were set out in the annexure to the reference were "legal, proper and justified"; if not, whether the workmen were 'entitled to any reliefs including the relief of reinstatement with continuity of service and full back wages'. The arbitrator's decision went against the Sabha while, on a challenge under Article 226, the High Court's judgment virtually vindicated its stand. This is the hang of the case. The substantial appeal is by the Management while the Sabha has a marginal quarrel over a portion of the judgment as disclosed in its appeal. The 'jetsam' workmen, a few hundred in number, have been directed to be reinstated with full or partial back pay and this is the bitter bone of contention.

9. A stage-by-stage recapitulation of the developments in important to get grips with the core controversy.

10. Sri Asoke Sen, for the appellant-Management, and Sri Tarkunde for the respondent-Sabha, have extensively presented their rival versions with forceful erudition. Sri R. K. Garg, of course, for some workmen - has invoked with passion the socialist thrust of the Constitution as a substantive submission and, as justificatory of the workmen's demands, relied on the glaring contrast between the soaring profits and the sagging wages, while Sri Bhandare has pressed the lachrymose case of the several hundreds of 'interregnal' employees whose removal from service, on reinstatement of the old, might spell iniquity.

Olive Branch Approach

11. At this stage we must disclose an effort at settlement we made with the hearty participation of Sri Asoke Sen and Sri Tarkunde at the early stages of the hearing.

12. The golden rule for the judicial resolution of an industrial dispute is first to persuade fighting parties, by judicious suggestions, into the peace-making zone, disentangle the differences, narrow the mistrust gap and convert them, through consensual steps, into negotiated justice. Law is not the last word in justice, especially social justice. Moreover, in out hierarchical court system, the little man lives in the short run but most litigation lives in the long run. So it is that negotiation first and adjudication next, is a welcome formula for the Bench and the Bar, Management and Union. This 'olive branch' approach brought the parties closer in our Court and gave us a better understanding of the problem, although we could not clinch a settlement. So we heard the case in depth and felt that some of the legal issues did merit this Court's declaratory pronouncement, settlement or no settlement. Mercifully, counsel abbreviated their oral arguments into an eight-day exercise, sparing us the sparring marathon of 28 laborious days through which the case stretched out in the High Court !

13. Orality ad libitem may be the genius of Victorian era advocacy but in the 'needy' Republic with crowded dockets, forensic brevity is a necessity. The Bench and the Bar must fabricate a new shorthand from of Court methodology which will do justice to the pockets of the poor who seek

right and justice and to the limited judicial hours humanly available to the Court if the delivery system of justice is not to suffer obsolescence.

The facts

14. Back to the central facts. Proof of the 'efficient' management of the Gujarat Steel Tubes Ltd. is afforded by the testimony of larger turnover and profits, year after year, from the beginning down to date. The mill was commissioned in January 1964 but by the accounting year 1971-72 the turnover had leapt to Rs. 560 lakhs. It soared to Rs. 680 lakhs the next year, to Rs. 1136 lakhs the year after and to Rs. 20 crores in 1974-75. This enterprise entered the export trade and other wise established itself as a premier manufactory in the line. Steel shortage is the only shackle which hampers it higher productivity. But its increasing shower of prosperity was a sharp contrast, according to Sri Garg, to the share of the wage bill. The worker started on a magnificent sum per mensem of Rs. 100 in toto even as late as 1970, although some workmen, with more service, were paid somewhat higher. The extenuatory plea of the Management, justificatory of this parsimony, was that other mill-hands were receiving more niggardly wages in comparable enterprises. Probably, unionisation, under these luridly low-paid circumstances, caught on and a workers' union was born somewhere around 1966. A sensible stroke of enlightened capitalism persuaded the Management to enter into agreements with the unions, somewhat improving emoluments and ameliorating conditions. By 1968, the Sabha, a later union, came into being and commanded the backing of all or most of the mill-hands. By March 1969, the Sabha presented a charter of demands, followed by resistance from the management and strike by the workers. By July 1969, a settlement with them Sabha was reached. Agreements relating to the various demands brought quite and respite to the industry although it proved temporary.

15. A vivid close-up of the sequences and consequences of the dramatic and traumatic events culminating in the reference to arbitration and the impugned award is essential as factual foundation for the decision of the issues. Even so, we must condense, since labyrinthine details are not needed in a third tier judgment. Broad line with the brush bring out the effect, not minute etches which encumber the picture.

16. An agreement of futuristic import with which we may begin the confrontational chronicle is that of April 1970. Clause 6 thereof runs thus :

> Management of the company agrees to implement recommendations of the Central Wages Board for Engineering Industries as and when finally declared and all the increments granted to workmen from time to time under this agreement shall be adjusted with those recommendations provided that such adjustment shall not adversely affect the wages of workmen.

17. The engineering industry, where India is forging ahead, was apparently exploitative towards labour, and to make amends for this unhealthy position, the Central Wage Board was appointed in 1964 although it took six long years to recommend revision of wages to be implemented with effect from January 1, 1969. Meanwhile, the masses of workers were living 'below the bread line'. Saintly patience in such a milieu was too much to expect from hungry humans. The restive workers, naturally, were seething with demands and pressing for the recommendations of the Wage Board to be converted into immediate cash. But, as we will presently unravel, 'wage Board expectations' were proving teasing illusions and promises of unreality because of non-implementation, viewed from the Sabha's angle. The Management, on the other hand, had a contrary version which we will briefly

consider. Luckily, agreed mini-increases in wages were taking place during the years 1970, 1971 and 1972. Likewise, bonus was also the subject of bargain and agreement. But in September 1971, an allegedly violent episode broke up the truce between the two, spawned criminal cases against workers, led to charges if go-slow tactics and lock-outs and burst into suspension, discharge and dismissal of workmen.

18. The crisis was tided over by continued conciliation and two settlements. We are not directly concerned with the cluster of clauses therein save one. 64 workmen had been discharged or dismissed, of whom half the number were agreed to be reinstated. The fate of the other half (32 workers) was left for arbitration by the Industrial Tribunal. The dark clouds cleared for a while but the sky turned murky over again, although the previous agreement had promised a long spell of normalcy. The Sabha, in October 1972, met and resolved to raise demands of which the principal once were non-implementation of the Wage Board recommendations, bonus for 1971 and wages during the lock-out period. The primary pathology of industrial frictions is attitudinal. The Management could have (and, indeed, did, with a new Union) solved these problems had they regarded the Sabha as partner, not saboteur. Had the bitter combativeness of the Sabha been moderated, may be the showdown could have been averted.

19. Apportioning blame does not help now, but we refer to it here because Sri Asoke Sen with feeling fury, fell foul of the criticism by the High Court that the Management had acted improperly in insisting on arbitration, and argued that when parties disagreed, arbitral reference was the only answer and the workers' fanatical rejection of arbitration made no sense. We need not delve into the details of the correspondence relied on by either side to reach the truth. For, the union's case is that in the prior settlement between the two parties arbitral reference came only after negotiations failed. That was why they pressed the Management to reasons together, avoiding wresting with each other before a slow-moving umpire.

20. Sri Tarkunde, for the Sabha, urged that the workmen were not intransigent but impatient and pleaded for a negotiated settlement since the main point in dispute, namely, the implementation of the Central Engineering Wages Board's recommendations, was too plain to admit of difference, given good faith on both sides. We will examine the substance of this submission later but in needs to be emphasised that workmen, surviving on starving wages and with notoriously fragile staying power, are in no mood for adjudicatory procedures, arbitral or other, if the doors of negotiation are still ajar. The obvious reason for this attitude is that the litigative length of the adjudicatory apparatus, be it the tribunal, the Court or the Arbitrator, is too lethargic and long-winded for workmen without the wherewithal to survive and is beset with protracted challenges either by way of appeal upon appeal or in the shape of writ petitions and, thereafter, appeals upon appeals. The present case illustrates the point. Where workmen on hundred rupees a month demand immediate negotiation the reason is that privations have no patience beyond a point. Now and here, by negotiation, is the shop-floor clamour. In this very matter, although the controversy before the arbitrator fell within a small compass, he took a year and ninety printed pages to decide, inevitably followed by a few years and hundred and thirty printed pages of judgment in the High Court and a longer spell in this Court with slightly lesser length of judgment. Which workmen under Third World conditions can withstand this wasting disease while hunger leaves no option save to do or die ? Raw life, not rigid logic, is the mother of law.

21. After the demands where raised by the Union, the main issue being implementation of the Wages Board recommendations, a stream of correspondence, meetings and inchoate settlements ensued, but the crucial question, which would have meant 'cash and carry' for the workmen, baffled

solution. Do negotiate since the application of the Wages Board recommendations are beyond ambiguity, was the Sabha's peremptory plea. We differ; therefore, go to arbitration, was the management's firm response. A stalemate descended on the sense.

22. No breakthrough being visible, the Sabha charged the Management by its letter of January 25, 1973 with breach of Clause 6 of the Agreement of August 4, 1972 which ran thus :

> That the parties agree that for a period of 5 years from the date of this settlement all disputes will be solved by mutual negotiations or, failing that, by joint arbitration under Section 10-A of the I.D. Act, 1947. Neither party shall take any direct action including go-slow, strike and lock-out for a period of 5 years from the date of this settlement.

Various aspersions of anti-labour tactics were included in the Sabha's letter but the most money-loaded item was the grievance about the Wage board recommendations. The temper, by now, was tense.

23. The Management, on the same day, (January 25, 1973), set out its version on the notice board and the High Court's summary of it runs thus :

> The notice stated that during the course of meeting with the representatives of the Sabha held on January 20, 1973 the company had expressed its willingness to implement the Wage Board recommendations according to its interpretation on and with effect from January 1, 1969 without prejudice to the rights and contentions of the workmen and leaving it open to the parties to take the matter to arbitration for resolution of the points of dispute. The Sabha, however, had turned down this suggestion and it came to the notice of the Company that workmen were being instigated by making false representations. The company clarified that on and with effect from January 1, 1972 every workman would be entitled to the benefits of Wage Board recommendations, irrespective of whether the concerned workmen had put in 240 days attendance.

24. The Sabha's answer was a strike two days later. This event of January 27 was countered quickly by the Management restating its attitude on the Wage Board recommendations, asserting that the strike was illegal and in breach of the settlement of August 4, 1972 and wholly unjustified because the offer of reference to arbitration, negotiations failing, had been spurned by the Sabha. The notice would up with a command and a caveat :

> If the workmen do not immediately resume duty, the Company would not be under any obligation to continue in service those 32 workmen who have been taken back in service pursuant to the settlement dated August 4, 1972. Besides, if (the workmen) continue causing loss to the company from time to time in this manner, the Company will not also be bound to implement the Wage Board recommendations on and with effect from January 1, 1969, which may also be noted. The company hereby with draws all its proposals unless the workmen withdraw the strike and resume work within two days.

25. This threat was dismissed by the workmen as a brutum fulmen and the strike continued. The Management, therefore, came up on the notice board castigating the Sabha with irresponsible

obduracy in waging an illegal and unjustified strike. A warning of the shape of things to come was given in this notice. The High Court has summed in up thus :

> The company gave an intimation that in such obstinate attitude on the part of the Sabha and the workmen, it had decided to withdraw its earlier offer to implement the Wage Board recommendations on and with effect from January 1, 1969 as already cautioned in the notice dated January 27, 1973. The said decision must be taken to have been thereby communicated to the workmen and Sabha. The notice further stated that having regard to the obdurate, unreasonable and illegal attitude adopted by the workmen and Sabha, the Company had decided to take disciplinary proceedings against the defaulting workmen. In this connection, the attention of the workmen was drawn to the fact that the strike was illegal not only because of the terms of the settlement dated August 4, 1972 but also because of the pendancy of the reference relating to reinstatement of 32 workmen before the Industrial Court and, that, therefore, the company was entitled to take disciplinary action against them. Finally, the company appealed to the workmen to withdraw their illegal and unjustified strike forthwith and to resume work.

26. These exercises notwithstanding, the strike regard undaunted, the production was paralysed and the Management retaliated by an elaborate notice which dilated on its preparedness to negotiate or arbitrate and the Sabha's unreason in rejecting this gesture and persisting on the war path. The stern economic sanction was brought home in a critical paragraph :

> By this final notice the workmen are informed that they should withdraw the strike and resume work before Thursday, February 15, 1973. If the workmen resume duty accordingly, the management would be still willing to pay salary according to the recommendations of the Wages Board on and with effect from January 1, 1969. Furthermore, the management is ready and willing to refer to the arbitration of the Industrial Tribunal and question as to whether the Management has implemented the settlement August 4, 1972 and all other labour problems. In spite of this, if the workmen do not resume duty before Thursday, February 15, 1973, then the company will terminate the services of all workmen who are on strike and thereafter it will run the factory by employing new workmen. All Workmen may take note of this fact.

27. The count-down thus began. February 15, 1973 arrived, and the Management struck the fatal blow of discharging the strikers - all the labour force, 853 strong, - and recruiting fresh hands unless work was resumed by February 19, 1973.

28. This public notice was allegedly sent to the Sabha and circulated to such workmen as hovered around the factory. It is common case that the notice of February 15, 1973, was not sent to individual workmen but was a signal for action. The drastic consequence of disobedience was spelt out in no uncertain terms :

> The workmen are hereby informed that they should resume duty on or before Monday, February 19, 1973 failing which the Management will presume that the workmen want to continue their strike and do not wish to resume work until their demands as aforesaid are accepted by the Management.

29. Parallel negotiations were going on even while mailed first manoeuvres were being played up -

thanks to the basic goodwill and tradition of dispute settlements that existed in this Company. Even admit the clash of arms, bilateral diplomacy has a place in successful industrial relations. The management and the Sabha allowed the talks to continue which, at any rate, clarified the area of discord. One thing that stood out of these palavers was that both sides affirmed the pre-condition of negotiations before arbitration over differences although the contents, accent and connotation of 'negotiations' varied with each side. No tangible results flowed from these exercises and the inevitable happened on February 21, 1973 when the management blotted out the entire lot of 853 workmen from the roster, by separate order of discharge from service, couched in identical terms. The essential terms read thus :

> Your service are hereby terminated by giving you one month's salary in lieu of one month's notice and accordingly you are discharged from service.

You should collect immediately from the cashier of the factory your one month's notice-pay and due pay, leave entitlement and gratuity, if you are entitled to the same. The payment will be made between 12 noon and 5 p.m.

If and when you desire to be employed, you may apply in writing to the company in that behalf and on receipt of the application, a reply will be sent to you in the matter.

30. Casual workmen were issued separate but similar orders. The Management did record its reasons for the action taken, on February 20, 1973 and forwarded them to the Sabha and to the individual workmen on request. The anatomy of this proceeding is of critical importance in deciding the character of the action. Was it a harmless farewell to the workmen who were unwilling to rejoin or a condign punishment of delinquent workmen ?

31. The separate memorandum of reasons refers to the strike as illegal and unjustified and narrates the hostile history of assault by workmen of the officers, their go-slow tactics and sabotage activities, their contumacious conduct and a host of other perversities vindicating the drastic action of determining the services of all the employees. The concluding portion reads partly stern and partly non-committal :

In the interest of the Company it is decided to terminate the services of all the workmen who are on illegal and justified strike since January 27, 1973.

Under the circumstances, it is decided that the service of all the workmen who are on illegal and unjustified strike should be terminated by way of discharge simpliciter. These workmen, however, may be given opportunity to apply for employment in the Company and in case applications are received for employment from such employees, such applications may be considered on their merits later on.

It may be mentioned here that while arriving at the aforesaid decision, to terminate the services of the workmen, various documents, notices, correspondence with the Union and others, records of production, etc., have been considered and therefore the same are treated as part of the relevant evidence to come to the conclusion as aforesaid.

FINAL CONCLUSION

The services of all the workmen who are on illegal and unjustified strike since January 27, 1973 should be terminated by way of discharge simpliciter and they should be offered all their legal dues

immediately.

The Administrative Manager is hereby directed to pass orders on individual workers as per draft attached.

32. We thus reach the tragic crescendo when the Management and the workmen fell apart and all the workmen's services were severed. Whether each of these orders using, in the contemporaneous reasons, the vocabulary of misconduct but, in the formal part, the expression 'discharge simpliciter', should be read softly as innocent termination or sternly as penal actions, is one of the principal disputes demanding decision.

33. We may as well complete the procession of events before taking up the major controversies decisive of the case. The total termination of the entire work force of 853 employees was undoubtedly a calamity of the first magnitude in a country of chronic unemployment and starving wages. Nevertheless, under certain circumstances, discharge of employees may well be within the powers of the Management subject to the provisions of the Act. With all the strikers struck off the rolls there was for a time the silence of the grave. The conditional invitation to the employees to seek de novo employment by fresh applications would be considered on their merits, left the workers cold. So the factory remained closed until April 28, 1973 when, with new workers recruited from the open market, production recommenced. Among the militants the morale, which kept the strike going, remained intact but among the others the pressure to report for employment became strong. Re-employment of discharged workmen began and slowly snowballed, so that by July 31, 1973 a substantial number of 419 returned to the factory.

34. The crack of workmen's morals was accelerated by escalating re-employment and the Management's restoration of continuity of service and other benefits for re-employed hands. The employer relief on this gesture as proof of his bona fides. Meanwhile, there were exchanges of letters between and 'trading' of charges against each other. The Management alleged that the strikers were violent and prevented loyalists' return while the Sabha was bitter that gonads were hired to break the strike and promote blacklegs. These imputations have a familiar ring and their impact on the legality of the discharge of workmen falls for consideration a little later. The stream of events flowed on. The Sabha protested that the Managements was terrorising workmen, exploiting their sagging spirit and illegally insisting on fresh applications for employment while they were in law continuing in services. With more 'old workers' trickling back for work and their discharge orders being cancelled, the strike became counter-productive. Many overtures on both sides were made through letters but his epistolary futility failed to end the imbroglio and brought no bread. The worker wanted bread, job, and no pyrrhic victory.

35. A crescent of hope appeared on the industrial sky. The Management put out a 'final offer' on May 31, 1973, calling on all workmen to rejoin lest the remaining vacancies also should be filled by fresh recruits. The Sabha responded with readiness to settle and sought some clarifications and assurances. The employer informed :

> Our offer is open till June 10, 1973. From June 11, 1973 we shall recruit new hands to the extent necessary. Thereafter workers who will not have reported for work shall have no chance left for re-employment with us.

We repeat that those workers who will report for work will be taken back in employment with continuity of their services, that the orders of discharge passed against them on February 21, 1973

shall be treated as cancelled and they will also be paid the difference in wages from 1969 as per the recommendations of the Wage Board.

36. The Sabha was willing and wrote back on June 8, 1973 but sought details about the attitude of the Management to the many pending demands. Meanwhile, the sands of time were running out and so the Sabha telegraphed on June 9, that the workers were willing to report for work but were being refused work. They demands the presence of an impartial observer. The reply by the Management repelled these charges, but there was some thaw in the estrangement, since the time for return to work of the strikers was extended up to 16-6-1973. An apparent end to a long strike was seemingly in sight with the Sabha sore but driven to surrender. On 13-6-1973 the Sabha Secretary wrote back :

> This is a further opportunity to you even now to show your bona fides. If you confirm to take all the workmen discharged on 21-2-1973 as stated in your various letters and to give them intimation and reasonable time to join, I will see that your offer is accepted by the workers.

