DISMISSAL IN INDUSTRIAL EMPLOYMENT

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DECEMBER, 1982

DECLARATION

I do hereby declare that this work has been originally carried out by me under the guidance and supervision of Prof.(Dr.) P. Leelakrishnan, Head of the Department of Law, University of Cochin. This work has not been submitted either in part, or in whole, for any degree at any University.

Cochin-682022,
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CERTIFICATE

This is to certify that this thesis entitled "Dismissal in Industrial Employment", submitted by Shri N.S. Chandrasekharan, for the Degree of Doctor of Philosophy is the record of bona fide research carried out under my guidance and supervision from 19.10.1978 in the Department of Law, University of Cochin. This thesis, or any part thereof, has not been submitted elsewhere for any other degree.

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Preface

This is a study in Labour Law. Dismissal of workmen in private industrial sector is the area of this study. Confined within the framework of the Industrial Disputes Act 1947, the study is an analytical assessment of the decisions of the Supreme Court of India on dismissal in industrial employment. Few attempts were made in the past to analyse on identical lines the problems in this area. Hence what is written in the thesis is one's own.

Dismissal carries a stigma. The dismissed employee may find it extremely difficult to get alternative employment, especially, in a land of severe unemployment. The need for law with built-in safeguards against arbitrary dismissal cannot be overemphasised. From this perspective the study examines to what extent the Industrial Disputes Act 1947 provides protection and how far the protection is adequate.

The lay out of this thesis is in seven parts and fifteen chapters. Part I consisting of Chapter I has an introductory

comparative look. Part II has two chapters. Chapter II makes a survey of the judicial controversies and legislative action on the question whether or not a dispute between a dismissed workman and the employer is an industrial dispute. Chapter III makes a probe into discharge with a 'punitive flavour.' Part III deals with the legal aspects of dismissal during pendency of an industrial dispute. It consists of four chapters. Chapter IV highlights statutory restrictions on dismissal during pendency, while chapters V and VI deal with the jurisdiction of the authorities in permitting and approving dismissal during pendency. Chapter VII examines the scope of complaint mechanism against violation of restrictions and evaluates the jurisdiction of the authority in dealing with the complaints. Part IV has chapters VIII and IX and looks at the procedural fairness in dismissal. Chapter VIII specifically deals with how far the domestic enquiry be vitiated by the application of the doctrines of _ultra vires_ and bias. Chapter IX highlights the importance of reasonable opportunity to the workmen in domestic enquiries. Part V discusses the problems in adjudication of

disputes over dismissal and has two chapters - Chapter X and Chapter XI - dealing with the old law and the new law respectively. Part VI scrutinises in two chapters the procedure of arbitration and the jurisdiction of arbitrators. Part VII focuses attention on the new trends in this area of law. While the proposed amendments to the Industrial Disputes Act 1947 are discussed in Chapter XIV the main conclusions and suggestions of this study are summed up in Chapter XV.

Prof. (Dr.) P. Leelakrishnan, the Head of the Department of Law, University of Cochin, was my superviser. His guidance and constant supervision stood me in good stead throughout the days of my research. I express my deep felt gratitude.

For their ready help and assistance my thanks are due to the Librarian and other staff of the Department of Law library; to the library staff of the University of Cochin Central Library; and to those in Advocate General's Library, Ernakulam. Mr.P. Thankappan, the Assistant Librarian of

the Cochin University Department of Law library deserves special mention. My thanks are due to Mr.K.B. Mohamedkutty, Lawyer, High Court of Kerala, who was ready at any time to discuss whatever problems that arise in connection with the study. My thanks are also due to my students, especially Sri P.S. Gopi, who helped me in comparing the scripts.

Last, but not the least, I should thank Mr.K. Janardanan who neatly typed this thesis.

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PART I

INTRODUCTORY.

Chapter I

A COMPARATIVE OVER VIEW.

The right to 'hire and fire' has been the privilege of the employer in olden days. The right to hire, the employer enjoys even today. But the employers' right to fire has undergone a transformation in the course of this century and been subjected to various restrictions.[1] Employers insist that both rights should be available to keep industrial discipline. Considerations of social justice demand introduction of various measures to curb their right to dismiss workmen.

Termination of the service of a workman may take various forms. Workmen may be sent out of service being in excess of the actual requirement at a given time. This discharge is not punitive. It is retrenchment. The contract may provide for termination of employment by giving notice. This again is in no way a punitive measure; the idea of punishment is

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1. The National Commission on Labour observed,
   "The right to 'hire and fire' has been urged before us by employers as a remedy for improving industrial discipline. The right to 'hire' belongs to them, but the other right has, in recent years, been circumscribed."
   See, Ministry of Labour And Employment And Rehabilitation, Government of India, Report of the National Commission on Labour (1969) p.349.

foreign to such a termination. This is discharge simpliciter. A workman may be sent out of service by the employer for the reason that he is guilty of misconduct. This is dismissal. The order terminating the service of the workman will show that he is dismissed for misconduct. On the face of it the order carries a stigma. The workman loses the benefits to which he would have been entitled if the termination had been a discharge simpliciter. There is a middle category between discharge simpliciter and dismissal. The employer finds a workman guilty of misconduct. If he is dismissed the workman is denied of the termination benefits. Instead of doing so the employer passes an order of discharge. The reason for discharge is misconduct. The workman, however, gets all the termination benefits. Yet the discharge is by way of punishment. What in effect is a punishment may at times be camouflaged as discharge simpliciter. In other words discharge may be resorted to as a punitive measure with an appearance of simple discharge. This also is punitive discharge.

Dismissal and punitive discharge come in the same category.[2] Both are punishments of a severe type. Punitive

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2. See Ch.III.

discharge, being termination of employment as a punishment is in substance dismissal.[3]

British Law.

In Britain the term 'dismissal' has a wider statutory connotation than it has in India. The Employment Protection (Consolidation) Act 1978 defines dismissal to cover termination of a non-punitive nature also. Expiry of fixed term of employment without a renewal, and termination of service, by the employer or employee, with or without notice is 'dismissal' in Britain.[4] If the employer commits a fundamental breach of an implied term it can amount to a repudiation of the contract by the employer. This would entitle the

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3. This point is discussed in subsequent chapters.
4. Employment Protection (Consolidation) Act 1978. S.55(2) provides that an employee shall be treated as dismissed by his employer if—
"(a) the contract under which he is employed by the employer is terminated by the employer whether it is so terminated by notice or without notice, or
(b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract, or
(c) the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

employee to terminate the contract and establish that he has been dismissed.[5] When an employee is dismissed the burden is on the employer to show, when the question of the fairness of dismissal falls to be decided, the reason for dismissal. That reason must be a fair reason. The reason for termination, to be fair,[6] should be related to the capability,[7]

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5. David Newell, "Contract of Employment", 132 New Law Journal 310 at p.311 (1982). For a discussion on such 'constructive dismissal' see also Alan C. Neal, "Recent Developments in Unfair Dismissal", 132 New Law Journal 351 (1982).
6. Employment Protection (Consolidation) Act 1978. S.57(1) and (2) provide,
   "(1) In determining for the purposes of this Part whether the dismissal of an employee was fair or unfair, it shall be for the employer to show—
      (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal, and
      (b) that it was a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.
   (2) In sub-section (1)(b) the reference to a reason falling within this sub-section is a reference to a reason which—
      (a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, or
      (b) related to the conduct of the employee, or
      (c) was that the employee was redundant, or
      (d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."
7. Dismissal on ground of ill health would fall within the ground of capability. A.B. Clarke, "Dismissal for Ill Health", 131 New Law Journal 309 (1981).

qualification, the conduct, the fact of redundancy, legal requirements or some other substantial reason.[8] The question of fairness or otherwise[9] of dismissal depends on whether the employer acted reasonably in treating it as a sufficient reason for dismissing the employee.[10] Dismissal of an employee for the reason of trade union membership or legitimate trade union work is statutorily declared to be unfair.[11]

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8. On 'other substantial reasons' see John Bowers and Andrew Clarke, "Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason'", 10 Industrial Law Journal 34 (1981). For short narration of cases on unfair dismissal see John E. McGlyne, Unfair Dismissal Cases (1979).
9. In the year 1980, 28 per cent of the unfair dismissal claims was decided by tribunals in favour of the employees. See, Paul Lewis, "Public Knowledge of the Law on Unfair Dismissal: Ignorance is Security?", 132 New Law Journal 758 at p.759 (1982).
10. Employment Protection (Consolidation) Act 1978, S.57(3) as amended by the Employment Act 1980, S.6.
    "The employer having satisfied the tribunal that the reason for the dismissal was one of the above, then the determination of the question whether the dismissal was fair or unfair depends, the Act provides, on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case'".
    J.G. Riddal, The Law of Industrial Relations (1981) p.109. See also Gwyneth Pitt, "Individual Rights under the New Legislation", 9 Industrial Law Journal 233 (1980).
11. Id., S.58(1). It reads:
    "(1) For the purposes of this part, the dismissal of an employee by an employer shall be regarded

(contd..)

However if there exists a union membership agreement[12] and an employee is dismissed for refusal to join the union, the dismissal is not unfair unless such non-joining is on grounds of religious belief.[13] Dismissal due to pregnancy is also unfair.[14] Discriminatory dismissal during strike or lockout

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(f.n.11 continued)

as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a) was, or proposed to become, a member of an independent trade union,

(b) had taken, or proposed to take, part at any appropriate time in the activities of an independent trade union; or

(c) had refused, or proposed to refuse, to become or remain a member of a trade union which was not an independent trade union."

S.153(1) defines an independent trade union as one which is not under the domination or control of, and is not liable to interference by, an employer or a group of employers or employers' association. S.58(2) defines 'appropriate time' to mean a time outside working hours or within working hours if agreed with, or consented by, the employer.

12. This is an agreement which has the effect of requiring the employees to be or become members of the trade union which is a party to the agreement or any other specified independent union.

13. Employment Protection (Consolidation) Act 1978, S.58(3).

14. Id. S.60. On unfair dismissal law in Britain a learned author observes,

"We have elaborate legislation against unfair dismissal under which an employee may be entitled to be reinstated (i.e. have his old contract restored), to be re-engaged under a new contract, or be compensated, and we have the right of a woman after absence owing to pregnancy or confinement to return to her job." Otto Kahn Freund, Labour And the Law (1977), p.26.

is unfair.[15] An employee aggrieved of unfair dismissal for trade union membership or activity has the right to complain to an industrial tribunal. The tribunal will hear the case. If it thinks that the complaint is likely to be upheld the tribunal will announce that preliminary finding. It will ask the employer whether or not he is willing to take back the employee pending determination of the complaint. If he is willing, orders will be passed accordingly. If he is not, an order will be passed for the continuation of the service of the employee. The service will then be deemed to continue, inspite of dismissal, till the final settlement of the complaint.[16] An employee[17] aggrieved by a dismissal[18] which

15. Id., S.62. See also Roger Benedictus, "Recent Developments in Collective Labour Law", 131 New Law Journal 535 (1981) and Richard Kidner, "Dismissal and Industrial Action", 131 New Law Journal 151 (1981).
16. Id., Ss.77-79.
17. Only employees who come within the qualifying period of employment and age limit prescribed are entitled to file the complaint. Id., S.64.
18. Only a dismissed employee can claim unfair dismissal. If he leaves work by resignation he has no right to claim unfair dismissal. But resignation under threat of dismissal stands on a different footing. The departure from service in such a case amounts to dismissal. Martin Edwards, "Resignation or Dismissal", 132 New Law Journal 641 (1982). The claim has to be proposed within the prescribed period. See, Geoff Holgate, "Unfair Dismissal Claims and the 3 Month Limit", 131 New Law Journal 213 (1981).

according to him is unfair can file a complaint before the industrial tribunal. After hearing the case the tribunal passes an order of reinstatement or re-engagement[19] or an award for compensation.[20] An appeal lies to the Employment Appeal Tribunal on a question of law arising from the decision of the industrial tribunal.[21] Before the complaint is dealt with by the tribunal there could be an attempt at conciliation. A copy of the complaint is to be given to the conciliation officer. He may step in at the request of the parties or on his own and attempt a settlement of the

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19. "The effect of a reinstatement order is...to restore the original contract and, of a re-engagement order, to force the parties to enter into a new contract." A.P. Davidson, "Reinstatement of Employees by State Industrial Tribunals", 34 Australian Law Journal 706 at p.712 (1980). "The difference between the two is that reinstatement involves installing the employee in his old job, with incidental benefits restored as if the dismissal had not occurred, while re-engagement is the employment of the dismissed employee in a new job, though normally with not substantially less favourable terms than previously enjoyed." Patrick Elias, Brian Napier, Peter Wallington, (Eds.), Labour Law: Cases and Materials (1980) p.533.
20. Employment Protection (Consolidation) Act 1978. Ss.67-76. If an employee is ordered to be reinstated or re-engaged but the order is not complied with additional compensation is awarded. Id., S.71. For a survey of adequacy of compensation awarded, see Paul Lewis, "Compensation in Unfair Dismissal Cases", 131 New Law Journal 1115 (1981).
21. Id., S.136.

dispute.[22] The system of referring the dispute for arbitration also exists.[23]

American Law.

In the United States, where the process of collective bargaining has advanced, collective agreements provide for arbitration of disputes. The agreements provide for a grievance procedure the final stage of which is settlement by arbitration.[24] However, this does not mean that statutory protection is absent. The National Labor Relations Act[25] provides that it shall be unfair labour practice for an employer 'by discrimination in regard to hire or tenure of

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22. Id., S.134. In the year 1977, 38 per cent of the complaints were settled through conciliation. See Herbert L. Sherman Jr., "Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries", 29 Am. J. Comp. L. 467 at p.503 (1981).
23. The reference to arbitration is made by the Advisory, Conciliation and Arbitration Service established under the Employment Protection Act 1975. The reference is made at the request of one of the parties and with consent of the other party. Norman M. Selwyn, Law of Employment (1980), p.9.
24. See I.L.O., Collective Bargaining in Industrialised Market Economies (1978) p.403.
25. 29 U.S.C. Ss.158-169 (1976). For the text of the National Labor Relations Act see Robert A. Gorman, Basic Text on Labour Law, Unionisation And Collective Bargaining (1976) pp.796-818.

employment to encourage or discourage membership in any union,'[26] or to 'discharge or otherwise discriminate against an employee because he has filed charges or given testimony' under the Act.[27] The National Labor Relations Board is empowered to prevent any person from engaging in any unfair labour practice.[28] The employer may discharge an employee 'for cause.'[29] The protection of the Act is not available against such discharges.[30] However, if the discharge is the product of anti-union animus the protection is available. If it is by way of breach of contract and also by way of unfair labour practice, the same cause may be the subject

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26. National Labor Relations Act, S.8(a)(3). This Act does not define the types of employer action which may come within the prohibition. The standards have been developed by decisions of courts. See, for a note on this, Anastasia D. Kelly, "Recent Decisions, Labour Law", 49 Geo. Wash. L. Rev. 411 (1981).
27. National Labor Relations Act, S.8(a)(4).
28. *Id.*, S.10(a).
29. *Id.*, S.10(c) provides that no order of the Board 'shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him any back pay, if such individual was suspended or dismissed for cause'.
30. The National Labor Relations Act does not define the concept of 'cause'. It is understood to refer to work related reasons. See, Robert A. Gorman, *op. cit.*, p.139.

matter of both arbitration under collective agreement and proceedings before the National Labor Relations Board under the National Labor Relations Act.[31] Neither agency has exclusive jurisdiction in such cases and in case of conflicting decisions the decision of the National Labor Relations Board prevails.[32]

Other Laws.

Under the Belgian law the reason for dismissal must have relationship either with the aptitude or conduct of the worker or with the functioning of the enterprise. If a workman is dismissed for any other reason it is 'abusive dismissal' and the employer is liable to pay compensation to the workman. A just cause for dismissal is defined as "a serious shortcoming which makes any further....collaboration between the employer and the employee immediately and definitely impossible."[33]

31. "Single transaction involving an employer, its employees and their union, may give rise to two kinds of claims. One for breach of contract under the parties' collective bargaining agreement, and the other for application of the provisions of the National Labor Relations Act.... The availability of both contractual and statutory machinery for the dissolution of disputes creates the possibility of at least duplicative procedures and at worst of conflicting results..." Id., p.729.
32. Id., at p.730.
33. Contracts of Employment Act of 1978, Art.35.

Higher compensation is to be paid for protected workmen such as members of works council. The dismissed workman has no right to reinstatement.[34]

In Denmark also an employer who dismisses an employee unfairly has to pay damages. The employee's remedy is limited to a claim for damages. He is not entitled to be reinstated.[35]

In France reinstatement of unfairly dismissed employees is possible in the case of workers' representatives,[36] and employees returning from military service. In the case of others damages are the only legal remedy. A special procedure of approval has to be observed for dismissal of an employee who is a workers' representative.[37]

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34. Herbert L. Sherman Jr., "Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries", 29 Am. J. Comp.L. 467 at pp.467, 470 (1981).
35. *Id.*, at p.474.
36. "Workers' representatives include delegates of the workers (*De'le'gues du personne*), Workers' Committee members (*Membres du Comite' du Comite' d'entreprise*), and delegates of the trade unions (*Repre'sentants des Syndicates*)". *Id.*, p.477.
37. For dismissal the employer has to secure approval of the Workers' Committee. If approval is not given the employer may seek authorisation from a labour inspector. His decision could be challenged by appeal before the Minister for Labour or before courts. *Ibid.*

Prior consultation with works council is necessary in West Germany, before an employee is dismissed. Dismissal is null and void if no such consultation is made. On receipt of notice the employee can file an action in Labour Court protesting dismissal. The Labour Court decides whether or not the dismissal is 'socially unwarranted', and grants appropriate relief. A dismissal is 'socially unwarranted' if it is 'not based on reasons connected with the person or conduct of the employee, or on urgent operating requirements precluding his continued employment in the undertaking.'[38]

In Ireland, the Unfair Dismissals Act of 1977 treats a dismissal as unfair unless there are substantial grounds justifying dismissal. An aggrieved employee can file a claim with a Rights Commissioner. Either party can appeal to the Employment Appeals Tribunal and from its decision to the Circuit Court. Employee is entitled to appropriate relief. He may be reinstated in his old job with back pay, re-engaged in his old job or in an alternative job on reasonable conditions or may be paid compensation.[39]

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38. Id., at pp.482, 484.
39. Id., at pp.486, 487.

The law in Italy provides for reinstatement of those employees dismissed for trade union activities or membership. So is the case with employees dismissed on the basis of sex, race, political or religious discrimination. Failure to reinstate in such cases would render the employer liable to penal sanctions. In respect of other unjustified dismissals where reinstatement is ordered the employer is required to pay the employee remuneration due to him from the date of the order to the date of reinstatement.[40]

In Luxembourg under a statute passed in 1979 a union representative is entitled to reinstatement if unfairly dismissed. Other workers are entitled only to compensation.[41]

In Netherlands prior permission of Government is required for dismissing an employee except in cases where an employee has to be dismissed for urgent reason like theft, insulting behaviour and the like. There are no Labour Courts or Industrial Courts and hence cases against unfair dismissals are heard by ordinary courts.[42]

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40. Id., at pp.491, 492.
41. Id., at pp.495, 496.
42. Id., at pp.497, 498.

In Australia the tribunals of most states exercise reinstatement jurisdiction. But this has not taken root in the federal arbitration system.[43]

Coming back to the Indian position the Industrial Disputes Act 1947 is the relevant legislation. The Industrial Disputes Act 1947 is called hereafter in this thesis as 'the Act' unless the context otherwise indicates. The Act places restrictions on the power of the employer to effect punitive termination of employment. A dispute over such termination could be the subject matter of an industrial dispute.[44]

The Act provides for settlement of industrial disputes by mutual agreement. It provides for settlement in the course of conciliation.[45] The Act also provides for adjudication[46] and arbitration.[47] Government has the power to refer a dispute

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43. A.P. Davidson, "Reinstatement of Employees by State Industrial Tribunals", 54 Australian Law Journal 706 (1980). See also J.O. Donovan, "Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice", 50 Australian Law Journal 636 (1976).
44. See Ch.II.
45. The Industrial Disputes Act 1947, S.2(p) defines 'settlement' to mean a settlement arrived at in the course of conciliation proceedings and also one arrived at by agreement between the parties otherwise than in the course of conciliation proceedings.
46. On reference of the dispute by Government under S.10 of the Act to a Labour Court, Tribunal or National Tribunal.
47. Under S.10A of the Act. See Ch.XII.

to a Board for settlement[48] and to a Labour Court or Tribunal for adjudication.[49] The parties jointly or separately can request the Government to refer the dispute for adjudication. In this case the dispute has to be referred by the Government for adjudication.[50] Parties by agreement may refer a matter for arbitration also.[51] These are the measures by which a dispute relating to dismissal or punitive discharge could be settled. Bipartite settlement of the dispute will be possible only when parties agree on it. The same is the case of settlement by conciliation. After the drastic action of dismissal against an employee it is not likely that the employer agrees to settle the dispute by agreement. The procedure for adjudication and arbitration may therefore be resorted to in such cases.

The Act places restrictions on the right of the employer to fire. He cannot effect punitive termination of service of a workman concerned in an industrial dispute while proceedings relating to the dispute are pending before the authorities

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48. S.10(1)(a).
49. S.10(1)(c) and (d).
50. S.10(2) provides that the reference shall be made if the Government is satisfied that the persons applying represent the majority of each party.
51. See Ch.XII.

under the Act.[52] Previous permission of the authority is insisted on in one category, i.e. dismissal of a workman concerned in a pending dispute for a misconduct[53] connected with such dispute.[54] The employer has to obtain approval of the concerned authority in respect of dismissal of another category, i.e. dismissal for a misconduct not connected with the pending dispute.[55]

Legislation is on its onward march in the area of labour. Labour, as a collective force, is organising itself. With legislative backing labour is moving towards a progressive future. An important question arises. Does the Act take adequate care of the legitimate claim of an individual workman aggrieved by dismissal? The question can be put from another angle. Has the workman an effective remedy within the framework of the Act against unjustified dismissal?[56] This is a crucial problem.

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52. See Ch.IV.
53. Misconduct may be of different types and hues. For this See, B.R. Ghaiye, Misconduct in Employment (1977).
54. See Ch.V.
55. See Ch.VI.
56. This study is limited to an examination of the remedy available to a workman in private industrial employment, within the frame work of the Industrial Disputes Act 1947. For jurisdiction of civil courts and the remedies available before such courts to employees see Suranjan Chakraverti, Law of Wrongful Dismissals (1980). On jurisdiction of civil courts in industrial disputes, see Paul, P.P., "Civil Jurisdiction in Industrial Disputes", 1979 Cochin University Law Review 417.

PART II

PUNITIVE TERMINATION

Chapter II

DISPUTE OVER DISMISSAL.

When a workman is dismissed he is aggrieved. He may demand reinstatement. The employer may disagree. The difference between the two results in a dispute. Is such a dispute over dismissal between the dismissed workman and the employer an industrial dispute which can set in motion the dispute resolving machinery? A conflict of judicial opinion prevailed.

The definition.

The Act defines[1] an industrial dispute. The definition reads:

> "'Industrial dispute' means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

The definition specifies who are the parties to and what are the subject matter of the dispute. There may be disputes

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1. S.2(k).

between employers and employers, employers and workmen, or workmen and workmen. The subject matter of the dispute should be connected with employment, non-employment, terms of employment or conditions of labour of any person. When a workman is dismissed the dispute that arises over his dismissal will naturally involve the question of reinstatement. Can a demand for reinstatement be the subject matter of an industrial dispute?[2] In the case of dismissal the parties to the dispute may be a single dismissed workman and his employer. Will it be an industrial dispute? Is collective nature a sine qua non of an industrial dispute with the result that a dispute over dismissal will be an industrial dispute only when it is sponsored by a Union or supported by a group of workmen? In the chequered history of development of the law these questions received attention of courts.

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2. There can be a statutory definition by which a dispute over dismissal or reinstatement of any particular employee be made an industrial dispute. For instance in Tasmania, S.2(3) of the Industrial Relations Act 1975 defines an industrial dispute to include the engagement, dismissal or reinstatement of any particular employee or class of employees. See, A.P. Davidson, "Reinstatement in Employment Jurisdiction Under the Industrial Relations Act 1975 (TAS)", 7 University of Tasmania Law Review 62 (1981).

Judicial exposition of definition.

Western India Automobile Association v. Industrial Tribunal, Bombay[3] is an earlier instance. The question was whether a demand for reinstatement could be the subject matter of an industrial dispute. The Federal Court held that being connected with 'non-employment', a term finding its place in the definition of 'industrial dispute', a demand for reinstatement could be the subject matter of an industrial dispute. The Court observed,

> "The failure to employ or the refusal to employ are actions on the part of the employer which would be covered by the term 'employment or non-employment.' Reinstatement is connected with non-employment and is therefore within the words of the definition."[4]

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3. A.I.R. 1949 F.C. 111. The Western India Automobile Association Staff Union raised certain demands with the Western India Automobile Association. These demands were not allowed. Strike ensued. The employer association threatened the workers that unless they resumed work they would be dismissed. The workers refused to work. They were dismissed. The Union raised certain additional demands also and the whole dispute, including the question of reinstatement, was referred to the Industrial Tribunal for adjudication. The Association moved the High Court of Bombay challenging the jurisdiction of the Tribunal, on the ground inter alia that a dispute on reinstatement was not an 'industrial dispute.' The contention was upheld by a Single Judge but on appeal by the Province of Bombay a Division Bench of the High Court decided the issue against the Association. The issue was then taken in appeal by the Association before the Federal Court.
4. Id., per Mahajan, J. at pp.114, 115. It may be noted that the Court was not holding by these words that a dispute

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Will it be an industrial dispute when a workman is dismissed and a dispute over it is raised by a union? This was another question in the case. It was argued that if the union represented the dismissed employee, there was no industrial dispute since a dismissed employee is no more a workman.[5] If on the other hand, the union represented the other workmen in the service of the employer, then also there was no industrial dispute, it was contended, there being no dispute between them and the employer about dismissal since they have not been dismissed. The Federal Court found no difficulty in holding that a union can take up the cause of a dismissed employee, and that the dispute will then be an industrial dispute. It is not necessary that the dispute should be between the employer and the dismissed workman only. An industrial dispute can arise between workers and employer

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(f.n.4 continued)
raised by a workman would be per se an industrial dispute. The holding is only to the effect that reinstatement could be the subject matter of an industrial dispute.

5. As the definition of 'workman' in S.2(s) of the Act, stood at the material time it did not include discharged workmen except those discharged during an industrial dispute. By the amendment in 1956 a dismissed workman also comes within the meaning of the expression 'workman' for purposes of any preceeding under the Act relating to an industrial dispute.

over the dismissal of another. The Court observed, "The last words in the definition of industrial dispute, viz: 'any person', are a complete answer to this argument of the appellants."[6] The proposition laid down in the case is this. When the cause of a dismissed workman is taken up by a union, the dispute becomes an industrial dispute between the employer and workman.

Can a dismissed workman individually raise an industrial dispute? Will such dispute remain only an individual dispute unless his cause is taken up by a union or by other workmen? This issue came up in Kandan Textile v. Industrial Tribunal.[7] The dispute was referred by government for adjudication to industrial tribunal. The case involved, among other things, the dispute over dismissal of a workman.[8] Before the government

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6. Western India Automobile Association v. Industrial Tribunal, Bombay, A.I.R. 1949 F.C. 111 at p.121 per Mahajan, J.
7. A.I.R. 1951 Mad. 616.
8. Ibid. One Sundaram, a workman of the appellant mill, was dismissed. After sometime the mill was closed temporarily. On reopening some workmen were not taken back. Some of those taken back were allotted different types of work. The services of those who refused to do the allotted work were terminated. The Labour Commissioner reported to government about the existence of an industrial dispute over the principle of seniority. There were two rival unions in the mill, namely, K.T.L.U. and K.W.W.U. The former was formed in 1947 and was registered in 1948. No information was available as to when the latter union was formed, who all

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there was no material to conclude that the matters referred for adjudication were matters in dispute between workmen and management. The Court held that the reference was bad for this reason.[9] The contention was raised in the case that even if there existed a dispute over dismissal[10] it could not

(f.n.8 continued)
were its members and by what proceedings its office bearers were elected. The latter union was registered in 1948 and Sundaram was its Secretary. Its President sent a letter to the Secretary to Government listing out certain items of disputes including the dispute over dismissal of Sundaram and requesting for reference of those items for adjudication. But the dispute referred to by the Labour Commissioner did not find a place in his letter. The Government referred all the items specified in the letter of the President of the union for adjudication, stating that the Labour Commissioner had reported that an industrial dispute in respect of these matters had arisen and had not been settled. The items mentioned in the annexure did not include the dispute mentioned in the report of the Labour Commissioner, but included all items mentioned in the President's letter including the dismissal of Sundaram.

9. Ibid. The Bench consisted of Rajamannar, C.J. and Mack, J. Rajamannar, C.J. held that Government will not be justified in making a reference without applying its mind to the relevant material and satisfying itself that an industrial dispute did exist or is apprehended. He said,

> "...if the Government had considered the truth of the existence of a dispute and had exercised their mind on the material placed before them, they would have certainly come to the conclusion that the items set out in the annexure to their order were not matters of dispute and there was no material before them that a dispute existed as to them." p.619.

He therefore held the reference made by Government was incompetent and invalid (p.620). Mack, J. agreed (p.623).

10. The Court found that no dispute existed over dismissal of workmen. Rajamannar, C.J. observed that the President of the union never addressed any letter to the management. Absence of any definite particulars as to the membership

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become an industrial dispute unless the cause is taken up by other workmen. In other words, the contention was that a dispute between a dismissed workman and his employer is not an industrial dispute but only an individual dispute. It was not necessary for the purpose of the case to decide this point.[11] However, dealing with the point Rajamannar, C.J. observed with wisdom and insight:

> "I must confess that the language of the definition of 'industrial dispute' is so wide that giving the words their ordinary meaning, even a dispute between an employer and one of the workmen or between one workman and another workman which is connected with one or other of the matters mentioned therein would fall within the definition."[12]

(f.n.10 continued)
of the union, and its representative character, absence of anything to show that it was decided by workmen members of the union to take up the cause of the aggrieved workmen and the absence of evidence to show the aggrieved workmen put forward the President of this union as their representative and spokesman, made it impossible, according to him, to hold that an industrial dispute existed between the employer and the workmen. *Id.* at p.620. Mack, J. observed that the K.W.W.Union was not a genuine union and had no *locus standi* to represent the workmen. *Id.* at p.625.

11. *Id.* at p.620. Rajamannar, C.J. observed, "The application before us can be disposed of in favour of the petitioner on these findings of ours, namely, that the reference by Government was bad and that it is not established that there is a dispute between the employer and the workers because the authority of the Weaving Workers' Union to represent any worker has not been proved to exist."
12. *Id.* at p.621.

Section 18 of the Act[13] however prompted him to remark that it would appear that an industrial dispute must be something more than an individual dispute.[14] He suggested that the legislative intention should be clearly expressed.

Rajamannar, C.J. remarked:

> "Difficult questions arise when the only parties to a dispute are the employer on the one hand and certain dismissed employees on the other hand.... As we have already mentioned, <u>in the view we take as to the validity of the order of reference made by the Government, all these questions need not be finally decided</u>. I must, however, suggest that the intention of the Legislature may be expressed

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13. Clause (a) of sub-section (3) of S.18 of the Act provides that an award of a Labour Court, Tribunal or National Tribunal shall be binding on all parties to the industrial dispute. Clause (d) provides that when workmen is one of the parties to the dispute, the award shall be binding on all persons who were employed in the establishment or part of the establishment to which the dispute relates and all persons who subsequently become employed in that establishment or part.
14. <u>Kandan Textile</u> v. <u>Industrial Tribunal</u>, A.I.R. 1951 Mad. 616 at p.621. Rajamannar, C.J. observed that the award is binding, where a party is composed of workmen, on all persons who were employed in the establishment or part of the establishment and all persons who subsequently become employed in that establishment or part. This suggests according to him that something more than an individual dispute between a worker or a few workers and employer is meant by an industrial dispute.

> in a more clear and unambiguous language than it is at present, to decide whether an individual dispute between an employee or employees on the one side and the employer on the other side is an industrial dispute which could be referred to a tribunal for determination even when a substantial section of the entire establishment or a recognised part of the establishment does not take up his or their cause."[15]

Justice Mack, the other judge in the Bench, expressed the view that a dispute over dismissal will be an industrial dispute only when it is taken up by a union of workers or by a substantial number of workmen who continue in employment. He observed,

> "The Industrial Disputes Act was never intended to provide a machinery for redress by a dismissed workman or even by a group of workmen who may be simultaneously punished or dismissed. They cannot by joining in a demand for reinstatement create an industrial dispute after their dismissal. If such a dismissal however even of an individual workman is taken up by a Workers' Union or a substantial body of workmen who continue in employment and espouse his cause then an industrial dispute may arise."[16]

Clearly <u>Kandan</u> did not decide the issue whether an individual dispute is an industrial dispute.[17] Yet paradoxically,

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15. <u>Id</u>. at p.623 (Emphasis added).
16. <u>Ibid</u>.
17. The Labour Appellate Tribunal in <u>Swadeshi Cotton Mills</u> noted this. See <u>infra</u>, n.26.

the future development of the law is intriguing. Kandan became the base for the development of the law to the effect that an individual dispute is not an industrial dispute. United Commercial Bank v. Commissioner of Labour,[18] is the starting point. A workman was dismissed. He went in appeal under the Madras Shops and Establishments Act 1947. The issue was whether the appellate authority under the Madras Shops and Establishments Act 1947 had jurisdiction to continue appeal proceedings after the dispute over dismissal is referred for adjudication to an Industrial Tribunal under the Industrial Disputes Act. The Court upheld the jurisdiction of the appellate authority to continue proceedings, as the dispute in question was an individual dispute. A distinction in the scope was made out between the two enactments. The Shops and Establishments Act applied to an individual dispute over

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18. A.I.R. 1951 Mad. 141. Sarma, an employee of the appellant Bank was dismissed for misconduct on 30th June 1949. He preferred an appeal under the Madras Shops and Establishments Act 1947 to the Commissioner of Labour. Subsequently, Government referred to the Industrial Tribunal certain items of disputes between the Bank and its employees, including dismissal of workmen after 13th June 1949. No specific case of dismissal of any workman was stated in the reference. Specific cases were left to be cited by the employees. The Tribunal directed the employees to file their statement of claims. Neither Sarma, nor any Union acting on his behalf delivered a statement of claim regarding his dismissal.

dismissal. On the other hand the Industrial Disputes Act related to an industrial dispute. Rajamannar, C.J., who was one of the judges in Kandan, observed:

> "The two Acts, namely, the Industrial Disputes Act and the Madras Act are not in pari materia. Though in one sense....the Madras Act concerns a dispute between an employee and an employer, an individual dispute falling under it would not by itself be an industrial dispute falling within the scope of the Industrial Disputes Act. It may be that the dismissal of even one workman can become the subject of an industrial dispute, but then it is no longer an individual dispute, between the dismissed workman and the employer only; it becomes a dispute between the workmen on the one hand and the employer on the other. Such a dispute, it may be called a collective dispute, certainly cannot be a subject matter of an appeal under....the Madras Act.... In the Kandan Textile Ltd. v. The Industrial Tribunal, Madras, it was held by a Bench of this Court that something more than an individual dispute between a worker and the employer is required to make the dispute an industrial dispute."[19]

It appears that Chief Justice Rajamannar was not correct in observing that the ratio of Kandan was to the effect that an individual dispute is not an industrial dispute. It is submitted that Kandan did not decide the question. Kandan

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19. Id. at p.144. (Emphasis added).

was on a different plane, viz. the validity of the order of reference.[20]

Justice Viswanatha Sasthri in a separate judgement agreed with Chief Justice Rajamannar. He observed that a dispute between a dismissed workman and his employer in which other workers are not interested is only an individual dispute; but if a union or a substantial number of the other workmen take up the cause and demand reinstatement it becomes an industrial dispute.[21]

In Swadeshi Cotton Mills Company v. Workmen[22] the question arose[23] before the Labour Appellate Tribunal. Kandan[24] was cited. The Labour Appellate Tribunal noted rightly[25] that the

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20. See supra, nn.11, 15.
21. United Commercial Bank v. Commissioner of Labour, A.I.R. 1951 Mad. 141. "In between these two extreme cases there may be disputes about 'employment or non-employment' of which it would be difficult to say a priori that they are individual disputes or industrial dispute." Id., p.146.
22. 1953(1) L.L.J. 757.
23. Ibid. One of the questions the Labour Appellate Tribunal had to decide, was:
 "When a dispute is raised by a workman personally and individually which is connected with his employment or non-employment or his terms of employment or conditions of labour, whether such a dispute is an industrial dispute within the meaning of section 2(k) of the Industrial Disputes Act 1947." Id. at p.758.
24. Supra, n.7.
25. Supra, n.17.

view in Kandan, that an individual dispute is not an industrial dispute and hence is outside the purview of the Act, was only by way of obiter.[26] The Labour Appellate Tribunal proceeded to examine the scope of the expression 'employers and workmen' in section 2(k) of the Act. The expression is in plural form. If it excludes the singular form the position would be as follows. A dispute between a single employer and his workmen will not be an industrial dispute. A dispute between an employer and a single workman will also not be an industrial dispute. The General Clauses Act provides that expressions in plural form should be deemed to include the singular form.[27] The Appellate Tribunal was of the view that this provision was applicable.[28] It also observed that there was nothing in section 18 of the Act[29] to indicate that an individual dispute is not covered by the expression 'industrial

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26. Swadeshi Cotton Mills Co. v. Workmen, 1953(1) L.L.J. 757 at p.759.
27. The General Clauses Act 1897. S.13(2) reads:
    "13. In all Central Acts and Regulations, unless there is anything repugnant in the subject or context,—
    (1) .. ..
    (2) words in the singular shall include the plural, and vice versa.
28. Swadeshi Cotton Mills Co. v. Workmen, 1953(1) L.L.J. 757 at p.759.
29. S.18 was relied on by Rajamannar, C.J. in Kandan to think that the 'industrial dispute' contemplates only collective disputes. See supra, n.14.

dispute.'[30] The Labour Appellate Tribunal held that a dispute over employment, non-employment, etc. between a single workman and his employer will be an industrial dispute.[31]

The Supreme Court considered the question in C.P. Transport Service Ltd. v. Raghunath Gopal Patwardhan.[32] The case

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30. Swadeshi Cotton Mills Co. v. Workmen, 1953(1) L.L.J. 757 at p.763. The Labour Appellate Tribunal observed that clause (d) of S.18(3) which speaks of 'workmen' would come into play only when workmen is a party in a representative capacity. Referring to S.18(3)(d) of the Industrial Disputes Act (supra, n.13), the Appellate Tribunal said:
"The plain meaning of clause (d) to us appears to be that where a body of workmen is the party on the one side in a representative capacity....the adjudication of the tribunal would be binding on all workmen of the establishment, present or future.... This carries with it the necessary implication that where the party...is not composed of workmen, that is to say, of workmen not being parties in a representative capacity but one workman or more than one workman are parties in their individual capacity, this clause is not to apply but the persons bound by the ...award would be the workman himself and no others ..."
31. The Appellate Tribunal observed that under S.33A a complaint filed over dismissal in contravention of S.33, is to be treated as a dispute referred to in accordance with the provisions of the Act and this implied that the dispute raised by a workman could be an industrial dispute. Id. at pp.763, 764.
32. A.I.R. 1957 S.C. 104. The respondent was a mechanic of the appellant company. He was dismissed on the ground of gross misconduct and negligence. A criminal case was launched against him for that. He was acquitted. He then demanded reinstatement. The company refused. He filed an application for reinstatement under S.16(2) of

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related to a Provincial Act, the C.P. and Berar Industrial Disputes Settlement Act 1947. This Act authorised the Labour Commissioner to decide industrial disputes concerning dismissal. It permitted an employee to apply to the Labour Commissioner for reinstatement, within six months of dismissal.[33] This Act contained a definition of industrial dispute. It was defined as "any dispute or difference connected with an industrial matter arising between employer and employee or between employers and employees."[34] The question for decision by the Supreme Court was whether an application for reinstatement by a dismissed employee was maintainable before the Labour

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(f.n.32 continued)
the C.P. and Berar Industrial Disputes Settlement Act (*infra* n.33) but failed. Subsequent revision petition before the Provincial Industrial Court was decided in his favour. The Company filed appeal before the Labour Appellate Tribunal. It was dismissed. The Company filed appeal before the Supreme Court.

33. S.16 of this Provincial Act reads,
"(1) Where the State Government by notification so directs, the Labour Commissioner shall have power to decide an industrial dispute touching the dismissal, discharge, removal or suspension of an employee working in any industry in general or in any local area as may be specified in the notification.
(2) Any employee, working in an industry to which the notification under sub-section (1) applied, may within six months from the date of such dismissal, discharge, removal or suspension, apply to the Labour Commissioner for reinstatement and payment of compensation for loss of wages."

34. S.2(12) of the Provincial Act referred to in the case.

Commissioner. It was argued that the dispute in question was only an individual dispute and not an industrial dispute as defined in the C.P. and Berar Act, an industrial dispute touching dismissal was a pre-requisite to the entertainment of an application for reinstatement and that the application was not maintainable.

The Court held that the definition of 'industrial dispute' under the C.P. and Berar Act is wider than that in the Industrial Disputes Act 1947 and that a dispute between a single employee and his employer on dismissal is an industrial dispute under the Provincial Act.[35]

The Supreme Court did not express any final opinion on the question whether the definition of 'industrial dispute'[36] under the Industrial Disputes Act covered a dispute between an employer and a single workman, since that question was not directly involved in the case.[37] However, the Court observed on the scope of the expression 'industrial dispute' in the Industrial Disputes Act,

35. C.P. Transport Service Ltd. v. Raghunath Gopal Patwardhan, A.I.R. 1957 S.C. 104 at p.110.
36. Supra, n.1.
37. C.P. Transport Service Ltd. v. Raghunath Gopal Patwardhan, A.I.R. 1957 S.C. 104 at p.109.

"Notwithstanding that the language of S.2(k) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion, to settle only disputes which involve the rights of workmen as a class and that a dispute touching the individual rights of a workman was not intended to be the subject of an adjudication under the Act, when the same has not been taken up by the Union or a number of workmen."[38]

The question whether an individual dispute over dismissal will be an industrial dispute arose in Newspapers Ltd. v. State Industrial Tribunal.[39] This was a case under the U.P. Industrial Disputes Act 1947. This Act adopted[40] the definition[41] of 'industrial dispute' under the Industrial Disputes

38. Ibid., per Venkatama Ayyar, J.
39. A.I.R. 1957 S.C. 532. A line typist of the appellant company was dismissed. No other workers or unions of the appellant company took up his cause. His cause was taken up by U.P. Working Journalists Union, Lucknow, with which he had no connexion. The U.P. Government referred the dispute to an Industrial Tribunal. The Tribunal ordered his reinstatement. On appeal the Labour Appellate Tribunal affirmed the decision. A writ petition was filed in the Allahabad High Court. It was dismissed. Appeal against the decision was also dismissed by the High Court. The case was then taken in appeal to the Supreme Court. The Court observed that there was no dispute between the employer and his 'workmen' since the dismissed employee could not be referred to as 'workmen' (in the plural) and the U.P. Working Journalists Union could not be called 'his workmen.' Id. at p.540.
40. U.P. Industrial Disputes Act 1947, S.2. This section defined 'industrial dispute' as having the same meaning assigned to it as in S.2 of the Industrial Disputes Act 1947.
41. Supra, n.1.

Act 1947. The Court came to the conclusion that an individual dispute was not an industrial dispute. The Court said,

> "The object of the Act[42] is the prevention of industrial strife, strikes and lockouts and the promotion of industrial peace and not to take the place of the ordinary tribunals of the land for the enforcement of contracts between an employer and an individual workman. Thus viewed the provisions of the Act lead to the conclusion that its applicability to an individual dispute as opposed to dispute involving a group of workmen is excluded unless it acquires the general characteristics of an industrial dispute, viz. the workmen as a body or a considerable section of them make common cause with the individual workman and thus create conditions contemplated by section 3 ...."[43]

The Court restricted the meaning of the expression 'industrial dispute' to a collective dispute on a consideration of the provisions of the U.P. Act and the previous decisions. The relevant portion of the section 3 of the U.P. Act as referred in the judgement reads,

> "If in the opinion of the State Government, it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the

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42. U.P. Industrial Disputes Act 1947.
43. Newspapers Ltd. v. State Industrial Tribunal, A.I.R. 1957 S.C. 532, per Kapur, J. at p.536.

> life of the community, or for maintaining employment, it may, by general or special order, make provision—
> .. ..
> (d) for referring any industrial dispute for conciliation or adjudication in the manner provided in the order,
> .. .."

Problems of securing public safety, maintaining public order and the like arise only consequent on a collective dispute. It cannot arise solely because of a dispute between an employer and a single employee. The conditions contemplated under section 3 of the U.P. Act threw light on the construction of the scope of the expression 'industrial dispute' in the U.P. Act. Therefore, the construction put on the expression 'industrial dispute' in the context of the U.P. Act, may not _per se_ be applicable to the expression 'industrial dispute' in the Central Act.[44] The Court, however, referred to the meaning of the expression 'industrial dispute' in the Industrial Disputes Act and to the observations in _Central Provinces Transport Service_ v. _Raghunath Patwardhan_[45] that an industrial dispute under the Central Act refers not to an individual dispute but a collective dispute.[46] The Court

44. _Supra_, n.1.
45. A.I.R. 1957 S.C. 104.
46. _Supra_, n.38.

did not approve[47] the view of the Labour Appellate Tribunal in Swadeshi Cotton Mills Co. Ltd. v. Their Workmen,[48] that an individual dispute could be an industrial dispute.

The Court referred also to the meaning assigned to the term 'trade dispute' under the English law. Conway v. Wade[49] interpreted that expression[50] in the Trade Disputes Act 1906.

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47. Newspapers Ltd. v. State Industrial Tribunal, A.I.R. 1957 S.C. 532 at p.539.
48. Supra, n.31.
49. [1909] A.C. 506. The respondent was an official of the trade union. With a view to compelling the appellant to pay a fine due to the trade union and to punishing him for not paying it, the respondent threatened the employer of the appellant that unless the appellant is dismissed from service, the other workmen in the service of the employer who were members of the trade union will leave off work, which was not true. The appellant was dismissed. He brought an action for damages against the respondent for inducing the employer to dismiss him. The question was whether the action of the respondent was an action 'in contemplation or furtherance of a trade dispute' protected by S.3 of the Trade Disputes Act 1906. The House of Lords held that the action was not protected by S.3 since there was no trade dispute. Lord Loreburn, L.C. held that there was no dispute in existence and the respondent was acting as a mischief maker to injure the appellant. (Id. at p.509). Lord MacNaghten, Lord James, Lord Atkinson and Lord Gorell agreed with the view that there was no trade dispute. Lord Shaw agreeing with the view observed that the question of non-payment of fine had not reached the stage of a trade dispute. Id. at pp.521, 522.
50. The expression 'trade dispute' was defined in that Act to mean "any dispute between employers and workmen or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment....of any person." Id. at p.520.

National Association of Local Government Officers v. Bolton Corporation[51] also involved the question of interpretation of the definition of 'trade dispute'[52] in the Industrial Courts Act 1919. In R. v. National Arbitration Tribunal ex-parte Keable Press Ltd.[53] the Court of Appeal had to interpret the

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51. [1943] A.C. 166. Local authorities were given power by the Local Government Staffs (War Service) Act 1939 to make up the pay of officers selected to war service, equal to the level of pay they would have drawn had they continued in service under local government. The respondent Corporation decided by resolutions that it will not exercise the power under the Act. There upon the appellant, a trade union, formally claimed on behalf of the members who were employees of the respondent Corporation, that it should be made a condition of employment that the difference in pay would be made up by the Corporation. The Minister for Labour and National Service referred this dispute to the National Arbitration Tribunal, under Article 2 of the Conditions of Employment and National Arbitration Order 1940 which authorised the Minister to refer 'trade disputes.' The Order was made under Regulation 58AA of the Defence (General) Regulation 1939. The definition of 'trade dispute' in the Industrial Courts Act 1919 was adopted in this Regulation. Article 7 of the Order defined 'trade dispute' in the same terms. The question was whether the dispute was a trade dispute. The House of Lords held that it was.
52. The term 'trade dispute' was defined in section 8 of the Industrial Courts Act 1919, and in Article 7 of the Conditions of Employment and National Arbitration Order 1940, to mean "any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person."
53. 1943 2 All E.R. 633. A newspaper was ordered for some time to cease publication. When the ban was lifted the newspaper asked the union, according to the custom, for suitable workmen. The union sent one who had been formerly employed by the newspaper. The newspaper refused to employ

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term 'trade dispute' under the Conditions of Employment and National Arbitration Order 1940. Again in R. v. National Arbitration Tribunal and Another ex-parte South Shields Corporation[54] the Kings Bench examined the question whether the dispute between the employer and a single workman[55] was

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(f.n.53 continued)
him. The union insisted that he should be employed and called on a strike by the workers in the newspaper. The dispute was referred to the National Arbitration Tribunal. The question was whether it was a 'trade dispute' under the Conditions of Employment and National Arbitration Order 1940. (For the definition, see supra, n.52). The contention was raised that the dispute was between the employers and the union and not between the employers and their workmen. The Court of Appeal found that the workers backed up the union by launching the strike and that this showed that the dispute was between the employers and the workmen. Id. at p.634, per Lord Greene, M.R.

54. [1951] 2 All E.R. 828. This decision of a Divisional Court of the Kings Bench, is wrongly referred to as one of Court of Appeal, by the Supreme Court in Newspapers Ltd. v. State Industrial Tribunal, A.I.R. 1957 S.C. 532 at p.536 per Kapur, J.

55. A Joint Committee of the Association of Municipal Corporations and the Society of Town Clerks was constituted to adopt recommendations on conditions of service and salaries of town clerks. South Shield Corporation, a member of the Association of Municipal Corporations, refused to apply the recommendations and were willing to continue the employment of its town clerk only on the terms on which he was originally engaged. A dispute between the Corporation and the town clerk over conditions of service was referred in March 1951 to the National Arbitration Tribunal, under Conditions of Employment and National Arbitration Order 1940. A second reference was made in April 1951 in respect of the salary of the town clerk to the Industrial Disputes Tribunal, under the Industrial Disputes Order 1951. The 1951 Order replaced the 1940 Order. It provides that references under the 1940 Order which were not heard and concerns a dispute under the 1951 Order shall be deemed to be a reference under the 1951 Order. Hence the question was whether the references in question were disputes under the 1951 Order.

one which could be referred to Industrial Disputes Tribunal as a 'dispute'[56] under the Industrial Disputes Order 1951.[57] In Newspapers Ltd. v. State Industrial Tribunal the Supreme Court of India observed[58] that 'trade dispute' was interpreted as a collective dispute in these decisions as opposed to individual disputes. The Court referred to the decisions of the High Court of Australia in Jumbunna Coal Mine v. Victorian Coal Miners' Association;[59] Federated Saw Mill, Timber Yard

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56. 'Dispute' was defined in art.12(1) of the 1951 Order as follows:
"Dispute' does not include a dispute as to the employment or non-employment of any person or as to whether any person should or should not be a member of any trade union but, save as aforesaid, means any dispute between an employer and workmen in the employment of that employer connected with the terms of the employment or with the conditions of labour of any of those workmen."

57. It was held that the dispute between the Corporation and its town clerk was not a dispute within the meaning of the term in art.12(1) of the 1951 Order and that it could not therefore be referred to the Industrial Disputes Tribunal. Lord Goddard, C.J. speaking for the Court said, "What we do decide is that there must be a dispute between an employer and more than one workman in his employ though it may be that the dispute originates with a single workman, and that the others only become parties to the dispute in support of one member of their body." R. v. National Arbitration Tribunal and Another Ex-parte South Shields Corporation, [1951] 2 All E.R. 828 at p.833.

58. A.I.R. 1957 S.C. 532 at p.538, per Kapur, J.

59. (1908) 6 C.L.R. 309. The question was whether the respondent was an association which could be registered under the Commonwealth Conciliation and Arbitration Act 1904. Under S.55(b) of the Act 'any association of not less than one hundred employees in or in connection with any industry'

(contd..)

and General Workers Employees Association of Australasia v. James Moore & Sons Prop. Ltd.,[60] George Hudson v. Australian Timber Workers' Union[61] and Metal Trades Employers Association

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(f.n.59 continued)
could be registered. S.4 defined an 'association' as including a trade union. The Act was intended to apply to industrial disputes extending beyond the limits of any one State. The Registrar registered the respondent association. The appellants contended that the union could not be registered under the Act, since it was incapable of being engaged in an industrial dispute extending beyond the limits of a State, and that if it could be registered under the Act, the provision was *ultra vires* S.51 of the Constitution which conferred on Commonwealth Parliament power to make laws with respect to certain matters relating to industrial disputes extending beyond the limits of any one State. The High Court, upholding the decision of the President of the Commonwealth Court of Conciliation and Arbitration, held that the association could be registered under the Act and that the Act was not unconstitutional.

60. (1909)8 C.L.R. 465. One of the questions stated by the President of the Commonwealth Court of Conciliation and Arbitration, for decisions of the High Court, was whether there was an industrial dispute extending beyond the limits of a State in the case. The association of employees having members in all the States raised certain demands with employers in different States. The employers in the States, having no connection with those in other States, refused, independently and without any preconcert with other employers, the demands of the association. The High Court held that mere want of preconcert by employers did not exclude the dispute from being an industrial dispute extending beyond the limits of one State, if otherwise it was such a dispute.

61. (1923)32 C.L.R. 413. The question was whether the amendment to S.24(1) of the Commonwealth Conciliation and Arbitration Act 1904-1920, made on 16th December 1921 by S.3 of the Commonwealth Conciliation and Arbitration Act 1921, making an agreement between the parties binding not only

(contd..)

v. Amalgamated Engineering Union,[62] wherein the term 'industrial dispute' was explained to be one involving workers as a collective body. In the light of the observations relating to 'trade dispute' in English decisions and 'industrial dispute' in the Australian decisions, indicating that collectivity of workers is the test of an industrial dispute, the Supreme Court of India observed that in the absence of an express provision or necessary intendment to the contrary there is no reason to give a different meaning to the expression 'industrial dispute' in the Indian statute.[63]

(f.n.61 continued.)
on the parties to the agreement but also to successors, assigns, etc. was applicable from 16-12-1921 to agreements made prior to that date and to assigns, successors, etc. who had become such before that date. An agreement settling an industrial dispute had been entered in this case on 10th Nov. 1920, of which one party was George Hudson & Sons Ltd. On 30th Dec. 1920 George Hudson Ltd. was incorporated. The business of the former was assigned to the latter. George Hudson Ltd. was proceeded against for failure to publish a a copy of the agreement referred to above in a conspicuous place as specified therein and was convicted. The High Court held by majority that S.24(1) as amended applied to the agreement, and to George Hudson Ltd., from 16-12-1921 and the conviction was upheld.

62. (1935-36) 54 C.L.R. 387. One of the questions for decision was whether when a union of employees in an industry served on employers in that industry demands as to terms of employment of all workmen and the employers did not accede to their demand, there was an industrial dispute even between the union and the employers where no union members were employed, for settlement of which the Commonwealth Court of Conciliation could make an award binding on all workmen. The Court by majority held that there was an industrial dispute on which an award could be passed.

63. Newspapers Ltd. v. State Industrial Tribunal, A.I.R. 1957 S.C. 532 at p.538 per Kapur, J.

The concept of direct and substantial interest.

There may be dispute between an employer and his workmen about dismissal of another person. The dismissed individual may not be a workman. The workmen may not have any direct interest in him. Is such a dispute an industrial dispute? This question arose in Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate.[64] The service of Assistant Medical Officer of the establishment was terminated by the management. The union of workmen of the estate sponsored his cause. The Court held that the Assistant Medical Officer, being neither a workman nor one in whose conditions of service the workmen had any 'direct and substantial interest', did not come within the scope of the expression 'any person' in the definition of the term 'industrial dispute'[65] in the Act. It was therefore held that his cause cannot be taken up by a union so as to make the dispute an industrial dispute.

The concept of 'direct and substantial interest' thus evolved in a case of a union sponsoring the cause of a person other than a workman was later extended to sponsoring the cause of workmen. In Bombay Union of Journalists v. The Hindu[66]

64. A.I.R. 1958 S.C. 353.
65. Section 2(k), supra, n.1.
66. A.I.R. 1963 S.C. 318.

the cause of a workman was taken up[67] by the Bombay Union of Journalists. It was not a union of the employees of the respondent organisation. Applying the test of 'direct and substantial interest', the Supreme Court said that persons whom the union represented were not employees of the same employer. They cannot be regarded as directly and substantially interested in the dispute. In the Court's view they cannot, therefore, by their support, convert an individual dispute into an industrial dispute. It was held that the support of the Bombay Union of Journalists could not convert the dispute between the employee and The Hindu into an industrial dispute.[68]

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67. One of its correspondents intimated the Managing Director of The Hindu that he was proceeding to Europe. The management told him that his services would be dispensed with, if he so proceeded. He, however, went to Europe. The management informed him thereupon that he ceased to be a correspondent. On his return he made a claim for reinstatement and called upon the management to treat the period of absence as leave. The management refused to do so. He alleged that the termination was wrongful. His cause was taken up by the Bombay Union of Journalists of which he was a member. The Hindu, at the relevant time had, besides this particular correspondent nine others as employees but of them only one was a member of this Union. The Bombay Union of Journalists was not a Union of the employees of The Hindu alone.
68. A.I.R. 1963 S.C. 318, per Sinha, J. at p.321.

Should the dispute over dismissal, to become an industrial dispute, be sponsored by a union exclusively of the employees of the establishment? This question was considered by the Supreme Court in *Workmen* v. *M/s. Dharampal*.[69] The Court held that if there is no union exclusively of employees of the establishment, a union in the same industry of which the workers are members can sponsor the cause, provided the union sponsoring the cause can fairly claim a representative character.[70] It was also observed that the dismissed workmen themselves form a group and the dispute between them and the employer will be an industrial dispute, being a dispute between employer and 'workmen'.[71]

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69. A.I.R. 1966 S.C. 182. The respondent company dismissed 18 of its 45 employees. All the dismissed persons were members of a union organised at the industry level. The union took up the cause of the dismissed workman. The dispute was referred for adjudication. The Tribunal held that since the cause of the workmen had not been sponsored by a union of the employees of the establishment, it was not an industrial dispute. Appeal by special leave was filed before the Supreme Court.
70. *Id.* at p.186, *per* Gajendragadkar, C.J.
71. Gajendragadkar, C.J. observed,

    "If 18 workmen are dismissed by an order passed on the same day, it would be unreasonable to hold that they themselves do not form a group of workmen which would be justified in supporting the cause of one another." *Id.* at p.186.

Subsequent espousal by union.

An industrial dispute is referred for adjudication. The union comes up and espouses the cause only after reference. Will this convert the dispute into an industrial dispute so that the Labour Court or Tribunal gets jurisdiction to proceed with the industrial dispute? This question was also involved in the Hindu case.[72] The Indian Federation of Working Journalists had taken up the cause of the workman subsequent to the reference of the case for adjudication. The Court held that a dispute which was only an individual dispute at the time of reference cannot be converted into an industrial dispute by subsequent espousal of the cause by a union.[73]

It is certainly not a satisfactory state if industrial adjudication is to oscillate in accordance with the fanciful giving or withdrawing of support to the cause of a workman by a union. So necessarily a point of time has to be fixed with reference to which the question whether the dispute is sponsored by a union is to be decided. The date of reference has thus been prescribed by the Court as the crucial time to

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72. Bombay Union of Journalists v. The Hindu, A.I.R. 1963 S.C. 318.
73. Id. at p.324.

decide whether the dispute was an industrial dispute or collective dispute.

Change in the Law.

The scope of the expression 'industrial dispute' as evolved by judicial interpretation was limited to collective dispute. It did not cover an individual dispute between a workman and his employer. A workman dismissed from service could not therefore act individually, raise an industrial dispute and get it referred to a Tribunal for adjudication. He had to persuade other workmen or a union to espouse his cause in order to convert it into an industrial dispute.

This position was quite unsatisfactory. The dismissed workman acting by himself should be in a position to raise an industrial dispute over his dismissal. He should be able to set in motion the machinery under the Act for getting justice in case of extreme punishment like dismissal. It is unfair to compel him to go after other workmen or a union for this purpose. The law definitely needed a change. Parliament in 1965 enacted[74] a provision, namely section 2A,[75]

74. The Industrial Disputes (Amendment) Act 1965. (Act 35 of 1965).
75. See n.77 *infra*.

for the purpose.[76] The section provided that a dispute between an employer and a workman whose service is terminated will be an industrial dispute.[77]

The judicial approach, though styled as pragmatic,[78] was obviously against the interests of a dismissed individual

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76. The Statement of Objects and Reasons read:
"In construing the scope of industrial dispute, courts have taken the view that a dispute between an employer and an individual workman cannot *per se* be an industrial dispute, but it may become one if it is taken up by a union or a number of workmen making a common cause with the aggrieved individual workman. In view of this, cases of individual dismissals and discharges cannot be taken up for conciliation or arbitration or referred to adjudication under the Industrial Disputes Act, unless they are sponsored by a union or a number of workmen. It is now proposed to make the machinery under the Act available in such cases." See *Current Indian Statutes* (1966) Part II, p.60.

77. Section 2A reads,
"2A. *Dismissal, etc. of an individual workman to be deemed to be industrial dispute*-
Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute."

78. In *Workmen* v. *M/s. Dharammal*, A.I.R. 1966 S.C. 182, Gajendragadkar, C.J. observed, at p.186.
"The approach of industrial adjudication in dealing with industrial disputes has necessarily to be pragmatic.... There is no doubt that the limitation introduced by the decisions of this court in interpreting the effect of the definition prescribed by section 2(k) of the Act were based on such pragmatic consideration."

workman since the collective force alone could provide him with a remedy under the Act. The legislative wisdom dawned. The amendment brought to some extent justice to the individual workman in dismay. Today a dispute between a workman and his employer relating to dismissal is, by legislation, recognised as an industrial dispute.

