GUJARAT HIGH COURT

Ahmadabad Sarangpur Mills Co. Ltd.

Vs.

I.G. Thakore

Spl. Civil Appln. No. 603 of 1961

(J.M. Shelat, C.J. and A.R. Bakshi, J.)

17.10.1964

JUDGMENT

Shelat, C.J.

1.This petition is for a certiorari or for any other appropriate writ or direction, quashing the order of the Industrial Court requiring the petitioner to pay wages to the second respondent from the date of the order of discharge by the petitioner company whereby the second respondent's services were terminated, upto the date of the decision of the Labor Court.

2. The second respondent was, at the material time, serving as a supervisor in the dyeing department of the petitioner company. On September 17, 1959 he was served with a show cause notice along with a preliminary suspension order. The notice alleged that in the morning of September 11, 1959 the second respondent had behaved towards his superior officer, one Varma, in an insulting and indisciplined manner, that the incident took place in the presence of the Chief Chemist, one B.D. Patel, and called upon the second respondent to show cause before the Factory Manager why his services should not be terminated.

3. It is not in dispute that an enquiry was held on September 19, 1959, but it is also not in dispute that during that enquiry, the said Varma was not examined in the presence of the second respondent, nor was he offered for cross examination. The Chief Chemist, the said B.D. Patel, in whose presence the incident was alleged to have taken place, was also not examined, though he was offered for cross-examination. On that very day, i.e. September 19, 1959 an order was served upon the second respondent whereby he was discharged from his service with one month's wages in lieu of notice. The second respondent thereupon filed an application under Section 79 of the Bombay Industrial Relations Act, 1946, alleging (1) that he was discharged with an ulterior motive on account of his having given a notice as a shareholder to another concern, the Behari Mills Co. Ltd., in connection with the affairs of that company, whose agent

was a relation of the petitioner company's agent; and (2) that the enquiry held on September 19, 1959 was a defective enquiry inasmuch as the said Varma was not examined thereat and though the Chief Chemist was offered for cross-examination, he had not been examined by the company in his presence. Both the parties were allowed to and did in fact, adduce evidence before the Labor Court, and the Labor Court, on the basis of the evidence led before it, came to the conclusion that the enquiry held by the company was defective and further that though the impugned order was in form an order of discharge, it was in substance one of dismissal and therefore, a proper enquiry was obligatory before such punitive action could be taken against the second respondent. In the opinion of the Labor Court, no proper inquiry was held and therefore, an opportunity was given to the parties to lead evidence. The Labor Court came to the conclusion that the second respondent had behaved in an insolent manner towards the said Varma. It was thus of the view that the charge against the second respondent was established and on that basis, declined to pass an order of reinstatement. It, however, directed that as no proper enquiry was held, the petitioner company was liable to pay wages to the second respondent upto the date of its order. Against this order, both the second respondent and the petitioner company filed appeals to the Industrial Court, the former for refusal to grant reinstatement and the latter against the direction to pay wages upto the date of the said order. The Industrial Court agreed with the Labor Court in refusing to grant reinstatement and dismissed the second respondent's appeal. So far as the appeal by the company was concerned, the Industrial Court also declined to interfere with the Labor Court's decision and held that inasmuch as the action taken against the second respondent was penal in nature, the order passed against the second respondent, though one of discharge in form, was in substance an order of dismissal, and as no proper enquiry was held, the second respondent was not properly or legally discharged and therefore the company was liable to pay wages from the date of the order of discharge until the date of the order of the Labor Court. It is the correctness of this order that is challenged in this petition.

4. Before we proceed further, it is necessary first to know the Standing Orders which were applicable to the parties under the Bombay Industrial Relations Act. It is not in dispute that the Standing Orders applicable in the present case were the Standing Orders known as Model Standing Orders for employees other than operatives. Standing Order 23 of the Model Standing Orders provides that the employment of a permanent clerk may be terminated by one month's notice or on payment of one month's wages in lieu of notice. Clause (2) thereof provides that the reasons for the termination of service of a permanent clerk shall he recorded in writing and shall be communicated to him, if he so desires, at the time of discharge unless such 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, clerk. Clause (6) provides that when the employment of any clerk is terminated or when he leaves the service, the wages earned by him and all other dues shall he, paid before the expiry of the second working day from the day on which he leaves the service. Clause (7) provides that an order relating to discharge or termination of service shall be in writing and shall be signed by the Manager, and a copy of such order shall be supplied to the clerk concerned. Standing Order No. 24 sets out various acts or omissions on the part of a

clerk which would amount to misconduct. This Standing Order inter alia in clause (1) provides that "commission of any act, subversive of discipline or good behavior on the premises of the undertaking" shall amount to misconduct. Standing Order 25 provides that a clerk guilty of misconduct, as set out in Standing Order 24, may be (a) warned or censured, or (b) subject to and in accordance with the provisions of the Payment of Wages Act, 1946, fined, or (c) by an order in writing signed by the Manager suspended for a period not exceeding four days, or dismissed without notice. Clause (2) provides that no order under clause (1)(c) of this order shall be made unless the clerk concerned has been informed in writing of the alleged misconduct or given an opportunity to explain the circumstances alleged against him. Clause (3) provides that no order of dismissal under clause (1)(c) of this order shall be made except after holding an enquiry against the clerk concerned in respect of the alleged misconduct in the manner set forth in clause (4). Clause (4) provides that a clerk against whom an enquiry has to be held shall be given a charge-sheet clearly setting forth the circumstances appearing against him and requiring explanation. It also provides that he should be given an opportunity to answer the charge and permitted to be defended by a representative of employees in the industry and the clerk should be permitted to produce witnesses in his defense and cross-examine any witness on whose evidence the charge rests. It further provides that a concise summary of the evidence led on either side and the clerk's plea shall be recorded.

5. One thing may be observed in these Standing Orders that though an employer has the power to terminate the services of an employee governed by these Standing Orders, that right is not absolute inasmuch as the employer has to give one month's notice or pay one month's wages in lieu of notice and has also to record reasons for such termination and communicate them to the employee at the time of the discharge, if the employee so desires. Standing Order 24 lays down that certain acts and omissions on the part of the employee therein set out in clauses (a) to (t) constitute misconduct, and Standing Order 25 provides that an employee guilty of misconduct may be warned or censured or fined or, by an order in writing signed by the Manager, suspended for a period not exceeding four days, or dismissed without notice. Clause (2) provides that no order of fine can be made unless the employee has been informed in writing of the alleged misconduct and given an opportunity to explain the circumstances alleged against him. Clause (3) provides that no order of dismissal can be made except after holding an enquiry against the employee concerned in respect of the alleged misconduct in the manner set forth in clause (4). It may be noticed that as provided by clause (3), an enquiry is obligatory only if an order of dismissal is contemplated as a punishment for misconduct. Under clause (2), even though an order of fine is made, no enquiry is necessary and the only thing that is necessary is that the employee concerned is to be either informed in writing of the alleged misconduct and to be given an opportunity to explain the circumstances alleged against him. It is also clear that though warning or censure or even suspension for a period not exceeding four days are punishments for misconduct, no enquiry is necessary nor is it necessary even to inform the employee concerned of the alleged misconduct or to give an opportunity to explain the circumstances alleged against him. Therefore, the only cases where such an opportunity is to be given or an enquiry is