37. Here, at long last, was the Management willing to 'welcome' back all the former employee and the Sabha limping back to the old wheels of work. Was the curtain being finally drawn on the feud ? Not so soon, in a world of bad cloud and bad faith; or may be, new developments made old offers absolute and the expected and proves an illusion. Anyway, the victor was the Management and the vanquished the Sabha and the re-employment proffered was watered down. In out materialist cosmos, often Might is Right and victory dictates morality !

38. Hot upon the receipt of the Sabha's letter accepting the offer the Management back-tracked or had second thoughts on full re-employment. For, they replied with a long catalogue of the Sabha's sins, set out the story of compulsion to keep the production going and explained that since new hands had come on the scene full re-employment was beyond them. In its new mood of victorious righteousness, the Management modified the terms of intake of strikers and saddled choosy conditions on such absorption suggestive of breaking the Sabha's solidarity :

> As on the present working of the Company, the Company may still need about 250 more workers including those to be on the casual list as per the employment position prior to the start of the strike.

You may, therefore, send to us immediately per return of post the list of the workers who can and are willing to join duty immediately so as to enable us to select and employ the workmen as per the requirements of the Company. Further, it would also be necessary for you to state in your reply that you have called off the strike and have advised the workers to resume the work as otherwise it is not clear from your letter as to whether you are still advocating the continuance of the strike or that you have called off the strike. Therefore, unless we have a very definite stand known from you on this issue, it may not be even now possible for us to enter into any correspondence with you.

We may again stress that if your tactics of prolonging the issue by correspondence are continued the Management would be constrained to take new recruits and in that case, at a later date it may not be even possible to employ as many workmen as may be possible to employ now.

39. Nothing is more galling, says Sri Tarkunde, than for a Union which has lost the battle and offered to go back to work to be told that it should further humiliate itself by formally declaring the calling off of the strike. Sentiment apart, the Sabha had agreed to go back, but then the Management

cut down the number to be re-employed to 250 and, even this, on a selective basis. This selection could well be to weed out Union activists or to drive a wedge among the union members. These sensitive thoughts and hard bargains kept the two apart. The Sabha, wounded but not wiped out, did not eat the humble pie. The Management, on account of the intervening recruitments and injuries inflicted by the strike, did not budge either.

40. At this point we find that out of 853 employees who had been sacked 419 had wandered back by July 31, leaving 434 workmen as flotsam. Their reinstatement became the focus of an industrial dispute raised by the Sabha. A few more were left out of this jobless mass, and through the intercession of the Commissioner of Labour both sides agreed to resolve their disagreement by arbitral reference under Section 10-A of the Act, confining the dispute to reinstatement of 400 workmen discharged on February 21, 1973. A reference under Section 10-A materialised. The 'Labour litigation' began in May, 1975 and becoming 'at each remove a lengthening chain' laboured from deck to deck and is coming to a close, hopefully, by this decision. Is legal justice at such expensive length worth the candle or counter-productive of social justice ? In a streamlined alternative beyond the creative genius of Law India ?

An Aside

41. As urgent as an industrial revolution is an industrial law revolution, if the rule of law were at all to serve as social engineering. The current forensic process needs through overhaul because it is over-judicialised and under professionalised, lacking in social orientation and shop-floor knowhow and, by its sheer slow motion and high price, defects effective and equitable solution leaving both Management and Unions unhappy. If Parliament would heed, we stress this need. Industrial Justice desiderates specialised processual expertise and agencies.

42. This factual panorama, omitting a welter of debatable details and wealth of exciting embellishments, being not germane to the essential issue, leads us to a formulation of the decisive questions which alone need engage out discussion. The Management might have been right in its version or the Sabha might have been wronged as it wails, but an objective assessment of the proven facts and unbiased application of the declared law will yield the broad basis for working out a just and legal solution. Here, it must be noticed that a new union now exists even though its numerical following is perhaps slender. We are not concerned whether it is the favoured child of the Management, although it has received soft treatment in several settlements which have somewhat benefited the whole work force and suggests a syndrome not unfamiliar among some industrial bosses allergic to strong unions.

43. The central problem on the answer to which either the award of the arbitrator or the judgment of the High Court can be sustained as sound is whether the discharge of the workmen en masse was on innocuous termination or a disciplinary action. If the latter, the High Court's reasoning may broadly be invulnerable. Secondly, what has been mooted before us is a question as to whether the evidence before the Arbitrator, even if accepted at its face value, establishes any misconduct of any discharged workman and further whether the misconduct, if any, made out is of such degree as to warrant punitive discharge. Of course, the scope of Section 11-A as including arbitrators, the power of arbitrators, given sufficiently wide terms of reference, to examine the correctness and propriety of the punishment, inter alia, deserve examination. Likewise the rules regarding reinstatement, retrenchment, back wages and the like, fall for subsidiary consideration.

44. Prefactory to this discussion is the appreciation of the constitutional consciousness with regard

to labour law. The Constitution of India is not a non-aligned parchment but a partisan of social justice with a direction and destination which it sets in the Preamble and Article 38, and so, when we read the evidence, the rulings, the statute and the rival pleas we must be guided by the value-set of the Constitution. We not only appraise Industrial Law from this perspective in the disputes before us but also realise that ours is a mixed economy with capitalist mores, only slowly wobbling towards a socialist order, notwithstanding Sri Garg's thoughts. And, after all, ideals apart, 'law can never be higher than the economics order and the cultural development of society brought to pass by that economics order'. The new jurisprudence in industrial relations must prudently be tuned to the wave-length in out constitutional values whose emphatic expression is found in a passage quoted by Chief Justice Rajamanner of the Madras High Court the learned Judge observed :

> The doctrine of 'laissez faire' which held sway in the world since the time of Adam Smith has practically given place to a doctrine which emphasises the duty of the State to interfere in the affairs of individuals in the interests of the social well being of the entire community. As Julian Huxley remarks in his essay on "Economics Man and Social Man" : "Many of out old ideas must be retranslated, so to speak, into a new language. The democratic idea of freedom, for instance, must lose its nineteenth century meaning of individual liberty in the economics sphere, and become adjusted to new conception of social duties and responsibilities. When a big employer talks about his democratic rights to individual freedom, meaning thereby a claim to socially irresponsible control over a huge industrial concerns and over the lives of tens of thousands of human beings whom it happens to employ, he is talking in a dying language". (Cited in V. R. Krishna Iyer : LAW AND THE PEOPLE - A COLLECTION OF ESSAYS, p. 36)

45. Homo economicus can no longer warp the social order. Even so the Constitution is ambitiously called socialist but realists will agree that a socialist transformation of the law of labour relations is a slow though steady judicial desideratum. Until specific legislative mandates emerge from Parliament the court may mould the old but not make the new law. 'Interstitially, from the molar to the molecular' is the limited legislative role of the court, as Justice Holmes said and Mr. Justice Mathew quoted (See State of Kerala v. N. M. Thomas, (1976) 2 SCC 310, 343).

The Core Question

46. Right at the forefront falls the issue whether the orders of discharge are, as contended by Sri Tarkunde, de facto dismissals, punitive in impact and, therefore, liable to be voided if the procedural imperatives for such disciplinary action are not complied with, even though draped in silken phrases like 'termination simpliciter'. It is common case that none of the processes implicit in natural justice and mandated by the relevant standing orders have been complied with, were we to construe the orders impugned as punishment by was of discharge or dismissal. But Sri Asoke Sen impressively insists that the orders here are simple terminations with no punitive component, as, on their face, the orders read. To interpret otherwise is to deny to the employer the right, not to dismiss but to discharge, when the law gives him the option.

47. An analysis of the standing orders in the background of disciplinary jurisprudence is necessitous at this point of the case.

48. The Model Standing Orders prescribed under Section 15 of the Industrial Employment (Standing Orders) Act, 1946, apply to this factory. Order 23, clauses (1) and (4), relate to

termination of employment of permanent workmen. Termination of their services on giving the prescribed notice or wages in lieu of such notice is provided for. But clause (4-A) requires reasons for such termination of service of permanent workmen to be recorded and, if asked for, communicated. This is obviously intended to discover the real reason for the discharge so that remedies available may not be defeated by clever phraseology of orders of termination. Clause (7) permits the services of non-permanent workmen to be terminated without notice except when such temporary workmen are discharged by way of punishment. Punitive discharge is prohibited unless opportunity to show cause against charges of misconduct is afforded (Standing Order 25). Order of termination of service have to be by the Manager and in writing and copies of orders shall be furnished to the workmen concerned. Standing Order 24 itemises the acts and omissions which amount to misconduct :

> According to clause (b) of the said Standing Order, going on an illegal strike of abetting, inciting, instigating or acting in furtherance thereof amounts to misconduct. Standing Order 25 provides for penalty imposable on a workman guilty of misconduct. Accordingly amongst other punishments, a workman could be visited with the penalty of discharge under Order 23 of dismissal without notice for a misconduct [see sub-clauses (f) and (g) of clause (1)]. Clause (3) provides that no order of dismissal under sub-clause (g) of clause (1) shall be made except after holding an enquiry against the workman concerned in respect of the alleged misconduct in the manner set forth in clause (4). Clause (4) provides for giving to the concerned workman a charge-sheet and an opportunity to answer the charge and the right to be defended by a workman working in the same department as himself and production of witnesses and cross-examination of witnesses on whom the charge rests. Under clause (6), in awarding punishment the Manager has to take into account the gravity of the misconduct, the previous record, if any, of the workman, and any other extenuating or aggravating circumstance.

49. The finding of the arbitrator that the workmen went on a strike which was illegal and in which they had participated is not disputed. In this background, the application of the procedural imperatives before termination of services of the workmen in the circumstances of the present case, has to be judged. This, in turn, depends on the key finding as to whether the discharge orders issued by the management were punitive or non-penal.

50. The anatomy of a dismissal order is not a mystery, once we agree that substance, not semblance, governs the decision. Legal criteria are not so slippery that verbal manipulations may outwit the court. Broadly stated, the face is the index to the mind and an order fair on its face may be taken at its face value. But there is more to it than that, because sometime words are designed to conceal deeds by linguistic engineering. So it is beyond dispute that the form of the order or the language in which it is couched is not conclusive. The Court will lift the veil to see the true nature of the order.

51. Many situations arise where courts have been puzzled because the manifest language of the termination order is equivocal or misleading and dismissals have been drowsed up as simple termination. And so, Judges have dived into distinctions between the motive and the foundation of the order and a variety of other variations to discover the true effect of an order of termination. Rulings are a maze on this question but, in sum, the conclusion is clear. If two factors co-exist, an inference of punishment is reasonable though not inevitable. What are they ?

52. If the severance of service is effected, the first condition is fulfilled and if the foundation or

causa causans of such severance is the servant's misconduct the second is fulfilled. If the basis or foundation for the order of termination is clearly not turpitudinous or stigmatic or rooted in misconduct or visited with evil pecuniary effects, then the inference of dismissal stands negated and vice versa. These canons run right through the disciplinary branch of master and servant jurisprudence, both under Article 311 and in other cases including workmen under managements. The law cannot be stultified by verbal haberdashery because the court will lift the mask and discover the true face. It is true that decisions of this Court and of the High Courts since Dhingra case (Parshotam Lal Dhingra v. Union of India, 1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544) have been at times obscure, if citied de hors the full facts. In Samsher Singh case (Samsher Singh v. State of Punjab, (1975) 1 SCR 814, 880 : (1974) 2 SCC 831, 889 : 1974 SCC (L & S) 550) the unsatisfactory state of the law was commented upon by one of us, per Krishna Iyer, J., quoting Dr. Tripathi for support : (SCC p. 889, paras 160, 161)

> In some cases, the rule of guidance has been stated to be 'the substance of the matter' and the 'foundation' of the order. When does 'motive' trespass into 'foundation' ? When do we lift the veil of 'form' to touch the substance ? When the Court says so. These 'Freudian' frontiers obviously fail in the work-a-day world and Dr. Tripathi's observations in this context are not without force. He says :

As already explained, in a situation where the order of termination purports to be a mere order of discharge without stating the stigmatizing results of the departmental enquiry a search for the 'substance of the matter' will be indistinguishable from a search for the motive (real, unrevealed object) of the order. Failure to appreciate this relationship between motive (the real, but unrevealed object) and form (the apparent, or officially revealed object) in the present context has led to an unreal interplay of words and phrases wherein symbols like 'motive', 'substance', 'form' or 'direct' parade in different combinations without communicating precise situations or entities in the world of facts.

The need, in this branch of jurisprudence, is not so much to reach perfect justice but to lay down a plain test which the administrator and civil servant can understand without subtlety and apply without difficulty. After all, between 'unsuitability' and 'misconduct' 'thin partitioners do their bounds divide'. And over the years, in the rulings of this Court the accept has shifted, the canons have varied and predictability has proved difficult because the play of legal light and shade has been baffling. The learned Chief Justice has in his judgment, tackled this problem and explained the rule which must govern the determination of the question as to when termination of service of a probationer can be said to amount to discharge simpliciter and when it can be said to amount to punishment so as to attract the inhibition of Article 311.

53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus, scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after

being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

54. On the contrary, even if these is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate not take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situations here.

55. What is decisive is the plain reason for the discharge, not the strategy of a non-enquiry or clever avoidance of stigmatising epithets. If the basis is not misconduct, the order is saved. In Murugan Mills (Murugan Mills v. Industrial-Tribunal. (1965) 2 SCR 148, 151-152 : AIR 1965 SC 1496), this Court observed :

> The right of the employer to terminate the services of his workman under a standing order, like Clause 17(a) in the present case, which amounts to a claim "to hire and fire" an employee as the employer pleases and thus completely negatives security of service which has been secured to industrial employees through industrial adjudication, came up for consideration before the Labour Appellate Tribunal in Buckingham and Carnatic Co. Ltd. v. Workers of the Company ((1952) LAC 490). The matter then came up before this Court also in Chartered Bank v. Chartered Bank Employees Union ((1960) 3 SCR 441 : AIR 1960 SC 919 : (1960) 2 LLJ 222), and the Management of U. B. Dutt & Co. v. Workmen of U. B. Dutt & Co. (1962 Supp 2 SCR 822 : AIR 1963 SC 411 : (1962) 1 LLJ 374) wherein the view taken by Labour Appellate Tribunal was approved and it was held that even in a case like the present the requirement of bona fides was essential and if the termination of service was a colourable exercise of the power or as a result of victimisation or unfair labour practice to industrial tribunal would have the jurisdiction to intervene and set aside such termination. The form of the order in such a case is not conclusive and the tribunal can go behind the order to find the reasons which led to the order and then consider for itself whether the termination was a colourable exercise of the power or was a result of victimisation or unfair labour practice. If it came to the conclusion that the termination was a colourable exercise of the power or was a result of victimisation or unfair labour practice it would have the jurisdiction to intervene and set aside such termination.

56. Again, in Chartered Bank v. Employees' Union ((1960) 3 SCR 441 : AIR 1960 SC 919 : (1960) 2 LLJ 222), this Court emphasised :

> The form of the order of termination is not conclusive of the true nature of the order, for it is possible that the form may be merely a camouflage for an order of misconduct. It is, therefore, always open to the Tribunal to go behind the form and look at the substance and if it comes to the conclusion, for example, that though in form the order amounts to termination simpliciter, it in reality cloaks a dismissal for misconduct, it will be open to it aside as a colourable exercise of the power.

57. A rain of rulings merely adds to the volume, not to the weight of the proposition, and so we desist from citing all of them. A Bench of seven judges of this Court considered this precise point in Samsher Singh case ((1975) 1 SCR 814, 841-842 : (1974) SCC 831, 855) and Chief Justice Ray ruled : (SCC p. 855, para 80)

> The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the services may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside.

Simple termination or punitive discharge ?

58. We must scan the present order of discharge of 853 workmen and ask the right questions to decide whether they are punishments or innocent terminations. Neither judicial naivete not managerial ingenuity will put the Court off the track of truth. What, then are the diagnostic factors in the orders under study ?

59. An isolated reading of the formal notices terminating their services reveals no stigma, no penalty, no misconduct. They have just been told off. But the management admits that as required by the Standing orders it has recorded reasons for the discharge. There, several pages of damnatory conduct have been heaped on the workers collectively accounting for the resort of the Management to the extreme step of discharging the whole lot, there being no alternative. Sri A. K. Sen took us through the various appeals made by the Management, the losses sustained, the many offers to negotiate and arbitrate, the Sabha's deaf obduracy and resort to sudden strike and violent tactics and, worst of all, its attempts to persuaded the Central Government to take over the factory as a 'sick' mill. These ordeals were described by Sri Asoke Sen graphically to justify the submission that the Management had no choice, caught between Scylla of strike and Charybdis of takeover, but to get rid of the strikers and recruit new workers. If the employer did not discharge the strikers they were adamant and would not return to work, and the very closure compelled by the Sabha was being abused by it to tell the Central Government that for three months there had been no production and so the mill qualified to be taken over as 'sick' under the Industries (Development and Regulation) Act. If the Management discharged the workers to facilitate fresh recruitment and save the factory from statutory takeover the cry was raised that the action was dismissal because an elaborate enquiry was not held. The Management had avoided injury to the workmen, argued Sri Sen, by merely terminating their services without resort to disciplinary action and recording the uncomplimentary grounds in a separate invisible order. He also underscored the fact that the strike was illegal and unjustified, as concurrently held by the Arbitrator and the High Court.

60. We agree that industrial law promotes industrial life, not industrial death, and realism is the soul of legal dynamics. Any doctrine that destroys industrial progress interlaced with social justice is lethal juristics and cannot be accepted. Each side has its own version of the role of the other which we must consider before holding either guilty. Sri Tarkunde told us the tale of woe of the workmen. In a country where the despair of government is appalling unemployment it is a terrible tragedy to put to economics death 853 workmen. And for what ? For insisting that the pittance of Rs. 100 per month be raised in terms of the Central Wage Board recommendations, as long ago agreed to by the Management but put off by the tantalising but treacherous offer of arbitration when the point

admitted of easy negotiated solution. Arbitration looks nice, but, since 1969, the hungry families have been yearning for a morsel more, he urged. Blood, toil, sweat and tears for the workers and all the profits and production for the Management, was the industrial irony ! Knowing that every arbitral or other adjudicatory agency in India, especially when weak Labour is pitted against strong Capital in the sophisticated processual system, consumes considerable time, the lowly working class is allergic to this dilatory offer of arbitration. They just don't survive to eat the fruits. Such was his case.