Recognition of a dispute over dismissal between an individual workman and his employer as an industrial dispute is a leap forward. Till this change the collective strength of labour was required to move the wheels of dispute resolving machinery. The isolated individual was neglected. The injury done to an individual workman was immaterial unless the other workmen took up his cause and the issue was made one of labour as a collective body. In the absence of collective action his grievance was unheeded. There is a change in vision - a change for recognising the dignity and worth of the individual. The new law recognised that individual grievance of the dismissed workman is also one which should be taken into account. This is a step in the right direction towards the progressive development of industrial law.

It has to be mentioned in this context that section 2A of the Act is only the first step. It is true that now a

dispute between a dismissed workman and his employer is recognised as an industrial dispute. However, under the Act the workman has to approach the appropriate government to get the matter referred to a Tribunal or Labour Court for adjudication.[79] This is a great hurdle. The Act must confer a right in the dismissed workman to have direct access to the adjudicatory body, viz. the Labour Court or Tribunal. Until this is achieved one cannot say that the law is just or fair. Dismissal is an extreme action. Every workman against whom this action is taken should have the right to get the issue adjudicated upon by the Labour Court or Tribunal. Access to justice should not depend upon discretion of the Executive. The principle that a dismissed workman should have a right to appeal to an impartial Tribunal is an internationally acceptted norm.[80]

79. S.10. On the scope of the power of Government in the matter of reference, see Visweswaraiah, S.S., "Governments' Power to Refer Disputes for Adjudication Under the Industrial Disputes Act 1947: A Review", 3 Academy Law Review 65 (1979). For a criticism of the system see Santhok Ram, "Government's Discretion to Refer Industrial Disputes for Adjudication", 15 Indian Journal of Industrial Relations 307 (1979).

80. Recommendation No.119 adopted by the International Labour Organisation; see I.L.O., Conventions and Recommendations 1919-1966 (1966), p.1060. See Ch.X, n.5 & Ch.XI, n.2. "...(I)t seems clear that in principle (and this is the position of Recommendation No.119) the individual worker should himself have the right to appeal against his dismissal. Otherwise non-members may go unprotected, and even members - for reasons unrelated to the merits of the case - may fail to convince their union to take action." Edward Yemin, "Job Security: Influence of ILO Standards and Recent Trends", 113 International Labour Review 17 at p.27 (1976).

Chapter III

PUNITIVE DISCHARGE IN NON-PUNITIVE ROBE

The employer may terminate the services of workmen as a punitive measure. Punitive discharge attracts compliance with the requirements of permission or approval, as the case may be, when it is made during pendency of proceedings relating to industrial disputes. Even while such proceedings are not pending an industrial dispute may be raised over punitive discharge. The dispute may be referred for adjudication.

The employer may claim that the termination is not punitive but only a discharge simpliciter. He may say that he is exercising the right under the contract or standing orders to terminate the service of an employee. The order may be couched in non-punitive language. It may appear to be one of simple discharge. The employer may resort to such a step with a view to avoiding the restrictions the law places on punitive termination of services and to save his invalid action from being scrutinised by industrial adjudication. If the form of the order is the decisive factor, then obviously the workman will be denied of the protection the law affords

to him against unjustified punitive termination of service. Even though the termination is in form a simple discharge, can the question whether it is in reality a punitive termination of the service of the workman and hence a dismissal, be examined by the adjudicatory authority? If it can, how to decide whether the termination in a given case is a dismissal or a simple discharge?

In Patna Electric Supply Co. Ltd. v. Shri Bali Rai[1] the company sought for the permission of the Tribunal for dismissing certain workmen for misconduct. Later the company made another application before the Tribunal that on a reconsideration it was not pressing the petition for permission to dismiss and that it would meet the ends of justice if the workmen are discharged under the standing orders providing for simple discharge. The Tribunal allowed the request and granted permission to discharge. On appeal[2] the Labour Appellate Tribunal held that the appellant had alleged misconduct and that the misconduct had not been proved and that

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1. A.I.R. 1958 S.C. 204.
2. An appeal to the Labour Appellate Tribunal was permissible when the decision of the Tribunal involved a substantial question of law.

therefore the order of the Tribunal granting permission to terminate the service was liable to be set aside.[3] On appeal the Supreme Court pointed out that the Industrial Tribunal had recorded that the application for discharge was _bona fide_ and was actuated by an honest desire to discharge the workmen instead of dismissing them.[4] The Court said,

> "The discharge of the respondent, was a discharge simpliciter.....and was not a punitive discharge."[5]

The Court held that since the Tribunal had held that the action of the company was _bona fide_ exercise of the power to effect simple discharge, no substantial question of law was involved which would enable the Labour Appellate Tribunal to entertain an appeal over it.

It may be noted that the direct question which arose for consideration of the Court was only whether there was a substantial question of law arising from the order of the Tribunal. In other words it was not sitting in appeal over the finding of the Tribunal that the decision of the Tribunal

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3. _Patna Electric Supply Co. Ltd._ v. _Shri Bali Rai_, A.I.R. 1958 S.C. 204 at p.205.
4. _Id._ at p.206.
5. _Ibid._, _per_ Bhagwati, J.

on the *bona fides* of employer was correct or not. It is beyond any shadow of doubt that when an employer seeks to dismiss workmen on certain allegations and later seeks only to discharge them for the same allegations, the action is really punitive and therefore dismissal. The decision of the Tribunal that it was only a simple discharge effected *bona fide* does not appear to be correct.

Chartered Bank, Bombay v. *The Chartered Bank Employees Union*[6] applied the test of locking into the 'substance' to decide the issue. Justice Wanchoo said,

6. (1950-67)1 S.C.L.J. 51; A.I.R. 1960 S.C. 919. Under the system prevailing in the Bank the Chief Cashier had to give security for the entire working of the Cash Department and was responsible for any loss in that department. Consequently, appointments in that department were made on his recommendation. He had to give a guarantee about each employee so appointed. The Chief Cashier, finding that an Assistant Cashier for whom he had given such a guarantee was usually leaving the Bank before the cash was checked and locked up, withdrew the guarantee given in respect of that Assistant Cashier. The Bank there upon effected a simple termination of the service of the Assistant Cashier under para 522(1) of the Award applicable to the Bank. Procedure of termination by way of disciplinary action was provided in para 521 of the Award. The Tribunal held, deciding an industrial dispute raised over the termination, that it was in fact a case of termination of service for misconduct and that action in accordance with para 521 of the award had to be taken. It ordered reinstatement. In appeal the Supreme Court held that this was not a termination for misconduct and did not amount to a colourable exercise of power under para 522(1) of the Award.

> "It is....always open to the tribunals 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 to set it aside as a colourable exercise of the power."[7]

According to this view simple termination will be a colourable exercise of the power, if it is resorted to cover up what is in effect a termination for misconduct. In other words if such termination was by way of punishment for a misconduct, it will be dismissal.[8]

The same view was expressed in _Assam Oil Co._ v. _Workmen_.[9] Justice Gajendragadkar observed,

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7. _Id._ at p.55 _per_ Wanchoo, J.
8. The Court said,
   "It is true that there was some kind of allegation by the Chief Cashier which may amount to misconduct in this case and if we were satisfied that the termination of service of the respondent was due to that misconduct and that the form of the order was merely a cloak to avoid holding a proper enquiry under paragraph 521, no doubt there would have been no case for interference with the order of the tribunal." _Id._ at p.56 _per_ Wanchoo, J. The Court however found that in a situation when the guarantee was withdrawn by the Chief Cashier and the bank terminated the service of the Assistant Cashier, it could not be said that the use of power for simple termination under para 522(1) was a colourable exercise of that power. _Ibid._
9. A.I.R. 1960 S.C. 1264. Miss Scott, whose terms of appointment provided for termination of appointment on one months notice on either side was warned to show improvement in work and not to repeat lapses. Since no improvement was

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> "If it appears that the purported exercise of the power to terminate the service of the employee was in fact the result of the misconduct alleged against him then the tribunal will 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."[10]

He added that whether the termination in a given case amounted to dismissal would depend upon the facts and circumstances of the case.[11] Grave defects in work were pointed out to the discharged workman. In the letter of discharge itself the same allegations were made. These facts were relied by the Court to conclude that the discharge effected in the form of simple discharge amounted to punishment for alleged misconduct.[12]

(f.n.9 continued)
shown and the lapses did continue, the company terminated her service in the form of simple discharge. An industrial dispute arose. The Tribunal held that the termination was in substance dismissal for misconduct. The Supreme Court upheld this view.

10. Id. at p.1267.
11. Ibid. On the facts of the case the Court held that the discharge amounted to dismissal.
12. Id. at p.1268 per Gajendragadkar, J.
"In the present case there is no doubt that the order of discharge passed against Miss Scott proceeds on the basis that she was guilty of a misconduct. As we have already pointed out Mr. Gowan communicated to her what he thought were grave defects in her work and in the letter of discharge itself the same allegations are made against her. That being so, it must be held that the discharge in the present case is punitive. It amounts to a punishment for alleged misconduct...."

But even though misconduct is involved it would be open to the employer to effect a discharge by paying all terminal benefits as is done in the case of a simple discharge. The employer can either conduct a domestic enquiry and find him guilty and then discharge him invoking a provision in the contract of employment or in standing orders. He may prove misconduct before the Tribunal by adducing evidence, when the dispute over the termination is adjudicated. He may apply for permission for or approval of such discharge for misconduct. Such a step shows that he is resorting to termination as a punitive measure. Yet he prefers to discharge him. The action in substance is then punitive termination and hence amounts to dismissal, though the discharged workman gets all the benefits which he would have got in the case of a simple non-punitive termination.

In Assam Oil Co.[13] the guilt of the workman was not proved in a domestic enquiry. Still an attempt was made to prove the same before the Tribunal.[14] It was argued that the whole evidence relating to misconduct was produced before the Tribunal

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13. Assam Oil Co. v. Workmen, A.I.R. 1960 S.C. 1264.
14. Id. at p.1268.

and that therefore the Tribunal was not justified in interfering with the order of termination.[15] But the Court examined the evidence. According to the Court the fact that the workman joined a union also weighed in the mind of the management in terminating the service. Hence it held that the termination was not justified on that count.[16] It appears that had this circumstance not been there, and had the misconduct proved before the Tribunal, the action of terminating the service, though made as one of simple discharge, would have been upheld.

Management of U.B. Dutt & Co. v. Workmen[17] involved the case of a workman alleged to have been guilty of misconduct of threatening some of the officers of the company. A charge was served on him. He denied the allegations. He was informe that an enquiry would be held. He was placed under suspension He insisted that a domestic enquiry be held. But no enquiry was held. His service was terminated invoking a provision in the Standing Orders providing for termination of service with notice or pay in lieu of notice. In the order of termination

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15. *Id.* at pp.1266, 1267.
16. *Id.* at p.1268.
17. A.I.R. 1963 S.C. 411.

it was specified that a domestic enquiry, if held would lead to further friction and prejudice to the maintenance of discipline in the industry. An industrial dispute arose and was referred for adjudication. No attempt was made by the company before the Tribunal to prove the misconduct of the workman.[18] The Tribunal ordered reinstatement holding that the termination was a colourable exercise of the power. In appeal the Supreme Court upheld this view. Justice Wanchoo said,

> "The appellant failed to satisfy the tribunal when the matter came before it for adjudication that the exercise of the power in this case was _bona fide_ and was not colourable. It could have easily done so by producing satisfactory evidence; but it seems to have rested upon its right that no such justification was required and therefore having failed to justify its action must suffer the consequences."[19]

The decision in _Patna Electric Supply_[20] which upheld a discharge in similar circumstances was brought to the attention of the Court. Brushing the case aside the Court observed,

> "That case in our opinion has no application to the facts of this case because that case dealt with an application under

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18. _Id._ at p.413.
19. _Id._ at p.414.
20. A.I.R. 1958 S.C. 204, _supra_, n.8.

> S.33 of the Industrial Disputes Act while the present proceedings are under S.10 of the Act and the considerations which apply under S.33 are different in many respects from those which apply to an adjudication under Section 10."[21]

The jurisdiction in section 33 of the Act in granting permission for discharge or dismissal and the jurisdiction in adjudicating an industrial dispute over discharge or dismissal may vary. But the test to decide whether in a given case the order is one of discharge simpliciter or punitive discharge should be the same whether it is under section 33 or it is under section 10. If the power to effect a simple discharge is not exercised _bona fide_, then it is exercised for a punitive purpose. The scope of section 33 should extend to restrict such arbitrary punitive termination during pendency of proceedings. The purpose of adjudication on reference of a dispute over termination of employment is to mete out justice to the workmen. The test to decide whether the action is punitive or not should be the same both under section 33 and under section 10. It has also to be noted that in _Patna_

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21. _Management of U.B. Dutt & Co._ v. _Workmen_, A.I.R. 1963 S.C. 411 at p.414 _per_ Wanchoo, J.

Electric Supply[22] the Supreme Court was concerned not with the merits of the finding of the Industrial Tribunal that the action of the management in effecting the discharge for an alleged misconduct was bona fide, but concerned only with the limited jurisdictional question as to whether an appeal from the decision of the Tribunal would lie to the Labour Appellate Tribunal.[23]

Tata Oil Mills Co. Ltd. v. Workman[24] is a case of termination of the services of a workman. The order of discharge looked as if it is simple discharge. The reason given for the termination was that the management had lost confidence in him.[25] No domestic enquiry had been held in this case

22. Patna Electric Supply Co. Ltd. v. Shri Bali Rai, A.I.R. 1958 S.C. 204.
23. Id. at p.207.
24. [1964] 2 S.C.R. 125.
25. The workman, Mr. Banerjee was a salesman of the appellant company. It was his duty to visit dealers in his area and to popularise the products. He sent a report that certain products with stockists were damaged and not marketable. On inspection by his superior officer it was found that this report was false and that he had made the report without even opening the boxes which contained the products. The superior officer made a report. The explanation of Banerjee was taken. It was found to be unsatisfactory. His service was terminated under Rule 40(1) of the Service Rules which provided for simple discharge. An industrial dispute was raised and referred for adjudication to Labour Court.

though specific allegations of dereliction of duty were made and his explanation was called for. Evidence was led before the Labour Court[26] by both parties. The Labour Court held that the action was not mala fide. However, it felt that the discharge was not justified. On appeal the Supreme Court found that the appreciation of evidence by the Labour Court was not done properly and therefore the reasons given by the Labour Court were unsatisfactory.[27] The Court on appreciation of the evidence found that the allegations made against the workman were supported by evidence. It held that the discharge was justified.[28] The Court said,

> "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 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."[29]

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26. [1964]2 S.C.R. 125 at p.129.
27. Id. at p.132.
28. Id. at pp.132-135.
29. Id. at pp.130-131 per Gajendragadkar, J.

It could be seen that the action was in substance punitive. It was termination of the service for dereliction of duty. The action was upheld since there was evidence in support of the allegations. The discharge in the form of simple discharge was not a _mala fide_ action.

Murugan Mills[30] is an instance where the employer attempted to characterise a punitive discharge as a simple termination. The service of a workman was terminated during pendency of proceedings relating to an industrial dispute. The allegation of the management was that he deliberately adopted a policy of 'go slow' in his work. The order of termination showed that it was a simple termination of service under the Standing Orders.[31] It was not proved that the workman participated in 'go slow'. The employer contended that the termination was not a punitive measure for misconduct but only simple discharge. The Tribunal accepted the contention but ordered reinstatement since

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30. _Management of Murugan Mills Ltd._ v. _Industrial Tribunal, Madras_, (1950-67)6 S.C.L.J. 3817; A.I.R. 1965 S.C. 1496.
31. Clause 17(a) of the Standing Orders applicable to the establishment enabled the employer to terminate the service of a worker by 14 days' notice.

in its view the termination was not effected for proper reasons.[32] When the matter came on appeal[33] the Supreme Court emphasised that the form of the order is not decisive and pointed out that this was a case in which approval of the Tribunal ought to have been obtained as the action in

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32. Management of Murugan Mills Ltd. v. Industrial Tribunal, Madras, (1950-67)6 S.C.L.J. 3817. No application was filed by the employer seeking for approval. The workman complained under section 33A that it amounted to violation of S.33. The Tribunal held that it was not a case of dismissal for misconduct but a termination under the standing orders. Still in its view the action violated S.33 in so far as it amounted to an alteration of conditions of service for which also approval of the Tribunal was necessary. On merits the Tribunal held that the reason for termination alleged by the management, namely, go slow in work was not proved. Observing that termination under the Standing Orders could be effected only for proper reasons the Tribunal ordered reinstatement of the workman.

33. Ibid. The appellant filed a writ petition before the High Court of Madras against the decision of the Tribunal. The Court held that the termination was by way of punishment and required approval of the Tribunal. As the charge against the workman had not been made out by the employer the writ petition was dismissed. In appeal before a division bench the decision was upheld. Appeal was filed before the Supreme Court by special leave.

effect is punitive discharge.[34]

The holding in Tata Engineering and Locomotive Co. v. S.C. Prasad[35] indicates that when the management is reasonably satisfied of misconduct against a workman the employer can validly effect a discharge simpliciter instead of resorting to the procedure of holding an enquiry and dismissing him. Dubey, a workman was alleged to have assaulted, along with others the superintendent of the company. A police case was registered against him. The company terminated his service on the ground that it had lost confidence in him and his further continuation was prejudicial to the company's interest. The Tribunal deciding an industrial

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34. Id. at p.3820. Justice Wanchoo said:
"The form of 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.... These reasons were given before the tribunal by the appellant viz., the respondents' services were terminated because he deliberately adopted go-slow and was negligent in the discharge of his duty.... This clearly amounted to punishment for misconduct and therefore to pass an order under clause 17(a) of the Standing Orders in such circumstances was clearly a colourable exercise of the power...."

35. (1969) 3 S.C.C. 372.

dispute over the issue observed that no enquiry was held against him and that the company did not produce any material to show that the workman was involved in the incident. It held that the discharge was not bona fide. On appeal the Supreme Court referred to the undisputed facts on record like the assault, the charge by police, the committal order by the magistrate and the evidence adduced before him and said,

> "It is impossible to think the management was unaware of these materials.... From these materials,....if they were reasonably satisfied that Dubey had in one way or the other a hand in the assault, though they may not be enough for a conviction in a criminal court and the management came to the conclusion that it was no longer possible to continue to have confidence in him and retaining him in service was prejudicial to the interests of the company and discharged him from service, it is manifest that the management cannot be said to have acted mala fide or that their order was anything but what it stated."[36]

Workmen of Sudder Office, Cinnamara v. Management of Sudder Office[37] was a case of simple discharge on the ground of loss of confidence. A Store Keeper was suspected to

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36. Id. at p.378 per Shelat, J.
37. (1971)8 S.C.L.J. 575; 1971(2) L.L.J. 620.

have removed some materials without authority. He was served with a charge. In the enquiry it was found that the charges were proved.[38] The management passed an order of discharge on the ground that it lost confidence. A dispute over the discharge was referred for adjudication. The Labour Court held that the termination was in effect dismissal. In its view resort to the provision in the Standing Orders for simple discharge was a camouflage. On challenge by the management the Assam and Nagaland High Court held that the order was not one of dismissal but one of termination simpliciter on the ground of loss of confidence. On appeal the Supreme Court upheld the decision of the High Court and observed that though a charge sheet was given to the workman calling upon him to explain why he should not be dismissed or punished and some investigation was made, the order passed clearly showed that the management had not chosen to dismiss him.[39] What the

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38. Ibid. See infra, n.40.
39. Id. at p.385. The Court said:
"It is no doubt true that a charge-sheet was given to the workman wherein it was stated that if the allegations therein are proved, they will constitute an offence under the Standing Orders. But it must be noted that the said letter itself called upon the workman to explain why he should not be dismissed or otherwise punished. The workman gave his explanation by his letter dated March 22, 1960.

(contd..)

management said was that they lost confidence in him and considered it unsafe to retain him. In the Court's view it was only a discharge simpliciter.

What was the basis for loss of confidence? It was nothing but misconduct. Although it found that the charge against him was proved,[40] the management did not dismiss him but only discharged him. Instead of awarding him the extreme punishment of dismissal, a different course, i.e.,

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(f.n.39 continued)

Though some sort of investigation has been made by the management, which is loosely called the enquiry, the actual order passed on April 19, 1960 clearly shows that the management has not chosen to dismiss the workman on the ground that he is guilty of one or other of the misconduct enumerated in clause 10 of the Standing Orders. On the other hand, the order clearly shows that in view of the conduct of the workman, the management has lost confidence in him and that it considers it unsafe to retain him in his present position of trust and responsibility." Per Vaidyalingam, J.

40. Narrating the facts the Court said:

"An enquiry appears to have been made by the Sadar Office Manager and ultimately on April 19, 1960, an order was passed that the charges have been proved to the satisfaction of the management and that the latter has lost confidence in the workman." Id. at p.577 per Vaidyalingam, J. (Emphasis added).

discharge, was resorted. It was effected as a result of loss of confidence arising from misconduct of the employee. Will not discharge in such circumstances be punitive? The answer should be in the affirmative.

Dismissal in form of simple discharge, this wolf in sheep's garb, sometimes barks for air damsels employed to care those who travel by air. In Air India Corporation v. V.A. Rebellow[41] some air hostesses complained about the conduct of the respondent. The appellant Corporation took pity on them and terminated the service of the respondent, invoking a provision in the Regulations[42] which provided for termination of service without assigning any reason.[43] An

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41. (1972)9 S.C.L.J. 286; A.I.R. 1972 S.C. 1343.
42. Regulation 48 of the Air India Employees Service Regulations. The relevant portion read:
    "Termination: The service of an employee may be terminated without assigning any reason, as under:
    (a) of a permanent employee by giving him 30 days' notice in writing or pay in lieu of notice."
43. The relevant portion of the letter of termination read:
    "It has been decided to terminate your services, which we hereby do with immediate effect. You will be paid one month's salary in lieu of notice."

industrial dispute was then pending but no application for approval was filed. On a complaint[44] by the respondent the Labour Court held that it was punitive termination requiring approval. On appeal the Supreme Court examined whether the termination was a colourable exercise of power and in effect a dismissal for misconduct. The Court said:

> "The fact that the employer is not fully satisfied with the overall result of the performance of his duties by his employee does not necessarily imply misconduct on his part. The only thing that remains to be seen is if in this case the impugned order is mala fide. The record merely discloses that the appllant had suspicion about the complainant's suitability for the job in which he was employed and this led to loss of confidence in him with the result that his services were terminated under Regulation 48. In our view, loss of confidence in such circumstances cannot be considered to be mala fide."[45]

The Court observed that it was not possible to hold that the order was based on any misconduct.[46]

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44. Under S.33A of the Act. See Ch.VII, n.4.
45. Air India Corporation v. V.A. Rebellow, (1972)9 S.C.L.J. 286 at pp.296, 297, per Dua, J.
46. Id. at p.296. The Court said:
    "The order does not suggest any misconduct on the part of the complainant and indeed it is not possible to hold this order to be based on any conceivable misconduct." (Per Dua, J.)

The circumstances of the termination of service in the above case do not appear to point to any direction other than the conduct of the respondent with the air hostesses, as the reason for the termination. An employer may lose confidence in his employee if he is inefficient and thus unsuited for the job. Loss of confidence may also arise if the employee misbehaves and thus becomes unsuitable for the job. The circumstances in the case do not indicate inefficiency as the reason for termination of service. On the contrary, the reason was the complaints by the air hostesses about the respondent's conduct with them. If that is the case, clearly the termination was for his misconduct. The Court further said;

> "Once bona fide loss of confidence is affirmed the impugned order must be considered to be immune from challenge. The opinion formed by the employer about the suitability of his employee for the job assigned to him even though erroneous, if bona fide, is in our opinion final and not subject to review by the industrial adjudication."[47]

Bona fides of loss of confidence is not a safe criterion to decide whether or not the order of termination is in effect

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47. Id. at p.297, per Dua, J.

punitive. There may be a bona fide loss of confidence where misconduct is suspected. There may be bona fide loss of confidence also when the workman is inefficient and found to be not suited for the job. There may be bona fide loss of confidence even in cases where the opinion that the employee is unsuitable for the job is erroneous. If an employer can terminate the service of his employee on suspected misconduct job security in industrial employment will be a cry in the wilderness.

In a case where the misconduct of the employee, or the suspicion about the misconduct of the employee, is the cause for action based on 'loss of confidence', the action should be viewed as having its roots in misconduct. Even if the loss of confidence in the employee is bona fide, the case should not go outside the scope of scrutiny by Labour Court or Tribunal. The protection envisaged in the Act should be available in such cases. A contrary position will make it easy for an employer to circumvent the safeguards provided to workmen.

The doctrine of 'loss of confidence' was put within limits by the Supreme Court in L. Michael v. Messrs. Johnson Pumps India Ltd.[48] The appellant, an employee of proved efficiency and recipient of 'merit increments', was discharged. He alleged that it was victimisation for trade union activity. The management took the position that it had lost confidence in the workman, the reason being that he passed on very important and secret information about the affairs of the company to certain outside agency. There was no material in support of this plea. The Court held that the termination was not bona fide and said;

> "Loss of confidence is no new armour for the management; otherwise security of tenure, ensured by the new industrial jurisprudence and authenticated by a catena of cases of this court, can be subverted by this neo-formula. Loss of confidence in the Law will be the consequence of the loss of Confidence Doctrine."[49]

Loss of confidence is to be evaluated objectively and can be upheld only in cases where it rests on tangible basis which

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48. 1975(1) L.L.J. 262.
49. Id. at p.268 per Krishna Iyer, J.

can stand a judicial test. In the Court's view loss of confidence on mere suspicion without materials in support, or an exercise of the power to discharge on mere subjective feeling, is not bona fide exercise of the power. The Court observed,

> "...an employer who believes or suspects that his employee, particularly one holding a position of confidence, has betrayed that confidence, can, if the conditions and terms of the employment permit, terminate his employment and discharge him without any stigma attaching to the discharge. But such belief or suspicion of the employer should not be mere whim or fancy. It should be bona fide and reasonable. It must rest on some tangible basis and the power has to be exercised by the employer objectively, in good faith, which means honestly with due care and prudence. If the exercise of such power is challenged on the ground of being colourable or mala fide or an act of victimisation or unfair labour practice, the employer must disclose to the court the grounds of his impugned action so that the same may be tested judicially."[50]

In view of the observations of Michael,[51] it appears, an employer losing confidence in an employee on a suspicion about

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50. Id. at p.269.
51. Ibid.

his conduct may not be exercising the power of simple termination bona fide unless there are materials in support of the action. This would mean that in cases where the termination has its roots in misconduct a mere suspicion about it is not enough, but there should be evidence on which a reasonable person can come to the conclusion that the case warrants a termination of service.

M.S. Dhantwal v. Hindustan Motors[52] discloses an attempt to defeat an order of reinstatement by colourable exercise of power. During the pendency of proceedings relating to an industrial dispute before Tribunal, the appellant's services were terminated for misconduct.[53] No application for approval was filed before the Tribunal. On a complaint by the appellant the Tribunal ordered his reinstatement. The management reinstated him. But after ten days they terminated his services invoking a clause[54] in the contract of service. The

52. (1976)13 S.C.L.J. 262; A.I.R. 1976 S.C. 2062.
53. Ibid. The alleged misconduct was 'habitual absence' which was a misconduct under the company's Standing Orders.
54. Ibid. The first clause of the agreement of service between the appellant and the respondent read:
"The Employer agrees to and does hereby engage the services of the employee for a period of 5 years beginning with June 1, 1956 and thereafter until this agreement shall be determined by either party hereto giving to the other 3 months notice in writing of such intended termination.

(contd..)

industrial dispute was still pending but for a second time the management did not care to file application for approval. According to them the termination was not punitive and therefore no approval was required. On another complaint by the appellant, the Tribunal again held that it was dismissal for misconduct. It ordered for reinstatement.[55] Dealing with the question the Supreme Court observed:

> "Termination simpliciter or automatic termination of service under the conditions of service or under the standing orders is outside the scope of section 33 of the Act. This does not mean that the employer has the last

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(f.n.54 continued)

Provided that in case employer finds the employees' work satisfactory, employer shall have the option to extend the period of service by a further term of 3 years."

55. *Ibid.* The Tribunal held that the company really dismissed the workman for misconduct. The company challenged the decision before the High Court of Calcutta. A single Judge dismissed the writ petition, but on appeal a Division Bench set aside the order of the Tribunal. The Division Bench observed,

"It may be that having regard to the sequence of events that took place in this case the termination of service.... may be regarded as a colourable exercise of the power under the contract of employment or may even be regarded as one of unfair labour practice or *mala fide*, but the discharge cannot be said to be for any misconduct."

Id. at p.266. Appeal was filed before the Supreme Court against this decision.

> word about the termination of service of an employee and can get away with it by describing it to be a simple termination in his letter of discharge addressed to the employee."[56]

Upholding the decision of the Tribunal the Court clarified that though on the face of it the order of termination was one invoking the relevant clause in the agreement it was open to the Tribunal to pierce the viel and have a close look at the circumstances before it came to conclusion.[57]

In <u>Municipal Corporation of Greater Bombay</u> v. <u>P.S. Mavlankar</u>[58] the Supreme Court observed that in a case where misconduct is the foundation of the order and yet the employer effects only a simple discharge it may be possible to argue that he has not punished the employee but only discharged him. The Court felt it unnecessary to go into this controversy since it found that the termination in the case was not for misconduct. The reason for the simple discharge of the workman in this case was unsatisfactory record of

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56. <u>Id</u>., <u>per</u> Goswami, J. at p.270.
57. <u>Id</u>. at p.272.
58. A.I.R. 1978 S.C. 1380.

service. The Court held that the termination was not punitive.[59]

The Supreme Court highlighted the fluid state of law in the area of simple discharge and dismissal and observed in Gujarat Steel Tubes v. Gujarat Steel Tubes Mazdoor Sabha,[60]

> "Many situations arise where courts have been puzzled because the manifest language of the termination order is equivocal or misleading and dismissals have been dressed up as simple termination. And so judges have delved into distinction 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. Ruling are a maze on this question...."[61]

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59. Id. at pp.1384, 1385. Jaswant Singh, J. observed, "No misconduct was alleged against the respondent nor was any misconduct made the foundation for passing the impugned order of termination. The order of termination was clearly not passed by way of punishing the respondent for any misconduct. The view that the service of the respondent was not satisfactory was undoubtedly based on past incidents set out in the record but for each of these incidents punishment in one form or another had already been meted out to her and it was not by way of punishment for any of these incidents, but because as gathered from these incidents, her record of service was unsatisfactory that her service was terminated...."
60. A.I.R. 1980 S.C. 1896.
61. Id. at p.1910 per Krishna Iyer, J.

According to the Court if 'the basis or foundation for the order of termination is clearly not turpitudious or stigmatic or rooted in misconduct or visited with evil pecuniary effects' it is simple discharge; if otherwise it is dismissal.[62] The Court observed that the true ground for the termination is to be found out not from the formal order alone but from other proceedings and documents connected with the order of termination. When it is so scrutinised and is found to have 'a punitive flavour in cause or consequence' the order of termination is dismissal.[63] Speaking for the majority, Justice Krishna Iyer said,

> "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, it 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

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62. Ibid.
63. Id. at p.1911.

> 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."[64]

Justice Koshal dissented with the view. In his view it is open to the employer not to punish an employee even if misconduct is proved. He may only effect a simple discharge. It is the 'intention to punish' that makes an order of discharge one of dismissal. Justice Koshal said,

> "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.... 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."[65]

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64. *Ibid.*
65. *Id.* at pp.1937, 1938.

Justice Krishna Iyer, it appears, looks at the issue from the angle of the workman when he puts forward the test as one of 'cause or consequence' whereas Justice Koshal appears to look it from the angle of the employer, when despite the cause for termination the 'intention' of the employer is decisive of the issue.

The test formulated by Justice Iyer is more persuasive than the one applied by Justice Koshal. To permit an employer to effect a discharge with all the benefits to the workman as in the case of simple discharge may not be objectionable in itself even if it is for a misconduct. But what is objectionable is seeing it as a case of simple discharge and not as one of punitive discharge. This in effect denies the workman the protection afforded by the Act in the case of punitive discharges.

Closure as a punitive measure.

Punitive actions by the employer may take various forms. Punitive termination may be effected not only in the form of discharge. It may even take the form of a closure. An employer may bona fide close down an undertaking due to

financial reasons where he cannot carry on the industrial activity profitably. An employer may also close down an undertaking *mala fide* with the ulterior motive of punishing his employees. This he may do during pendency of proceedings relating to an industrial dispute. Reasons may be many. The employer may be enraged by the trade union activities of the employees in his undertaking. He may not be in a position to bear with them when they make various demands. He may also be unhappy as the workmen have raised an industrial dispute. He may close down the undertaking with a view to punishing the workmen *en masse* for bringing about such a state of affairs in the industrial undertaking. Should he be permitted to do so freely? Should not the restrictions on punitive discharge apply to such cases? Discharge of one workman for his trade union activity would amount to punitive discharge by way of victimisation. By the same token collective discharge as a punishment for trade union activity or collective action, arising from closure of the above mentioned type should also come within the scope of punitive discharge. In other words, the law should provide for some control over the exercise of the power by the employer in closing down an

undertaking. Previous permission should be insisted in such cases. This will render the authority an opportunity to examine whether or not the proposed closure is mala fide and an attempt at victimisation.

In Banaras Ice Factory Ltd. v. Its Workmen[66] the Supreme Court held that the requirement of previous permission[67] did not apply to a case of discharge due to bona fide closure[68] of an undertaking. In the Court's view the employer has the right to close his business and he can exercise that right bona fide.[69] But if there is no real closure, or if the

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66. A.I.R. 1957 S.C. 168.
67. Section 22(b) of the Industrial Disputes (Appellate Tribunal) Act 1950, provided that during pendency of an appeal no employer shall "discharge or punish, whether by dismissal or otherwise, any workman concerned in such appeal, save with the express permission in writing of the Appellate Tribunal."
68. Banaras Ice Factory Ltd. v. Its Workmen, A.I.R. 1957 S.C. 168. The case related to closure of an undertaking due to want of coal, during pendency of an appeal before the Labour Appellate Tribunal.
69. Id. The object of the restriction is protection of workmen against victimisation and creation of a peaceful atmosphere to ensure that the pending dispute can be brought to a termination in such an atmosphere. Justice S.K. Das observed at p.173,

    "Those objects are capable of fulfilment in a running or continuing industry only, and not in a dead industry. There is hardly any occasion for praying for permission to lift the ban imposed by S.22, when the employer has the right to close his business and bona fide does so, with the result that the industry itself ceases to exist."

closure is *mala fide*, the Court observed, there is no closure in the eye of the law and the workmen may complain that the provision stipulating permission has not been observed.[70] Thus the Court made a distinction between *bona fide* closure and *mala fide* closure, in applying the restrictions of permission or approval. It appears that by *bona fide* closure and *mala fide* closure the Court meant closures which are justified and unjustified respectively.[71]

The same meaning appears to have been given to '*bona fide* closure' in an earlier decision, *Pipraich Sugar Mills Ltd. v. Pipriach Sugar Mills Mazdoor Union*,[72] where the Supreme Court observed,

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70. *Ibid.* The Court said:
"If there is no real closure but a mere pretence of a closure or it is *mala fide*, there is no closure in the eye of law and the workmen can raise an industrial dispute and may even complain under section 23 of the Act."

71. *Ibid.* The Court said,
"The Appellate Tribunal did not find that the closure of the appellants' business was not *bona fide*; on the contrary, in awarding compensation, it proceeded on the footing that the appellant was justified in closing its business on account of the reasons stated by it."

72. A.I.R. 1957 S.C. 95. The undertaking was closed and the workmen were discharged. An industrial dispute was raised and the question whether the workers' services were improperly terminated was referred for adjudication. The contention was raised before the Supreme Court in appeal

(contd..)

"....where the business has been closed and it is either admitted or found that the closure is real and *bona fide* any dispute arising with reference thereto would....fall outside the purview of the Industrial Disputes Act."[73]

Subsequent decisions of the Supreme Court appear to whittle down the meaning of *bona fide* and *mala fide* closure. *Tea Districts Labour Association* v. *Ex-Employees*[74] did not read the observations[75] in *Banaras Ice Factory*[76] as laying down the proposition that wherever it is *mala fide* a closure must be deemed to be unreal and non-existent.[77] The Court

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(f.n.72 continued)
from the decision of the Tribunal that there could be no reference of an industrial dispute after closure of the undertaking. The Court held that the claims of workers which arose while an industry was alive could be referred for adjudication though when there had been a real and *bona fide* closure a dispute about such closure would be outside the scope of the Act.

73. *Id.* at p.100 *per* Venkatarama Ayyar, J.
74. A.I.R. 1960 S.C. 815.
75. *Supra*, n.70.
76. *Banaras Ice Factory Ltd.* v. *Its Workmen*, A.I.R. 1957 S.C. 168.
77. *Tea Districts Labour Association* v. *Ex-Employees*, A.I.R. 1960 S.C. 815. Justice Gajendragadkar, observed at p.817. "With respect we do not read the observations as laying down an unqualified and categorical proposition of law that wherever a closure is mala fide it must be deemed to be unreal and non-existent. What this Court has said is that in cases of pretence of closure no closure in fact has taken place and for the purpose of S.23 of the Act with which the Court was dealing a mala fide closure may conceivably be treated as falling in the same class as a pretence of closure."

therefore held that the findings about _mala fides_ cannot justify an order for payment of pay and allowances to the workmen discharged.[78] The Supreme Court went a step further. It held in _Indian Hume Pipe Company_ v. _Their Workmen_,[79] that the Tribunal cannot go into the question of motive behind the closure to decide whether the closure had been _mala fide_.[80] Rferring to some previous decisions[81] the Court said,

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78. _Ibid_. The appellant company closed down two of its establishments. The workers challenged the closure as _mala fide_. An industrial dispute was raised and referred for adjudication. The Tribunal took the view that the apprehensions of the appellant were not justified and it could have carried on the business of the two establishments. It therefore held that the closure was not _bona fide_ and hence unreal and directed payment of pay and allowances to the workmen. In appeal the Supreme Court set aside the decision of the Tribunal and held that in _mala fide_ closures the only liability of the employer is to pay compensation for closure as stipulated in the Act.
79. 1969(1) L.L.J. 242. The appellant company's factory was closed down on the ground that it was not safe to continue the working of the factory at that site. Workmen raised a dispute. The industrial dispute was referred for adjudication. The Tribunal held that the closure was _mala fide_ being effected to discharge workmen who were fighting for betterment of their service conditions. The Supreme Court in appeal set aside the decision of the Tribunal.
80. _Id_. at p.246. See _infra_, n.82.
81. See _Hathisingh Manufacturing Co. Ltd_. v. _Union of India_, (1950-67)4 S.C.L.J. 2506; A.I.R. 1960 S.C. 923; _Express Newspapers Ltd_. v. _Their Workers_, (1950-67)5 S.C.L.J. 3139; A.I.R. 1963 S.C. 569 and _Andhra Prabha Ltd_. v. _Madras Union of Journalists_, (1950-67)4 S.C.L.J. 2494; [1967-68]33 F.J.R. 318.

"..... once the Tribunal finds that an employer has closed its factory as a matter of fact it is not concerned to go into the question as to the motive which guided him and to come to a conclusion that because of the previous history of the dispute between the employer and employees the closure was not justified."[82]

In coming to this conclusion the Court relied on previous decisions in Hathisingh Manufacturing Co. Ltd. v. Union of India,[83] Express Newspapers Ltd. v. Their Workers,[84] and Andhra Prabha Ltd. v. Madras Union of Journalists.[85] The main question in Hathisingh was however the constitutional validity of the provision for payment of compensation in cases of closure. A contention was raised that it is an unreasonable restriction on the fundamental freedom to close down an undertaking if payment of compensation is to be made even in bona fide closures. In this context the Court observed in Hathisingh:

"If the true basis of the impugned provision is the achievement of social justice,

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82. Indian Hume Pipe Company v. Their Workmen, 1969(1) L.L.J. 242 at p.246 per Mitter, J.
83. (1950-67)4 S.C.L.J. 2506; A.I.R. 1960 S.C. 923.
84. (1950-67)5 S.C.L.J. 3139; A.I.R. 1963 S.C. 569.
85. (1950-67)4 S.C.L.J. 2494; 1967-68 33 F.J.R. 318.

> it is immaterial to consider the motives of the employer or to decide whether the closure is bona fide or otherwise."[86]

Express Newspapers[87] related to the question whether the action taken by the employer was a lock-out or closure. It was held that it was a matter which could be examined by the Tribunal and in that context the Court observed that if the action taken by the employer was bona fide and genuine closure the dispute in respect of it would not be an industrial dispute.[88]

In Andhra Prabha[89] the management claimed to have closed down the undertaking on April 1959. The Tribunal on consideration of some factors held that the closure was effected only in November 1959. The Supreme Court examining the facts stated by the Tribunal in support of its finding, held that they did not indicate that the undertaking was not closed in April 1959. It held that the business of the company was closed from April and whatever might have been the motive

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86. Hathisingh Manufacturing Co. Ltd. v. Union of India, (1950-67)4 S.C.L.J. 2506 at pp.2511, 2512 per Shah, J.
87. Express Newspapers Ltd. v. Their Workers, (1950-67)5 S.C.L.J. 3139; A.I.R. 1963 S.C. 569.
88. Id. at p.3144 per Gajendragadkar, J.
89. Andhra Prabha Ltd. v. Madras Union of Journalists, (1950-67)4 S.C.L.J. 2494; (1967-68) 33 F.J.R. 318.

behind the closure, it was effective from April 1959.[90]

In none of these cases has it been held that the Tribunal could not examine whether a closure was bona fide or mala fide.

Examining the expression of bona fide in Pipraich Sugar Mills[91] the Court argued in Indian Hume Pipe Company[92] that the expression referred not to the motive but to the fact of closure. One wonders whether in arguing so, the Court has been a little confused. Does the Court mean to say that every closure if it is factual is bona fide irrespective of the motive behind? This would amount to recognition of a right in the employer to close down his undertaking arbitrarily and even by way of victimisation.

The law should not recognise an absolute right in the employer to effect a mala fide closure of his undertaking.

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90. Id. at p.2505 per Mitter, J.
91. Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union, A.I.R. 1957 S.C. 95.
92. Indian Hume Pipe Company v. Their Workmen, 1969(1) L.L.J. 242 at p.245. Quoting the observation of Justice Venkatarama Iyer (supra, n.73) Justice Mitter observed:
"The use of the expression bona fide in the above quotation does not refer to the motive behind the closure but to the fact of the closure."

The Supreme Court observed in Excel Wara v. Union of India,[93]

> "The law may provide to deter the reckless, unfair, unjust or mala fide closures. But it is not for us to suggest ....what should be a just and reasonable method to do so."[94]

A reasonable method may be to provide for obtaining of previous permission from an authority which can grant permission for bona fide closure. In any case, if such requirement is violated the doors of industrial adjudication should be open to enable the workmen to get their grievance mitigated.

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93. A.I.R. 1979 S.C. 25. The case related to the constitutional validity of section 25-O providing for previous permission of Government for closing down big industrial establishments. The Court held that it violated article 19(1)(g) of the Constitution being an unreasonable restriction on the freedom, since it enables the Government to refuse to grant permission, in the public interest, even in cases of bona fide closure effected for adequate and sufficient reasons.

94. Id. at p.38 per Untwalia, J.

PART III

DISMISSAL DURING PENDENCY

Chapter IV

RESTRICTIONS ON DISMISSAL.

Differences of opinion often arise between the employer and workmen on various issues. An industrial dispute may be raised and the machinery of dispute resolution under the Act may be set in motion. Attempts at conciliation may be made or the procedure of arbitration may be resorted. Another means of dispute settlement is adjudication. The dispute may be referred by the Government for adjudication. One thing is obvious. When workmen raise an industrial dispute, it may lead to straining the relations between the employer and employees. The employer may attempt to wreck vengeance on the workmen. With a view to preventing such unhappy turn of events and securing industrial peace the law lays down some safeguards. Restrictions are put on the exercise of the managerial prerogative of taking disciplinary action against workmen.

Restrictions during pendency.

Section 33 of the Act places restriction on the right of the employer to punish workmen for misconduct during the

pendency of proceedings relating to industrial disputes, when such proceedings are pending before the conciliation, arbitration and adjudication authorities. Originally in 1947 such restriction applied to punishment for misconduct connected with a pending dispute.[1] The restriction was that the employer before imposing punishment, had to obtain prior permission of the authority before whom the proceedings were pending. On the other hand, for misconduct not connected with a pending dispute the employer was free to punish a workman.

The law was altered in 1950.[2] The amendment extended the requirement of previous permission even to a case of punishment for misconduct not connected with a pending

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1. S.33. As enacted originally in 1947, it read: "No employer shall during the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings, nor save with the express permission in writing of the conciliation officer, Board or Tribunal, as the case may be, shall during the pendency of such proceedings, discharge, dismiss or otherwise punish any such workmen, except for misconduct not connected with the dispute."
2. In 1950, by the Industrial Disputes (Appellate Tribunal) Act, 1950.

dispute.[3] No employer could punish by dismissal or otherwise, his workman during pendency of proceedings without permission, if such workman was one concerned in the pending industrial dispute.[4]

Purpose of restrictions.

The purpose behind the above scheme of restrictions is clear. It is to secure industrial peace, to avoid victimisation during pendency of industrial dispute and to ensure settlement of the pending disputes in a calm and peaceful

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3. S.33, as substituted in 1950, read:
"During the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, no employer shall—
(a) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or
(b) discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute,
save with the express permission in writing of the conciliation officer, Board or Tribunal as the case may be."

4. "In Sweden under the Employment Protection Act 1974, there can be no dismissal until a dispute about dismissal for 'cause' has been resolved by the County Court."
Bob Hepple, "A Right to Work?", 10 Industrial Law Journal 65 (1981) at p.77.

atmosphere.[5] Justice S.R. Das observed in Bukmaji Bala,[6]

> "The object...is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimisation by the employer on account of their having raised industrial disputes or their continuing the pending proceedings. It is further the object...to ensure that proceedings in connection with industrial disputes already pending should be brought to a termination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned....which may give rise to fresh disputes likely to further exacerbate the already strained relations between the employer and the workmen."

Whether or not the misconduct is connected with the dispute, punishment to workman concerned in a dispute might further worsen the already strained atmosphere in the industrial undertaking. This may be the reason why the original position was altered extending the requirement of prior permission even to punishment for misconduct not connected with a pending dispute. The employers, however, viewed this as a serious inroad into their right of taking disciplinary action against workmen. There may be an unhappy situation when

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5. For a discussion on S.33 see K.P. Chakravarti, Law Relating to Services and Dismissals in Industry (1976) pp.138-145.
6. Automobile Products of India Ltd. v. Bukmaji Bala, (1950-67) 4 S.C.L.J. 2728 at p.2738; A.I.R. 1955 S.C. 258 at p.265. For facts of the case see Ch.V. nn.6. 7 & 8.

several applications for permission are filed and are awaiting disposal for a considerable time. The result is obvious. An employer cannot take prompt action against his workman even for a serious misconduct not connected with a pending dispute. Such situation is not uncommon. The complaint of the employers will be that such a situation will have adverse impact upon maintenance of discipline in industries.[7] It is true that indiscipline in industries affects industrial production. It goes counter to the interest of the employer. It is detrimental to public interest. The other side of the picture is also important. It is with a view to avoiding victimisation and ensuring industrial peace during pendency

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7. Gajendragadkar, J. observed in Lord Krishna Textile Mills v. Its Workmen:

"(T)he effect of the....section was that pending an industrial dispute the employer....could pass no order of discharge or dismissal against any of his employee even though....the intended action had no connection whatever with the dispute pending between him and his employees. This led to a general complaint by the employers that several applications had to be made for obtaining the permission of the specified authorities in regard to matters which were not connected with the industrial dispute pending....and in many cases where....immediate action against an offending workman was essential in the interest of discipline, the employers were powerless to do the needful and had to submit to the delay involved in the process of making an application for permission in that behalf and obtaining the consent ...."

(1950-67)4 S.C.L.J. 2706 at p.2709; A.I.R. 1961 S.C. 860 at p.862.

of proceedings restrictions on the power of the employer are introduced. There is inevitably a conflict between these two values. Solution lay in balancing these diverse interests. The law was therefore altered again.[8]

The amended law confined the requirement of prior permission to punishment for a misconduct connected with the pending dispute.[9] For misconduct not thus connected with the dispute the employer could punish workman subject to subsequent

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8. By the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956.
9. Clause (b) of sub-section (1) of Section 33 as amended in 1956. It read:

    "During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,—

    .. ..

    (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending."

   In 1964, by the Industrial Disputes (Amendment) Act 1964 the restriction was made applicable also when proceedings were pending before an arbitrator.

approval by the authority.[10] A limited number[11] of workmen's representatives[12] were, however, given special treatment; in

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10. Clause (b) sub-section (2) of Section 33 as amended in 1956. It read:

    "During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute,—

    .. ..

    (b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

    Provided that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

    The Industrial Disputes (Amendment) Act 1964 made these restrictions applicable when proceedings were pending before an arbitrator. The same Act conferred authority to take action, subject to the above restrictions, in accordance with the terms of the contract where there were no standing orders.

11. The number in an establishment was to be one per-cent of the total number of workmen, subject, however, to a minimum of five and a maximum of one hundred. Sub-section (4) of S.33, introduced in 1956 read:

    "In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one per-cent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen."

12. They were described as 'protected workmen.' The Explanation to sub-section (3) of Section 33 introduced in 1956 defined a protected workman thus:

(contd..)

their case previous permission was required.[13] In other words for punishing the officer of a trade union, the protected workman as the law calls him, prior permission is necessary.

'Workman concerned'

The requirement of previous permission or subsequent approval is applicable only if the workman proceeded against is one concerned in a pending industrial dispute. Now an

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(f.n.12 continued)

"Explanation.— For the purpose of this sub-section, a 'protected workman', in relation to an establishment, means a workman who, being an officer of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf."

In 1971, by the Industrial Disputes (Amendment) Act 1971 for the words 'an officer' the words 'a member of the executive or, other office bearer' were substituted.

13. Clause (b) of sub-section (3) of Section 33. The relevant portion of the sub-section read:

"Notwithstanding anything contained in sub-section (2) no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

.. ..

(b) by discharging or punishing, whether by dismissal or otherwise such protected workman, save with the express permission in writing of the authority before which the proceeding is pending..."

important question arises. Who is a workman concerned in a dispute? An industrial dispute in an establishment is one over which all the workmen in the establishment will have a general concern. Does this 'general concern' entitle one to be called a workman concerned in the dispute? Or, is it necessary that the outcome of the dispute should affect him directly? There existed a divergence of judicial opinion. The Labour Appellate Tribunal,[14] the High Courts of Madras and Bombay and the Supreme Court of India had expressed their considered opinion on different occasions.[15]

The Labour Appellate Tribunal examined the question whether or not the expression 'workman concerned' covers only persons whose cases were the subject-matter of the pending dispute. In its view a restrictive interpretation

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14. The Labour Appellate Tribunal was established in 1950 as an appellate body over industrial tribunals. It was abolished in 1956. For a detailed study of the circumstances which led to its setting up and abolition, see B.S. Narula, The Abolition of the Labour Appellate Tribunal (1963).
15. Eastern Plywood Manufacturing Co. v. Eastern Plywood Manufacturing Workers' Union, 1952(1) L.L.J. 628; Newtone Studios v. Ethirajulu, A.I.R. 1957 Mad. 737; New Jahangir Vakil Mills v. N.L. Vyas, A.I.R. 1959 Bom. 248 and New India Motors (P) Ltd. v. K.T. Morris, A.I.R. 1960 S.C. 875.

confining the expression to such person involved in the dispute would defeat the object of the restrictions, namely, fair and satisfactory enquiry on the pending dispute by avoidance of victimisation. It held that where the dispute was a collective one the workmen not directly involved also would be concerned in the dispute since they would be or must be considered to be parties to the dispute.[16] According to the Labour Appellate Tribunal all those who are bound by the settlement or award in the dispute are concerned in the dispute.

The High Court of Madras went on the same lines and gave a wide interpretation. In Newtone Studios v. Ethirajulu[17] it

16. Eastern Plywood Manufacturing Co. v. Eastern Plywood Manufacturing Workers Union, (1952)1 L.L.J. 628. The question involved in the case was whether the workmen dismissed without permission during pendency of an industrial dispute about dismissal of other workmen were concerned in the dispute. The Labour Appellate Tribunal held, confirming in appeal the decision of the industrial tribunal, that the pending dispute was a collective dispute between the company and its 'workmen,' and hence the workmen were concerned in the dispute. The authority drew a distinction between a dispute raised by a single individual and a dispute raised by the employees collectively. In the former, in its view, no other workman could be said to be concerned. But in the latter case, namely, a collective dispute, the other workmen were concerned. (at p.630.)
17. A.I.R. 1957 Mad. 737.

observed that a restrictive interpretation would leave the management free to take action without any restriction against other workmen not directly involved.[18] If the management does so the only remedy of these workmen is to raise an industrial dispute. Industrial peace will be the casualty. Effective prior checks on victimisation will be done away with. Peaceful atmosphere conducive to a peaceful termination of the pending proceedings will remain a mirage.

The Court was not, however, prepared to accept the test of collective nature of the dispute to hold that the other workmen were concerned in the dispute. Every industrial dispute being a collective dispute[19] acceptance of the test would obliterate, the court pointed out, the distinction between 'workmen' and 'workmen concerned' in an industrial dispute.

Could it be said that all those who would be bound by the award in the dispute are workmen concerned in the dispute?

18. Id. at p.740 per Rajagopalan, J.
19. S.2A of the Industrial Disputes Act, which deems an individual dispute over dismissal to be an industrial dispute, it may be noted, had not been introduced in the Act at that time.

An award being binding not only on persons currently employed in the establishment but also on those subsequently employed,[20] every workman on whom an award in a dispute would bind could not be treated as one concerned in the dispute.[21] Finding it difficult to formulate a general test or formula to be applied to solve the issue, the Court observed that the question is one to be decided in each case on an appreciation of all the circumstances of the case.[22] A workman was dismissed and some others retrenched. Whether or not the action was justified was the question in Newtone Studios v. Ethirajulu.[23] The termination was effected during the pendency of an appeal before the Labour Appellate Tribunal. The appeal was filed under the Industrial Disputes (Appellate Tribunal) Act 1950 from the award of the Industrial Tribunal in an industrial dispute relating to retrenchment raised by two unions in the establishment. This Act required permission of the Appellate Tribunal[24] before such action was taken against workmen

20. S.18(3)(d) of the Act provides that where a party to the industrial dispute is composed of workmen the award binds on all persons employed in the establishment or part of the establishment, as the case may be, to which the dispute relates and on all persons who subsequently become employed in that establishment or part.
21. Newtone Studios v. Ethirajulu, A.I.R. 1957 Mad. 737 at p.739 per Rajagopalan, J.
22. Ibid.
23. A.I.R. 1957 Mad. 737
24. Industrial Disputes (Appellate Tribunal) Act 1950, S.22.

concerned in the appeal. The required permission was not taken. The workmen were therefore ordered to be reinstated. This was challenged by the employer before the High Court of Madras. The question was raised whether the respondents were 'workmen concerned' in the appeal pending before the Labour Appellate Tribunal. The workmen involved were parties to the pending proceedings. The Court held that they were. The subject matter of the dispute was one in which they were interested. These factors were considered by the Court as relevant circumstances for holding that the workmen were concerned in the pending proceedings.[25]

Looking at the case one finds that the subject matter of the pending dispute was one in which obviously the respondent's interest was only general and not direct. The pending dispute related to retrenchment of some other workmen. The respondents would in no way be affected directly by the outcome of that dispute. But being a dispute in the establishment relating to termination of service of some workmen, the respondents would have a general interest in the outcome of the dispute.

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25. Newtone Studios v. Ethirajulu, A.I.R. 1957 Mad. 737 at p.740.

The High Court of Bombay, however, preferred to take a different view in New Jahangir Vakil Mills v. N.L. Vyas.[26] Three workmen belonging to the ring frame department were dismissed for misconduct by the appellant. Two industrial disputes were pending at that time. One related to compensation payable to the workers in the winding and warping department and the other was about seniority among some workers in the bleaching department. The question which the court considered was whether the dismissed workmen were concerned in the above dispute. The court held that they were not. In the court's view only those who were directly and personally concerned in the pending dispute could be called workmen 'concerned.' This meant that unless the result of the pending proceeding would directly operate to the benefit or prejudice of a workman he would not be one concerned in the dispute.[27] Thus according to the Bombay view when the

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26. A.I.R. 1959 Bom. 248.
27. Id. at p.249 per Vyas, J. Making a distinction between a person 'interested' and one 'concerned' in a dispute, he observed,

"It is...conceivable that in a dispute in which only a particular worker might be concerned, the other workers of the other departments of the Mills might be interested.... In our opinion, the word 'concerned' connotes a kind of specific, direct interest ....it implies a direct and personal interest which

(contd..)

cause of workmen in one department is taken up by a union of workers the workmen in other departments of the company are not concerned in the dispute.

The narrow construction formulated by the Bombay High Court did not survive. In New India Motors (P) Ltd. v. K.T. Morris[28] the Supreme Court overruled the decision. The respondent had taken interest in the case of seven discharged apprentices who had been working under him. He gave evidence on their behalf in an industrial dispute, relating to their discharge pending before the industrial tribunal. The question was whether he was a workman concerned in that dispute.[29] The

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(f.n.27 continued)
a party to the proceedings would have in the result of those proceedings, when the same are capable of directly affecting him...beneficially or prejudicially according to the result."

28. A.I.R. 1960 S.C. 875.
29. Ibid. After giving evidence in favour of the workmen the respondent was proceeded against. The company then began to call for explanations from him on various charges. Finally it abolished the post and discharged the respondent. The industrial dispute relating to the discharge of seven apprentices was pending at that time, but the employer did not take permission under S.33 of the Industrial Disputes Act, from the Tribunal for discharging the respondent. The employer's contention was that only the discharged apprentices were the workmen concerned in the dispute and that the respondent was not one concerned in the dispute.

Court held that the expression 'workmen concerned in such dispute'[30] includes all workmen on whose behalf the dispute has been raised. It covers also those who will be bound by the award in the pending dispute.[31] The Court examined the nature of an industrial dispute,[32] the persons on whom an award in such a dispute would be binding[33] and the object of the restrictions[34] imposed on the employers' right to dismiss during pendency of proceedings. It held these aspects as very relevant in deciding the question. Sponsored by a union or by a number of workmen a dispute becomes an industrial dispute.[35] It is a dispute between the employer and some workers acting collectively. All those who sponsor the dispute in the Court's view, will be concerned in the dispute.[36]

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30. Id. The Court was construing the scope of section 33 as it stood before the amendment in 1956. But the expression being the same even after its amendment the court clarified that the construction applies even to the amended section. per Gajendragadkar, J. at p.878.
31. Id. at p.879.
32. Since section 2A of the Act was not then introduced the court was referring to the definition of industrial dispute in section 2(k) under which a dispute had to be sponsored by workmen to become an industrial dispute.
33. See supra, n.20.
34. Under section 33 of the Act.
35. See supra, n.32.
36. New India Motors (P) Ltd. v. K.T. Morris, A.I.R. 1960 S.C. 875 at p.879.

An award binds persons directly involved in the dispute and others employed in the establishment or part of the establishment to which the dispute relates.[37] All those bound by the award will be workmen concerned in the dispute.[38] The object of the restriction is to keep industrial peace so as to ensure a fair and satisfactory enquiry into the pending dispute. These circumstances indicated, in the view of the Court, that a narrow construction, limiting the application of the restriction to the case of persons whose cases were actually involved in the pending dispute, was not acceptable. The Supreme Court held on these considerations that the respondent was one concerned in the pending dispute.[39]

A workman may be one whose case is not the subject matter of the pending dispute. He may not be one on whom the award in the pending dispute may be binding. Suppose such a workman gives evidence in a dispute in favour of the workmen involved in the dispute. Should not the requirement of permission extend to his case? It should, if an atmosphere

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37. See _supra_, n.20.
38. _New India Motors (P) Ltd._ v. _K.T. Morris_, A.I.R. 1960 S.C. 875 at p.879.
39. _Ibid._

ensuring a fair and satisfactory enquiry is one of the objects of the restriction. A workman can co-operate without fear of victimisation in a proceeding relating to an industrial dispute, only if the restrictions on dismissal are applicable in his case also. Suppose a workman is dismissed and an industrial dispute over it is raised by him.[40] When this dispute is referred for adjudication, perhaps workmen in other parts of the establishment may be witnesses. They are not parties to the dispute, since the dispute is not raised by them. They are not bound by the award since they do not work in that part of the establishment to which the dispute relates. They may have a fear that if they give evidence for the workman, they may be victimised. Permission of the Tribunal will not be required if punitive action of dismissal is taken against them since they are not workmen concerned in the pending dispute. The restriction, of permission or approval, designed to check arbitrary punitive action by employer during pendency of proceedings being not available to them, it is likely that a fear complex develops in these workmen who may be chary in

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40. S.2A of the Act deems a dispute over dismissal raised by a workman to be an industrial dispute.

giving evidence in favour of the workman and against the management. Obviously, this interferes with a just probe into the pending dispute. If they do give such evidence and are proceeded against, the peaceful atmosphere in the establishment will be disturbed. The reason behind the restrictions on dismissal during pendency of proceedings applies to them with equal force. The restrictions should therefore be extended to such cases.

Nature of the dispute, relevant.