necessary are cases where for misconduct, the punishment given is either fine under clause (1)(b) or dismissal under clause (1)(c). Therefore, so far as these Standing Orders are concerned, even though an order passed by an employer amounts to punishment and that punishment is for any of the acts or omissions amounting to misconduct, no enquiry is necessary, unless such an order is one of dismissal falling under clause (1)(c) of Standing Order 25. It would also follow that if an order of termination of services is passed, even though it may be of a penal nature no enquiry would he necessary as the enquiry is made obligatory only if the order is one of dismissal passed under clause (1)(c) of Standing Order 25.

6. The Industrial Court, relying on certain decisions of the Supreme Court, accepted the contention urged on behalf of the second respondent that it was obligatory on an employer, when any penal action was sought to be taken against a workman, to hold an enquiry under the Standing Orders applicable to the undertaking, and if no such enquiry was made and a workman was dismissed, the Labor Court, in an application under Section 79 of the Bombay Industrial Relations Act, can hold that the action of the employer was improper or illegal within the meaning of Section 78(1) and the Labor Court would be justified in granting relief to the workman. It also held that just as an employer can justify his action by producing evidence before the Industrial Tribunal, as held by the Supreme Court the Labor Court also has jurisdiction to permit such an employer to adduce evidence in justification of the action taken by him against a workman and that this was a latitude given to the employer in exercise of the equitable jurisdiction held by the Labor Court and therefore, until the Labor Court has decided on the evidence produced before it that the employer's action was justified, the workman would still be in service as he was improperly dismissed or discharged and therefore, he would be entitled to his wages upto the date of the decision of the Labor Court. The Industrial Court accepted the contention that where an employer has issued a show cause notice for misconduct but, instead of imposing any punishment under Standing Order 25, simply passes an order of discharge under Standing Order 23, it would be open in such a case to the Labor Court to go behind such an order and determine whether the action taken was in reality one of discharge simpliciter or was a penal action. and though the order might be in form one of discharge, the Labor Court, like the Industrial Tribunal under the Industrial Disputes Act, would have jurisdiction to consider whether the action was in substance and reality a penal action. In para 9 of its order, the Industrial Court observed that it would be necessary to consider whether the employer had in the instant case taken penal action against the workman or not. Relying on the fact that a show cause notice, Exhibit 8, was served on the second respondent which showed that a charge of misconduct was made against him, the fact that the second respondent had submitted his explanation and also the fact that the order of discharge stated that the charge of misconduct was established during the enquiry, the Industrial Court found that though the order in form was one of discharge, it was in reality by way of punishment for misconduct set out in the show cause notice. The Industrial Court, on this basis, held that it was obligatory on the company to hold an enquiry as laid down in Standing Order 25 and to give an adequate opportunity to the workman to make his defence and that not having been done, the workman was not properly and legally discharged and therefore, the second respondent was entitled to have his wages until the decision of the Labor

Court. The Industrial Court negatived the contentions urged on behalf of the petitioner company (a) that no enquiry was necessary under the Standing Orders, for the order was not one of dismissal and in an enquiry under Section 79, it was open to the petitioner company to justify its order by leading evidence, and (b) that in cases arising under the Industrial Disputes Act, an employer was under a disability in the sense that by reason of Section 33 of that Act, he cannot discharge or dismiss a workman until the approval of the Industrial Tribunal is obtained there under. But there was no such restriction to this power of terminating employment under the Bombay Industrial Relations Act and therefore, an employer can take action against a workman first and then justify it when such action is challenged under Section 79 of the Act by adducing evidence. The Industrial Court repelled these contentions and held that even though there was no such ban in the Bombay Industrial Relations Act, the employer was nonetheless under an obligation to hold an enquiry before taking penal action as the Standing Orders provided for such enquiry and therefore, an employer cannot be permitted to circumvent the provisions of the Standing Orders by merely passing an order of discharge when in reality the action taken is penal in nature. The Industrial Court, therefore, upheld the order of the Labor Court, observing that the Labor Court had taken the correct view in following the decision in *Sasa Musa Sugar Works (P) Ltd. v. Shobrati Khan*[1], in the instant case which, though arising under a different Act, the principles enunciated therein by the Supreme Court were applicable to the present case.

7. The contentions urged by Mr. Nanavati on behalf of the petitioner company were –

> "(1) that where an impugned order is one of termination of services under Standing Order 23 and not one of dismissal under Standing Order 25 inasmuch as it is only an order of dismissal which requires that an enquiry must be held, no enquiry is obligatory :
> (2) that the Labor Court having held an enquiry and having come to the conclusion on the evidence led before it that the employee was guilty of misconduct, namely of insolence towards his superior officer, the Labor Court and the Industrial Court were in error in granting wages to the employee from the date of discharge until the date of the decision of the Labor Court;
> (3) that the Standing Orders being determinative of the relations between an employer and an employee, the Labor Court had no jurisdiction under Sections 78 and 79 to go beyond the scope of the Standing Orders in an enquiry as to the legality or propriety of that order, in other words, in deciding such an application, the Labor Court cannot brush aside the Standing Orders but has to take them into account and decide the question as to the legality or propriety of the order in question;
> (4) that the Labor Court had no jurisdiction to award wages once it was proved by evidence led before it and having itself held the enquiry and found on such enquiry that the termination of service was justified, i.e. having found that the employee was guilty of insolence, and the employer was entitled to terminate his services and such termination was justified under the Standing Orders; and
> (5) that assuming that the order, though in form one of discharge was in substance one of

dismissal, the Labor Court on an enquiry held by it and the employee having had the opportunity of defending himself and having found that the impugned order was justified, had no jurisdiction to award the back wages."