61. The story of violence was also refuted by Sri Tarkunde, since the boot was on the other leg. Goondas were hired by the Management to sabotage the fundamental right to strike and with broken hearts several of them surrendered. When, at last, the Sabha agreed to see that all workmen reported for work within the extended time, the Management took to the typical tactics of victimisation, of refusing work for all, as first offered, and of picking and choosing even for the 250 vacancies. Moreover, other conditions were put upon the Sabha calculated to break unionism which those familiar with trade union movements would painfully appreciate. This insult and injury apart, the orders of termination were plainly dismissals for a series of alleged misconducts which were chronicled in separate proceedings. The formal order was like a decree, the grounds recorded contemporaneously were like the judgment, to use Court vocabulary. It was obvious that the foundation for the termination was the catena of charges set out by the Management. The true character of the order could not be hidden by the unfair device of keeping a separate record and omitting it from the formal communication. Law is not such an ass as yet and if the intent and effect is damnatory the action is disciplinary.

62. Between these two competing cases, presented by counsel, we have to gravitate towards the correct factual-legal conclusion. A number of peripheral controversies have been omitted from this statement, for brevity's sake. When two high tribunals have spread out the pros and cons it is supererogation for this court to essay likewise, and miniaturization is a wise husbandry of judicial resources. First, we must decide whether the order of termination was a punitive discharge or a simple discharge.

63. Here we reach the dilemma of the law for discovering unfailing guidelines to distinguish between discharge simpliciter and dismissal sinister. The search for infallible formulae is vain and only pragmatic humanism can help navigate towards just solutions. We have earlier explained that from Dhingra case (Parshotam Lal Dhingra v. Union of India, 1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544) to Shamsher Singh case (Samsher Singh v. State of Punjab, (1975) 1 SCR 814, 880 : (1974) 2 SCC 831, 889 : 1974 SCC (L & S) 550), law has been dithering but some rough and ready rules can be decocted to serve in most situations. Law, in this area, is a pragmatist, not a philologist, and we have set out the dual diagnostic tests applicable in such cases.

64. It was not retrenchment, according to the Management. Then what was it ? If there was work to be done, why terminate services of workmen except as punishment ? Because, argued Sri Sen, the workers did not work, being on strike and the Management, bent on keeping the factory going, needed workmen who work. To recruit fresh hands into the lists and to keep the old hands on the roster was double burden, and, therefore, the strikers had to be eased out to yield place to new recruits. The object was not to punish the workmen but to keep the factory working. Accepting this plea, as it were, the award of the arbitrator has exonerated the Management of the charge of dismissal while the High Court has held the action to be dismissal for misconduct and therefore bad in law.

65. In our opinion, the facts of the case before us speak for themselves. Here are workmen on strike. The strike is illegal. The Management is hurt because production is paralysed. The strikers allegedly indulge in objectionable activities. The exasperated Management hits back by ordering their discharge for reasons set out in several pages in the appropriate contemporaneous proceeding. Misconduct after misconduct is flung on the workers to justify the drastic action. In all conscience and common sense, the discharge is the punishment for the misconduct. The Management minces no words. What is explicitly stated is not a colourless farewell to make way for fresh hands to work the factory until the strike is settled but a hard hitting order with grounds of guilt and penalty of removal.

66. The inference is inevitable, however, ingenious the contrary argument, that precisely because the Management found the workmen refractory in their misconduct they were sacked. Maybe, the Management had no other way of working the factory but that did not change the character of the action taken. Once we hold the discharge punitive the necessary consequence is that enquiry before punishment was admittedly obligatory and confessedly not undertaken. The orders were bad on this score alone.

67. Sri A. K. Sen urged that in a dismissal the employee is denied some of the retiral and other benefits which he gets in a simple discharge, and here all the employees were offered their full monetary benefits, so that it was wrong to classify the orders of discharge as punitive. Maybe, a dismissed servant may well be disentitled to some, at least, of the financial benefits which his counterpart who is simply discharged may draw. But that is not a conclusive test. Otherwise, the master may 'cashier' his servant and camouflage it by offering full retiral benefits. Dismissal is not discharge plus a price. The substance of the action is the litmus test. In the present case, the penal core, 'tied in tooth and claw', shows up once we probe; and the non-committal frame of the formal order is a disguise. For a poor workman loss of his job is a heavy penalty when inflicted for alleged misconduct, for he is so hungry that, in Gandhiji's expressive words, he sees God Himself in a loaf of bread.

68. Before we leave this part of the case, a reference to some industrial law aspects and cases may be apposite though little repetitive. Standing orders certified for an industrial undertaking or the Model Standing Orders framed under the Industrial Employment Standing Orders Act provides for discharge simpliciter, a term understood in contradistinction to punitive discharge or discharge by way of penalty. It is not unknown that an employer resorts to camouflage by garbing or cloaking a punitive discharge in the innocuous words of discharge simpliciter. Courts have to interpose in order to ascertain whether the discharge is one simpliciter or a punitive discharge, and in doing so, the veil of language is lifted and the realities perceived. In the initial stages the controversy raised was whether the court/tribunal had any jurisdiction to lift such a veil. Probe and penetrate so as to reveal the reality, but this controversy has been set at rest by the decision in Western India Automobile Association v. Industrial Tribunal, Bombay ((1949) FCR 321 : (1949) 1 FJR 97 : 1949 LLJ 245 : AIR 1949 FC 111). The wide scope of the jurisdiction of industrial tribunal/court in this behalf is now well established. If standing orders or the terms of contract permit the employer to terminate the services of his employee by discharge simpliciter without assigning reasons, it would be open to him to take recourse to the said term or condition and terminate the services of his employee but when the validity of such termination is challenged in industrial adjudication it would be competent to the industrial tribunal to enquire whether the impugned discharge has been effected in the bona fide exercise of the power conferred by the terms of employment. If the discharge has been ordered by the employer in bona fide exercise of his power, then the industrial tribunal may not interfere with it; but the words used in the order of discharge and the form which it may have taken are not

conclusive in the matter and the industrial tribunal would be entitled to go behind the words and form and decide whether the discharge is a discharge simpliciter or not. If it appears that the purported exercise of power to terminate the service of the employee was in fact the result of the misconduct alleged against him, then the tribunal would be justified in dealing with the dispute on the basis that, despite its appearance to the contrary, the order of discharge is in effect an order of dismissal. In the exercise of this power, the court/tribunal would be entitled to interfere with the order in question (see Assam Oil Co. v. Its Workmen ((1960) 3 SCR 467, 462 : AIR 1960 SC 1264 : (1960) 1 LLJ 587)). In the matter of an order of discharge of an employee as understood within the meaning of the Industrial Disputes Act the form of the order and the language in which it is couched are not decisive. If the industrial court is satisfied that the order of discharge is punitive or that it amounts to victimisation or unfair labour practice it is competent to the court/tribunal to set aside the order in a proper case and direct reinstatement of the employee (see Tata Oil Mills Co. Ltd. v. Workmen ((1964) 2 SCR 125, 130 : AIR 1966 SC 1672 : (1966) 2 LLJ 602)). The form used for terminating the service is not conclusive and the tribunal has jurisdiction to enquire into the reasons which led to such termination. In the facts of the case it was found that Standing Orders provided that an employee could ask for reasons for discharge in the case of discharge simpliciter. Those reasons were given before the tribunal by the appellant, viz., that the respondent's services were terminated because he deliberately resorted to go-slow and was negligent in the discharge of his duty. It was accordingly held that the services of the employee were terminated for dereliction of duty and go-slow in his work which clearly amounted to punishment for misconduct and, therefore, to pass an order under Clause 17(a) of the Standing Order permitting discharge simpliciter in such circumstances was clearly a colourable exercise of power to terminate services of a workman under the provisions of the Standing Orders. In these circumstances, the tribunal would be justified in going behind the order and deciding for itself whether the termination of the respondents' services could be sustained vide Management of Murugan Mills Ltd. v. Industrial Tribunal, Madras (Murugan Mills v. Industrial-Tribunal, (1965) 2 SCR 148, 151-152 : AIR 1965 SC 1496)). This view was affirmed in Tata Engineering & Locomotive Co. Ltd. v. S. C. Prasad ((1969) 3 SCC 372, 378). After approving the ratio in Murugan Mills case (Murugan Mills v. Industrial-Tribunal, (1965) 2 SCR 148, 151-152 : AIR 1965 SC 1496), this Court in L. Michael v. M/s. Johnson Pumps India Ltd. ((1975) 3 SCR 489 : (1975) 1 SCC 574 : 1975 SCC (L & S) 169) observed that the manner of dressing up an order did not matter. The slightly different observation in Workmen of Sudder Office, Cinnamare v. Management ((1972) 4 SCC 746 : (1971) 2 LLJ 620) was explained by the Court and it was further affirmed that since the decision of this Court in Chartered Bank v. Chartered Bank Employees' Union ((1960) 3 SCR 441 : AIR 1960 SC 919 : (1960) 2 LLJ 222) it has taken the consistent view that if the termination of service is a colourable exercise of power vested in the management of is a result of victimisation or unfair labour practice, the court/tribunal would have jurisdiction to intervence and set aside such termination. It was urged that a different view was taken by this Court in Municipal Corporation of Greater Bombay v. P. S. Malvenkar ((1978) 3 SCR 1000 : (1978) 3 SCR 78, 84, 85 : 1978 SCC (L & S) 130). The employee in that case was discharged from service by paying one month's wages in lieu of notice. This action was challenged by the employee before the Labour Court and it was contended that it was a punitive discharge. The Corporation contended that under Standing Order 26 the Corporation had the power to discharge but there was an obligation to give reasons if so demanded by the employee. The Corporation had also the power to discharge by way of punishment. The Court in this connection observed as under : (SCC pp. 84 & 85, Para 7)

> Now one thing must be borne in mind that these are two distinct and independent powers and as far as possible neither should be construed so as to emasculate the

> other or to render it ineffective. One is the power to punish an employee for misconduct while the other is the power to terminate simpliciter the service of an employee without any other adverse consequence. Now, proviso (i) to clause (1) of Standing Order 26 requires that the reason for termination of the employment should be given in writing to the employee when exercising the power of termination of service of the employee under Standing Order 26. Therefore, when the service of an employee is terminated simpliciter under Standing Order 26, the reason for such termination has to be given to the employee and this provision has been made in the Standing Order with a view to ensuring that the management does not act in an arbitrary manner. The management is required to articulate the reason which operated on its mind in terminating the service of the employee. But merely because the reason for terminating the service of the employee is required to be given - and the reason must obviously not be arbitrary, capricious or irrelevant - it would not necessarily in every case make the order of termination punitive in character so as to require compliance with the requirement of clause (2) of Standing Order 21 read with Standing Order 23. Otherwise, the power of termination of service of an employee under Standing Order 26 would be rendered meaningless and futile, for in no case it would be possible to exercise it. Of course, if misconduct of the employee constitutes the foundation for terminating his service, then even if the order of termination is purported to be made under Standing Order 26, it may be liable to be regarded as punitive in character attracting the procedure of clause (2) of Standing Order 21 read with Standing Order 23, though even in such a case it may be argued that the management has not punished the employee but has merely terminated his service under Standing Order 26.

69. It does not purport to run counter to the established ratio that the form of the order is not decisive and the Court can lift the veil. However, it may be noted that there was an alternative contention before the Court that even if the order of discharge was considered punitive in character, the employer corporation had led evidence before the Labour Court to substantiate the charge of misconduct and that funding was also affirmed.

70. We are satisfied that the Management, whatever its motives vis-a-vis keeping the stream of production flowing, did remove from service, on punitive grounds, all the 853 workmen.

71. The law is trite that the Management may still ask for an opportunity to make out a case for dismissal before the Tribunal. The refinements of industrial law in this branch need not detain us because the arbitrator did investigate and hold that the workmen were guilty of misconduct and the 'sentence' of dismissal was merited, even as the High Court did reappraise and reach, on both counts, the reverse conclusion.

The sweep of Article 226

72. Once we assume that the jurisdiction of the arbitrator to enquire into the alleged misconduct was exercised, was there any ground under Article 226 of the Constitution to demolish that holding ? Every wrong order cannot be righted merely because it is wrong. It can be quashed only if it is vitiated by the fundamental flows of gross miscarriage of justice, absence of legal evidence, perverse misreading of facts, serious errors of law on the face of the order, jurisdictional failure and the like.

73. While the remedy under Article 226 is extraordinary and is of Anglo-Saxon vintage, it is not a carbon copy of English processes. Article 226 is a sparing surgery but the lancet operates where injustice suppurates. While traditional restraints like availability of alternative remedy hold back the court, and judicial power should not ordinarily rush in where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action. The wide words of Article 226 are designed for service of the lowly numbers in their grievances if the subject belongs to the court's province and the remedy is appropriate to the judicial process. There is a native hue about Article 226, without being anglophilic or anglophobic in attitude. Viewed from this jurisprudential perspective, we have to be cautious both in not overstepping as if Article 226 were as large as an appeal and not failing to intervence where a grave error has crept in. Moreover, we sit here in appeal over the High Court's judgment. And an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine.

74. What are the primary facts which have entered the Tribunal's verdict in holding the strikers guilty of misconduct meriting dismissal ? We must pause to remove a confusion and emphasise that the dismissal order is not against the union but the individual workers. What did each one do ? Did has conduct, when sifted and scrutinised, have any exculpation or extenuation ? Not strikers in the mass, but each worker separately, must be regarded as the unit of disciplinary action. Each one's role and the degree of turpitude, his defence on guilt and punishment must be adjudged before economic death sentence is inflicted. A typical trial process instance will illumine the point. Suppose there is case of arson and murder in a village because of communal factions and a hundred men from the aggressive community are charged in Court with serious offences. Suppose further that convincing testimony of the provocation and aggression by that community is produced. Can any single member of the violent community be convicted on 'mass' evidence, without specific charges of participation or clear proof of constructive involvement ? Judicial perspicacity clears this common fallacy. It is dangerous to mass-convict on the theory of community guilt. Anger sometimes brings in this error.

75. In our assessment, the arbitrator has been swayed by generalities where particularities alone would have sufficed. A long story may be made short by skipping the details and focussing on essentials. We must, in fairness, state that the arbitrator an experienced and accepted tribunal in labour disputes, has exhaustively brought into the award all available details pro and con with over-emphasis here and there. There are only a few confusions in his long award but, regrettably, they happen to be on a few fundamentals. The foremost, of course, is a mix-up between mob-misconduct and individual guilt. The next is getting lost in the oceanic evidence while navigating towards a specified port. The High Court too has excelled in marshalling the details and handling the legal issues, although even there, shortcomings on basic issues have been pointed out by Sri A. K. Sen. We too are apt to err and reverse ourselves although we try out best to avoid error. The Supreme Court is final not because it is infallible; it is infallible because it is final. We propose to examine the essential issues from the perspective we have set out and in their proper jurisprudential bearings.

76. If misconduct was basic to the discharge and no enquiry precedent to the dismissal was made the story did not and there in favour of the workmen. The law is well settled that the Management may still satisfy the tribunal about the misconduct.

77. As a fact the arbitrator held misconduct proved. He further found that the circumstances justified dismissal though he decoded the order to mean discharge simpliciter. Was misconduct proved against each discharged worker at least before the arbitrator ? If it was, did every worker deserve punitive discharge ?

78. Dual jurisdictional issues arise here which have been argued at some length before us. The position taken up by Sri Sen was that the High Court could not, under Article 226, direct reinstatement, and even if it felt that the arbitrator had gone wrong in refusing reinstatement, the Court could only demolish the order and direct the arbitrator to reconsider the issue. What belonged, as a discretionary power, to a tribunal or other adjudicatory body, could not be wrested by the Writ Court. To put it pithily, regarding the relief of reinstatement the arbitrator could but would not and the High Court would but could not. (We will deal later with the point that the arbitrator had himself no power under Section 11-A of the Act but did have it in view of the vide terms of reference.)

79. The basis of this submission, as we conceive it, is the traditional limitations woven around high prerogative writs. Without examining the correctness of this limitation, we disregard it because while Article 226 has been inspired by the royal writs its sweep and scope exceed hide-bound British processes of yore. We are what we are because our Constitution-framers have felt the need for a pervasive reserve power in the higher judiciary to right wrongs under our conditions. Heritage cannot hamstring nor custom constrict where the language used is wisely wide. The British paradigms are not necessarily models in the Indian Republic. So broad are the expressive expressions designedly used in Article 226 that any order which should have been made by the lower authority could be made by the High Court. The very width of the power and the disinclination to meddle, except where gross injustice or fatal illegality and the like are present, inhibit the exercise but do not abolish the power.

80. We may dilate a little more on Article 226 vis-a-vis awards of arbitrators. The first limb of the argument is that when there is a voluntary joint submission of an industrial dispute to an arbitrator named by them under Section 10-A of the Industrial Disputes Act, he does not function as a Tribunal and is not amenable to the jurisdiction of that Court under Article 227 or under Article 226. Without further elaboration this contention can be negatived on a decision of this Court in Rohtas Industries Ltd. v. Rohtas Industries Staff Union ((1976) 3 SCR 12 : (1976) 2 SCC 82 : 1976 SCC (L&S) 200). This Court observed that as the arbitrator under Section 10-A has the power to bind even those who are not parties to the reference or agreement and the whole exercise under Section 10-A as well as the source of the force of the award on publication derived from the statute, it is legitimate to regard such an arbitrator now as part of the infra-structure of the sovereign's dispensation of justice, thus falling within the rainbow of statutory tribunals amenable to judicial review.

81. The second limb of the argument was that a writ of certiorari could not be issued to correct errors of facts. In this connection after affirming the ratio in Engineering Mazdoor Sabha v. Hind Cycle Ltd. (1963 supp 1 SCR 625 : AIR 1963 SC 874 : (1962) 2 LLJ 760) this Court observes that what is important is a question of law arising on the face of the facts found and its resolution ex facie or sub silentio. The arbitrator may not state the law as such; even then such acute silence confers no greater or subtler immunity on the award than plain speech. We do not dilate on this part of the argument as we are satisfied that be the test the deeply embedded rules to issue certiorari or the traditional grounds to set aside an arbitration award, 'thin partition do their bounds divide' on the facts and circumstances of the present case. Broadly stated, the principle of law is that the jurisdiction of the High Court under Article 226 of the Constitution is limited to holding the judicial or quasi-judicial tribunals or administrative bodies exercising the quasi-judicial powers within the leading strings of legality and to see that they do not exceed their statutory jurisdiction and correctly administer the law laid down by the statute under which they act. So long as the hierarchy of officers and appellate authorities created by the statute function within their ambit the manner in which they do so can be no ground for interference. The powers of judicial supervision of the High

Court under Article 227 of the Constitution (as it then stood) are not greater than those under Article 226 and it must be limited to seeing that a tribunal functions within the limits of its authority (see Nagendra Nath Bora and another v. The Commissioner of Hills Division and Appeals ((1958) SCR 1240 : AIR 1958 SC 398)). This led to a proposition that in exercising jurisdiction under Art. 226 the High Court is not constituted a Court of Appeal over the decision of authorities, administrative or quasi-judicial. Adequacy or sufficiency of evidence is not its meat. It is not the function of a High Court in a petition for writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. (See State of A. P. v. S. Sree Rama Rao ((1964) 3 SCR 25, 33 : AIR 1963 SC 1723 : (1964) 2 LLJ 150)). A constitution Bench of this Court in P. H. Kalyani v. M/s. Air France, Calcutta ((1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) SC 1756 : (1963) 1 LLJ 879 : [Editor But it would seem that the case intended to be relied upon is Syed Yakoob v. K. S. Radhakrishan. (1964) 5 SCR 64 : AIR 1964 SC 4771) succinctly set out the limits of the jurisdiction of the High Court in dealing with a writ petition. It was said that in order to justify a writ of certiorari it must be shown that an order suffers from an error apparent on the face of the record. It was further pointed out that if the finding of fact is made by the impugned order and it is shown that it suffers from an error of law and not of fact, a writ under Article 226 would issue, and, while so saying the decision in Nagendra Nath Bora case ((1958) SCR 1240 : AIR 1958 SC 398) was affirmed. Following the aforementioned decision, the Gujarat High Court in Navinchandra Shankerchand Shah v. Manager, Ahmedabad Co-op. Department Stores Ltd. ((1978) 19 GLR 108, 140). observed that the amended Article 226 would enable the High Court to interfere with an award of the industrial adjudicator if that is based on a complete misconception of law or it is based on no evidence or that no reasonable man would come to the conclusion to which the arbitrator has arrived.