New India Motors[41] appears to stand qualified by Digwadih Colliery v. Ramji Singh.[42] In the latter, the respondent was dismissed for misconduct of lending money to a subordinate worker. This misconduct was prohibited by the Standing Orders. An industrial dispute was pending in the Tribunal between the appellant company and the workmen. Should the approval of the Tribunal be obtained for the dismissal of the respondent for this misconduct? The Tribunal answered the question in the affirmative. Relying on the

41. New India Motors (P) Ltd. v. K.T. Morris, A.I.R. 1960 S.C. 875.
42. [1962-63] 22 F.J.R. 383 (S.C.).

broader construction in _New India Motors_ it held that the respondent was a workman concerned in the pending dispute and approval was required. On appeal the Supreme Court had a different view and quashed the order of the Tribunal. The Court observed that the nature of the dispute is material to decide the question whether the workman was concerned in the pending dispute. The respondent had not explained what the nature of the pending dispute was. The Court said,

> "Even if the broader construction...is adopted it is necessary to enquire what was the subject matter of reference.... (U)nless it is known as to what was the nature of the dispute pending in the said Reference, it would plainly be impossible to decide whether the respondent is a workman concerned..."[43]

In other words being a party to the dispute is not the decisive factor. The position seems to be quite unsatisfactory. It gives unrestricted freedom to the employer who in some cases at least can proceed against the workmen who are parties to the dispute during pendency of proceedings. This may not be conducive to maintenance of the much talked about industrial peace and avoidance of victimisation. If a person

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43. _Id._ at p.385 _per_ Gajendragadkar, J.

who sponsors the cause in an industrial dispute is victimised his remedy then will be to raise an industrial dispute. Digwadi Colliery is more or less a return to the narrow construction making the protection of permission and approval available only in the case of those who are primarily and directly concerned in a pending dispute. Persons who sponsor a dispute or give evidence against an employer are likely to be viewed by the employer as trouble makers. The employer, naturally, would like to get rid of them as early as possible. In such cases the purpose of law should be to extend, and not to deny, protection.

Pendency.

The restrictions are applicable during pendency of proceedings not only before Labour Courts and Tribunals but also before the conciliation and other specified authorities under the Act.[44] The question arises when the period of pendency starts and ends. This has to be answered in the light of the relevant statutory provisions.[45]

44. See supra, nn.9 and 10.
45. Section 20 of the Act. It reads:
"20. Commencement and conclusion of proceedings.— (1) A conciliation proceeding shall be deemed to have commenced on the date on which a notice of strike or lock-out under section 22 is received

(contd...)

In a public utility service[46] conciliation proceedings commence when the notice of strike is received by the conciliation officer and conclude when the memorandum of settlement is signed or when report of the conciliation officer on the failure of conciliation is received by the Government. It may not be possible for the employer to know the date on

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(f.n.45 continued)

by the conciliation officer or on the date of the order referring the dispute to a Board, as the case may be.

(2) A conciliation proceeding shall be deemed to have concluded—

(a) where a settlement is arrived at, when a memorandum of the settlement is signed by the parties to the dispute;

(b) where no settlement is arrived at, when the report of the conciliation officer is received by the appropriate government or when the report of the Board is published under section 17, as the case may be; or

(c) when a reference is made to a court, Labour Court, Tribunal or National Tribunal under section 10 during the pendency of conciliation proceedings.

(3) Proceedings before an arbitrator under Sec.10A or before a Labour Court, Tribunal or National Tribunal shall be deemed to have commenced on the date of the reference of the dispute for arbitration or adjudication, as the case may be and such proceedings shall be deemed to have concluded on the date on which the award becomes enforceable under section 17A."

46. Public utility service is defined in section 2(n) of the Act. Section 22 of the Act prescribes advance service of a notice of strike or lock-out in public utility services.

which the report is received by the Government. The employer may dismiss an employee, after failure of conciliation proceedings, without permission or without filing an application for approval. If by that time the conciliation officer's report did not reach the Government, the action of the employer will be violative of section 33, since conciliation proceedings are, in the eye of the law, still pending.

In a non-public utility service the Act is silent when proceedings before a conciliation officer commence. The conciliation officer has to intimate the parties the date from which proceedings[47] will be commenced. An ingenuous employer can flout the statutory safeguards. He can dismiss a workman before the date so specified.

Conciliation proceedings can be not only before the conciliation officer but also before the Board of Conciliation.[48]

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47. Rule 10 of the Industrial Tribunal (Central) Rules 1957 provides that the conciliation officer shall give intimation to the parties when he intends to commence conciliation in a non-public utility service. In his communication he has to specify the date from which he intends to commence conciliation.
48. Section 5 of the Act provides for constitution of Boards of Conciliation. It consists of a Chairman who is an independent person and two or four other members. These other members represent the parties to the dispute in equal numbers.

Proceedings before the latter commence[49] from the date of reference of the dispute by the appropriate government.[50] Adjudicatory proceedings before a Labour Court or Tribunal and arbitration proceedings before an arbitrator commence from the date of reference.[51] Will it not again lead to an anomalous situation? A dismissal is made after the date of reference of a dispute for adjudication; but the employer does not know that there is a reference when he dismisses the employee. Will not the dismissal be bad in law? The provisions relating to pending proceedings manifestly create problems in these areas.

The protection ceases when the proceedings terminate. An employer may start disciplinary proceedings for a misconduct which arose during pendency of proceedings. If he wants to punish the workman during pendency permission or approval, as the case may be, is required. But he can wait and punish the workman the moment the pending proceedings

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49. S.20(1). Supra, n.45.
50. Section 10 of the Act provides for reference of disputes.
51. Supra, n.45.

terminate without seeking permission or approval. This is a defect in the law.

There is no use treating the symptoms without examining the causes of the evil. It is not the mere pendency of the dispute but the cause that lies at the substratum that is material. Proceedings before the authorities in respect of a dispute often antagonise the parties. Workmen may give evidence against employer and criticise his actions. Employer may threaten workmen and workmen may attempt to pay this back in the same coin. Knowingly or unknowingly both sides add fuel to the already existing fire. Victimisation and revenge go deep into the mind of the employer. He may pick one or the other conduct of the workmen and initiate disciplinary action. This may be to threaten them and to make them behave as the employer desires. The threat is that if they do not behave accordingly punishment will follow. The law has to prevent these untoward happenings. The law seeks to prevent this now only during pendency. All that the employer has to do is to wait till the disposal of the pending proceedings before he can punish. In other words, he need only postpone

the punishment. The effect of the threat on the workman is the same irrespective of whether the punishment comes during pendency or immediately after pendency. What is required is that in respect of a misconduct alleged to have been committed during pendency of proceedings the protection of the law should be available. In otherwords a punishment which required permission or approval, should not be permitted to be inflicted freely after such pendency; the requirement should extend to such action even after pendency. One has to look not to the time of punishment but to the time when the alleged misconduct is said to have been committed. If the misconduct is one alleged to have been committed during pendency the protection of the requirement of permission or approval by a competent authority should be available to the workman.

To whom does the restriction apply?

Suppose there is a change in employer in an establishment during the pendency of an industrial dispute. Can the second employer dismiss the workman without permission or approval? In S.K.G. Sugar Ltd. v. Chairman, Industrial Tribunal[52] the Supreme Court had to meet this question. On

52. (1950-67)4 S.C.L.J. 2604; A.I.R. 1959 S.C.230.

the day next to the reference of a dispute between the management of a factory and its workmen, the liquidator obtained from the Court an order to lease out the factory to the appellant. The new lessee discharged some workmen during pendency of the dispute. The Supreme Court held that section 33 was not attracted in this case since the employer who discharged the workmen was different from the one who was a party to the pending dispute. The Court said:

> "The identity of the employer at the commencement of the reference with the employer who intends to take proceedings within the ban of section 33 of the Act must be established and if the latter has no concern with or relationship with the former, section 33...of the Act do not come into operation at all."[53]

In the view of the Court the only situation in which such identity exists is when the latter employer is a nominee or benamidar of the former or is his heir, successor or assignee.[54] The object of the restriction being to put checks on victimisation, unfair labour practices, dismissal without even a prima facie case and to maintain industrial

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53. Id. at p.2618 per Bhagwati, J.
54. Ibid.

peace during pendency of proceedings, the Court observed, the employer against whom the ban applies is the one who is concerned in the pending industrial dispute.[55]

This interpretation of the law has the effect of modifying of the language in section 33. The provision does not stipulate that the employer should be one 'concerned' in the pending dispute[56] where as it does so in the case of workman.[57] Had the intention been to restrict the application of the ban only to employers concerned in the dispute a similar qualification would have been used in the section in the case of employers. The fact that it was used in the case of workman but not used in the case of employer indicates that the purpose was to bring within the scope of the section an employer though he is not concerned in the pending dispute.

Victimisation or unfair labour practice may involve attempts on the part of the employer to take to task such persons who in his view are trade union workers fomenting

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55. Id. at p.2614.
56. Section 33, supra, nn.9 and 10.
57. Ibid.

trouble. It is idle to presume that only the employer with whom a dispute was raised will resort to such measures. The new employer may attempt to victimise the workmen who had raised disputes with the previous employer. If victimisation by the old employer would create disharmony in the establishment the same would be the result of such action by the new employer. There is an obvious need to protect workmen concerned in an industrial dispute from victimisation by his employer, old or new.

What is material is the identity of the workers and not of the employer. If the protection in section 33 is not extended to victimisation by a new employer during pendency of an industrial dispute, the workmen are deprived of an effective safeguard. S.K.G. Sugar Ltd.[58] shuts the eyes against this reality when it says:

> "If the workmen felt that they have been victimised or that there had been an unfair labour practice, they could perhaps raise fresh industrial disputes and press the State Government to make a fresh reference...."[59]

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58. S.K.G. Sugar Ltd. v. Chairman, Industrial Tribunal, (1950-67)4 S.C.L.J. 2604; A.I.R. 1959 S.C. 230.
59. Id. at p.2617 per Bhagwati, J.

Applicability of the requirements of permission or approval: A preliminary issue.

When an employer proposes to take punitive action against his employer in some cases he may be in doubt whether the case is one which falls within the scope of section 33.[60] Can he, in such cases, invoke the jurisdiction of the authority by filing an application for permission or approval and at the same time raise the plea that no permission or approval is required in the case?

It may look strange that an employer can be permitted both to invoke the jurisdiction of an authority and to challenge its jurisdiction. But the context in which he invokes the jurisdiction is peculiar. Evidently, the need for permission or approval fetters his rights to take action against his employee. It is not an action to his liking if the employer files an application under section 33. The other party to the proceeding, the workman, will rather submit to than challenge the jurisdiction. A challenge by the workman indicates in the ultimate analysis his indirect endorsement on the power of the employer to take action and

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60. For the text of the relevant portion of the section see *supra*, nn.9 and 10.

finally leads to giving a blank cheque to the employer. The workmen may not like to have such a position.

Violation of the requirement of obtaining prior permission or approval attracts the penal provisions in the Act and causes sanctions against the employer.[61] The employer may be at times in doubt whether or not the requirement of permission or approval is attracted in a given case. It is advisable then to permit him to file an application seeking permission or approval and then to contend that the application is not really required as the section is not attracted. If the authority affirms its jurisdiction erroneously he can challenge it in appropriate proceedings. If the authority holds erroneously that it has no jurisdiction, the aggrieved party can challenge it in appropriate proceedings. The employer will not then run the risk of incurring penalty. This is the ironical situation which compels the employer to take to contradictory pleas before the authority.

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61. S.31(1). It reads:
"Any employer who contravenes the provisions of section 33 shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both."

Recognition of a right in the employer to raise the applicability of section 33 as preliminary issue will also be in the interest of workers. The authority cannot suo motu exercise its jurisdiction. An application is sine qua non of its jurisdiction to examine whether the workman is entitled to protection. The chance to raise as a preliminary issue the question whether or not the case is one requiring permission or approval, permits the employer to file an application seeking permission or approval even in doubtful cases. The authority will then get an opportunity to examine the issue and pass proper orders. Tata Iron & Steel Co. v. D.R. Singh[62] is illustrative. The appellant company sought approval for dismissal of the respondent. At the hearing the company raised the plea that it filed the application only by way of abundant caution. It also pleaded that the jurisdiction of the Tribunal was not attracted since the respondent was not a 'workman concerned' in the pending dispute. The company wanted the Tribunal to decide this preliminary point before considering the question whether or not approval is to be given. The Tribunal, however, took

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62. (1960-67)4 S.C.L.J. 2598; A.I.R. 1966 S.C. 288.

the view that the company could not raise such a plea. In its view the company itself had to decide the question whether the dismissal required approval of the Tribunal and that if it felt that no approval was required the application had to be withdrawn. The company did not withdraw the application. The Tribunal considered the application and refused approval. The question reached the Supreme Court. It was held that the Tribunal was in error in not dealing with the preliminary point. The Court said:

> "...(I)n a situation like the present.... it would be legitimate for an employer like the appellant to make an application under section 33 without prejudice to his case that section 33 did not apply. The question about the construction of the words 'a workman concerned in such dispute' which occur in section 33(1) and (2) has been the subject matter of judicial decisions and somewhat inconsistent views had been taken by different High Courts on this point.... Where judicial decisions differed on the construction of the words 'workmen concerned in such dispute,' it would be idle and unreasonable to suggest that the employer should make up his mind whether section 33 applies or not...."[63]

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63. Id. at p.2599, 60 per Gajendragadkar, C.J. (Emphasis added).

The use of the words 'in a situation like the present' and 'an employer like the appellant' and the reference to a situation when 'judicial decisions differed on the construction' appear to indicate that what was laid down is not a general proposition. It appears, for the reasons stated before, that it would be in the interest of all concerned, both the employer and the employee, if a right to raise the applicability of the section as a preliminary issue is recognised.

Disposal of the application after pendency.

It may be recalled that the statutory provision for permission and approval has application only during pendency of proceedings relating to an industrial dispute. Can the authority permit or approve dismissal after the disposal of the main dispute? According to the Supreme Court the authority will have no jurisdiction to dispose an application for permission[64] but will have jurisdiction to dispose of an application for approval.[65] Proceedings for permission or approval are not subsidiary or incidental to the

64. See infra, n.70.
65. See infra, n.67.

main dispute but are independent and separate.[66] There is no provision for abatement of these proceedings on disposal of the main dispute. Obviously the authority would not lose jurisdiction even after disposal of the main dispute.

Cases requiring permission are, by that very requirement, graver than those requiring only subsequent approval. The situation that in the graver cases the authority would lose jurisdiction and in the other it would retain jurisdiction may appear at first sight to be anomalous. In _Tata Iron & Steel Co._ v. _S.N. Modak_[67] the question arose whether the Tribunal can dispose of an application for approval after the disposal of the main dispute. The Court held that it can. As stated early an application for approval is not a proceeding interlocutory and subsidiary to the pending

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66. See _infra_, n.68.
67. (1950-67)4 S.C.L.J. 3692; A.I.R. 1966 S.C. 380. A workman was dismissed for misconduct not connected with the pending industrial dispute. An application for approval was filed. Before the disposal of the application the pending industrial dispute was disposed of. The Tribunal holding that the application for approval can be disposed of by it, even after the disposal of the main dispute, considered the application and refused to accord approval finding that the domestic inquiry conducted before dismissal was unfair, _mala fide_ and biased.

industrial dispute.[68] The only connection between the pending industrial dispute and the application for approval is that the latter was necessary because the dismissal was effected during pendency of the industrial dispute. In the absence of a specific clause to that effect in the Act a proceeding validly commenced by way of an application for approval does not automatically end when the main dispute is disposed of. Dismissal during pendency will be invalid unless it is approved by the Tribunal. The fact that the main dispute has been disposed of *ipso facto* does not validate the dismissal.[69] The Tribunal should therefore have

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68. *Id.* at pp.2697, 98. Gajendragadkar, C.J. speaking for the Court said:
"...(T)he application of the appellant can, in a sense, be treated as an incidental proceeding; but it is a separate proceeding all the same, and in that sense, it will be governed by the provisions of section 33 (2)(b) as an independent proceeding. It is not an interlocutory proceeding properly so called in its full sense and significance; it is a proceeding between the employer and his employee who was no doubt concerned with the main industrial dispute along with other employees; but it is nevertheless a proceeding between two parties in respect of a matter not covered by the said dispute."

69. *Id.* at pp.2698, 99. Gajendragadkar, C.J. said:
"It cannot be denied that with the final determination of the main dispute between the parties the employer's right to terminate the services of the respondent according to the terms of service revives and the ban imposed on the exercise of the said power is lifted. But it cannot be overlooked that for the period between the date on

(contd..)

jurisdiction, separate and independent from that over the main dispute, to dispose of an application for approval even after the disposal of the main dispute.

But the case of permission to dismiss is viewed from a different angle. Permission sought is to dismiss during pendency of the industrial dispute. When the dispute is solved there remains to be no need for dismissal during pendency nor a need to take permission for exercising the employer's right to dismiss. In P.D. Sharma v. State Bank of India[70] it was pointed out by the Supreme Court that

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(f.n.69 continued)
which the appellant passed its order in question against the respondent, and the date when the ban was lifted by the final determination of the main dispute, the order cannot be said to be valid, unless it receives the approval of the Tribunal."

70. 1969(1) L.L.J. 513. An industrial dispute was pending before the National Tribunal. A protected workman concerned in the dispute was sought to be dismissed and application for permission was filed. This was later transferred to Labour Court. The main dispute was disposed of and the award became enforceable. At this time no orders had been passed by the Labour Court on the permission application. Subsequently the Labour Court dropped the proceedings holding that it had no competence to deal with the application after the termination of the proceedings relating to the industrial dispute.

under common law the employer had the right to dismiss his employee and the only question to be examined was the extent to which such right has been statutorily restricted. The restriction, namely, the requirement of permission, being operative only during pendency of proceedings, the Court held, vanishes on the disposal of the main dispute.[71] Distinguishing the cases of approval from those of permission the Court held that the previous decision in Tata Iron & Steel Co. v. S.N. Modak[72] had no bearing on the present question and that the Labour Court had no competence to consider the application for permission after the termination of the pending proceedings.[73]

The requirement of permission serves one useful purpose. It helps to avert chances of victimisation that may further deteriorate industrial peace. But if after termination of

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71. Id. at p.519. Hegde, J. observed,
"Once the industrial dispute was decided, the ban placed on the common law, statutory or contractual rights of the respondent stood removed and it was free to exercise those rights. Thereafter there was no need to take any body's permission to exercise its rights."
72. (1950-67)4 S.C.L.J. 2692; A.I.R. 1966 S.C. 380.
73. P.D. Sharma v. State Bank of India, 1969(1) L.L.J. 513 at p.519.

proceedings the employer has a free hand in disciplinary matters, it smacks danger, namely, the possibility of victimisation after the conclusion of proceedings. No sure and effective remedy is there for the workmen in such cases. An industrial dispute can be raised but reference of it for adjudication is discretionary on the part of the Government. This points to the need for extending the jurisdiction to dispose of an application for permission even after the conclusion of the pending industrial dispute.

Chapter V

PERMISSION TO DISMISS.

That the management should seek permission to dismiss a workman during pendency of proceedings is an important safeguard against arbitrary dismissal. The Act does not indicate the extent of jurisdiction of the authority in deciding an application seeking for permission. The jurisdiction of the authority in granting or refusing the request has therefore been delimited by judicial decisions.

Permission: Scope.

The Supreme Court had occasion to speak on the scope of enquiry by the authority in an application seeking for permission. One of its earlier decisions, Atherton West and Co. v. Suti Mill Mazdoor Union,[1] can be cited. The case related not to the Industrial Disputes Act 1947 but to a State law, namely, the United Provinces Industrial Disputes Act 1947. The direct question for consideration of the Court was whether an industrial dispute could arise from a dismissal effected

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1. (1950-67) 1 S.C.L.J. 120; A.I.R. 1953 S.C. 241.

after obtaining permission from the Regional Conciliation Officer during pendency of proceedings of another industrial dispute.[2] Referring to the extent of jurisdiction of that authority in dealing with an application for permission,[3] the Court observed that the effect of granting permission was in no way to validate the dismissal since the authority was not entrusted with the duty of examining whether the dismissal

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2. Clause 23 of the Government notification issued under the United Provinces Industrial Disputes Act, 1947 (see infra n.3) prohibited dismissal of a workman, during pendency of certain proceedings under the Act, except with the written permission of the Regional Conciliation Officer. The appellant obtained permission and dismissed some workmen during pendency of the proceedings. An industrial dispute over the dismissal was raised. On reference, examining the merits of the case the Regional Conciliation Board held, on merits, the dismissal wrongful and ordered reinstatement. The decision was confirmed in appeal by the Labour Appellate Tribunal. The matter was taken up in appeal before the Supreme Court.
3. Clause 23 of the United Province Government Notification provided:

   "Save with the written permission of the Regional Conciliation Officer or the Assistant Regional Conciliation Officer concerned irrespective of the fact whether an enquiry is pending before a Regional Conciliation Board or the Provincial Conciliations Board or an appeal has been filed before the Industrial Court, no employer, his agent or manager, shall discharge or dismiss any workman during the continuance of an enquiry or appeal and pending the issue of the orders of the State Government upon the findings of the said Court...."

   See (1950-67)1 S.C.L.J. 120 at p.124.

proposed was within the rights of the employer. In deciding whether or not permission is to be granted all that the authority had to examine is whether a prima facie case for dismissal of the workman is made out or whether the employer was actuated by any improper motive and whether he was resorting to any unfair labour practice. The enquiring authority examines only the question whether the ban imposed on the employer's right to dismiss is to be lifted. The authority does not examine the merits of the case. The scope of enquiry being thus limited, the Court in Atherton held that an industrial dispute could arise from a dismissal effected with prior permission of the authority.[4]

A distinctive feature can be noted in Atherton. The proceedings were pending before the adjudicatory authority (Industrial Court) while the permission had to be obtained from the conciliation authority (Regional Conciliation Officer or Assistant Regional Conciliation Officer).[5] Suppose that permission is to be obtained from the adjudicatory authority before whom the main proceedings are pending? Would it make

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4. Atherton West & Co. v. Suti Mill Mazdoor Union, (1950-67)1 S.C.L.J. 120 at pp.125, 126.
5. Supra, n.3.

any difference? Automobile Products of India v. Rukmaji Bala[6] throws some light on this aspect. This case, again, did not relate to section 33 of the Industrial Disputes Act, but related to section 22 of the Industrial Disputes (Appellate Tribunal) Act 1950.[7] Some workmen were sought to be retrenched. These workmen were concerned in an appeal pending before the Labour Appellate Tribunal. An application for permission was filed before it under section 22 of the 1950 Act, since the retrenchment amounted to alteration of conditions of service to the prejudice of the workmen. The Appellate Tribunal granted the permission but in doing so it imposed certain conditions also.[8] Section 22 of the 1950 Act and section 33 of the Industrial

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6. (1950-67)4 S.C.L.J. 2728; A.I.R. 1955 S.C. 258.
7. S.22 of the 1950 Act read,
   "During the period of thirty days allowed for the filing of an appeal under section 10 or during the pendency of any appeal under this Act, no employer shall—
   (a) alter, to the prejudice of the workmen concerned in such appeal, the conditions of service applicable to them immediately before the filing of such appeal, or
   (b) discharge or punish, whether by dismissal or otherwise, any workman concerned in such appeal,
   save with the express permission in writing of the Appellate Tribunal."
8. Automobile Products of India v. Rukmaji Bala, (1950-67)4 S.C.L.J. 2728. The appellant's name was removed from the list of approved contractors by the Government of India. Hence it had to retrench some workmen. Since an appeal was then pending it filed applications for permission before Labour Appellate Tribunal. The Labour Appellate Tribunal gave permission subject to some conditions as to payment of compensation. The validity of this order was challenged in appeal before the Supreme Court.

Disputes Act were similar. On appeal the Supreme Court construed the scope of these sections in both the Acts. According to the Court the provisions imposed restrictions on the employer in respect of the matters mentioned in them and also provided for removal of the ban. The Court observed that all that the authority had to do was to determine whether the ban is to be removed or not by according or withholding permission. It was held therefore that the authority could not impose any conditions while granting the permission. The authority exercises only a limited jurisdiction while deciding a permission application; it is not deciding an industrial dispute relating to the question. Under section 33 the power to grant permission has been vested in the conciliation officer and the Board of Conciliation. This was relied on by the Court as a circumstance to indicate that consideration of the merits of the question, as may be done by a Tribunal when it decides an industrial dispute over the question, has not been intended to be done by the authority, including a Tribunal, when it decides an application under section 33. The extent of jurisdiction exercisable by a Tribunal under section 33 was therefore limited and did not extend to an adjudication of the

issue on merits. The jurisdiction was similar, observed the Court, to that exercisable by a conciliation officer.[9] Construing section 22 of the 1950 Act in the light of section 33 of the 1947 Act, the Court held that the Labour Appellate Tribunal also exercised only a limited jurisdiction while disposing of an application for permission.[10]

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9. Id. at p.2738. Justice Das said:

"Even a cursory perusal of section 33 of the 1947 Act will make it clear that the purpose of that section was not to confer any general power of adjudication of disputes. It will be noticed that under section 33 of the 1947 Act the authority invested with the power of granting or withholding permission is the conciliation officer, Board or Tribunal. The Conciliation Officer or the Board normally has no power, under the 1947 Act, to decide any industrial dispute but is only charged with the duty of bringing about a settlement of dispute. It is only the Tribunal which can by its award decide a dispute referred to it. Section 33 by the same language confers jurisdiction and power on all the three authorities. Power being thus conferred by one and the same section, it cannot mean one thing in relation to the conciliation officer or the Board but a different and larger thing in relation to the Tribunal. There is no reason to think that the legislature, by a side wind as it were, vested in the conciliation officer and the Board the jurisdiction and power of adjudicating upon disputes which they normally do not possess and which they may not be competent or qualified to exercise."

10. Id. at p.2739. Das, J. referring to the earlier decision in Atherton West & Co. Ltd. v. Suti Mill Mazdoor Union (supra, n.1) said:

"Section 22 of the 1950 Act is in pari materia with section 33 of the 1947 Act and the above clause 33 of the U.P. Government Notification (supra, n.3) and most of the considerations noted above in connection with these provisions apply mutatis mutandis to section 22 of the 1950 Act."

The limited jurisdiction in dealing with an application for permission was affirmed by the Supreme Court in Rohtas Industries v. Brijnandan Pandey.[11] Referring to the decision in Atherton[12] and Automobile Products[13] the Court said:

> "That being the scope of the enquiry on an application under section 22 of the Act,[14] what the Labour Appellate Tribunal had to decide in the present case was whether the

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11. (1950-67)4 S.C.L.J. 2869; A.I.R. 1957 S.C. 1. The case related to the question of granting permission to discharge some temporary workmen. The terms of employment stated "....the company could discharge the employee at any time without notice, compensation and giving any reason therefor, whether on completion of the work on which the employee was engaged or earlier." (Id. at p.2871). The Labour Appellate Tribunal refused permission holding that the workmen could not be discharged on the ground put forward by the appellant, viz., that the erection work was over, since the workers had been working in the production department after completion of the erection work in 1950. In appeal the Supreme Court set aside the decision of the Labour Appellate Tribunal holding that the erection work was not over by 1950, that workers were being discharged under the terms of appointment as and when the works were completed and that since it is shown that the workers were temporary employees and were put on the spare list as and when the erection work were gradually over, a prima facie case has been made out for giving permission.
12. Supra, n.1.
13. Supra, n.6.
14. The Industrial Disputes (Appellate Tribunal) Act 1950. Supra, n.7.

> appellant company had made out a *prima facie case for the proposed discharge* and whether they were resorting to any unfair practice or victimisation in the matter of the proposed discharge."[15]

Where there has been a proper domestic enquiry.

What is a *prima facie* case? How is it made out? These questions were looked into by the Supreme Court in *Lakshmi Devi Sugar Mills v. Ram Sarup.*[16] The Court held that where there has been a fair domestic enquiry into the misconduct

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15. *Rohtas Industries v. Brijnandan Pandey,* (1950-67)4 S.C.L.J. 2869 at p.2874 *per* S.K. Das, J. (Emphasis added).
16. (1950-67)4 S.C.L.J. 2579; A.I.R. 1957 S.C. 82. This was also a case relating to section 22 of the 1950 Act providing for permission of the Labour Appellate Tribunal. During the pendency of an appeal before the Labour Appellate Tribunal some workmen resorted to strike and adopted a threatening attitude. The management proceeded against them for misconduct, by serving charge sheets, suspending them and fixing a domestic enquiry. The management conducted the enquiry but the workmen did not present themselves at the enquiry. The workmen demanded that the enquiry must be conducted not by the management but by an independent tribunal. The management suspended the workmen and applied for permission of the Tribunal to dismiss them. The suspended workmen filed an application before the Appellate Tribunal under section 23 alleging that the management had locked them out by way of punishment and that since this was done without prior permission of the Appellate Tribunal they had to be reinstated. The Appellate Tribunal refused permission to dismiss the workmen since according to it the appellant company did not act in conformity with the standing orders. The workmen's application was allowed and they were ordered to be reinstated. The Supreme Court in appeal set aside the order of the Appellate Tribunal and granted permission to the appellant to dismiss the workmen.

and the management had *bona fide* come to the conclusion that the workman was guilty of misconduct, a *prima facie* case is made out. In such circumstances, Justice Bhagwati emphasized, the authority is "bound to give requisite permission."[17] He made it clear that the Appellate Tribunal dealing with an application for permission to dismiss could not go into the question of the gravity or harshness of the proposed punishment.[18]

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17. "If on the materials before it the Tribunal came to the conclusion that a fair inquiry was held by the management in the circumstances of the case and it had *bona fide* come to the conclusion that the workman was guilty of misconduct with which he had been charged a *prima facie* case would be made out by the employer and the Tribunal would under these circumstances be bound to give the requisite permission..." *Id.* at p.2592 *per* Bhagwati, J.
18. "The Tribunal before whom such an application for permission is made under section 22 of the Act would not be entitled to sit in judgement on the action of the employer if once it came to the conclusion that a *prima facie* case had been made out *for dealing out the punishment* to the workmen. It would not be concerned with the measure of the punishment nor with the harshness or otherwise of the action proposed to be taken by the employer except perhaps to the extent that it might bear on the question whether the action of the management was *bona fide* or was actuated by the motive of victimisation." *Ibid.* (Emphasis added).

The same principle was applied by the Court in deciding the jurisdiction of Tribunal under section 33 of the Act. In Caltex (India) Ltd. v. Fernandes,[19] the extent of this jurisdiction was the moot question. A workman was, after enquiry, sought to be dismissed for misconduct, namely, smoking in the prohibited area while an aircraft was being fuelled.[20] An application for permission to dismiss the workman was filed before the Tribunal. The Tribunal examined the merits and found the dismissal an excessive punishment in view of certain facts.[21] The management was not agreeable to imposition of a lesser punishment. Hence the Tribunal refused permission. The Supreme Court on appeal[22] following Atherton,[23] Automobile Products[24] and Lakshmi Devi Sugar Mills[25] held that

19. (1950-67)4 S.C.L.J. 2546; A.I.R. 1957 S.C. 326.
20. Ibid. A charge was given and a domestic enquiry held. He admitted guilt and pleaded for leniency.
21. Id. at p.2547. The facts taken into consideration were the admission of guilt, the plea for leniency, his good previous record and the assurance given by him that the misconduct would not be repeated.
22. The order of the Tribunal was taken in appeal to the Labour Appellate Tribunal which set aside the order and granted permission to dismiss the workman. The validity of the order of the Labour Appellate Tribunal was challenged before the High Court of Bombay. A single judge of the High Court dismissed the writ petition. In appeal a Division Bench set aside the order of the Labour Appellate Tribunal. The matter was then taken in appeal to the Supreme Court.
23. Supra, n.1.
24. Supra, n.6.
25. Supra, n.16.

the jurisdiction of the Tribunal was only to examine whether a *prima facie* case was made out and whether the employer was actuated by *mala fides* or was resorting to unfair labour practice or victimisation. According to the Court the punishment is a matter within the discretion of the employer. The Court held that acting under section 33 the Tribunal could not examine whether the proposed punishment was excessive.[26]

The position was reiterated in *Tractors (India) Ltd.* v. *Mohamed Sayeed.*[27] The Tribunal granted permission to dismiss some workmen[28] after satisfying itself that a proper domestic enquiry had been held in which the workmen were found guilty and that the management was therefore justified in dismissing

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26. *Caltex (India) Ltd.* v. *Fernandes*, (1950-67)4 S.C.L.J. 2546 at p.2549 *per* Bhagwati, J.
27. (1950-67)4 S.C.L.J. 2550; A.I.R. 1959 S.C. 1196.
28. *Ibid.* Watchmen of the company raised certain demands and refused to operate the watchman's clock (the watchmen had to turn the keys of this clock which then recorded the time; a device to check whether they did patrol duty properly). Company issued orders to the watchmen to do their duty but all except one refused to accept the order. Charges were framed and enquiries conducted. The watchman did not adduce any evidence in the enquiry, nor did they cross-examine any witness. After enquiry the company satisfied itself that the charges have been proved. It decided to dismiss the watchmen and applied for permission of the Tribunal before which an industrial dispute was pending.

them. On appeal the Labour Appellate Tribunal examined the merits and found the workmen not guilty. The matter was taken to the Supreme Court. It reversed the decision of the Labour Appellate Tribunal and said,

> "The simple question of fact which had to be tried by the Tribunal under section 33 was whether a _prima facie_ case had been made out by the appellant against the respondents.... There is no doubt that in exercising jurisdiction under section 33 the Tribunal is not sitting in appeal over the decision of the employer. This position was clearly recognised by the Tribunal when it dealt with the present application; and so it passed an order in favour of the appellant when it was satisfied that the appellant had held a proper enquiry and that the conclusion reached by it could not be said to be _mala fide_ or unfair."[29]

Suppose it is found that a proper enquiry has been made and the action is proposed without an indicia of victimisation. Has the Tribunal in such a case jurisdiction under section 33 to further examine whether a _prima facie_ case is made out? In _Punjab National Bank_ v. _All India Punjab National Bank Employees' Federation_[30] the Supreme Court held

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29. _Id._ at p.2553 _per_ Gajendragadkar, J.
30. (1950-67)4 S.C.L.J. 2632; A.I.R. 1960 S.C. 160. The management dismissed certain workers in violation of S.33 of the Act. No enquiry was conducted before dismissal. An industrial dispute arose over the dismissal and was referred for adjudication. One of the contentions raised was

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that it has.[31] The effect of permission under section 33, the Court observed, is not to validate the dismissal effected in pursuance of it, but only to permit the employer to do what he proposes to do. The action may be either valid or invalid on merits. The Tribunal does not examine the merits in granting permission.[32]

Does it constitute a *prima facie* case if the enquiry was proper and the decision of the management on the guilt of workmen was *bona fide*? The Supreme Court has expressed divergent views. *Lakshmi Devi Sugar Mills* says that it does.[33] *Punjab National Bank* on the other hand appears to extend the issue further. It says that even in a case of

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(f.n.30 continued)
that the dismissal effected in violation of S.33 was void. The Court examined the scope of S.33 and held that reinstatement cannot be ordered on the sole ground of violation of S.33.

31. *Id.* at p.2643 *per* Gajendragadkar, J.
"If the employer has held a proper enquiry into the alleged misconduct of the employee, and *if it does not appear that the proposed dismissal of the employee amounts to victimisation or an unfair labour practice, the Tribunal has to limit its enquiry only to the question as to whether a prima facie case has been made out or not.*" (Emphasis added).

32. *Ibid.* The Court said:
"But it is significant that even if the requisite permission is granted to the employer under section 33 that would not be the end of the matter. It is not as if the permission granted under section 33 validates the order of dismissal. It merely removes the ban; and so the validity of the order of dismissal still can be, and often is, challenged by the Union by raising an industrial dispute in that behalf."

33. *Lakshmi Devi Sugar Mills* v. *Ram Sarup*, (1950-67)4 S.C.L.J. 2579 at p.2592, *supra*, n.17.

proper inquiry and _bona fide_ conclusion the Tribunal has to examine whether a _prima facie_ case is made out.[34]

This apparent difference in approach, however, appears to have been balanced, in _Caltex (India) Ltd._ v. _Their Workmen._[35] The Court said in line with _Punjab National Bank_, that if the employer has held a proper enquiry and that if it did not appear that the proposed action of dismissal amounted to victimisation or unfair labour practice the Tribunal has to limit its enquiry as to whether a _prima facie_ case is made out.[36] It also held that a _prima facie_ case is

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34. _Supra_, n.31.
35. (1950-67)4 S.C.L.J. 2542; A.I.R. 1960 S.C. 1262. Some workmen of the appellant company resorted to stay-in-strike consequent on the refusal to pay them Festival Advance of Rs.5/- to 7/-. The refused to obey the order of the management to resume work or to leave the premises. The strike was illegal. The management initiated disciplinary action, conducted an enquiry and found the workmen guilty. As an industrial dispute was then pending in adjudication, permission of the Tribunal was sought for under section 33. The Tribunal granted permission only in the case of one workman. In appeal the Labour Appellate Tribunal confirmed the decision holding that the punishment of dismissal was too severe one in the case of the other workmen. In appeal the Supreme Court held that permission to dismiss ought to have been given.
36. _Id._ at p.2545. Justice Gajendragadkar, observed:
"If the employer has held a proper enquiry into the alleged misconduct of the employee and if it does not appear that the proposed dismissal amounts to victimisation or an unfair labour practice the tribunal has to limit its enquiry only to the question as to whether a _prima facie_ case has been made out or not. In such proceedings it is not open to the Tribunal to substitute its judgement in the matter of punishment."

made out, in line with Lakshmi Devi Sugar Mills, where misconduct warranting dismissal is proved to the satisfaction of the enquiry officer in the domestic enquiry.[37] Where a proper enquiry is held the test of a *prima facie* case raises a question. Did the enquiry officer satisfy himself that a misconduct which warrant dismissal has been committed by the workman? If the answer is 'yes', the Tribunal has to grant permission. The Tribunal cannot substitute its own judgement in the matter of punishment.

By what test can the question of satisfaction on the misconduct be determined? In Bangalore Woollen Cotton and Silk Mills Co. Ltd. v. Dasappa[38] the Supreme Court said that

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37. *Ibid*. Justice Gajendragadkar added:
"As we have already pointed out there was no complaint made against the regularity or the validity of the enquiry proceedings or of the conclusions reached therein. If, therefore, it has been shown in the enquiry to the satisfaction of the enquiring officer that the workmen concerned were guilty not merely of participation in an illegal strike but also of several other acts of gross indiscipline for which dismissal has been provided as a punishment under the standing orders it is difficult to see how an industrial tribunal can refuse to grant the application made by the appellant under section 33."

38. (1950-67)4 S.C.L.J. 2593; A.I.R. 1960 S.C. 1352. A workman was proceeded against for dishonestly removing property of the company. An enquiry was held against him and the enquiry officer held the charge proved. The management decided to dismiss him and sought for permission of Tribunal under section 33. The Tribunal refused

(contd..)

test is not whether the Tribunal would have come to the same conclusion as the enquiry officer did. In its view the proper test to be applied is to examine whether a reasonable man would have come, on the evidence, to the conclusion already arrived at. The Court said:

> "In most cases it will happen where the materials are such that no reasonable person could have come to the conclusion as regards the workman's misconduct that the Management has not acted *bona fide*. A finding that the Management has acted *bona fide* will ordinarily not be reached if the materials are such that a reasonable man could not have come to the conclusion which the Management has reached. In every case, therefore, it would be proper for the Tribunal to address itself to the question, after ascertaining that the principles of natural justice have not been violated, whether on the materials on which the Management has reached a conclusion adverse to the workman, a reasonable person could reach such a conclusion."[39]

(f.n.38 continued)
permission holding that the enquiry officer ought not have, in the circumstances, accepted the version of the management's witnesses as true. In appeal the Supreme Court held that the Tribunal had no jurisdiction to examine whether in its opinion the evidence of the witness was true.

39. *Id.* at p.2596 *per* Das Gupta, J.

The Court further pointed out that in examining whether a *prima facie* case is made out the Tribunal cannot for itself decide the question whether the evidence given by the witnesses in the enquiry was true. It can only examine whether the enquiry officer, when he held the evidence credible, was acting like a reasonable person.[40] The reasonable man's test was thus applied by the Court in two contexts, viz., (1) in appreciating evidence and (2) in reaching a conclusion on the basis of the evidence. The Tribunal can reject as untrue the evidence relied on in enquiry only if no reasonable man would believe it. Similarly, the Tribunal can reject the conclusion only if no reasonable man would reach such a conclusion on the evidence.

In *Messrs. Bharat Iron Works v. Bhagubhai Balubhai Patel*[41] the Supreme Court applied the same test. When a

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40. *Id.* at p.2597. Das Gupta, J. said:
"The Tribunal was not called upon to decide whether, in its opinion, the evidence given by these witnesses was true but only whether when the Manager stated that he considered this evidence credible, he had acted like a reasonable person."

41. (1976) 12 S.C.L.J. 333; A.I.R. 1976 S.C. 98. Some workers were charged with misconduct of assaulting certain temporary workers. The domestic enquiry found the workers guilty. Applications were filed for permission to dismiss some protected workmen. In respect of others application for approval of dismissal was filed. The Tribunal found

(contd..)

proper enquiry is held the Tribunal, for deciding the existence of a *prima facie* case, has to examine whether or not there is legal evidence with reference to the charge. If there is such evidence the Tribunal should consider whether a reasonable person would rely on it and arrive at the conclusion of guilt. The Tribunal has also to examine whether the proposed action is *bona fide*. If it is by way of victimisation or unfair labour practice the Tribunal can refuse permission.[42]

The observations could be summed up. In dealing with an application for permission to dismiss, the authority has only to follow certain prerequisites. It has to examine whether a *prima facie* case for dismissal is made out. In case there is a proper domestic enquiry the authority in

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(f.n.41 continued)
that there was no defect in the enquiry. But it held that the finding of the enquiry officer was perverse and not *bona fide*, no *prima facie* case was made out against the workmen and that it was a case of victimisation. It therefore refused to grant permission and approval. The High Court of Gujarat dismissed a challenge. In an appeal by special leave the Supreme Court held that on the basis of evidence recorded in the domestic enquiry a *prima facie* case was made out and that the case was not one of victimisation.

42. *Id.* at p.337 *per* Goswami, J.

granting or refusing permission examines whether a *prima facie* case of misconduct is made out. The authority cannot examine whether the misconduct is proved to its satisfaction on the evidence. Nor can it examine whether the evidence in its view could be accepted as true. It has to apply the test of a reasonable man. If a reasonable man would accept the evidence and come to the conclusion on the basis of the evidence that the workman was guilty, a *prima facie* case of misconduct is made out. If the proposed action was *bona fide* in the sense that it was not by way of victimisation or unfair labour practice, the authority should give permission to dismiss the workman.

When there is no proper enquiry: the right to adduce fresh evidence.

At times, the management may not hold any enquiry. It is now well established that this is no ground for the authority to refuse permission. The enquiry already held may be defective. This is also no ground to refuse permission. The authority has to afford an opportunity to the management to adduce fresh evidence before it if the

management seeks for such an opportunity.[43]

The Supreme Court, in Delhi Cloth and General Mills v. Ludh Budh Singh,[44] considering the previous decisions on the point,[45] summarised the law as follows:[46]

If no enquiry is held, or if management does not rely on domestic enquiry, it can straight away adduce fresh evidence. The Tribunal has to consider such evidence. It need not consider the validity of domestic enquiry. If an enquiry is held it is open to management to rely on domestic enquiry. It can without prejudice to this right simultaneously adduce fresh evidence. In such a case the Tribunal has to consider the validity of the domestic enquiry. If the enquiry is found proper the question of considering the fresh evidence

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43. This right the management has in proceedings relating to permission, approval as also adjudication. For a discussion on the right see L.C. Dhingra, "Right of employer vis-a-vis-workmen to Lead Evidence for Adjudication of Industrial Dispute", 1981(2) Indian Law Review 20.
44. (1972)9 S.C.L.J. 229; A.I.R. 1972 S.C.1031.
45. The cases referred to are Bharat Sugar Mills v. Jai Singh, [1963]3 S.C.R. 684; (1950-67)6 S.C.L.J. 3742; Management of Ritz Theatre v. Its Workmen, A.I.R. 1963 S.C. 295; Workmen of the Motipur Sugar Factory v. Motipur Sugar Factory, 1965(11) F.L.R. 112; (1950-67)5 S.C.L.J. 2939 and State Bank of India v. R.K. Jain, A.I.R. 1972 S.C. 136.
46. Delhi Cloth & General Mills v. Ludh Budh Singh, (1972)9 S.C.L.J. 229 at pp.250-252; A.I.R. 1972 S.C. 1031 at pp.1046, 47 per Vaidyalingam, J.

adduced does not arise. It is open to the management to rely on the domestic enquiry. The employer may ask the Tribunal to decide the validity of domestic enquiry as a preliminary issue and to permit the management to adduce fresh evidence if the domestic enquiry is found to be not proper. In such a case, if the finding is that domestic enquiry is not proper, Tribunal has to give an opportunity to the management to adduce fresh evidence and to the workmen to adduce evidence contra. The request for opportunity to adduce fresh evidence has to be made by the management at an appropriate stage, before the proceedings are closed. If the employer does not seek to adduce fresh evidence but relies solely on domestic enquiry the Tribunal can decide the matter solely on the basis of the domestic enquiry.

The case[47] presents interesting facts. In an application for permission the Tribunal reserved the order after

47. Ibid. The application for permission to dismiss the workman was filed on January 6, 1967, on the basis of domestic enquiry held. On the basis of the enquiry reports arguments were advanced on both sides. On 21st March after final arguments, judgement was reserved. Then management filed an application for an opportunity to adduce additional evidence if the Tribunal held the enquiry defective. The Tribunal passed order the next day refusing permission, finding the enquiry to be defective. No opportunity was given to the management to adduce additional evidence as requested.

the final hearing. Then the employer came out with a request for adducing additional evidence. The Tribunal did not permit this. Upholding this, the Supreme Court observed,

> "..... If the management wants to avail itself of the right that it has in law, of adducing additional evidence, it has either to adduce evidence simultaneously with its reliance on the domestic enquiry or should ask the Tribunal to consider the validity of the domestic enquiry as a preliminary issue with a request to grant permission to adduce evidence, if the decision of preliminary issue is against the management."[48]

Is it not likely that the management may reach the witnesses if it is given an opportunity to adduce additional evidence? It is likely. But it cannot be a valid plea on which tribunal can reject an application for additional evidence. Dismissing a similar plea Justice Vaidyalingam held in Delhi Cloth and General Mills v. Tej Vir Singh[49]

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48. Id. at p.252 per Vaidyalingam, J.
49. (1973)10 S.C.L.J. 116; A.I.R. 1972 S.C. 2128. The appellant filed an application on April 9, 1966, for permission to dismiss the respondent on the basis of a domestic enquiry held. The workman filed his reply statement on May 1, 1966. The management relied on the domestic enquiry and the workman pleaded that it was defective. On March 15, 1967 appellant filed an application praying for an opportunity for adducing additional evidence. The next day the Tribunal refused permission holding the enquiry to be defective. The application of the appellant for opportunity to adduce additional evidence was rejected on the ground that it will give an opportunity to the management to reach the witnesses.

that the nature of the evidence to be let in is entirely left to the management and it is for the tribunal to appreciate the evidence and decide. He reiterated that if it is not filed at the proper stage an application for additional evidence is liable to be rejected.[50]

Cooper Engineering Ltd. v. _Mundhe_[51] is a case where the question of adducing fresh evidence came up. The question arose not in connection with a proceeding relating to

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50. _Id._ at p.123 Justice Vaidyalingam said:
"…. (W)e agree with the Tribunal when it rejected the application but however, we do not agree with the reasons given by the Tribunal for rejecting the same. In its order the Tribunal has stated that if the management is allowed to adduce evidence, it will mean that it can coach up its witness, so as to give improved statements before the Tribunal. This is not a proper approach to be made when dealing with such an application. The nature of the evidence to be let in before the Tribunal is entirely a matter for the management and if such witnesses give a version different from the one given in the domestic enquiry, then it will be a matter for the Tribunal to consider those aspects in appreciating their evidence…. (We) are of the opinion that the application filed by the appellant for adducing additional evidence has not been filed at a proper stage and therefore the Tribunal was justified in rejecting the said application."

51. 1975 Lab. I.C. 1441; A.I.R. 1975 S.C. 1900.

permission. It arose in connection with adjudication of a dispute over dismissal referred to the Labour Court. The Supreme Court held that the validity of domestic enquiry should be decided as a preliminary issue in order to afford the employer an opportunity to adduce additional evidence if the enquiry is found invalid. A few workmen were dismissed after enquiry. An industrial dispute was referred for adjudication. The Labour Court ordered reinstatement of the workmen. In the award it said that the enquiry was defective and that since the employer had not adduced any additional evidence the natural result would be to set aside the dismissal. On appeal the Supreme Court observed that the validity of domestic enquiry involved a jurisdictional point[52] and it is unfair to require the management to make a definite stand before a decision on the validity of the enquiry was given. The Court said,

> "Is it however fair and in accordance with the principles of natural justice for the Labour Court to withhold its decision on a jurisdictional point at the appropriate stage and visit a party with evil consequences of a default on its part in not asking the court to give an opportunity to adduce additional evidence at the commencement of the proceedings or at any rate in

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52. The jurisdiction being limited if the enquiry is valid and wider if it is invalid. (See Ch.X).

> advance of the pronouncement of the order in that behalf? In our considered opinion it will be most unnatural and unpractical to expect a party to take a definite stand when a decision of a jurisdictional fact has first to be reached by the Labour Court prior to the embarking upon an enquiry to decide the dispute on its merits."[53]

The Court held the Labour Court should decide the question of validity of domestic enquiry as a preliminary issue when there is a controversy as to the validity of domestic enquiry.[54] This is the stage at which the employer could ask for an opportunity to adduce fresh evidence. The Court

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53. Cooper Engineering Ltd. v. Mundhe, 1975 Lab. I.C. 1441 at p.1445 per Goswami, J.
54. Ibid. This position relieves the management from an embarrassment. It need not adduce fresh evidence in anticipation of an adverse decision. It need not be worried about what the appropriate stage is to ask for an opportunity to adduce fresh evidence. It gets an opportunity to know the verdict of the Labour Court on the validity of the domestic enquiry. See Kalpakam, "When Can an Employer Adduce Additional Evidence before a Labour Court in Case of Defective Domestic Enquiry: Cooper Engineering Ltd. v. P.P. Mundhe", 18 J.I.L.I. 344 (1976). The author observes at p.347, "Goswami, J. speaking for a unanimous Court, has pointed out that the validity or otherwise of the domestic enquiry is a jurisdictional fact. As such the Labour Court is bound to decide it as a preliminary issue. When this preliminary issue is decided the stage is set for the management to take its stand. The questions of taking a definite stand even in anticipation on this issue, which was a perennial source of embarassment to the management, is thus eliminated."

pointed out that even if reinstatement is ordered on the ground that no proper enquiry was held there could be another enquiry and dismissal which may again be the subject matter of a further dispute. This is not conducive to industrial peace and will result in duplication of proceedings.[55] The Court therefore said,

> "We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or where defective enquiry is admitted by the employer there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceedings to raise the issue."[56]

Clearly, the Court held that whenever the employer relies on domestic enquiry but the workman contends it to be invalid,

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55. Id. at p.1445.
56. Ibid. Per Goswami, J. In view of the long delay that had taken place, the offer of management to pay workman upto-date salary, and in view of the fact that the law was not clear as to whether a duty was cast on the Labour Court to decide validity of domestic enquiry as a preliminary issue, the Court held that it would meet the ends of justice if the order of reinstatement is converted into one of compensation.

that issue has to be decided first. The question of the employer asking for permission to adduce fresh evidence arises only after the decision is so rendered. In other words even though the employer asks for no opportunity at the initial stage for adducing additional evidence and relies on domestic enquiry, when the validity of domestic enquiry is in controversy between the parties, the Labour Court or Tribunal has to decide the validity of the domestic enquiry as a preliminary issue and there is no bar for the employer to ask for opportunity to adduce fresh evidence once the preliminary issue is decided against him.

The earlier position was that if he is to avail himself of the right of adducing additional evidence the employer could do two things.[87] He could adduce evidence simultaneously with reliance on the domestic enquiry. Or he could ask the Tribunal to consider the validity of the domestic enquiry as a preliminary issue with a request to grant permission to adduce evidence if the decision on the preliminary issue is against the employer. The decision

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87. See Delhi Cloth and General Mills v. Ludh Budh Singh, (1972)9 S.C.L.J. 229. Supra, n.46.

in Cooner appears to negative this earlier position.

The decision of the Supreme Court in Shankar Chakravarti v. Britannia Biscuit Co.[58] explains away the above holding in Cooner. In this case a workman was dismissed during pendency of proceedings relating to an industrial dispute before the Tribunal. An application for approval was made. The company did not seek for an opportunity to adduce fresh evidence at any stage of the proceedings before the Tribunal. The Tribunal found the domestic enquiry was conducted in violation of the principles of natural justice. It refused approval. The company challenged this unsuccessfully before the High Court of Calcutta by a writ petition. In appeal, a Division Bench of the Court held that the Tribunal had to decide the question of validity of domestic enquiry as a preliminary issue and then if it found the enquiry defective it was incumbent upon the Tribunal to give an opportunity to the employer to lead evidence against the workman. This decision was challenged in appeal before the Supreme Court. The Court held that no duty was cast on the Tribunal to call upon the employer to adduce evidence before

58. A.I.R. 1979 S.C. 1652.

it against the workman. Justice Desai said:

> "In an application under section 33 the employer has to plead that a domestic enquiry has been held and it is legal and valid. In the alternative it must plead that if the Labour Court or Industrial Tribunal comes to the conclusion that either there was no enquiry or the one held was defective, the employer would adduce evidence to substantiate the charges of misconduct alleged against the workman. Now, if no such pleading is put forth either at the initial stage or during the pendency of the proceedings there arises no question of a sort of advisory role of the Labour Court or the industrial tribunal, unintended by the Act, to advise the employer, a party much better off than the workman, to inform it about its rights, namely the right to lead additional evidence and then give an opportunity which was never sought."[59]

It was argued in this case that the decision in Cooper[60] created an obligation on the part of the Labour Court to

59. Id. at pp.1665, 1666. The charge against the workman was that he hoisted red flags at the top of the office, shouted slogans and threatened the Shift Manager. The matter was reported to the police. The company simultaneously initiated disciplinary action. The workman denied the charges and alleged that he was victimised for being a trade union leader. He was arrested and a criminal case was lodged, but he was acquitted. After some months he was detained under Prevention of Violence Act, 1970. Thereafter the company proceeded to hold a domestic enquiry. The workman was given notice of enquiry but he asked for adjournment. It was adjourned to another date, but even then he continued to be in custody and hence could not appear for the enquiry. The enquiry was held *ex parte*. The Enquiry Officer held the charges proved.
60. See *supra*, n.51.

decide the validity of domestic enquiry as a preliminary issue and then to call upon the employer to adduce evidence. This contention was rejected by the Court. Justice Desai said,

> "Having given our most anxious consideration to the question raised before us, and minutely examining the decision in Cooper Engineering Ltd. case to ascertain the ratio as well as the question raised both on precedent and on principle, it is undeniable that there is no duty cast on the Industrial Tribunal or the Labour Court while adjudicating upon a penal termination of service of a workman either under section 10 or under section 33 to call upon the employer to adduce additional evidence to substantiate the charge of misconduct by giving some specific opportunity after decision on the preliminary issue whether the domestic enquiry was at all held, or if held, was defective, in favour of the workman."[61]

The Court held that Cooper merely points out the stage at which the opportunity to adduce additional evidence is to be given to the employer, if he asks for such an opportunity.[62] The Court added,

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61. Shankar Chakravarthi v. Brittannia Biscuit Co., A.I.R. 1979 S.C. 1652 at 1666.
62. Ibid.

> "But if no such opportunity is sought nor there is any pleading to that effect no duty is cast on the Labour Court or the Industrial Tribunal suo moto to call upon the employer to adduce additional evidence."[63]

It is worthy of notice that there was no request in Cooner by the employer to adduce additional evidence.[64] The Labour Court passed the award on the basis that the enquiry was defective. It did not decide it as a preliminary issue. The Supreme Court held in Cooner, that the Labour Court had to decide the issue of validity as a preliminary issue and the question of the management asking for an opportunity would arise only then.

In Shankar Chakravarti[65] also, it may be noted, there was no request to adduce additional evidence at any stage in the proceedings. The Tribunal did not decide the validity of domestic enquiry as a preliminary issue. But the Supreme Court held that there is no duty on the Tribunal to decide

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63. Ibid.
64. Cooper Engineering Ltd. v. Mundha, 1975 Lab. I.C. 1441 at 1442. The finding of the Labour Court was,
"...in the instant case no evidence regarding merits is led by the opponent before this court.... the opponent has chosen not to lead any evidence regarding the merits of the alleged misconduct."
65. Supra, n.58.

validity of domestic enquiry as a preliminary issue and to call upon the employer to adduce further evidence, unless the employer asks for it.

The Court said in Shanker Chakravarti;

> "Cooper Engineering Ltd. case is not an authority for the proposition in every case coming before the Labour Court or Industrial Tribunal under S.10 or S.33 of the Act complaining about the punitive termination of service following a domestic enquiry that the Court or Tribunal as a matter of law must first frame a preliminary issue and proceed to decide the validity or otherwise of the enquiry and then serve a fresh notice on the employer by calling upon the employer to adduce further evidence to sustain the charges if it so chooses to do.... This Court merely indicated the stage where such opportunity should be given meaning thereby if and when it is sought.... When read in the context of the propositions culled out in Delhi Cloth & General Mills Co.[66] case and the Firestone Tyre & Rubber Co. of India (P) Ltd.[67] case the decision in Cooper Engineering Ltd. case merely indicates the stage at which an opportunity is to be given but it must not be overlooked that the opportunity has to be asked for."[68]

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66. Delhi Cloth & General Mills Co. v. Ludh Budh Singh, (1972)9 S.C.L.J. 229; A.I.R. 1972 S.C. 1031.
67. Workmen of Firestone Tyre & Rubber Co. v. Management, (1973)10 S.C.L.J. 159; A.I.R. 1973 S.C. 1227, see Ch.XI,n.9.
68. Shanker Chakravarti v. Britannia Biscuit Co., A.I.R. 1979 S.C. 1652 at pp.1663, 1664 per Desai, J.

The decision of the Supreme Court in Firestone Tyre & Rubber Co. of India (P) Ltd. v. The Workmen[69] indicates that the Tribunal can ask the employer to adduce evidence and has to do so if the domestic enquiry is found defective. In this case an industrial dispute was referred over dismissal of certain workmen. Later some workmen were taken. Some others were not taken back. The Tribunal found that the domestic enquiry was vitiated in the case of the workmen who were not taken back. The Tribunal noted that the employer had to be given an opportunity, when it found that the enquiry was defective, to adduce evidence justifying dismissal.[70] But in view of the fact that other workmen served with similar charges were taken back in service, the Tribunal found that the other workmen who were not taken back were unfairly discriminated against. On appeal the Supreme Court held that the Tribunal should not be concerned with the question of subsequent taking back of some workmen as it was not a question which fell within the terms of reference before the Tribunal.[71] The Court held that in view of the fact that the

69. A.I.R. 1981 S.C. 1626.
70. Id. at p.1628.
71. Tribunal has to confine adjudication to the points referred to it and matters incidental thereto. See section 10(4) of the Act.

enquiry was defective the whole issue was before the Tribunal. But the Court has not examined the merits. The case was sent back to Tribunal to decide the case after giving the parties concerned an opportunity to adduce evidence. Neither Caspar[72] nor Shanker Chakravarti[73] was referred to in this decision. There is no mention in the case that an opportunity was sought for by the management to adduce evidence before Tribunal. The case was remanded without referring to any such request and to the failure of Tribunal to allow it. The Court said,

> "...the order directing reinstatement of the 12 workmen without a consideration of the merits of the case cannot be sustained. We therefore remit the case to the Industrial Tribunal to decide the dispute....after giving the parties concerned an opportunity to lead evidence in support of their respective cases."[74]

The Court has not specifically held in Firestone[75] that different considerations should apply when deciding a

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72. Supra, n.51.
73. Supra, n.58.
74. Firestone Tyre & Rubber Co. of India (P) Ltd. v. The Workmen, A.I.R. 1981 S.C. 1626 at p.1629 per Gupta, J.
75. Ibid.

reference under section 10 of the Act from those which should apply in section 33 proceeding. The net result of the holding in Firestone is that in an adjudicatory proceedings under section 10 it becomes obligatory on the part of the Tribunal to afford an opportunity to adduce fresh evidence even if the employer does not seek for the same.

In a proceeding whether under section 33, i.e., a proceeding relating to permission/approval of dismissal, or under section 10, i.e., an industrial dispute over dismissal, justice demands that the Tribunal should have no duty to ask the employer to adduce additional evidence when it comes to the conclusion that the enquiry is defective. By providing him with an opportunity to adduce such evidence even when the employer does not ask for it, the Tribunal will be acting in an unfair manner to the workmen, the other party before it. The observation of Justice Desai[76] appears to put the position correctly, when he says,

> "The Labour Court or Industrial Tribunal to which either a reference under S.10 or an application under S.33....is made, would be exercising quasi-judicial powers .... Parties are arrayed before these

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76. Shankar Chakravarti v. Britannia Biscuit Co., A.I.R. 1979 S.C. 1652.

> quasi-judicial Tribunals.... There is thus a lis between the parties.... It has to decide the lis on the evidence adduced before it... The quasi-judicial tribunal is not required to advise the party either about its rights or what it should do or omit to do."[77]

Cases of no enquiry: Jurisdiction of the authority.

Why should the management undertake the trouble of holding a domestic enquiry at all, if it has the freedom to adduce evidence for the first time before the Tribunal? The right of the management to adduce evidence before the Tribunal would appear to nullify the need for and importance of domestic enquiry. There is, however, a factor which may persuade the employer to hold an enquiry. Jurisdiction of the authority in permission cases where there is no proper enquiry is different from the one where there is a proper enquiry. The jurisdiction in the former is wider than that in the latter. This would persuade the employer to hold a proper enquiry.