8. On the other hand, Mr. Daru for the second respondent, urged that –

"(1) under Section 78, the jurisdiction of the Labor Court will be to decide the dispute, both as to the legality and propriety of the impugned order. Therefore, when a dispute is raised, the Labor Court would enquire in a case where the charge is one of misconduct and the enquiry held is defective, whether the order, though one of discharge, is a proper one;

(2) that Standing Order 23 does no more than recognise the employer's common law right to terminate an employee's services, but such a right was subject to two qualifications, (a) to give in writing reasons for such an order, and (b) that it was subject to a scrutiny by the Labor Court whether such an order was legal and/or proper;

[1] AIR 1959 SC 923

(3) that when the order terminates the services of a workman as and by way of punishment on the basis of misconduct, it is but fair that an employer should hold an enquiry and if on such enquiry, it is found that the workman was guilty of such misconduct, if the employer does not wish to impose the drastic punishment of dismissal, he may pass an order of mere discharge. But even if the order is one of discharge only, it is nonetheless penal and carries the stigma of guilt of misconduct and the mere fact that the employer pays one month's wages makes no difference to the order being of a penal character;

(4) that if the Labor Court comes to the conclusion that the impugned order was not proper and the termination of service was improperly made, it can award wages, for the termination of service can be said to be proper only when on an enquiry held by the Court it is found that the employee is guilty and his service can be said then only to be properly terminated. Since the Labor Court has jurisdiction under Section 78 to say that the impugned order is bad. the Court would normally set aside such an order and there would, in such a case, be no termination of services and the employer would be liable to pay wages to the workman. The only thing that happens under the industrial law is that since the Court acts on equity and it is fair that the employer should be given an opportunity to satisfy the Court that there was proper reason to terminate the services or to dismiss and the employer does so at the time of such enquiry by the Court, it cannot be said that there was valid termination and therefore the employer would be liable to pay wages until the Court is satisfied on an enquiry held by it that the workman was guilty of the charge against him; and

(5) that the power of a Labor Court is to be rend in Section 78 of the Act. The section does not contain limitations to that power. Therefore, if the Labor Court finds that injustice has resulted by the employer having terminated the services on the ground of

misconduct without holding a proper enquiry, the Court would find the order improper. The mere fact that such an order is made under a Standing Order is not enough, because it is the propriety of such an order made in fact under a Standing Order that Section 78 requires the Labor Court to adjudge. Therefore, whenever an order of a penal nature is made, whether the act of the employee falls under any of the items of misconduct under Standing Order 24 or not and the punishment is not dismissal, an enquiry is still necessary."

9. Before we proceed to examine these rival contentions, it is necessary first to consider a few provisions of the Act and ascertain the scope of the jurisdiction of the Labor Court under Section 78 of the Act. Section 3(17) defines "an industrial dispute" as meaning any dispute or difference between an employer and an employee, or between employers and employees, or between employees and employees and which is connected with any industrial matter. "An industrial matter" in clause (18) means any matter relating to employment, work, wages, hours of work, privileges, rights or duties of employers or employees or the mode, terms and conditions of employment and includes the several matters therein set nut. An industrial dispute, as contemplated by the Bombay Industrial Relations Act, 1946, therefore, not only means a dispute between an employer and his employees collectively, but also includes a dispute between an individual employee against his employer which is connected with any Industrial matter. It will be observed that this definition is wider than that of "an industrial dispute" in the Industrial Disputes Act, 1947, for there, an industrial dispute means one that is collective and not one concerning an individual workman. Section 35 provides for the making of Standing Orders which, once brought into operation, are, under Section 40(1), or in their absence the Model Standing Orders, applicable under Section 35(5), are determinative of the relations between an employer and his employees. In regard to all matters specified in Schedule I to the Act. Sub-Section (2) of Section 40, however provides that notwithstanding anything contained in Sub-Section (1), the State Government may refer, or an employee or a representative union may apply in respect of any dispute referred to in clause (a) of paragraph A of Section 78, to a Labor Court. Under Section 78(1), paragraph A, the Labor Court is empowered to decide inter alia disputes regarding propriety or legality of an order passed by an employer acting or purporting to act under the Standing Orders. Therefore, the combined effect of Section 40(2) read with Section 78(1)A is that though Standing Orders are determinative of the relationship between an employer and his employees, an employee can apply to a Labor Court and the Labor Court can decide the dispute regarding the legality or propriety of an order passed by his employer acting under the Standing Orders. The determinative character of the Standing Orders thus does not preclude the Labor Court from entertaining and deciding an application which disputes the legality or propriety of an order of an employer, though made or purported to have been made under the Standing Orders.

10. It was, however, urged by Mr. Nanavati that though the fact that an action is taken under the Standing Orders does not preclude a Labor Court from deciding an application which challenges

the legality or propriety of such action, inasmuch as the Standing Orders are made determinative of the relationship between an employer and his employees, the question of the legality or propriety of an order made by an employer has to be decided in the light of the Standing Orders and therefore, if the order made by an employer satisfies the requirements of the Standing Orders, the Labor Court cannot interfere with such an order or set it aside on the ground of either legality or propriety. In support of this proposition, he relied upon an unreported judgment of a Division Bench of the High Court of Bombay consisting of Mudholkar and Patel, JJ. in Spl. Appln. Nos. 3321 and 3322 of 1958 decided on January 6, 1959 (Bom). It appears that two workmen in the petitioner company there were found lighting in a rowdy manner in the department where they were working. The management thereupon issued a show cause notice and held an inquiry as required by the Standing Orders and thereafter passed an order dismissing the two workers. The two workers then filed an application before the Labor Court challenging the order of dismissal, alleging that the order was mala fide and also alleging victimization. These allegations were denied by the employer. The Labor Court held that the enquiry was properly held and negatived the allegations as to mala fides of the petitioner company and also the allegation of victimization, but held that the order of dismissal was harsh and therefore set it aside and directed reinstatement of the two workers. There was an appeal against the order, but the appellate Court, agreeing with the Labor Court, upheld the aforesaid order. It was urged in the High Court on behalf of the company that the powers of a Labor Court under paragraph A(a) of Section 78 were merely revisional powers conferred in well-known legal phraseology, viz., legality or propriety, which imported only revisions powers and no more, and that they were in contrast to the powers given to the Labor Court in clauses (b) and (c) of paragraph A relating to industrial disputes, and the question whether a strike or a lock-out etc., is illegal under the Act. The High Court found substance in this contention and observed that -

> "The wording of the Section 78 itself is such that it leaves no room for doubt that the powers with regard to clause (i)(A)(a) are limited to great extent and are not co-extensive with those with regard to disputes mentioned in the other clauses of the section."