82. Even apart from, but while approving, the Gujarat ruling in Navinchandra Shankerchand Shah ((1978) 19 GLR 108, 140) cited before us, we are satisfied that the writ power is larger, given illegality and injustice, even if its use is severely discretionary as decided cases have repeatedly laid down. We overrule the objection of invalidity of the High Courts order for want of power.

83. The more serious question is whether the arbitrator had the plentitude of power to re-examine the punishment imposed by the Management, even if he disagreed with its serverity. In this case the arbitrator expressed himself as concurring with the punishment. But if he had disagreed, as the High Court in his place, did, could he have interfered ? Armed with the language of Section 11-A, which confers wide original power to the tribunal to re-fix the 'sentence', Sri Sen argued that an arbitrator was uncovered by this new section. So even if he would, he could not. And, in this case if he could, he would not. There the matter ended, was the argument. We disagree. Even if he could, he would not, true; but that did not preclude the High Court from reviewing the order in exercise of its extraordinary constitutional power. Moreover, Section 11-A did clothe the arbitrator with similar power as tribunals, despite the doubt created by the abstruse absence of specific mention of 'arbitrator' in Section 11-A. This position needs closer examination and turns on interpretational limitations. At this stage, to facilitate the discussion, we may read the provision :

> 11-A. Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified it may, by its award set, aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of

> any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require :
>
> Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal as the case may be, shall rely not the materials on record and shall not take any fresh evidence in relation to the matter.

84. Section 11-A was introduced in purported implementation of the I.L.O. recommendation which expressly referred, inter alia to arbitrators. The statement of objects and reasons which illumines the words of the legislative text when it is half-lit, even if it cannot directly supplement the Section, does speak of the I.L.O. recommendations and, in terms of tribunals and arbitrators. When it came to drafting Section 11-A the word 'arbitrator' was missing. Was this of deliberate legislative design to deprive arbitrators, who discharge identical functions as tribunals under the Industrial Disputes Act, of some vital powers which vested in their tribunal brethren ? For what mystic purpose could such distinction be ? Functionally, tribunals and arbitrators belong to the same brood. The entire scheme, from its I.L.O. genesis, through the objects and Reasons, fits in only with arbitrators being covered by Section 11-A, unless Parliament cheated itself and the nation by proclaiming a great purpose essential to industrial justice and, for no rhyme or reason and wittingly, or unwittingly, withdrawing one vital word. Every reason for clothing Tribunals with Section 11-A powers applies a fortiori to arbitrators. Then why omit ? Could it be a syncopic omission which did not affect the semantics because a tribunal, in its wider connotation, embraced every adjudicator organ, including an arbitrator ? An economy of words is a legislative risk before a judiciary accustomed to the Anglo-Saxon meticulousness in drafting. We may easily see meaning by one construction. A 'tribunal' is merely a seat of justice or a judicial body with jurisdiction to render justice. If an arbitrator fulfils this functional role - and he does - how can he be excluded from the scope of the expression ? A caste distinction between Courts, tribunals, arbitrators and others, is functionally fallacious and, in our context, stems from confusion. The Section makes only a hierarchical, not functional, difference by speaking of tribunals and national tribunals. So we see no ground to truncate the natural meaning of 'tribunal' on the supposed intent of Parliament to omit irrationally the category of adjudicator organs known as arbitrator. To cut down is to cripple and the art of interpretation makes whole, not mutilates, furthers the expressed purpose, not hampers by narrow literality.

85. Section 2(r) defines Tribunal thus :

> 'Tribunal' means an Industrial Tribunal constituted under Section 7-A and includes an Industrial Tribunal constituted before the 10th day of March, 1957, under this Act;

Prima facie it is a different category from arbitrators but all statutory definitions are subject to contextual changes. It is perfectly open to the Court to give the natural meaning to a word defined in the Act if the context in which it appears suggests a departure from the definition because then there is something repugnant in the subject or context.

86. Then what is the natural meaning of the expression "Tribunal" ? A 'tribunal' literally means a seat of justice. May be, justice is dispensed by a quasi-judicial body, an arbitrator, a commission, a court or other adjudicator organ created by the State. All these are tribunal and naturally the import of the word embraces an arbitration tribunal. Stroud's Judicial Dictionary (Vol. 4, p. 3093) speaks of 'tribunal' in the wider sense and quotes Fry, L.J. in Dawkins v. Rokeby (LR 8 Q B 255, a ffirmed LR 7 HL 744) :

> I accept that, with this qualification that I do not like the word 'tribunal'. The word is, ambiguous, because it has not like 'court' any ascertainable meaning in English law. (Royal Acquarium v. parkinson, (1892) 1 QB 431)

87. There is a reference to the bishop's commission of enquiry as a judicial tribunal and, significantly, specific mention has been made in these terms :

> Disputes between employers and employees are refereed to such tribunals as the Civil Service Arbitration Tribunal, National Arbitration Tribunal and the Industrial Disputes Tribunal. (Stroud : JUDICIAL DICTIONARY, Vol. 4,p. 3094)

88. We have hardly any doubt that 'tribunal' simpliciter has a sweeping signification and does not exclude 'arbitrator'.

89. Here we come upon a fundamental dilemma of interpretative technology vis-a-vis the judicative faculty. What are the limits of statutory construction ? Does creativity in this jurisprudential area permit travel into semantic engineering as substitute for verbalism ? It is increasingly important for developing countries, where legislative transformation of the economic order is an urgent item on the national agenda, to have the judiciary play a meaningful role in the constitutional revolution without ferreting out flaws in the draftsman, once the object and effect are plain. Judges may not be too 'anglophonic' lest the system fail.

90. It is edifying to recall from Robert Stevens' Law and Politics of the House of Lords as a judicial body :

> Moreover, Macmillan, who began to specialize in the increasingly frequent tax appeals, continued to develop this highly artificial approach in Inland Revenue Commissioners v. Ayrshire Employers Mutual Insurance Association ((1946) 1 All ER 637), when Parliament had clearly intended to make the annual surpluses of mutual insurance companies subject to tax, Macmillan found a particularly formalistic argument to show that this had not been the effect of Section 31 of the Finance Act of 1933. He was then happily able to announce. "The legislature has plainly missed fire" (Ibid., p. 641). Of this decision Lord Diplock was later to say that "if, as in this case, the courts can identify the target of Parliamentary legislation their proper function is to see that it is hit : not merely to record that it has been missed. Here is judicial legislation at its worst." (Sir Kenneth Diplock : THE COURTS As LEGISLATORS, p. 10).

We would rather adapt Lord Diplock's thought and have the Court help hit the legislative target, within limits, than sigh relief that the legislative fire has missed the bull's eye. Of course, the social philosophy of the Constitution has, as ruled by this Court in several cases, a role in interpretative enlightenment and judicial value vision.

91. We may reinforce this liberal rule of statutory construction, being a matter of importance in the daily work of the Court, by reference even to Roman Law from Justinian's days down to the Amercian Supreme Court. "Not all special cases can be contained in the laws and resolutions of the Senate", said the Roman Jurist Jullianus, "but where their meaning is manifest in some case, the one who exercises jurisdiction must apply the provision analogously and in this way administer justice." (Edgar Bodenheimer : JURISPRUDENCE - THE PHILOSOPHY AND METHOD OF LAW, p.

474) Prof. Bodenheimer has explained that civil law does not regard words as the sole basis of law but allows it to be modified by purpose. Celsus added the following admonition to these general principles of interpretation : "The laws should be liberally interpreted, in order that their intent be preserved". (Ibid., p. 474)

92. "Samuel Thorne has shown that, during certain periods of English medieval history, the position of the Common Law towards the construction of statutes was similar to the general attitude of the Roman and Civil Law. Statutes were frequently extended to situations not expressly covered by them." (Ibid., p. 414)

93. Plowden pointed out that "when the words of a statute enact one thing, they enact all other things which are in the like degree". Plowden demonstrated that a statutory remedy at that time was deemed to be merely illustrative of other analogous cases that deserved to be governed by the same principle.

94. "Our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law .... And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive". (Ibid., p. 115-116)

95. Prof. Bodenheimer states that the American trend is towards a purpose-oriented rather than a plain-meaning rule in its rigid orthodoxy. In United States v. Amercian Trucking Association (310 US 534, 543-44 (1940), the U.S. Supreme Court wrote :

> When the plain meaning has led to absurd or futile results .... this Court had looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose rather than the literal words. When aid to construction of the meaning of words, as used in the statue, is available, there can certainly be no "rule of law" which forbids its use, however clear the words may be on "superficial examination."

96. In the present case, as the narration of the facts unfolded, the reference of the dispute was to an arbitrator. He reinvestigated and reassessed the evidence bearing on the guilt of the discharged workmen after giving an opportunity to both sides to adduce evidence thereon. Admittedly, he had this power. But had he the follow-up power, if he held the men guilty of punitive misconduct, to reweigh the quantum of punishment having regard to the degree of culpability ? This jurisdiction he enjoys if Section 11-A included 'arbitrators'. This, in turn, flows from our inference as to whether the word 'tribunal' takes in an adjudicatory organ like the arbitrator. It is plain that the expression 'arbitrator' is not expressly mentioned in Section 11-A. Nevertheless, if the meaning of the word 'tribunal' is wider rather than narrower, it will embrace arbitrator as well. That is how the dynamics of interpreatrion are, in one sense, decisive of the fate of the present appeal.

97. Competing interpretative angles have contended for judicial acceptance. English preference apart, Indian socio-legal conditions must decide the choice in each situation. Sometimes Judges are prone to castigate creative interpretation in preference to petrified literality by stating that Judges declare the law and cannot make law. The reply to this frozen faith is best borne out by Lord Radcliffe's blunt words :

> There was never a more sterile controversy than that upon the question whether a Judge makes law. Of course he does. How can he help it ? .... Judicial Law is always a reinterpretation of principles in the light of new combinations of facts .... (J)udges do not reverse principles. Once well established, but they do modify them, extend them, restrict them and even deny their application to the combination in hand ((Robert Stevens : LAW AND POLITICS. THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976,p. 447).

98. Lord Devlin in his "Samples of Lawmaking", agreed that Judges are fashioners of law, if not creators out of material supplied to them and went on to observe :

> If the House of Lords did not treat itself as bound by its own decisions, it might do its own lopping and pruning .... and perhaps even a little grafting, instead of leaving all that to the legislature. But it could not greatly alter the shape of the tree (Devlin : SAMPLES OF LAW-MAKING, p.116).

99. Even so eminent a Judge as Lord Reid leaned to the view that the law should be developed since it was not static and, in this limited sense, Judges are law-makers although this view prevented "technical minded Judges (from pressing) precedents to their logical conclusions". (STEVENS : Judge as LAWMAKER, P.28-470) on the whole a just and humanist interpretative technique, meaning permitting, is the best. We do not meant to conclude that Judges can take liberties with language ad libitem and it is wholesome to be cautious as Lord Reid in Shaw v. D.P.P. (1962 ACC 220, 275 : (1961) 2 All ER 446, 457) warned : "Where Parliament fears to tread it is not for the Courts to rush in."

100. We are persuaded that there is much to learn from Lord Denning's consistent refrain about the inevitable creative element in the judicial process in the interpretative area. We permit ourselves a quota from Lord Denning because Shri A. K. Sen did draw our attention to straightening the creases as permissible but not stitching the cloth, making a critical reference to the controversial activism of which Lord Denning was leading light :

> The truth is that the law is uncertain. It does not cover all the situations that may arise. Time and again practitioners and Judges are faced with new situations where the decision may go either way. No one can tell what the law is until the Courts decide it. The Judges do every day make law though it is almost hereby to say so. If the truth is recognized then we may hope to escape from the dead hand of the past and consciously mould new principles to meet the needs of the present.

101. Mr. Justice Mathew in Kesavananda Bharati case (1973 Supp SCR 1 : (1973) 4 SCC 225) referred with approval - and so do we - to the observations of Justice Holmes (Edgar Bodenheimer : SOURCES AND TECHINQUES OF THE LAW "JURISPRUDENCE" :

> I recognize without hesitation that Judges do not must legislate, but they can do so only interestitially; they are confined from molar to molecular motions.

102. Arthur Selwyn Miller writes, "Some have called it (the Supreme Court) the highest legislative chamber in the nation. Although there is no question that the Court can and does make law, and does so routinely, ... (Arthur Selwyn Miller : THE SUPREME COURT, MYTH AND REALITY, p. 133)

103. Assuming the above approach to be too creatively novel for traditionalism, let us approach the same problem from a conventional angle authenticated by case law. The question of construction of Section 11-A was argued at length, as to whether an omission of any reference to arbitrator appointed under Section 10-A in Section 11-A would suggest that the arbitrator under Section 10-A, notwithstanding the terms of reference, would not enjoy the power conferred on all conceivable industrial adjudicators under Section 11-A. It was said, after referring to the objects and Reasons in respect of the bill which was moved to enact Section 11-A in the Industrial Disputes Act, that while the I.L.O. had indicated that an arbitrator selected by the parties for adjudication of industrial dispute must be invested with power by appropriate legislation as found in Section 11-A, the Parliament while enacting the section in its wisdom, did not include the arbitrator even though other adjudicators of industrial disputes have been conferred such power and, therefore, it is a case of casus omissus. Reliance was placed on Gladstone v. Bower ((1960) 3 All ER 353) where the question arose whether a reference to a tenancy from year to year in Section 2(1) of the Agricultural Holdings Act, 1948 would also cover a tenancy for 18 moths which could be terminated at the end of the first year. The submission was that even though no notice was necessary at common law because the tenancy would automatically terminate at the expiry of the specified period of tenancy, the tenancy took effect as tenancy from year to year by virtue of Section 2(1) of the Act so that it continued until terminated by notice to quit and, therefore, the landlord was not entitled to possession without notice. It was further contended that if a tenancy from year to year was to get the protection of the Act it is inconceivable that tenancy for a longer duration would not qualify for that protection. Court of Appeal negatived this contention holding that this is a case simply of casus omissus and the Act is defective. The Court further held that if it were ever permissible for the Court to repair a defective Act of Parliament, the Court would be very glad to do so in this case so far as the Court could. The Court will always allow the intention of a statute to override the defects of wording but the Court's ability to do so is limited by the recognised canons of interpretation. The Court may, for example prefer an alternative construction which is less well-fitted to the words but better fitted to the intention of the Act. But here, for the reasons given by the learned Judge, there is no alternative construction; it is simply a case of something being overlooked. The Court cannot legislate for a causes omissus. To do so would be to usurp the function of the Legislature (see Magor and St. Mellons Rural District Council v. Newport Corporation (1952 AC 189)). Where the Statute's meaning is clear and explicit, words cannot be interpolated. Even where the meaning of the statute is clear and sensible, either with or without the omitted word, interpolation is improper, since the primary source of the legislative intent is in the language of the statute (see Crawford's "Construction of Statues", 1940 Edn., p. 269 extracted in S. Narayanaswamy v. G. Pannerselvam ((1972) 3 SCC 717, 726, para 19 : AIR 1972 SC 2284, 2290, para 20)). Undoubtedly, the Court cannot put into the Act words which are not expressed, and which cannot reasonably be implied on any recognised principles of construction. That would be a work of legislation, not of construction, and outside the province of the construction, and outside the province of the Court (see Kamalaranjan v. Secretary of State (AIR 1938 PC 281, 283)). Similarly, where the words of the statute are clear it would not be open to the Court in order to obtain a desired result either to omit or add to the words of the statute. This is not the function of the Court charged with a duty of construction. This approach has, however, undergone a see change a expressed by Denning, L.J. in Seaford Court Estates Ltd. v. Asher ((1949) 2 All ER 155, 164) wherein he observed as under :

> When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament ... and then he must supplement the written words so as to give 'force and life' to the intention of Legislature ... A Judge, should ask himself the question how,

> if the makers of the Act had themselves comes across this ruck in the texture of it, they would have straightened it out ? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

(Approved in State of Bihar v. Dr. Asis Kumar Mukherjee ((1975) 2 SCR 894, 902 : (1975) 3 SCC 602, 609 : 1975 SCC (L&S) 51)). The old order changeth, yielding place to new.

104. This long excursion has become important because, once in awhile social legislation which requires sharing of social philosophy between the Parliament and the Judiciary meets with its Waterloop in the higher Courts because the true role of interpretation shifts from Judge to Judge. We are clearly of the view that statutory construction which fulfils the mandate of the statute must find favour with the Judges, excepts where the words and the context rebel against such flexibility. We would prefer to be liberal rather than lexical when reading the meaning of industrial legislation which develops from day to day in the growing economy of India. The necessary conclusion from this discussion is that the expression 'tribunal' includes. In the statutory setting, an arbitrator also. Contemporaneous para-legislative material may legitimately be consulted when a word of wider import and of marginal obscurity needs to be interpreted. So viewed, we are not in a 'sound-proof system' and the I.L.O. recommendation accepted by India and the Objects and Reasons of the amending Act leave no doubt about the sense, policy and purpose. Therefore, Section 11-A applies to the arbitrator in the present case and he has the power to examine whether the punishment imposed in the instant case is excessive. So has the High Court, if the award suffers from a fundamental flaw.

105. A study of the lengthy award discloses no mention of Section 11-A, and presumably, the authority was unmindful of that provision while rendering the verdict. In a limited sense, even prior to Section 11-A, there was jurisdiction for a labour Tribunal, including an arbitrator, to go in to the punitive aspect of the Management's order. This Court has, in a catena of cases, held that a mala fide punishment is bad in law and when the punishment is grotesquely condign or perversely harsh or glaringly discriminatory, an easy inference of bad faith, unfair labour practice or victimisation arises. The wider power to examine or prescribe the correct punishment belongs to the tribunal/arbitrator even under Section 11 if no enquiry (or a directive enquiry which is bad, and, therefore, can be equated with a 'no enquiry' situation) has been held by the management. For, then, there is no extent order of guilt of punishment and the Tribunal determines it afresh. In such a virgin situation, both culpability and qualification of punishment are within the jurisdiction of the tribunal/arbitrator. The present in such a case.