What is the extent of jurisdiction of the authority in dealing with an application for permission in a case where

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77. Id. at pp.1664, 1665.

no proper domestic enquiry has been held by the management? Martin Burn Ltd. v. Banerji[78] is a significant case in which the Supreme Court dealt with the question. A permission of the Labour Appellate Tribunal was sought to dismiss the workman on the basis of the report of his superior officer.[79] No formal enquiry had been held by the management before the proposed action. The Labour Appellate Tribunal, in this circumstance, considered the evidence[80] produced before it.

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78. (1950-67)4 S.C.L.J. 2850; A.I.R. 1958 S.C. 79.
79. Ibid. A workman was found to be careless. Opportunities were given to him to improve. Still he showed no signs of improvement. Finally, his superior officer sent a final report. On the basis of this the management proposed to dismiss the workman. As an appeal in respect of another industrial dispute was pending before the Labour Appellate Tribunal, an application for permission was filed before it, as per the provision of S.22 of the Industrial Disputes (Appellate Tribunal) Act 1950.
80. Ibid. The evidence before the Appellate Tribunal consisted of affidavit and oral evidences. According to the management, the report of the workman's immediate boss was not the only basis. They claimed that they further investigated and examined old records. This was denied by the workman in his affidavit. According to him the guilt was never established and the management's action was arbitrary. The management filed a rejoinder affidavit. They denied the allegation of the workman. They stated that they were satisfied after enquiry and after affording sufficient opportunity to the workman that he was guilty. The author of the report was examined before the Tribunal. But the contents of the report were not proved through him.

It held that no _prima facie_ case has been made out against the workman and refused permission. In appeal the Supreme Court upheld this decision. In its view the evidence adduced before the Labour Appellate Tribunal was not such as would establish a _prima facie_ case.[81] It observed that the jurisdiction of the authority in granting or refusing permission is a limited one and all that it had to examine was only whether a _prima facie_ case is made out. Explaining what is meant by a _prima facie_ case Justice Bhagwati said:

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81. _Id._ at pp.2859, 2860. Bhagwati, J. said:

> "The evidence led by the parties before the Labour Appellate Tribunal consisting as it did of the affidavit and oral evidence was not such as would enable it to come to the conclusion that a _prima facie_ case for the termination of the respondent's service was made out by the appellant." _Id._ at p.2859.

Observing that the report was not proved through the officer, and that without disclosing the contents of the report only a reference to it was made and that there was nothing in the deposition of the officer to show that the contents of the report were prejudicial to the workman the Court said:

> "This was not enough to prove the contents of that report, much less to give the respondent an opportunity to controverting the allegations made against him. If, therefore, these essential ingredients were wanting, it cannot be said that the evidence led by the appellant before the Labour Appellate Tribunal was sufficient to establish a _prima facie_ case for the termination of the respondent's service." _Id._ at p.2860.

> "A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a *prima facie* case had been made out the the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, *not to substitute its own judgement* for the judgement in question. It has only got to consider whether the view taken is a possible view on the evidence on the record."[82]

The permission granting authority cannot, in the Court's view, apply a high standard of proof nor can it examine whether the case against the workman is proved to the hilt.[83] The scope of enquiry is limited to the examination of the question whether the view taken by the management was a possible view on the evidence on record.

82. *Id.* at p.2860. (Emphasis added).
83. *Ibid.* Justice Bhagwati said:
"The Labour Appellate Tribunal in the instant case discussed the evidence led before it in meticulous detail and came to the conclusion that no *prima facie* case was made out by the appellant for the termination of the service of the respondent. It applied a standard of proof which having regard to the observations made above was not strictly justifiable. If the matter had rested there it may have been possible to upset the finding of the Labour Appellate Tribunal. But if regard be had to the evidence which was actually led before it, there is such a lacuna in that evidence that it is impossible to come to the conclusion that even if the evidence was taken at its face value a *prima facie* case was made out by the appellant."

Cases may arise where there is no formal enquiry and where the misconduct is proved before the authority and the action of the management found bona fide. Orissa Cement Ltd. v. Adikanda Sahu[84] is one of such cases. A workman abused the labour officer. The language was indecent and vulgar. The workman was very young - a man of immature and impulsive age. He tendered an apology. The management sought permission to dismiss him. No domestic enquiry was held. The tribunal found him, on the evidence produced, guilty of misconduct. But in view of the young age and the apology tendered[85] by him, it refused permission. In appeal the Labour Appellate Tribunal confirmed the decision of the Tribunal. The fact that no domestic enquiry was held in the case was an added ground on which the decision of the Appellate Tribunal was based. Significantly, in further appeal, the Supreme Court had a different view. According to Justice Gajendragadkar, the jurisdiction of the Tribunal under section 33 is limited. The misconduct against the workman in this case was proved before the Tribunal. If the

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84. (1950-67)4 S.C.L.J. 2622.
85. Ibid. In appeal the Supreme Court pointed out that the apology tendered was a conditional one. The Tribunal had assumed that the apology was unconditional.

management took the view in the circumstances that it should not keep in its employment a workman capable of using such filthy language, the Tribunal ought to have, the Court held, granted permission to dismiss him.[86]

Cases of defective domestic enquiry stand on the same footing as cases of no enquiry. In both cases the Tribunal has to satisfy itself that a prima facie case has been made out. In Bharat Sugar Mills Ltd. v. Jai Singh[87] the Court was emphatic that the fact that an enquiry has not been held

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86. Id. at p.2624. Justice Gajendragadkar concluded, "This is a clear case where the appellant's prayer for permission to dismiss the respondent should have been granted. If no enquiry was held by the appellant it has produced evidence before the Tribunal to support its case, and...that case has been held proved by both the Tribunals."

87. (1950-67)6 S.C.L.J. 3742; [1962]3 S.C.R. 684. Some workmen were sought to be dismissed for participation in go-slow. The enquiry held was found to be defective. The Tribunal permitted evidence to be produced before it. Tribunal refused permission in the case of some workers on the ground that they did not actively participate in go slow and that the action of the management to dismiss them was by way of victimisation. Appeal was filed before the Supreme Court by the management. In the appeal the workers raised a contention that if the enquiry was found to be not proper it was not open to the Tribunal in a proceeding under section 33 to allow any evidence to be adduced before it. This contention was rejected by the Court. The Court examined the evidence against the workmen filed before the Tribunal and held that the Tribunal was not justified in refusing permission to dismiss the workmen.

properly does not absolve the Tribunal of its duty to decide whether a prima facie case against the workman is made out for granting permission. Justice Das Gupta said:[88]

> "When an application for permission for dismissal is made on the allegation that the workman has been guilty of some misconduct for which the management considers dismissal the appropriate punishment the Tribunal has to satisfy itself that there is a prima facie case for such dismissal.... But the mere fact that no enquiry has been held or that the enquiry has not been properly conducted cannot absolve the Tribunal of its duty to decide whether the case that the workman has been guilty of the alleged misconduct has been made out."

The extent of jurisdiction of the Tribunal in a case where no proper enquiry is held is wide. The responsibility of the management in proving its stand is heavy. The Tribunal has to satisfy itself, the Court held, that the workman was guilty of misconduct. Justice Das Gupta said:

> "When such evidence is adduced before the Tribunal the management is deprived of the benefit of having the findings of the domestic tribunal being accepted as prima facie proof of the alleged misconduct unless the finding is perverse and has to prove to the satisfaction of the Tribunal itself that the workman was guilty of the alleged misconduct."[89]

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88. Id. at p.3746.
89. Ibid. (Emphasis added).

The limitation placed by _Martin Burn_[90] on the permission in cases where there was no domestic enquiry appears to be set at naught in _Bharat Sugar Mills_.[91] According to _Martin Burn_,[92] in deciding whether a prima facie case is made out, the relevant consideration is whether it was 'possible' to arrive at the conclusion and not whether that was the only conclusion that could be arrived at. In other words, according to _Martin Burn_ Tribunal is not justified in substituting its own judgment in such cases.[93] But _Bharat Sugar Mills_[94] insists that to establish a _prima facie_ case the management has to prove to the satisfaction of the Tribunal itself that the workman is guilty.[95]

It may be that the jurisdiction of the authority is wider if the authority itself is to be satisfied, on evidence adduced before it, that the misconduct against the workman is proved. Its jurisdiction can be said to be limited only in the sense that it cannot examine, once misconduct is proved, the question of propriety of punishment. No doubt

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90. _Supra_, n.78.
91. _Supra_, n.87.
92. _Supra_, n.78.
93. _Supra_, nn.82, 83.
94. _Supra_, n.87.
95. _Supra_, n.89.

there will be a _prima facie_ case for dismissal if the authority comes to the conclusion that a misconduct for which the punishment of dismissal may be effected has been committed. The authority will then have to grant permission even if dismissal is a harsh punishment in the circumstances of the case.

Evidently, this leads one to draw a distinction between the jurisdiction in dealing with an application for permission to dismiss a workman where there has been a proper enquiry and a jurisdiction where there has been no enquiry. In case where there has been a proper enquiry it is not open to the authority to appreciate the evidence itself and to come to its own conclusions. Al that it could do, if the proposed action of the management is not by way of victimisation or unfair labour practice, is to examine whether a reasonable man could have accepted the evidence in the enquiry as credible and would have come to the conclusion that the workman is guilty. When the enquiry is defective or there has been no enquiry the authority itself appreciates the evidence and comes to the conclusion whether the workman is guilty. Once it comes to the conclusion that the guilt

is so made out, there is no denying the existence of a *prima facie* case for dismissal and the authority will have to grant permission.

To sum up, the jurisdiction is very limited when there has been a proper enquiry. This may encourage the management to hold a proper enquiry before filing an application for permission to dismiss a workman. Though the effect of the limited jurisdiction is thus to encourage proper domestic enquiry it is not sufficient to protect the interest of the workman fully since it precludes the authority from satisfying itself on the evidence that the workman is guilty before it can grant permission to dismiss the workman. The jurisdiction is wider when the application for permission to dismiss is filed without a proper enquiry. But here also since the authority cannot examine the propriety of the proposed punishment, the Tribunal cannot adequately protect the workman against excessive punishments.

The need for a change in the law.

It is desirable that the Tribunal, Labour Court and Arbitrator be given wider jurisdiction in disposing of

application for permission.[96] The jurisdiction should be similar to that conferred by section 11A of the Act.[97] The jurisdiction should not be limited to the examination of a _prima facie_ case. These authorities discharge functions different from the conciliatory authorities. Tribunal, Labour Court and Arbitrator are authorised to decide industrial disputes. A limited jurisdiction may be sufficient when proceedings are pending before the conciliation authorities. But to limit the jurisdiction in a similar manner to proceedings before the Tribunal, Labour Court and Arbitrator is not justified. Such limitation results in duplication of proceedings for the reason that a dispute could be raised over dismissal effected with permission and then it has to be decided on merits by the Tribunal, Labour Court or Arbitrator when it is referred. This can be avoided if

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96. "If the law permits the worker to ventilate his grievance at a later stage — in the section 10 proceeding — _post facto_, why should he be denied a similar opportunity before the 'injustice' has been accomplished?" Solomon E. Robinson, "The Supreme Court and Section 33 of the Industrial Disputes Act 1947", 3 _J.I.L.I._ 15 at p.38 (1961).
97. See for a similar view, M.L. Puri, "Nature and Scope of Jurisdiction of the Tribunals under Section 33 of the Industrial Disputes Act, 1947", 23 _J.I.L.I._ 546 at p.554 (1981)

these authorities go into the merits of dismissal and decide the issue at the permission stage itself. Further such a change would help to protect the workman against unjustified dismissal for an alleged misconduct connected with a pending dispute during the pendency of proceedings before these authorities.

Chapter VI

APPROVAL OF DISMISSAL

The Act recognises the right of the employer to dismiss a workman concerned in a pending dispute for misconduct unconnected with such dispute. The Act, however, imposes some restrictions on the power.[1] The dismissal has to be in accordance with the Standing Orders, if any, applicable to the establishment. If there are no Standing Orders, it has to be done in accordance with the terms of the contract of employment. The workman has to be paid wages for one month. The most significant restriction is the provision for approval of dismissal. The authority before which the proceedings are pending gets an opportunity to look into the question. The management has to make an application for approval before the authority.

When is the application to be filed? By what criteria does the authority decide whether or not an application for

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1. Section 33(2)(b). See Ch.IV, n.10.

approval be granted?

Time element.

Is the application to be filed before or after dismissal? Straw Board Manufacturing Co. Ltd. v. Govind[2] discussed this question. A workman was dismissed. On the same day application for approval was made. The Labour Court did not accord approval. In its view, the requirement that no workman shall be discharged or dismissed unless an application has been made for approval of the action[3] meant that the application has to be filed before dismissal. In appeal by special leave the Supreme Court, on the other hand, held that it was not necessary that the application for approval should be made before dismissal. In its view it is enough if the application is made as part of the same transaction of dismissal.[4]

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2. (1960-67)6 S.C.L.J. 3928; A.I.R. 1962 S.C. 1500.
3. Ibid. The case arose under the United Provinces Industrial Disputes Act 1947. Section 6(2)(b) of the Provincial Act was identical with section 33(2)(b) of the Central Act. The Court therefore examined the issue in the context of S.33 of the Central Act 1947.
4. Id. at p.3933. Justice Wanchoo said:
   "As we read the proviso, we are of opinion that it contemplates the three things mentioned therein, namely, (i) dismissal or discharge, (ii) payment of wages and (iii) making of an application for approval, to be simultaneous and to be part of the same transaction, so that the employer when he takes the action under section 33(2) by dismissing or discharging an employee should immediately pay

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Suppose an employer chooses to apply for approval of the proposed dismissal in advance. Can the application be rejected as premature? State Bank of Bikaner v. Balai Chander Sen[5] is a case in point. The Labour Court dismissed an application for approval for discharging a workman holding that the application could be filed only after actual discharge. On appeal the Supreme Court held to the contrary. If an employer chose to make an application for approval of the proposed action and then took the action there was nothing in section 33(2)(b) which made such an application not maintainable.[6] Straw Board case,[7] was distinguished. The Court said that Straw Board was concerned with the latest time by which the employer must make the application for approval and that an application will not be invalid for the mere reason that it was made before dismissal of the workman.

(f.n.4 continued)
him or offer to pay him wages for one month and also make an application to the tribunal for approval at the same time."

5. (1950-67)4 S.C.L.J. 2679; A.I.R. 1964 S.C. 732. The respondent, an Assistant Cashier of the appellant Bank was found, after enquiry, guilty of misconduct. The appellant decided to discharge him. It filed an application on December 27, 1961 under section 33(2)(b) of the Act for approval and dismissed the workman on January 15, 1962.
6. Id. at p.2681 per Wanchoo, J.
7. Supra, n.2.

The purpose of the procedure of approval is that when a workman is dismissed during pendency of proceedings for a misconduct, though the misconduct is not connected with the pending dispute, the action of the management has to be subjected to scrutiny as soon as possible. This is essential to put a check on victimisation and to keep a peaceful atmosphere in the industrial establishment. The holding of the Supreme Court in Strav Board helps to serve the above purpose. The purpose is in no manner defeated if the employer files the application for approval before dismissal. Further it helps the employer in one way. He can avoid the possibility of delay in filing the application after passing the order of dismissal by filing the application first and then passing the dismissal order.

Payment of Wages.

There is a requirement that one month's wages has to be paid before dismissal. Does it not mean that it should actually be paid? Actual payment may not be possible unless the workman is prepared to accept payment. It will be impossible for the employer to enforce payment on him. The requirement

may well be satisfied if the employer does all that he can do by tendering the wages to the workman. Management of Delhi Transport Undertaking v. Industrial Tribunal[8] examined the question whether actual payment of wages is necessary before a workman is dismissed. It was an appeal against the refusal of approval by the Tribunal. One of the grounds of refusal was that there was no proof that one month's wages were paid or even tendered to the workman before dismissal. The Supreme Court found that the wages were tendered to the workman. The Court held that it was enough if the wages were tendered, it was not necessary that the wages should actually be paid.[9] The condition of paying wages is mandatory. The

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8. (1950-67)4 S.C.L.J. 2686; A.I.R. 1965 S.C. 1803. A conductor of the Delhi Transport Undertaking was dismissed, after enquiry, for the possession of tickets already issued to passengers which was prohibited by the Executive Instructions issued. Application for approval was filed on October 28, 1961 proposing dismissal from 31st October. Memorandum of dismissal was issued on 30th October and one month's wages were tendered by directing the workman to collect it from the Accounts Officer. Since he did not collect the wages the amount was sent to him by money order on November 3, 1961.
9. Id. at 2690. Hidayatullah, J. said at p.2690.
   "The proviso does not mean that the wages for one month should have been actually paid, because in many cases the employer can only tender the amount before the dismissal but cannot force the employee to receive the payment before dismissal becomes effective. In this case the tender was definitely made before the order of dismissal became effective .... There was no failure to comply with the provision in this respect."

Tribunal cannot accord approval to dismissal if the wages are not even tendered along with dismissal. In Messrs. Poddar Mills Ltd. v. Bhagwan Singh[10] there was no evidence to show that one month's wages were tendered along with dismissal. The Supreme Court held that in such an instance the requirement of the section was not fulfilled.[11]

Payment of wages and filing of application should be made as part of the same transaction,[12] with the dismissal. It is a question of fact whether these things have been done as part of the same transaction. It may depend upon the circumstances of each case.[13] It is not necessary that application for approval is filed and the tendering of wages

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10. (1973) 10 S.C.L.J. 208; A.I.R. 1973 S.C. 2234.
11. Ibid. The order of dismissal was passed on January 4, 1968 and it was served on the workman on January 8, 1968. An application for approval was forwarded on January 8, 1968. The Tribunal held that the application was belated and that the management ought not have waited till serving the order of dismissal for filing the application. In appeal the Supreme Court held that there was no evidence of payment of one month's wages along with the dismissal. The workmen's case was that the wages were paid only on February 2, 1968. As the condition as to payment of wages was not satisfied, the Court on that ground upheld the order of the Tribunal refusing approval. The question whether the filing of the application before the Tribunal was belated was not therefore considered by the Court. Id. at p.212.
12. Supra, n.4.
13. Straw Board Manufacturing Co. v. Govind, (1950-67) 6 S.C.L.J. 3928 (Supra, n. 2) at p.3933 per Wanchoo, J.

made on the same day of dismissal. In Kalyani v. Air France[14] the Supreme Court held that the requirements were satisfied even though the payment of wages and filing of application for approval were made not on the day of passing of the order but on the day when the order of dismissal was communicated to the workman.[15] In Calcutta Transport Corporation v. Md. Noor Alam[16] the Court was not ready to follow

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14. (1950-67)4 S.C.L.J. 2700; A.I.R. 1963 S.C. 1756. A workman was dismissed after enquiry, on 28th May, 1960. The order of dismissal provided for payment of one month's wages and stated that an application was being made to the industrial tribunal for approval. The order of dismissal was communicated to the workman on 30th May. The wages were tendered to him and application for approval was filed on 30th May.
15. Id. at pp.2703-2704. Wanchoo, J. said:
"In the present case the order of dismissal was passed by the regional representative on May 28, 1960 and was communicated to the appellant on May 30. The wages were offered to the appellant at the same time when the order was communicated to him, though he did not accept them. The respondent also made the application under section 33(2)(b) to the industrial Tribunal the same day. In these circumstances, we are of opinion that the labour court was right in holding that the application under section 33(2)(b) was in accordance with the proviso to that section and was properly made."
16. (1973)10 S.C.L.J. 212; A.I.R. 1973 S.C. 1404. After enquiry the appellant decided to dismiss a workman. Agreeing with the report of the Enquiry Officer, the competent authority noted in the file on May 18, 1967 "The delinquent is removed from service of the Corporation. He will be given one month's wages and simultaneously an application may be filed in the Tribunal seeking approval of the

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a hard and fast rule to decide whether the requirements are observed as part of the same transaction. It held that what has to be considered is the conduct of the employer,[17] and endorsed an application filed a day after dismissal became effective.[18]

(f.n.16 continued)
action taken, as required under section 33(2) of the I.D. Act." A note was communicated to the workman on June 26, 1967 in which it was said that he was being removed from office with effect from July 1, 1967. One month's wages were sent to him by money order and it was received by him on July 1, 1967. An application for approval was filed on July 3, 1967 which was a Monday.

17. "It is the conduct of the employer that has to be considered from the point of view of finding out whether the dismissal or discharge, payment of wages and making of the application for approval from a part of the same transaction. A difference of a day in doing one thing or the other may not be of material consequence so long as it is clear that the employer meant to do all the three things as part of one and the same transaction. No hard and fast rule can be laid down in these matters. Each case must be decided in its own facts." Id. at p.215 per Grover, J.

18. "Firstly the order of removal was merely recorded on the official file on May 18, 1967 and it was to be effective only from July 1, 1967. Before that period it was open to the competent authority to withdraw the order. Therefore the date of dismissal of the workman could only be July 1, 1967 and not any prior date on which the order was recorded on the file. The wages were also received by the workman, i.e., the respondent, on the same date which was a Saturday. It was wholly immaterial when the money order was sent. The application was filed for approval on July 3, 1967 which was a Monday. It is obvious that no application could have been filed on a Sunday which was a holiday.... We are satisfied in the present case that all the three things which were done were a part of the same transaction." Id. at pp.214, 215.

Conformity with Standing Orders or contract.

The authority before whom the application for approval is filed has another jurisdiction. It has to examine whether the dismissal is in accordance with the Standing Orders, or the terms of the contract of employment. In Management of Delhi Transport Undertaking v. Industrial Tribunal[19] the Tribunal had refused to accord approval on the ground that the misconduct was not covered by the Standing Orders.[20] On appeal, however, the Supreme Court held that it was covered by the Standing Orders.[21] The fact that the omission of

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19. (1950-67)4 S.C.L.J. 2686; supra, n.8.
20. Ibid. The Delhi Transport Authority was established under the Delhi Road Transport Authority Act, 1950. Section 53 of the Act gave power to the Authority to frame Regulations providing, among other things, for the conditions of service of its servants, paragraph 15(1) of the Regulations authorised the authority to issue Standing Orders the violation of which would amount to misconduct. Standing Order 2 provided that all employees of the Authority shall perform the duties and carry out the functions entrusted to them. By virtue of this power Executive Instructions were given. Executive Instruction No.12 provided that no conductor shall have in his possession used tickets and that if he is found to be in possession of them he will be liable to dismissal. The Tribunal held that the Executive Instruction was not part of Standing Orders and hence the misconduct was not covered by Standing Orders.
21. Id. at 2691 per Hidayatulla, J. The Court noted that Standing Order 19(m) provided that any activity which is prima facie detrimental to the interest of the Organisation shall be a misconduct, and Standing Order 2 required them to carry out the functions and perform duties assigned to them. Clause (m) of Standing Order 19 is wide enough, the Court observed, to cover breach of the Executive Instructions.

mentioning the appropriate Standing Order in the charge sheet was held not material.[22]

Workman is dismissed for a misconduct. Suppose that the authority finds that it is not a misconduct within the Standing Orders. Can the authority accord approval to such dismissal? Indian Express & Chronical Press v. M.C. Kapur[23] is an illustration. The employees of the appellant formed a co-operative society with membership limited to the employees. The respondent, a lino-operator in the press was the treasurer of the co-operative society. He committed certain irregularities in the financial affairs of the society. The President of the society made a complaint. The General Manager served a charge[24] on the respondent and held an enquiry. He found the respondent guilty[25] and ordered termination of service. An application for approval was filed before the Tribunal. It proceeded to examine whether the

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22. Ibid.
23. (1974) 11 S.C.L.J. 448; A.I.R. 1974 S.C. 1629.
24. Ibid. The charges framed were:
    (i) Misappropriating the funds of the society;
    (ii) Getting false cash memo prepared;
    (iii) Falsification of accounts of the society;
    (iv) Refusal to account for the amount of Rs.2800/- of the society;
    (v) Coercing the society to make some payments; and
    (vi) Refusal to hand over charge as treasurer after resignation and thus keeping the society's money and books unauthorisedly.
25. Ibid. The Enquiry Officer found that all charges except Charge (v), were proved.

dismissal was effected in accordance with the Standing Orders.[26] The Tribunal found that the Co-operative Society was a concern different from the Press and the conduct of the respondent did not affect in any manner the smooth and efficient working of the press. It also found that the respondent was not guilty of any act 'subversive of discipline' under the Standing Orders of the press.[27] Therefore, the Tribunal held, the misconduct was outside the purview of the Standing Orders. In appeal the Supreme Court endorsed the order of the Tribunal. According to the Court the charges framed against the respondent and the findings in the enquiry did not relate to any misconduct covered by the Standing Orders and the order made by the Tribunal was fully justified.[28] In other words dismissal was not in accordance with Standing Orders and hence approval was refused.

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26. Ibid. It was contended that the following items, (b) and (i), in Standing Order 13(2) were attracted, viz:
"(b) Theft, fraud or dishonesty in connection with the company's business or property.
.. ..
(i) Riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline."

27. Ibid. The Court observed that the charges were found proved by the Enquiry Officer, and on the basis of which dismissal was effected, constituted acts subversive of discipline. There was no charge of riot or disorderly behaviour against the workmen. The charges are not covered, the Court observed, by clause (b) of Standing Order 13(2). Id. at pp.450, 451.

28. Id. at p.451.

Is it necessary that the misconduct for which dismissal is made must be one covered by the Standing Orders? In Mahendra Singh Dhantwal v. Hindustan Motors[29] the Supreme Court held that it need not be so. The facts of the case have already been stated.[30] There were two dismissals of the same employee - one for 'habitual absence' described as misconduct under the Standing Orders and the other invoking a clause in the contract of service.[31] The workman complained to the Tribunal.[32] The Tribunal held that the second termination was also dismissal for misconduct. The Tribunal again ordered his reinstatement. The Company moved the High Court of Calcutta under article 226 of the Constitution. The Single Judge refused to interfere with the award. In appeal a Division Bench held that there was no evidence of discharge on any specific misconduct and when the discharge was effected under the contract as a mere retaliatory measure, section 33 of the Act was not attracted and no approval was therefore necessary. On appeal the Supreme Court reversed the decision of the Division Bench of the Calcutta High Court.

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29. (1976) 13 S.C.L.J. 262; A.I.R. 1976 S.C. 2062.
30. See Ch.III, nn.53, 54, 55.
31. Supra, Ch.III, n.54.
32. Under section 33A. For text of the section, see Ch.VII, n.4.

It held that punitive action by the employer is within the coverage of section 33 and when the provision is not complied with the workman can file a complaint under section 33A. The Court observed that the Tribunal had found as a fact that the termination was by way of punishment for misconduct. It could not be said that the decision of the Tribunal was not based on any evidence or was perverse. Hence the Supreme Court held that the Single Judge of the Calcutta High Court was right in not interfering with the order of the Tribunal and the Division Bench was wrong in interfering with it.[33] The Supreme Court was concerned in this case only with this limited jurisdictional question.[34] During the course of argument the counsel for the company contended that in order to invoke section 33(2)(b) the termination must be one for a specific misconduct enumerated in the Standing Orders.[35] The Court rejected this contention and observed that the misconduct need not be one enumerated in the Standing Orders. Justice Goswami said:

> "Standing Orders of a company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of

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33. (1976)13 S.C.L.J. 262 at p.272 per Goswami, J.
34. Id. at p.267 per Goswami, J.
35. See id. at p.270.

> misconduct which a workman may commit. Even though a given conduct may not come within the specific terms of misconduct described in the standing orders, it may still be a misconduct, in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. Ordinarily the standing orders may limit the concept but not infinitely so."[36]

From the facts it is clear that the second termination under the terms of the contract was for no other cause than the one for which the workman's services were terminated[37] originally. The Tribunal piercing the viel of the termination order found it to be one of dismissal for misconduct. In the absence any other misconduct in the interval between the two terminations of service, the misconduct which has been the cause of the first must be the cause of the second termination also. The first termination was for the misconduct of 'habitual absence.' It was a misconduct enumerated in the Standing Orders. The Court could therefore have avoided going into the question whether the misconduct for which a workman could be dismissed should be one enumerated in the Standing Orders and holding that it need not be one.

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36. Ibid.
37. See Ch.III, n.53.

The provisions under section 33 put a restriction on the power of the employer to dismiss. Dismissal is discharge for misconduct, a punitive act. The employer may do this either overtly by passing an order of dismissal referring to the misconduct or covertly without any such mention but with a garb of simple discharge. A colourable exercise of power to effect simple discharge is nothing other than punitive discharge. The cause of the discharge may be hidden in the mind of the employer. The restriction on dismissal during pendency of proceeding should apply to such cases. To say that the restriction applies only to dismissal for misconduct enumerated in the Standing Orders is to permit dismissal for a conduct not specified as misconduct in the Standing Orders. This will only help the employer in his attempt to perpetrate injustice to the workman. It is the purpose of section 33(2) to place restrictions on dismissal during pendency of proceedings. It permits, however, dismissal in accordance with Standing Orders, subject to other conditions such as payment of wages and approval. If approval is not required for dismissal for a misconduct not specified in the Standing Orders, the effect of the

provision becomes just the reverse. It will then permit dismissals not in accordance with Standing Orders and would put restriction on dismissal in accordance with Standing Orders.

If the employer does not apply for approval the workman can complain to Tribunal under section 33A. That section is attracted only when section 33 is violated. The position that only dismissal for a misconduct specified in Standing Orders attract the requirement of approval under section 33(2)(b) would put the burden on the workman to prove not only that he was dismissed during pendency of proceedings but also that he was dismissed for a misconduct covered by the Standing Orders. The action may be dismissal but the reason for it may not be disclosed by the employer who may characterise the termination as simple discharge. In such circumstances if he has to show that the misconduct is one covered by Standing Orders to establish that the case was covered by section 33(2)(b) and that the employer violated the provision, it would amount to denial to him of a remedy against arbitrary dismissal.

If the action is really punitive, the employer cannot resort to it during pendency of proceedings except in cases

where the exemption is provided, viz. when the dismissal is in accordance with Standing Orders. In other words a dismissal for a misconduct not specified in the Standing Orders is not saved by section 33(2)(b) of the Act. From this perspective it can be said that a misconduct for which dismissal is made need not be one specified in the Standing Orders.

This is not to say that a workman could be validly dismissed for a misconduct not specified in the Standing Orders. The employer may dismiss him for such misconduct, but such dismissal not covered by the Standing Orders cannot be said to be valid. The observation in M.S. Dhantwal that an employer may dismiss a workman for a misconduct not covered by the Standing Orders, would create problems if understood as justifying such action when no proceedings are pending. The Standing Orders prescribe the types of conduct which will be misconduct inviting disciplinary action. This serves a purpose. The workman knows in advance the types of acts which would render him liable to disciplinary action. If a workman could be validly dismissed for a misconduct not mentioned in the Standing Orders the above purpose will be defeated.

The Court observed that Standing Orders only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct.[38]

It may be that there is difficulty in making an exhaustive enumeration of the specific acts constituting misconduct. But a description of the activity which amounts to misconduct is not that difficult. Take an instance of the misconduct, 'disorderly behaviour.' The term by itself has wide amplitude. It should be possible in this way to exhaustively describe the types of activities which would amount to misconduct. Standing Orders should therefore be treated as exhaustive. The employer has to take care to include in the Standing Orders all misconduct. If he fails to do so, he should suffer the consequence, not the workmen. To hold otherwise, is to render the description of misconduct in the Standing Orders meaningless. The employer may take disciplinary action only in accordance with the Standing Orders when they are applicable.

Extent of jurisdiction.

Once it is satisfied that formal requirements of section 33(2)(b) of the Act have been complied with, the

38. Supra, n.36.

authority has to consider the question whether or not the approval sought for is to be granted. To what extent can it go in deciding this question? What relevant matters can it examine?

As in the case of permission, the jurisdiction is very limited when dismissal is preceded by a proper enquiry. The authority can neither reappreciate the evidence in the enquiry nor come to its own conclusions. Swatantra Bharat Mills v. Ratan Lal[39] is an example. A workman was dismissed after enquiry.[40] The Tribunal reappreciated the evidence, went into the merits of the case and came to the conclusion that the case against the workman had not been satisfactorily established. It therefore rejected the application for approval.[41] The Supreme Court held that the Tribunal had no jurisdiction to do so. All that it could do was only to examine whether a prima facie case was made out. The enquiry

39. (1950-67)4 S.C.L.J. 2676; A.I.R. 1961 S.C. 1156.
40. Ibid. The respondent was negligent in his work and was warned several times. But he did not show improvement. A domestic enquiry was held against him. The charges were found proved in the enquiry. He was dismissed and an application was filed before the Tribunal for approval.
41. Ibid. The Tribunal, appreciating the evidence in the domestic enquiry, held that the charges could not be 'held to have been satisfactorily established' and refused approval.

was proper; the conclusions reached after enquiry were supported by reasons. In the Court's view the Tribunal exceeded its jurisdiction in reappreciating the evidence and rejecting the application for approval.[42]

In the case of dismissal of a workman found guilty after an enquiry, the authority cannot rely on technical grounds in deciding whether or not approval is to be accorded. For

42. Id. at pp.2677, 78. Gajendragadkar, J. said:
"It is true that the tribunal began its award with the observation that it had to decide whether a prima facie case had been made out by the appellant against the workman. This approach is no doubt proper because under section 33(2)(b) the jurisdiction of the Tribunal is limited to the enquiry as to whether a prima facie case has been made out by the employer against the employee or not. Having stated the limits of its jurisdiction correctly in this manner the tribunal, however, proceeded to consider the merits of the rival contentions as though it was trying the case itself.... One has merely to look at the findings recorded by the tribunal to realise that it has exceeded its jurisdiction under section 33(2)(b). It may be pointed out in fairness to the appellant that the enquiry officer's report is a well considered document wherein he has examined the evidence adduced before him and has given elaborate reasons in support of his final conclusion.... In such a case we do not see how it was open to the industrial tribunal to sit in appeal over the findings of the enquiry officer and to reappreciate the evidence for itself. That is not the scope of the enquiry under section 33(2)(b)."

instance it cannot refuse approval on the mere ground that no formal charge has been given before the enquiry, if it is found that the workman had the opportunity to know the facts sufficiently and was able to defend his case. Neither the failure to mention the appropriate Standing Order under which action is taken, nor the fact that an inappropriate Standing Order was mentioned could lead to a refusal of approval if the action can be taken under any of the Standing Orders. The ground that dismissal is too severe a punishment for the workman is also irrelevant. *Central India Coal Fields* v. *Ram Bilas Sobhnath*[43] dealt with all these aspects. The workmen in the appellant's colliery complained that the respondent was guilty of rowdy and indecent behaviour in a state of drunkeness, at the quarters. The management held an enquiry after reading out the complaints against him. The respondent's companion who was with him at the time of the incident admitted the truth of the complaint. The respondent said that he did not remember anything about the incident since he was drunk. He also said that he had nothing to say in defence. The enquiry officer found the

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43. (1950-67)4 S.C.L.J. 2682; A.I.R. 1961 S.C. 1189.

allegations proved and held the workman guilty of misconduct as per Standing Order 29(5). The management passed an order of dismissal. An application for approval was made before the Tribunal. It found that the Standing Order 29(5) covered only such misconduct during working hours and within the work place. The misconduct in question was outside the premises and after working hours. It found that Standing Order 32 would have applied, but not 29(5), and hence refused approval. In appeal by special leave the Supreme Court held,

> "....(I)f the Tribunal thought as it appears to have done that since the incident happened in the company's quarters the management could take action provided the respondent's case fell under Standing Order 32 read with Standing Order 37, it need not have allowed considerations of this character to influence its final decision particularly when the extent of its jurisdiction under section 33(2)(b) was very limited. This is not a case where any _mala fides_ can be attributed to the appellant or it can be said that the dismissal amounts to unfair labour practice. In the circumstances of this case the order of dismissal passed by the appellant against the respondent appears to be a straight forward matter and the tribunal may well have resisted the temptation of examining the validity of the said order in such a technical way."[44]

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44. _Id._ at p.2684 _per_ Gajendragadkar, J.

The Court held that the enquiry was not vitiated for the reasons that no formal charge sheet was served on the workman,[45] since the complaint had been read out to the workman and it was not denied by him. The Court also observed that the Tribunal cannot examine, in a proceeding under section 33(2)(b) whether the punishment is very severe.[46]

As already explained[47] in dismissals for misconduct connected with the pending dispute prior permission is necessary and that in those unconnected with pending dispute only subsequent approval is provided. Does this indicate that the latter jurisdiction is more limited? The Supreme Court seems to hold in Lord Krishna Textile Mills v. Its Workmen,[48] that it does indicate so. Justice Gajendragadkar observed,

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45. Id. at p.2685.
46. "In an enquiry under section 33(2)(b) normally it is not open to the tribunal to consider whether the sentence proposed is unduly severe or not. Such a consideration may be relevant in dealing with an industrial dispute ...." Ibid.
47. See Ch.IV.
48. (1950-67)4 S.C.L.J. 2706; A.I.R. 1961 S.C. 860. Some workmen of the appellant company assaulted some of its officers. After enquiry the workmen were dismissed and application was filed before Tribunal for approval. The Tribunal re-appreciated the evidence in the enquiry, examined the justification and propriety of the punishment of dismissal, refused approval and ordered reinstatement of the workmen with full backwages. The case

(contd..)

> "The requirement that he must obtain approval as distinguished from the requirement that he must obtain previous permission indicates that the ban imposed by section 33(2) is not as rigid or rigorous as that imposed by section 33(1). The jurisdiction to give or withhold permission is *prima facie* wider than the jurisdiction to give or withhold approval.... Therefore, putting it negatively the jurisdiction of the appropriate industrial authority in holding an enquiry under section 33(2)(b) cannot be wider and is, if at all, more limited, than that permitted under section 33(1)...."[49]

He went on,

> "....(I)n exercising its powers under section 33(2) the appropriate authority must bear in mind the departure deliberately made by the legislature in separating the two classes of cases falling under the two sub-sections and in providing for express permission in one case and only approval in the other."[50]

The Court held that in refusing approval in the present case the Tribunal acted as an appellate Court.[51] In its view the

(f.n.48 continued)
arose under the United Provinces Industrial Disputes Act 1947. In appeal the Supreme Court examined the jurisdiction of the Tribunal under section 33(2)(b) of the Industrial Disputes Act 1947 observing that its holdings would apply to the United Provinces Act since the concerned provisions in both the Acts were similar.

49. Id. at p.2711.
50. Id. at pp.2711, 2712.
51. Id. at p.2715. The Tribunal did not hold that the enquiry was defective. But it examined whether the conclusions of fact recorded in the enquiry were justified on merits. It

(contd..)

Tribunal had no jurisdiction to do so. Questions on adequacy of evidence in enquiry can be raised in a Court of facts or an appellate court, but not before the Tribunal of limited jurisdiction, under section 33(2)(b) of the Act.

But an observation in a later case in Messrs Bharat Iron Works v. Bhagubhai Balubhai Patel[52] goes to show that the jurisdiction in both cases is the same. Goswami, J. observed,

> "When an application under section 33 whether for approval or for permission is made to a Tribunal it has initially a limited jurisdiction only to see whether a *prima facie* case is made out in respect of the misconduct charged. This is, however, the position only when the domestic enquiry....is free from any defect..."[53]

According to the view of the Court in Laxmi Krishna Textile Mills v. Its Workmen there is difference between a finding not supported by any legal evidence and one

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(f.n.51 continued)
observed that the evidence was not adequate. It appreciated the evidence and held that the conclusion that the guilt was proved ought not have been reached in the domestic enquiry.

52. (1975) 12 S.C.L.J. 333; A.I.R. 1976 S.C. 98.

53. Id. at p.336.

appearing to be not supported by sufficient or satisfactory evidence.[54] If the enquiry is proper and the order not perverse, and if the conditions in section 33(2)(b) are satisfied the authority has to hold that a *prima facie* case is made out and has to accord approval.[55]

It may be noted that Justice Gajendragadkar who waxed eloquent on limited jurisdiction applied a different test of a *prima facie* case in *Delhi Transport Undertaking v. Industrial Tribunal*.[56] A conductor was dismissed after enquiry by the management.[57] The Tribunal refused approval when an

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54. (1950-67)4 S.C.L.J. 2708 at p.2715.
55. *Id.* at p.2714. Gajendragadkar, J. said:
"In view of the limited nature and extent of the enquiry permissible under section 33(2)(b), all that the authority, can do in dealing with an employer's application is to consider whether a *prima facie* case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by section 33(2)(b) and the proviso are satisfied or not."
56. (1950-67)2 S.C.L.J. 1349; 1963(6) F.L.R. 264.
57. *Ibid.* The conductor, Jagdishlal, was put on duty along with a trainee driver, Inder Raj. The conductor refused to go on duty with that driver since according to him it was unsafe to go with a trainee driver who was not in the regular employment of the appellant. He was willing to join the duty only if he was put with a driver

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an examination of the merits of the case it was found that the conductor was justified in his action for which he was proceeded against.[58] In appeal, the Supreme Court, held that the Tribunal was not justified in coming to the conclusion that the action of the conductor was justified.[59]

(f.n.57 continued)
in the regular employment. The management taking the view that it amounted to misconduct served a charge sheet, held an enquiry and dismissed him. An application was filed before the Tribunal for approval.

58. Ibid. The Tribunal found that Inder Raj was only a trainee driver who had no badge, without a badge he could not have run the bus, and that Jagadishlal was justified in apprehending danger if the bus was run by the trainee driver. The Tribunal therefore refused approval.

59. Ibid. In appeal the Supreme Court held that even though the driver was a trainee, the Tribunal was under a misconception when it thought that the trainee was an inexperienced driver. The Court found that the persons who were taken for training were persons with licences for driving heavy public service vehicles and the purpose of training was to familiarise them with the routes and the exigencies and requirements of traffic in the routes in which they have to operate when they are put in charge of the bus. Inder Raj had three years experience in driving heavy motor vehicles and the conductor knew this. The court also found that a person who holds a licence is entitled to have a badge under the relevant Rules and also that at no stage had Jagdishlal stated it to be his case that driving without a badge is violative of the Rules. The Supreme Court therefore held that the Tribunal was not justified in not according approval to the dismissal of the conductor.

For holding so the Supreme Court seems to have travelled beyond and examined the merits. Ironically, the Supreme Court negatived the conclusion reached by the Tribunal not on the ground that the Tribunal was not justified in examining the merits of the case[60] but on the ground that the conclusion reached by the Tribunal on such examination was not justified.[61] A prima facie case, from this perspective,

60. Ibid. There was no finding that the enquiry was defective or that the conclusion in it was perverse or the action of management was mala fide. In such a case the Tribunal could not have examined the merits.
61. Id. at p.1351. Justice Gajendragadkar said:
"We have repeatedly pointed out that in dealing with disciplinary matters the Tribunal's jurisdiction is very limited. In the present case the Tribunal was merely called upon to consider whether a prima facie case had been made out for according approval to the action of the appellant proposed to be taken against Jagadishlal. In such a case we do not see how the Tribunal was justified in coming to the conclusion that because Inder Raj was a trainee driver Jagadishlal was justified in refusing to join duty. In this connection the Tribunal seems to have attached some importance to the conditions on which trainees are admitted in the school started by the appellant. One of the conditions is that at the end of the training there is no guarantee of employment. That of course is true; but that is not to say that the appellant cannot legitimately and reasonably avail itself of the services of these trainee drivers whenever it thought it necessary to do so, e.g. in case emergencies or unexpected circumstances arise. The record shows that such a course is often adopted and provision is made for payment to the trainee drivers whose services are requisitioned. Therefore, we are satisfied

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may also be understood in the sense of a reasonable case on merits against the workman.

In Bisra Stone Lime Co. Ltd. v. Industrial Tribunal[62] it was held that the Tribunal cannot exercise appellate jurisdiction acting under section 33(2)(b).[63] It was observed that if there was a proper enquiry the Tribunal should not take a different view of the facts or findings unless there were vitiating circumstances like victimisation

(f.n.61 continued)
that the appellant was justified in taking the view that the conduct of Jagadishlal amounted to misconduct and so a prima facie case had been made out in that case." (Emphasis added).

62. 1970(1) L.L.J. 626 (S.C.) A workman by name Das Gupta, a mechanic, while driving a vehicle assaulted another workman who was in that vehicle. It was a misconduct under Standing Order 20(8) of the company. A charge sheet was served on him and an enquiry conducted. The enquiry officer concluded that he was guilty of assault. The management dismissed the workman. The order of dismissal passed was:
"Action taken.— He is undoubtedly guilty of assault and what is more was driving in a reckless fashion. This offence was most serious. He is to be dismissed."
Application for approval was filed. The Tribunal refused approval. It held that the management had taken into account the fact of driving the vehicle in a reckless manner and without permission which were not included in the charge. A writ petition was filed before the High Court of Orissa, but it was dismissed. Appeal by special leave was filed before the Supreme Court against the judgement of the High Court. The Supreme Court held that the punishment was for assault and that the management did not go beyond the charge sheet.

63. Id. at p.628 per Hidayatulla, J.

or unfair labour practice.[64]

Cases where dismissal is effected without proper enquiry, however, stand on a different footing. It is open to the authority to examine the merits and to decide whether it should accord approval to the dismissal or not. Rohtas Industries Ltd. v. Ali Hasan[65] provides a comparison of the jurisdiction of the Tribunal in both the types of cases. Eight workmen of the appellant company were dismissed on a charge of assaulting the Works Manager.[66]

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64. Ibid. Hidayatulla, J. said:
"In the present case the facts were amply proved and, therefore, the finding that Das Gupta, was guilty of assault was supported by evidence. The decision of the management was, therefore, final and it was not open to the tribunal to take a different view of the facts or of the findings unless there was victimisation or some unfair labour practice or failure of justice. There is not even a suggestion that the enquiry was not properly conducted or was in any way unfair. Since no such ground existed the Tribunal erred in law in the exercise of its jurisdiction."

65. (1950-67)4 S.C.L.J. 2601; 1962(5) F.L.R. 374.

66. Ibid. The Establishment Officer of the appellant, Mr. Mehta, accompanied by some workmen, entered the room of the Works Manager, Mr. Poddar. Mr. Poddar was assaulted. The reason was stated to be that Mr. Mehta was asked to make over charge of the Guest House and the transport vehicles in his charge. Mr. Mehta refused to obey the order, locked the stores and rooms and took the keys to his residence. A show cause notice was issued to him and then he organised the above mentioned assault on the Works Manager. The Works Manager dismissed Mr. Mehta as also the other workmen concerned in the incident.

One workman was dismissed after an enquiry while other seven were dismissed without any enquiry. The workmen contended that they were at the place of the incident not to assault the Works Manager but to rescue another person, the Establishment Officer of the company, who, they alleged, was being assaulted by the Works Manager. The Tribunal rejected this contention. In the case of seven workmen the Tribunal permitted the employer to adduce evidence. It refused approval in the case of the workman dismissed after the enquiry on the ground that the Works Manager had not mentioned his name in the report. It refused approval in two cases among the remaining seven workmen dismissed without enquiry. In their case also approval was not accorded on the ground that their names were not there in the report made by the Works Manager. The doubt that two witnesses who implicated these two workmen did not make their statements before the police also weighed with the Tribunal. The Tribunal approved the dismissal of the rest. In appeal the Supreme Court held that the Tribunal was not justified in not according approval to the dismissal of the three workmen. Referring

to the case of the workman dismissed after enquiry, the Court held that the fact that the name of the workman was not mentioned in the report made by the Works Manager was not decisive. There was an enquiry in this case before dismissal. If the enquiry officer came to the conclusion that the charge against him was proved, the Court held, it was not open to the Tribunal to consider whether the said conclusion was valid or not. In the absence of perverse conclusions or a dismissal for victimisation, there is no justification for refusing approval.[67] It may be that the case in which the other two workmen whose dismissal without enquiry was not approved stands on a different footing. It was open to the Tribunal to consider the merits in instances where there was no enquiry and to take into account the fact that the names of the workmen were not included in the report of the Works Manager. But in the case of these two workmen the other circumstances, namely, that the witnesses did not make their statement before the police, was found to be incorrect by the Court, since in finding so the Tribunal overlooked the statement of the witnesses that the

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67. Id. at p.2603 per Gajendragadkar, J.

police did record their statements. The Tribunal had found that all the workmen were present at the scene not to rescue any person from assault by the Works Manager but to help assaulting the Works Manager himself. In view of these, the Court held that the Tribunal was not justified in holding that the appellant had not made out a prima facie case against these two workmen.[68]

The above case does not solve the problems. Is it enough that the management need show that there was a prima facie case against the workman in a case where no proper enquiry is conducted? Is it bound to prove to the satisfaction of the authority that on merits the dismissal is justified? In Kalyani v. Air France[69] there was an enquiry before the dismissal. The workman contended that the domestic enquiry was defective.[70] The management adduced

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68. Id. at p.2604.
69. (1950-67)4 S.C.L.J. 2700; A.I.R. 1963 S.C. 1756. Supra. The workman was charged with gross misconduct, namely, commission of mistakes in preparation of load-sheet and balance chart. He was dismissed after enquiry and application for approval filed. The management adduced evidence before the Labour Court in support of its action. Labour Court accorded approval. Appeal was filed before the Supreme Court by special leave.
70. The Labour Court observed that the contention that the enquiry officer was biased could not be brushed aside lightly. See id. at p.2702.

evidence before the Labour Court in support of the dismissal. The Labour Court went into the evidence tendered before it with a view to finding whether the dismissal was justified. Examining whether the dismissal was justified on merits[71] and satisfying itself that dismissal was justified in the circumstances, the Labour Court accorded approval. In appeal the Supreme Court upheld the order. The Court said that the Labour Court is justified in going into the question whether the dismissal was justified on the evidence led before it, when there is a defect in the domestic enquiry.[72] Justice Wanchoo stated the law thus:

> "If the enquiry is not defective, the labour court has 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.

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71. The Labour Court found that the workman admitted the mistakes which were the basis of the charge, the mistakes were so serious that they might have resulted in accident to the air craft, the responsibility of others to check the load-sheets was not a mitigating circumstance since the primary responsibility was on the workman himself, there was no victimisation of the workman, the plea of over work could not be accepted to mitigate the mistake and that the punishment imposed could not be said to be unconscionable or entirely out of proportion to the gravity of the offence.
72. _Kalyani_ v. _Air France_, (1950-67)4 S.C.L.J. 2700 at pp.2704, 2705 _per_ Wanchoo, J.

> Thereafter, on coming to the conclusion that the employer had *bona fide* come to the conclusion that the employee was guilty, i.e., there was no unfair labour practice and no victimisation, the labour court would grant the approval.... *If the enquiry is defective for any reason, the labour court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified.*"[73]

That the jurisdiction of the Tribunal is not to examine whether a prima facie case is made out when the dismissal is effected without a proper enquiry was laid down clearly in *K.N. Barooah v. Management of Budla Beta*.[74] The facts of the case show that a workman was dismissed for misconduct after enquiry but the enquiry was defective since principles of natural justice were violated. The Manager was examined before the Tribunal to prove the records of the enquiry. No other witness was examined. The Tribunal examining the evidence held that no misconduct as alleged against the workman has been proved,[75] and hence refused approval. On challenge the

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73. *Id.* at p.2706 (Emphasis added).
74. (1950-67)4 S.C.L.J. 2667; 1967(15) F.L.R. 40.
75. *Ibid.* The workman was proceeded against for attempting to steal tea leaves from the company premises. The Tribunal found that the domestic enquiry was vitiated since Mr. Alley, a witness against the workman was not examined in his presence nor was he produced for cross examination but his evidence was taken into consideration in establishing the misconduct. The Tribunal then proceeded to

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Assam High Court held that the Tribunal exceeded its jurisdiction under section 33(2)(b) by acting as an appellate authority and examining the merits. On appeal by special leave the Supreme Court had a different view. It held that the domestic enquiry was defective and hence the jurisdiction of the Tribunal is not limited to examine whether a *prima facie* case is made out. Justice Sikri speaking for the Court, said:

> "In our opinion, once the Tribunal holds that the domestic enquiry was conducted in violation of principles of natural justice, it must consider for itself on the evidence adduced before it whether

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(f.n.75 continued)
consider whether a case for dismissal is made out on the evidence before it. Only the Manager who conducted the enquiry was examined by the Management before the Tribunal. He proved the record of enquiry before the Tribunal. The Tribunal found that in the record of enquiry Mr. Alley and one Mr. Premnarayan were the only witnesses who implicated the workman. Mr. Alley's evidence could not be relied on as principles of natural justice were violated. In the charge sheet the names of persons who were eye witnesses to the incident constituting the misconduct were given. The name of Mr. Premnarayan was not there in it. There was no other evidence to corroborate his statement in the enquiry. The Tribunal therefore held that no misconduct has been made out against the workman.

> the dismissal was justified. Then there is no question of considering only whether there was a *prima facie* case for dismissal."[76]

The Court held that the Tribunal was justified in examining the evidence to consider whether the order of dismissal was justified or not.[77]

It is doubtful whether the Court applied this principle correctly in Mysore Steel Works v. Jitendra Chandra Kar.[78] A charge was served on the workman for the misconduct of unauthorised absence.[79] The reply tendered by the workman

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76. Id. at p.2671.
77. Id. at p.2672.
78. (1971)8 S.C.L.J. 410; 1971(1) L.L.J. 543.
79. Ibid. A workman was sick and was under treatment under the Employees State Insurance Scheme. The medical officer issued a certificate to the effect that the workman was under his treatment from May 1, 1963 and suggested that he might have to continue under treatment until June 4, 1963. No further information was received from the workman even after some time. The company wrote to the Medical Officer on July 25, 1963. He reported that the workman had not turned up for treatment since the first week of June. But subsequently, by certificate issued in October 5, 1963, the Medical Officer informed the company that the workman was under his treatment since May 29, 1963. This certificate was cancelled by him after two days. On November 1, 1963 he issued a certificate of fitness to the workman. The company wrote to the Employees State Insurance authorities whether the period from May 1, to November 1, 1963 was to be treated as continuous period of treatment. The reply received was not specific. It

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to the charge was found to be lacking in clarity. The company gave him another opportunity to explain. The reply again was unsatisfactory. A Board of Enquiry after giving a personal hearing to the workman held that the workman remained absent without leave for more than ten days. The company there upon passed an order of dismissal and applied under section 33(2)(b) for approval of the action. The management examined witnesses before the Tribunal and produced some documentary evidence. The workman also examined witnesses and produced documentary evidence.[80]

The Tribunal held that the domestic enquiry was not vitiated by violation of the principles of natural justice.[81]

(f.n.79 continued)
only said that the matter was under consideration. The company treated the period from June 4, 1963 to October 5, 1963 as absence unaccounted for since the certificates were contradictory. The workman reported for duty on November 2, 1963 but was placed under suspension.

80. Ibid. The workman contended that he was under treatment in Nowgong Hospital till November 1, 1963. After the hearing before the Tribunal was over on May 19, 1964, a letter dated 11th May 1964 was received by the Tribunal from the E.S.I. authorities in which it was said that the period from May 1, 1963 onwards has been accepted by them, on medical ground, as period of incapacity.

81. Ibid. The Tribunal held that since the fact of absence was undisputed it was for the workman to show that he was under treatment till November 1, 1963, and that the period has been accepted by the E.S.I. authorities as period of incapacity due to illness and though opportunity was given to him, the workman did not produce evidence in the domestic enquiry to explain his absence.

The Tribunal then proceeded to examine whether there was a *prima facie* case against the workman.[82] The Tribunal held that the action of the management could not be said to be improper. It gave approval holding that a *prima facie* case has been made out.

A writ petition was filed before the High Court of Assam against the decision. The High Court quashed the order on the ground that the Tribunal exceeded its jurisdiction in recording evidence and considering that evidence in deciding whether a *prima facie* case was made out, since it did not hold that the enquiry was vitiated or that the finding was perverse or that the action of the management was by way of victimisation. The High Court also found that the domestic enquiry was vitiated[83] and set aside the order of the Tribunal on that ground also.

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82. *Ibid.* Tribunal did not consider the letter of the E.S.I. authorities as valid on the ground that it was produced after the hearing was over. It found the certificates of the Medical Officer to be contradictory. The E.S.I. authorities only said that the question of treating the period of absence was under consideration. The workman did not give in the domestic enquiry any particulars explaining his absence. Till the date of dismissal no direction was issued by the E.S.I. authorities to treat the period of absence as period of illness.
83. The High Court held that the domestic enquiry was vitiated for the reasons that the management did not examine any witness to prove its allegation though the workman

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The decision was taken up in appeal by special leave, to the Supreme Court. The Supreme Court said that the Tribunal could examine the merits if the domestic enquiry was defective and examine only whether there was a *prima facie* case if the enquiry was proper. The Court pointed out that if as held by the High Court the enquiry was defective, it was open to the Tribunal to examine the merits of the case and that it could not then be said that the Tribunal exceeded its jurisdiction.[84] It further held that though the Tribunal used the word '*prima facie*' in its order, a

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(f.n.83 continued)
requested for it, that instead the workman himself was examined by the Board of Enquiry and that though the workman's case was that his absence was with permission of Mr. Budhia, the said person was not presented for examination in the enquiry. *Id.* at 414.

84. *Id.* at p.415. Shelat, J. said:
"The question then is whether the domestic enquiry suffered from breach of the principles of natural justice. If it was as the High Court has in terms held it to be so, the whole question of dismissal would be at large before the Tribunal and the Tribunal would come to its own conclusion thereon. Therefore, once the High Court came to the conclusion that the domestic enquiry was defective, it appears to us to be somewhat contradictory to say that the Tribunal acted beyond its jurisdiction in allowing the employers to lead evidence and in its coming to its own conclusion that the dismissal was justified and was not a consequence of victimisation."

reading of the order as a whole made it clear that it examined the merits of the case on the basis of evidence adduced before it.[85] The Supreme Court therefore set aside the High Court's order. According to the Supreme Court the burden was on the workman to show that though he was absent without leave he was protected against an order of dismissal. He had not discharged this burden.[86] The Court therefore upheld the Tribunal's order.

If as held by the Supreme Court, the Tribunal examined the merits and not merely a prima facie case it had no jurisdiction to do so after holding that the enquiry was not defective in any manner. Once the Tribunal finds that the enquiry is proper, its jurisdiction is limited only to an examination of a prima facie case. To quote the words of the Supreme Court in this very case;

> "If the Tribunal comes to the conclusion that the enquiry was not defective, that is, it was not in violation of the principles of natural justice, it has only to see if there was a prima facie case for dismissal...."[87]

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85. Ibid.
86. Ibid. The certificate received by the Tribunal did not help the workman since it was not proved before the Tribunal and the employer had no occasion to ascertain its veracity.
87. Id. at p.414 per Shelat, J.

The validity of the domestic enquiry is a jurisdictional fact.[88] A wrong finding on a jurisdictional fact would vitiate the order based on such jurisdiction assumed wrongly. If so it may become necessary to examine, by the higher tribunal before which the question is raised, whether the decision on the jurisdictional fact by the lower Tribunal is correct or not. The Tribunal held in the present case that the enquiry was proper but examined the case on merits. If its decision on the jurisdictional question, namely, validity of domestic enquiry is correct, its decision on merits in the case will be without jurisdiction. In examining whether the ultimate decision of the Tribunal is correct it may be necessary then for the High Court to examine the correctness of the decision on the jurisdictional question. In other words if the Tribunal rejects jurisdiction to decide the issue on merits[89] and yet decides the issue on merits, the High Court may decide whether the rejection

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88. If the enquiry is proper the jurisdiction of Tribunal is limited to an examination of a _prima facie_ case. If it is improper, it has jurisdiction to examine the merits. What exactly is the jurisdiction to the Tribunal in a given case would therefore depend on the fact whether the domestic enquiry is proper or not.
89. This is the effect when it holds that the domestic enquiry is not vitiated.

of jurisdiction has been improper and if it finds that the Tribunal had jurisdiction, it may uphold the final order. But when the decision of the High Court is taken in appeal to the Supreme Court challenging the validity of its decision, the appellate court has to examine whether the finding of the High Court as to the jurisdictional fact is correct or not. If so the Supreme Court ought to have examined the validity of the domestic enquiry before deciding whether the ultimate order passed by the Tribunal was within jurisdiction. Instead of doing this the approach of the Supreme Court in Mysore Steel Works v. Jitendra Chandra Kar[90] was to proceed on the basis that if the finding of the High Court with respect to domestic enquiry is correct, the order of the Tribunal on merits is within jurisdiction and that on merits it is correct.[91]

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90. (1971)8 S.C.L.J. 410 at p.415.
91. "The fact that the workman absented himself without leave was admitted. It was, therefore, clearly for him to show that he was protected against an order of dismissal.... The certificates which the management had before them were contradictory. The insurance authorities till the hearing of section 33(2) proceeding was over had not made up their mind whether the treatment alleged to have taken by respondent 1 at Nowgong Hospital should be treated as alternative evidence. The certificate dated May 11, 1964 reached the Tribunal after the hearing was over. It is difficult to say whether it was sent by respondent 1 or by the insurance authorities. But that certificate was

(contd..)

The finding that the management had made out a case for dismissal in this case also requires examination. As the facts of the case reveal, there was no dispute about the absence of the workman but the question was whether he was under medical treatment during the period. The management had before it proper evidence to the effect that the workman was under treatment for some period. The question was whether he continued under treatment for the rest of the period till he joined duty. The workman's case was that he was. Some conflicting certificates were however issued by the Medical Officer. In responce to the company's enquiries with the State Insurance authorities as to whether the entire period of absence is to be treated as period of treatment under Regulation 53 of the Employees State Insurance Regulations 1950[92] the authorities did not give a

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(91 continued)
never proved before the Tribunal and the management, therefore, had no opportunity of ascertaining its veracity. The Tribunal, therefore, was right in observing that it did not help respondent 1. Respondent 1, thus failed to show that he was protected for his absence from June 4, 1963 to November 1, 1963, or that his dismissal was unjustified or was as a result of victimisation." Ibid.