On this construction, the learned Judges held that there was not the least doubt that the orders of dismissal were orders passed under the Standing Orders by virtue of the discretion vested in the management, and as the powers under the Act were limited to revisional powers, it was not open to the Tribunal to substitute its own discretion for that of the management. If the discipline of the industrial establishment its production and its quality have to be maintained, it is but necessary that the management must have discretion to decide as to what punishment is necessary in a particular case, and if after having applied its mind to the relevant facts which are provided by the Standing Orders it lakes a decision, it would not be open to the Tribunal to review the decision merely by calling it an unfair Labor practice. Another decision that was pointed out in support of the contention that the expression "legality or propriety" occurring in Section 78 must mean revisional powers and no more, was *Chhugomal v. District Judge, Thana*[2], But that was a decision under Section 27(2) of the Administration of Evacuee Property Act, 1950, where the question was as to the nature of jurisdiction of the High Court in a reference made to it by the

Deputy Custodian General. The High Court held that Section 27(1) conferred revisional jurisdiction upon the Custodian General and that jurisdiction was confined to the legality or propriety of an order passed by the authority mentioned in the Act. It was, therefore, in connection with the provisions of Section 27 of that Act that the learned Chief Justice observed that the very fact that the Legislature had conferred revisional jurisdiction upon the Custodian General and not appellate jurisdiction must mean that the revisional jurisdiction is different from appellate jurisdiction and that it could not possibly be suggested that when the Custodian General made the reference to the High Court, appellate jurisdiction was conferred upon the High Court and the High Court became entitled to interfere with the findings of fact arrived at by the Custodian General. The jurisdiction that the High Court could exercise in references under Section 27(2) could only be the jurisdiction which the Custodian General himself could exercise under Section 27(1). Section 78 of the Bombay Industrial Relations Act is enacted in a different context and contains a totally different language and therefore this decision cannot he used for its construction. In recent decision in *Vithoba Maruli v. Taki Bilgrami*[3], a Division Bench of the High Court of Maharashtra has on the other hand, taken a view different from the one taken by Mudholkar and Patel, JJ. The learned Judges here have held that under Section 78(1)A(a)(i), the Labor Court can examine the propriety of an order made by an employer acting under the Standing Orders and in appropriate cases can set aside the order or alter that order to avoid miscarriage of justice. They also held that the section gives ample power to the Labor Court to interfere with a finding or with punishment imposed by the domestic tribunal if such in interference is called for on the ground of its impropriety in order to avoid grave injustice occurring in a particular case. After examining the language of Section 78(1)A of the Act, the learned Judges came to the conclusion that the Labor Court was empowered to decide disputes regarding legality or propriety of an order passed by an employer acting under the Standing Orders and was not confined only to satisfy itself as to the legality or propriety of an order passed

[2]58 Bom LR 545

[3]66 Bom LR 426 : (AIR 1965 Bom 81)

by an employer as the language of the section itself showed that the powers of the Labor Court were wider than the powers of a Court exercising a revisional jurisdiction. The learned Judges examined the scheme of the Bombay Act and that of the Industrial Disputes Act, 1947 and observing that the Bombay Act is materially different from the Central Act, held that the limitations placed by the Supreme Court in its decisions under the Central Act on the powers of interference of the Industrial Tribunals thereunder would not apply to the Labor Court under the Bombay Act. They further held that the limitations on the power of an Industrial Tribunal, as held by the Supreme Court, to interfere only when there is want of good faith or where there is victimization or unfair Labor practice or when the management had been guilty of the basic error or violation of a principle of natural justice or where on the materials, the finding is completely baseless or perverse, do not apply to a Labor Court and on Industrial Court while exercising their jurisdiction under Section 78 of the Bombay Act.

11. It is not necessary for us in the present case to enter into the question as to whether the powers of a Labor Court under the Bombay Act are wider than those of the Industrial Tribunals under Section 15 of the Industrial Disputes Act. We are for the moment concerned with the limited question whether, as contended by Mr. Nanavati, the expression "legality and propriety" used in Section 78(1)A limits the jurisdiction of the Labor Court to ft revisional jurisdiction. It is sufficient for us to say that looking to the language used in this clause, it would be difficult to accede to such a limited construction as suggested by Mr. Nanavati. Chapter XII deals with Labor Courts and Section 78 lays down jurisdiction of Labor Courts in disputes therein set out. To take paragraph A only in that section, it provides that the Labor Court shall have jurisdiction to decide :

> "(a) disputes regarding -
> (i) the propriety or legality of an order passed by an employer acting or purporting to act under the standing orders :
> (ii) the application and interoperation of standing orders;
> (iii) any change made by an employee or desired by an employee in respect of an industrial mailer specified in Schedule III and mailers arising out of such change :
> (b) industrial disputes -
> (i) referred to it under Section 71 or 72;
> (ii) in respect of which it is appointed as the Arbitrator by a submission;
> (c) whether a strike, lock-out, closure, stoppage, or any change is illegal under this Act."

Under clause (a)(1) of paragraph A, the jurisdiction, though confined to the question of propriety or legality of an order passed by an employer, cannot be held to be a revisional jurisdiction, for the domestic tribunal which has passed the order is not a tribunal inferior to the Labor Court and therefore, it is not as if the Labor Court like a revision Court can call for the record of such inferior tribunal and decide for itself the correctness or the legality or the propriety of an order passed by such a tribunal. The order passed by an employer and in respect of which this jurisdiction is conferred is one which is or purported to have been passed under Standing Orders which are made determinative of the relationship between the employer and his employees. But this clause read with Sub-Section (2) of Section 40 shows that even though the Standing Orders are determinative, an order passed thereunder or in accordance therewith is subject to the jurisdiction conferred on a Labor Court under Section 78. It is clear, therefore, that even though an under is passed under a Standing Order, such an order is subject to the scrutiny by a Labor Court, though such scrutiny is confined to the question of legality or propriety of such an order. Section 78 gives a right to an employee, when such an order is passed, to file an application challenging the legality or propriety of such an order. The Labor Court, in dealing with such an application, does not exercise revisions jurisdiction, but the jurisdiction which is conferred on it by this section is an original jurisdiction. Except that such an application can only challenge the order on the ground of legality and propriety, there is no limitation, such as a revisional jurisdiction would have. On the question as to the legality and propriety, the Labor Court can and

does usually record evidence that the parties adduce which if it was revisional jurisdiction, it cannot and would not record. It is, therefore, not possible to take a narrow view of the jurisdiction of the Labor Court under Section 78, as contended by Mr. Nanavati.

12. Mr. Nanavati then contended that assuming that the Labor Court has jurisdiction to go into the question of legality or propriety of an order made under a Standing Order, it cannot go beyond the Standing Order, in other words, the jurisdiction of the Labor Court would be confined to seeing whether the impugned order is made legally or properly under the Standing Orders, and if it finds that it is both legal and proper, it cannot question such an order to interfere with it. His contention was that since the executive management of the company rests entirely with the company the discretion used by a manager while passing an order cannot be interfered with by a Labor Court so long as the impugned order is passed under the Standing Orders and is in accordance with such Standing Orders. Therefore, the question of the legality and propriety of such an order has to be adjudged by the Labor Court from the point of view of the Standing Orders under which it is passed, and within the four corners of the Standing Order. In support of this contention, he relied on *Digambar Ramchandra v. Khandesh Spinning and Weaving Mills Co. Ltd*[4]*.,* That was a case under the Bombay Industrial Disputes Act of 1938 and where the High Court held that where standing orders have been framed and settled under Section 26 of the Act, the arbitrator, to whom a dispute falling under the standing order is referred by Government under Section 49A of that Act, has jurisdiction to determine the liability flowing from and arising out of the standing orders. He has no jurisdiction to determine any liability outside the standing orders, for instance, what is fair and right as between the employer and the employee and to give relief on moral and humanitarian considerations. We do not, however, see how this decision can assist the petitioner company, for the High Court there did not have before them such a provision as Section 78 of the present Act which in express terms, when read with Sub-Section (2) of Section 40, lays down that even when order is made under a Standing Order, notwithstanding that such Standing Order is determinative of the relations between an employer and his employees, a Labor Court has jurisdiction to decide a dispute regarding the legality or propriety of such an order. An order may be held to be legal in the sense that it is made under an appropriate Standing Order, or that it is made under a power given under a Standing Order, but it is one thing to say that it is legally made under a Standing Order and another thing to say that it is proper. Even if an order is legal and is made in accordance with a Standing Order, it can still be challenged on the ground that it is not a