106. Volleys of rulings from both sides were fired during arguments, the target being the limited area so the tribunals' power to overturn the quantum of punishment awarded by the management. We do not think it necessary to regurgitate all that has been said by this Court upto now, since it is sufficient to bring out the correct law in the light of the leading citations. It is incontrovertible that where, as here, no enquiry has been held by the Management, the entire subject is at large and both guilt and punishment, in equal measure may be determined, without inhibition of jurisdiction by the tribunal.

107. Lastly, as rightly urged by counsel for the Sabha, an arbitrator has all the powers the terms of reference, to which both sides are party, confer. Here, admittedly, the reference is very widely worded and includes the nature of the punishment. The law and the facts do not call for further elaboration and we hold that, in any view, the arbitrator had the authority to investigate into the

propriety of the discharge and the veracity of the misconduct. Even if Section 11-A is not applicable, an arbitrator under Section 10-A is bound to act in the spirit of the legislation under which he is to function. A commercial arbitrator who derives his jurisdiction from the terms of reference will by necessary implication, be bound to decide according to law and, when one says 'according to law', it only means existing law and the law laid down by the Supreme Court being the law of the land, an arbitrator under Section 10-A will have to decide keeping in view the spirit of Section 11-A (See Union of India v. Bungo Steel Furniture Pvt. Ltd. ((1967) 1 SCR 324 : AIR 1967 SC 1032)). The jurisdictional hurdles being thus cleared, we may handle the basic facts and the divergences between the arbitrator and the High Court before moulding the final relief.

108. Prefatory to the discussion about the factum of misconduct and its sequel, we must remind ourselves that the strike was illegal, having been launched when another industrial dispute was pending adjudication. Section 23(a) appears, at a verbal level, to convey such a meaning although the ambit of sub-clause (a) may have to be investigated fully in some appropriate case in the light of its scheme and rationale. It looks strange that the pendency of a reference on a tiny or obscure industrial dispute - and they often pend too long - should block strikes on totally unconnected yet substantial and righteous demands. The constitutional implications and practical complications of such a veto of a valuable right to strike often leads not to industrial peace but to seething unrest and lawless strikes. But in the present case, both before the arbitrator and the High Court, the parties have proceeded on the agreed footing that the strike was illegal under Section 23(a). We do not reopen the issue at this late stage and assume the illegality of the strike.

The Fatal Flaw in the Award

109. The Achilles heel of the arbitrator's award is where he makes, as a substitute for specific and individuated findings of guilt and appropriate penalty vis-a-vis each workman, a wholesale survey of the march of events, from tension to breakdown from fair settlement to illegal and unjustified strike, from futility of negotiation to readiness for arbitration, from offer of full re-employment to partial taking back on application by workmen in sack cloth and ashes, by picking and choosing after a humble declaration that the strike has been formally buried, from episodes of violence and paralysis of production to backstage manoeuvres to get the factory taken over as a 'sick mill' and after a full glimpse of this scenario, holds that the Sabha was always in the wrong and inevitably, the management was surely reasonable AND, ergo, every employee must individually bear the cross of misconduct and suffer dismissed for the sins of the Sabha leadership - its secretary was not an employee of the mill - by some sub-conscious doctrine of guilt by association ! Non Sequitur.

110. Each link in the chain of facts has been challenged by the respondents but let us assume them to be true, to test the strength of the legal fibre of the verdict. (We may mention by way of aside, that the company seems to be a well managed one.)

111. The cardinal distinction in our punitive jurisprudence between a commission of enquiry and a Court of adjudication between the cumulative causes of a calamity and the specific guilt of a particular person, is that speaking generally we have rejected, as a nation, the theory of community guilt and collective punishment and instead that no man shall be punished except for his own guilt. Its reflection in the disciplinary jurisdiction is that no worker shall be dismissed save on proof of his individual delinquency. Blanket attainder of a bulk of citizens on any vicarious theory for the gross sins of some only, is easy to apply but obnoxious in principle. Here the arbitrator has found the Sabha leadership perverse, held that the strikers should have reasonably reported for work and concluded that the Management had, for survival, to make do with new recruits. Therefore what ?

112. What at long last, is the answer to the only pertinent question in a disciplinary proceeding, viz. What is the specific misconduct against the particular workman who is to lose his job and what is his punitive desert ? Here you can't generalise any more than a sessions Judge can, by holding a faction responsible for a massacre, sentence every denizen of that faction's village to death penalty. The legal error is fundamental, although lay instinct may not be outraged. What did worker A do ? Did he join the strike or remain at home for fear of vengeance against blacklegs in a para-violent situation ? Life and limb are dearer than loyalty, to the common run of men, and discretion is the better part of valour. Surely, the Sabha complained of management's goondas and the latter sought police aid against the unruly core of strikers. In between, the ordinary rustic workmen might not have desired to be branded blacklegs or become martyrs and would not have reported for work. If not being heroic in daring to break though the strike cordon - illegal though the strike be - were misconduct, the conclusion would have been different. Not reporting for work does not lead to an irrebuttable presumption of active participation in the strike. More is needed to bring home the mens rea and that burden is on the prosecutor, to wit the management. Huddling together the eventful history of deteriorating industrial relations and perverse leadership of the Sabha is so no charge against a single worker whose job is at stake on dismissal. What did he do ? Even when lawyers did go on strike in the higher Courts or organize a boycott, legally or illegally, even top law officers of the Central Government did not attend Court, argued Shri Tarkunde, and if they did not boycott but merely did not attend, could workers beneath the bread line be made of sterner stuff ? There is force in this pragmatic approach. The strike being illegal is a non-issue at this level. The focus is on active participation. More absence, without more, may not compel the conclusion of involvement.

113. Likewise, the further blot on the strike, of being unjustified, even if true, cuts no ice. Unjustified, let us assume; so what ? The real question is, did the individual worker, who was to pay the penalty, actively involve himself in this unjustified misadventure ? Or did he merely remain a quiescent non-worker during that explosive period ? Even if he was a passive striker, that did not visit him with the vice of activism in running an unjustified strike. In the absence of proof of being militant participant the punishment may differ to dismiss a worker, in an economy cursed by massive unemployment, is a draconian measure as a lost resort. Rulings of this Court have held that the degree of culpability and the quantum of punishment turn on the level of participation in the unjustified strike. Regrettably, no individualised enquiry has been made by the arbitrator into this significant component of delinquency. Did any dismissed worker instigate, sabotage or indulge in vandalism or violence ?

114. The Management's necessity to move the mill into production for fear of being branded a 'sick unit' is understandable, of course, collective strike is economic pressure by cessation of work and not exchange of pleasantries. It means embarrassing business. Such a quandary cannot alter the law. Here the legal confusion is obvious. No inquest into the managements's recruitment of fresh hands is being made at this stage. The inquiry is into the personal turpitudes of particular workmen in propelling an illegal and unjustified strike and the proof of their separate part therein meriting dismissal. The despair of the management cannot, by specious transformation of logic, be converted into the despair of each of the 853 workmen. Sympathies shall not push one into fallacies.

115. We may now concretise this generalised criticism of the otherwise well-covered award. The crowd of documents and carping attitudes must have added to the strain on the arbitrator.

A voluminous record of documents and correspondence has been produced before my by both sides. There have been allegations and counter-allegations made by both sides not only against each other but even against the Police, the Department of Labour and person sin authority. The history has

been sought to be traced right from the inception of the Company in 1966 or 1967, by the company to show that their conduct has been always proper and above reproach and by Sabha to establish that not only the Gujarat Steel Tubes Ltd. were not fair to the employees but that every action of theirs, good or bad was ill-motivated, was executed with some sinister ulterior motives.

116. The award set out the history of the Company, its vicissitudes, the hills and valleys, the lights and shadows, of industrial relations with mob fury and lock-outs and allied episodes of tending in settlements and pious pledges. Then the arbitrator stressed clause 6 of the Agreement of December, 1971 which bespoke a no-strike zone for five years. There was reference to the management's premise to implement the Wage Board recommendations. The arbitrator was upset that despite clause 6, a strike was launched but was not disturbed that despite the Wage Board proposals negotiations were being baulked and an interminable arbitral alternative was being offered by the management. He exclaimed :

> If such a settlement arrived at was not respected and implemented the machinery provided by law would lose all meaning and so also the sanctity of the word of the Management or the word of the union. It is, therefore, essential to association who was responsible for the breach of the agreement so solemnly entered into.

Serious breach by management is alleged and this is given as a reason or is made as an excuse for getting rid of the obligations arising out of the agreement which specifically could not be terminated for five years.

117. The narration continues and the following conclusion is reached :

> It is thus very clear that the Company had fully discharged its obligation under the agreement in respect of 64 discharged or dismissed workmen and the other workmen and the allegation made by the Sabha of the Company having made a breach thereof is not correct.

118. We thus see, that at this stage, the arbitrator has merely made a generalised approach as if a commission of inquiry were going into the conduct of the management and the Sabha to discover who was blameworthy in the imbroglio. The award then swivelled round to a study of the case of the Sabha vis-a-vis the triple grievances, the Sabha had :

> I shall first deal with the grievance regarding demands of implementation of the recommendations of the Wage Board.

119. The long and sterile correspondence was set out and the arbitrator arrived at the conclusion that the insistence on reference to arbitration as against negotiation was justified on the part of the Management :

> I, therefore, have accepted the version of the management and disbelieved the motivated denial of the Sabha in this respect.

120. The culmination of the protracted discussion on the atmosphere and environment, rather than on the actual charge against each worker, was recorded in the award :

> I have exhaustively, perhaps more exhaustively than even necessary, dealt with the allegations made by the Sabha that the management had committed breach of

> agreement by refusing to accede to the demand of the Sabha for implementation of recommendations of the Wage Board. There appears to be no doubt that the management had agreed to implement the recommendation of the Wage Board. There is also not the least doubt of management was ready and willing to implement the recommendations of the Wage Board it was because it was prevented by the Sabha from doing so.

121. An analysis of the Management's conduct in the matter of non-implementation of the Wage Board recommendation was thereafter made by the arbitrator and he wound up thus :

> I am satisfied that the company had not committed any breach of the settlement dated August 4, 1972 at last so far as implementation of the recommendations of the Wage Board is concerned.

122. The question of bonus for the year 1971 was also considered and dismissed and the Sabha's case to that extent was negatived. Again, the plea for wages for the period of the lock-out was also negatived with the observations :

> I fail to see how the Sabha can allege breach of the agreement dated August 4, 1972 in view of the clear unequivocal terms contained in clause 4 of that agreement.

123. In this strain the award continued and the refrain was the sums that the Sabha was in the wrong. The award even went to the exaggerated extent of morbidly holding that the workers were wearing printed badges which, along with other circumstances, amounted to a breach of the agreement !

124. The award then moved on to the strike of January 27, 1973 because it led to the dismissal of all the workmen. Until this stage, the arbitrator was merely painting the background and, at any rate, did not engage himself in isolating or identifying any worker or any misconduct. He merely denounced the Sabha, which is neither here not there, in the matter of disciplinary proceedings against each individual workman. He missed the meat of the matter. The relevant portion of the award based on generalisation proved this error :

> I am concerned herein with the question whether the discharge or dismissal of the 400 workmen was legal and proper or not and what relief to grant to them.

Approached from any point of view the action of the company appears to me to be legal proper and justified and the demands on behalf of these workmen must be rejected.

125. A condemnation of the Sabha and an approval of the management's handing of the strike are miles away from the issue on hand.

126. We observe here also an unfortunate failure to separate and scan the evidence with specific reference to charges against individual workman. On the contrary, all that we find in the award is an autopsy of the strike by the Sabha and a study of its allegedly perverse postures. A disciplinary inquiry resulting in punishment of particular delinquents cannot but be illegal if the evidence is of mass misconduct by unspecified strikers led by leaders who are perhaps not even workmen. We are constrained to state that pointed consideration of facts which make any of the 400 workmen guilty, is search in vain. The award being ex facie blank from this vital angle, the verdict must prima facie rank as void since vicarious guilt must be brought home against the actively participating members

of a collectivity by positive testimony, not by hunch, suspicion or occult intuition. The short position is this. Is there a punishment of any workman ? If yes, has it been preceded by an enquiry ? If not, does the Management desire to prove the charge before the tribunal ? If yes, what is the evidence, against whom, of what misconduct ? If individuated proof be forthcoming and relates to an illegal strike, the further probe is this : was the strike unjustified ? If yes, was the accused worker an active participant therein ? If yes, what role did he play and of what acts was be author ? Then alone the stage is set for a just punishment. Those exercises, as an assembly-line process are fundamental. Generalisation of a violent strike of a vicious Union leadership of strikers fanatically or foolishly or out of fear, failing to report for work, are good background material. Beyond that these must be identified by a rational process, the workman their individual delinquency and the sentence according to their sin. Sans that, the dismissal is bad. Viewed from this perspective, the award fails.

127. The arbitrator comes to grips with the core question of discharge simpliciter versus dismissal as punishment but not with the identification of delinquents and delinquency. After referring to Order 23 of the Model Standing Orders he goes on to state the law correctly by extracting observations from the Assam Oil company case ((1960) 3 SCR 467, 462 : AIR 1960 SC 1264 : (1960) 1 LLJ 587).

128. Another vital facet of industrial law is that when no enquiry has been held by the management before imposing a punishment (or the enquiry held is defective and bad), the whole filed of delinquency and consequent penalty is at large for the Tribunal. Several rulings support this logic. We are constrained to hold that a certain observation made per incuriam by Mr. Justice Vaidyalingam, strongly relied on by Sri A. K. Sen, does not accurately represent the law, although the learned judge had earlier stated the law and case-law correctly, if we may say no with respect.

129. A selective study of the case law is proper at this place. Before we do this, few words on the basis of the right to strike and progressive legal thinking led by constitutional guidelines is necessitous. The right to union, the right to strike as part of collective bargaining and, subject to the legality and humanity of the situation, the right of the weaker group, viz., labour, to pressure the stronger party, viz., capital, to negotiate and render justice, are processes recognised by industrial jurisprudence and supported by Social justice. While society itself, in its basic needs of existence, may not beheld to ransom in the name of the right to bargain and strikers must obey civilised norms in the battle and not be vulgar or violent hoodlums, Industry, represented by intransigent managements, may well be made to reel into reason by the strike weapon and cannot then squeal or weil and complain of loss of profits or other ill-effects but must negotiate or get a reference made. The broad basis is that workers are weaker although they are the producers and their struggle to better their lot has the sanction of the rule of law. Unions and strikers are no more conspiracies then professions and political parties are, and, being for weaker, need succour. Part IV of the Constitution, read with Article 19, sows the seeds of this burgeoning jurisprudence. The Gandhian quote at the beginning of this judgment sets the tone of economic equity in industry. Of course, adventurist, extremist, extraneously inspired and puerile strike, absurdly insane persistence and violent or scorched earth policies boomerang and are anathema for the law. Within the parameters to the right to strike is integral to collective bargaining.

130. Responsible trade unionism is an instrument of concerted action and the laissez faire law that all strikes are ipso facto conspiracies, is no longer current coin even in Adam Smith's English country. Lord Chorley, in Modern Law Review, Vol. 28, 1965, p. 451, is quoted as saying that law must be altered as a consequence of Rookes v. Barnard ((1964) 1 All ER 367), so as to remove the

effects of decisions of conspiracy and intimidation. He goes on to state that Allen v. Flood (1895-99 All ER Rep 52 : 1898 AC 1) and Quinn. v. Leathem ((1900-03 All ER Rep 1 : 1901 AC 495) taking the conspiratorial view must never be permitted to be quoted in Courts. In contrast, reference was made to Willis on Constitutional Law, pp. 878-879, wherein the Supreme Court of America reflects the impact of capitalistic development and the economic views of the Judges and the facts that the Judges are members of a social order and a social product and the decisions are due more to the capitalistic system and the world of ideas in which the Judges live. Our Constitution is clear in its mandate, what with Article 39-A superadded and we have to act in tune with the values enshrined therein.

131. The benign attitude towards strike being what we have outlined, the further question arises whether in the light of the accepted finding that the strike as such was illegal and, further, was unjustified, all the strikers should face the penalty of dismissal or whether individual cases with special reference to active participation in the strike, should be considered. A rapid but relevant glance at the decided cases may yield dividends. In India General Navigation and Railway Co. v. Their Workmen (AIR 1960 SC 219 : (1960) 2 SCR 1 : (1960) 1 LLJ 13), this Court did observe that if a strike is illegal, it cannot be called 'perfectly justified'. But between 'perfectly justified' and 'unjustified' the neighbourhood is distant. Here illegality of the strike does not per se spell unjustifiability. For, in Crompton Greaves Ltd. v. Workmen ((1978) 3 SCC 155 : (1978) SCC (L&S) 447) this Court held that even if a strike be illegal, it cannot be castigated as unjustified, unless the reasons for it are entirely perverse or unreasonable - an aspect which has to be decided on the facts and circumstances of each case. In that decision this Court awarded wages during the strike period because the Management failed to prove that the workmen resorted to force and violence. Even in Indian General Navigation and Railway Co. Ltd. (AIR 1960 SC 219 : (1960) 2 SCR 1 : (1960) 1 LLJ 13) where the strike was illegal and affected a public utility service, this Court observed that "the only question of practical importance which may arise in the case of an illegal strike, would be the kind or quantum of punishment, and that, of course, has to be modulated in accordance with the facts and circumstances of each case .... There may be reasons for distinguishing the case of those who may have acted as mere dumb driven cattle from those who have taken an active part in fomenting the trouble and instigating women to join such a strike, or have taken recourse to violence". The Court after holding that the strike was illegal "and that it was not even justified" made a pregnant observation :

> To determine the question of punishment, a clear distinction has to be made between those workmen who are only jointed in such a strike, but also took part in obstructing the loyal workmen from carrying on their work, or took part in violent demonstrations, or acted in defiance of law and order, on the one hand, and these workmen who were more or less silent participators in such a strike, on the other hand. It is not in the interest of the industry that there should be a wholesale dismissal of all the workmen who merely participated in such a strike. It is certainly not in the interest of the workmen themselves. An Industrial Tribunal, therefore, has to consider the question of punishment, keeping in view the overriding consideration of the full and efficient working of the industry as a whole. The punishment of dismissal or termination of service, has, therefore, to be imposed on such workmen as had not only participated in the illegal strike, but had formented it, and had been guilty of violence or doing acts detrimental to the maintenance of law and order in the locality where work had to be carried on.

After noticing the distinction between peaceful strikers and violent strikers, Sinha, J., in that case,

observed : "it must be clearly understood by those who take part in an illegal strike that thereby they make themselves liable to be dealt with by their employers. There may be reasons for distinguishing the case of those who may have acted as mere dumb driven cattle from those who have taken an active part in fomenting the trouble and instigating workmen to join such a strike, or have taken recourse to violence". The same line of dichotomy is kept up :

> Both the types of workmen may have been equally guilty of participation in the illegal strike, but it is manifest that both are not liable to the same kind of punishment.

Significantly, the Court stressed the need for individual charge-sheet being delivered to individual workmen so that the degree of misconduct of each and the punitive deserts of each may be separately considered. We may as well refer to a few more rulings since considerable argument was expended on this point.