92. Regulation 53 reads:
"Evidence of sickness and temporary disablement: Every insured person claiming sickness benefit or disablement benefit for temporary disablement, shall furnish evidence of such or temporary disablement in respect of the days of his

(contd..)

negative reply but their reply was to the effect that the matter was under consideration. In such circumstance it cannot be said that the management has made out a case against the workman. It could have awaited a final reply before proceeding to dismiss the workman. If the management itself was not able to get a definite reply in the matter some leniency ought to have been shown to the workman. Had the management waited for the final reply perhaps the workman would not have been dismissed; the facts show that a certificate was received by the Tribunal to the effect that the entire period is to be treated as period of sickness under regulation 53 though it was not admitted

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(f.n.92 continued)

sickness or temporary disablement by means of a medical certificate given by an Insurance Medical Officer in accordance with these regulations in the form appropriate to the circumstances of the case;

Provided that in areas where arrangements for medical benefit under the Employees State Insurance Act have not been made or otherwise if in its opinion the circumstances of a particular case so justify, the corporation may accept any other evidence of sickness or temporary disablement in the form of a certificate issued by the medical officer of the State Government, local body or other medical institution, or a certificate issued by any registered medical practitioner containing such particulars and attested in such manner as may be specified by the Director General in this behalf."

in evidence being received after the hearing was over. Instead of holding that the burden was on the workman to show he is protected 'before he is dismissed'[93] what ought to have been found is that the burden is on the management to show a proper case for dismissing the workman.

Non-approval: Effect.

Under section 33(2)(b) the employer is free to dismiss his employee and the restriction is only that he has to file an application for approval. The Act provides that the application is to be disposed of by the authority without delay by passing such orders[94] as it deems fit.[95] We have seen that the jurisdiction, though not limited statutorily, is limited by judicial interpretation. Now,

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93. Mysore Steel Works v. Jitendra Chandra Kar, (1971)2 S.C.L.J. 410 at p.413. The Tribunal held:
   "Till the date of dismissal no direction was issued by the E.S.I. authorities to treat the period of absence in question as a period of illness and that consequently the actions of the management in holding that the workman was neither ill nor was under any medical treatment during the period in question cannot be said to be improper."
94. The order passed by the authority should be a speaking order. See H.M. Desai v. Testeels Ltd., A.I.R. 1980 S.C. 2124.
95. S.33(5) of the Act provides that the authority shall "without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it deems fit."

the question is what is the effect of an order passed in such application. If approval is refused what is the effect on dismissal? Will the employee be deemed to be in service and never to have been dismissed at all? If approval is accorded does the dismissal take effect from date of dismissal or only from the date of according approval?

The Supreme Court held in Straw Board Manufacturing Co. v. Govind[96] that though the employer dismisses a workman and files an application for approval the order passed by him does not become final until it is approved by the authority. A contention was raised that there is no provision for reinstatement in section 33(2)(b) and therefore if the employer dismisses a workman and the Tribunal refuses to accord its approval the workman will be left without any remedy. Rejecting this contention the Court said:

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96. (1950-67)6 S.C.L.J. 3928; A.I.R. 1962 S.C. 1500. The respondent, a workman refused to obey the orders of superior officers on several occasions. After enquiry the management dismissed him on 1-2-1960. Application was filed on the same day for approval. The Labour Court did not approve the dismissal.

> "If the tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fall and there upon the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer."[97]

The effect of refusal to approve is therefore that the dismissal order becomes non-est in law.

In Tata Iron & Steel Co. Ltd. v. S.N. Modak[98] the question was whether the Tribunal can dispose of an application for approval after the main industrial dispute is disposed of. Holding that the Tribunal can, the Supreme Court observed thatthe order of dismissal passed remains inchoate and incomplete until approval is obtained. If it is not approved it cannot effectively terminate the employer-employee relationship. If approval is granted it takes effect from the date of the order passed by the employer for which approval is sought. If approval is refused the order of dismissal passed by the employer becomes wholly inoperative and invalid.[99]

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97. Id. at p.3933 per Wanchoo, J.
98. (1950-67)4 S.C.L.J. 2692; A.I.R. 1966 S.C. 380.
99. Id. at p.2696 per Gajendragadkar, C.J.

However if section 33 is violated by not filing an application for approval the order of dismissal is not rendered void or inoperative.[100] This was because of the wider jurisdiction conferred on the authority under section 33A of the Act while deciding a complaint about voilation of section 33. Bhagwati, J. observed in Punjab Beverages (P) Ltd. v. Suresh Chand,[101]

> "The very fact that even after the contravention of section 33 is proved, the Tribunal is required to go into the further question whether the order of discharge or dismissal passed by the employer is justified on the merits, clearly indicates that the order of discharge is not rendered void and inoperative by such contravention."[102]

The same consequence follows if an application filed is withdrawn.[103]

Towards speedy justice.

When a workman is dismissed during pendency of proceedings before an adjudicatory authority and an

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100. Punjab National Bank v. A.I.P.N.B.E. Federation, A.I.R. 1960 S.C. 160 at p.171 per Gajendragadkar, J.
101. A.I.R. 1978 S.C. 995.
102. Id. at p.1002 per Bhagwati, J.
103. Id. at pp.1003, 1004 per Bhagwati, J.

application for approval is made no purpose is served by limiting the jurisdiction to an examination of a _prima facie_ case alone. When approval is granted on examination of a _prima facie_ case it is likely that the issue may again come up for examination before the adjudicatory authority by reference. Similar will be the position in the case of an arbitrator also. It would be in the interest of speedy justice that the issue of dismissal is examined on merits at the earlier possible instance itself. An application for approval provides such an instance for the authorities to examine the merits if such a jurisdiction is conferred on them. Therefore the section may be amended conferring wider jurisdiction, similar to that of section 11A, inthe Labour Court, Tribunal and Arbitrator before whom application for approval is made. When such applications are made before the other authorities, the jurisdiction may be limited to an examination of a _prima facie_ case, in view of the fact that their main function under the Act is not of an adjudicatory nature.

The law requires modification on the above lines. An amendment of the Act to achieve this purpose will be a welcome measure.

Chapter VII

COMPLAINT AGAINST VIOLATION OF RESTRICTIONS.

It has been seen already in the earlier chapters that the Act prescribes restrictions on the right of the employer to dismiss a workman concerned in a pending industrial dispute. He has to obtain prior permission or apply for subsequent approval as the case may be.[1] Suppose the employer does not comply with these requirements. What are the consequences?

Dismissal can never be in violation of the statutory requirements. If it is so the dismissal will certainly invite penal consequences. The employer may be prosecuted and punished.[2] It is true that the workman can raise an industrial dispute over the dismissal.[3] But under the Act the workman has a direct remedy by way of filing a complaint. The complaint has to be adjudicated. The Act provides,

> "Where an employer contravenes the provisions of Sec.33 during the pendency or proceedings before a Labour Court, Tribunal or National Tribunal, any employee

1. Industrial Disputes Act 1947, Section 33. See Ch.IV, nn.9, 10, 13.
2. Id. S.31(1). For text of the section see Ch.IV, n.61.
3. Section 2A of the Act. See supra, Ch.II, n.77.

> aggrieved by such contravention, may make a complaint in writing, in the prescribed manner to such Labour Court, Tribunal, or National Tribunal and on receipt of such complaint that Labour Court, Tribunal or National Tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its award to the appropriate government and the provisions of this Act shall apply accordingly."[4]

The complaint provision confers on the workman a right of direct access to the Tribunal. This right is not available to a dismissed workman in all cases of statutory violations. It is available only when the dismissal takes place without permission or approval while a dispute is pending before a Labour Court, Tribunal or National Tribunal. In cases of pendency before other authorities the dismissed workman has no such right.

What is the extent of jurisdiction of the Tribunal when a complaint is filed? Can it order reinstatement if it finds that dismissal was made without complying with the statutory

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4. Section 33A.

requirements? The Tribunal should have that power. If the employer dismisses an employee in an illegal manner, i.e., violating the requirements of permission or approval the Tribunal should not uphold the dismissal. If the Tribunal does, the imposition of restrictions would become meaningless.

A scrutiny of the judicial approach to the complaint provision reveals that the Court had certain assumptions. According to the Supreme Court the complaint of the workman will be based on two grievances, namely, that the dismissal is violative of the statutory provisions and that the dismissal itself is unjustified on merits. In Automobile Products of India v. Rukmaji Bala,[8] Justice Das observed:

> "That grievance is twofold. In the first place it is that the employer has taken a prejudicial action against them without the express permission in writing of the authority concerned and thereby deprived them of the salutary safeguard which the legislature has provided for their protection against victimisation. In the second place, and apart from the first grievance which may be called the statutory grievance, the workman may also have a grievance on merits which may also be of much more seriousness and gravity for them, namely, that in point

8. (1950-67)4 S.C.L.J. 2728; A.I.R. 1955 S.C. 258. For facts of the case, see supra, Ch.V, nn.6, 7, 8.

> of fact they have been unfairly dealt with in that their interest has actually been prejudicially affected by the high-handed act of the employer."[6]

Dismissal may be illegal, being in contravention of the statutory provision. Dismissal may be no unjustifiable grounds. According to the Supreme Court both the issues fall to be decided by the Tribunal.[7] This view was followed by the Supreme Court in Equitable Coal Co. v. Algu Singh.[8] The right to move the authority by lodging a complaint is a distinct and exclusive privilege given to the workman. When the provisions of permission or approval are violated the employee is given the right of making the conduct of the employer the subject matter of scrutiny by the adjudicatory authority.[9] This he can do without following the normal procedure laid

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6. Id. at p.2735.
7. Also see infra, n.10.
8. (1950-67)4 S.C.L.J. 2893; A.I.R. 1958 S.C. 761. In this case also the scope of section 23 of the 1950 Act (in pari materia with S.33A of the 1947 Act) came to be considered. Some workmen were dismissed after proper enquiry but without obtaining the required permission of the Labour Appellate Tribunal. Workmen filed complaint under section 23 of the 1950 Act. The Labour Appellate Tribunal found that the finding in the domestic enquiry was not 'an impossible view.' It, however, ordered payment of compensation to the workmen since dismissal was effected without permission. In appeal the Supreme Court held that the Labour Appellate Tribunal was not justified in passing the order of compensation.
9. Id. at p.2895.

down in the Act for raising an industrial dispute. When he files a complaint the adjudicatory authority has to examine, the Court observed, not only whether there has been a breach of the provision but also whether the dismissal is justified on merits. Gajendragadkar, J. observed,

> "In an enquiry....two questions fall to be considered: Is the fact of the contravention by employer of the provisions.... proved? If yes, is the order passed by the employer against the employee justified on the merits?.... If the first point is answered in favour of the employee, but on the second point the finding is that, on the merits, the order passed by the employer against the employee is justified, then the breach....proved against the employer may ordinarily be regarded as a technical breach and it may not, unless there are compelling facts in favour of the employee justify any substantial order of compensation in favour of the employee."[10]

Two propositions emerge from the cases. They are - (1) the complaint of the workman is that the dismissal is in violation of the statutory provision and also that it is unjustified on merits, (2) the complaint is to be decided by the Tribunal on merits if the violation of statutory provision is established.

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10. Id. at p.2896.

If the dismissal is justified on merits, mere violation of the statutory provision does not entitle the workman to any substantial relief.

Contrary to legislative intent.

A close scrutiny of the provision will reveal that the above position taken by the Court is not justified. What section 33A provides is that when an employer 'contravenes the provision of section 33' during pendency of adjudicatory proceedings any employee aggrieved 'by such contravention' may make a complaint and that the authority shall 'adjudicate upon the complaint as if it were an industrial dispute.'[11] Obviously the complaint of the workman need not relate to the merits of dismissal. His complaint can be confined to a dismissal in violation of section 33. Section 33A does not refer to merits of dismissal. It does not speak of 'unjustified dismissals.' To hold that the complaint of the workman is two-fold - one relating to violation of the statutory obligation by the employer and the other relating to merits of dismissal - is to stretch the language of the section unreasonably beyond the legislative intent.

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11. See supra, n.4.

The propositions have grave consequences. There is a clear finding of violation of the law against the employer. There arises a finding against the employee also when the dismissal is found to be justified on merits. Employee is then thrown out of employment. He is deprived of his livelihood. Does the statutory provision envisage such a position? Does it not mean to confer the power to decide only the question of legality of dismissal?

The interpretation of the Court has gone beyond limits of the statute leading to serious reperoussions. It narrowed down considerably the scope of complaint against statutory violations. In clear cases of violation of statutory provision the employee is left without remedy unless he proves that the dismissal was unjustified on merits. The interpretation works in favour of the employer. He is guilty of violation of the statutory requirements; still he can sustain the dismissal. What the Tribunal has to do is to examine whether the statutory requirement of permission or approval was violated and if so to grant relief to the workman. The requirement that the Tribunal has to decide the complaint 'as if it were a dispute referred to or pending before it' does

not mean that the Tribunal is bound to decide the merits of the dismissal.

Faulty reasoning of the Court.

What factors persuaded the Court to come to the conclusion that the Tribunal has to examine not only the violation of section 33 but also the merits of dismissal while it decides a complaint? In Automobile Products of India v. Rukmaji Bala[12] Justice Das observed;

> "Form DD prescribed by Rule 51A of the Industrial Disputes (Central) Rules, 1947, framed under Section 38 of the 1947 Act....requires the complaining workmen to show in their petition of complaint not only the manner in which the alleged contravention has taken place but also the grounds on which the order or the act of the management is challenged.[13] This clearly indicates that the authority to whom the

12. (1950-67)4 S.C.L.J. 2728; A.I.R. 1955 S.C. 258.
13. Ibid. Form DD prescribed by Rule 51A of the Industrial Disputes (Central) Rules 1947, was repealed by the Industrial Disputes (Central) Rules 1957. In the place of Form DD the 1957 Rules prescribe Form I. Form I also requires the manner of contravention and the grounds on which the action of the management is challenged, to be stated. The relevant portion of the Form reads:
"The petitioner(s) begs/beg to complain that the opposite party (ie.) has/have been guilty of a contravention of the provisions of S.33 of the Industrial Disputes Act 1947 (14 of 1947) as shown below:
(Here set out briefly the particulars showing the manner in which the alleged contravention has taken place and the grounds on which the order or act of the management is challenged.)"

complaint is made is to decide both the issues, namely, (1) the fact of contravention and (2) the merits of the act or order of the employer."[14]

It is not safe to construe the scope of the provisions in a statute with the aid of a Form prescribed by the rules made under the provisions of the Act.[15] The statute should govern the rules and not _vice versa_. This is all the more so when the rule making power is conferred on different authorities and different rules are framed by them.[16] The Court has construed the scope of Section 33A with reference to the Form prescribed under the Central Rules. But Forms prescribed by some State Governments are at variance with that form. Those Forms do not specifically require the complainant to state, in addition to the manner of violation of section 33, the grounds on which the order or the act of the employer is

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14. _Id._ at pp.2735, 2736.
15. "Statutes being a superior, and statutory instruments an inferior, form of legislation, statutes may of course be referred to for the purpose of interpreting statutory instruments. The extent to which statutory instruments are a permissible aid in the construction of statutes is more doubtful." _Maxwell on the Interpretation of Statutes_, Langan (ed.) (1969), p.74.
16. Section 38 of the Industrial Disputes Act 1947 confers the rule making power on the 'appropriate Government.' Under S.2(a) 'appropriate Government' is the Central Government in certain categories of industry (like, for instance, industry carried on by or under the authority of the Central Government) and the State Government in other cases. Hence both the Central Government and the State Governments have framed Rules under the Act.

challenged.[17] It is not therefore safe to construe the scope of section 33A on the basis of the Forms prescribed under the Central Rules.

Look at the wording of the Form in the Central Rules. It does not follow that the workman is required to state his grievance on the two counts, namely, (1) violation of section 33, and (2) merits of the dismissal. The Form requires the complainant to state the 'manner' of violation of section 33 and the 'grounds' on which the act of the management is challenged.

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17. For instance, in the form of complaint under section 33A Form XIX prescribed by the Industrial Disputes (Bombay) Rules, 1957 the relevant portion reads:
    "The complainant above named begs to state:-
    (1) that
    (2) that
    (3) that
    it is prayed that..."
    See, Malhotra, <u>The Law of Industrial Disputes</u>, Vol.2 (1981), p.432. Similar is the wording in the form of complaint (Form XIX) prescribed by the Industrial Disputes (Gujarat) Rules 1966. (at p.515). In Form L prescribed by the Tamil Nadu Industrial Disputes Rules 1958, for filing of complaint under section 33A, the relevant portion reads:
    "The petitioner(s)/begs/beg to complain that the opposite party(ies) has/have been guilty of contravention of the provisions of S.33 of the Industrial Disputes Act 1947 (Central Act XIV of 1947), as shown below:
    (Here enter the nature and details of contravention by the employer of the provisions of section 33 with dates from which the conditions of service have been altered or the date of discharge or punishment of the applicant or applicants." (at p.1056).

The manner of violation of section 33 may be dismissal without permission, dismissal without filing an application for approval or payment of one month's wages or dismissal of a protected workman without permission. When the employee is required to state the grounds on which the action is challenged, he has to show the ground on which he complains that the section has been violated. For instance a complaint by a workman may show the manner of violation of section 33 as 'dismissal without permission.' As grounds in support of his allegation he may state how he is a workman 'concerned' in the dispute, and how the misconduct for which he was dismissed is one connected with the pending dispute. The requirement to state the 'manner' and the 'grounds' help the complainant to indicate clearly the substance of his complaint. Its purpose is not to require him to show how the dismissal was unjustified on merits. The wording in the Form indicates only the limited question of violation of section 33 and not the wider question of the merits of dismissal. A look at the Industrial Disputes (Central Rules) 1957 makes the position clear. Form I requires the complainant to set out briefly the particulars showing the

manner in which the alleged contravention has taken place and the grounds on which the order or the act of the management is challenged. This requirement is preceded by the words;

> "The petitioner begs to complain that the opposite party has been guilty of a contravention of the provisions of section 33 of the Industrial Disputes Act 1947 (14 of 1947) as shown below."

Ostensibly, what should be 'shown below' is only the details of the contravention of section 33.

"As if it were a dispute"

The requirement that the Tribunal is to decide the complaint 'as if it were a dispute referred to or pending before it' also does not necessarily indicate that the merits of the dismissal have to be gone into in deciding the complaint. Its purpose is to remove a hurdle - the hurdle of a formal reference by the Government before the Tribunal can get jurisdiction to decide the issue of legality of dismissal. In other words it means that a dispute over dismissal in violation of the statutory obligation need not be referred by the Government to enable the Tribunal to decide the issue and order relief. The Tribunal can adjudicate that his dismissal

was in violation of the statutory provisions. It can decide the complaint 'as if it were a dispute referred to or pending before it.' It can pass appropriate orders when it finds that dismissal was in violation of section 33. The Tribunal need not confine itself to merely giving a declaration that the dismissal was in violation of section 33. It can order relief by way of reinstatement and back wages. These are the consequences that should follow by the statutory declaration that the Tribunal has to proceed with the complaint 'as if it were a dispute referred to or pending before it.' It should not be construed to mean that the Tribunal is to adjudicate the merits of the dismissal.

When the statute says that a person aggrieved by the violation can file a complaint and that the Tribunal shall proceed with it as if it were a dispute referred to or pending before it, the legitimate scope of the deemed reference can only be the question of dismissal in violation of the provisions. Whether the dismissal was justified on merits is an issue quite distinct from, and independent of, the issue of violation of the statutory provisions. It is not

one incidental to the main question. But Justice Das observed in *Automobile Products of India*,[18]

> "It is also clear that under section 33A of the 1947 Act the authority is to adjudicate upon the complaint 'as if it were a dispute referred to or pending before it' .... These provisions quite clearly indicate that the jurisdiction of the authority is not only to decide whether there has been a failure on the part of the employer to obtain the permission of the authority before taking action but also to go into the merits of the complaint and grant appropriate reliefs."[19]

True the Tribunal has the duty to examine the merits of the complaint and order relief. But to equate the duty to decide the merits of the complaint with the duty to decide on the merits of the dismissal proceeds from an erroneous assumption, namely, that the complaint of the workman relates not only to the violation of section 33 but also to the merits of dismissal.

'*Automobile Products*' - *a judicial gloss*.

The construction by the Supreme Court of the scope of complaint jurisdiction under section 33A, in *Automobile*

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18. (1950-67)4 S.C.L.J. 2728; A.I.R. 1955 S.C. 258.
19. *Id.* at p.2736.

Products,[20] is a judicial gloss. The Supreme Court based its decision on previous pronouncements by the Labour Appellate Tribunal and the Bombay High Court, in Serampore Belting Mazdoor Union v. Serampore Belting Company Ltd.[21] and Batuk K. Vyas v. Surat Borough Municipality[22] respectively.[23]

The Labour Appellate Tribunal decision in Serampore Belting case[24] related to dismissal of workmen in violation of section 33. The Tribunal was satisfied that the statutory provision was violated. It further examined the merits of dismissal and found the workmen guilty of misconduct warranting dismissal. In appeal the Labour Appellate Tribunal endorsed this. In doing so it examined the scope of section 33A of the Act.

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20. Supra, n.18.
21. Infra, n.24.
22. Infra, nn.34-36.
23. Automobile Products of India v. Rukmaji Bala, (1950-67)4 S.C.L.J. 2728. Das, J. observed in this case at p.2736.
    "The extreme contention that under section 33A of the 1947 Act, on a finding that there has been a contravention of the provisions of section 33, the Tribunal's duty is only to make a declaration to that effect, leaving the workmen to take such steps under the Act as they may be advised to do, has been negatived by the Labour Appellate Tribunal in Serampore Belting Mazdoor Union v. Serampur Belting Co.Ltd. and by the Bombay High Court in Batuk K. Vyas .... We find ourselves in agreement with the construction placed upon section 33A.... by these decisions."
24. 1951(2) L.L.J. 341.

Referring to the position before the introduction of section 33A by the amendment of 1950 it said that when section 33 was violated, two remedies were available to the workmen, namely, a prosecution under section 31,[25] and a reference under section 10[26] of the Act. These remedies were not available to the aggrieved workman as a matter of right. He could not himself prosecute the employer, for no court can take cognizance of the offence unless the complaint is filed by or under the authority of Government.[27] Nor could he get his grievance over dismissal redressed by a Tribunal, unless a reference of the dispute is made by Government. The Labour Appellate Tribunal proceeded to say;

> "Section 33A of the Act has conferred a right on the aggrieved workmen to have at their instance the dispute regarding the change of conditions of service or their discharge or punishment whether

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25. See Ch.IV, n.61.
26. Section 10 of the Act provides for reference of an industrial dispute to a Board, for settlement; to a Court, for inquiry and to a Labour Court, Tribunal or National Tribunal, for adjudication.
27. S.34(1) of the Act provides,
    "No court shall take cognizance of any offence punishable under this Act or of the abetment of any such offence, save on complaint made by or under the authority of the appropriate Government."

> by dismissal or otherwise during the pendency of the proceedings mentioned under section 33 adjudicated upon by approaching the Tribunal direct without the intervention of Government.... Thus by the introduction of S.33A, two objectives have been attained, namely, (1) avoidance of multiplicity of proceedings and (2) a more speedy determination of the dispute. The scope of the enquiry under section 33A would be the same as it would have been before the amendment of 1950 if a reference by the appropriate government had been made and this, in our opinion, is indicated by the phrase 'as if it were a dispute referred to' occurring in that section."[28]

This reasoning does not appear to be sound. Avoidance of multiplicity of proceedings and granting of speedy remedy to workmen do not seem to be the real objectives. These objectives could have been easily achieved by conferring a wider jurisdiction on the authority to examine the merits of dismissal when applications for permission or approval are considered. This was not done. There could be an industrial dispute even in respect of a dismissal effected with permission or approval. Further, in respect of violation of section 33 when proceedings under the Act other than

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28. Serampore Belting Mazdoor Union v. Serampore Belting Company Ltd., 1951(2) L.L.J. 341.

adjudicatory ones are pending, the remedy of complaint is not open to the workman; in such cases if the dispute cannot be settled otherwise he has to approach the Government for a reference of the dispute over dismissal for adjudication.

At first sight it may appear that jurisdiction to adjudicate on merits under section 33A is beneficial to the workman; the dispute could be adjudicated on merits at the earliest instance itself. But in fact the position is not beneficial to him. Suppose the jurisdiction under section 33A is limited to the question of violation of section 33. When violation is established he has to be reinstated. He gets his wages. Another proceedings in accordance with law will be required to dismiss him again. But when section 33A confers on the Tribunal jurisdiction to examine merits also, a dismissal effected in clear violation of the law may be enforced on the workman. The workman may be guilty. He may deserve a dismissal. But he could not be dismissed illegally. Dismissal in violation of section 33 should be declared illegal being in violation of the law. Section 33A confers on the workman a remedy against such illegal dismissal effected during adjudication proceedings. A construction of

section 33A which may deny the workman the remedy defeats this purpose. On the other hand it becomes beneficial to the employer. Section 33A has a purpose. The purpose is to enforce the provisions of section 33 against the employer. This purpose is defeated where the Tribunal is required to examine not only the question of violation of section 33 but also the merits of dismissal and to uphold dismissal even if effected in clear violation of the section.

If the Tribunal examines only the question of violation of section 33 and orders reinstatement it may happen that after reinstating the workman the employer may proceed to dismiss him again after observing the requirements of permission or approval. The employer may dismiss the workman after disposal of the pending proceedings. It is likely that such dismissal may be upheld on a reference under section 10. But such a contingency is no reason why the Tribunal should exercise the wider jurisdiction of examining merits of dismissal in a proceeding under section 33A. Dismissal without approval or permission during pendency of proceedings is obvious violation of the statute and is patent

illegality. A workman is entitled to work and earn his wages until his services are terminated in a legal manner. It is necessary that a workman dismissed illegally should be reinstated so that he can work and get his wages until his services are terminated properly.

Examined further, the reasoning of the Labour Appellate Tribunal seems to go still on the wrong lines. Section 33A presupposes that section 33 has been contravened. It is that fact which gives the 'aggrieved employees' the right to set the Tribunal in motion. If the employer disputes the fact of violation of section 33, the Appellate Tribunal observed, that would be a preliminary issue and when that issue is decided in favour of the employee a further inquiry into the merits of dismissal is to be made.[29] The Labour Appellate Tribunal said;

> "....the scope of this further enquiry is to be different and distinct from the enquiry necessary for the determination of the preliminary issue, and so must necessarily be in respect of the merit of the challenged act of the employer."[30]

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29. Ibid.
30. Ibid.

This is a wrong approach and an incorrect assumption adopted by the Labour Appellate Tribunal. It says that since section 33A contemplates violation of section 33, the Tribunal is to decide an issue substantially different from violation of section 33. The fact that section 33A confers remedy when section 33 is violated does not mean that the Tribunal has to decide an issue other than violation of section 33. The complaint of the workman will be that he was dismissed in violation of section 33; he is aggrieved by the very violation of section 33. He approaches the Tribunal for redressal of this particular grievance. What the Tribunal has to decide is whether this grievance has substance. For this it has only to examine whether section 33 has been violated. When violation is established the complaint is proved. When it is proved the workman is entitled to relief. The relief is given by passing an award redressing his grievance. The redressal is to be made by awarding reinstatement. Section 33A provides a remedy against dismissal in violation of section 33 during pendency of adjudication. The jurisdiction is very limited. It should not extend to examine merits. The judicial interpretation has, however, converted the limited

jurisdiction into a wider one. This judicial gloss is not correct interpretation. Irrespective of the question whether or not the dismissal is justified on merits, the workman should have a remedy against dismissal in violation of the law. That remedy is provided in section 33A.[31] Judicial interpretation has narrowed down this remedy by holding that Tribunal has to examine not only violation of section 33 but also the merits of dismissal.

The scope of section 33A was dealt with in a more detailed manner by the Bombay High Court in Batuk K. Vyas v. Surat Borough Municipality and others,[32] relied on by the Supreme Court in Automobile Products of India Ltd.[33] The dismissal was in violation of section33; complaint under section 33A was filed. The Tribunal went into the merits and held the dismissal justified. On appeal the Labour Appellate Tribunal upheld the decision. A writ petition was

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31. The remedy is only in part in so far as no direct remedy is provided by the statute to the workman in all cases of violation of S.33. When proceedings are pending before authorities other than the adjudicatory authorities and the conditions in S.33 are violated, the workman has no direct remedy. See S.33A, supra, n.4.
32. 1952(2) L.L.J. 178.
33. (1950-67)4 S.C.L.J. 2728.

filed before the Bombay High Court challenging the decision of the Tribunal and Labour Appellate Tribunal on jurisdictional grounds. The contention was raised that the scope of enquiry under section 33A was limited to examination of the question whether section 33 was violated and that the Tribunal could not go into the merits. If section 33 was violated, it was contended, the only award the Tribunal can make is to restore *status quo* by ordering reinstatement. The Court rejected the contention. Discussing the law before the introduction of section 33A the Court pointed out that if the employer violated the requirements of permission or approval the workman had no remedy except moving for a reference of the dispute for adjudication. The Court said:

> "....under the old law, although the employer was liable to be punished for a contravention of sec.33, the workman had no remedy in himself to move the Tribunal to adjudicate upon what the employer had done to his prejudice. Therefore, section 33A confers an important right upon the workman. He has a right to make a complaint to the Tribunal and the Tribunal has been given the right to adjudicate upon the complaint as if it were a dispute referred to or pending before it...."[34]

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34. *Natuk K. Vyas* v. *Surat Borough Municipality and others*, 1952(2) L.L.J. 178 at p.179 *per* Chagla, C.J.

Whenever there is an industrial dispute over dismissal on the ground that it is not justified the appropriate government could be moved for reference and when the question of the justifiability of dismissal is referred for adjudication the same could be considered and award passed by the Tribunal. The restriction contained in section 33 is against dismissals during pendency of proceedings without permission or approval. Any dismissal, irrespective of whether it is justified or not on merits would violate section 33 if the statutory prescriptions as to permission or approval are not followed by the employer. When an employer dismisses a workman in violation of section 33 the latter is aggrieved thereby. Before section 33A was enacted an employee had no right to complain to the Tribunal about such dismissal. Section 33A confers on him this right. It is in this sense that the statute confers on him an important right. When the law creates an obligation on the employer and provides a remedy to the workman the remedy should be geared to the obligation and whenever there is a violation of the obligation the remedy should be available. But the Court observed:

> "....*prima facie* it seems clear that the object of section 33A was to avoid a multiplicity of proceedings. Instead of government making an independent reference and calling upon the Tribunal to adjudicate upon that reference, a more summary procedure was provided by which the workman himself, if he objected...to his discharge, could go to the Tribunal and ask the Tribunal to adjudicate upon the dispute between himself and his employer."[35]

This statement is not proved by the wording of section 33A. The question is only whether section 33 is violated. The points to be examined by the Tribunal are pure and simple. Is the action punitive termination amounting to dismissal? Was there any industrial dispute pending? Was the workman concerned in such dispute? Was there permission or approval? When these questions are examined the violation of section 33 is found the Tribunal has no other course. It has to pass an order of reinstatement. There should be no question of hearing the employer on merits of dismissal. If a workman, reinstated in a proceeding under section 33A, is dismissed again legally such dismissal will be one different from the original dismissal. If an industrial dispute is raised over

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35. *Id.* at pp.179, 180.

such dismissal and referred for adjudication the Tribunal may proceed to examine whether the dismissal was justified. One cannot say in such a context that there is multiplicity of proceedings in respect of the same matter. The Court proceded to say;

> "The very fact that the legislature treats the complaint as if it were a dispute referred to or pending before it, goes to show that the jurisdiction of the tribunal was not limited merely to consider the question of contravention of section 33 but to decide on the substantive dispute between the employer and the workman with regard to the change in the conditions of service or the discharge of the employee by the employer."[35]

The fact that a complaint is treated as if it is a dispute referred to the Tribunal does not mean that the Tribunal can go beyond the scope of the complaint, namely, dismissal in violation of the requirement of permission or approval. It cannot proceed to decide another issue, namely, whether or not the dismissal was justified. A complaint is deemed to be an industrial dispute referred to the Tribunal. The Tribunal has to confine itself to the issue covered by the complaint. The relevant words in section 33A read:

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35. Id. at p.180.

> "Where an employer contravenes the provisions of section 33.... any employee aggrieved by such contravention, may make a complaint...."[37]

The cause of grievance is the contravention of section 33. The merits of dismissal will be a totally different issue from the question of contravention of section 33. The tribunal cannot, in a complaint under section 33A where the employee does not challenge the order of dismissal on merits but challenges it only on the ground that it was effected in violation of section 33, proceed to decide on the justifiability of dismissal on merits. If it does it will be acting outside its jurisdiction and deciding an issue which is not brought before it for adjudication.

Violation of section 33 is an offence under the Act. The guilty employer can be punished with imprisonment or fine or with both.[38] Section 33A on the other hand provides the aggrieved workman a remedy. The action of the employer giving rise to both types of proceedings is the same. Hence the issue falling for decision in both types of cases should be the same, namely whether or not the employer has violated

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37. See *supra*, n.4.
38. Section 31(1) of the Act. See Ch.IV, n.61.

section 33. If the question is in the affirmative, the duty of the deciding authority is to punish the employer in criminal proceedings. In proceedings under section 33A the duty is to award relief to the aggrieved workman. The interpretation put by the Court in section 33A results in a situation in which the dismissal by the employer is upheld and yet he is exposed to punishment.

Even the penal provision may not be effective for two reasons. The punishment provided are imprisonment, fine or both. Even if employer is found guilty of violation of section 33 imprisonment is less likely to be imposed on him. Fine may be the usual punishment. The negligible fine of rupees one thousand is no real punishment so far as a rich employer is concerned. Prosecution for violation of section 33 is to be initiated by or under the authority of the government. The employee aggrieved by violation of section 33 is not free to prosecute the employer. These two factors coupled with the interpretation put on section 33A enable employers to honour section 33 more by its infraction than by observance.

The Court did not feel that its interpretation on section 33A was in any way prejudicial to the workman. The Court said:

> "We are conscious of the fact that we are interpreting a statute which was intended to confer benefits upon the working classes and the underlying principle of all such legislation is that the workman should be protected against the employer and therefore we must always hesitate to put any interpretation upon labour legislation which is likely to prejudice the rights of workmen. But we feel certain that in placing the interpretation that we are doing, we are in no way prejudicing the rights of the workmen."[39]

It is submitted, that this is not true. The rights of workmen are prejudicially affected. The law confers on workmen a right not to be dismissed without permission or approval in certain situations. When the employer violates the law it prejudicially affects them.

Compensation to the employee.

There is another aspect. In the case of dismissal requiring permission, the employer cannot dismiss the workman

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39. Batuk K. Vyas v. Surat Borough Municipality and others, 1952(2) L.L.J. 178 at p.181 per Chagla, C.J.

on the spot. 'Firing' an employee on the spot smacks the evils of the old outmoded concept of contract. Gone are those days. New concepts set in. Action of an employer is subjected to restrictions. He has to wait for permission. This means that the workman will get his wages till permission is given and dismissal order passed. But where the workman is dismissed without permission he loses the salary for this period and the employer stands to gain by violating the law.[40] The High Court of Bombay considered this aspect in *Batuk K. Vyas*. v. *Surat Borough Municipality*[41] and said;

> "But even this prejudice can be obviated by the Tribunal *in proper cases* awarding compensation to the workman when he has been discharged without the sanction of the Tribunal. The Tribunal may well say to the employer that although your action is justified, inasmuch as you did not take the sanction of the Tribunal, inasmuch as you committed a breach of the law, we will penalise you and compel you to give compensation to the workman for *such period as the Tribunal thinks proper. It may be said in fairness to the industrial tribunal in this case that he did consider the question of compensation and* on the facts of this particular case, *he came to the conclusion that no compensation should be awarded to the petitioner.*"[42]

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40. *Id.* at p.181.
41. *Ibid*.
42. *Ibid*. (Emphasis added).

The Court makes here an attempt to show how prejudice to workmen could be avoided. How, according to the Court, is the prejudice obviated? The workman may get a compensation, not in all cases but in some cases ('proper cases') only. A compensation not amounting to his wages for the period till he is dismissed legally, but only for 'such period as the Tribunal thinks proper.' If this is so it amounts to miscarriage of justice to the prejudice of workmen. How this may work out is illustrated by the present case itself. The employer acted in clear violation of section 33. The Tribunal concluded that no compensation is to be given. The interpretation given by the Court thus enables the employer to evade the laudable object of the law.

Unless the jurisdiction of the Tribunal in section 33A is confined to examination of the question of violation of section 33 and ordering of relief on the violation being proved, the rights of the workman will be prejudiced. Though the decision of the Bombay High Court in Batuk K. Vyas v. Surat Borough Municipality[43] expressed the view that when

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43. 1952(2) L.L.J. 178.

section 33 is violated the Tribunal could award proper compensation[44] in a proceeding under section 33A, the decision of the Supreme Court in Equitable Coal Co. Ltd. v. Algu Singh[45] strikes a different note. Holding that payment of compensation is not to be adopted as a matter of rule in case of violation of the requirement of permission the Court reversed the order of compensation passed by the Tribunal, saying,

> "On the findings made by the Appellate Tribunal, it is clear that a proper enquiry was held by the appellant and, as the judgement of the appellate tribunal shows, the view taken by the enquiring officer and ultimately accepted by the appellant cannot be regarded as an unreasonable view. The conduct of the respondents which was held proved by the enquiring officer would undoubtedly justify their dismissal. Having regard to the facts of this case, therefore, we hold that the order of compensation passed by the Appellate Tribunal must be reversed."[46]

The prejudice to the rights of workman noted by the High Court of Bombay in Batuk K. Vyas[47] therefore remains.

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44. Supra, n.42.
45. (1950-67)4 S.C.L.J. 2893; A.I.R. 1958 S.C. 761.
46. Id. at p.2896 per Gajendragadkar, J.
47. 1952(2) L.L.J. 178 at p.181. Chagla, C.J. observed:
"There is one possible prejudice of which we are conscious and the possible prejudice is that if the employer were to ask for sanction of the

(contd..)

Its observation that the prejudice can be obviated by the Tribunal by ordering compensation for dismissal in breach of the statutory provision,[48] does not hold good in view of the decision in Equitable Coal Co. Ltd.[49] Examination of the merits of dismissal in a complaint proceeding prejudicially affects the workman. The proper construction to be put on section 33A is that it is limited to an enquiry of violation of section 33.

But the view that the jurisdiction under section 33A is wider has been followed in subsequent cases.[50] Recognition of a wider jurisdiction in a complaint under section 33A has persuaded the Courts to hold that a violation of section 33 would not render the order of dismissal void or inoperative.[51]

(f.n.47 continued)
Tribunal before taking action, the Tribunal would have to hear the matter and it is only after the Tribunal has given its decision that the employer could act as he intended to act.... In other words, the discharge...would have been postponed for sometime and during that period he would have earned his salary."

48. Supra, n.42.
49. (1950-67)4 S.C.L.J. 2893.
50. For example, see Punjab Beverages (P) Ltd. v. Suresh Chand, A.I.R. 1978 S.C. 995.
51. See Ch.VI, n.102.

The anomaly.

If the dismissal is effected during pendency of proceedings before a conciliation officer, Board or Arbitrator the remedy of filing a complaint is not available now to the workman. This is obviously an anomalous situation. There is no reason why the workman should be denied the remedy in such cases. He should be given the right to get the issue adjudicated by an appropriate authority. Workman should not be left in the ditch when the statutory safeguards are violated.

PART IV

PROCEDURAL FAIRNESS IN DISMISSAL

Chapter VIII

DOMESTIC ENQUIRY — ULTRA VIRES AND BIAS.

Is it necessary to hold a domestic enquiry before dismissing a workman? It is, as the dismissal affects the livelihood of the workman to a great extent. The employee is to be given a fair opportunity for hearing before he is condemned.[1] True that the employer has to maintain discipline in the establishment. He may plead that a right to effect an immediate dismissal for misconduct is essential for discipline. In its march towards the goal of industrial discipline the judiciary has attempted to strike a balance between two conflicting claims - the claim of the workman for fair hearing and the claim of the management for quick action. _Fire Stone_[2] is the best illustration. The holding of the Court is interesting. The management is expected to

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1. "The Management must hold enquiry to find out the guilt of the employee and also to determine the appropriate punishment, if any. Such a practice in pursuance of the principles of natural justice is followed in India to protect labour and to afford them all possible opportunity to disprove the charges levelled and to obviate chances of victimisation." Vijai Shankar, "Disciplinary Action and Natural Justice", 1971(1) L.L.J. vi at p.xiii. On domestic enquiry generally, see P.K. Sen, _Natural Justice in Indian Domestic Enquiries_ (1970).
2. See Ch.XI, nn.9, 16.

hold a domestic enquiry before dismissing a workman. The Court hastened to add that in a case there was no proper enquiry the management can justify dismissal subsequently before Tribunal adducing evidence.

Limitation put by Standing Orders and Rules.

The Act contains no provision making domestic enquiry a compulsory requirement before dismissal. But the Service Rules or Standing Orders applicable may provide, and prescribe the procedure, for domestic enquiry. In such cases the enquiry has to be held strictly according to that procedure. No doubt any deviation would vitiate the enquiry. Travancore Titanium Products Ltd. v. Workmen[3] is a relevant example. The Standing Orders provided for three clear days' notice. When the management intend to hold an enquiry into the misconduct it had to give this notice. The Standing Orders also said that the concerned workman can be represented by another workman in the enquiry. In the case the above requirements were not observed. When a dispute over dismissal of the workman was referred for adjudication the Tribunal held

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3. (1950-67)7 S.C.L.J. 153; 1970(2) L.L.J. 1.

the enquiry vitiated on this ground. The formal charge sheet was served on the workman on September 27, 1961 intimating him that an enquiry will be held on September 30, 1961. On appeal to the Supreme Court it was argued that the violation of requirement of notice was more technical than substantial because the workman had been given two and a half days notice. The Court did not accept this plea. Chief Justice Gajendragadkar said,

> "Since the Standing Order insists upon notice of three clear days being given to the workman, failure to comply with the Standing Order does introduce an infirmity in the proceedings."[4]

The Supreme Court held the enquiry was vitiated also on the ground that the workman was not permitted to be represented by another member of the staff of his choice.

An establishment may have the service rules of its own. These rules may designate a particular authority as the disciplinary authority. It is this authority that has to initiate the disciplinary action. It has to issue charge and institute the enquiry. No other authority is competent

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4. *Id.* at p.156.

to take these steps. In Steel Authority of India v. Presiding Officer, Labour Court[5] there was such a fact situation. According to the service rules of the appellate company, which contained provisions concerning the procedure for imposing penalties, the Personnel Manager was the disciplinary authority. An assistant in the Medical Department of the Company was accused of misconduct. The Chief Medical Officer[6] served the charges against him. He even constituted a Committee to enquire into the charges. The Committee submitted its report finding the employee guilty. The Personnel Manager of the company agreed with the report of the Committee and dismissed him. The Labour Court found[7] that the Chief Medical Officer was incompetent under the rules to frame charges against the employee and to constitute the enquiry committee. In a writ petition against this the Patna High Court held that the personnel Officer was the disciplinary

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5. (1980)16 S.C.L.J. 293; A.I.R. 1980 S.C. 2054.
6. Ibid. He was the Head of the Medical Department of the Company.
7. Ibid. The matter came before the Labour Court by a petition filed by the management seeking approval of dismissal under section 33(2)(b) of the Act and by an application filed by the employee under section 33A of the Act. These were disposed of together by the Labour Court.

authority in respect of the employee, he alone could frame the charges and constitute the enquiry committee and the Chief Medical Officer has no authority to do so. On appeal the Supreme Court upheld the concurrent findings of the Labour Court and the High Court.[8]

The *Travancore Titanium* and *Steel Authority* cases, discussed above, lay down in categorical terms that once the Standing Orders or the Service Rules of a particular industrial establishment prescribe a procedure for the appointment of an enquiry officer and other steps in enquiry, all actions relating to these must be within the limits of the Standing Orders or Service Rules. The decisions bring in the *ultra vires* principles to the process of domestic enquiry.

Managerial Bias in domestic enquiry.

The enquiry against the workman is held by the management. The enquiry officer is nominated by the management. Usually somebody in the managerial cadre is nominated as the enquiry officer.[9] Sometimes the counsel[10] of the management

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8. *Id.* at p.297 *per* Gupta, J.
9. See *Andhra Scientific Co.* v. *Seshagiri Rao*, (*infra*, n.13), *Meenglass Tea Estate* v. *Workmen* (*infra*, n.16), etc.
10. See *Saran Motors (P) Ltd.* v. *Viswanath*, (*infra*, n.26).

will be asked to hold the enquiry. It is likely that a person in the pay roll of the management or is connected otherwise with the management in protecting the interest of the management may not be a fair judge[11] in an enquiry against a workman. Such a person may be disposed to approach the enquiry with a predetermined mind.[12] The appreciation of the evidence by him may be tainted by partiality towards management. He may play different roles in the same case as enquiry officer, witness and prosecutor. The position strikes at the root of the cardinal principle of natural justice that no man shall be judge in his own cause. An impartial examination of the issue, namely, whether there is misconduct necessitating dismissal of the workman, may not be possible when the enquiry officer is a managerial nominee. The workman may have a feeling that the enquiry may not serve any useful purpose. In his eyes it is only a mere show

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11. But the judiciary rarely admits this position. Cf. Eckersley v. The Mersey Docks and Harbour Board, [1894] 2 Q.B. 667 where Lord Esher, M.R. held that an arbitrator as an employee of the Board was not expected to act in favour of his masters even in a situation where his son was to succeed him on the Board when he retired.
12. "Likelihood of bias may arise from the fact that an adjudicator is the employer or employee of one of the parties, if their personal relationship is a close one or if their respective interests are directly involved in the subject matter of the proceedings." S.A. de Smith, Judicial Review of Administrative Action (1973), p.236.

and a sham.[13] This position is obviously unsatisfactory.

There are a catena of cases in which the Supreme Court examined the above problems. Andhra Scientific Co. Ltd. v. Seshagiri Rao[14] is one such a case. The respondent workman was dismissed on charges of misconduct. The enquiry before his dismissal started with the General Manager himself as the enquiry officer. Another managerial personnel was in charge of procuring necessary evidence against the workman. This can be said to be prosecuting the case. After some witnesses were examined this prosecutor felt that the General

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13. Even domestic tribunals, namely, tribunals of professional bodies, clubs, etc. are not free from these evils. Referring to domestic tribunals, Robson observed:
"They are in nearly all cases entirely uncontrolled, and responsible to no one, save their own colleagues; and they are usually accustomed to regard the public interest as of less importance than, or identical with, the prosperity of the members of the trade or craft .... Frequently the body which creates the offence is the body which tries persons accused of having committed that offence. All this results in decisions which are obviously biased and informed by prejudice." Robson, Justice and Administrative Law (1970), pp.622, 623.
14. (1950-67)3 S.C.L.J. 1996; [1961-62]21 F.J.R. 253.

Manager, who was till then the enquiry officer, should himself give evidence against the workman.[15] It went on with the prosecutor becoming the enquiry officer for the rest of the enquiry and the first enquiry officer going to the witness box. The result was obvious. The workman was found guilty and dismissed. The workman would have been left in the ditch, had not the Government referred the dispute over dismissal for adjudication. The Labour Court, the adjudicatory authority, held the enquiry vitiated. In a writ petition the High Court of Andhra Pradesh and in appeal the Supreme Court made the same decision. The Supreme Court said that when the enquiry officer later poses as witness and the prosecuting officer poses as judge, the enquiry cannot be said to have ensured fair play. The Court said;

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15. Id. Ramanatha Babu, the person in charge of prosecuting the case against the workman and who later acted as presiding officer in the enquiry, said in evidence;

"I did not decide as to who should be witnesses when the enquiry began.... I did not know at the beginning that the general manager should be a witness.... While going through the evidence and perusing the records I decided that the general manager should depose as a witness."

(at p.2000).

"One can see that in the facts of this case the general manager and Ramanatha Babu formed practically one entity with two bodies. At one stage, the first acts as a judge; at a later stage, he steps down as a witness, and the second becomes a judge. There is the further fact here that the person who gave the actual decision had actively been procuring the evidence, with the avowed motive of securing a conclusion against the workman. These being the facts, the manner in which the enquiry was conducted in this case can hardly be said to have insured fair play which rules of natural justice require."[16]

Andhra Scientific Co. case has a memorable parallel; State of U.P. v. Mohamed Nooh[17] a case of disciplinary

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16. Ibid. Per Das Gupta, J.
17. A.I.R. 1958 S.C. 86. In a departmental enquiry the Deputy Superintendent of Police was the enquiry officer against a police constable. In the course of enquiry, the enquiry officer himself gave evidence against the constable. The Supreme Court held that the enquiry was violative of the principles of natural justice. S.R. Das, C.J. speaking for the majority said that the act of the enquiry officer,

    "in having his own testimony recorded in the case indubitably evidences a state of mind which clearly discloses considerable bias against the respondent."

    (Id. at p.91). Bose, J. in a separate judgement, agreed with this view and said,

    "....the spectacle of a Judge hopping on and off the Bench to act first as Judge, then as witness, then as Judge again to determine whether he should believe himself in preference to another witness, is startling to say the least. It would doubtless delight the hearts of a Gilbert and Sullivan comic opera audience but will hardly inspire public confidence in the fairness and impartiality of departmental trials; and certainly not in the minds of the respondent." Id. at p.97.

proceeding by a public authority and speaks volumes about the extent of bias the nominees of management may have while they act as enquiry officers. When a person who has his own biased version of the misconduct of the workman acts as a presiding officer to decide whether the workman is guilty, one can imagine how much injustice is likely to be perpetrated. Managerial personnel cannot but be prejudiced against the workman, when it takes up the prosecuting and judging functions together. The evil became patent in Andhra Scientific Company case where the judge and the prosecutor, the General Manager and the person entrusted with prosecuting the misconduct, changed places in the course of the enquiry as witness and enquiry officer respectively. If this had not taken place, their predisposition, prejudice or closed mind against the workman would have remained latent, unnoticed and unfathomed and in the absence of any evidence of bias against the workman, the enquiry would have been upheld.

When managerial personnel held the domestic enquiry it is possible that they may have some knowledge of the incident

alleged against the workman. No wonder this will in turn affect the outcome of the enquiry to a large extent. The result of the enquiry will be doubly unfair if one of the victims of an alleged misconduct against the workman himself holds the enquiry. In a system where the enquiry is held by the management, it is likely that the very persons involved in the misconduct alleged against the workman may hold the enquiry. The facts in Meenglass Tea Estate v. Workmen[18] are such a puzzling example. Some workmen were charged with the misconduct of assaulting the Manager and two Assistant Managers. The same Manager and one of the same Assistant Managers were the enquiry officers. No witnesses were examined. The enquiry officers cross-examined the workman, found him guilty and dismissed him. The Tribunal and in appeal the Supreme Court held the enquiry to be defective. The Court said,

> "The enquiry, such as it was, was made by Mr. Marshall or Mr. Nichols who were not only in the position of judges but also of prosecutors and witnesses. There was

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18. (1950-67)2 S.C.L.J. 1458; A.I.R. 1963 S.C. 1719.

> no opportunity to the persons charged to cross-examine them and indeed they drew upon their own knowledge of the incident and instead cross-examined the persons charged. This was such a travesty of the principles of natural justice that the Tribunal was justified in rejecting the findings...."[19]

It may be very difficult for the enquiry officers, as part and parcel of the management, to keep aloof from their roles of prosecutor and witness while they act as a judge in the cause against the workman. They being the victims of the alleged misconduct are judges more in their own cause than in the workman's cause and can never act with the cold neutrality of a judge. This will be prejudicial to workmen since the decision on guilt follows without proper evidence.

Associated Cement Company Ltd. v. Workmen[20] is a milestone in the search for laying down criteria for objectivity in domestic enquiry. A workman was charged with an act of hooliganism during a cinema show arranged by the management. He was asked to explain his misconduct. He denied the

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19. Id. at p.1460 per Hidayatullah, J.
20. (1950-67)2 S.C.L.J. 1423; 1963(7) F.L.R. 269.

allegation. Rejecting his explanation the Manager ordered for an enquiry and stated:

> "We are not prepared to accept all that you have stated by way of explanation as it is not borne out by all that we actually saw and also all that was seen by other independent witnesses."[21]

The Manager, the Assistant Manager and the Chief Engineer were the enquiry officers. The result was obvious. They held the workman guilty. The workman was suspended and later dismissed. The Tribunal on reference held that the enquiry was defective. On appeal the Supreme Court also held that the enquiry was not proper. The Court observed that if an officer claims that he himself saw the misconduct of the workman 'it is desirable that the enquiry be left to be held by some other person who does not claim to be an eye witness of the impugned incident.'[22] The purpose of a domestic enquiry is to determine whether the charge against the workman is proved or not. If the enquiry is held by a person who claims personal knowledge of the incident, the enquiry will become an empty formality. The Court observed,

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21. Id. at p.1426.
22. Id. at p.1427 per Gajendragadkar, J.

> "How the knowledge claimed by the enquiry officer can vitiate the entire proceedings of the enquiry is illustrated by the present enquiry itself.... We are inclined to think that the injustice which is likely to result if a domestic enquiry is held by an officer who has himself witnessed the alleged incident, is very eloquently illustrated by the statements contained in the Manager's letter...."[23]

The present case is peculiar in its kind. That the enquiry officers had personal knowledge of the incident was patent. They expressly relied on their personal knowledge in arriving at the conclusions. In many other cases this may not be patent but at the same time the decision of the enquiry officer may be influenced by knowledge of the alleged incident.

In the puzzling drama of industrial relations more often than not scenes are enacted wherein workman shout slogans against management, and forcibly confine and abuse them. There is usually a reaction from the side of the management. But in avenging the misbehaviour of the workmen management throw all principles of fairness and make a mockery of domestic

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23. Ibid.

enquiry. Workmen of Lambabari Tea Estate v. Management[24] is a crowning example for this. It is an instance of the enquiry officer confusing his role as witness, prosecutor and judge. The charges against the workmen were that they forcibly confined the Manager, Assistant Manager and Staff, shouted slogans and abused the Manager. The enquiry was held by the Manager himself. He found the charges proved and dismissed the workmen. What happened in the enquiry was this. The Manager records the statements of the workmen proceeded against. He cross examines them. He forgets that he is a judge. He makes his own statements. He himself records them. Then he turns to the workmen. He questions them about the truth of his own statements recorded by himself. All these acts of violence to justice and fair play induce the Tribunal to say that the enquiry was defective. The finding of the Tribunal was upheld by the Supreme Court. About the different roles in which the enquiry officer acted, the Supreme Court said,

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24. (1950-67) 3 S.C.L.J. 1571; 1966(12) F.L.R. 361.

"We shall content ourselves by saying that the enquiry should always be entrusted to a person who is not a witness. If it is not possible to find such a person some officer from another Estate should be asked to help in the matter. An enquiry cannot be said to be held properly when the person holding the enquiry begins to rely on his own statements."[25]

These cases relate to instances where the enquiry officers who had claimed to have personal knowledge held the enquiry. They lay emphasis on the desirability of enquiry being held by persons who are not witnesses.

There is another dimension to the problem of managerial prejudices plaguing domestic enquiry. It is necessary to ensure that the enquiry officer is an independent person who can decide the issue without fear or favour. Will a subordinate officer of the management be such an independent person? The judicial answer to the question is in the affirmative. In the Court's view an enquiry held by a subordinate officer of the employer is not vitiated, for that reason. In Delhi Cloth and General Mills Co. Ltd. v. Labour

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25. Id. at p.1573 per Hidayatullah, J.

Court[26] the contention that a subordinate officer of the management was bound to decide the issue in favour of management was negatived[27] by the Supreme Court.

Saran Motors Pvt. Ltd. v. Vishwanath[28] was a case in which a lawyer of the employer was appointed as enquiry officer. The Tribunal held that the enquiry officer was biased in favour of the company and was incompetent to hold the enquiry since he was engaged by the company as a lawyer in industrial matters. The Supreme Court in appeal held this view to be erroneous. The Court observed;

26. (1968-70)7 S.C.L.J. 480; 1970(1) L.L.J. 23. An employee was charged with misconduct. An enquiry was held before the Enquiry Officer of the company. The officer found him guilty. The Manager on receipt of the report of the Enquiry Officer dismissed the workman. An application for approval was filed before Tribunal. The Tribunal appreciating the evidence held that the misconduct was not proved. The Supreme Court on appeal held that the Tribunal had no jurisdiction to sit in appeal over the decision of the management unless there were vitiating circumstances justifying the exercise of such jurisdiction.

27. Id. at p.484. Justice Shah said,
"Counsel for Sri. Gopal the dismissed workman contended that the Enquiry officer was an employee of the management and that 'he was bound to decide the case in their favour.' But no such assumption can be made."

28. (1950-67)2 S.C.L.J. 1414; 1964(9) F.L.R. 7.

> "....it is impossible to accept the argument that because a person is employed by the employer, he becomes incompetent to hold a domestic enquiry. It is well known that enquiries of this type are generally conducted by the officers of the employer and in the absence of any special individual bias being attributable to a particular officer, it has never been held that the enquiry is bad, just because it is conducted by an officer of the employer. If that be so, it is unsound to take the view that a lawyer who is not a paid officer of the employer, is incompetent to hold the enquiry, because he is the employer's lawyer and is paid remuneration for holding the enquiry."[29]

A lawyer entrusted with an enquiry may be free to act independently. He may not be influenced by any directive by the management. But this may not be true of a subordinate officer of the management. He may be free only in cases where the management lets him to be free and permits him to take a free decision. Suppose in a case the management is bent upon punishing an employee. The desired independence of the subordinate officer may only be a vain hope. There is always a link, an invisible link, between the management and its subordinate officers. When the superior management wishes

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29. Id. at p.1416 per Gajendragadkar, C.J.

to bring about a desired result, namely, a finding of guilt and consequent dismissal of a workman, the chances are that the subordinate officer holding the enquiry will condition himself to the situation in such a way as to bring about a result in conformity with the higher managerial wish. The subordinate may do it consciously since he is identified with the management, being a cog in the managerial machinery. Sometimes he may do it even without the awareness that his decision in the enquiry is influenced by the higher managerial determination to punish the workman. A call from within, like a magic wand, makes him act according to the dictates of the management. At the same time it will be very difficult for the workman to prove a special bias in the enquiry officer that damages his case.

After the introduction of section 11A in the Act, widening the jurisdiction of the Tribunal to appreciate the evidence in the enquiry afresh and to come to its own conclusion, the rigour of the situation is reduced considerably. But there is no guarantee that every case of dismissal based on a defective enquiry will be subject to scrutiny by the Tribunal.

It is desirable that the domestic enquiry is held by an external independent agency.[30] An alternative may be to entrust the enquiry to a person in the establishment agreeable both to the management and to the workman.

30. Impartiality of the person who decides is a prerequisite of a fair procedure. When the management nominates one of its employees to prosecute the case against the workman and another employee to decide the case, in one sense the same party is acting as both the prosecutor and the judge. This contradiction could be avoided by a different arrangement in which the enquiry is held by the independent agency. See Balkishan Rathi, "Fair Hearing in Domestic Enquiries", 5 J.I.L.I., 191 at pp.194, 195 (1963).

Chapter IX

DOMESTIC ENQUIRY - OPPORTUNITY AND REASONS

The minimum requirements of a valid domestic enquiry[1] were enumerated in no better words than those of Justice Das Gupta in Sur Enamel and Stamping Works Ltd. v. Workmen.[2] They are,

(1) the employee should be informed clearly of the charges against him,

(2) witnesses are examined in respect of the charges,

(3) the employee is given a fair opportunity to cross-examine witnesses,

(4) the employee is given a fair opportunity to examine witnesses in his defence and that,

(5) the enquiry officer records his findings with reasons.

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1. For a brief discussion of the requirements of domestic enquiry, see A.M. Sarma, "Domestic Enquiry", 20 J.I.L.I. 122 at pp.122-128 (1978). On domestic enquiry, generally, see also Markanday Katju, Domestic Enquiry (1975) pp.13-39.
2. (1950-67) 2 S.C.L.J. 1466; A.I.R. 1963 S.C. 1914. For facts see infra, nn.17, 19.

The purpose of domestic enquiry is to probe into the question whether the workman is guilty of the charges against him. Natural justice requires that an adequate opportunity of being heard be given to the workman.[4] Adequate opportunity helps defending himself effectively. This may not be possible if the charges against him are vague and not clear. He must know what the charges are. Then only he will be capable of explaining his position. Then alone will he be able to defend himself properly and effectively.

Northern Railway Co-operative Credit Society Ltd. v. Industrial Tribunal[5] is a typical case where the charges were vague. A workman was dismissed after domestic enquiry. The charges against him, as detailed in the memo of charges served, were:

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4. In Britain, the Code of Practice provides that the disciplinary procedure should, inter alia, 'provide 'individuals to be informed of by complaints against them and to be given an opportunity to state their case before decisions are reached.' See Butterworths Employment Law Handbook, Peter Wallington (ed.) (1979), p.522.
5. (1950-67)2 S.C.L.J. 1171; 1967(15) F.L.R. 71.

"1. To instigate and conspire to paralyse the working of the society at the time of the impending Annual General Meeting on April 28, 1956 by collectively submitting sick certificates.

2. Disobedience of orders in not attending for medical examination vide Hony. Secretary's letter No.CCS/Est. of April, 1956 which goes to show that you were not prepared to face the medical examination as you had pretended to be sick.

3. Taking active part in the issue and distribution of certain leaflets issued against the Management of the society.

4. Carrying vilifying propaganda in connection with the elections of the society at the Annual General Meeting on April 28, 1956.

5. Instigating the depositors to withdraw their deposits from the society and thus undermining the very existence of the institution."[6]

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6. *Id.* at p.1173.