[4]52 Bom LR 46 : (AIR 1950 Bom174)

proper order. Similarly, the decision in *Tata Chemicals Ltd. v. Kailash*[5]*,* where the Standing Orders, when certified under the Industrial Employment (Standing Orders) Act 1946, were held to be binding upon the employer and his workmen and as governing the relations between them, cannot be used in support of the present contention as there was no question arising in that case of the jurisdiction of an Industrial Tribunal to decide the legality or the propriety of an order made under a Standing Order.

13. The question that really arises in this petition is, whether the Labor Court can, under its jurisdiction under Section 78(1)A(a), interfere with an order passed by an employer under a Standing Order which empowers him to discharge his workmen, on an application disputing its legality or propriety. As aforesaid, Mr. Nanavati's contention was that the Labor Court has no jurisdiction to interfere with an order which an employer is entitled to pass under a Standing Order as the Standing Orders are determinative under Section 40(1) of the Act, and therefore, an order of the Labor Court has to be in accordance with the Standing Orders. In *Rashiriya Mill Mazdoor Sangh v. Apollo Mills Ltd*[6]*.,* a contention was urged on behalf of the respondent Mills as against its employees who claimed compensation for loss of wages owing to temporary stoppage of work as s result of short supply of power, that no such compensation was claimable in a reference under Section 73 of the Bombay Industrial Relations Act to the Industrial Court by the Government of Bombay, which contention was based on Section 40(1). On behalf of the employees, it was contended that Sub-Section (2) of Section 40 excluded the first Sub-Section because of the non-obstinate clause, and that the Industrial Court was not bound by the first Sub-Section or the Standing Orders. Though the Supreme Court dealt with the case on the footing that Standing Orders 16 and 17, which were invoked by the mills, did not apply, the learned Judges also observed that there was some force in the aforesaid contention of the appellants and that the non-obstante clause in Section 73 clearly showed that in spite of the other provisions of the Act an industrial dispute may be referred to the Industrial Court and that the powers of the Industrial Court were very wide under Section 73 inasmuch as the State Government can refer an industrial dispute to it notwithstanding anything contained in the Act. Similarly, under Sub-Section (2) of Section 40, an employee or a representative union can apply in respect of any dispute of the nature referred to in clause (a) of paragraph A of Section 78 to a Labor Court. Just as the determinative character of the Standing Orders does not prevent an Industrial Court from going into adjudication under Section 73, the determinative character of the Standing Orders likewise would not hind or circumscribe the jurisdiction of the Labor Court in deciding an application under Section 78 challenging the legality or propriety of an order made by an employer acting under a Standing Order, and if would seem that while deciding such a question, the Labor Court would not be hound by the Standing Orders, for Section 78 postulates that the order has or purported to have been made under a Standing Order and though it is made under a Standing Order, it has to adjudge its legality or propriety. The contention, therefore, that a Labor Court cannot traverse beyond a Standing Order while deciding an application under Section 78 does not seem correct.

14. On merits, Mr. Nanavati argued, (a) that as the impugned order was one of termination of service, though the order was passed on the ground of misconduct, the case fell under Standing Order 23 and therefore, no enquiry was necessary and (b) that even

[5] ILR (1964) 5 Guj 612

[6] AIR 1960 SC 819

assuming that an enquiry was necessary, since the Labor Court and the Industrial Court were satisfied that the employee was guilty of misconduct, no order of compensation could be made As against this contention, Mr. Daru relied upon *Assam Oil Co. Ltd. v. Its Workmen*[7]. where the

Supreme Court and down the following principles :

> "(1) that even if the contract of employment gives an employer power to terminate the service of his employees and the employer resorts to that power, if the validity of the termination of service is challenged in an industrial adjudication, an Industrial Tribunal would be competent to enquire whether the termination was effected in *bona fide* exercise of the power conferred by the contract :
> (2) that whether the termination is the result of a *bona fide* exercise of such power or whether in substance it is punishment for the alleged misconduct would depend upon the facts and circumstances of each case;
> (3) that just as an employer's right to exercise his option in terms of the contract is recognised by the industrial law, an employee's right to expect security of tenure has also to be taken into account;
> (4) therefore, it does not follow that whenever an employer purports to terminate services by virtue of the power conferred on him by the terms of the contract, an Industrial Tribunal cannot question its validity, propriety or legality;
> (5) that if it is found that the order of discharge proceeded on the basis that the employee was guilty of misconduct and was punitive in nature, it would be competent for an Industrial Tribunal to hold that the employer was not justified in discharging the workman without holding a proper enquiry and the Tribunal could go behind the words of the form of an order of discharge and decide whether the discharge is discharge simpliciter or the result of misconduct alleged against the workman. The exercise of the power to be valid must always be bona fide, and if the *bona fides* are successfully challenged, the Tribunal can interfere with the order in question :
> (6) in the context of this power, a Tribunal is competent to consider whether the discharge is mala fide or amounts to victimization or an unfair Labor practice or is so capricious or unreasonable that it must lead to the inference that it was passed for ulterior motives;
> (7) in a case where an order, on the face of it, appears to be one of discharge but is in substance founded on misconduct of which, according to the employer, the workman is guilty, the order would be a punitive dismissal and fair play and justice require that the employee should be given a chance to explain the allegations weighing in the employer's mind and would necessitate a proper enquiry." In AIR 1960 Supreme Court 819 (supra) the Supreme Court laid down that in an industrial adjudication, the principle is that social justice is not based on contractual relations and is not to be enforced on the principles of contract of service. It is something outside these principles and is invoked to do justice without a contract to back it. In this case, the Supreme Court gave the imprint of its approval to the observations of the Industrial Tribunal in *Textile Labor Association, Ahmedabad v. Ahmedabad Mill owners' Association*[8], that though the workers were not entitled to wages during the period of stoppage of work under the Standing Orders, the jurisdiction of the Industrial Court to adjudicate a demand