132. This Court in M/s. Burn & Co. Ltd. v. Their Workmen (AIR 1959 SC 529 : (1959) 1 LLJ 450) clearly laid down that mere participation in the strike would not justify the suspension or dismissal of workmen particularly where no clear distinction can be made between those persons and the very large number of workmen who had been taken back into service although they had participated in the strike. After referring to the ratio in M/s. Burn & Co. Ltd. case (AIR 1959 SC 529 : (1959) 1 LLJ 450), this Court in Bata Shoe Co. (P.) Ltd. v. D. N. Ganguly ((1961) 3 SCR 308 : AIR 1961 SC 1158 : (1961) 1 LLJ 303) observed that there is no doubt that of an employer makes an unreasonable discrimination in the matter of taking back employees there may in certain circumstances be reason for the industrial tribunal to interfere; but the circumstances of each case have to be examined before the tribunal can interfere with the order of the employer in a property held managerial inquiry on the ground of discrimination. The Court then proceeded to determine the facts placed before it. Sri Sen specifically pointed out that in the Bata Shoe Co. case ((1961) 3 SCR 308 : AIR 1961 SC 1158 : (1961) 1 LLJ 303) this Court distinguished the decision in India General Nvigation & Railway Co. Ltd. (AIR 1960 SC 219 : (1960) 2 SCR 1 : (1960) 1 LLJ 13) and observed that the decision in that case was on the facts placed before the Court. In fact, Bata Shoe Co. case ((1961) 3 SCR 308 : AIR 1961 SC 1158 : (1961) 1 LLJ 303) does not lay down any distinct proposition about the treatment to be meted out to participants in strike and actually it is a decision on its own facts.

133. In Swadeshi Industries Ltd. v. Its Workmen (AIR 1960 SC 1258 : (1960) 2 LLJ 78), the Management, after holding that the strike was illegal, terminated the services of 230 workmen without framing any charge-sheet or holding any enquiry. It was contended that the strike was not legal. The Court observed that collective bargaining for securing improvement on matters like basic pay, dearness allowance, bonus, provident fund and gratuity, leave and holidays was the primary object of a trade union and when demands like these were put forward and thereafter a strike was resorted in an attempt to induce the company to agree to the demands or at least to open negotiations the strike must prime facie be considered justified. As the order of termination was found to be illegal it was held that reinstatement with back wages must follow as a matter of course, not necessarily because new hands had not been inducted.

134. In I. M. H. Press, Delhi v. Additional Industrial Tribunal, Delhi (AIR 1961 SC 1168 : (1961) 1 LLJ 499), this Court was called upon to examine the ratio in Model Mills case (Mill Manager. Model Mills v. Dharam Das, AIR 1958 SC 311 : (1958) 1 LLJ 539) and India General Navigation & Railway Co. Ltd. case (AIR 1960 SC 219 : (1960) 2 SCR 1 : (1960) 1 LLJ 13) and this Court in terms affirmed the ratio in India General Navigation & Railway Co. Ltd. (AIR 1960 SC 219 :

(1960) 2 SCR 1 : (1960) 1 LLJ 13) observing that mere taking part in an illegal strike without anything further would not justify the dismissal of all the workmen taking part in the strike.

135. In Indian Iron & Steel Co. Ltd. v. Their Workmen (1958 SCR 667, 685 : AIR 1958 SC 130 : (1958) 1 LLJ 260), this Court observed that the management of a concern has power to direct its own internal administration and discipline but the power is not unlimited and when a dispute arises, Industrial tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. It may be noticed that the decision is prior to introduction of Section 11-A. It would thus appear that the important effect of omission to hold an enquiry was merely this that the tribunal would have to consider not only whether there was a prima facie case but would decide for itself on the evidence adduced whether the charges have been made out. A defective enquiry in this connection stood on the same foot in gas no enquiry and in either case the tribunal would have jurisdiction to go into the entire matter and the employer would have to satisfy the tribunal that on the facts the order of dismissal or discharge was proper (see Workmen of Motipur Sugar Factory (Pvt.) Ltd. v. Motipur Sugar Factory ((1965) 3 SCR 588, 597 : AIR 1965 SC 1803 : (1965) 1 LLJ 162) and Provincial Transport Service v. State Industrial Court ((1963) 3 SCR 650 : AIR 1963 SC 114 : (1962) 2 LLJ 360)). Once, therefore, it was held that the enquiry was not proper, it was irrelevant whether the workman withdrew from the enquiry or participated in it the decision had to be on appraisal of evidence, and if it was found that the enquiry was not proper the whole case was open before the labour court to decide for itself whether the charge of misconduct was proved and that punishment should be awarded (see Imperial Tobacco Company India Ltd. v. Its Workmen (AIR 1962 SC 1348 : (1961) 2 LLJ 414)).

136. As against the above propositions, Sri Sen relied upon the observations of this Court in Oriental textile Finishing Mills, Amritsar v. Labour Court, Jullundur ((1972) 1 SCR 490 : (1971) 3 SCC 646 : 1972 SC 277). We fail to see how it runs counter to the established principle. The Court, in fact, held that even where the strike is illegal, before any action was taken with a view to punishing the strikers a domestic enquiry must be held. Even though the Standing Orders prescribing enquiry before punishment did not provide for any such enquiry the Court held that nonetheless a domestic enquiry should have been held in order to entitle the management to dispense with the service of the workmen on the ground of misconduct, viz., participation in the illegal strike. After so saying the Court agreed with the view of the Court in Indian General Navigation & Railway Co. Ltd. case (AIR 1960 SC 219 : (1960) 2 SCR 1 : (1960) 1 LLJ 13) and reaffirmed the principle that mere taking part in an illegal strike without anything further would not necessarily justify the dismissal of all the workers taking part in the strike and that if the employer, before dismissing a workman, gave him sufficient opportunity of explaining his conduct and no question of mala fides or victimisation arose, it was not for the tribunal in adjudicating the property of such dismissal to look into the sufficiency or otherwise of the evidence led before the enquiry officer or insist on the same degree of proof as was required in a Court of law, as it were sitting in appeal over the decision of the employer.

137. Another aspect of this case emphasised that it could not be dogmatised as a matter of law that an overt act such as intimidation or instigation or violence was necessary in order to justify termination of service of participating in an illegal strike. On the facts of that case, even though it was found that no domestic enquiry was held, reinstatement was refused on the ground that misconduct was made out.

138. Sri Sen, of course, relied on this judgment to show that where a strike was resorted to and the workers were called upon to join service within the stipulated time, on their failure it was open to

the company to employ new hands. This is reading more into the ruling than is warranted.

139. We cannot agree that mere failure to report for duty, when a strike is on, necessarily means misconduct. Many a workmen as a matter of prudence, may not take the risk of facing the militant workmen or the Management's hirelings for fear especially when there is evidence in the case from the Sabha that the Management had hired goondas and from the Management that the striking vanguard was violent. It is also possible, in the absence of evidence to contrary, that several workmen might not be posted with the Management's notice of recall or the terms on which they were being recalled. In this view we are not able to uphold the conclusion of the arbitrator that the punishment of dismissal was appropriate for the entire mass of workmen whose only guilt, as proved was nothing more than passive participation in the illegal and unjustified strike by not reporting for duty. The verdict is inevitable that the discharge is wrongful.

140. The only comment we reluctantly make about the otherwise thorough award of the arbitrator is that omnibus rhetoric about the obnoxious behaviour of a class may not make do for hard proof of specific act of particular persons where a punitive jurisdiction is exercised.

141. What, then, is the normal rule in the case of wrongful dismissal when the workmen claim reinstatement with full back wages ? The High Court has held the discharge wrongful and directed restoration with an equitable amount of back wages. The following rulings of this Court, et al, deal with this subject :

142. The recent case of Hindustan Tin Works v. Its Employees (AIR 1979 SC 75, 77-78 : (1979) 2 SCC 80, 85) sets out the rule on reinstatement and back wages when the order of discharge is demolished : (SCC p. 85, para 9)

> It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protected litigation is itself such an awesome factor that he may not survive to see the day when law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be held that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly underserved. Ordinarily therefore, a workman whose service as has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be premium on the unwarranted litigative activity

> of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz, to resist the workman's demand for revision of wages, and termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect .... In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant consideration will enter the verdict. More or less, it would be a motion addressed to the discretion of the tribunal. Full back wages would be the normal establish the circumstances necessitating departure. At that stage the tribunal will exercise its discretion keeping in view all the relevant circumstances.

143. Dealing with the complex of considerations bearing on payment of back wages the new perspective emerging from Article 43-A cannot be missed, as explained in Hindustan Tin Works (AIR 1979 SC 75, 77-78 : (1979) 2 SCC 80, 85). Labour is no more a mere factor in production but a partner in industry conceptually speaking and less than full back wages is a sacrifice by those who cannot best afford and cannot be demanded by those, who least sacrifice their large 'wages' though can best afford, if financial constraint is the ground urged by the latter (Management) as inability to pay full back pay to the former. The morality of law and the constitutional mutation implied in Article 43-A bring about a new equation in industrial relations. Anyway, in the Hindustan Tin Works' case (AIR 1979 SC 75, 77-78 : (1979) 2 SCC 80, 85), 75 per cent of the past wages was directed to be paid. Travelling over the same ground by going though every precedent is supererogatory and we hold the rule is simple that the discretion to deny reinstatement or pare down the quantum of back wages is absent save for exceptional reasons.

144. It must be added however that particular circumstances of each case may induce the Court to modify the direction in regard to the quantum of back wages payable as happened in the Indian General Navigation and Railway Co. Ltd. v. Their Workmen (AIR 1960 SC 219 : (1960) 2 SCR 1 : (1960) 1 LLJ 13). We may, therefore have to consider when finally moulding the relief, what, in this case, we should do regarding reinstatement and back wages.

A Sum-up

145. We may now crystallise our conclusions in the light of the long discussion. The basis assumption we make is that the strike was not only illegal but also unjustified. On the latter part, a contrary view cannot be ruled out in the circumstances present but we do not reinvestigate the issue since the High Court has proceeded on what both sides have taken for granted. The management, in our view, did punish its 853 workmen when it discharged them for reasons of misconduct set out in separate but integrated proceedings, even though with legal finesse, the formal order was phrased in harmless verbalism. But fine words butter no parsnips, and law, in its intelligent honesty, must be blunt and when in sees a spade, must call it a spade. The action taken under the general law or the Standing Orders, was illegal in the absence of individualised charge-sheets, proper hearing and personalised punishment. If found guilty. None of these steps having been taken, the discharge orders were still-born. But the Management could, as in this case it did, after to make out the delinquency of the employees and the arbitrator had in such cases, the full jurisdiction to adjured de novo both guilt and punishment. We held that Section 11-A does take in an arbitrator too, and, in this case, the arbitral reference, apart from Section 11-A, is plenary in scope.

146. In the second chapter of our sum-up, the first thing we decide is that Article 226 however

restrictive in practice, is a power vide enough, in all conscience, to be a friend in need when the summons comes in a crisis from a victim of injustice; and more importantly, this extraordinary reserve power is unsheathed to grant final relief without necessary recourse to a remand. What the tribunal may, in its direction do, the High Court too under Article 226, can, if facts compel, do. Secondly, we hold that the award suffers from a fundamental flaw that it equates an illegal and unjustified strike with brazen misconduct by every workmen without so much as identification of the charge against each, the part of each, the punishment for each, after adverting to the gravamen of his misconduct meriting dismissal. Passive participation in a strike which is both illegal and unjustified does not ipso facto invite dismissal or punitive discharge. There must be active individual excess such as master-minding the unjustified aspects of the strike e.g., violence, sabotage or other reprehensible role. Absent such gravamen in the accusation, the extreme economic penalty of discharge is wrong. An indicator of the absence of such grievous guilt is that the Management, after stating in strong terms all the sins of the workmen, took back over 400 of them as they trickled back slowly and beyond the time set, with continuity of service, suggestive of the dubiety of the inflated accusations and awareness of the minor role of the mass of workmen in the lingering strike. Furthermore, even though all sanctions short of punitive discharge may be employed by a Management in over current conditions of massive unemployment, low wages and high cost of living dismissal of several hundreds with disastrous impact on numerous families, is of such sensitive social concern that, save in exceptional situations, the law will inhibit such a lethal step for the peace of the Industry, the welfare of the workmen and the broader justice that transcends transient disputes. The human dimensions have decisional relevance. We hold the discharge orders, though approved by the arbitrator, invalid.

147. The last part of our conclusions relates to the relief which must be fashioned with an eye on mutual equities. We cannot ignore a few raw realities since law is not dogmatics but pragmatics, without temporising on principle. The Management's limitations in absorbing all the large number of discharged employees all at once when steel, the raw material, is scarce, is a problem. Likewise their inability to pay huge sums by way of back wages or otherwise, without crippling the progress of the industry, cannot be overlooked but cannot be overplayed after Hindustan Tin Works (AIR 1979 SC 75, 77-78 : (1979) 2 SCC 80, 85). Another factor which cannot be wished away is the presence of over a couple of hundred workmen, with varying lengths of service who may have to be sacked if the old workmen are to be brought back. It is a problem of humanist justice. Lastly, the rugged fact of life must not be missed that some of the workmen during the long years of desperate litigation, might have sought jobs elsewhere and most of them perhaps have, for sheer survival, made at least a starving wages during the prolonged idle interval. This factor too is a weak consideration, tested by the reasoning in Hindustan Tin Works (AIR 1979 SC 75, 77-78 : (1979) 2 SCC 80, 85). Moreover rationalisation of reabsorption of the removed workmen requires attention to the classification of permanent workmen and their casual counterparts. Every proposal must be bottomed on the basic economic fact that the beneficiaries are from the many below the destitution line. This Court has in a very different context though, has drawn attention to the Gandhian guide-line :

> Whenever you are in doubt .... apply the following test. Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him.

It is apt here.

148. This perspective informs our decision. What did the High Court do regarding reinstatement and

should we modify and why ? If the discharge is bad, reinstatement is the rule. In India General Navigation (AIR 1960 SC 219 : (1960) 2 SCR 1 : (1960) 1 LLJ 13), Punjab National Bank (Punjab National Bank Ltd. v. Employees, AIR 1960 SC 160 : (1959) 2 LLJ 666) and Swadeshi Industries (AIR 1960 SC 1258 : (1960) 2 LLJ 78), et al, restoration, despite large numbers, was directed. But most rules have exceptions wrought by the pressure of life and oriental ((1972) 1 SCR 490 : (1971) 3 SCC 646 : AIR 1972 SC 277) was relied on to contend that reinstatement must be denied. There is force in the High Court's reasoning to distinguish Oriental ((1972) 1 SCR 490 : (1971) 3 SCC 646 : AIR 1972 SC 277) as we hinted earlier and we quote :

> There were only 22 workmen involved in that case. The Management had made genuine and persistent efforts to persuade the concerned workman to call off the strike and join work. Those efforts were made at three different stages, namely, (1) immediately after the workers went on the lightning strike and before charge-sheets were issued, (2) after the charges were dropped and individual notices were sent to the workmen asking them to resume work by specified dates, and resume work by specified dates, and (3) after the orders of termination were served and conciliation proceedings were commenced pursuant to the demand notice. But this is not all. Even the Labour Officer and Labour Inspector had tired to persuade the concerned workmen to join duty before the charge-sheets came to be issued. As against these repeated bona fide attempts on the part of the Management and an outside agency to persuade the erring workmen, they not only did not resume work but also failed to acknowledge or send a reply to the individual notices served upon them requesting them to resume work and they appear to have made it a condition precedent to their joining duty that the suspended workman should also be taken back. Even under such circumstances, the management did not straightway terminate their services but gave individual notices requiring the concerned workmen to show cause why their names should not be struck off and asked them to submit their reply by a certain date. Even those notices were not replied. It is only thereafter that the service of the concerned workman came to be terminated. It is against this background that the Supreme Court held that there was "a persistent and obdurate refusal by the workmen to join duty" notwithstanding the fact that "the management has done everything possible to persuade them and given them opportunity to come back to work" and that they had without any sufficient cause refused to do so which constituted "misconduct" so as to "justify the termination of their services."
>
> ..... If the workmen had been approached individually, not only those amongst them who were unwilling to join strike but were prevented from joining work would have taken courage to resume duty but even those amongst them who were undecided could also have been won over. That apart, those notices, as their contents disclose, were hardly persuasive efforts. They were a mixture of ultimatums, threats, complaints and indictment of the workmen and the Sabha. Was it, therefore, a genuine effort on the part of a keenly desirous employer to offer an olive branch ? In Oriental ((1972) 1 SCR 490 : (1971) 3 SCC 646 : AIR 1972 SC 277) orders of termination were passed only after giving individual notices to the concerned workmen to show cause why their names should not be struck off. Besides, those notices were given after charges formally served upon each workman earlier were dropped and persuasive efforts made in the meantime had failed. None of those steps was taken herein. All that happened was that in one of the notice meant for mass consumption and circulation, such intimation was given.

149. Even so, during the several years of the pendency of the dispute, surely see workmen would have secured employment elsewhere as was conceded by counsel at a certain stage, and it is not equitable to recall them merely to vindicate the law especially when new workmen already in precarious service may have to be evicted to accommodate them. In the course of the debate at the bar we gained the impression that somewhere around a hundred workmen are likely to be alternatively employed. Hopefully there is no hazard in this guess.

150. Another facet of the turns on the demand for full back wages. Certainly the normal rule, on reinstatement, is full back wages since the order of termination in non est. (See G. T. Lad v. Chemical & Fibers of India, (1979) 1 SCC 590 : 1979 SCC (L&S) 76 and Panitole Tea Estate v. Workmen, (1971) 3 SCR 774 : (1971) 1 SCC 742) Even so the Industrial Court may well slice off a part if the workmen are not wholly blameless or the strike is illegal and unjustified. To what extent wages for the long interregnum should be paid is, therefore, a variable dependent on a complex of circumstances (See for eg. Workmen v. Charothar Gramodhar Shakari Mandal, (1967) 15 FLR 395, Paras 3 and 4).

151. We are mindful of the submission of Sri Tarkunde urged in the connected appeal by the Sabha, that where no enquiry has preceded a punitive discharge and the tribunal, for the first time, upholds the punishment this Court has in D. C. Roy v. Presiding Officer, M.P. Industrial Court, Indore ((1976) 3 SCR 801 : (1976) 3 SCC 693 : 1976 SCC (L&S) 484) taken the view that full wages must be paid until the date of the award. There cannot be any relation back of the date of dismissal to when the Management passed the void order.