The first charge does not say whom he instigated and with whom he conspired. Without disclosing these how can he be expected to defend himself except by a mere denial that the charge was not true. The third charge does not specify what the leaflets were and what role the workman had in its distribution or issue. The fourth charge does not show what the propaganda was and with whom, when and where he carried it on. The fifth charge does not mention which of the various depositors were instigated by him and when they were instigated. The workman in reply pointed out that the charges were very vague. Enquiry was held.[7] The workman was found guilty. He was removed from service. An industrial dispute was raised. The tribunal held the enquiry vitiated since the charges were very vague. The Supreme Court held that all

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7. Kanraj, the workman did not participate in the enquiry, since his demand to be represented by a railway employee or a union official was not granted. He was allowed to be assisted by any employee of the Society. But he insisted that he should be represented by a railway employee or union official, contending that since he was the senior most employee of the society he could not expect to get any assistance from a junior employee of the Society.

the charges except the second one[8] were vague.[9] According to the Court the workman could not be dismissed on the mere ground that he did not attend a medical examination.[10]

It may perhaps be said that the purpose of the memo of charges is only to bring to the attention of the workman the allegations against him and that it is not necessary that it should contain all the details in full. This statement may be true in the case where a workman is actually guilty of the alleged misconduct and where he can know what the details of the acts alleged generally against him are. But in a case where the workman is not guilty, he will not be in a position to defend himself without knowing the specific

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8. "Charge No.2 was the only charge in respect of which full details were mentioned.... In these circumstances, Kanraj was fully justified in pleading that the charges were vague and he was unable to show cause against the charges served on him." Northern Railway Co-operative Credit Society Ltd. v. Industrial Tribunal, (1950-67)2 S.C.L.J. 1171 per Bhargava, J. at p.1180.
9. Ibid.
10. This was because there were no rules of the Society under which the workman could be required to obey the orders given by the Honorary Secretary to appear for medical examination by the particular doctor nominated by him and that therefore the workman was justified in relying on certificates obtained by him from a registered medical practitioner. Ibid.

allegations against him in all material particulars. The burden is on the management to prove the guilt of the workman. The first part of this burden is to make all the charges against the workman clear to him. Punishment on vague charges would amount to penalising a workman for not proving that he is innocent. Such a course will make an ass of industrial adjudication and lead to ignoring the ever growing dimensions of the concept of natural justice in this arena. Viewed from this light the decision of the Supreme Court in Northern Rilway Co-op. Society is welcome when it insists that the charges against the workman should be clear and specific. It gives an effective opportunity to the workman to defend himself. The concept has therefore a meaningful content and is not an insistence on a mere technicality.

Importance of charge.

Serving a charge on the workman is of prime importance. A workman may actually be guilty of a misconduct. But if the particular act which constitutes that misconduct is not included in the charge he cannot be dismissed for that misconduct. In other words, when a workman is dismissed and

the management seeks to justify his dismissal, it will not be permitted to rely on any misconduct not included in the charge served on the workman. Laxmi Devi Sugar Mills Ltd. v. Nand Kishore Singh[11] illustrates this point. The only charge against the workman was that he made a speech[12] subversive of discipline. On this question the decision of

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11. (1950-67)2 S.C.L.J. 1353; A.I.R. 1957 S.C. 7. The respondent was a steno-typist of the appellant company. He was also the Vice-President of the Union of Workers. In a meeting of workmen, convened to consider the situation arising out of suspension of some workers, he made a speech criticising the General Manager. A resolution was passed in the said meeting requesting the management to reinstate the workmen and to dismiss the General Manager. The General Manager came to know of this and asked the respondent, his steno-typist, to give information of what transpired in the meeting. The respondent's reply was that he did not attend any meeting in his capacity as steno-typist and that he has nothing to say about the meeting when he is addressed in the capacity of steno-typist. Inspite of a second letter from the General Manager he repeated the same answer. A charge sheet was served on him calling on him to show cause why action should not be taken against him under the Standing Orders for making a speech in the said meeting wherein, among other defamatory remarks, he made workers to take steps for removal of the General Manager, an act which in the view of the management was subversive of discipline which entails the punishment of dismissal.
12. For a discussion on the freedom of speech available to industrial workers in India see, S.R. Baj, "Freedom of Speech and Expression in Labour Management Relations", 5 J.I.L.I. 377 at pp.377-396 (1963).

the Court[13] was against the management.[14] It was the view of the Court that he was guilty of acts of insubordination.[15] But in the charges served there was no allegation of

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13. Laxmi Devi Sugar Mills Ltd. v. Nand Kishore Singh, (1950-67)2 S.C.L.J. 1353. An enquiry was held against the workman by the General Manager. The workman refused to answer the questions put to him taking the stand that any information about the meeting is to be obtained by addressing the union officials and that there was no justification for charging him with the breach of the Standing Order. The General Manager found him guilty. Since an appeal was pending before the Labour Appellate Tribunal an application for permission to dismiss him was filed. The Labour Appellate Tribunal found that the speech made by the workman was not an act subversive of discipline and hence refused permission. The management filed an appeal before the Supreme Court. The Supreme Court upheld the decision of the Labour Appellate Tribunal.
14. "The only question for determination before us is whether the speech made by the respondent....was an act subversive of discipline. The respondent was the Vice-President of of the Union and, prima facie, any resolution passed by the union asking for the removal of the General Manager would be perfectly legitimate if the members of the Union thought that there were circumstances warranting the same .... So far as the Union is concerned, apart from mala fides or malice or ill will, the act of its passing the resolution would be innocuous and would not be liable to be visited with any punishment and the members of the union would not be committing any breach of the Standing Orders nor would they be guilty of any act subversive of discipline." Id. at pp.1357-58 per Bhagwati, J.
15. "Even though he happened to occupy what he considered to be the august position of the Vice-President of the Union he did not cease to be an employee of the appellant and the attempt to distinguish between his capacity as the stenotypist and his capacity as the Vice-President of the Union was absolutely puerile. He ought to have realised that he was first and foremost an employee of the appellant and owed a duty to the appellant to answer all the queries

(contd..)

insubordination. The management lost the case. It was not open to it to justify the dismissal on any ground other than that given in the charge sheet.[16]

The purpose of domestic enquiry is to afford an opportunity to the workman to prove that he is not guilty of the misconduct alleged against him. If the charge contains one misconduct about which an enquiry is held and if the dismissal order is passed for another misconduct it cannot be

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(f.n.15 continued)
which had been addressed to him by the General Manager. His evasion to give such replies on the pretext of shielding himself under his capacity as the Vice-President of the union was absolutely unjustifiable and if such insubordination and breach of discipline had been the subject matter of the charges made against him, we do not see how the respondent could have escaped the punishment of dismissal." Id. at pp.1358-59 par Bhagwati, J.

16. "The charge sheet which was furnished by the appellant to the respondent formed the basis of the enquiry which was held by the General Manager and the appellant could not be allowed to justify its action on any other grounds than those contained in the charge sheet. The respondent not having been charged with the acts of insubordination which would have really justified the appellant in dismissing him from its employ, the appellant could not take advantage of the same even though these acts could be brought home to him." Id. at p.1359 par Bhagwati, J.

said that the workman had an opportunity to prove that he was not guilty in respect of the misconduct for which he is dismissed. An identical situation arose in Sur Enamel and Stamping Works Ltd. v. Workman.[17] A workman was served with notice alleging that a number of articles were spoiled due to his fault. The workman denied any responsibility in the matter. An enquiry was held. He was found guilty of deliberately causing damage to raw materials. Instead of taking action on this ground the management dismissed him for wilful insubordination and disobedience of orders. The Tribunal set aside the order of dismissal.[18] On appeal the Supreme Court upheld the order of the Tribunal observing that the dismissal was on a ground other than that mentioned in the charge sheet and the one which formed the subject matter of enquiry. Holding the enquiry defective and the guilt against the workman not proved, Justice Das Gupta observed,

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17. (1950-67)2 S.C.L.J. 1466; A.I.R. 1963 S.C. 1914.
18. Ibid. An industrial dispute was raised over the dismissal and referred to the Tribunal. The Tribunal found the enquiry to be defective and examining the evidence came to the conclusion that the workman was not guilty of insubordination or disobedience for which the dismissal order was passed. It also found that the charge of damaging property was also not proved. The Tribunal therefore ordered reinstatement of the workman.

"There is again the curious circumstance that while the domestic tribunal recommended the dismissal....on a charge of having deliberately caused damage to raw materials the order of dismissal passed by the management was not in respect of this misconduct. The order in terms mentions that 'you are dismissed from the service of the company for causing wilful insubordination or disobedience whether alone or in combination with another or others, of any order of the superior or of the management....' It appears that the charge sheet....did not mention any charge of 'wilful insubordination or disobedience.' It is quite clear that the domestic tribunal did not find him guilty of any insubordination or disobedience. It is difficult to understand how the charge being for causing damage to property and the enquiry officer's report being in respect of the same, the dismissal order was made for something else. That itself would be a sufficient ground for setting aside the order of dismissal."[19]

<u>When is the charge to be served?</u>

In certain cases service of a formal charge will serve no purpose. For example the cause for the termination of service may be a matter of record on which there can be no dispute. Is it necessary in such cases that a charge be

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19. Id. at p.1468.

served on the workman and an enquiry held? Burn & Co. Calcutta v. Their Employees[20] involved *inter alia* discharge of two workmen for continued absence from duty. These employees had been arrested by the Government under the West Bengal Security Act and detained in jail for a long period. The Company terminated their services. No charge was served on them. No enquiry was held. On these lapses in procedure the Tribunal ordered for re-employment. On appeal the Labour Appellate Tribunal ordered for reinstatement with continuity of service. On appeal the Supreme Court had a different view. According to the Court no purpose would have been served by service of a formal charge. Nor could any conceivable answer to the charge have been given by the workmen. In such a situation, the Court said, failure to serve charges and to hold an enquiry was not material.[21] When a

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20. (1950-67)4 S.C.L.J. 2382; A.I.R. 1957 S.C. 38.
21. The workmen had been detained in jail for long. Referring to the acceptance by the Labour Appellate Tribunal of the claim of reinstatement, Justice Venkatarama Ayyar said:
"The Appellate Tribunal has accepted that claim on the ground that he had been discharged without the company framing a charge or holding an enquiry, and that the rules of natural justice had been violated. We are unable to agree with this decision. The ground of discharge is the continued absence of the employee, and his inability to do work, and it is difficult to see what purpose would be served by a formal charge being delivered to him and what conceivable answer he could give thereto. The order of the Appellate Tribunal is manifestly erroneous and must be set aside." Id. at pp.2393, 2394.

workman knew clearly the charges against him and had an effective opportunity of meeting them, failure to serve a formal charge sheet may not be a circumstance vitiating dismissal. Burn & Co.[22] involved the case of another workman also.[23] The Tribunal held that he was not entitled to any kind of relief but on appeal the Labour Appellate Tribunal held that since no charge was given and no enquiry held, the termination of his service was vitiated. The Supreme Court reversed this finding and held:

> "It is true that no charge sheet was formally drawn up against him, but that would not vitiate the order of dismissal if he knew what the charge against him was and had an opportunity of giving his explanation."[24]

The Court found, on the facts of the case, that he had such an opportunity.[25]

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22. Supra, n.20.
23. Ibid. The workman along with others, it was alleged participated in an assault on the Works Manager. Company dismissed all the workmen involved. The question was whether the dismissal of the workman was in violation of natural justice since no charge was framed and no enquiry held.
24. Id. at p.2394 per Venkatarama Ayyar, J.
25. Ibid. The Court noted that fourteen employees had been dismissed on the ground that they assaulted the Works Manager and that there were conciliation proceedings and an enquiry by the Labour Minister as a result of which reinstatement of some workmen were recommended. This workman was not among those recommended to be reinstated. The Court observed: "In the face of these facts it is idle for him to contend that he had been dismissed without hearing or enquiry." (Per Venkatarama Ayyar, J.)

It is the duty of the enquiry officer to explain clearly the charges against the workman and to provide him ample opportunity to contradict the charges and prove his innocence. The workman may not even put up a defence. He may not dispute the actual incident. In such cases, there is no point in insisting for a formal charge since its purpose, namely knowing clearly the allegation and getting an effective opportunity to defend himself, is amply served. Central India Coal Fields v. Ram Bilas Shobnath[26] is the best illustration. A workman was dismissed. Approval of Tribunal was sought for. The Tribunal refused to approve the dismissal. On appeal to the Supreme Court, one of the points which arose for consideration was whether the enquiry was proper. It was urged that the enquiry was defective since no formal charge was served on the workman. The Court held that on the facts of the case the objection that the enquiry was defective for want of service of charge could not be sustained. Gajendragadkar, J. speaking for the Court said;

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26. (1950-67)4 S.C.L.J. 2682; A.I.R. 1961 S.C. 1189. For facts of the case, see Ch.VI, n.43.

"The enquiry proceedings show that the officer told the respondent clearly what the complaint against him was. The complaint was in fact read out to him and ...the respondent's companion admitted the truth of the complaint made in the statement. It does not appear that the respondent wanted to cross-examine any of the parties who had complained against him and that an opportunity was refused to him so to do. It is abundantly clear from the record that in substance the respondent himself admitted all the facts though he pretended that he was too drunk and therefore did not remember what had really happened at the time. Therefore this is not a case where there is any dispute as to the incident itself and so the objection that the enquiry was improper cannot be sustained."[27]

Instead of explaining the charges to the workman at the time of enquiry and asking him whether he denies the charges, it is always fair to the workman, who in many cases may be illiterate, to serve a proper charge. This would enable him to consult persons who are competent and to formulate his defence properly. It is also essential that the workmen should be permitted to be represented by competent persons in the enquiry. Otherwise ignorant and illiterate workmen may quite

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27. Id. at p.2685.

often find themselves in the embarassing situation in which they do not know what to say when confronted by skilled management persons wearing the robe of impartial enquiry officers. The workmen may be so embarassed that they may say they understood the charge and that they may not deny the charges. In such circumstances absence of denial cannot be equated with admission of charges. On an overall view of the situation in which skilled managerial personnel confront illiterate workmen, it is advisable that the law insists on formal procedure of serving a charge and establishing guilt in a formal enquiry.

Right to representation.

Should the workman be required to defend himself on his own? Should he be given permission to be represented in the enquiry by a lawyer? Should he be permitted to be represented by a union official if he so wishes? The Standing Orders may provide for the procedure to be adopted in the domestic enquiry. It may provide that the workman can be represented in the enquiry by a person of his choice. The

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27. Id. at p.2685.

enquiry has then to be conducted in accordance with the Standing Orders and the workman can avail himself of the services of a person of his choice. But if there are no such Standing Orders applicable to an establishment will the workman have a right to representation?

To answer this question one has to keep in mind the capacity of the two sides meeting as opponents. On the one side you have the gigantic management represented by efficient and experienced personnel prosecuting the case against the workman. A Manager will undoubtedly be a leviathan of superior calibre in talent, education and other capacities compared to a workman. What makes a manager is in fact these qualities. On the other side you have the workman, the person against whom the disciplinary proceedings are started, usually illiterate. He will be almost emotionally disturbed because of the initiation of the disciplinary proceedings against him. The two sides are unequal. When such imbalance is there, it cannot be said that the workman gets a fair opportunity to defend himself properly, if he is denied of the right to be

represented by a competent person of his choice.[28]

The question of representation came up before the Supreme Court in Kalindi v. Tata Locomotive and Engineering Co. Ltd.[29] In an appeal over the decision of Labour Court,[30] one of the contentions was that the domestic enquiry held by the management was not proper as the workmen were not allowed to be represented at the enquiry by a representative of the union to which the workers belonged. The Court rejected this contention. A fair enquiry demands that the workman should be represented by one who can skilfully examine and cross examine witnesses.[31]

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28. In Britain the Code of Practice - Disciplinary Practice and Procedures in Employment - provides that the disciplinary procedure should 'give individuals the right to be accompanied by a trade union representative or by a fellow employee of their choice.' See Butterworths Employment Law Handbook, Peter Wallington (ed.) (1979) p.[illegible].
29. A.I.R. 1960 S.C. 914.
30. Ibid. Some workmen were dismissed after domestic enquiry. The workmen filed applications under section 33A of the Act. The Labour Court dismissed the applications.
31. "Accustomed as we are to the practice in the Courts of Law to skilful handling of witnesses by lawyers specially trained in the art of examination and cross examination of witnesses, our first inclination is to think that a fair enquiry demands that the person accused of an act should have the assistance of some person, who even if not a lawyer may be expected to examine and cross-examine witnesses with a fair amount of skill." Id. at p.915 per Das Gupta, J.

But in domestic enquiries, in the Court's view only simple questions of fact fall to be decided and a workman will be able to defend himself properly. The Court said;

> "We have to remember however in the first place that these are not enquiries in a Court of Law. It is necessary to remember also that in these enquiries, fairly simple questions of fact as to whether certain acts of misconduct were committed by a workman or not only fall to be considered, and straight forward questioning which a person of fair intelligence and knowledge of conditions prevailing in the industry will be able to do will ordinarily help to elicit the truth. It may often happen that the accused workman will be best suited, and fully able to cross-examine the witnesses who have spoken against him and to examine witnesses in his favour."[32]

The Court also referred to the practice for departmental enquiries provided in the rules framed by Government. The Government Rules contain no provision that the person accused may be represented by any body else and that the general practice is that the accused conducts his own case.[33] The

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32. Ibid.
33. "It is helpful to consider in this connection the fact that ordinarily in enquiries before domestic tribunals the person accused of any misconduct conducts his own case. Rules have been framed by Government as regards the procedure to be followed in enquiries against their own

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Court found no reason why workman against whom domestic enquiry is held should have the right to be represented in such enquiry by a representative of his union.[34]

The *Kalindi* dictum was followed by the Supreme Court in *Brooke Bond India (P) Ltd.* v. *Subba Raman*[35] in order to hold that a workman is not entitled to be represented by a lawyer as of right in domestic enquiry. The Court observed that the demand of the workman to be represented by a Union representative was negatived in *Kalindi*[36] and that the demand in the

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(f.n.33 continued)
employees. No provision is made in these rules that the person against whom an enquiry is held may be represented by any body else. When the general practice adopted by domestic tribunals is that the person accused conducts his own case, we are unable to accept an argument that natural justice demands that in the case of enquiries into a charge sheet of misconduct against a workman he should be represented by a member of his union." *Id.* at pp.915, 916.

34. *Id.* at p.916.
35. (1950-67)4 S.C.L.J. 2560; 1961(3) F.L.R. 526. Two workmen were dismissed after domestic enquiry. In the enquiry one employee came with a lawyer and insisted that he should be permitted to be represented by the lawyer. The other employee appeared with an outsider and insisted that he should be represented by the outsider. The enquiry officer refused the request and held the enquiry *ex-parte*. Application for permission to dismiss the workman was filed before the Commissioner of Labour. He refused permission holding that in the circumstances the workmen were not given full and fair opportunity to place their case in the enquiry. The issue was taken in appeal to the Supreme Court.
36. *Kalindi* v. *Tata Locomotive and Engineering Co. Ltd.*, A.I.R. 1960 S.C. 914, *supra*, n.34.

present case went even further, namely, representation by a lawyer in one case and by an outsider in the other.[37] Following Kalindi the Court held that the workmen had no such right and that the enquiry was not defective for the reason that the workmen were not allowed to be represented by others.[38]

Suppose Standing Orders provide that in domestic enquiry a representative of a registered trade union can assist a workman. The management will have to abide by the provision and as seen early the doctrine of ultra vires may apply if it acts contrary to the provision of the Standing Orders. Suppose the workman demands for assistance by a representative of an unrecognised trade union rather than of a recognised union. In Dunlop Rubber Co. (India) Ltd. v. Their Workmen[39] there were two unions in the company. Only one was recognised. The Standing Orders provided that a workman could be

37. Brooke Bond India (P) Ltd. v. Subba Raman, (1950-67)4 S.C.L.J. 2580 at p.2581.

38. "The matter is now concluded by the decision of this Court in Kalindi and others v. Tata Locomotive and Engineering Co. Ltd.... In view therefore of the decision in Kalindi case we cannot agree that as a counsel or an outsider was not allowed to appear on behalf of the employees there was no fair or full enquiry in the case." Ibid. per Wanchoo, J.

39. (1950-67)2 S.C.L.J. 1470; A.I.R. 1965 S.C. 1392.

assisted in domestic enquiry by a representative of a registered trade union recognised by the company. The workmen belonged to the unrecognised union. They insisted that they should be permitted to be represented by a member of their union in his capacity as representative of the unrecognised union.[40] This request was not granted. Enquiry was held _ex parte_. The Tribunal held the enquiry vitiated. On appeal the Supreme Court reversed the finding. The Court observed that refusal to allow representation by any union, unless the Standing Orders confer that right, does not vitiate the proceedings.[41] Observing that the insistance of the workmen to be represented by a member of the unrecognised union amounted to an attempt at recognition of that union in an indirect way[42] and that the refusal by the Company cannot be said to amount to denial of natural justice in the circumstances of the case[43] the Court, however added,

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40. _Id._ at p.1475.
41. _Ibid._
42. _Ibid._
43. _Ibid._

> "In this connection, we have repeatedly emphasised that in holding domestic enquiries, reasonable opportunity should be given to the delinquent employees to meet the charges framed against them and it is desirable that at such an enquiry the employees should be given liberty to represent their case by persons of their choice, if there is no standing order against such a course being adopted and if there is nothing otherwise objectionable in the said request."[44]

The refusal of the request of the workman to be represented by a stranger, will also have no impact upon the legality of domestic enquiry. Northern Railway Co-operative Credit Society v. Industrial Tribunal[45] is an instance. A workman of the society was dismissed after enquiry. The workman insisted that he should be represented by a stranger, a railway employee or a union officer, whereas the management was agreeable to permit him to be represented by any other workman of the society. The Tribunal held that the workman was not justified in making such a demand. The Supreme Court also expressed the same view. The Court said

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44. Ibid. per Hidayatullah, J.
45. (1950-67)2 S.C.L.J. 1171; 1967(2) L.L.J. 46; see supra, n.5.

that the workman "was taking a very unreasonable and undesirable attitude in this matter and his conduct in persistently demanding representation by a stranger and on that account refusing to participate in the enquiry deserves to be condemned."[46]

The distinction placed by the Court in Kalindi[47] between proceedings in a court of law and proceedings in a domestic enquiry[48] does not appear to justify the stand that a workman is not entitled to the right to representation. It is essential that in a domestic enquiry the workman proceeded against should get a fair opportunity to defend himself. Such opportunity will be real only if and when he is permitted to be defended by another person of his choice. The questions that fall to be decided in a trial court may also be questions of fact. Whether the accused committed the act constituting the offence alleged against him may be one of such facts. Similarly, in a domestic enquiry the question is whether or not the accused workman is guilty of the acts constituting

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46. Id. at p.1181.
47. Kalindi v. Tata Locomotive and Engineering Co. Ltd., A.I.R. 1960 S.C. 914.
48. Supra, n.32.

misconduct alleged against him. Just as the accused should have a fair chance of defence in a criminal trial, a workman whose livelihood and reputation may depend on the outcome of the enquiry should have a fair opportunity for defence. Facts are established in a domestic enquiry through the process of examination and cross-examination of witnesses. This is an art which calls for dexterous handling by an expert. A workman, inexperienced in the art, may be ill-suited to the task.[40] There appears to be no harm in permitting a workman to be represented in the enquiry by an able person of his choice. It only serves to raise the quality of the enquiry. It will also help to create a feeling in the workman that he was dismissed after a proper enquiry. The request for representation is made only when the workman feels that he is incompetent to defend himself properly. To deny him in such case a proper opportunity to defend himself

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40. "Although the matter cannot be said to be finally decided, and although the right to appear by counsel or agent may not be absolute, it is obvious that if a party is entitled to show cause and has a right to cross-examine witnesses, such a right would be illusory in all but the simplest of cases if it is required to be exercised by lay persons.... On the question of principle it is submitted that unless there are considerations of public policy overriding the claims of natural justice in any particular class of matters, the assistance of counsel or agent is necessary if a person is to have a fair opportunity to meet the case against him." H.M. Seervai, Constitutional Law of India (1976), pp.931, 932.

is unjustified. There may be circumstances where even an expert may need the help from another. It is safe to leave the choice of defence by self or by another to the workman, rather than to the management.

Kalindi[50] and Brooke Bond[51] were followed in Dunlop Rubber.[52] But Dunlop Rubber contains a significant observation. In Dunlop Rubber the Court said that it is desirable to allow a workman to be represented by a person of his choice unless prohibited by the Standing Orders or is not otherwise objectionable.[53] This in reality indicates a judicial awareness to the need to extend the right to representation to the workman and to avoid possible injustice to the workman.

Domestic enquiry is a step before dismissal. Dismissal leaves a stigma to the workman and affects adversely the reputation of the workman. It renders his livelihood at stake. It is desirable that in the domestic enquiry a workman

50. Supra, n.29.
51. Supra, n.35.
52. Supra, n.39.
53. Supra, n.44.

be allowed representation[54] by a person of his choice, a lawyer or a member of his union.[55] The right to representation should form part of the principles of natural justice.[56]

Evidence against workman and opportunity to cross-examine.

Before he can be asked to answer the charges and lead evidence in support of his position the accused workman should know not only the charges against him but also the evidence against him. To ask the workman to answer the charges first and to lead evidence will shift the burden to him. This makes the whole process upside down putting the burden on the workman to prove his innocence, rather than on the management to prove the misconduct of workman. The

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54. The National Commission on Labour recommended that in the domestic enquiry the aggrieved workman should have the right to be represented by an executive of the recognised trade union or a workman of his choice and that the record of enquiry should be made in a language understood by the workman or his union. See Report of the National Commission on Labour (1969), p.351.
55. "...(S)ince trade union representatives are allowed to represent the workers in the Labour Court and Industrial Tribunals, there is no reason why they should not be allowed to do so in a domestic enquiry too." Balkishan Rathi, "Fair Hearing in Domestic Enquiries", 5 J.I.L.I. 191 at p.210 (1963).
56. See Jain and Jain, Principles of Administrative Law (1981) pp.238-240. The authors observed at p.240,
"A general right of legal representation should be recognised as a part of natural justice, and the matter should no longer remain as one of discretion of the adjudicator, in those proceedings where there is no statutory provision barring legal representation."

burden should be on the management to make out a case against the workman before he is asked to answer it. The workman should be given an opportunity to cross-examine the witnesses.[57] In Meenglass Tea Estate v. The Workmen[58] the Supreme Court made particular emphasis on this requirement. In the enquiry the workmen were questioned. But before this was done no witness was examined in support of the charge. The evidence consisted of answers of the workmen to the charges against them. It also consisted of their replies to the questions put to them in the cross-examination. The workmen were found guilty and dismissed. Holding that the enquiry was not proper, the Supreme Court said,

> "It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted."[59]

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57. The right of cross-examination is available to public servants also in disciplinary proceedings. See Union of India v. T.R. Varma, A.I.R. 1957 S.C. 882; Khem Chand v. Union of India, A.I.R. 1958 S.C. 300; State of M.P. v. Chintaman Sadashiva Waishampayan, A.I.R. 1961 S.C. 1623.
58. (1950-67)2 S.C.L.J. 1458; A.I.R. 1963 S.C. 1719.
59. Id. at p.1460 per Hidayatullah, J.

The same view was expressed in Associated Cement Co. v. Workmen[60] and in Sur Enamel and Stamping Works v. Workmen.[61]

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60. (1950-67)2 S.C.L.J. 1423. See Ch.VIII, n.20. One of the grounds on which the enquiry was held to be defective was that the accused workman was examined first. Justice Gajendragadkar, said:

"It is necessary to emphasize that in domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross-examine the said evidence and then should the workman be asked whether he wants to give any explanation about the evidence led against him." at pp.1427, 28.

61. (1950-67)2 S.C.L.J. 1466; A.I.R. 1963 S.C. 1914. Supra, n.17. In the enquiry the workman was confronted with reports his superiors had made against him. No witnesses were examined against them. The officers who made the reports were not permitted for cross-examination. The reports were not made available to the workman. The reports had been taken behind his back. The workman was asked in the enquiry why the officers should submit false report against him. The enquiry officer held the charges proved. He was dismissed. The Tribunal held the enquiry vitiated and this view was upheld by the Supreme Court. Justice Das Gupta said at p.1468.

"In the present case the person whose statements were made behind the back of employees were used by the enquiry authority were not made available for cross-examination but it would appear that they were not even present at the enquiry. It does not even appear that these reports were made available to the employee at any time before the enquiry was held. Even if the persons who made the reports had been present and the employee given an opportunity to cross-examine them, it would have been difficult to say in these circumstances that that was a fair and sufficient opportunity."

The right of cross-examination is treated as an essential ingredient of the principles of natural justice.[62]

No invariable rule.

When he admits guilt the workman could be examined first. Central Bank of India v. Karunamoy Banerjee[63] was a case where an employee of the appellant Bank was discharged after an enquiry. The charge against him was that he allowed overdraft without obtaining sanction of the concerned authority. He admitted guilt and pleaded for mercy. In the enquiry he was examined first. He was allowed to search the concerned records. He was given opportunity to examine and cross-examine witnesses, if he wanted. In the enquiry he was found guilty and discharged. An application for approval was filed before the Labour Court since an industrial dispute was pending. The Labour Court refused to approve the dismissal. In its view the domestic enquiry

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62. "In cases of domestic enquiry by the employers for taking disciplinary action against their employees in the area of Labour-Management relations and also in disciplinary proceedings initiated by the Government against the civil servants, the right of cross-examination has been regarded as an essential content of natural justice." Jain and Jain, Principles of Administrative Law (1981), pp.235,236.
63. (1950-67)2 S.C.L.J. 1430; 1967(15) F.L.R. 398.

was defective. One of the grounds for such holding was that in the enquiry, the employee was examined in the first instance. On appeal the order of the Labour Court was reversed by the Supreme Court. The Court held that when a workman admits his guilt he could be examined first and such a procedure would not make the enquiry defective.[64] In Employers of Firestone Tyre and Rubber Co. (P) Ltd. v. Workman,[65] a van driver of the company, was dismissed after a domestic enquiry.[66]

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64. "If the allegations are denied by the workman, it is needless to state that the burden of proving the truth of these allegations will be on the management.... But if the workman admits his guilt, to insist upon the management to let in evidence about the allegations, will, in our opinion, only be an empty formality. In such a case, it will be open to the management to examine the workman himself, even in the first instance, so as to enable him to offer any explanation for his conduct, or to place before the management any circumstances which will go to mitigate the gravity of the offence." Id. at p.1437 per Vaidyalingam, J.

65. (1950-67)2 S.C.L.J. 1409; 1967(15) F.L.R. 462.

66. Ibid. The charge against a van driver, Subramaniam, was of theft, fraud and dishonesty in connection with the employer's business or property. The incident which gave rise to the charge was this: Tyres were loaded in the van to be delivered to various addresses. The driver signed the invoices, locked the tyres in the van, and set out to deliver them. After some time he telephoned to the office and said that two tyres were short as per invoice. He was asked to return immediately. On his return the tyres in the van were unloaded and counted. There was shortage of two tyres. The driver said that no tyres were lost or stolen on the way. His case was that the tyres were short-loaded. The entire stock of tyres in the company were then checked. There was no excess stock.

The charge gave full details. In the enquiry, he was examined even before evidence against him as adduced. The tribunal held that the enquiry was vitiated on the ground that the workman was examined before adducing evidence against him. The Supreme Court, on appeal, reversed this finding and observed that examination of a workman first would not always invalidate the enquiry. The enquiry will be vitiated if the workman is put to a disadvantage by such procedure, or if he was put to such a procedure even after he objected.[67] In the Court's view the examination of the workman in the first instance helped to identify the points on which he differed from the version of the management.[68] The evidence against him was adduced on these points and he was permitted to cross-examine

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67. Id. "It is, however, wise to ask the delinquent whether he would like to make a statement first or wait till the evidence is over but the failure to question him in this way does not ipso facto vitiate the enquiry unless prejudice is caused. It is only when the persons enquired against seems to have been held at a disadvantage or has objected to such a course that the enquiry may be said to be vitiated." at p.1412 per Hidayatullah, J.

68. Id. Justice Hidayatullah pointed out at p.1413.
"The issue was thus narrowed to the fact whether 8 tyres were loaded or 6, it being the case of the company that 8 tyres were loaded and that of Subramaniam that only 6 tyres were loaded, but his receipt for 8 tyres was obtained."

the witnesses. The Court held that in the circumstances the examination of the workman in the first instance did not vitiate the enquiry.[69] Holding that the requirement that the evidence against the workman should be led first cannot be an invariable rule in all cases, the Court said,

> "The situation is different where the accusation is based on a matter of record or the facts are admitted. In such a case it may be permissible to draw the attention of the delinquent to the evidence on the record which goes against him and which if he cannot satisfactorily explain must lead to a conclusion of guilt. In certain cases it may even be fair to the delinquent to take his version first so that the enquiry may cover the point of difference and the witnesses may be questioned properly on the aspect of the case suggested by him. It is all a question of justice and fair play."[70]

When a workman admits guilt no prejudice is caused by first examining him in the enquiry. Records kept in the

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69. _Ibid._
70. _Id._ at p.1412, _per_ Hidayatullah, J. He, however, emphasised that in all cases where the facts are in controversy the procedure of leading evidence against the delinquent before he is examined, should be followed. _Ibid._

ordinary course of business may legitimately be presumed to be true unless otherwise proved.[71] If the workman has a case that the records are false it is upto him to prove it. So no prejudice will be caused to the workman when the facts are all a matter of record when a workman is examined first, after drawing his attention to such facts on the record. Similarly is the case when a workman requests that he may be examined first so that he can present his version. The true test to decide whether the procedure of examining the delinquent first would vitiate the enquiry is to ask the question whether the workman is prejudiced in any manner by the procedure.

Another ramification of the principles of natural justice in domestic enquiry is that the evidence against the workman is to be adduced in his presence. If, for any reason, this is not done, it is essential that such evidence

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71. This principle finds statutory recognition in S.114 of the Indian Evidence Act 1872, which provides,
"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case...."

should be communicated to him and persons who gave the evidence should be made available for cross-examination. Phulbari Tea Estate v. Its Workmen[72] related to dismissal of a workman.[73] In the enquiry the evidence against the workman was not recorded in his presence. The contents of the evidence against him were not even read out to him.[74] In the reference for adjudication the Tribunal held the enquiry vitiated. Endorsing this holding the Supreme Court pointed out that the enquiry violated principles of natural justice.[75] This was so because the evidence was not taken in the presence of the workman. Even copies of the statements of witnesses who gave evidence were not given to him. The statements were not read out to him before he was asked to question the witnesses. When evidence not taken in his

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72. (1950-67)2 S.C.L.J. 1393; A.I.R. 1959 S.C. 1111.
73. Ibid. The charges against him was that he committed theft of two wheels from the Company's lorry.
74. Ibid. What happened in the enquiry was that the workman was asked what he had to say in connection with the disappearance of the two wheels. He answered he has nothing to say and that he knew nothing about the theft. On this answer, he was told that persons who had given evidence against him were present and he should ask them what they had to say. He said he would put no question to them. Then the witnesses present were asked whether the evidence they had given before the Manager was correct or not. They answered that the evidence was correct. This concluded the enquiry.
75. Id. at p.1396.

presence or even communicated to him is relied on, the workman has no effective opportunity to rebut the said evidence. Such evidence may sometimes be an untrue version of the facts since it is not tested by cross-examination. Reliance on such evidence and using it against the workman is totally unfair and palpably incorrect. The Supreme Court was therefore right in holding the enquiry invalid.

One question remains. Suppose the evidence taken behind his back is read over to the workman and he is asked to cross-examine the witnesses. When the workman is not represented by a lawyer, he may not be in a position to comprehend the full significance of such evidence when it is read over to him and hence he may not be able to effectively cross-examine the witness. In such a case it cannot be said that the workman gets a fair opportunity for defence. M/s. Kesoram Kotton Mills Ltd. v. Gangadhar[76] is an illustration. The

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76. (1950-67)6 S.C.L.J. 3766; 1963(7) F.L.R. 213. Some workmen were charged with misconduct and dismissed after enquiry. What happened in the enquiry was that witnesses against workmen were produced and previously prepared and signed statements of them were read over to them and they were asked whether they had signed the statements. The statements were also read over and explained to workmen and they were then asked to cross-examine the witnesses. There was no examination in chief of the witnesses. Copies

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Supreme Court emphasized the need for taking the evidence in the presence of the workman and in cases where this is not possible for any reason, of the need for supplying him in advance copies of statements made by witnesses. The Court was emphatic in observing that a mere reading of the material in his presence is not sufficient. When a person is represented by a lawyer in an enquiry, it may be sufficient. But in domestic enquiries workman is not represented by a lawyer. He may not be represented even by a representative of a trade union. Workmen are generally illiterate. To read a prepared statement to a workman and then to ask him to cross-examine the witnesses will be making a mockery of domestic enquiry. The Court observed that the proper course is to examine the witnesses at the inquiry from beginning to end, in the presence of the workman.[77] When

(f.n.76 continued)
of the statements made by the witnesses were not supplied to the workmen. The Supreme Court held the enquiry vitiated. The Court observed,

"....the purpose of rules of natural justice is to safeguard the position of the person against whom an enquiry is being conducted so that he is able to meet the charge laid against him properly. Therefore the nature of the enquiry and the status of the person against whom the enquiry is being held will have some bearing on what should be the minimum requirements of the rules of natural justice." at p.3776 per Wanchoo, J.

77. "Oral examination always takes much longer than a mere reading of a prepared statement of the same length and brings home the evidence more clearly to the person

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this is not possible, it is essential that copies of the statements made by the witnesses which are proposed to be used in the enquiry should be given well in advance to the workman.[78]

The importance to be attached to recording of evidence in the presence of the workman was emphasized by the Supreme Court in Khardah & Co. Ltd. v. Workmen.[79] The Court pointed

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(f.n.77 continued)
against whom the enquiry is being held. Generally speaking therefore we should expect a domestic enquiry by the management to be of this kind." Ibid, per Wanchoo, J.

78. "The minimum that we shall expect where witnesses are not examined from the beginning at the enquiry in the presence of the person charged is that the person charged should be given a copy of the statement made by the witnesses which are to be used at the enquiry well in advance....at least two days before the enquiry is to begin. If this is not done and yet the witnesses are not examined in chief fully at the enquiry, we do not think that it can be said that principles of natural justice which provide that the person charged should have an adequate opportunity of defending himself are complied with in the case of a domestic enquiry in an industrial matter." Ibid, per Wanchoo, J.

79. (1950-67)2 S.C.L.J. 1442; 1963(7) F.L.R. 274. A workman was dismissed after enquiry. The enquiry was conducted by the Manager. At the early stages the workman participated in the enquiry, but later he refrained from taking part in it on the ground that it was conducted in an unfair manner. The Manager concluded the enquiry but did not make any report. The Management dismissed the workman. The Supreme Court held the enquiry invalid.

out that unless there are compelling reasons the normal procedure should be followed and all evidence should be recorded in the presence of the workman.[80] The same view was expressed in India General Navigation and Railway Co. Ltd. v. Its Employees.[81] Upholding the order of the Tribunal that the enquiry was vitiated, the Supreme Court said,

> "It is not disputed that in the managerial enquiry witnesses were examined in the absence of the workmen and the workmen were examined in the absence of the witnesses. Not only had the workmen no chance of cross-examining the persons who spoke against them, but it also does not appear that these workmen were given any opportunity of knowing as to what was said against them. The tribunal's conclusion that the managerial enquiry was vitiated by the violation of the rules of natural justice is, therefore, unassailable."[82]

The compulsory need that evidence be recorded in the presence of the workman has beneficial results.[83] It makes the

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80. Id. at p.1447 per Gajendragadkar, J.
81. (1950-67)2 S.C.L.J. 894; 1966(13) F.L.R. 270. Certain workmen were suspended on charges of misconduct. An enquiry was held and they were found guilty. The company decided to dismiss them. An industrial dispute arose over this, and it was referred for adjudication. The Tribunal held that the domestic enquiry was defective and proceeded to examine whether dismissal would be justified. It held that dismissal will not be justified and directed that all the workmen should be allowed to resume work.
82. Id. at p.898 per Das Gupta, J.
83. Khardha & Co. Ltd. v. Workmen, (1950-67)2 S.C.L.J. 1442 at p.1447.

witnesses to be cautious in making statements. It leaves no room for making convenient statements which are not true. Above all such a procedure makes it easy for the workman to cross-examine the witnesses.

Evidence by the workman: Proper opportunity.

A workman should have an effective opportunity to examine himself and his witnesses in support of his version. However, it is not necessary that each and every witness cited by him is to be examined in the enquiry. If the witnesses are not necessary and material, the enquiry officer can reject the request to examine them. Ananda Bazar Patrika (P) Ltd. v. Their Employees[84] is an instance. The Labour Court held that the dismissal was not valid as in the enquiry the workman was not allowed to examine his witness.[85] On appeal the Supreme Court held that there was no violation of natural justice. According to the Court the witness cited by the employee was not a necessary or material witness.[86]

84. (1950-67) 5 S.C.L.J. 2978; [1964-65] 26 F.J.R. 168.
85. Id. at p.2981.
86. "There can be no doubt that at the domestic enquiry it is competent to the enquiry officer to refuse to examine a witness if he bona fide comes to the conclusion that the said witness would be irrelevant or immaterial. If the refusal to examine such a witness, or to allow other

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It is for the workman to arrange production of his witnesses in domestic enquiry. He has to do so at his own expense.[87] But if the enquiry is cancelled and a second enquiry ordered the workman will be put to unnecessary expenses in bringing his witnesses again. He may not be able to afford to have a repeat performance. This would mean that he may lose the chance of examining his witnesses and the opportunity to adduce proper evidence in the enquiry. Is it not proper in such circumstances to insist on a rule that the management should arrange to produce the witnesses? State Bank of India v. R.K. Jain[88] dealt with this question.

(f.n.86 continued)
evidence to be led appears to be the result of the desire on the part of the enquiry officer to deprive the person charged of an opportunity to establish his innocence, that of course, would be a very serious matter." Id. at pp.2982, 2983 per Gajendragadkar, J.

87. See Tata Oil Mills Co. Ltd. v. Workmen, (1950-67)2 S.C.L.J. 1451; A.I.R. 1965 S.C. 155. The workmen proceeded against in this case wanted the enquiry officer to summon two witnesses the workmen wanted to examine. The enquiry officer wrote letters to them, but one expressed his inability and the other by an unsigned letter wanted further time and the enquiry officer took no action on it. The Tribunal held the enquiry was unfair. But the Supreme Court held that it was for the workman to arrange for production of two witnesses. Id. at p.1455 per Gajendragadkar, C.J.

88. (1971)8 S.C.L.J. 224; A.I.R. 1972 S.C. 136. R.K. Jain, a Money Tester in State Bank of India, was charged with deliberately tearing off the label with his initials in the packet of notes submitted for cancellation and with deficiency of notes in such packet.

A workman was discharged after enquiry. Two enquiries were held. In the first the workman produced two cashiers as his witnesses. This enquiry was however cancelled.[89] A second enquiry was held. It was held against the protest of the workman. The workman wanted the management to arrange production of his witnesses since he had produced them once. This was not granted. There upon the workman wanted the evidence adduced by them in the first enquiry to be treated as evidence in the second enquiry. This also was not granted. The workman was found guilty in the enquiry. The Tribunal held the enquiry defective. This finding was

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89. Ibid. In the first enquiry some employees of Reserve Bank of India were examined by the management as witness but these employees refused to be cross-examined by the workman. The workman's case was that the staff of Reserve Bank of India were prejudiced against the staff of the State Bank of India. According to him on a previous occasion also deficiency was found in a bundle of notes submitted for cancellation from State Bank of India. It was made good by the staff of Reserve Bank of India since they were negligent. They wanted the staff of State Bank of India to make good to them the loss, and this request was refused by the staff of the State Bank of India. This, according to the workman made the staff of the Reserve Bank of India, prejudiced against the staff of State Bank of India. Inspite of the refusal of the staff of the Reserve Bank of India to be cross-examined by the workman, the enquiry officer proceeded with the enquiry and found the workman guilty. This enquiry was cancelled by the management and a fresh enquiry was ordered to be held by another enquiry officer.

upheld by the Supreme Court. Justice Vaidyalingam dealt with the unequal position into which the employees are placed in their quest for justice. Examining how fairness and justice can be brought to them, he observes,

> "The workman had admittedly incurred heavy expenses in the previous enquiry.... That enquiry....was abandoned by the management not because of any fault of the workman, but because of the unreasonable attitude adopted by the employees of the Reserve Bank who gave evidence. For the conduct of these witnesses, the workman in our opinion, should not be punished by making him to incur the expenses over again especially when the second enquiry was being conducted by the management of its own volition in spite of the protests made by the workman and the management was prepared to bear the expenses of the second enquiry regarding its officers as well as the officers of the Reserve Bank of India, Ludhiana. But it was not prepared to accept, what in our view, was a reasonable and modest request made by the first respondent to have the two cashiers summoned for giving evidence on his side.... Under those circumstances, in our opinion, the Tribunal was justified in holding that there has been a violation of the principles of natural justice in the conduct of the domestic enquiry and that the workman was not afforded a reasonable opportunity to place his defence before the enquiry officer."[90]

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90. Id. at 230.

When the workman wants to produce his witnesses it is essential that he be given proper and effective opportunity for the same. Delhi Cloth & General Mills Co. Ltd. v. Rajvir Singh[91] illustrates how management may put the workman in difficulty by not granting proper opportunity. What happened in the case was that the workman was informed that the enquiry against him would take place the next day. When the enquiry started the workman made a request to postpone the enquiry for two or three days. This would have enabled him to bring his witnesses. The request was rejected on the ground that the notice of enquiry given to him on the previous day specified that he should be ready with his witnesses. The Tribunal held the enquiry defective. The Supreme Court upheld this finding.[92]

Reasons for dismissal.

Is it necessary that the enquiry officer should record his reasons for the decision, at the conclusion of enquiry?

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91. (1973)10 S.C.L.J. 116; A.I.R. 1972 S.C. 2128.
92. "This very reasonable request was summarily rejected by the enquiry officer.... To say the least, it is a very unreasonable attitude to be adopted by an enquiry officer." Id. per Vaidyalingam, J. at 122.

More often than not the Supreme Court has emphasised that this should be done. Khardah & Co. Ltd. v. Workmen[93] was a case where the Manager was himself the enquiry officer who decided to dismiss the workman. But he did not record any conclusions. The Supreme Court held that the enquiry was not valid. The argument that it was not necessary for the enquiry officer to record his findings and to make a formal report was rejected by the Court.[94] The Court observed that even if the enquiry is held by a person who is himself competent to dismiss the employee it is essential that the findings in the enquiry should be recorded.[95] Justice Gajendragadkar discussed in the following manner how significant articulate reasons for conclusions in domestic enquiry are;

> "If industrial adjudication attaches importance to domestic enquiries and the conclusions reached at the end of such enquiries, that necessarily postulates that the enquiry would be followed by a statement containing the conclusions of the enquiry officer.

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93. (1950-67) 2 S.C.L.J. 1442; 1963(7) F.L.R. 274.
94. Id. at pp.1447, 1448. The Court pointed out that the Tribunal would not be in a position to examine the validity of the findings in the domestic enquiry unless the enquiry officer recorded his conclusions with reasons, for the adjudicatory authority has no way of knowing how the enquiry officer approached the question of guilt of the workman and what conclusions he reached.
95. Ibid.

> It may be that the enquiry officer need not write a very long or elaborate report; but since his findings are likely to lead to the dismissal of the employee, it is his duty to record clearly and precisely his conclusions and to indicate briefly his reasons for reaching the said conclusions."[96]

Enquiry on the whole may be fairly conducted but there may be no evidence on any report being made by the enquiry officer. Can the enquiry be held valid in such cases? In Samnuggur Jute Factory Co. Ltd. v. Workmen,[97] although the Tribunal was not willing to hold the enquiry defective for that reason, the Supreme Court was of the view that absence of report introduces a serious infirmity in the enquiry.[98]

The Supreme Court emphasised the need for a report by enquiry officer recording his conclusions with reasons in Pawari Tea Estate v. Barkataki.[99] The enquiry against the workman was held by the Divisional Manager of the appellant

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96. Id. at p.1448.
97. (1950-67)5 S.C.L.J. 2990; 1964(8) F.L.R. 270. The charge against the workman was that he dragged and robbed, with the help of some others, a retired employee returning from the factory to home on his retirement.
98. Id. at p.2992 per Gajendragadkar, J.
99. (1950-67)2 S.C.L.J. 1462; 1965(11) F.L.R. 1.

company. After the enquiry he failed to record his conclusions with reasons. Himself being the disciplinary authority, he dismissed the workman. An industrial dispute arose. The Labour Court did not specifically hold the enquiry to be defective for the absence of recorded conclusions. But on evidence it held the dismissal was not justified. A writ was filed before the High Court of Assam and was dismissed. On appeal the Supreme Court held that the domestic enquiry was defective. The Court held that it is essential that the officer who makes the enquiry should make a report indicating clearly his conclusions and reasons in support of it. Gajendragadkar, C.J. observed,

> "It is necessary to emphasize that domestic enquiries held against industrial employees must conform to the basic requirement of natural justice, and one of the essential requisities of a proceeding of this character is that when the enquiry is over, the officer must consider the evidence and record his conclusions and reasons therefor."[100]

The requirement that domestic enquiries have to be held strictly in accordance with the principles of natural justice

100. Id. at p.1465.

serves a great purpose. It promotes an objective approach on the part of management and acts as a check on arbitrary dismissal.

PART V

ADJUDICATION OF DISMISSAL

Chapter X

ADJUDICATION OF DISMISSAL: OLD LAW.

Dismissal is a severe punishment to the workman. Work is his means of livelihood. Dismissal takes this way. It is a heavy blow to him. It is heavier to his dependents. Dismissal in a given case may be justified or unjustified.[1] Management may feel that the dismissal is justified. Workman may feel that it is not. The result is a dispute. The Government may interfere. It may refer the dispute[2] for adjudication. It may refer it either to a Labour Court[3] or

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1. For a discussion on the effect of legislation relating to dismissal in Britain erected on the foundation of contract, see, Fraser P. Davidson, "When is a Dismissal not a Dismissal", 32 <u>Northern Ireland Legal Quarterly</u>, p.236 (1981).
2. A dispute to become an industrial dispute had to be sponsored by a union or a group of workmen. Section 2A introduced in the Act in 1965 removed this fetter. The section provided that a dispute relating to dismissal will be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute. See Ch.II, n.77.
3. Section 10(1)(c) of the Act provides that the appropriate government may refer an industrial dispute relating to any matter specified in the Second Schedule to a Labour Court for adjudication. Dismissal of workmen is the third item in the Second Schedule.

to a Tribunal.[4] The dismissed workman should get justice. For this two things are necessary. First, the merits of the case will have to be examined.[5] Second, appropriate relief will have to be given. The adjudicatory authority should have the power to do both. A decade ago[6] the Act was silent on the extent of jurisdiction of the adjudicatory authorities. Could the Tribunal[7] interfere with dismissals? If it could, to what extent? The Act gave no guidelines. Omissions of the Legislature are to be supplied by the

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4. Section 10(1)(d) of the Act authorises the appropriate government to refer a matter specified in the Second Schedule or Third Schedule to a Tribunal for adjudication. Hence a dispute over dismissal could be referred either to a Labour Court or a Tribunal, for adjudication.
5. See the Termination of Employment Recommendation, 1963 adopted by the International Labour Organisation. Clause 4 of the Recommendation provides that a dismissed workman should be entitled to appeal to a neutral body and clause 5(1) stipulates that such body 'should be empowered to examine the reasons given for the termination of employment and other circumstances relating to the case and to render a decision on the justification of the termination.' For the text of the Recommendation, see International Labour Office, Termination of Employment: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (1974), Appendix I at p.94. See also Ch.II, n.80 and Ch.XI, n.2.
6. Before the introduction of Section 11A in the Act by the Industrial Disputes (Amendment) Act, 1971.
7. The term is used as inclusive of Labour Court.

justice of judicial exposition. The judiciary therefore stepped in.

Dismissal after domestic enquiry.

According to the judicial interpretation of the law, the adjudicatory agency had no jurisdiction to examine the merits when dismissal was preceded by a proper domestic enquiry. It could not sit in appeal over the decision of the management and decide for itself that the dismissal was unjustified.

Power to direct its internal administration and discipline was recognised as a managerial prerogative. But this is subject to the power of Tribunal to give appropriate relief when the dismissal is found 'unjustified.' In Indian Iron and Steel Co. Ltd. v. Their Workmen[8] the Supreme Court upheld the decision of the Tribunal quashing the dismissal of a workman, a nurse, and ordering reinstatement. However, the Court laid down the limitations on the power of adjudicatory authority. The Tribunal cannot, the Court clarified,

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8. A.I.R. 1958 S.C. 130.

act as a court of appeal and substitute its own judgement for that of the management.[9] Interference by Tribunal would be justified only on grounds of want of good faith, victimisation[10] or unfair labour practice, a basic error or violation of principles of natural justice or of completely baseless or perverse finding.[11]

The pronouncement that the Tribunal cannot sit in appeal over the decision of the management had its implications. The Tribunal could not insist on conclusive proof of guilt. It could not examine the evidence to decide whether the workman was guilty or not. Suppose that on

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9. Id. at p.138 per S.K. Das, J.
10. Otto Kahn Freund, Labour and the Law (1977), p.174. In Britain dismissal of an employee for the reason that he participated in Trade Union activity renders the dismissal unfair. The late Professor Kahn-Freund observed,
"....(A)n employee must not be dismissed by reason of his membership in, or his activity for, an independent union, or his refusal to be a member of a dependent (sham) union. If the employer dismisses one of his employees mainly or entirely for one of these reasons, the reason is what the law calls inadmissible.' A dismissal for an 'inadmissible reason' is an 'unfair dismissal'...."
11. Indian Iron and Steel Co. Ltd. v. Their Workmen, A.I.R. 1958 S.C. 130 at p.138 per S.K. Das, J.

evidence the Tribunal is of the view that the workman is not guilty. Even then, it had to uphold the dismissal.[12] Tribunal is not to examine whether the workman is guilty. It has to examine whether the management is justified in dismissing him.[13] In short the justification of the management in dismissing the workman, rather than his guilt is the factor on which the tribunal decision depends. A finding on the justification of managerial action does depend not on the merits of dismissal but on whether the action of the management was vitiated on account of any of the stated grounds.[14]

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12. In Britain the jurisdiction of the Tribunal is limited. If the employer 'could reasonably have decided either to dismiss or not to dismiss an employee, the dismissal is fair even although the members of the Tribunal would not have dismissed in the circumstances.' See J.M. Thomson, "Crime, Morality and Unfair Dismissal", 98 L.Q.R. 423 at p.426 (1982).
13. In Britain the industrial Tribunal examining the fairness of dismissal has to confine itself to a similar probe. "In assessing the fairness of the dismissal the task of an industrial tribunal is not to decide whether it would have dismissed for the reason proved but simply whether a reasonable employer could have come to the conclusion that dismissal was reasonable in the circumstances." Roger W. Rideout, Principles of Labour Law (1979), p.101.
14. Grounds like want of good faith, victimisation, unfair practice, etc. Supra, n.11.

The adjudicatory agencies need not go for the conclusive proof of the guilt of the dismissal. _Balipara Tea Estate_ v. _Its Workmen_[15] is an example. A workman was dismissed after domestic enquiry on a charge of making over-payment to some female workers as wages. Only the book recording the specific work of the workers was produced, the one that recorded the miscellaneous work was not produced. Perhaps there might be some entries in the latter and wages might have been paid for that work also. The Tribunal therefore ordered reinstatement of the workman on the ground that the management had not proved the case against the workman. In appeal the Supreme Court held that it was wrong to insist that conclusive proof of guilt should be available. If there was a burden on the management to prove the case against the workman clearly, it ought to have produced the book in which other miscellaneous works were used to be recorded. This was to satisfy the Tribunal that there were no entries relating to work in that book and that the workers were over paid. It

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15. (1950-67)5 S.C.L.J. 2999; A.I.R. 1960 S.C. 191.

would not then be necessary for the workman to ask for it. It would not be necessary for the Tribunal to require the production of it. The Tribunal proceeded on the basis that the management had the burden to prove clearly the case against the workman. If there were some entries in the book relating to the workmen in question, the case against the dismissed workman would not stand. The fact that the records which were produced showed that the workers were engaged on the days in question in one type of work does not conclusively prove that they had not been engaged in any other kind of work also during these days. The book in which other types of work are entered alone can prove it. That book was therefore a material document which ought to have been produced. In its absence the Tribunal held that the guilt of workman was not proved. But Justice Sinha said:

> "The Tribunal misdirected itself in so far as it insisted upon conclusive proof of guilt to be adduced by the Management in the inquiry before it....the Tribunal completely misdirected itself in basing its conclusion upon the absence of a document which neither the parties before it, nor the Tribunal itself, during the inquiry, thought to be relevant."[16]

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16. Id. at pp.3004, 3005.

In other words, the management could take advantage of the default, if it was a default, of the workman in not requiring the production of the book. If so, it follows that it was not for the management to prove guilt; it was for the workman to prove innocence. It was not for the management to adduce all the evidence before Tribunal to show that workman is guilty; it was for the Tribunal to call for records if it is to hold the workman not guilty. Because the Tribunal did not require its production the Court concluded that it was not considered by the Tribunal to be a relevant document. The Court held that the Tribunal could not examine the evidence to satisfy itself that the workman was guilty before upholding the dismissal. Its duty is not to see whether workman was guilty but to see whether the management was justified in holding him guilty. Sinha, J. said,

> "In this case, the award suffers from the inherent weakness of the approach made by the Tribunal in determining the controversy before it. It had not got to decide for itself whether the charge framed against the workman concerned had been established to its satisfaction; it had only to be satisfied that the management was justified in

> coming to the conclusion that the charge against the workman was well founded."[17]

It is to be noted that the Supreme Court had seized of the problems in the Mckenzie & Co. v. Its Workmen.[18] The case attempted to solve the riddle how a Tribunal can, without satisfying itself that the workman is guilty, decide that the management was justified in holding him guilty. Some workmen were dismissed after enquiry. The Tribunal without proceeding to satisfy itself that the workmen were guilty upheld the dismissal saying;

> "Since there was evidence and it was a possible view, the Tribunal must accept the finding and hold that the dismissal of the workers was justified."[19]

In appeal the Labour Appellate Tribunal found the evidence in the managerial enquiry unacceptable and therefore set aside the order of the Tribunal. The Supreme Court in appeal held that the Labour Appellate Tribunal was in error in setting aside the order of the Tribunal.[20] The jurisdiction of the Tribunal, the Court observed, was only to

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17. Id. at p.3005.
18. (1950-67)2 S.C.L.J. 1364; A.I.R. 1959 S.C. 389.
19. Id. at p.1367.
20. Id. at pp.1369, 1370.

examine whether there were facts in support of the management, the action was in good faith and principles of natural justice were observed; if the answers to these were in the affirmative, the management's action had to be held justified and the dismissal upheld. Justice Kapur said:

> "It is for the management to determine what constitutes major misconduct within its standing orders sufficient to merit dismissal of a workman but in determining such misconduct it must have facts upon which to base its conclusion and it must act in good faith without caprice or discrimination and without motives of vindictiveness, intimidation or resorting to unfair labour practice and there must be no infraction of the accepted rules of natural justice. When the management does have facts from which it can conclude misconduct its judgement cannot be questioned provided that above mentioned principles are not violated."[21]

<u>Jurisdiction in adjudication and permission proceedings: A comparison</u>.

The jurisdiction to adjudicate a dispute over dismissal should be different from the jurisdiction to grant permission

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21. *Id.* at p.1369.

for dismissal under section 33 of the Act.[22] In deciding the question of granting permission the Tribunal is not acting as a reviewing authority over dismissal but is only examining whether a *prima facie* case is made out against the workman.[23] Granting of permission does not bar raising an industrial dispute over dismissal effected with such permission.[24] The jurisdiction of the Tribunal adjudicating an industrial dispute over dismissal should therefore be wider than the jurisdiction in granting permission for dismissal. But it appears, there existed no substantial difference between the two jurisdictions of the Tribunal when the dismissal was made after a proper domestic enquiry. This is evident when one looks at, and compares, the observation in two cases already discussed. In *Indian Iron and Steel Co.*

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22. See Ch.V.
23. *Mckenzie & Co.* v. *Its Workmen*, (1950-67)2 S.C.L.J. 1364 at p.1372. See also Ch.V.
24. *Ibid.* Justice Kapur observed:
    "The nature and scope of proceedings under section 33 shows that the removing or refusing to remove the ban on punishment or dismissal of workman does not bar the raising of an industrial dispute when as a result of the permission of the Industrial Tribunal the employer dismisses or punishes the workman."

v. Their Workmen[25] Justice S.K. Das explained the jurisdiction in adjudication as follows:

> "In cases of dismissal on misconduct, the Tribunal does not, however, act as a court of appeal and substitute its own judgement for that of the management. It will interfere (i) when there is a want of good faith, (ii) when there is victimisation or unfair labour practice, (iii) when the management has been guilty of a basic error or violation of a principle of natural justice, and (iv) when on the materials, the finding is completely baseless or perverse."

In Mckenzie & Co. v. Its Workmen[26] Justice Kapur observes on jurisdiction in permission cases as below:

> "....(I)n deciding whether permission should or should not be given, the Industrial Tribunal is not to act as a reviewing tribunal against the decision of the management.... (P)rinciples governing the giving of permission in such cases are that the employer is not acting mala fide, is not resorting to any unfair labour practice, intimidation or victimisation and there is no basic error or contravention of the principles of natural justice."

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25. A.I.R. 1958 S.C. 130 at p.138.
26. (1950-67)2 S.C.L.J. 1364 at p.1372.

The following table is evolved from the observations in the above two cases and shows that the two jurisdictions are almost the same.

Jurisdiction in adjudication of an industrial dispute over dismissal	Jurisdiction in deciding an application for permission to dismiss
1. Tribunal does not substitute its own judgement for that of management.	1. Tribunal does not act as a reviewing Tribunal against the decision of the management.
2. Tribunal can interfere with the order of dismissal when there is want of good faith in the employer.	2. Tribunal can refuse permission to dismiss if employer is acting _mala fide_.
3. Tribunal can interfere if dismissal was by way of victimisation or unfair labour practice.	3. Tribunal can refuse permission if dismissal is an act of victimisation or unfair labour practice.
4. Tribunal can interfere when there is a basic error or violation of principles of natural justice.	4. Tribunal can refuse permission if there is a basic error or contravention of principles of natural justice.
5. Tribunal can interfere if the finding of guilt is completely baseless or perverse.	5. Tribunal can refuse permission if there is no _prima facie_ case for dismissal.