[7] AIR 1960 SC 1264

[8] 1946-1947 Industrial Court Reporter 87

therefor was not barred by the Standing Order and that Section 73 of the Bombay Indus trial Relations Art was wide enough to cover a reference of such a dispute In the *Chartered Bank, Bombay v. Chartered Bank Employees' Union*[9], the Bank was entitled under the Bank Award of 1953 to terminate the services of its workmen in cases not involving disciplinary action for misconduct, by three months' notice, or on payment of three months' pay in lieu of notice. The Supreme Court laid down that in the case of such a provision whether in a contract or in a Standing Order or an award, 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 victimization or unfair Labor practice, the Industrial Tribunal would have the jurisdiction to intervene and set aside such termination. The Tribunal can go behind the form of the order and see whether it is a mere camouflage for a dismissal for misconduct without following the prescribed procedure. It added, however, that the mere fact that there was an allegation of misconduct by an employee did not necessarily preclude the exercise of power of termination of service and compel the employer to follow the procedure prescribed for dismissal for misconduct. These principles were repeated in ***U**.B. Datt and Co., (Private) Ltd. v. Its Workmen*[10], where, the facts showed that the employer issued a charge-sheet against a workman but subsequently terminated his services dropping the disciplinary proceedings purporting to act under the powers conferred on the management under the provisions of certain Standing Orders. The order terminating his services stated that the proposed enquiry, if conducted, would lead to further friction among the employees and that discipline would be prejudiced if the workman was retained in service. The Industrial Tribunal found that these reasons were not established and that the employer failed to prove that there was in fact misconduct on the part of the workman and consequently, held the action to be not *bona fide* and ordered reinstatement. Approving the principle laid down by the Labor Appellate Tribunal in *Buckingham and Carnatic Mills Ltd. v. Their Workmen*[11], the Supreme Court held that it was no longer possible for an employer to raise a plea to terminate the services of his employees at any time by just giving a notice or paying wages in lieu of notice, for it would amount to a claim 'to hire and fire" an employee as the employer pleased and would thus completely negative the security of service, secured to the industrial employees through industrial adjudication. In the case of such termination, the requirement of *bona fides* would be essential and if the termination was a colourable exercise of power, or the result of victimization or unfair Labor practice, an Industrial Tribunal would have jurisdiction to intervene and set aside such an order of termination. An employer cannot now therefore press his right purely on contract and say that under the contract, he has an unfettered right "to hire or fire" his employees. Such a light is now subject to industrial adjudication and even a power granted under the provisions of the Standing Orders to terminate the services of a workman without assigning any reasons or merely giving a notice or paying wages in lieu of such notice is now subject to industrial

adjudication. The Tribunal has the right to enquire in such a case into the causes that led to the termination and if it is satisfied that the action

[9] AIR 1960 SC 919

[10](1962) 1 Lab LJ 374 : AIR 1963 SC 411

[11](1951) 21 Lab LJ 314 (LATI - Cal)

taken was a colorable exercise of power, it would have jurisdiction to set aside such termination. The Supreme Court held on the facts that if the employer wanted to take action for misconduct and then suddenly were to drop the enquiry which was intended to be held and were to discharge an employee under the Standing Orders, it was clearly a colorable exercise of power under the standing Orders inasmuch as the Standing Orders were used to gel rid of an employee instead of following the course of holding an enquiry for misconduct, the notice for which had in fart been given to the employee.

15. Mr. Nanavati, however, relied upon an unreported judgment of the Bombay High Court in Special Civil Appln. No. 877 of 1956 decided by Chagla, C.J. and Tendolkar, J. on July 31, 1956 (Bom) The petitioner there was a clerk employed by the first opponent company. The company served him with a notice to show cause why he should not he discharged from service on three grounds. (1) negligence. (2) insubordination and insolence towards the manager, and (3) quarrelling with another clerk. The manager held an enquiry and served a discharge notice intimating to the employee that one month's notice was given to him for being negligent in work, for quarrelling with other clerk and for insolence towards the manager. The employee challenged this order under Section 78, and the Labor Court held this the order of discharge was justified. The Industrial Court on appeal held to the contrary and ordered reinstatement, and on an appeal to the Labor Appellate Tribunal, the Tribunal allowed the appeal and restored the order of the Labor Court. The High Court observed that there were two Standing Orders, Standing Order No. 10 where under the company could terminate services without an enquiry, and Standing Order No. 12 which dealt with punishment for misconduct and the power to order suspension and dismissal but which required an enquiry. Mr. Nanavati relied on the observations made by the learned Chief Justice where he has stated that if an order of dismissal was passed under Standing Order 12(1) an Industrial Tribunal could deal with the question of legality or propriety of such an order and consider whether a proper opportunity was given to the employee to explain the allegation it misconduct again to him, but that no such enquiry was contemplated under Standing Order 10 and that was for a good reason. because on Standing Orders 12 and 13 dealt with misconduct and punishment for such misconduct, whereas an order of discharge was governed by Standing Order and an order under that Standing Order would not be punishment and where the employer terminated the services and paid him one month's wage and the only obligation east on him under the Standing Order was that he must record reasons for discharging the employee. But this decision cannot assist Mr. Nanavati for his proposition that if the order is one of discharge. The only thing that the employer need do is to pay the employee three month's wages in lieu of notice and that so long as that is done, the Industrial Tribunal cannot interfere with the order of discharge. The learned Chief Justice, on the contrary, has expressly stated that under the industrial law, there is no absolute liberty to an employer to put an end to the contract of employment, because even in a case of discharge an employer has to record reasons for

discharge and secondly because the Industrial Tribunal has been given the power to consider the legality or propriety of an order passed by an employer and the Tribunal can consider whether the reasons given for determination are proper reasons and whether such reasons are established. Mr. Nanavati is not entitled to rely upon this decision because the Court there did not concern itself with the question before us. The only question there was whether the Appellate Tribunal was competent to interfere with the order passed by the Industrial Court and whether there was a point of law on which it could so interfere. It was while pointing out that there was such a point of law that the learned Chief Justice pointed out that the industrial Court proceeded on a wrong basis, namely, that the order of the manager was assumed to the one for misconduct whereas one of the allegations was one of negligence, an allegation which did not constitute misconduct. That being so, the question of law on which the Appellate Tribunal could interfere was whether the approach of the Industrial Court was erroneous in the sense that it demanded an enquiry, though on the ground of negligence an order of discharge could be passed without the necessity of an enquiry. This decision, therefore, does not lay down the proposition for which Mr. Nanavati canvasses. On the contrary, there are express observations in this decision to show that notwithstanding the determinative character of the Standing Orders, an Industrial Tribunal, by virtue of powers conferred on it by Section 78, can interfere with an order of termination or dismissal whenever such an order is challenged on the ground of legality or propriety.

16. Though the decisions of the Supreme Court cited above were decisions under the. Industrial Disputes Act, 1947 relating to the power of adjudication, the principles laid down relate to The industrial law and would aptly apply to the Tribunals created under the Bombay Industrial Relations Act, especially as the Act confers power on them to examine the legality or propriety of orders passed by employers against their employers under powers conferred on them either by the contract of employment or by the Standing Orders.