152. Kalyani (1952 SCR 597, 607 : AIR 1952 SC 126 : 1952 SCJ 253) was cited to support the view of relation back of the award to the date of the employer's termination orders. We do not agree that the ratio of Kalyani (1952 SCR 597, 607 : AIR 1952 SC 126 : 1952 SCJ 253) corroborates the proposition propounded. Jurisprudentially, approval, is not creative but confirmatory and therefore relates back. A void dismissal is just void and does not exist. If the Tribunal, for the first time, passes an order recording a finding of misconduct and thus breathes life into the dead shall of the Management's order, pre-dating of the nativity does not arise. The reference to Sasa Musa (Sasa Musa Sugar Works (P) Ltd. v. Shabrati Khan, AIR 1959 SC 932 : (1959) 2 LLJ 388) in Kalyani (1952 SCR 597, 607 : AIR 1952 SC 126 : 1952 SCJ 253) enlightens this position. The latter case of D. C. Roy v. Presiding Officer, Madhya Pradesh Industrial Court, Indore ((1976) 3 SCR 801 : (1976) 3 SCC 693 : 1976 SCC (L&S) 484) specifically refers to Kalyani's case (1952 SCR 597, 607 : AIR 1952 SC 126 : 1952 SCJ 253) and Sasa Musa Case (Sasa Musa Sugar Works (P) Ltd. v. Shobrati Khan, AIR 1959 SC 923 : (1959) 2 LLJ 388) and holds that where the management discharges a workman by an order which is void for want of an enquiry or for blatant violation of rules of natural justice, the relation back doctrine cannot be invoked. The jurisprudential difference between a void order which by a subsequent judicial resuscitation comes into being de novo, and an order, which may suffer from some defects but is not still-born or void and all that is needed in the law to make it good is a subsequent approval by a tribunal which is granted, cannot be obfuscated.

153. We agree that the law stated in D. C. Roy ((1976) 3 SCR 801 : (1976)3 SCC 693 : 1976 SCC (L&S) 484) is correct but now that the termination orders are being set aside, the problem does not present itself directly. Even the other alternative submission of Sri Tarkunde that if the plea of the Management that the order is a discharge simpliciter were to be accepted, the result is a retrenchment within the meaning of Section 2(oo) which, in this case, is in violation of Section 25-F and therefore bad, is not a point urged earlier. We are disposed to stand by the view that discharge, even where it is not occasioned by a surplus of hands, will be retrenchment, having regard to the

breach of the definition and its annotation in Hindustan Steel Ltd. v. Presiding Officer, Labour Court ((1977) 1 SCR 586 : (1976) 4 SCC 222 : (1976) (L&S) 583). But the milieu in which the order was passed in February 1973 is not fully available, viewed from this new angle. So we decline to go into that contention.

Final Relief

154. We are concerned with 400 workmen, some of whom have been claimed by death or other irreversible causes - casualties of litigative longevity ! 370 workmen are left behind, of whom 239 are admittedly permanent. We have already stated that 100, out of them, are probably fixed up elsewhere. So, we exclude them and direct that the remaining 139 alone will be reinstated. A list of the aforesaid 100 workmen will be furnished to the Management by the Sabha within two weeks from today. That shall be accepted as correct and final.

155. While reinstatement is refused for these 100 workmen, when shall they be deemed to have ceased to be in service for drawal of terminal benefits ? Their discharge orders having been quashed, they remain in service until today. We concluded the arguments on August 3, 1979 and on the eye of the closure of counsel's submissions certain inconclusive settlement proposals were discussed. We, therefor consider August 3, 1979 as a pivotal point in the calendar with reference to which the final relief may be moulded. We direct that the 100 workmen for whom reinstatement is being refused will be treated as in service until August 3, 1979 on which date they will be deemed to have been retrenched. We direct this step with a view to pragmatise the situation in working out the equities. These 100 will draw all terminal benefits plus 75 per cent of the back wages. This scaling down of back pay is consistent with the assumption that somewhere in the past they had secured alternative employment. The long years and the large sum payable also persuade us to make this minor cut. Of course, in addition, they will be entitled to retrenchment benefits under Section 25-F of the Act, and one month's notice pay.

156. The remaining 139 will be awarded 50 per cent of the back wages since we are restoring them. The High Court has adopted this measure and so we do not depart from it. The case of the hundred stands on a slight different footing, because some compensation in lieu of refusal of reinstatement is due to them and that also has entered our reckoning while fixing 75 per cent for them. The computation of the wages will such as they would have drawn had they continued in service and on that the cut directed will be applied.

157. We have disposed of the case of the permanent workmen except to clarify that in their case continuity of service will be maintained and accrual of benefits on that footing reckoned. The next category relates to casual employees, 131 in number of whom 57 have less than nine months' services. The policy of the Act draws a distinction between those with service of 240 days and more and others with less. The casuals with less than nine months service are 57 in number and we do not think that this fugitive service should qualify for reinstatement especially when we find a number of intermediate recruits, with longer through untenable service, have to be baled out. We decline reinstatement of these 57 hands. The other 74 must be reinstated although nationally but wrongly they are shown as causal. In the 'life' sense all mortals are a casuals but in the legal sense, those with a record of 240 days on the rolls, are a class who have rights under industrial law. We direct the 74 long-term casuals aforesaid to be reinstated but not the 57 short-terms ones. To this extent, we vary the High Court's order.

158. We adopt the directive of the High Court regarding the back wages to both categories of

casuals except that for the lesser class of 57 casuals, flat sum of Rs. 1,000 more will be paid as a token compensation in lieu of reinstatement. The reinstated casuals (74 of them) will be put back as casuals but will be confirmed within six months from the date rejoining since it is meaningless to keep them as causal labourers when they are, by sheet length of service, on the regular rolls.

159. Two issues remain. When are the workmen to be retaken and what is to happen in the meanwhile ? How is the amount parable by the Management to be discharged and on what terms ? Many years have flowed by, thanks to the long-drawn-out litigation. Further delay in putting back the workers will be unfair. But the Management pleads that steel shortage cuts into the flesh of the factory's expansion, without which additional intake of workers is beyond their budget unless considerable time for reabsorption were given. But the lot of the workmen is unspeakable while the overall assets and outlook of the Company are commendable enough to bear an increased wage bill. Dives cannot complain when Lazarus asks for more cramps. Even if a slight slant be made in favour of the Management, the direction to them to take back in order of seniority the first 70 out of the 139 permanent workmen on or before December 31, 1979 and the rest on or before March 31, 1980 is the least that is just. Until those dates the workmen will be paid two-third of their wages as now due. Of course, if any workmen falls to report for work within 15 days of service of written notice to him, with simultaneous copy to the Sabha, he will not be eligible for any more reinstatement or wages.

160. The back wages run into a large sum but a good part has been paid under the stay order of this Court. We make it clear that the payments made will be given credit and the balance if paid as directed below and within the time specified will not carry interest. If default is made, the sums in default will carry 10 per cent interest.

161. The figures of amounts due will be worked out by both sides and put into Court in 10 days from now. Half the amount determined by the Court, after perusing both statements, will be paid directly to the workmen or deposited with the Industrial Tribunal who will give notice and make disbursements, on or before March 31, 1980 and the other half on or before September 30, 1980.

162. The conclusions may be capitulated for easier consumption :

> 1. Out of 370 workmen directed to be reinstated by the High Court, 239 are permanent. It is assumed that 100 have found alternative employment and are not interested any more in reinstatement and they are to be excluded from the direction of reinstatement. The company must, therefore, reinstate 139 permanent workmen and the list of 100 workmen who are not to be reinstated would be supplied by the Sabha within two weeks from the date of this judgment. This discharge order in respect of 100 workmen hereinbefore mentioned would be set aside and they are deemed to be in service till August 3, 1979, when they will be retrenched and they will be paid retrenchment compensation as provided in Section 25-F plus one month's pay in lieu of notice, the compensation to be worked out on the basis of the wages that will be admissible under the recommendations of the Engineering Wage Board as applicable to the Company. This amount will be paid in lieu of reinstatement and they will also be paid 75 per cent of the back wages.
>
> 2. The remaining 139 permanent employees would be paid 50 per cent of the back wages as directed by the High Court.

> 3. 70 out of 139 permanent workmen directed to be reinstated should be provided actual employment on or before December 31, 1979 and the rest on or before March 31, 1980. During this period and till the actual reinstatement each one of these 139 workmen should be paid two-third of the monthly wages from August 9, 1979, when the hearing in this case concluded. 50 per cent of the amount that become payable to each workman under the directions hereinabove given will be paid on or before March 31, 1980 and the balance on or before September 30, 1980, and till then the amount will carry interest at the rate of 10 per cent.
>
> 4. In respect of casual workmen whose service was less than 9 months on the date of dismissal it would not be proper to grant reinstatement. They are 57 in number. The remaining casual workmen 74 in number shall be reinstated. In case of 57 casual workmen to whom reinstatement is refused, the direction of the High Court is confirmed with the further addition that each one will be paid Rs. 1,000 over and above the amount payable under the direction of the High Court and this would be in lieu of reinstatement. Causal workmen 74 in number and having service of more than 9 months on the date of dismissal will be treated as confirmed within six months of the date of their rejoining and they will be offered reinstatement by March 31, 1980, and the High Court's direction for back wages in their respect is confirmed.

163. With these modifications, we dismiss both the appeals. The Management-appellant will pay the costs of the Sabha-respondent advocates fee being fixed at Rs. 5,000.

An After word

164. This litigation, involving many workmen living precariously on poor wages amidst agonising inflation and a management whose young budget, to what with steel scarcity, may well be shaken by the burden of arrears, points to the chronic pathology of our Justice System - the intractables and escalating backlog in the Forensic Assembly Line that slowly spins Injustice out of Justice and effectually wears down or keeps out the weaker sector of Indian life. This trauma is felt more poignantly in labour litigation and the legislature fails functionally if it dawdles to radicalise, streamline and simplify the conflict resolution procedures so as to be credibly available to the common people who make up the lower bracket of the nation. The stakes are large, the peril is grave, the evils are worse than the prognostics of Prof. Laurence Tribe (of the Harvard Law School) :

> If Court backlogs grow at their present rate our children may not be above to bring a lawsuit to a conclusion within their lifetime. Legal claims might then be willed on, generation to generation, like hillbilly founds; and the burdens of pressing them would be contracted like a hereditary disease.

165. Law may be guilty of double injustice when it is too late and too costly for in holds out remedial hopes which peter out into four dupes and bleeds the anaemic litigant of his little cash only to tantalise him into a system equal in form but unequal in fact. The price of this promise of unreality may be the search by the lowly for the reality of revolutionary alternatives. Compelled by the crisis in the Justice System, we sound this somber judical note.

166. We direct payments and reinstatements as spelt out earlier, within the specificated time, and, hopefully, leave the case with the thought that, given better report between the partners in

production, the galvanic Gujarat Steel Tubes Ltd., will forge ahead as a paradigm for the rest.

Koshal, J. (dissenting) -

I have had the advantage of going through the judgment of my learned brother Iyer J., but after giving the same my most serious consideration I regret that I find myself unable to endorse it as I hold a different opinion in relation to three important findings arrived at by him, namely,

> (a) that the discharge of workmen amounted really to their dismissal because the motivation for it was their alleged misconduct.
>
> (b) that an arbitrator would fall within the submit of the term "tribunal" as used in sub-section (2) of Section 11-A of the Industrial Disputes Act (hereinafter called the 1947 Act), and
>
> (c) that the High Court acted within the four corners of its jurisdiction under Article 227 of the Constitution of Indian while interfering with the finding of the arbitrator that the workmen were correctly punished with dismissal if the orders of discharge could be construed as such.

168. I am therefore appending this note this may be read in continuation of that judgment.

169. The parties are admittedly governed by the Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as the "S.O. Act") Section 15(2) of which empowers the appropriate government to make rules inter alia, setting out model standing orders for the purposes of that Act. The expression 'standing orders' is defined in Section 2(g) of the S.O. Act to mean rules relating to the matters set out in the schedule thereto, items 8 and 9 of which run thus :

> 8. Termination of employment and the notice therefore to be given by the employer and workmen.
>
> 9. Suspension or dismissal for misconduct and acts or omissions which constitute misconduct.

170. The appropriate government (in this case the Government of Gujarat) has prescribed Model Standing Orders (M.S.O.s for short) under Section 15(2) of the S.O. Act. The relevant part of M.S.O. 23 is extracted below :

> 23. (1) Subject to the provisions of the Industrial Disputes Act, 1947, the employment of a permanent workman employed on rates other than the monthly rates of wages may be terminated by giving him fourteen days' notice or by payment of thirteen days.' wages (including all admissible allowances) in lieu of notice.
>
> (4) The employment of a permanent workman employed on the monthly rates of wages may be terminated by giving him one month's notice or on payment of one month's wages (including all admissible allowances) in lieu of notice.
>
> (4-A) The reason for the termination of service of a permanent workmen shall be recorded in writing and communicated to him, if he so desires, at the time of discharge unless much communication, in the opinion of the Manager, is likely

directly or indirectly to lay any person open to civil or criminal proceedings at the instance of the workman.

(7) All clauses of workmen other than those appointed on a permanent basis may leave their service or their service may be terminated without notice or pay in lieu of notice : Provided that services of a temporary workman shall not be terminated as a punishment unless he has been given an opportunity of explaining the charges of misconduct alleged against him in the manner prescribed in Standing Order 25.

171. M.S.O. 24 enumerates 25 kinds of acts or omissions on the part of a workman which amount to misconduct. Clauses (a) and (b) of the M.S.O. describe two of such act thus :

(a) willful insubordination or disobedience whether or not in combination with another, or any lawful and reasonable order of a superior;

(b) going on illegal strike or abetting, inciting instigating or acting in furtherance thereof;

172. M.S.O. 25 lays down the manner in which a workman guilty of misconduct may be dealt with. It states :

25. (1) A workmen guilty of misconduct may be -

(f) discharged under Order 23;

(g) dismissed without notice.

#(2) .....##

(3) No order of dismissal under sub-clause (g) of clause (1) shall be made except after holding an inquiry against the workman concerned in respect of the alleged misconduct in the manner set forth in clause (4).

(4) A workman against whom an inquiry has been held shall be given a charge-sheets clearly setting forth the circumstances appearing against him and requiring explanation. He shall be given an opportunity to answer the charge and permitted to be defended by a workman working in the same department as himself. Except for reasons to be recorded in writing by the officer holding, the inquiry the workman shall be permitted to produce witnesses in his defence and cross-examine any witness on whose evidence the charge rests. A concise summary of the evidence led on either side and the workman's plea shall be recorded.

#(5) .....##

173. Clauses (3) and (4) of M.S.O. 25 speak of an inquiry only in the case of an order falling under sub-clause (g) of clause (1) of that M.S.O. It is thus quite clear (and this is not disputed) that the only sub-clause (1) of M.S.O. would be attracted is sub-clause (g) and that if an order of discharge falls under M.S.O. 23 an inquiry under clause (3) and (4) of M.S.O. 25 would not be a prerequisite thereto even though such an order is mentioned in sub-clause (f) of clause (1) of that M.S.O. And that is why it has been vehemently urged on behalf of the workmen who were discharged en masse

and who were not taken back by the Management that the orders of discharge made in relation to them amount really to orders of the fact that no inquiry of the type above mentioned was held before they were passed.

174. Under M.S.O.s 23 and 25 the Management has the power to effect termination of the services of an employee by having recourse to either of them. In action taken under M.S.O. 23 no element of punishment is involved and the discharge is a discharge simpliciter; and that is why no opportunity to the concerned employee to show cause against the termination is provided for. Dismissal, however which an employer may order, is, in its very nature, a punishment, the infliction of which therefore has been made subject to the result of an inquiry (having the semblance of a trial in a criminal proceedings). Exercise of each of the two powers has the effect of the termination of the services of the concerned employee but must be regarded, because of the manner in which each has been dealt with by the M.S.O.s as separate and distinct from the other.

175. It was vehemently argued on behalf of the workman that once it was proved that the order of discharge of a workman was passed by reason of a misconduct attributed to him by the management, the order cannot but amount to an order of dismissal. But this argument, to my mind, is wholly without substance and that for two reasons. For one thing clause (1) of M.S.O. 25 specifically states in sub-clause (f) that a workmen guilty of misconduct may be discharged under M.S.O. 23. This clearly means that when the employer is satisfied that a workman has been guilty of misconduct, he may [apart from visiting the workman with any of the punishments specified in sub-clause (a), (b), (c), (d) and (e) of clause . (1) of M.S.O. 25] either pass against him an order of discharge for which no inquiry precedent as provided for in clause (3) and (4) of M.S.O. 25 would be necessary, or, may dismiss him after holding such an inquiry. Which of the two kinds of order the employer shall pass is left entirely to his own discretion.

176. It is true that the employer cannot pass a real order of dismissal in the garb of one of discharge. But that only means that if the order of termination of service of an employee is in reality intended to punish an employee and not merely to get rid of him because he is considered useless, inconvenient or troublesome, the order even though specified to be an order of discharge, would be deemed to be an order of dismissal covered by sub-clause (g) of clause (1) of M.S.O. 25. On the other hand if no such intention is made out, the order would remain one of discharge simpliciter even though it has been passed for the sole reason that a misconduct is imputed to the employee. That is how, in my opinion, M.S. O.s 23 and 25 have to be interpreted. The argument that once an alleged misconduct is shown to have been the motive for the passage of an order of discharge, the same would immediately and without more, amount to an order of dismissal is not warranted by the language used in M.S.O. 25 which specifically gives to the employer the power to get rid of "a workman guilty of misconduct" by passing an order of his discharge under M.S.O. 23.

177. Secondly, the reasons for the termination of service of a permanent workman under M.S.O. 23 have to be recorded in writing and communicated to him, if he so desires, under clause (4-A) thereof. Such reasons must obviously consist of an opinion derogatory to the workman in relation to the performance of his duties; and whether such reasons consists of negligence work-shirking or of serious overt acts like theft or embezzlement they would in any case amount to misconduct for which he may be punished under M.S.O. 25. It is difficult to conceive of a case which such reasons would not amount to misconduct. The result is that M.S.O. 23 would be rendered otiose if termination of service thereunder for misconduct could be regarded as a dismissal and such a result strikes at the very root of accepted cannons of interpretation. If it was open to the Court to "lift the veil" and to hold an order of discharge to amount to a dismissal merely because the motive behind it

was a misconduct attributed to the employee, the service of on employee could be terminated without holding against him an inquiry such as is contemplated by clause (3) and (4) of M.S.O. 25.

178. The interpretation placed by me on M.S.O.s 23 and 25 finds ample support in Bombay Corporation v. Malvenkar ((1978) 3 SCR 1000 : (1978) 3 SCC 78 : 1978 SCC (L&S) 430) of which the facts are on all fours with these in the present case. Miss P. S. Malvenkar respondent 1 in that case was a clerk in the employment of the Bombay Electric Supply and Transport Undertaking which was being run by the Bombay Corporation. Her service were terminated on the ground that her record of service was unsatisfactory. It was however stated in the order of termination of her service that she would be paid one month's wages in lieu of notice and would also be eligible for all the benefits as might be admissible under the Standing Orders and Service Regulations of the Undertaking. Those Standing Orders correspond to the standing orders with which we are here concerned. Thereunder, two powers were conferred on the employer, one being a power to impose punishment for misconduct following a disciplinary inquiry under clause (2) of Standing Order 21 read with Standing Order 23 and the other one to terminate the service of the employee by one calendar month's written notice or pay in lieu thereof under Standing Order 26. The question arose as to which power had been exercised by the employer in the case of Miss Malvenkar and Jaswant Singh, J., delivering the judgment of the Court on behalf of himself and Bhagwati J., was answering that question when he made the observations reproduced from his decision by my learned brother Krishna Iyer J. This Court was then clearly of the opinion that -

> (a) the power to terminate the services by an order of discharge simpliciter is distinct from and independent of the power to punish for misconduct and the Standing Orders cannot be construed so as to render either of these powers ineffective; and
>
> (b) reasons for termination have to be communicated to the employee and those reasons cannot be arbitrary, capricious or irrelevant but that would not mean that the order of termination becomes punitive in character just because good reasons are its basis.