When a Tribunal adjudicating a dispute over dismissal effected after proper enquiry is entitled to look only whether there were some facts in support of the action and the view taken by the management was a possible view, as was said in *Mckenzie*,[27] the Tribunal is only looking for a *prima facie* case, and the jurisdiction it exercises is substantially the same as that it exercises in an application for permission. The jurisdictions in dealing with an application for approval of dismissal is also almost the same.[28] This has already been noted in juristic circles.[29] If so, in adjudication of an industrial dispute over dismissal effected after a proper enquiry and with approval or permission, the tribunal does not exercise a wider jurisdiction since the merits of dismissal cannot be examined by it.[30]

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27. *Supra*, nn.20, 21.
28. See Ch.VI, n.42.
29. "....the conclusion is inescapable that the scope of enquiry in both the permission proceeding under section 33 and the adjudication proceeding under section 10 are substantially the same." Solomon E. Robinson, "The Supreme Court and Section 33 of the Industrial Disputes Act 1947", 3 *J.I.L.I.* 15 at pp.33, 34 (1961). Also see n.30, *infra*.
30. See also Yogendra Singh, "A Legal Conundrum in Labour Law: The Concept of a Prima Facie Case", 14 *J.I.L.I.* 386 (1972). The author observed at p.400:

    "The fundamental similarity of the grounds of attack under both sets of affairs is apparent. It is not correct to assert, as the Supreme

(contd..)

Dismissal without domestic enquiry.

Absence of proper domestic enquiry does not by itself, according to the law laid down by the Supreme Court, render the dismissal invalid and enable the Tribunal to order reinstatement. In Phulbari Tea Estate v. Its Workmen[31] it was observed that even if an employer does not hold any enquiry before dismissal he can produce evidence before the Tribunal when a dispute over dismissal is referred for adjudication and prove the case against the workman.[32] Facts in the case show that a workman was dismissed on a charge of theft after an enquiry. The Tribunal held the enquiry to be defective[33] and ordered payment of compensation to the workman in lieu of reinstatement. In appeal the Supreme Court upheld this finding. Wanchoo, J. observed:

(f.n.30 continued)

Court does, that under section 33, only thing that the tribunals and Courts are required to do is to see prima facie case, and under the regular reference to see the case on merits."

31. (1950-67)2 S.C.L.J. 1393; A.I.R. 1959 S.C. 1111.
32. This right has been reiterated in subsequent decisions. Even after the introduction of S.11A in the Act, this right is available to the employer. See Ch.XI.
33. The evidence against the workman was not recorded in his presence nor were the contents of the statements recorded read out to him or copies supplied to him during the enquiry.

> "The defect in the conduct of the enquiry could have been cured if the company had produced the witnesses before the Tribunal and given an opportunity....to cross-examine them there.... (I)f there was defect in the enquiry by the employer he could make good that defect by producing evidence before the Tribunal."[34]

Suppose that no enquiry was held before dismissal. The Tribunal cannot straight away pass an order of reinstatement on the ground that dismissal was not preceded by a proper enquiry. It has to decide for itself on the basis of evidence adduced before it whether the misconduct is proved against the workmen. In Punjab National Bank v. A.I.P.N.B.E. Federation,[35] Justice Gajendragadkar observed:

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34. (1950-67)2 S.C.L.J. 1393 at p.1397; A.I.R. 1959 S.C. 1111 at p.1113.
35. A.I.R. 1960 S.C. 160. Some workmen were dismissed without domestic enquiry for participating in illegal strike. The Tribunal upheld dismissal on the ground that dismissal for participation in illegal strike is justified. The Labour Appellate Tribunal held that mere participation in illegal strike does not render the employees liable for dismissal. It ordered, after examining evidence let in, reinstatement of some workmen who participated in illegal strike.

> "....if no enquiry has in fact been held by the employer, the issue about the merits of the impugned order of dismissal is at large before the Tribunal and, on the evidence adduced before it, the tribunal has to decide for itself whether the misconduct alleged is proved, and if yes, what would be proper order to make."[36]

In other words on the evidence the Tribunal has to decide the question of guilt as also that a punishment. The issue that it has to examine is whether the dismissal is justified. This is nothing but the merits of dismissal. Justifiability of the order of dismissal involves examination of two aspects. The first aspect is whether the workman is guilty of the misconduct. The second is whether dismissal is a proper punishment having regard to the misconduct proved.[37] Even if the Tribunal finds that the

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36. *Id.* at p.173.
37. Some confusion arose when, summing up the old law in *Workmen of Firestone Tyre & Rubber Co. Of India (P) Ltd. v. The Management*, (1973)10 S.C.L.J. 159; A.I.R. 1973 S.C. 1227, Justice Vaidyalingam observed at p.180.
    "Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation."

(contd..)

dismissal was unjustified on evidence adduced before it, it is not obligatory on its part to order reinstatement. According to the Supreme Court though the normal rule in the case of unfair dismissal is reinstatement, the Tribunal has jurisdiction in unusual cases not to order reinstatement. In the Punjab National Bank case Gajendragadkar, J. said:

> "It is obvious that no hard and fast rule can be laid down in dealing with this problem. Each case must be considered on its own merits, and, in reaching the final decision an attempt must be made to reconcile the conflicting claims made by the employee and the employer. The employee is entitled to security of service and should be protected against wrongful dismissals, and so the normal rule would be reinstatement in such cases. Nevertheless in unusual or exceptional cases the Tribunal may have to consider whether, in the interest of the industry itself, it would be desirable or expedient not to direct reinstatement."[38]

(f.n.37 continued)
This position is not correct. Justice Krishna Iyer pointed out in Gujarat Steel Tubes v. Gujarat Steel Tubes Mazdoor Sabha, A.I.R. 1980 S.C. 1896 at pp.1926, 1927:
"Another vital fact 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 field of delinquency and consequent penalty is at large for the tribunal.... We are constrained to hold that a certain observation made per incuriam by Mr. Justice Vaidyalingam.... does not accurately represent the law..."

38. Punjab National Bank v. A.I.P.N.B.E. Federation, A.I.R. 1960 S.C. 160 at p.173.

The approach of the Judiciary.

If there was a proper enquiry and if action of management was *bona fide* Tribunal could not interfere with dismissal. This was so even if on the evidence it would have reached a conclusion different from that of the management. Reinstatement is not an absolute rule in all cases of wrongful dismissal. Even if no enquiry has been held before dismissal the employer can justify its action by adducing evidence before Tribunal. This position indicates that the Supreme Court has been slow in recognising jurisdiction in the Tribunal to interfere with the right of the management in taking disciplinary action against the workman. It shows that the Court was prepared to sacrifice, to some extent, in the name of industrial harmony, the right of workman against unfair dismissal.

The Tribunal could not appreciate the evidence and consider the probabilities of the case to decide whether the conclusions of the management were proper. But it could do so to decide whether the action of the management is vitiated

on any one of the stated grounds[39] justifying interference by Tribunal. Doom Dooma Tea Co. v. Workmen of Daimukhia Tea Estate[40] made this clear. A workman was dismissed for the misconduct of assaulting his boss.[41] On reference the Tribunal found that the enquiry officer was biased and the evidence not good enough on which an order of dismissal could be based. The Tribunal held that a discharge with retrenchment compensation will suffice. Disagreeing Justice Gajendragadkar said:

> "If this finding had been based on appreciation of evidence considered in the light of probabilities we would have been reluctant to interfere with it.... We are, however, satisfied that the Tribunal's finding as to the Manager's bias is not even reasonably possible."[42]

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39. The grounds stated in Indian Iron & Steel Corp. case. See supra, n.25.
40. [1960-61] 18 F.J.R. 138.
41. Ibid. The Assistant Manager asked the workman (who also supervised the work of other workmen) to require the workmen doing unsatisfactorily the work of pruning to re-do it. The workman did not carry out this instruction. The Assistant Manager grew angry and used abusive language against the workman. The workman also grew angry and hit the Assistant Manager. The Assistant Manager made a report of the assault to the Manager. The Manager placed the workman under suspension, conducted an enquiry, found him guilty and dismissed him.
42. Id. at p.142.

The circumstances under which the Tribunal found the Manager biased was that he suspended the workman immediately on receipt of the report of the Assistant Manager about the assault and that he did not wait for any report from the workman. According to the Supreme Court bias could not be inferred from these facts. Justice Gajendragadkar observed:

> "Whether or not the Industrial Tribunal itself would have passed this order if the matter had come for its decision is not material. Normally the awarding of proper punishment for misconduct under the standing orders is the function of the management, and, unless there is valid justification, the Tribunal should be slow to interfere with the exercise of that function."[43]

Interestingly, the case presents a paradox. On the one hand it illustrates how a workman is deprived of his livelihood in the name of an alleged misconduct without a fair procedure. On the other hand it is an example of how the employer after firing an employee without adopting a fair and just procedure, go scot free with impunity. An abusive language by the Assistant Manager prompting assault

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43. Id. at p.145.

was equally bad. Yet on complaint of the Assistant Manager the workman was dismissed. The Assistant Manager remained unaffected. Does this show an even balance of justice? If the policy of the Supreme Court is accepted, the Tribunal is to remain dumb and helpless at such extreme punishment to the workman. It has no jurisdiction, according to the Supreme Court, to modify the punishment. The Supreme Court upheld the dismissal and gave the management an advice to honour the dignity of workman. The Court observed:

> "Employers must realise that their employees, however humble their status and however poor their earnings may be, are entitled to be treated as human beings and must be treated with due respect to human dignity. Abuse of any kind not only shows bad manners but hurts the dignity of the person to whom it is addressed and inevitably creates strong reactions in his mind. Therefore, we must strongly disapprove of the attitude adopted by Mr. Addission (The Assistant Manager) in dealing with respondent 2. That, however, does not mean that the Tribunal has jurisdiction to interfere with the order of punishment passed by the Management. This question must be considered in the light of the limits which are imposed by law on the jurisdiction of Tribunals in dealing with such a dispute."[44]

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44. Id. at pp.143, 144 per Gajendragadkar, J.

Intolerance of the management towards trade union activities is proverbial. This makes the management to look at workers who are leaders through a jaundiced eye, to take advantage of minor lapses and punish them severely. On such occasions the position taken by the judiciary often goes against the interest of workers. Titaghur Paper Mills Co. Ltd. v. Ram Nareshkumar[45] is the best illustration. The facts of the case were these. When the report of daily attendance was not sent, the usual practice was that the Head Office would issue a reminder before it took any disciplinary action. The respondent worker who was responsible in sending this report did not send the report in one month. He happened to be the Vice-President of the Union with which the management had certain disputes. Instead of sending the usual reminder the management plunged into holding a domestic enquiry on a charge of dereliction of duty and dismissed the respondent. The Tribunal found that as no reminder was issued in this case, there was room for suspicion that the management wanted to get rid of the trade

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45. (1950-67)5 S.C.L.J. 3319; 1961(2) F.L.R. 598.

union activist and that the disciplinary proceedings were designedly initiated, taking advantage of the lapses of the workman. The Tribunal ordered reinstatement. But in appeal the Supreme Court held that the Tribunal could not act as a court of appeal. It was the view of the Supreme Court that in the absence of any of the grounds specified in Indian Iron & Steel Company the Tribunal could not interfere with the order of the management. Justice Wanchoo said:

> "We are of opinion that the present case is not covered by any of the four grounds on which a tribunal can interfere with the order of dismissal by the management. Dereliction of duty was clearly established in this case; the management had the right of dismissal under the relevant standing orders; proper enquiry was held and the explanation of the workman was found to be childish. In these circumstances, there was no ground for the tribunal to substitute its own judgement for the judgement of the management in the matter of punishment to be meted out."[46]

When a domestic enquiry is held before dismissal, the conclusions of fact recorded in the enquiry were not open

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46. Id. at p.3321.

to review by the adjudicatory autherities. Pure Drinks (P) Ltd. v. Kirat Singh Maungati[47] illustrates the limited jurisdiction of the Tribunal. A workman was discharged by way of punishment on a charge of wilful insubordination and acts subversive of discipline.[48] A dispute was raised and referred for adjudication. The Tribunal found the evidence unreliable and the charge unsustainable.[49] Reinstatement of the workman was ordered. In appeal the Supreme Court, on the other hand, held that the Tribunal exceeded its jurisdiction in appreciating the evidence and in coming to its own conclusion as to the guilt of the workman. The Tribunal could not, observed the Court, sit in appeal on the conclusion of fact recorded in the domestic enquiry.

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47. (1950-67) 5 S.C.L.J. 2954; 1961(3) F.L.R. 46.
48. Ibid. A helper used to accompany the workman who was a route salesman of areated water. One day the helper was absent. The Sales Manager of the Company sent a boy to the workman as helper. The workman, apprehensive of loss on the route, asked for an additional helper. This request was rejected. The workman applied for leave. Leave was not granted. The management's case was that there upon the workman used abusive language, took off his uniform, tried to snatch the attendance book and ultimately left the premises.
49. Ibid. The Tribunal found that the evidence led was interested and unreliable. The promotion of some of the witnesses was then pending with the management. Some witnesses were promoted soon after the enquiry. The Tribunal found that it was not sustained, even in the evidence produced, that the workman used abusive language.

Justice Gajendragadkar said that in dealing with an industrial dispute arising out of dismissal the industrial court is entitled to enquire whether the impugned order has been passed mala fide and with improper motive or is the result of a desire to victimise the workman.[50] Improper motive of the employer was treated as a ground for interference. The Court held that if the dismissal was vitiated on the above grounds the Tribunal should set aside the order.[51] If the enquiry was proper and was conducted on a proper charge the Tribunal can interfere only if the findings or conclusions in the enquiry "is perverse and is not supported by any evidence."[52] Absence of any valid evidence in support renders the decision perverse. If there is some evidence in support of the finding, Tribunal cannot interfere with the finding in the domestic enquiry. In other words, it is not open to the Tribunal to sit in appeal over conclusions of facts recorded in the enquiry. In the words of Justice Gajendragadkar the infirmity in the approach of the Tribunal was,

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50. Id. at p.2956 per Gajendragadkar, J.
51. Ibid.
52. Ibid.

"It has elaborately examined the evidence adduced in the case, considered the probabilities, examined the reliability of the two rival versions and has come to the conclusion that the version of the workman should be preferred to that of the employer...."[53]

Is this not exactly what the Tribunal should do if it is to deliver justice? On the contrary in the view of the Supreme Court, this approach was not correct. Will this not justify the remark that the highest court of the land leaned towards capitalistic justice?

When the domestic enquiry held by management is not proper the Tribunal gets a wider jurisdiction. It can examine the evidence and enter a decision of its own. In Workmen of M/s. Dem Dima Tea Estate v. M/s. Dem Dima Tea Estate[54] the Supreme Court upheld the order of the Tribunal. It did so because the Tribunal found the enquiry defective and made the order after appreciating evidence.[55]

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53. Ibid.
54. (1950-67) 5 S.C.L.J. 2976; 1962(5) F.L.R. 372.
55. Ibid. The workman, a head munshi in the company, permitted a workman to work impersonating a regular woman worker who had left the company for good. He was dismissed after an enquiry. A dispute over the dismissal was referred for adjudication. The Tribunal found the enquiry defective. On appreciation of the evidence the Tribunal found the workman guilty and hence the dismissal was upheld. On appeal by special leave the Supreme Court held that the Tribunal was justified in upholding the dismissal.

The adjudicatory authorities could not, however, interfere with dismissal if there was a proper enquiry and if the decision was based on some evidence. The management is given an additional privilege of adducing further evidence before the tribunal in support of the dismissal. The judicial policy puts the management on a double advantage. In Ritz Theatre (P) Ltd. v. Its Workmen,[56] two workmen were dismissed after enquiry. On reference the Tribunal permitted both the management and the workmen to produce additional evidence. On appreciating the evidence so adduced, in addition to the evidence of domestic enquiry, the tribunal found the dismissal of one employee unjustified. It also found that dismissal of the other workman was defective as the order of dismissal was not communicated. As a result the tribunal ordered that both were to be reinstated. In appeal the Supreme Court was categorical in saying that to effect a severance of the relationship it was necessary that the order of dismissal be communicated to the employee. Ironically, in respect of the other workman the view of the

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56. (1950-67) 5 S.C.L.J. 3061; A.I.R. 1963 S.C. 295.

Supreme Court was that the Tribunal exceeded its jurisdiction when it considered the case on merits. The view of the Court was that adducing additional evidence by the employer did not give the Tribunal jurisdiction to examine such evidence and decide the case. It could exercise such wider jurisdiction, in the Court's view, only if there has been no proper enquiry or if the findings in the enquiry were perverse.

The trend of the decision seems to go again indirectly in favour of management to a large extent. The employer may adduce evidence before Tribunal and then the employee may adduce evidence contra. The contradiction lay in the fact that the Tribunal could not appreciate the evidence so produced unless it examined first the validity of the enquiry and the findings. If it found the enquiry proper and the finding not perverse, it could not proceed to examine the further evidence produced by the parties and could not consider the case on merits.

The decision shows the obvious reluctance of the Court to permit the Tribunal to interfere with the managerial prerogative of taking disciplinary action against the employees.

The effect is that the hands of the tribunal were tied and that it was not able to deliver justice to dismissed workmen on the basis of the evidence available. Appreciation of the evidence produced by the employer and employee in a given case may lead to the conclusion in a given case that the dismissal was unfair. But the Tribunal was to look only whether there was a proper enquiry and whether there was some evidence in support of the finding in the enquiry. If these two conditions were satisfied the consequence was that, despite the evidence to show that the dismissal was unjustified, the Tribunal had to uphold the dismissal. The employer is given free hand to adduce additional evidence before the Tribunal. He can rely on the validity of the domestic enquiry. The employer can do these without any risk of the case being decided by the tribunal on merits. In _Ritz Theatre_ the Supreme Court was very much concerned about an anomaly.

> "If the view taken by the Tribunal was held to be correct, it would lead to this _anomaly_, that the employer would be precluded from justifying the dismissal of his employee by leading

> additional evidence unless he takes the risk of inviting the Tribunal to deal with the merits for itself...."[57]

What really is the anomaly? It is not what the Court describes. The anomaly lies in permitting dismissal unless it is justified on merits and in protecting the interest of the employer disregarding the legitimate interest of the employee not to be unfairly dismissed. Decision on merits of dismissal is a 'risk' only when the whole issue is viewed through the eyes of management. It is a fair and reasonable determination when viewed from an impartial angle.

If the enquiry is defective the management can adduce evidence before the Tribunal to show that the dismissal is justified. But does the workman have the right to adduce evidence before the Tribunal to prove that the dismissal is unjustified when the management relies on the domestic enquiry? Justice demands that no workman should be dismissed in an unfair manner; if the dismissal is unjustified he should have a remedy. There is an adjudication of the

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57. Id. at p.2085 per Gajendragadkar, J. (Emphasis added).

dispute before the tribunal. The workman wants to produce evidence to prove that the dismissal was unfair. He wants to show that he is innocent. He should be permitted to do so. But this view did not find approval of the Supreme Court. _Tata Oil Mills Co. Ltd._ v. _Workmen_[58] shows the high-water mark of the judicial attitude. There was a specific plea by the employee for an opportunity to adduce evidence similar to that given to the employer. An opportunity was asked for to prove his case before the industrial tribunal as the workman had been unable to lead evidence in the domestic enquiry. The Court rejected this contention observing;

> "If this plea is upheld, no domestic enquiry would be effective and in every case, the matter would have to be tried afresh by the Industrial Tribunal."[59]

The management gets a double opportunity. One is at enquiry stage. The other is at the stage of adjudication. These opportunities are to prove that workman is guilty. Is it

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58. (1950-67)2 S.C.L.J. 1451; A.I.R. 1965 S.C. 155.
59. _Id._ at p.1457 _per_ Gajendragadkar, C.J.

fair if the Court blocks a similar right to workman to prove his innocence? The judicial position seems to be that the domestic enquiry is to be given the stamp of finality. The question of saving a workman from unjustified punishment of dismissal was given secondary importance. Tata Oil Mills indicates this dubious position.

When dismissal follows a proper domestic enquiry the Tribunal had no jurisdiction to examine the correctness of conclusions of fact arrived at in the domestic enquiry. Nor could it examine whether the material before the enquiry officer was adequate to enter finding against the workman. It was also not in a position to say that a witness believed by the enquiry officer ought not have been believed. Nor could the Tribunal examine whether the workman was actually guilty. In J.K. Cotton Spinning and Weaving Co. Ltd. v. The Workmen,[60] a workman was prosecuted on a charge of theft of the company's property. The Court of first instance convicted him. But the appellate court acquitted him. A

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60. (1950-67)2 S.C.L.J. 1438; 1965(11) F.L.R. 27.

domestic enquiry was held during pendency of appeal in the criminal case. The workman requested to postpone enquiry till disposal of appeal in the criminal case. This was not granted. The enquiry went on ex-parte. Three witnesses were examined. On going through the statements of the witnesses the enquiry officer concluded that the workman was guilty. The workman was dismissed. An industrial dispute was raised over the dismissal. The Tribunal, in deciding the dispute recorded the evidence on behalf of workman and the company, discussed and weighed the evidence, evaluated the probabilities and held that the management did not succeed in proving that the workman had committed theft. In appeal the Labour Appellate Tribunal refused to interfere with the order of the Tribunal, holding that though the domestic enquiry was proper the decision in the enquiry was influenced by the conviction in the criminal case. It observed that the Tribunal has given cogent reasons why the case of theft against the workman could not be believed. The case went on appeal to the highest court of the land. The pronouncement of the Supreme Court was that unless the enquiry was unfair or improper or the action of the

management was actuated by ulterior motive, Industrial Tribunal could not set at naught the action of the management. The Tribunal could not review the evidence or take fresh evidence except in the circumstances stated in the _Indian Iron and Steel Company's_ case.[61] The Court said;

> "This court has pointed out time and again that an industrial tribunal to which a dispute arising from dismissal has been referred for adjudication is not an appeal court having the power to examine the correctness of the conclusions of fact arrived at by a domestic tribunal. Where the Industrial Tribunal finds that there was nothing improper or unfair in an enquiry conducted by the domestic tribunal and where the action taken against workmen was not actuated by any ulterior motive and where the principles of natural justice have not been infringed it is beyond the powers of an Industrial Tribunal to set at naught the action taken by the management which lay within its competence under the Standing Orders. Whether the material before the domestic tribunal was adequate or not or whether the particular witnesses upon whom reliance was placed by the tribunal should have been believed or not was entirely a matter for the consideration of the domestic tribunal."[62]

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61. _Supra_, n.25.
62. _J.K. Cotton Spinning and Weaving Co. Ltd._ v. _The Workmen_, (1950-67)2 S.C.L.J. 1438 at p.1441.

Since the managerial personnel could be the officer holding the enquiry, it is possible that a workman may be found guilty and punished on the basis of unreliable evidence. If a tribunal adjudicating a dispute over the dismissal could not examine these matters unless the exceptional circumstances laid down in Indian Iron and Steel Company's case[63] were present, it amounts to denial of justice to workmen

When it has ample evidence against the workman the management could dispense with the enquiry and prove its case before the Tribunal. If it does not have adequate evidence against the workman it may hold a domestic enquiry, find the workman guilty and dismiss him. This decision was not open to review by the Tribunal since it could not examine the adequacy of evidence. Domestic enquiry in such a context would serve more as a weapon at the hands of the management than as a device to protect the worker against unfair dismissal.

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63. Supra, n.25.

The whole position was unsatisfactory. The jurisdiction of the adjudicatory authority had to be made wider to enable the Tribunal to deliver justice to dismissed workmen. This necessitated legislative action and led to the introduction of section 11A in the Act.

Chapter XI

ADJUDICATION OF DISMISSAL: NEW LAW.

The limited jurisdiction of tribunal recognised in the *Indian Iron and Steel Company's* case[1] was not satisfactory. The tribunal had no power to sit in appeal over the decision of the management. The need for an appeal against the decision of the management terminating the service of workman was keenly felt even at the international level. The International Labour Organisation adopted a Recommendation[2] in this regard.[3] The recommendation provides:

(a) A worker aggrieved by termination of his employment should be entitled to appeal against the termination.

(b) The appeal should be to a neutral body.

(c) The body should be empowered to examine,

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1. *Indian Iron & Steel Co. Ltd.* v. *Their Workmen*, A.I.R. 1958 S.C. 130.
2. Recommendation No.119. See Ch.II, n.80 and Ch.X, n.8.
3. The I.L.O. Conference Committee on the Application of Conventions and Recommendations expressed the view that "Termination of Employment" should again be brought before the General Conference of the I.L.O. for framing further standards. See Vaidyanathan, N., *International Labour Standards - A Hand Book* (1977), p.66.

(i) the reasons given for the termination of employment, and

(ii) other circumstances relating to the case.

(d) The body should have power to render a decision on the justification of the termination.

(e) In cases of unjustified termination the body should have power to order reinstatement, to require payment of compensation or to render other appropriate relief.

It was in 1963 that the I.L.O. adopted the Recommendation.[4] It took another eight years for India to amend the Industrial Disputes Act. The amendment of 1971 introduced

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4. After the adoption of the Recommendation modifications in the law were effected in several countries. New legislation requiring justification for dismissals was adopted in Australia (South Australia), Cambodia, Cameroon, Chile, Cyprus, Czechoslovakia, Denmark, Finland, France, Gibraltar, Indonesia, Iraq, Italy, Kenya, Luxembourg, Malaysia, Malta, Mauritius, the Netherlands, Antilles, New Zeland, Panama, Peru, the Phillipines, Poland, Rwanda, Singapore, Sudan, Sweden, Tanzania, Trinidad and Tobago, the United Kingdom and Zaire. Legislative provisions were amended in Byelorussian S.S.R., Colombia, Congo, India, the Libyan Arab Republic, Sri Lanka, The Ukranian S.S.R., the U.S.S.R., Venezuela and Yugoslavia. See Edward Yemin "Job Security: influence of I.L.O. Standards and Recent Trends", 113 International Labour Review 17 at p.20 (1976).

a new section, section 11A, with a view to bringing the law in conformity with the international norm.[5]

An examination reveals that section 11A[6] differs from the Recommendation in one respect. The latter visualised

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5. The statement of Objects and Reasons to the Industrial Disputes (Amendment) Act 1971 inserting section 11A in the Act with effect from 15.12.1971, referred to the historical background of the existence of only a limited jurisdiction in the Tribunal in view of the decision of the <u>Indian Iron & Steel Cor's</u> case, to the Recommendation of the I.L.O. (Recommendation No.119), and said, "In accordance with these recommendations, it is considered that the Tribunal's power in an adjudication proceeding relating to discharge or dismissal of a workman should not be limited and that the Tribunal should have the power, in cases wherever necessary to 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. For this purpose, a new S.11A is proposed to be inserted in the Industrial Disputes Act 1947."
6. Section 11A provides:
"<u>Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workman</u>.—
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

(contd..)

that a worker aggrieved by termination should be entitled "to appeal" against the termination.[7]

The new law contained in section 11A is of course a step forward. The Tribunal can set aside the dismissal when it finds that the dismissal was not justified.[8]

(F.n.6 continued)
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."

7. The National Commission on Labour also expressed the view that the workman should have a right of appeal against the findings in the domestic enquiry. The Commission recommended an amendment of the law giving the aggrieved worker the right to appeal against the findings of the inquiry. See, Government of India, <u>Report of the National Commission on Labour</u> (1969), p.350.
8. In Britain, the employer has the duty to justify dismissal before Tribunal when a complaint about unfair dismissal is entertained. He has to show the reason for dismissal. The reasons may be automatically fair (for instance dismissal of a non-unionist within a closed shop)or automatically unfair (e.g. dismissal for trade union activity). There is another category, those reasons which are potentially fair, where the tribunal is to examine whether the employer acted reasonably in treating that reason as a sufficient one for dismissing the employee. See Patrick Elias, Brian Napier and Peter Wallington (eds.), <u>Labour Law: Cases and Materials</u> (1980), pp.532, 533. See also Roger W. Rideout, <u>Principles of Labour Law</u> (1979), pp.106-112.

The wider jurisdiction.

Some important questions arise in this context. Has the Tribunal jurisdiction to examine the merits in a case where proper domestic enquiry was held? Can the Tribunal reappreciate evidence? If it finds the workman guilty, can it examine whether the punishment of dismissal is excessive? In Workmen of Firestone Tyre and Rubber Co. of India (P) Ltd. v. The Management[9] the Supreme Court held that under section 11A, the Tribunal could do all these. The Tribunal can examine and satisfy itself whether the evidence in the enquiry establishes misconduct. This is a significant change from the old law wherein the Tribunal could examine only whether the conclusion of the management was a plausible one.[10] But now the satisfaction of the management is not conclusive; the tribunal has to satisfy itself that the workman is guilty.[11] The jurisdiction of the Tribunal extends

9. (1973) 10 S.C.L.J. 159; A.I.R. 1973 S.C. 1227.
10. Section 11A is applicable only to references made on or after 15.12.1971, the date of coming into operation of S.11A. Since the section is not retrospective the old law governs references prior to this date. See Workmen of M/s. Firestone Tyre and Rubber Co. of India v. The Management, A.I.R. 1973 S.C. 1227 at p.1246 and East India Hotels v. Their Workmen, A.I.R. 1974 S.C. 696 at 698.
11. Workmen of Firestone Tyre and Rubber Co. of India (P) Ltd. v. The Management, (1973) 10 S.C.L.J. 159 at pp.181, 182 Per Vaidyalingam, J.

still further. It can also examine the justifiability of punishment. It can order lesser punishment, if it comes to the conclusion that dismissal is excessive in the circumstances of the case.[12] Under the old law there existed a jurisdictional distinction between a case where there is proper domestic enquiry and a case where there is no proper enquiry. The new law did away with this distinction.

'Materials on Record'

The new law provides that the Tribunal shall "rely only on the materials on record and shall not take any fresh evidence in relation to the matter."[13] This requirement would appear to take away the right of the management under the old law to adduce fresh evidence before the Tribunal. If this is so, it would also appear that Tribunal can order reinstatement where no domestic enquiry is held or where the enquiry held is defective. The reason is that in such a case there may be no 'material on record' to justify dismissal and the Tribunal cannot 'take any fresh evidence.' The Supreme Court considered this question in Fire Stone[14]

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12. Id. at pp.183, 184.
13. The proviso to S.11A. See supra, n.6.
14. Workmen of Firestone Tyre and Rubber Co.of India (P) Ltd. v. The Management, (1973)10 S.C.L.J. 159 at pp.186, 188.

and held that the right of the management to adduce fresh evidence[15] before the Tribunal still subsists. In its view such evidence adduced before the Tribunal for the first time forms part of 'the materials on record' which the Tribunal is bound to consider. In other words, 'materials on record' would include the evidence taken in the domestic enquiry, the proceeding of such enquiry, evidence placed before the Tribunal for the first time in support of the action of the employer and evidence adduced by the workmen contra.[16] According to the Court, section 11A of the Act

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15. To adduce such evidence before the Tribunal, the employer has to make a specific plea for the purpose. Unless he makes such a plea there is no duty on the Tribunal to examine the validity of the domestic enquiry as a preliminary issue and if it finds the enquiry defective to call upon the employer to adduce fresh evidence. See _Shankar Chakravarti_ v. _Britannia Biscuit Co. Ltd._, (A.I.R. 1979 S.C. 1652, Ch.V, nn.61, 62). Desai, J. observed at p.1666;
   "It is both the right and obligation of the employer, if it so chooses, to adduce additional evidence to substantiate the charges of misconduct. It is for the employer to avail of such opportunity by a specific pleading or a specific request...."
16. _Workmen of Firestone Tyre and Rubber Co.of India (P) Ltd._ v. _The Management_, (1973)10 S.C.L.J. 150 at p.186. The contra evidence adduced by the workmen can relate only to the evidence adduced for the first time before the Tribunal by the employer. When the employer relies on domestic enquiry and does not adduce any fresh evidence before the Tribunal it appears that the workman cannot seek to adduce evidence for the first time before the

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does not lead to the conclusion that the Tribunal has to order reinstatement of the workman if no domestic enquiry is held or if the enquiry held is defective.[17]

Domestic enquiry provides an opportunity to the workman to prove his innocence. It is a safeguard against arbitrary action by the management. Domestic enquiry provides an interval between the alleged commission of misconduct and infliction of punishment. This may probably act as a 'cooling off period' while emotions of the management subside facilitating a decision, considered and not hasty.

Dispensing with the requirement of domestic enquiry is not conducive to the interests of the workman.[18] The new law can be construed by the Court as enabling the Tribunal to order reinstatement in cases of no proper domestic enquiry. Such a construction can make domestic enquiry a condition precedent for dismissal.

(f.n.16 continued)
Tribunal to prove, in a case where dismissal was after a proper enquiry, that dismissal was unjustified. See Tata Oil Mills Co. Ltd. v. Workmen, (1950-67)2 S.C.L.J. 1451; A.I.R. 1965 S.C. 155. Supra, Ch.X, nn.58, 59.

17. Id. at p.187.

18. See supra, Ch.VIII, n.1.

Reasoning of the Court.

The reasoning of the Supreme Court went, however, on different lines. One reason adduced by the Court[19] is that neither the Industrial Disputes Act 1947 nor the Industrial Employment Standing Orders Act 1946 provides that dismissal without domestic enquiry will be illegal. Justice Vaidyalingam said,

> "It is no doubt true that Standing Orders, which have been certified under the Industrial Employment (Standing Orders) Act, 1946, become part of the statutory terms and conditions of service between the industrial employer and his employee and that they govern the relationship between the parties. But there is no provision either in this statute or in the Act (Industrial Disputes Act 1947) which states that an order of dismissal or discharge is illegal if it is not preceded by a proper and valid domestic enquiry."[20]

The view of the Court is open to objection. In industrial establishments where there are certified Standing Orders providing for a domestic enquiry the management will not be justified in effecting dismissals without enquiry. The Tribunal has been given the power to set aside dismissal

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19. Workmen of Firestone Tyre and Rubber Co.of India (P) Ltd. v. The Management, (1973)10 S.C.L.J. 159 at p.185.
20. Ibid.

and to direct reinstatement, if it is satisfied that the order of dismissal is not justified.[21] Absence of a statutory provision declaring dismissal without domestic enquiry illegal cannot therefore stand in the way of the Tribunal in ordering reinstatement.

If reinstatement is so ordered, in the view of the Court, an anomalous situation would arise. The Court pointed out that if dismissal without domestic enquiry as specified in Standing Orders is to be treated as illegal for purposes of section 11A and furnishing of fresh evidence before Tribunal in support of dismissal refused and workman reinstated, the Industrial Disputes Act will have to be applied differently to those who have Standing Orders, on the one hand, and those who do not have them, on the other.[22] There are industrial establishments to which the Industrial Employment (Standing Orders) Act 1946 does not apply.[23] Workmen

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21. S.11A, supra, n.6.
22. Workmen of Firestone Tyre and Rubber Co. of India (P) Ltd. v. The Management, (1973)10 S.C.L.J. 159 at pp.185, 186.
23. The Industrial Employment (Standing Orders) Act 1946 is not applicable to an establishment employing less than 100 workmen unless it is specifically made applicable to such establishment by notification.

in small industrial undertakings, not covered by the Industrial Employment (Standing Orders) Act will have no Standing Orders applicable to them and hence they will not be able to claim reinstatement on the ground that they were dismissed without domestic enquiry. Reinstatement of workmen dismissed without domestic enquiry could be ordered only where the Standing Orders applicable provide for domestic enquiry.

Absence of the requirement of domestic enquiry as part of the terms and conditions of service in small industrial establishments has thus become a defect in the law. This defect has now resulted in diluting the importance of domestic enquiry even in big establishments which have Standing Orders providing for such enquiry. By the holding that section 11A cannot be applied differently to these two sets of establishments, employers even in establishments covered by Standing Orders which provide for domestic enquiry can now seek justification of the dismissal without enquiry.

The Court could have made domestic enquiry a condition precedent for dismissal. Such a holding would have conferred

on the workman a right to prove his case before he is dismissed. This, the Court could have achieved by holding that 'materials on record' would include only materials already on record when the case comes before Tribunal. In other words, had the Court held that the employer cannot adduce any fresh evidence before the Tribunal but have to confine himself to the material on record already, the purpose would have been served. Then, irrespective of whether the Standing Orders provide for it or not the employer will have to hold a domestic enquiry with a view to recording proper evidence against the workman. The evidence so recorded will be the 'material on record' on which the employer can rely when proceedings come before Tribunal. In cases where there was no domestic enquiry, there is no reason why the Court should accept evidence against workmen. The imperative requirement that the employer should rely only on such 'materials on record', could have been construed to impose a compulsive force on the employer to hold domestic enquiry in all cases of dismissal. Then there will arise no question of applying the provisions of section 11A differently between employers who have the Standing Orders

and those who do not have. The Court can apply a single test to both types of cases, namely, whether the dismissal is justified on the materials on record.

There is no specific statutory provision conferring on management the right to adduce fresh evidence before the Tribunal. However, the Court found no difficulty in evolving such a right by judicial pronouncements. Conspicuously judiciary has no similar enthusiasm in emphasising the need for domestic enquiry. When it came to the question of conferment of a right on the workmen to have a domestic enquiry before dismissal, in the Court's view, the absence of statutory provision came to be a hurdle. The words in the statute that the Tribunal shall rely only on the 'materials on record' and 'shall not take any fresh evidence' could have been construed in a manner to make domestic enquiry a must. But it was construed in a directly opposite way which enabled the employer to adduce fresh evidence before Tribunal and consequently to dispense with a domestic enquiry.

There is another point on which the Court supported its conclusion. In a proceedings for permission or approval the right of management to adduce fresh evidence before Tribunal exists.[24] There could be an industrial dispute over dismissals effected with such permission or approval. The proceedings relating to permission or approval, which include evidence adduced before the Tribunal, will form part of the 'materials on record' when an industrial dispute relating to dismissal, effected with such approval or permission, is raised and referred for adjudication. The Tribunal will have then to consider such evidence while it adjudicates over the dispute over dismissal. It cannot ignore the evidence on the basis of which it gave permission or approval and order reinstatement in the case on the ground that no enquiry was held before dismissal.[25] It has to be noted that the right to

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24. See Delhi Cloth and General Mills v. Ludh Budh Singh, (1972)9 S.C.L.J. 229; A.I.R. 1972 S.C. 1031, supra, Ch.V, n.44.
25. Workmen of Firestone Tyre and Rubber Company of India (P) Ltd. v. The Management, (1973)10 S.C.L.J. 159. Justice Vaidyalingam observed,
 "An order of dismissal or discharge passed even with the permission or approval of the Tribunal can from the subject of a dispute and as such referred for adjudication. Quite naturally, when the dispute is

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adduce fresh evidence in a proceeding relating to permission or approval was not a statutory right conferred on the employer. It is a judicial innovation. Had this not been done a domestic enquiry would have been necessary before the employer can ask for permission or approval. Then there would have been no occasion to give a restrictive interpretation on S.11A on the reasoning put forward by the Court. In the circumstances, the Act has to be amended for making domestic enquiry a compulsory requirement before dismissal.

An alternative procedure?

There are employers with a limited number of workmen. In an establishment of such employer there may arise difficulties when a workman is alleged to have committed a misconduct against the employer. The employer may himself be a witness against the workman. Naturally he cannot be

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(f.n.25 continued)
being adjudicated, the employer will rely upon the proceedings that were already held before a Tribunal under section 33. They will form part of the materials on record before the Tribunal.... The Tribunal would have allowed the employer to adduce evidence before it in proceedings under section 33 for the first time, even though no domestic enquiry had been held. If it is held that another Tribunal, which adjudicates the main dispute, has to ignore those proceedings and straight away order reinstatement on the ground that no domestic enquiry had been held by an employer, it will lead to very startling results." (Id. at pp.187, 188).

the enquiry officer. Who else can hold the enquiry? Perhaps this difficulty might be another factor which persuaded the court to hold that absence of domestic enquiry cannot render dismissal illegal. The Court observed that an employer may have sufficient materials with him to satisfy the Tribunal about the justifiability of dismissal and that such material will have to be considered by the Tribunal. The Court suggested in such cases a procedure in lieu of domestic enquiry. The employer can serve a memo, call for explanation and take disciplinary action against the workman.[26]

The Court seems to suggest that serving memo of charges and calling for explanation are sufficient safeguards to protect the interest of workman. In a circumstance where the employer himself is a witness, these two procedures will only be an empty formality. The management will, most likely, approach the questions of guilt and punishment with a predetermined mind. If the interest of the workman is to

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26. *Id.* at p.188.

be safeguarded there should be a proper domestic enquiry. The workman should get full and effective opportunity to prove his innocence before he is dismissed. He should be able to adduce evidence in his favour by examining witnesses. He should get an opportunity to show that the evidence adduced against him cannot be relied on, by cross-examining witnesses against him. Opportunity for a mere explanation cannot be an effective substitute to a proper domestic enquiry. Such a procedure indicates a double standard. Under it the management need not prove that the workman is guilty before he is dismissed. But the workman has to prove his innocence.

A domestic enquiry, held by an independent agency and not by management personnel, is necessary to ensure a fair treatment to workmen.

Fire Stone[27] whittles down the importance of the requirement of a domestic enquiry. The management has no stake if

27. Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd. v. The Management, (1973)10 S.C.L.J. 159; A.I.R. 1973 S.C. 1227.

domestic enquiry is dispensed with. This is particularly so when it has the freedom to produce fresh evidence before the Tribunal. If it does not have sufficient material it is not so much affected as the workman is. The management can keep the workman away from its factory doors till an industrial dispute is raised and referred for adjudication and the Tribunal orders reinstatement.

Dismissal after enquiry.

In Fire Stone[28] the Court was not prepared to accept domestic enquiry as a condition precedent for dismissal. Nevertheless it observed that the management is 'expected' to hold a domestic enquiry.[29] The Court said,

> "If a proper enquiry is conducted by an employer and a correct finding arrived at regarding the misconduct, the Tribunal, even though it has now power to differ from the conclusions arrived at by the management, will have to give very cogent reasons for not accepting the view of the employer."[30]

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28. Ibid.
29. Id. at p.188.
30. Id. at pp.188, 189.

Section 11A gives jurisdiction to the Tribunal to examine the justifiability of dismissal.[31] It can examine the evidence and come to its own conclusions. The observations that once a proper domestic enquiry is held the employer can persuade the Tribunal to accept the findings therein and that 'very cogent' reasons will be required for not accepting the same, whittle down the jurisdiction of the Tribunal. The freedom of the Tribunal to arrive at its own conclusions is fettered. It would require not only reasons, but 'very cogent' ones to depart from the view taken in the enquiry. Under the old law when a proper enquiry was held the Tribunal's jurisdiction to interfere with the findings therein was very limited. The obvious purpose of section 11A was to widen the jurisdiction of the Tribunal.[32]

31. In Britain the Tribunal should satisfy itself that the employer acted reasonably in dismissing the employee. See Patrick Elias, "Fairness in Unfair Dismissal : Trends and Tensions", 10 Industrial Law Journal p.201 (1981). See also John Bowers and Andrew Clarke, "Unfair Dismissal and Managerial Prerogative : A Study of 'Other Substantial Reason'" 10 Industrial Law Journal p.34 (1981).

32. "The Parliament has expressed its will clearly by stating that the Tribunal should act as a court of appeal and may substitute its own views to that of the management in cases it comes to the conclusion that the decision of the management is unjustified. Before the Amendment Act the Industrial Tribunal was exercising limited revisional powers. But after the amendment Act the Industrial Tribunals exercise appellate powers." Balagangadhara Menon, P., "Symposium on Section 11A of the Industrial Disputes Act", 1973 K.L.T. 27 (Jour.) at p.30.

In *Fire Stone*[33] itself the Court said,

> "....the Tribunal is now clothed with the power to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer established the misconduct alleged against a workman.... (T)he satisfaction under section 11A about the guilt or otherwise of the workmen concerned, is that of the Tribunal.... Under section 11A, though the Tribunal may hold that the misconduct is proved, nevertheless, it may ....hold that the proved misconduct does not merit punishment by way of discharge or dismissal"[34]

In other words, the Tribunal can appreciate the evidence and come to its own conclusions as to misconduct and punishment. But the observation that the Tribunal would require very cogent reasons[35] for not accepting the view of the management in a case where an enquiry is held, would suggest that where a proper domestic enquiry is held, it has to agree with the decision of management as a general rule, and can disagree only in exceptional circumstances.

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33. *Workmen of Fire Stone Tyre and Rubber Co. of India (P) Ltd. v. The Management*, (1973) 10 S.C.L.J. 159.
34. *Id.* at pp.181-184.
35. *Supra*, n.30.

What is the scope of the power of the Tribunal under section 11A to reappreciate the evidence in a domestic enquiry? Can it look whether the evidence in the enquiry establishes guilt beyond reasonable doubt? The answer is in the negative. L.D. Jain v. Management[36] is an illustrative case. A cashier was discharged from service after a domestic enquiry.[37] The Tribunal held that there was no reliable proof of guilt.[38] The High Court of Delhi set the

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36. A.I.R. 1982 S.C. 673.
37. Ibid. Kansal, a customer who had a Savings Bank Account with the Bank complained orally that on a certain date he had withdrawn only Rs.500/- whereas it was shown in the pass book that Rs.1500/- had been withdrawn. The documents were verified and it was found that it had been corrected with a different ink. The appellant was proceeded against. A charge was served on him stating, among other things, that he had in his own handwriting with different ink corrected the amount of Rs.500/- to Rs-1500/- and thus received Rs.1000/- in excess and passed on only Rs.500/- to Kansal and that later the cashier remitted Rs.250/- to the account of Kansal to liquidate a part of the misappropriated amount. The cashier denied the charges. A domestic enquiry was held. Kansal was not examined. Other witnesses deposed that Kansal had made the oral complaint and that the cashier had admitted to them that he had altered the entry in the withdrawal form. The Enquiry Officer found him guilty. The management dismissed the cashier.
38. Ibid. The Tribunal observed that the evidence was only about a complaint by Kansal and of confession about alteration of the entry in the document. This did not prove in its view, that this was done to defraud Rs.1000/- or that he actually defrauded Rs.1000/- by paying only Rs.500/-. The evidence, in this regard, it held, was only hearsay. The Tribunal said,

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order aside in a writ proceedings, holding that the charges had been established in the domestic enquiry. On appeal the Supreme Court upheld the decision of the High Court. The Supreme Court observed that the Tribunal was wrong in insisting on strict proof of guilt beyond reasonable doubt. In the Court's view proof of misconduct was enough.[39] The Court held that the award of the Tribunal was vitiated by

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(f.n.38 continued)

"This evidence by no means proved that the workman altered the debit authority to defraud or that he actually defrauded or that he misappropriated the amount of Rs.1000/-....as it was not direct evidence but was in the nature of hearsay...." Id. at p.675.

The Tribunal added,

"But the question was whether it was done without the consent or knowledge of Mr. Kansal. There was no evidence on the record to prove it. The only person who could speak about it was Mr. Kansal. He did not appear before the enquiry officer, therefore, there was no direct evidence that the change that was admittedly made by the workman in the debit authority was without Mr. Kansal's consent or knowledge or that it was designed to defraud." Ibid.

39. Ibid. The Court said,

"The learned Tribunal, it appears, was oblivious of the fact that it was examining the evidence in a domestic enquiry, and not the evidence in a criminal prosecution entailing conviction and sentence."

Per Bahrul Islam, J. The Court observed that in a domestic enquiry "guilt need not be established beyond reasonable doubt; proof of misconduct may be sufficient." Ibid.

misconception of the law.[40]

The decisions in Firestone and J.D. Jain narrowed down the scope of section 11A of the Act. The Tribunal cannot interfere with the findings in an enquiry unless exceptional circumstances exist.

There is a gap between dismissal and the final decision in adjudication proceeding. This gap and the financial impact are hardly of any consequence to the employer. Its impact on the workman on the contrary is drastic. Dismissal is a punishment. A stigma is attached to it. Dismissal means that the workman ceases to get his wages. Finding an alternative work is not an easy task for any body in our land of heavy unemployment much less for a dismissed workman.

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40. Ibid. The Court based the decision on the following reasoning:
   (1) The principle applied was incorrect. (at p.676).
   (2) The Tribunal held that the decision in the enquiry was based on hearsay. This is another error. Strict rules of evidence are not applicable in a domestic enquiry. (at p.676).
   (3) Tribunal failed to appreciate the confessions of the cashier made before other witnesses. (at p.677).

He finds himself entangled in a host of problems.[41] A salvation likely to come in future by way of reinstatement with back wages may not undo the harm already done.

In this context domestic enquiry by an independent body becomes relevant as a safeguard against arbitrary dismissal or a dismissal by way of victimisation. A subsequent adjudication may be a better safeguard than no adjudication. But it is not a better safeguard than the one preceded by a domestic enquiry.

An arbitrary dismissal results in industrial disharmony. Domestic enquiry is a safeguard against this. The Act has therefore to make domestic enquiry a compulsory requirement before a workman is dismissed.[42] In an industrial dispute

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41. The following observations of Donovan Commission are significant and highlight the gravity of the problem equally in India.

    "For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all."

    HMSO, Royal Commission on Trade Unions and Employers' Associations 1965-1968, at pp.142, 143.

42. The fear in the mind of workman that he may be dismissed arbitrarily has to be avoided. Hence it is important that domestic enquiries be held and principles of natural

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relating to dismissal the Tribunal has to decide the question of guilt and punishment on the basis of evidence unfettered by any finding in the domestic enquiry. If no proper domestic enquiry is held before dismissal the Tribunal should be empowered to order reinstatement. The right in the management to adduce fresh evidence before the Tribunal is unnecessary. It should be taken away. What is needed is that the management be required to dismiss a workman only after observing the principles of natural justice.

It is true that section 11A of the Act widens the jurisdiction of the adjudicatory authority. But the authority can exercise such jurisdiction only when a dispute relating to discharge or dismissal "has been referred" to it.[43] In other

(f.n.42 continued)
justice followed before a workman is dismissed. See Balkishan Rathi, "Fair Hearing in Domestic Enquiries", 5 J.I.L.I. 191 at pp.192, 193 (1963).

43. Under S.10(4) of the Act the Tribunal has to confine its decision to the points referred and matters incidental thereto. Hence if after reference some workmen are taken back and some others are not taken back the question whether this amounts to discrimination against the employees taken back cannot be gone into by the Tribunal. See Fire Stone Tyre and Rubber Co. of India (P) Ltd. v. The Workman, (A.I.R. 1981 S.C. 1626). It is necessary that Tribunal should be empowered to render full justice to workmen aggrieved by unfair dismissal. The following observation of Donovan Commission, throws light on this aspect:

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words the dismissed workman has no direct access to the adjudication; he has no right of appeal.

This is an unsatisfactory situation. Reference of a dispute is a discretionary power vested in Government. There is no guarantee that a dismissed workman will always get an opportunity for adjudication through reference. Again, the method of conciliation has also its limitations and may not be effective. Once he has taken the strong action of dismissal against an employee the employer may not, in all probability, take the workman back. He may do so only if there is the strong force of workmen acting collectively pressurising him to do so. Or there should be a binding order from a competent authority. Collective action may not materialise. Dismissal may thus remain an

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(f.n.43 continued)

"An employee who is dismissed for misconduct and admits that he committed the act alleged, may nevertheless complain that the employer has acted in a discriminatory way since similar acts are normally condoned. We think that in such a case it must be open to the labour tribunal to decide that the dismissal is unfair if the employee establishes his contention, since it would otherwise be possible for an employer to find an opportunity to dismiss an employee of whom he wished to be rid for some quite different reason."

HMSO, Royal Commission on Trade Unions and Employer's Associations 1965-1968, p.153.

individual grievance[44] rather than a collective grievance of workmen in general. The policy of the law should be to provide dismissed workman a remedy before Tribunal. Section 11A has therefore to be modified giving the aggrieved workman a right to approach the Tribunal directly. We can draw profitably from the French[45] and British[46] practice.

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44. David Annoussamy, "Settlement of Individual Disputes in French Labour Law", 13 J.I.L.I. p.230 (1971).
 "...(A)s regards individual disputes like those arising from the wrongful termination of service which is the most common type of such disputes, the government is not interested, the body of workmen as a class is not involved, the management is also very lightly concerned." (at p.230).
45. The system in French Labour Law appears to be a good one. The aggrieved workman can institute an action before the Labour Court. The parties are summoned by the Labour Court. They can be represented by a worker or employer, a lawyer or a representative of the organisation to which they belong. An attempt at conciliation first takes place before the Labour Court. In case it is not successful, the case is immediately proceeded with. Adjournments are not allowed unless the parties agree or further enquiry into the matter is necessary. On termination of proceedings the judgement is drafted forthwith and the judgement read. See David Annoussamy, Id. at p.232.
46. A similar procedure is available in Britain also. A dismissed employee can file a complaint before the Industrial Tribunal within three months from the effective date of the dismissal order, showing the grounds on which relief is sought for. The employer has to show, in his reply, the grounds on which he intends to resist the claim of the applicant. Copy of the complaint is sent to the conciliation officer who endeavours to promote a settlement. If no settlement is reached the Industrial Tribunal will hear the case. Where dismissal is admitted by the employer the burden is on him to prove that the reason for

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The legislative protection will have to be extended to workmen until job security could otherwise be secured by collective agreement.[47]

(f.n.46 continued)
dismissal is one recognised by the statute. Then the Industrial Tribunal decides whether the employer acted reasonably in treating that reason as a sufficient ground for dismissal. See, Norman M. Selwyn, Law of Employment (1980), p.239 at seq.

47. In the United States there is no general federal or state legislation on the matter of unfair dismissal. The National Labor Relations Act however provide for relief to employees discharged for union activities. See, Herman Miles Levy, "The Role of the Law in the United States and England in Protecting the Worker from Discharge and Discrimination", 18 I.C.L.Q. 558 at pp.560, 561 (1969). Job security is achieved in the U.S. more by resort to collectively agreed grievance procedure. About half of the employees who complain about unfair dismissal are reinstated by recourse to this procedure. "Whereas in Germany the rudiments of a law against unfair dismissal were introduced under the Weimar Republic during the 1920s in the United States there is no federal or state legislation on the matter at all.... In the case of unfair dismissal, it is evident that two alternative routes present themselves to employees and unions concerned to improve job security. One is to press in the legislature for the enactment of general legal protection; the other is to use collective bargaining to achieve the same end.... For example, in the United States where there is no general legislative protection, the unions have achieved considerable job security in the sectors of employment which have been organised. As many as half the employees who complain about unjust discharge are reinstated in pursuance of the collectively agreed grievance procedure." Hugh Collins, "Capitalist Discipline and Corporatist Law", 11 Industrial Law Journal 78 at pp.84, 85 (1982).

PART VI

ARBITRATION OF DISMISSAL

Chapter XII

ARBITRATION OF DISMISSAL : PROCEDURE.

The Act deems a dispute over dismissal to be an industrial dispute.[1] The Act provides for arbitration also. The parties can refer the dispute relating to dismissal for arbitration.[2] The option to refer the dispute for arbitration is open till the dispute is referred by the appropriate Government for adjudication by a Labour Court or Tribunal.[3] It is voluntary. No external agency imposes it on the parties.[4] The dispute is referred by the agreement of the

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1. Section 2A of the Act. See *supra*, Ch.II, n.77.
2. S.10A.
3. S.10A(1), *infra*, n.5.
4. In Nigeria under Trade Disputes Decree 1976, after failure of conciliation, an industrial dispute is referred for compulsory arbitration to the Industrial Arbitration Panel by the Commissioner. If any party objects to the arbitration award the case will go to the Industrial Court the decision of which is final and binding on parties. See Tayo Fashoyin, "Arbitration in Nigeria", 13 *Indian Journal of Industrial Relations*, 153 at p.158 (1977).

parties.[5] The agreement has to be in the prescribed form.[6] Copies of agreement should be forwarded to the appropriate Government and the conciliation officer.[7] The Government has

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5. The Industrial Disputes Act 1947, sub-section (1) of S.10A provides,
   "(1). Where any industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may, at any time before the dispute has been referred under S.10 to a Labour Court, or Tribunal or National Tribunal, by a written agreement, refer the dispute to arbitration and the reference shall be to such person or persons (including the presiding officer of a Labour Court or Tribunal or National Tribunal) as an arbitrator or arbitrators as may be specified in the arbitration agreement."
6. Id. S.10A, sub-section (2) which reads:
   "An arbitration agreement referred to in sub-section (1) shall be in such form and shall be signed by the parties thereto in such manner as may be prescribed."
7. Id. S.10A, sub-section (3) which provides;
   "A copy of the arbitration agreement shall be forwarded to the appropriate Government and the conciliation officer and the appropriate Government shall, within one month from the date of receipt of such copy, publish the same in the Official Gazette."
   S.38 of the Act authorises the appropriate Government to make Rules. Rule 7 of the Industrial Disputes (Central) Rules 1957 provides that an arbitration agreement shall be made in the form specified in the Rule and shall be sent to the Secretary to Government of India in the Ministry of Labour and to the Chief and Regional Labour Commissioners and the conciliation officer. The agreement has to be accompanied by the consent in writing of the arbitrator.

to publish it in the official gazette.[8] If the parties to the agreement represent the majority of each party Government may issue a notification.[9] Then Government can prohibit any existing strike or lockout.[10] Employers and workmen concerned in the dispute, though not parties to the agreement, will be given an opportunity to present their case before the arbitrator.[11] The arbitrator has to decide the industrial dispute and pass an award.[12] The award will

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8. Ibid.
9. Id. S.10A, sub-sec.(3A). It reads,
   "Where an industrial dispute has been referred to arbitration and the appropriate Government is satisfied that the persons making the reference represent the majority of each party, the appropriate Government may, within the time referred to in sub-sec.(3), issue a notification in such manner as may be prescribed; and when any such notification is issued, the employers and workmen who are not parties to the arbitration agreement but are concerned in the dispute, shall be given an opportunity of presenting their case before the arbitrator or arbitrators."
10. Id. S.10A, sub-sec. (4A). See infra, n.89.
11. Supra, n.9.
12. Industrial Disputes Act 1947, S.10A, sub-sec.(4), which read,
   "The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all the arbitrators as the case may be."

be binding not only on the parties to the agreement but on all parties summoned to appear as parties, the hiers, successors and assigns of employer and workmen.[13]

There is a special law on arbitration - the Arbitration Act 1940. The procedure under this Act is different from that cited above. Under this Act parties may refer a dispute for arbitration by an 'arbitration agreement.'[14] When the arbitrator issues the award any party to the agreement of arbitration can require the arbitrator to file the award[15] in court.[16] The Court has powers to modify the award.[17] It can if it thinks so remit the award to the arbitrator for

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13. S.18(3).
14. Arbitration Act 1940. S.2(a) defines an 'arbitration agreement' as a written agreement to submit present or future differences to arbitration.
15. Id. S.14(2).
16. Id. S.2(c) defines a court as a civil court having jurisdiction to decide the question forming the subject matter of the reference if the same had been the subject matter of a suit.
17. Id. S.15. The power is limited. Court can modify the award by correcting clerical mistakes, obvious errors amenable to correction without interfering with the decision or where the award decides also a matter not referred and that part is severable without affecting the decision on the matter referred.

reconsideration.[18] Any party to the agreement can challenge the validity of the award before the court.[19] The court can either remit or set aside the award. If it does not do either, the court has to pass a judgement and decree in accordance with the award.[20] The provision in the Arbitration Act 1940 does not apply to arbitration of industrial disputes under section 10A of the Act.[21]

Conflict of Laws.

If the agreement for arbitration is on a matter on which a civil court can exercise jurisdiction, the award in such cases will be enforceable under the provisions of the Arbitration Act 1940. If the dispute is not an industrial dispute, or does not relate to enforcement of any right under

18. Id. S.16. This could be done when a matter referred to the arbitrator is left undetermined or a matter not required is determined; when the award is indefinite and hence incapable of execution or where an objection to the legality of the award is apparent on the face of it.
19. Id. S.33.
20. Id. S.17.
21. Sub-sec.(5) of S.10A of the Industrial Disputes Act provides:
"Nothing in the Arbitration Act 1940 (10 of 1940) shall apply to arbitrations under this section."

the Act the civil court has jurisdiction to decide such disputes. An arbitration award in respect of such dispute will be an award under the Arbitration Act 1940, enforceable under the provisions of that Act. Ved Prakash v. Ram Narain Goyal[22] decided by the Delhi High Court is a case in point. There was an agreement for arbitration of a dispute. The dispute was about non-payment of certain sums as per the agreement between the employers and workmen.[23] The arbitrator passed award in favour of the workmen. The provisions of the Arbitration Act 1940 were complied with. The award was filed in court,[24] and a judgement and decree passed in accordance with the award.[25] At the stage of execution the employers raised an objection. They contended that the arbitration was under section 10A of the Act, the matter was

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22. 1976 Lab. I.C. 1375.
23. The parties, employers and employees, entered into an agreement at the time of transfer of management. The workmen wanted a full settlement of their accounts. The agreement stated the sums payable to each worker and provided for reference of dispute over non-payment under the agreement to an arbitrator named in the agreement. Sums as specified in the agreement were not given. Arbitration proceeding was set in motion.
24. As provided in S.14 of the Arbitration Act 1940.
25. As provided in S.17 of the Arbitration Act 1940.

an industrial dispute and that civil court had no jurisdiction. Against this the court found that there was no industrial dispute.[26] According to the court the matter did not relate to the enforcement of any rights under the Industrial Disputes Act[27] and the civil court had jurisdiction to entertain a suit in the matter.[28] The court accordingly rejected the objections and held that the judgement and decree was made in accordance with the arbitration award under the Arbitration Act 1940.[29]

Form and publication.

The agreement referring the dispute for arbitration under the Act may not be made in the prescribed form.[30] The

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26. Ved Prakash v. Ram Narain Goyal, 1976 Lab. I.C. 1375. Yogeshwar Dayal, J. observed:
"The cause of action for reference of dispute to the Arbitrator was the agreement of settlement. .... The recitals in the settlement do not show that there was any industrial dispute whatsoever ...." (at p.1381).
27. Id. at pp.1380, 1381.
28. Id. at p.1381.
29. Ibid.
30. Rule 7 of the Industrial Disputes (Central) Rules 1957 provides that the agreement has to be in Form C prescribed thereunder and that the agreement has to be forwarded to the prescribed authorities along with the consent in writing of the arbitrator or arbitrators. See supra, n.7.

arbitration agreement may not be published in the Official Gazette as required by the Act. Will it then be a reference for arbitration under the Arbitration Act 1940?