17. In the instant case, it is clear that the order of discharge was not termination simpliciter, but was in fad an order punishing the employee for misconduct. This is obvious from the fad that a show cause notice on the ground of misconduct was served upon the employee and an enquiry was held on the basis of that misconduct. There can, therefore, be no manner of doubt that the order of termination was by way of punishment for misconduct set out in the notice. The Labor Court and the Industrial Court, while examining the legality and propriety, had jurisdiction to consider whether the order suffered from lack of legality and/or propriety, and since the order was not one of termination simpliciter but was based on misconduct, and the enquiry held was not proper, they were justified in coming to the conclusion that the order was passed on a defective enquiry. If an employer terminates the services of an employee as and by way of punishment and his mind is weighed by an allegation of misconduct on the part of the employee, it is but fair and just that he should have proper opportunity to the employee to explain by holding a proper enquiry. Termination of services of an employee without giving such an opportunity would constitute nothing short than a colourable exercise of powers conferred by the Standing Orders. The Labor Court and the Industrial Court were, therefore, right in the

conclusion that the order of discharge was not properly passed and that though is purported to be one of discharge, it was in substance one of dismissal for misconduct on the part of the employee.

18. It follows that if the Industrial Tribunal comes to the conclusion that the order of termination of service is not improper order by reason of its being a colourable exercise of the power or otherwise, it would have the power to set aside the impugned order. But since the Tribunal acts on principles of equity and fair-play, it permits an employer to lead evidence in an enquiry where this order is impugned, to establish that there is good reason (or dismissal in the case of U.B. Dutt and Co., 1962-1 Lab LJ 374 : AIR 1963 Supreme Court 411) (supra), the Supreme Court held that even if the enquiry was not held by the employer, it was well settled that the employer could defend his action by proving the mis-conduct alleged against the employee by leading evidence before the Tribunal to show that there was in fact misconduct and therefore the action taken by him was *bona fide* and was not colourable exercise of power under the Standing Orders. The question then would be whether in such a case, the order relates back to the date when the impugned order was passed.

19. It must be borne in mind, however, that there is a clear distinction between an enquiry to be held under a Standing Order by in employer and an enquiry held by a Labor Court under Section 78. In *Management of Ranipur Colliery v. Bhuban Singh*[12], the Supreme Court brought out this distinction between an enquiry under a Standing Order and an enquiry by the Tribunal under Section 33 of the industrial Disputes Act. 1947. In AIR 1959 Supreme Court 923, a case under Section 33 of the Industrial Disputes Act, 1947, the Supreme Court laid down the principle that where an employer has not held an enquiry necessary under a Standing Order to establish misconduct on the part of his employee, but in an application by him for the approval of dismissal under Section 33 pending the decision by the Tribunal of an industrial dispute between him and his workmen and the Tribunal on enquiry held for inch approval is satisfied that there was misconduct, the Tribunal would be bound to accord permission. The Supreme Court further held that as the management had merely passed suspension orders not as punishment but as an interim measure pending an enquiry and proceedings before the Tribunal, the proceedings under Section 33 were practically converted into the enquiry for misconduct which normally the management should hold before applying for permission. the management was bound to pay wages to its workmen till a case for dismissal was made out in the proceedings under Section 33. This would be so because there was no question of an order of dismissal a relating back on account of there being in order of dismissal by way of punishment. the only order there being one of suspension and that too, not by way of punishment but by way an interim measure pending the enquiry. But, whereas the case in Sasa Musa Sugar Works. AIR 1959 Supreme Court 923 was in case under Section 33 of the Industrial Disputes Act, 1947, the case in *Phulbari Tea Estate v. Its workmen*[13] was one of adjudication under Section 15 of the Act and in which the facts and the disputes were somewhat similar to the facts in the present case. In an enquiry by the management against its employee, the witnesses who were present at the enquiry were not

examined in the presence of the employee. The copies of the statements made by the witnesses were not supplied to him before he was asked to question them, and the statements which bad been recorded were not even read over to the employee at the enquiry before he was asked to question the witnesses. Even in the reference made before the Industrial Tribunal, the only willing that the management did was to produce the statements which were recorded, but the management did not produce witnesses for being cross-examined by the employee. In these circumstances, the Tribunal held that the dismissal was not justified on the ground of a proper procedure not having been followed. The Supreme Court upheld the order of the Tribunal, observing that –

> "The defect in the conduct of the enquiry run Id have been cured if the company had produced the witnesses before the Tribunal and given an opportunity to Das to

[12] AIR 1959 SC 833

[13] AIR 1959 SC 1111

> cross-examine them there. In C. As. Nos. 746 and 747 of 1957, dated 4-4-1959, AIR 1959 Supreme Court 923, we bad occasion to point out that even where the employer did not hold an enquiry before applying under Section 33 of the Act for permission to dismiss an employee, he could make good the defect by producing all relevant evidence which would have been examined at the enquiry, before the Tribunal, in which case the tribunal would consider the evidence and decide whether permission should be granted or not. The same principle would apply in case of adjudication tinder Section 15 of the Act, and if there was defect in the enquiry by the employer he could make good that defect by producing necessary evidence before the tribunal. But even that was not done in this case,....."

Thus, in the case of Phulbari Tea Estate, AIR 1959 Supreme Court 1111, the Supreme Court applied the principles laid down in Sasa Musa Sugar Work's case, AIR 1959 Supreme Court 923 which was a case of approval under Section 33 of the Industrial Disputes Act, to a case of adjudication. In *Management of Hotel Imperial New Delhi v. Hotel Workers' Union*[14], the question for consideration related to the employer's power to suspend an employee. The Supreme Court there held that the power to suspend an employee under the ordinary law of master and servant is not an implied term of contract between master and servant and such an order can only be the creature of either a statute governing the contract, or of an express term in the contract itself. Therefore, the absence of such power in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and if he does so, he would be liable to pay wages during the suspension. But where there is power to suspend, the suspension has the effect of temporarily suspending the relations of master and servant and the servant is not bound to serve and the master is not bound to pay wages. The Supreme Court also held that the ordinary law of master and servant as to suspension is modified in view of Section 33 of the Industrial Disputes Act in that an Industrial Tribunal could read as implied in that law a term that if the master has held a proper enquiry and has come to the conclusion that the servant should be dismissed and in consequence suspends him pending the permission

required under Section 33, he has the power to suspend. It follows that if the Tribunal grants the permission under Section 33, the contract comes to an end and there would be no obligation to pay wages after the date of the suspension. But if the permission is not granted, the suspension would be wrong and the workman would be entitled to wages from the date of suspension. The principle thus laid down is that if the order of suspension is made on a conclusion properly arrived at by an employer that dismissal should be ordered, i.e. after if proper enquiry and if the Tribunal gives its approval in proceedings under Section 33, the suspension would be proper and the workman would not be entitled to get any wages from the dale of suspension.