The Court further remarked that if the misconduct of the employee constituted the foundation for terminating his service then if might be liable to be regarded as punitive but this proposition was doubted inasmuch as "even in such case it may be argued that the Management has not punished the employee but has merely terminated his service under Standing Order 26".

179. So all that remains to be determined in this connection is as took when would misconduct be the 'foundation' of an order of discharge. Merely because it is the reason which has weighed with the employer in effecting the termination of services would not make the order of such termination as one founded on misconduct, for, such a proposition would run counter to the plain meaning of clause (1) of M.S.O. 25. For an order to be 'founded' on misconduct, it must, in my opinion, be intended to have been passed by way of punishment, that is, it must be intended to chastise or cause pain in body or mind or harm or loss in reputation or money to the concerned worker. If such an intention cannot be spelled out of the prevailing circumstances, the order of discharge or the reasons for which it was ostensible passed, it cannot be regarded an order of dismissal. Such would be the case when the employer orders discharge in the interests of the factory or of the general body of workers themselves. That this is what was really meant by the judicial precedents which use the word 'foundation' in connection with the present controversy finds support from a number of decisions of this Court. The Chartered Bank, Bombay v. The Chartered Bank Employees' Union ((1960) 3 SCR 441 : AIR 1960 SC 919 : (1960) 2 LLJ 222) this Court held that it if termination of

service is a colourable exercise of the power vested in the Management or is a result of victimisation or unfair labour practice, the Industrial Tribunal will have jurisdiction to intervene and set aside such termination. Applying this principle to the facts of the case before it, this Court ruled :

> We are satisfied that the Management has passed the order of termination simpliciter and the order does not amount to one of dismissal as and by way of punishment.

180. This case was followed in The Tata Oil Mills Co. Ltd. v. Workman ((1964) 2 SCR 125, 130 : AIR 1966 SC 1672 : (1966) 2 LLJ 602) where Gajendragadkar, C.J., who delivered the judgment of the Court stated the law thus :

> The true legal position about the Industrial Courts' jurisdiction and authority in dealing with cases of this kind is no longer in doubt. It is true that in several cases, contract of employment or provisions in Standing Orders authorise an industrial employer to terminate the service of his employees after giving notice for one month or paying salary for one month in lieu of notice, and normally, an employer may, in a proper case, be entitled to exercise the said power. But where an order of discharge passed by an employer gives rise to an industrial dispute, the form of the order by which the employees services are terminated, would not be decisive; industrial adjudication would be entitled to examine the substance of the matter and decide whether the termination is in fact discharge simpliciter or it amounts to dismissal which has put on the cloak of a discharge simpliciter. If the Industrial Court is satisfied that the order of discharge is punitive, that it is mala fide, or that it amounts to victimization or unfair labour practice, it is competent to the Industrial Court to set aside the order and in a proper case, direct the reinstatement of the employee. In some case, the termination of the employee's services may appear to the Industrial Court to be capricious or so unreasonably severe that an inference may legitimately and reasonably be drawn that in terminating the services, the employer was not acting bona fide. The test always has to be whether the act of the employer is bona fide or not. If the act is mala fide, or appears to be a colourable exercise of the powers conferred on the employer either by the terms of the contract or by the standing orders, then notwithstanding the form of the order, industrial adjudication would examine the substance and would direct reinstatement in a fit case.

The same test was laid down for determining whether an order of discharge could be construed as one ordering dismissal in Tata Engineering and Locomotive Co. Ltd. v. S. C. Prasad ((1969) 3 SCC 372, 378) by Shelat and Bhargava, JJ. :

> No doubt, the fact that the order was couched in the language of a discharge simpliciter is not conclusive. Where such an order gives rise to an industrial dispute its form is not decisive and the tribunal which adjudicates that dispute can, of course, examine the substance of the matter and decide whether the termination is in fact discharge simpliciter or dismissal though the language of the order is one of simple termination of service. If it is satisfied that the order is punitive or mala fide or is made to victimize the workmen or amounts to unfair about practice, it is competent to set it aside. The test is whether the act of the employer is bona fide. If it is not, and is a colourable exercise of the power under the contract of service or standing orders, the tribunal can discard it and in a proper case direct reinstatement.

181. The Chartered Bank, Bombay v. Chartered Bank Employees' Union ((1969) 3 SCC 372, 378) was followed by this Court in Workmen of Sudder Office, Cinnamare v. Management ((1972) 4 SCC 746 : (1971) 2 LLJ 620) and therein stress was laid on the employer's right to terminate the services of a workman by an order of discharge simpliciter under the terms of the contract where there was no lack of bona fides, unfair labour practice or victimization.

182. So the real criterion which formed the touchstone of a test to determine whether an order of termination of services is an order of discharge simpliciter or amounts to dismissal is the real nature of the order, that is, the intention with which it was passed. If the intention was to punish, that is to chastise, the order may be regarded as an order of dismissal; and for judging the intention, the question of mala fides (which is the same thing as a colourable exercise of power) becomes all important. If no mala fides can be attributed to the Management, the order of discharge must be regarded as one having been passed under M.S.O. 23 even though the reason for its passage is serious misconduct.

183. It is in light of the conclusion just above arrived at the discharge of the workmen in the instant case has to be judged. The question of intention of mala fides is really one of fact (of which the arbitrator was, in my opinion, the sole Judge, unless his finding on the point was vitiated by perversity in which case alone it was liable to be reviewed by the High Court). The discussion of the evidence by the arbitrator in his award is not only full and logical but, in my opinion, also eminently just. At all material time the Management was out to placate the Sabha (and therefore, the workmen) and gave to it a long rope throughout. The attitude of the Sabha on the other hand was one of intransigence and obduracy. According to the settlement of August 4, 1972, it was not open to the workmen to resort to a strike till the expiry of a period of five years; nor could the Management discharge a lock-out till then. Any disputes arising between the parties, according to the terms arrived at, were to be sorted out through negotiations or, failure that, by recourse to arbitration. A dispute was raised by the Sabha soon thereafter over the implementation of the recommendations of the Central Engineering Wage Board (hereinafter called the Board), the payment of bonus for the year 1971 and wages for an earlier lock-out. In paragraph 7.47 of its award the Board had made the following recommendations :

> 7.47. After considering the problem in its entirety, we agreed to divide the industry into five regions or areas as under and in doing so, we have also considered the prevailing wage levels at different place and the cost of living at important centres in these places.
>
> 1. Bombay City and Greater Bombay including Thana, Ambarnath & Kalyan industrial areas.
>
> 2. Calcutta, Greater Calcutta, Howrah industrial area, Jamshedpur industrial area, Durgapur, Asansol and Ranchi industrial areas.
>
> 3. Madras industrial area, Bangalore industrial area, Hyderabad industrial area, Poona-Chinchwad industrial area, Delhi industrial area and Ahmedabad.
>
> 4. Coimbatore, Nagpur, Bhopal, Kanpur, Baroda and Faridabad industrial areas.
>
> 5. The rest of the country.

This classification was made for the purpose of granting 'area allowance' which varied with the

category in which the area of the situation of a factory fall. No allowance was to be paid to the factories falling in category 5 and an the basis of the phraseology used by the Board the Management contended that Ahmedabad industrial area (in which its factory was situated) fell within that category. This interpretation of the categorisation made by the Board was not acceptable to the Sabha who claimed that the factory was covered by category 3; and this was in issue on which the Sabha was not prepared to climb down. Similarly, the Sabha was adamant on the question of bonus for the year 1971 which it claimed at 16 per cent over and above 8.33 per cent allowed by statute with the plea that bonus at that rate had been paid in the earlier year. This being the position and negotiations between the parties held at two meetings convened on December 14, 1972 and January 20, 1973 having ended in a fiasco, the Management offered to have the disputes resolved by arbitration but that again was a course not acceptable to the Sabha which, however, accused the Management of flouting the settlement dated August 4, 1972, by not coming to the negotiating table. The attitude adopted by the Sabha was, to say the least, most unreasonable. It could not have its own way in taking certain matters as final and non-negotiable. Nor can it be said that the stand taken by the Management was unreasonable. Paragraph 7.47 of the award of the Board categorised various factories with reference to the areas which were either described by the names of the cities in which they were situated or by the names of certain industrial areas. Ahmedabad was mentioned as such as so was Calcutta while the other areas were mentioned as such and such industrial areas. It was thus a very reasonable plea put forward on behalf of the Management that only Ahmedabad city and not Ahmedabad industrial area was included in category 3 and that that industrial area fell within category 5. On the other hand, the Sabha interpreted the work 'Ahmedabad' occurring in category 3 to include Ahmedabad industrial area (in which lay the factory in question) and demanded area allowance for its workers on that score. The reasonableness of the plea of the Management is obvious and it was the attitude of the Sabha which lacked reason in that on the failure of the negotiations they spurned the offer of the Management for arbitration on the question of interpretation of the categorisation. It can also not be said that the objection regarding payment of bonus raised by the Management was not a reasonable one. The argument that the stand of the Management that the negotiations between them and the Sabha of the questions of interpretation of the Board's award and bonus having failed as there was no meeting around on either of them, they could be referred to arbitration, lacked reason, is wholly unacceptable. The attitude of the Sabha in insisting on negotiations being held any on the basis of certain propositions formulated by it amounted really to a refusal to negotiate the points in dispute and the Management was, therefore, not left with any alternative except to suggest an arbitration as envisaged in the settlement dated August 4, 1972.

184. Later developments reveal a similar state of affairs in so far as the attitude of the Sabha is concerned. Over and over again it was asked not to precipitate a strike and to act within the terms of the settlement but the advice fell on deaf care. Even after the strike which, it is admitted on all hands, was illegal and certainly not envisaged by the settlement of August 4, 1972, the Management continued to make requests to the Sabha to send back the workers, but again no heed was paid to those requests. On the other hand, the Sabha began making suggestions to the government to take over the factory. Ultimately, when the Management was forced to adopt means to rehabilitate the factory by recourse to fresh recruitment, they had no option except to terminate the services of its workmen. Each one of the orders of termination of services which were actually passed, was on the face of it wholly innocuous inasmuch as it did not stigmatise in any manner whatsoever the concerned workmen. The Management had however to record reasons for the discharge in pursuance of the provisions of clause (4-A) of M.S.O. 25 and those reasons did charge each worker with misconduct inasmuch as he had taken part in the illegal strike and had refused to resume duty

in spite of repeated demands made by the Management in that behalf. All the same, the Management made it clear that in spite of such misconduct in had no intention of punishing the workers who were given not only the benefit of an order of discharge simpliciter but also the option to come back to work within a specified period in which case they would be reinstated with full benefits. An intention not to punish could not be expressed in clearer terms and is further made out from the fact that more than 400 workers who resumed duty were reinstated without break in service. In passing the orders of discharge, therefore, the Management did nothing more than act under M.S.O. 23 and its action cannot be regarded as amounting to dismissal in the case of any of the workers. They had the right to choose between a discharge simpliciter and a dismissal and, in the interests of the factory and the members of the Sabha and perhaps on compassionate grounds also, they chose the former in unequivocal terms. The intention to punish being absent, the finding of the High Court that the order of discharge amounted to one of dismissal cannot be sustained.

185. I now turn to the interpretation of sub-section (2) of Section 11-A of the 1947 Act. It is a well settled cannot of interpretation of statutes that the language used by the legislature must be regarded as the any source of its intention unless such language is ambiguous, in which situation the preamble of the Act, the statement of objects of the reasons for bringing it on the statute book and the purpose underlying the legislation may be taken into consideration for ascertaining such intention. That the purpose of the legislation is to fulfill a socio-economic need, or the express object underlying it, does not come into the picture till an ambiguity is detected in the language and the Court must steer clear of the temptation to wound the written word according to its own concept of what should have been enacted. That is how I propose to approach the exercise in hand.

186. For the sake of convenience of reference I may set out the provisions of clause (aa) and (r) of Section 2, of sub-sections (1) and (2) and the opening clause of sub-section (3) of Section 11, and of the whole of Section 11-A of the 1947 Act :

> 2. (aa) 'arbitrator' includes an umpire;
>
> 2. (r) 'Tribunal' means an Industrial Tribunal constituted under Section 7-A and includes an Industrial Tribunal constituted before March 10, 1957, under this Act;
>
> 11. (1) Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedures as the arbitrator or other authority concerned may think fit.
>
> (2) A conciliation officer or a member of a Board, or Court or the presiding officer of a Labour Court, Tribunal or National Tribunal may for the purpose of inquiry into any existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates.
>
> (3) Every Board, Court, Labour Court, Tribunal and National Tribunal shall have the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely :
>
> 11-A. Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or

dismissal was to justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require :

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

187. Section 2 of the Act specifically lays down that unless there is anything repugnant in the subject or context, the expressions defined therein would have the meanings attributed to them. Throughout the Act therefore, while 'arbitrator' would include an umpire, a 'Tribunal' would not include an arbitrator but would mean only an Industrial Tribunal constituted under the Act, unless the context makes it necessary to give the word a different connotation. In sub-section. (1) of Section 11, it is conceded, the word 'Tribunal' has been used in accordance with the definition appearing in clause (r) of Section 2 because an arbitrator is separately mentioned in that sub-section. In sub-section (2) and (3) of that section a Board, a Labour Court, a Tribunal and a National Tribunal have been invested with certain powers. Would a Tribunal as contemplated by sub-sections (2) and (3) then include an arbitrator ? My reply to the question is an emphatic 'no'. It is well-settled that if a term or expression is used in a particular piece of legislation in one sense at one place, the same sense intention to the contrary is expressed. Here the word 'Tribunal' has been used in three sub-sections of the same section and no reason at all is fathomable for the proposition that in means one thing in sub-section (1) and something different in sub-section (2) and (3). It may also be mentioned here that in all the three sub-sections the word 'Tribunal' has a capital 'T' which is also part of the expression 'Tribunal' as a occurring in clause (r) of Section 2 and thus connotes a proper noun rather than the generic word 'tribunal' as embracing all institutions adjudicating upon rights of contending parties. A third and perhaps a clinching reason for this interpretation is available in the use of the expression "National Tribunal" along with the word 'Tribunal' in all the three sub-sections which militates against the argument that the word "Tribunal" as used in sub-sections (2) and (3) means an institution of that type. If the word "Tribunal" as used in sub-sections (2) and (3) means such an institution, then the use of the expression "National Tribunal" would be redundant and redundancy is not one of the qualities easily attributable to a legislative product. In that case, in fact, order words used in the two sub-sections last mentioned, namely, 'Court' and 'Labour Court' would also become redundant. In this view of the matter, the word "Tribunal" as used in all the first three sub-sections of Section 11 must be held to have been used in the sense of the definition occurring in clause (r) of Section 2.

188. Section 11-A is just the next succeeding section and therein a part of the arrangement adopted is the same as in sub-sections (2) and (3) of Section 11 so that powers are conferred by it on a "Labour Court, Tribunal or National Tribunal" which arrangement is repeated in the section thrice over. That the word "Tribunal" is used in Section 11-A has the same meaning as it carries in the three sub-section of Section 11 is obvious and I need not repeat the reasons in that behalf; for, they are practically the same as have been set out by me in relation to Section 11.

189. In my opinion the language employed in Section 11-A suffers from no ambiguity whatever and is capable only of one meaning, i.e., that the word 'Tribunal' occurring therein is used in the sense of the definition give in clause (r) of Section 2. It is thus not permissible for this Court to take the statement of objects and Reasons or the purpose underlying the enactment into consideration while

interpreting Section 11-A.

190. I may mention here however that a perusal of the statement of objects and Reasons forming the background to the enactment of Section 11-A leads me to the same conclusion. In that statement a reference was specifically made to tribunals as well as arbitrators in terms of the recommendations of the International Labour Organisation. But in spite of that the word 'arbitrator' is conspicuous by its absence from the section. What is the reason for the omission ? was it conspicuous and deliberately made or was it due to carelessness on the part of the draftsmen and a consequent failure on the part of the Legislature ? In my opinion the Court would step beyond the field of interpretation and enter upon the area of legislation if it resort to guess-work (however intelligently the same may be carried out) and attributes the omission to the latter cause in the situation like this which postulates that the pointed attention of the legislature was drawn to the desirability of clothing an arbitrator with the same powers as were sought to be conferred on certain Courts and tribunals by Section 11-A and it did not accept the recommendation. I would hold, in the circumstances, that the omission was deliberately made.

191. It follows that the powers given to a tribunal under Section 11-A are not exercisable by an arbitrator who, therefore, cannot interfere with the punishment (awarded by the employer) in case he finds misconduct proved.

192. The last point on which I differ with the finding of my learned brother relates to the exercise by the High Court of its powers under Article 227 of the Constitution of India. As pointed out by him the High Court, while discharging its functions as envisaged by what article, does not sit as a Court of appeal over the award of the arbitrator but exercise limited jurisdiction which extends only to seeing that the arbitrator has functioned within the scope of his legal authority. This proposition finds full support from Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam ((1958) 1 SCR 1240 : AIR 1958 SC 398), P. H. Kalyani v. M/s. Air France, Calcutt__a(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 879 : [Editor : But it would seem that the case intended to be relied upon is syed Yakoob v. K. S. Radhakrishnan. (1964) 5 SCR 64 : AIR 1964 SC 4771), State of Andhra Pradesh v. S. Sree Rama Rao ((1964) 3 SCR 25, 33 : AIR 1963 SC 1723 : (1964) 2 LLJ 150) and Navinchandra Shankerchand Shah v. Manager, Ahmedabad Co-operative Department Stores Ltd. ((1978) 19 GLR 108, 140) all of which have been discussed at length by him and require no further consideration at my hands. In this view of the matter it was not open to the High Court to revise the punishment (if the discharge is regarded as such) meted out by the Management to the delinquent workman and left intact by the arbitrator whose authority in doing so has not been shown to have been exercised beyond the limits of his jurisdiction.

193. I need not go into the other aspects of the case. In view of my findings -

> (a) that the orders of discharge of the workmen could not be regarded as orders of their dismissal and were, on the other hand, orders of discharge simpliciter properly passed under. M.S.O. 23;
>
> (b) that the arbitrator could not exercise the powers conferred on a Tribunal under Section 11-A of the 1947 Act and could not, therefore, interfere with the punishment awarded by the Management to the workmen (even if the discharge could be regarded as punishment), and
>
> (c) that in any case the High Court exceeded the limits of its jurisdiction in

interfering with the said punishment purporting to act in the exercise of its powers under Article 227 of the Constitution on India.

the judgment of the High Court must be reversed and the order of the arbitrator restored. There three appeals are decided accordingly, the parties being left to bear their own costs throughout.

ORDER OF THE COURT

194. The appeals are dismissed substantially with such modifications as are indicated in the decretal part of the judgment of the majority.

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