20. But, what is the position where an order of discharge has been passed without holding a proper enquiry, but on the appraisal of evidence before it the Tribunal comes to the conclusion that the order was justified ? Is the workman in such a case entitled to get wages or compensation for the period between the dale of discharge and the date of the order of the Tribunal ? Under the ordinary law of contract, an employer has the right to terminate the contract of service, but such a right is no longer absolute by reason of the industrial law or a statute governing such right or rules or standing orders made under

[14] AIR 1959 SC 1342

some statute Such a right is subject to the right of an employee to have in opportunity to explain the allegations against him. The right of termination of service being thus qualified, such termination is liable to be set aside if the right of the employee is violated or the principles of natural justice are not observed before the order is made. But where an enquiry is obligatory and it is not held or where it is held but it is defective or the rules of natural justice are not observed and the order in such a case is challenged before a Tribunal, the Tribunal can go into the question of justification of such an order under its jurisdiction and consider the legality or propriety of such an order. If the employer then leads evidence to justify his order, and if on a consideration of such evidence the Tribunal comes to the conclusion that the order was justified and that, misconduct on the part of the employee was established, the order of dismissal would not be set aside. In such a case it is difficult to see how it can be legitimately argued that the order of dismissal would date from the date of the Tribunal's order and the workman, therefore, would be entitled to wages for the period between the date of the order of the employer and the dale of the Tribunal's order. Such a thing was not held in Phulbari's case, AIR 1959 Supreme Court 1111 by the Supreme Court. No doubt, the Supreme Court said in that case that the principle laid down in Sasa Musa's case, AIR 1959 Supreme Court 923 was applicable to cases of adjudication also. But a scrutiny of that decision shows that the Supreme Court did not also lay down that the order of discharge or dismissal would not relate back to the date of such order where such an order is held to be justified or that in spite of such an order by the Tribunal justifying the employer's order, the employer would still be liable to pay wages for the intervening period. In our view, an employee would not be entitled to wages for the intervening period or that *Phulbari's case*[15], lay down any such principle. This is clear from *P.H. Kalyani v. Air France. Calcutta*[16]. In that case, one of the contentions raised before the Supreme Court was that the domestic enquiry held by the employer was defective and that therefore, there could be no approval of the action taken in con

sequence of such an enquiry and the Labor Court, even if it held that the dismissal was justified, should have ordered the dismissal from the date its award would become operative for this contention, reliance was placed on Sasa Musa's case, AIR 1959 Supreme Court 923. Negativing this contention, the Supreme Court said, after questioning the principle laid down in Sasa Musa's case, AIR 1959 Supreme Court 923 that that was a case where an application was made under Section 33(1) of the Industrial Disputes Act for permission to dismiss the employee and such permission was asked though no enquiry whatsoever had been held by the employer and no decision taken that the employee should be dismissed. The Supreme Court observed that it was in those circumstances that a case for dismissal was made out only in proceedings under Section 33(1) and therefore, the employees were entitled to their wages till the decision of the application under Section 38. The Supreme Court then explained –

> "The matter would have been different if in that case an inquiry had been held and the employer had come to the conclusion that dismissal was the proper punishment and then had applied under Section 33(1) for permission to dismiss. In those circumstances the permission would have related back to the date when the employer came to the conclusion after an enquiry that dismissal was the proper punishment and had applied for removal of the ban by an application under Section 33(1)."

[15] AIR 1959 SC 1111

[16] AIR 1963 SC 1756

As a further clarification, the Supreme Court stated that the case before it was a case where the employer had held an enquiry, though it was defective, and had passed an order of dismissal and sought thereafter approval of that order under Section 33(1) of the Industrial Disputes Act. If the enquiry was not defective the Labor Court had only to see whether there was a prima facie case for dismissal and whether the employer had come to the *bona fide* conclusion that the employee was guilty of misconduct. Thereafter, on coming to the con elusion that the employer had *bona fide* come to the conclusion that the employee was guilty. i.e. there was no unfair Labor practice and no victimization, the Labor Court would grant the approval which would relate back to the date of the order of the employer. If the enquiry was defective for any reason, the Labor Court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of evidence adduced before it that the order of dismissal was justified, its approval of the order of dismissal made by the employer's in a defective enquiry would still relate back to the dale when the order was made. The Supreme Court also added that the observations made in Sasa Musa's case. AIR 1959 Supreme Court 923 applied only to a case where the employer had neither dismissed the employee nor had come to the conclusion that the case for dismissal had been made out. In that case, dismissal takes effect from the date of the award and so until then, the relation of employer and employee continues in law and in fact.

21. It is thus incorrect to say, as argued by Mr. Daru, that the principle laid down in Sasa Musa's case. AIR 1959 Supreme Court 923 was together with the rider as to wages payable by an employer from the date of his order till the date of the order of the Tribunal applied in cases of

adjudication also by its decision in Phulbari's case, AIR 1959 Supreme Court 1111. It is clear, however, from the decisions referred to above that the Labor Court as also the Industrial Court had jurisdiction to examine the legality and propriety of the order passed by the petitioner company, and though the order was passed under Standing Order 23 under which the company had the power to terminate the services of the second respondent the matter did not conclude and the Labor Court had jurisdiction to ascertain the true effect and substance of that order.

22. From the facts of the case, there can be no doubt that that order was in the nature of punishment and was not one of discharge simpliciter and the Labor Court and the Industrial Court were correct in coming to the conclusion that such an order could not be passed without holding a proper enquiry consistent with the rules of natural justice, it was hardly in dispute that though an enquiry was held, it was defective, a proper opportunity to explain not having been given to the second respondent. But as held in the case of Sasa Musa Sugar Works, AIR 1959 Supreme Court 923 and in Phulbari's case, AIR 1959 Supreme Court in, the Labor Court could allow the petitioner company to justify its order by adducing evidence and the Labor Court, on its own appraisal of that evidence, could arrive at a conclusion that the order of the company was justified. Both the Labor Court and the Industrial Court were agreed that on the facts and circumstances of the case, the company was instilled in making the order and therefore, declined in order reinstatement. But though the order was punitive in nature and the enquiry held was not proper and the company had terminated the services of the second respondent, that termination was held to be justified and therefore, on the principles laid down in AIR 1963 Supreme Court 1756 the order of the Labor Court would relate back to the date of the order of the petitioner company and therefore, the second respondent would not be entitled to wages or compensation for the period between the two orders. To that extent, the under passed by the Labor Court and confirmed by the Industrial Court, directing the petitioner company to pay those wages or compensation, was contrary to the principles laid down in P.H. Kalyani's case, AIR 1963 Supreme Court 1756 and was consequently, erroneous, and will have to be set aside.

23. Rule absolute in terms of Prayer (a) of the petition. No order as to costs.
Order accordingly.