The Madhya Pradesh High Court held that there cannot be an agreement for arbitration of an industrial dispute under the Arbitration Act. According to a Division Bench of the Court in Singh v. Gokhale[31] industrial dispute cannot be made the subject matter of private arbitration under the Arbitration Act 1940. This is so because, in the Court's view, the Act provides for arbitration of disputes under section 10A and that section excludes the application of the Arbitration Act. The agreement for arbitration in the case was executed in the prescribed form. But it was not forwarded to the government and hence was not published in the Gazette. The award also was not forwarded to the Government. The award was challenged by the employee on the ground that the arbitrator had no jurisdiction and the award was invalid. The employer raised the defence that this was not a case of arbitration under section 10A of the Act, but one falling

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31. 1970(1) L.L.J. 128.

under the Arbitration Act 1940. Rejecting the plea, the court held that there could be no arbitration of an industrial dispute under the Arbitration Act 1940. The court said,

> "It would be futile to contend that an arbitration agreement between an employer and an employee regarding an industrial dispute would be a private agreement outside the scope of section 10A of the Act. We are unable to accede to that contention for the simple reason that the Industrial Disputes Act does not contemplate any private arbitrations in respect of questions of public importance involving industrial disputes. If that had been the intent of the legislature, sub-section (5) of Section 10A of the Act would not have excluded the operation of the Arbitration Act 1940."[32]

The court held that the mandatory provisions in the Act were violated and the award was invalid in as much as the agreement as also the award was not forwarded to and published by Government.[33]

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32. *Id.* at p.128 per Tare, J.
33. *Id.* at p.129.

What is the effect of other procedural lapses? In Modern Stores v. Krishnadas,[34] there was delay in the publication of the agreement in the Gazette. It was a case relating to dispute over the termination of service of some workmen. The agreement for arbitration was executed in the prescribed form and forwarded for publication in the gazette. The arbitrator completed the proceedings and drew up the award. But even then the publication of the agreement was not made in the gazette. The arbitrator did not pronounce the award. He waited till the agreement was published later. He thereafter pronounced the award. The employer challenged. He raised the contention inter alia that the award was vitiated since the arbitration agreement was not published in the Gazette within a period of one month of its receipt by the Government as required by the Act. Negativing this contention the High Court of Madhya Pradesh said,

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34. 1970 Lab. I.C. 196.

"On a true construction of the section, we are of the view that although the first condition as regards the publication of an agreement in the official Gazette is obligatory, i.e. a *sine qua non*, the other requirement, namely of its notification within one month from its receipt is only directory and not imperative."[35]

In short an award is not invalid for the reason of belated publication of the agreement in the Gazette.[36]

The Punjab and Haryana High Court expressed the same view: the requirement of publication of the arbitration agreement within one month is only directory and not mandatory. The question was considered by the court in *Landra Engineering and Foundry Works* v. *Punjab State*.[37] The publication was delayed by two weeks. The employer challenged the award on the ground of delay. Rejecting the contention the court applied the ratio in *Remington Rand of India Ltd.* v. *The Workmen*[38] where the Supreme Court had held that the

35. *Id.* at p.203 *per* A.P. Sen, J.
36. *Ibid.*
37. 1969 Lab. I.C. 52.
38. A.I.R. 1968 S.C. 224 at p.226.

requirement in section 17 of the Act for publication of the award within thirty days was not mandatory but only directory and would not therefore invalidate the award. It was pointed out in Remington[39] that a strike in the press or other similar causes may delay publication in the Gazette and invalidating of the award on that ground would cause needless harassment to parties.[40] Following this principle the High Court held in Landra Engineering that the provision for publication of arbitration agreement was only directory, not mandatory.[41]

The Delhi High Court also seems to have taken the view that publication of the arbitration agreement may be valid even if not done within the stipulated time. In Mineral Industry Association v. Union of India,[42] the validity of a reference by Government for adjudication of an industrial dispute was in issue. The parties had entered into an agreement for arbitration of the dispute[43] before the

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39. Ibid.
40. Ibid.
41. Landra Engineering and Foundry Works v. Punjab State, 1969 Lab. I.C. 52 at p.53, per Tek Chand, J.
42. 1971 Lab. I.C. 837.
43. Ibid. The agreement for arbitration was entered into between twenty Mine owners and their workmen. The agreement was signed by the chairman of the association

(contd..)

reference for adjudication by Tribunal was made by Government.[44] The agreement was signed by an association of employers on behalf of the employers. The Government took the view that the agreement had to be signed by the employers individually. The association which signed on behalf of the employers informed the Government that all individual employers have given their consent to arbitration and they will send individual letters to the Government, if necessary. Government did not reply nor did it publish the arbitration agreement. Instead it referred the dispute for adjudication by Tribunal. The validity of this was challenged.[45] The court found that the employers' association could validly sign the agreement.[46] In the court's view there was a valid

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(f.n.43 continued)
representing the Mine owners and by the union of workers representing the workers. The dispute related to bonus payable. The agreement was forwarded to Government on 14.10.1960.

44. Ibid. The dispute was referred by Government for adjudication on 19.4.1961. But even after expiry of several years no steps were taken by the parties to proceed with the reference for adjudication.

45. Ibid. The writ petition was filed in the year 1961 before the High Court of Delhi.

46. Ibid. The court observed that an attorney or a duly constituted agent could sign on behalf of the employer and therefore held that the association could sign on behalf of the employers. The court also pointed out that S.36(2)

(contd..)

agreement for reference of the dispute for arbitration and hence the government was not justified in not publishing it. Reference for adjudication was held to be bad in law.[47] But the question was whether further proceedings of arbitration could go on. The arbitration agreement had not been published by Government.[48] The court was concerned with the question whether or not it should issue a writ directing the Government to publish the agreement. The court held that since several years have passed, it should not.[49] Conditions might have changed during these years. The court said,

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(f.n.46 continued)
of the Act provided that an employer who is a party to a dispute shall be entitled to be represented in any proceedings under the Act by an officer of an association of employers of which he is a member. 1971 Lab. I.C. 837 at pp.841, 842.

47. Id. at p.841. Prakash Narain, J. held,
"....the petitioner and its members have done all that was necessary under section 10A of the Industrial Disputes Act and the Government on receiving it was bound to publish the agreement and did not act within its jurisdiction in ignoring the arbitration agreement and making a reference...."

48. Ibid. The court quoted the Division Bench decision of the Madhya Pradesh High Court in Modern Stores v. Krishnadas, (supra, n.34) where it was held that the requirement of publication of the agreement in the Gazette was mandatory but the requirement of publication within one month from receipt by Government was only directory. (supra, n.35).

49. Ibid. The agreement was forwarded to Government in 1960. The writ was disposed of in 1970.

> "As the dispute is almost ten years old and it cannot be disputed that conditions obtaining in 1960 cannot be obtaining today, so no direction can be issued to the Central Government to publish the agreement...."[50]

It is possible to infer that if there had not been so much lapse of time in between, and there was only reasonable delay the court would have issued the direction to publish the agreement where upon the arbitrator could have proceeded with arbitration resulting in a valid award.

Suppose the statutory requirements are not complied with fully but the objectives behind the provision are achieved. Will the award be then valid? In North Orissa Workers' Union v. State of Orissa[51] the High Court of Orissa examined this question. A workman is dismissed. A dispute arises. Conciliation fails. Parties agree to refer the dispute for arbitration. Copy of the agreement is sent to the District Labour Officer and not direct to the Government. However, a letter sent by the Labour Commissioner to the parties clearly

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50. Id. at p.842.
51. 1971(2) L.L.J. 199.

indicates that Government is fully aware of the agreement. The agreement is not in the prescribed form. But it substantially complies with the requirements of the form. The original letter of consent of the arbitrator is not enclosed with the arbitration agreement as required by the Rules,[52] but a copy is sent later to the District Labour Officer. The Government does not publish the agreement. Instead it refers the dispute to a Tribunal for adjudication. This is challenged. The High Court quashed the reference for adjudication. It held that there was a valid reference by the parties for arbitration of the dispute. In the court's view there was substantial compliance with the requirements of reference for arbitration under section 10A and that the reference for arbitration was valid.[53] The court directed

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52. Rule 7 of the Orissa Industrial Disputes Rules 1959 provides:
"An arbitration agreement for the reference of an industrial dispute to an arbitrator or arbitrators shall be made in Form C and shall be delivered personally or forwarded by registered post in triplicate to the Secretary to the Government of Orissa in the Labour Department, Labour Commissioner, Orissa, and the local conciliation officer concerned. The agreement shall be accompanied by the consent in writing of the Arbitrator or Arbitrators."
53. North Orissa Workers' Union v. State of Orissa, 1971(2) L.L.J. 199 at p.201.

the Government to publish the arbitration agreement within one month from the date of the order of the court.[54]

The High Court of Mysore shared the same view. In Workmen of Madras Woodlands Hotel v. K. Srinivasa Rao[55] a Division Bench of the Court examined the validity of an arbitration award. The award was not in the prescribed form. The agreement was not published in the Official Gazette. The arbitrator passed the award. But it was not forwarded to the Government. Workmen challenged the validity of the award. The management raised the defence that this was a private arbitration under the Arbitration Act 1940 and not one under section 10A of the Act. The court held that the award was invalid as the agreement was not published and the award not forwarded to the Government.[56] However, the court held that the reference was valid under section 10A of the Act. True that the agreement was not in the prescribed form. But, the court said, since there was substantial compliance with the requirements of the form[57] the reference was valid.

54. Ibid. See infra, n.85.
55. [1972]42 F.J.R. 223.
56. Id. at p.226 per Chandrasekhar, J.
57. Ibid.

It was open to the parties to persuade the Government to publish the agreement and the arbitrator to proceed with arbitration.[58] Requirements of the form of agreement may not be observed, agreement not published and award not submitted to Government. The lapses will not in the court's view, render the arbitration agreement one falling under the Arbitration Act 1940.[59]

The same view was shared by a Full Bench of the High Court of Madras. _R.K. Steels_ v. _Workmen_[60] is an example. During conciliation the parties agreed to leave the question of bonus to the decision of the Assistant Labour Commissioner. The question was whether this was an agreement to refer the dispute for arbitration under section 10A of the Act or only an agreement for an informal arbitration outside section 10A. The court found that it was not in the prescribed form though the agreement complied with all the essential requirements of the prescribed form. The agreement was not forwarded to

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58. _Id._ at pp.226, 227. See _infra_, n.81.
59. _Ibid._
60. 1977(1) L.L.J. 382.

the Government. It was not published in the Gazette. But these, the court held, will not invalidate the agreement.[61] The effect of non-observance of these requirements on the validity of the award was not an issue before the court. The only question was whether a writ will lie against the award. A writ will lie against the award only if the agreement for arbitration was under section 10A of the Act and not under the Arbitration Act. The court held that the agreement was one for arbitration under section 10A of the Act.[62] The court doubted whether an agreement for arbitration of an industrial dispute under the Arbitration Act 1940 was permissible in law.[63]

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61. Id. at p.386 per Ramaswami, J.
62. "We are also of the view that an agreement entered into during conciliation proceedings between the management and the workers' union regarding an industrial dispute is an agreement, to refer the dispute to arbitration under S.10A for the Act does not contemplate arbitration of an industrial dispute outside section 10A." (ibid. per Ramaswami, J.)
63. "In the face of S.10A(5) excluding the application of Arbitration Act 1940 to arbitration under section 10A, it would be very doubtful whether private agreement in respect of industrial disputes contracting out of the statutory provisions of section 10A would be permissible at all in law." (ibid.)

Two prior decisions of the Madras High Court held a contrary view. In Estate Staff Union of South India v. Commissioner of Labour[64] Justice Ramakrishnan observed that the agreement in the course of conciliation proceedings to leave a dispute relating to termination of service does not come within the ambit of section 10A of the Act, since the requirements of section 10A have not been complied with.[65] According to him the agreement was one for private arbitration. In Dayaram Agarwal v. Engineering Metal and General Workers' Union[66] the same view was reiterated.[67]

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64. 1970(1) L.L.J. 94. A workman's service was terminated. During conciliation a settlement was arrived at by which the dispute was agreed to be referred for arbitration. But the requirements of S.10A were not complied with. The arbitrator upheld the termination. A writ was filed challenging the award. The court held that the arbitration was not under S.10A but a private arbitration and no writ will lie against the award of a private arbitrator.
65. Id. at pp.95, 96.
66. 1969(2) L.L.J. 367. Service of workmen was terminated. During conciliation a settlement was arrived at by which the parties agreed to refer the issue for arbitration. Arbitrator held termination unjustified and ordered reinstatement. Management filed a writ petition against the award.
67. "Certain formalities have to be observed under S.10A and one of them is that the arbitration award should be submitted to the Government who should publish it under S.17 of the Act. Under S.17A of the Act it will become enforceable on the expiry of thirty days from the date of the publication. It is admitted by both parties that the

(contd..)

This view, however, is no more good law in view of the observations of the Full Bench in R.K. Steels.[68]

The High Court of Orissa expressed the view that if arbitration agreement and award were not published the lapse would render the award unenforceable under the Act. Rashbehary Mohanty v. Presiding Officer, Labour Court[69] involved inter alia the question whether an application filed by the workman under section 33C(2) of the Act,[70] was maintainable. The dispute over his discharge was referred for arbitration by

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(f.n.67 continued)
above procedure has not been followed in the case of the decision of the Deputy Commissioner of Labour in the present case. In fact none of the several formalities mentioned in regard to the decision of the arbitrator under section 10A had been followed in this case.... It would, therefore, follow that the bar against the application of the Arbitration Act 1940, will not apply to the decision of the arbitrator in the present case." (Id. at p.369 per Ramakrishnan, J.)

68. 1977(1) L.L.J. 382, supra, nn.60-63.
69. 1974(2) L.L.J. 222.
70. S.33C(1) of the Act provides for recovery of money due from employer. It provides that if money is due under an award, settlement or under certain provisions of the Act, the workman may make an application to the appropriate Government and if the Government is satisfied that money is due it may issue a certificate to the Collector to recover it as an arrear of land revenue. Under sub-sec.(2) of S.33C jurisdiction is vested on specified Labour Court to decide disputes about the quantum of money so due.

agreement. The arbitrator passed an award in favour of the workman. Neither the arbitration agreement nor the award had been forwarded to the Government or published in the Gazette. The question was whether the workman could enforce his claim for wages under section 33C of the Act by an application to the Labour Court. The court held that no relief under section 33C(2) was available to the workman since the award never became effective as it had not been published under the Act.[71] The court observed that the agreement for arbitration was arrived at during conciliation proceedings and the provisions of section 10A(1) of the Act applied to such a reference. The Court further said,

> "Sub-section (5) of Section 10A of the Act makes the Arbitration Act inapplicable to such arbitrations. The legislative intention seems to be to subject such arbitration to the special provisions of the Act.

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71. Rasbehary Mohanty v. Presiding Officer, Labour Court, 1974(2) L.L.J. 222 at pp.226, 227. Justice R.N. Misra said,

"The petitioner had applied under S.33C(2) of the Act to the Labour Court. The award having not been published as required under the Act, it never became effective and the petitioner's claim having been founded upon the award was, therefore, not enforceable. No relief under section 33C(2) of the Act was, therefore, available."

> Admittedly the arbitration agreement was not forwarded to the appropriate government. Nor was it ever published in the official gazette. Thus, there was no compliance with the requirements of sub-section (3) of section 10A. Similarly, the arbitration award was not submitted to the appropriate government as required under sub-section (4) of section 10A of the Act. Thus there has been statutory infraction in the matter of the reference to the Arbitrator as also in the matter of making of the award."[72]

The court, however, did not base its decision on the ground of violation of the provisions of section 10A. It held[73] that since section 10A of the Act applied to arbitration, the award had to be published[74] by Government to become effective[75] and since this has not been done it never became effective.

Validity of arbitration agreements was involved in these cases. Courts have approached the question from a functional

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72. Id. at p.226 per Misra, J.
73. Id. at pp.226, 227.
74. S.17(1) of the Industrial Disputes Act 1947 provides that the arbitration award shall, within a period of thirty days from the date of its receipt by the Government, be published.
75. The award becomes enforceable on the expiry of thirty days from the date of its publication. See Industrial Disputes Act 1947, S.17A(1).

angle. As a method of settling industrial disputes the Act prefers voluntary arbitration to compulsory adjudication. This is evident from one fact: option to resort to arbitration is kept open to the parties till the government adopts the final step of referring the dispute for adjudication. Arbitration has a definite merit over adjudication. The parties are free to choose, by agreement, the person or persons who should arbitrate. In adjudication by reference this freedom of choice is absent. Parties choose an arbitrator in whom they have faith. Decision by arbitrator may be more acceptable to the parties than decision by a Tribunal or Labour Court.[76] Objections that agreement is not in

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76. In the United States where there is no system of adjudication of disputes relating to dismissal (see supra, Ch.XI, n.47) the collective agreements may provide for arbitration. The experience has been on the whole the awards of arbitrators are respected by the parties. The reason is that the arbitrator appointed by the parties will try to resolve the matter in a manner satisfactory to both:

> "The arbitrator is selected by the parties to the collective agreement. He is naturally inclined to remain loyal to his employers by trying to resolve matters in a manner satisfactory to both.... The arbitrator thus develops the content of the collective agreement in an incremental fashion in the hope that his decisions will satisfy both the parties as a reasonable compromise. It is a kind of joint regulation through adjudication. On the whole, arbitrators have been successful in these aims and most awards are respected without the need for a trial of strength or litigation."

Hugh Collins, "Capitalist Discipline and Corporatist Law", 11 Industrial Law Journal 78 at pp.89, 90 (1982).

strict compliance with the prescribed form, and that there is delay in publishing the same and the like are only technical in nature. They should not be allowed to defeat the genuine intent of the parties to refer the dispute for arbitration. Mutual agreement of the parties is the most significant aspect of the concept of arbitration. The decisions, discussed above, show that courts have made an effort to give effect to the spirit behind the law rather than its letter.

A question which requires consideration is whether publication of the agreement in the Gazette, though not strictly within time, is a mandatory requirement. What is the reason behind the requirement of publication of the agreement? Generally an industrial dispute is a matter on which persons other than parties directly involved in the dispute may be interested. For a fair decision it is desirable that all persons interested in the dispute get notice of reference for arbitration. They may wish to present their views on the issue and should get an opportunity of being heard by the arbitrator. This will be possible only if they know

that a reference has been made. Publication in the official gazette serves this purpose. It is also necessary that the Government is appraised of the agreement to settle the dispute by arbitration. In the old laissez faire economy industrial relations was a matter between the employer and the employee only. But in modern times, the State is not merely a good samaritan, a regulator and an entrepreneur. The State is an umpire as well in the game of conflict of competing interests. The State is no longer a dumb observer on industrial relations. It has to keep a close watch over the shape of things to come.

Publication of agreement is not a mere technicality. It serves a useful purpose. So it has to be a mandatory requirement. Can the arbitrator proceed with arbitration even in the absence of publication of the agreement? Publication provides an opportunity to all concerned to present their case in the dispute. This purpose will be defeated if the arbitrator proceeds with arbitration and prepares an award before publication of the agreement and forwards it

to the Government soon after the publication of the agreement. The judiciary should have approached the question and construed the provision from this functional perspective. It should hold that the arbitrator must proceed with the arbitration only after publication of the agreement in the official gazette. Although the High Court of Mysore has approached the question from this angle in Workmen of Madras Woodlands Hotel v. Srinivasa Rao[77] the High Court of Madhya Pradesh seems to have missed this aspect in its decision in Modern Stores v. Krishnadas.[78] In Workmen of Madras Woodlands Hotel the Mysore High Court held that non-publication of the agreement vitiated the award.[79] But it held rightly that there was a valid reference for arbitration.[80] The court proceeded to observe,

> "It will be open to the parties to persuade the Government to publish the arbitration agreement between the parties, as required in sub-section (3) of section 10A and after such publication in the

77. [1972]42 F.J.R. 223.
78. 1970 Lab. I.C. 196.
79. Supra, n.56.
80. Supra, n.57.

> Mysore Gazette, it will be open to respondent 3 to proceed with the arbitration in accordance with law and to submit his award to the Government."[81]

In Modern Stores the arbitrator completed proceedings and drew up the award but pronounced it after the arbitration agreement was published in the gazette. The High Court of Madhya Pradesh held that publication within the time limit was only directory though the requirement of publication was mandatory and that therefore the award was not vitiated.[82] Since the arbitration proceedings were started and concluded before the publication of the agreement in the gazette the award ought to have been held vitiated.

Publication of agreement being a statutory duty[83] imposed on government the parties should be in a position to force the government to discharge it. If the requirement of publication within the prescribed time is held to be a

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81. Workmen of Madras Woodlands Hotel v. Srinivasa Rao, (1972) 42 F.J.R. 223, at pp.226, 227 per Chandrasekhar, J. (Emphasis added).
82. Modern Stores v. Krishnadas, 1970 Lab.I.C. 196 at p.203, supra, nn.35, 36.
83. Supra, n.7.

mandatory provision violation of which may render the reference to arbitration invalid, the parties may not be in a position to enforce the obligation. Government has to publish the agreement within 30 days of its receipt. It is only on the expiry of this period that the parties can say that government has failed to discharge the duty of publication. No useful purpose will then be served by resorting to Court for publication; for, on the above construction, publication of agreement after thirty days would invalidate arbitration based on it. It is therefore necessary that the provision as to time limit for publication of agreement be held directory only. Such a construction enabled the High Court of Orissa to enforce the obligation against the Government in North Orissa Workers Union v. State of Orissa.[84] The court gave a direction to the government to publish the agreement within one month of the court's order, observing

> "In view of the fact that a copy of the arbitration agreement had been forwarded to government and government were fully aware of the same, it was their

84. 1971(2) L.L.J. 199, supra, nn.51-54.

> duty to publish the same in the official gazette within a month from the date of receipt of the agreement from the parties. Government admittedly failed to discharge the statutory duty imposed on them. It is necessary that they should now do so."[85]

Suppose several years have passed since the arbitration agreement was forwarded to the Government. Such a long lapse may dissuade the court from issuing a direction to the government to publish the agreement as happened in <u>Mineral Industry Association</u> v. <u>Union of India</u>.[86]

<u>Publication of Notification</u>.

Arbitration agreement is entered into between the majority of workmen and the employer. Is it still necessary that the agreement has to be published? Section 10A(3) is not excluded in such cases and hence the agreement has to be published. Sub-section (3A) of section 10A specifically provides that in such cases government may issue a notification.[87] This will enable workmen concerned in the dispute,

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85. <u>Id</u>. at p.201 <u>per</u> Patra, J.
86. 1971 Lab. I.C. 837, at p.842. The High Court of Delhi declined to issue a direction to publish the agreement since almost ten years had elapsed after the agreement was forwarded to government. <u>Supra</u>, n.80.
87. <u>Supra</u>, n.9.

though not parties to the agreement, to get an opportunity to present their case before the arbitrator.[88] On publication of such notification government gets power to prohibit any existing strike or lock out in connection with such dispute.[89] Starting of strikes during pendency of arbitration will be illegal.[90] The award of the arbitrator will be binding on all workmen in the establishment.[91]

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88. Ibid.
89. Sub-section (4A) of Section 10A provides:
"4A. Where an industrial dispute has been referred to arbitration and a notification has been issued under sub-section (3A), the appropriate Government may, by order, prohibit the continuance of any strike or lockout in connection with such dispute which may be in existence on the date of the reference."
90. Section 23(bb) read with Section 24.
91. Section 18(3) of the Act. The relevant portion reads:
"(3)....an arbitration award in a case where a notification has been issued under sub-section (3A) of S.10A....shall be binding on—
(a) all parties to the industrial dispute;
(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the...arbitrator...record the opinion that they were so summoned without proper cause;
(c) where a party referred to clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;
(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates, on the date of the dispute and all persons who subsequently become employed in that establishment or part."

According to the Madhya Pradesh High Court in *Singh* v. *Gokhale*[92] the publication of the arbitration agreement itself may provide interested persons with an opportunity to present their views before the Arbitrator.[93] But unless a notification under sub-section (3A) of S.10A is published the award will be binding on the parties to the agreement only,[94] and there will also be no bar on strike or lock-out.[95]

Industrial peace and harmony are paramount objectives. In order to achieve this there should be discipline on all sides. Once an industrial dispute is raised by majority of workmen and referred for arbitration it is necessary to prohibit strike or lock-out and to make the award binding on all workmen. This is made possible by issuance of a notification under sub-section (3A) of section 10A of the Act.

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92. 1970(1) L.L.J. 125.
93. *Id.* at p.128 *per* Tare, J.
94. Section 18(2) of the Act. It reads,
"(2) subject to the provisions of sub-section (3) an arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration."
95. *Supra*, n.89 and *infra*, n.97.

Is the power to issue such a notification discretionary? Will the award be rendered invalid in such a case by non-issuance of the notification? Keeping in mind the need to maintain industrial peace and harmony by prohibiting existing strikes and lockout the High Court of Madras held in _Madras Machine Tools Manufacturers_ v. _Special Deputy Commissioner of Labour_[96] that the requirement is mandatory. In its view the award would be invalid if the notification is not issued. The court said,[97]

> "If section 10A(3A) is not complied with, we fail to understand how an award could ever be characterised as valid. There is an important legal consequence if section 10A(3A) is not complied with, that being the failure of the Government to issue a notification under section 10A (4A) of the Act. In other words, if there is a strike or lock out, no notification under section 10A(4A) can be issued prohibiting the continuance of that strike or lockout. In such a case, if it is held that section 10A(3A) is not a mandatory requirement, will it not jeopardise the industrial peace and harmony and will not the Government lose its jurisdiction to issue a notification under section 10A(4A) ....? We therefore hold that having regard to the admitted fact of non-compliance with section 10A(3A) the award is declared to be invalid."

96. 1979(2) L.L.J. 331.
97. _Id._ at p.335 _per_ Mohan, J.

The reasoning of the court is not convincing. Notification under sub-section (4A) will be necessary only if there exists a strike and the Government wants to prohibit its continuance. But if there is no strike or lockout existing at the time of reference for arbitration there is no question of prohibiting its continuance by notification under sub-section (4A). Hence there is no need in such a case to publish the notification under sub-section (3A) with a view to enabling prohibition of existing strike or lockout. Notification under sub-section (3A) cannot for that reason be held mandatory.

Notification under sub-section (3A) serves another purpose. The award will be binding on all workmen only on issuance of the notification.[98] The court could have held that publication of the notification under sub-section (3A) is mandatory for this reason.

Adjudication and Arbitration : Method of Avoiding Clash.

The right to refer a dispute regarding dismissal for arbitration is open till the dispute is referred for

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98. S.18(3). See supra, n.91.

adjudication.[99] Evidently, reference of a dispute for arbitration after reference of the same dispute for adjudication will be invalid.

The Andhra Pradesh decision in M/s. Vazir Sultan Tobacco Co. Ltd. v. Labour Court[100] is an illustration. The facts are these. A workman was dismissed in 1968. The dispute over this was referred by Government to Labour Court for adjudication. After this the workers' union and management agreed to refer all disputes over dismissal from the year 1963 onwards for arbitration, including the case of the workman dismissed in 1968. The arbitration agreement was published. Later a settlement was arrived at. The management agreed to reinstate some workmen. The workman dismissed in 1968 was not included among those agreed to be reinstated. The arbitrator passed an award in terms of the settlement. When the Labour Court proceeded with adjudication of the dispute referred to it the management raised the objection that the Labour Court has no jurisdiction to proceed with the matter

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99. S.10A(1), supra, n.5.
100. 1974 Lab. I.C. 817.

in view of the settlement and the arbitration award. The Labour Court over-ruled the objection on the ground that there could be no reference of the dispute for arbitration after it is referred for adjudication. The management filed a writ petition before the High Court of Andhra Pradesh. It was held that reference of the dispute for arbitration was not permissible in view of the fact that it had by that time been referred for adjudication.[101]

What about the reference for adjudication after a reference for arbitration? This question arose before the High Court of Delhi in Mineral Industry Association v. Union of India.[102] There was an agreement for arbitration of an industrial dispute.[103] The Government thought that it was not valid and referred the dispute for adjudication. The Delhi High Court on the contrary held that the agreement for arbitration being valid[104] reference to adjudication is bad in law.[105]

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101. Id. at p.819 per Chinnappa Reddy, J.
102. 1971 Lab. I.C. 837. Supra, n.42.
103. See supra, n.43.
104. Supra, n.47.
105. Ibid.

By and large, resolving industrial disputes relating to dismissal by settlement or arbitration may remain a remote possibility in many cases. This will be so since it requires the employer who dismissed the workman to agree for arbitration and such agreement is in most cases only a mirage.[106] Inevitably adjudication becomes necessary in cases of dismissal.

Adjudication is an open, unbiased, impartial method of settling disputes. A subsequent reference for arbitration should not render it useless. Similarly arbitration signifies volition of both parties on the choice of the arbitrator. This factor should not be overlooked when a subsequent reference is made by the Government for adjudication.

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106. The National Commission on Labour found that there is a general reluctance, especially from the employers to resort to the system of arbitration. The availability of the system of adjudication, dearth of suitable arbitrators and the legal obstacles including the fact that no appeal lies to the Supreme Court against an arbitrator's award where as an appeal would like against the decision of a Tribunal or Labour Court were some of the factors pointed out by the National Commission as factors inhibiting a general resort to the system of arbitration. See Government of India, Report of the National Commission on Labour (1969), p.324.

The policy of the Act is good. It aims at settling disputes by agreement or arbitration. As seen above, when there is an arbitration no reference for adjudication is possible. When the dispute is referred for adjudication there is no scope for arbitration. This is the view of the courts. This avoids clash between the two methods.

Chapter XIII

JURISDICTION OF ARBITRATOR.

Arbitrator has the power, under the Act, to investigate the dispute and to pass an award.[1] A Tribunal adjudicating a dispute has been given the power to adjudicate the points referred to it as well as 'matters incidental thereto.'[2] But no such power is conferred on the arbitrator. Is the arbitrator to look only to the points referred to him in deciding the dispute?

Arbitrator to confine to points referred.

Arbitrator cannot decide an issue not referred to him by the parties. National Products Construction Co. v. Their Workmen[3] points to the importance of assessing the scope of the reference and of adhering to the issues referred for arbitration. There arose an industrial dispute. The workmen

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1. Industrial Disputes Act 1947, S.10A(4); See Ch.XII, n.4.
2. Id. S.10(4); See Ch.XI, n.43.
3. 1976(1) L.L.J. 86 (S.C.).

were of three categories of which one category was muster roll workmen. A settlement was arrived at regarding the wages of muster roll workmen and it provided for reference of dispute over dearness allowance, pay scales, etc. of workmen for arbitration. The arbitrator in his award allowed 25 per cent wage increase for muster roll workmen also. The Supreme Court held that the reference did not cover the question of wages of muster roll workmen.[4] The court set aside the award in so far as it granted wage increase to muster roll workmen since it was not an issue referred for arbitration.[5]

Arbitrator - Whether Tribunal?

Of course he is an arbiter of disputes between parties. He determines rights of parties. Can it be said that functionally he is a tribunal whose actions are subject to judicial review? He is appointed by the parties, and not by the Government. This may induce one to hold that he is only a private arbitrator not amenable to judicial review.

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4. Id. at p.89 per Alagiriswami, J.
5. Id. at p.90.

Another view seems possible. Being an authority exercising powers under a statute he is a statutory arbitrator.

A similar question arose in an old case in England. This was a case relating to dismissal that came for review before the Queens Bench. In R. v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians[6] the Court had to examine an indenture of apprenticeship under which a young man was to be taught the craft of dental mechanic. The agreement provided for reference of any dispute relating thereto to the National Joint Council for the Craft of Dental Technicians. The employer dismissed him and the dispute was arbitrated by the Disputes Committee. A writ was sought to quash the order of the Committee declaring that the employers were entitled to dismiss him and to prohibit the Committee from further proceeding in arbitration. Holding that a writ of certiorari or prohibition cannot be issued to a private arbitrator, Lord Chief Justice Goddard, observed:

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6. [1953]1 All E.R. 327.

> "The bodies to which in modern times the remedies of these prerogative writs have been applied are all statutory bodies on whom Parliament has conferred statutory powers and duties....and a statutory arbitrator is a person to whom by statute, the parties must resort."[7]

Croom-Johnson, J. agreeing with him observed,

> "This being a private arbitration between private individuals and directed by agreement to a body which has the name of National Joint Council for the Craft of Dental Technicians, all the matters in dispute must be dealt with by persons who represent that body. That is all. They are in no sense a public body. Their authority does not depend on any statutory jurisdiction. People are not compelled to abide by their decision. This is a private tribunal set up as arbitrators by agreement between parties."[8]

It would appear that an arbitrator under section 10A of the Act is not exactly in the same position as a private arbitrator. Though he is named by the parties and the points at dispute are referred to him for arbitration by agreement of parties, the reference is in accordance with a statutory provision which provides when and how the reference could be

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7. Id. at pp.327, 328.
8. Id. at p.328.

made. The Act provides that the arbitrator shall investigate the dispute and submit the award to government.[9] Publication of the award has an impact not only on the parties to the agreement[10] but also on others.[11] The position of an arbitrator under section 10A is thus obviously different from that of a private arbitrator. The former has powers and duties conferred on him by statute. He makes decisions having an impact on rights of parties.

The question whether an arbitrator under section 10A is a Tribunal for purpose of special leave to appeal under article 136 of the Constitution of India arose before the Supreme Court in Engineering Mazdoor Sabha v. Hind Cycles Ltd.[12] The objection was that the arbitrator under section 10A is not a 'tribunal' and hence the appeal is incompetent.[13]

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9. Industrial Disputes Act 1947. S.10A(4); See Ch.XII, n.4.
10. Id. S.18(2); See Ch.XII, n.94.
11. Ss.18(3), 10A(4A) and 23(bb); See Ch.XII, nn.91, 89 and 90 respectively.
12. (1950-67)4 S.C.L.J. 2330; A.I.R. 1963 S.C. 874.
13. Article 136(1) of the Constitution of India reads:
"Notwithstanding anything in this chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India."

Upholding the objection the Supreme Court went to examine the nature and functions of an arbitrator, and the procedure he has to adopt under the Act. The view of the Court is interesting. The arbitrator under the Act is not in the same position as a private arbitrator, nor is he a 'tribunal' for purpose of article 136 of the Constitution. According to the court he stands midway between a private arbitrator and a statutory tribunal. The difference between him and a private arbitrator is pointed out in this manner. The Statute and the Rules framed thereunder govern his powers.[14] He is invested with certain powers.[15] He has to follow certain procedure.[16] His award has binding force.[17]

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14. Engineering Mazdoor Sabha v. Hind Cycles Ltd., (1950-67)4 S.C.L.J. 2330. Justice Gajendragadkar observed,
"It may be conceded that having regard to several provisions contained in the Act and the rules framed thereunder, an arbitrator appointed under section 10A cannot be treated to be exactly similar to a private arbitrator.... The arbitrator under section 10A is clothed with certain powers, his procedure is regulated by certain rules and the award pronounced by him is given by statutory provisions a certain validity and a binding character for a specified period." (at p.2339).
15. S.10A(4) authorises him to investigate the dispute and to pass an award. S.11(1) authorises him, subject to Rules framed under the Act, to follow such procedure as he thinks fit.
16. See for instance Rules 13 (Communication of place and time of hearing), 15 (evidence taking), 16 (administration of oath), 20 (service of notice) and 22 (proceeding ex-parte) of the Industrial Disputes (Central) Rules 1957.
17. Section 18; See Ch.XII, nn.91, 94.

Notwithstanding the fact that he thus differs from a private arbitrator and some of the trappings of a court[18] are present in his case the Court said that he cannot be equated with a 'tribunal' under article 136, for "he lacks the basic, the essential and the fundamental requisite in that behalf because he is not invested with the State's inherent judicial power."[19] In the Court's view the basic and essential condition which makes an authority a tribunal for purposes of article 136 of the Constitution is that 'it should be constituted by the State and should be invested with the State's inherent judicial power.'[20] An arbitrator under section 10A

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18. Engineering Mazdoor Sabha v. Hind Cycles, (1950-67)4 S.C.L.J. 2330. Justice Gajendragadkar observed at p.2333. "The procedural rules which regulate the proceedings before the tribunals and the powers conferred on them in dealing with matters brought before them, are sometimes described as the 'trappings of a court!"
19. Id. at p.2339. Justice Gajendragadkar, J. went on at p.2335.
    "... (T)he test which has to applied in determining the character of an adjudicating body is whether the said body has been invested by the State with its inherent judicial power. This test implies that the adjudicating body should be constituted by the State and should be invested with the State's judicial power which it is authorised to exercise."
20. Id. at p.2334.

did not satisfy these tests. He is appointed by the parties. The power to decide the dispute between the parties who appointed him is derived from the agreement of the parties and form no other source. The fact that his appointment is recognised by section 10A and he is clothed with certain powers on his appointment does not mean, in the Court's view, that the adjudicatory power he is exercising is derived from the State.[21] The Court observed,

> "His position, thus, may be said to be higher than that of a private arbitrator and lower than that of a tribunal. A statutory tribunal is appointed under the relevant provisions of a statute which also compulsorily refers to its adjudication certain classified cases of disputes."[22]

An industrial tribunal is a tribunal for the purpose of judicial review under article 136 of the Constitution. The distinction between an industrial tribunal and an arbitrator appointed under section 10A seems to lie in one fact. The

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21. Id. at p.2339.
"He is not a tribunal because the State has not invested him with its inherent judicial power and the power of adjudication which he exercises is derived by him from the agreement of the parties.
(Per Gajendragadkar, J.)
22. Ibid.

initial power to adjudicate upon the dispute is derived by the arbitrator from the agreement of parties. In the case of the industrial tribunal this originates from the statute itself. Reference of a dispute to a tribunal is to be made by Government. It is not done by the parties. An industrial tribunal is one constituted by the State. It is constituted to exercise its inherent judicial power. An arbitrator on the other hand is one constituted by the parties conferring on him, by their agreement, power to adjudicate the dispute.[23]

The above arguments are based to hold that decisions of an arbitrator are not appealable to the Supreme Court under the provision for special leave under article 136. But the question still remains whether these reasons go to exclude judicial review by the High Court.

Although it was only incidentally considered[24] in Engineering Mazdoor Sabha, the question was directly raised in

23. Id. at p.2341.
24. The Supreme Court incidentally examined this aspect in Engineering Mazdoor Sabha, (1950-67)4 S.C.L.J. 2330. The argument was raised in the case that since a writ will lie against the award of an arbitrator under article 226, the arbitrator should be deemed to be a tribunal for purpose of article 136. Rejecting this contention the court observed that even if an arbitrator is not a Tribunal under article 136 in a proper case, a

(contd..)

Rohtas Industries Ltd. v. Rohtas Industries Staff Union.[25] One of the questions raised for decision of the Supreme Court was whether a writ under article 226 will lie against the award of an arbitrator under section 10A. The court considered the observations[26] in Engineering Mazdoor Sabha and held that a writ under article 226 would lie.[27] Justice Krishna Iyer said,

> "Suffice it to say, an award is not only not invulnerable but more sensitively susceptible to the writ lancet being a quasi-statutory body's decision."[28]

(f.n.24 continued)
writ may lie against his award under article 226. Justice Gajendragadkar observed,

"Art.226 under which a writ of certiorari can be issued in an appropriate case, in a sense, is wider than Art.136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued only against the orders of courts or tribunals. Under Art.226(1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore, even if the arbitrator appointed under section 10A is not a tribunal under Art.136 in a proper case, a writ may lie against his award." (at pp.2338, 2339).

25. 1976(1) L.L.J. 274. It was not a case of dismissal but one of whether or not compensation from the striking workers could be claimed as decided by the arbitrator.
26. Supra, n.24.
27. Rohtas Industries Ltd. v. Rohtas Industries Staff Union, 1976(1) L.L.J. 274 at p.278.
28. Id. at p.279 per Krishna Iyer, J.

Is the decision of the arbitrator amenable to judicial review under article 227? In Engineering Mazdoor Sabha[29] the Supreme Court observed that article 227[30] like article 136 speaks of courts and tribunals and therefore the holding that an arbitrator under section 10A is not a tribunal may prima facie apply to proceedings under article 227.[31]

The position in Engineering Mazdoor Sabha with regard to amenability of arbitration to judicial review under articles 136, 226 and 227 seems to be outdated. Engineering Mazdoor Sabha was decided in the year 1962. Sections 10A, 18 and 23 underwent a change subsequently by Act 36 of 1964. When the

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29. Engineering Mazdoor Sabha v. Hind Cycles Ltd., (1950-67)4 S.C.L.J. 2330.
30. Art.227 provides that every High Court shall have superintendence over all courts and tribunals, other than courts and tribunals constituted by or under any law relating to the Armed Forces, throughout the territories in relation to which the High Court exercises jurisdiction.
31. Engineering Mazdoor Sabha v. Hind Cycles Ltd., (1950-67)4 S.C.L.J. 2330 at p.2342. Justice Gajendragadkar observed, "Like article 136, article 227 also refers to courts and tribunals and what we have said about the character of the arbitrator appointed under section 10A by reference to the requirements of article 136, may prima facie apply to the requirements of Art.227."

majority of the parties agree for arbitration government was given the power to issue a notification.[32] Again Government was authorised to prohibit existing strikes.[33] The award would become binding on all workmen including those who are not parties to arbitration agreement.[34] Commencement of strikes during arbitration proceedings would be illegal.[35] In the light of these significant changes arbitration no more remains a method of resolving disputes which is of concern to the parties to the agreement alone. Rights of others can be affected by resorting to this method. The incidence becomes similar to that of an adjudication by an industrial tribunal in almost all respects whether it be in relation to prohibition of existing strikes,[36] commencement

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32. Industrial Disputes Act 1947, S.10A(3A); See Ch.XII, n.9.
33. Id. S.10A(4A); See Ch.XII, n.89.
34. Id. S.18(3); See Ch.XII, n.91.
35. Id. S.23(bb); See Ch.XII, n.90.
36. Id. S.10(3); which reads,
    "Where an industrial dispute has been referred to a Board, Labour Court, Tribunal or National Tribunal, under this section, the appropriate Government may by order prohibit the continuance of any strike or lockout in connection with such dispute which may be in existence on the date of the reference."

of strikes,[37] or binding nature of awards.[38]

The changes will in effect make an arbitrator a tribunal for purposes of judicial review. The later judicial attitude seems to have made a departure from the earlier stand. Justice Krishna Iyer referred to the opinion expressed in Engineering Mazdoor Sabha[39] and taking note of the subsequent amendments[40] to the Act in 1964 observed in Rohtas Industries Ltd. v. Rohtas Industries Staff Union[41] that in view of the amendments it is legitimate to regard an arbitrator under section 10A as statutory tribunal amenable to judicial

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37. Id. S.23(b). It reads:
"No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lockout—
(a) .. ..
(b) during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal and two months after the conclusion of such proceedings."
38. Id. S.18(3).
39. Supra, n.31.
40. Supra, nn.32-35.
41. 1976(1) L.L.J. 274. The point for decision of the court was, however, not whether High Court can exercise jurisdiction under Art.227 against an arbitrator under S.10A, but only whether a writ under Art.226 will lie against his award.

review.[42] Justice Iyer reiterated this view in Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha.[43] It was contended in this case that when there is a voluntary joint submission of an industrial dispute to an arbitrator named by the parties under section 10A of the Act, the arbitrator does not function as a tribunal and is not amenable to the jurisdiction under article 226 or 227. Repelling this plea and following Rohtas Industries,[44] Justice Iyer said,

> "Without further elaboration this contention can be negatived on a decision of this court in Rohtas Industries Ltd. v. Rohtas Industries Staff Union.[45] This court observed that as the arbitrator under section 10A has the power to bind

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42. "We agree that the position of an arbitrator under S.10A of the Act (as it then stood) vis-a-vis Art.227 might have been different. Today, however, such an arbitrator has power to bind even those who are not parties to the reference or agreement and the whole exercise under S.10A as well as the source of the force of the award on publication derive from the statute. It is legitimate to regard such an arbitrator now as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory Tribunals amenable to judicial review. This observation made en passant by us is induced by the discussion at the bar and turns on the amendments to S.10A and cognate provisions like S.23, by Act XXXVI of 1964." Id. at p.279 per Justice Iyer.
43. A.I.R. 1980 S.C. 1896. See infra, n.46.
44. Rohtas Industries Ltd. v. Rohtas Industries Staff Union, 1976(1) L.L.J. 274.
45. Ibid.

even those who are not parties to the reference or agreement and the whole exercise under section 10A 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."[46]

A move towards change in law in this area is now evident. Perhaps it will lead to a declaration by the Supreme Court that an arbitrator is a tribunal for purposes of article 136. If so, it will facilitate judicial review of arbitration by the Supreme Court.[47]

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46. Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, A.I.R. 1980 S.C. 1896 at p.1917. One author observes that on this view the decision of the arbitrator may be appealable under Art.136 of the Constitution and may therefore remove another hurdle in the progress of arbitration, viz: that no appeal lies against an award of the arbitrator. See Suresh C. Srivastava, "Voluntary Labour Arbitration: Law and Policy", 23 J.I.L.I. 340 at p.394 (1981).
47. The legal position that an award of Labour Court or Tribunal would be appealable under Article 136 and an award of an arbitrator would not be appealable may persuade the parties to prefer adjudication to arbitration. See Arjun P. Aggarwal, "Arbitration under Section 10A of the Industrial Disputes Act 1947 and Articles 136, 226 and 227 of the Constitution of India", 5 J.I.L.I. 138 at p.144 (1963).

New Vistas of Jurisdiction.

The Act provides that the arbitrator shall investigate the dispute and submit the award to the appropriate Government.[48] When a dispute relating to dismissal is referred for arbitration, what is the jurisdiction of the arbitrator? The Supreme Court examined the question of jurisdiction of arbitrator in Gujarat Steel Tubes v. Gujarat Steel Tubes Mazdoor Sabha.[49] The industrial dispute in the case related to dismissal en masse of workmen.[50] Arbitrator decided

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48. S.10A(4). See Ch.XII, n.12.
49. A.I.R. 1980 S.C. 1896.
50. Ibid. A settlement arrived at in 1970 between the company and workmen provided for implementation of wages recommended by the Central Wage Board for Engineering Industries. A settlement in 1972 provided for settlement of disputes by negotiation and failing that by arbitration, thus avoiding strikes and lock-outs. Dispute over Wage Board recommendations arose. The interpretation put by the management on recommendations of Wage Board was not acceptable to workmen. An illegal strike ensued. Many workers were discharged. Some were taken back later. The dispute over termination of service of others was referred to arbitration.

against the workmen while the High Court decided in favour of them.[51] On appeal the Supreme Court by majority[52] upheld the decision of the High Court with some modification.

The Court held that a High Court could make in exercising its jurisdiction, any order which should have been made by the lower authority.[53] This has led the Court to examine the question whether the arbitrator could go into the question

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51. Id. In the words of Justice Iyer,
"....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." (at p.1916).
52. Id. at pp.1934, 1935. The Bench consisted of V.R. Krishna Iyer, D.A. Desai and A.D. Koshal, JJ. Justice Koshal dissented with the view of the other two judges and expressed the view that the High Court's decision cannot be upheld. (at p.1943).
53. Id. at p.1917. Justice Iyer, speaking for the majority observed,
"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.... So broad are the expressive expressions designedly used in Art.226 that any order which should have been made by the lower authority could be made by the High Court."

of punishment.[54] The Court by majority held that he could[55] since the terms of reference included the question of punishment;[56] there was no domestic enquiry and the arbitrator could therefore examine the question of punishment,[57] and section 11A of the Act was applicable to an arbitrator under section 10A.[58]

The Court observed[59] that an arbitrator has all the powers which the terms of reference confer on him. The reference in the present case was very widely worded.[60] It authorised the arbitrator to examine the question of punishment also. The court observed that an arbitrator has also to act and decide in accordance with the spirit of the legislation.[61]

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54. Id. at p.1918. Justice Iyer posed the question thus: "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 severity. 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?"
55. Id. at p.1923.
56. Ibid.
57. Ibid.
58. Id. at p.1920.
59. Id. at p.1923.
60. Id. at p.1902. The dispute referred was, as stated by the court, 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 and if not, whether the workmen were entitled to any reliefs including the relief of reinstatement with continuity of service and full back wages.
61. Id. at p.1923.

Even a private arbitrator has to exercise his powers in accordance with law. But the distinction between him and an arbitrator under section 10A lies in the fact that the latter cannot decide a dispute unless what is referred to him is an industrial dispute.[62] He will have no jurisdiction to arbitrate the dispute if the reference for arbitration was made after a reference for adjudication.[63] As in the case of a tribunal, the Act casts on the arbitrator a duty to pass an award and submit the same to government.[64]

The terms of reference by themselves cannot over ride the limits of jurisdiction conferred by the statute. In other words, a reference cannot confer on the arbitrator a jurisdiction which he does not possess under section 10A. The arbitrator gets jurisdiction to examine the question of punishment for dismissal not only because of the terms of reference but also because his jurisdiction under section 10A extends to this. It is notable that Justice Iyer did not

62. S.10A(1) read with S.10A(4). See Ch.XII, nn.5, 12.
63. See Ch.XII.
64. S.10A(4). See Ch.XII, n.12.

confine his observation entirely on the terms of reference. He went on,

> "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 Sec.11A is not applicable, an arbitrator under Sec.10A is bound to act in the spirit of the legislation under which he is to function....an arbitrator under section 10A will have to decide keeping in view the spirit of section 11A."[65]

Section 11A contemplates an adjudication on punishment of dismissal. If the arbitrator's jurisdiction under section 10A is to decide in accordance with the spirit of section 11A, even if the terms of reference might not have, in a given case, extended to the question of punishment, the arbitrator will be acting within his jurisdiction if he examined the question of punishment. That is why the terms of reference may not be conclusive in deciding the jurisdiction of the

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65. Gujarat Steel Tubes Ltd.v.Gujarat Steel Tubes Mazdoor Sabha, A.I.R. 1980 S.C. 1896 at p.1923.

arbitrator under section 10A. His jurisdiction is limited and defined by statute. He may therefore be treated as a statutory arbitrator, even though he is nominated and the reference of the dispute to him is made by the parties.[66]

In a case where dismissal is not preceded by domestic enquiry the question of misconduct and punishment can be examined by the arbitrator.[67] His jurisdiction is the same as that of an industrial tribunal. Justice Iyer said,

> "In a limited sense, even prior to section 11A, there was jurisdiction for a labour tribunal, including an arbitrator, to go into the punitive aspect of the Management's order.... The wider power to examine or prescribe the correct punishment belongs to the tribunal/arbitrator....if no enquiry (or a defective 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 extant order of guilt or punishment and the tribunal determines it afresh. In such a virgin situation both culpability and quantification of punishment are within the

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66. See also *supra*, n.42.
67. In the United States collective agreements provide for arbitration of disputes relating to dismissals and confer on the arbitrator power to modify the punishment. See Arjun P. Aggarwal, "Discharge in the United States and India: A Comparative Analysis", 6 *J.I.L.I.* 1 at p.18 (1964).

jurisdiction of the tribunal/arbitrator."[68]

The Gujarat Steel case involved dismissal without a domestic enquiry. The court held that therefore the arbitrator could have examined the question of punishment.[69]

Section 11A confers on Labour Court, Tribunals and National Tribunals the power to examine whether dismissals are justified. It confers on them the power to examine the punishment aspect when industrial disputes over dismissal are referred to them.[70]

The Court by majority held that the powers under section 11A are available to arbitrators under section 10A. In arriving at this conclusion the court considered many factors; the scope of the recommendation of the I.L.O. on termination of employment, the definition of the term 'tribunal' in section 2(r) of the Act, the use of that term

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68. Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, A.I.R. 1980 S.C. 1896 at p.1923.
69. Ibid.
70. For the text of section 11A and discussion on its scope, see Ch.XI.

in section 11A of the Act and the need for a liberal rather than 'lexical' construction when reading the meaning of industrial legislation in a developing country.

The International Labour Organisation in its Recommendation No.119 stated that a worker aggrieved by termination of his employment should be entitled to appeal to a neutral body such as an arbitrator, a court, an arbitration committee or a similar body.[71] The statement of objects and reasons to the Bill[72] by which section 11A was sought to be introduced referred to this I.L.O. Recommendation.[73] The I.L.O.

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71. Termination of Employment Recommendation 1963, paragraph 4. It reads,

    "4. A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation, to appeal, within a reasonable time, against that termination with the assistance, where the worker so requests, of a person representing him to a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration Committee or a similar body."

    I.L.O., Conventions and Recommendations 1919-1966 (1966), pp.1060-61.

72. See Ch.XI, n.5. Amendment Bill No.XXIII of 1971. See Malhotra, Law of Industrial Disputes (1981) Vol.I, p.746.

73. See supra, Ch.XI, n.5.

Recommendation referred to arbitration proceedings. It was referred to in the statement of objects and reasons in the Bill seeking to introduce section 11A. However reference to arbitrator was not there in the text of section 11A of the Act. Can it then be said that the section covers arbitrator? The court held it does. In its view there was no reason to omit the category of arbitrators from the scope of section 11A. Justice Iyer said,

> "Functionally, tribunals and arbitrators belong to the same brood. The entire scheme, from its I.L.O. genesis, through the objects and reasons, fit in only with arbitrators being covered by section11A, 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 11A powers applies a fortiori to arbitrators."[74]

According to him the word 'tribunal' in the section should be assigned its natural meaning[75] and hence it embraces an

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74. Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, A.I.R. 1980 S.C. 1896 at p.1919 per Krishna Iyer, J.
75. Ibid. The natural meaning of the term was explained by Justice Iyer, as follows:
    "A 'tribunal' literally means a seat of justice. May be, justice is dispensed by a quasi-judicial body, an arbitrator, a commissioner, a court or other adjudicatory organ created by the State. All these are tribunals and naturally the import of the word embraces an arbitration tribunal."

arbitrator also.[76] A tribunal is 'merely a seat of justice or a judicial body with jurisdiction to render justice.[77] Justice Krishna Iyer went on,

> "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...."[78]

There may be a possible objection to the above proposition. The Act defines the term 'tribunal'.[79] This definition does not cover an arbitrator. How can this objection be met? The court finds a way out. The court says this. It can give a natural meaning to a term defined in the Act, if the context demands so. Justice Krishna Iyer says,

> "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 suggest a departure from the definition because then there is something repugnant in the subject or context."[80]

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76. *Id.* at p.1920.
77. *Id.* at p.1919.
78. *Ibid.*
79. Section 2(r) of the Act defines 'Tribunal' as an 'Industrial Tribunal constituted under section 7A...."
80. *Gujarat Steel Tubes* v. *Gujarat Steel Tubes Mazdoor Sabha*, A.I.R. 1980 S.C. 1896 at p.1919.

In the court's view section 11A made only a heirarchical and not a functional difference by speaking of tribunals, and national tribunals. The word 'tribunal' in section 11A should be assigned its natural meaning.[81] The interpretation seems to be in accord with the need for liberal interpretation of social legislation.[82]

Justice Koshal's dissent was purely on technical criteria. According to him section 11A does not apply to arbitrator under section 10A,[83] as the word 'tribunal' in section 11A has to be given the meaning as defined in the Act.[84] Justice Koshal lays stress on the omission of the

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81. Ibid.
82. Id. Justice Krishna Iyer observed,
"This long excursion has become important because, once in a while, social legislation which requires sharing of social philosophy between the Parliament and the Judiciary meets with its Waterloo 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, except 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." (at p.1922).
83. Id. at p.1943.
84. Ibid. Justice Koshal said,
"In my opinion the language employed in section 11A suffers from no ambiguity whatever and is capable only of one meaning, ie. that the word 'Tribunal'

(contd..)

word 'arbitration' within section 11A when the amendment Act of 1971 introduced the provision. According to him this was a deliberate omission by Parliament.[85]

The majority in Gujarat Steel equates the jurisdiction of arbitrator to that of tribunal in dismissal cases. This removes a hurdle. If the arbitrator is not invested with the power to examine the question of merits of dismissal including the question of punishment, his jurisdiction will remain very

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(f.n.84 continued)
occurring therein is used in the sense of the definition given 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 11A."

85. Ibid. Justice Koshal observed, referring to the presence of the word 'arbitrator' in the statement of objects and reasons and its omission in section 11A,
"What is the reason for the omission? Was it consciously 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 resorts to guess work (however intelligently the same may be carried out) and attributes the omission to the latter cause in a 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 11A and it did not accept the recommendation."

limited while that of a Tribunal or Labour Court will be wide. Workmen may not therefore prefer arbitration as a method of settling disputes. Management on the other hand would prefer limited interference with its dismissal orders. Obviously the management may be more agreeable for arbitration than for adjudication on dismissals when it comes to a question of choosing between the two. Arbitration presupposes an agreement between parties. When employer prefers arbitration and workers adjudication, agreement may not be forthcoming. If at all the management is agreeable to settlement of the dispute by reference to an external authority, it may insist on reference to an arbitrator because arbitrator will have only limited powers to interfere with dismissal. On the other hand, workmen would prefer reference to a Tribunal which has wider jurisdiction and can render full justice to them. Thus an agreement may become difficult to refer the issue either to an arbitrator[86] or a tribunal.[87] This stumbling block is removed by

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86. Under S.10A of the Act.
87. Under S.10(2) of the Act which provides for reference of the dispute to Tribunal by Government when both parties apply to the Government for such reference.

Gujarat Steel which widens the jurisdiction of industrial arbitrators. The decision has been criticised as an instance of too much of judicial creativity.[88] But the fact remains that the decision does away with an unnecessary distinction in jurisdiction between Tribunal and arbitrator. It brings the Indian law close to the international norm laid down in the I.L.O. Recommendation. It helps a dismissed workman to get substantial justice at the hands of the arbitrator. From this functional perspective the decision in Gujarat Steel is undoubtedly a beacon light.

Legislative action would have been required, in course of time, to confer jurisdiction on the arbitrator similar to that of S.11A, had not the judiciary been alive to the situation and has been ready to discharge a creative role in

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88. For instance, See Malhotra, The Law of Industrial Disputes (1981) Vol.I, p.749.
"This case strikingly illustrates how far beyond the confines of a case the court can travel when it chooses to 'jettison' the judicial restraint .... It illustrates a disturbing aspect of activist mentality."

this area.[89] History shows us that it would have been the consequence. It was the restrictive interpretation of the jurisdiction of the Tribunal under the old law, which necessitated legislative action. The decision in _Gujarat Steel_ may be criticised as an instance of the judiciary stepping into the area of legislature. But while it comes to a question of interpretation and application of welfare legislation, especially relating to labour, the function of the court should be creative. The policy should not be one of 'hands off.'

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89. "The exercise of judicial function involves, to a greater or lesser degree according to circumstances, a margin of discretion in the evaluation of facts, in the interpretation placed on legal rules and precedent, and in the choice of remedies. In the use of that discretion, judges reflect the values of the community and are no doubt expected to do so." Felice Morgenstern, "The Role of the Courts in the Evolution of Labour Law", 118 _International Labour Review_ 427 at pp.433, 434 (1979).

PART VII

N E W T R E N D S

Chapter XIV

RECENT DECELOPMENTS

Social mores are ever changing. Law seldom remains static. Legislative machinery is set in motion. Attempt at modification of law is made. Law relating to dismissal is no exception to this phenomenon. A few changes in this area of the law are in the offing. A Bill[1] to amend the Act has been passed by both the Houses of Parliament. It is awaiting the assent of the President.

New provisions.

Procedure for settlement of disputes within the industrial establishment itself is an innovation in the proposed law. Employer has to set up a Grievance Settlement Authority.[2] This requirement is not applicable to small industrial establishments. The obligation to set up such Authority is there

1. Bill No.47 of 1982.
2. S.9C introduced by clause 7 of the Bill.

only in industrial establishments employing one hundred or more workmen. The authority is set up with a view to enabling settlement of industrial disputes connected with an individual workman employed in the establishment. The procedure of its functioning and its composition are to be prescribed by Rules.

A dispute over dismissal is an industrial dispute connected with an individual workman. The workman himself can refer the dispute to the Grievance Settlement Authority. The period within which the Authority is to complete the proceedings is not specified. It has to be prescribed by rules. The decision of the Authority over the dispute is not final. The dispute could continue even after the decision is rendered. The restriction is that no reference of the dispute for settlement, adjudication or arbitration shall be made unless the dispute has been referred to the Grievance Settlement Authority and the decision of the Authority is not acceptable to any of the parties to the dispute.[3]

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3. Ibid.

The delay in disposing disputes by Tribunals and Labour Courts prompted the Legislature to fix a time limit for disposal of industrial disputes referred for adjudication.[4] The order of reference may specify the period within which the dispute is to be decided and the award passed. In the case of disputes relating to an individual workman the period so fixed is not to exceed three months. This however is not an invariable rule. The time limit could be extended if both the parties apply for it and the adjudicatory authority considers it expedient to extend the period. The reasons for such extension have to be recorded in writing. The provision of time limit is only directory and not mandatory. The proceedings shall not lapse even if they are not completed within the period specified. The proceedings would not lapse by reason of the death of the workman who is a party to the dispute.[5]

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4. S.10, sub-section (2A) introduced by clause 8 of the Bill.
5. Ibid.

There is provision for payment of full wages to the dismissed workman during pendency of proceedings before High Court or the Supreme Court against an order of reinstatement passed by the Labour Court, Tribunal or National Tribunal. This is another innovation. During the pendency of such proceedings, the employer has to pay full wages if he has not been employed in any establishment during pendency.[6]

A restriction on closure is also sought to be imposed.[7] The employer who intends to close down an industrial undertaking has to apply for permission.[8] This application has to be given to government at least ninety days before the date of intended closure. The reasons for the closure have to be stated in the application. A copy of the application has to be given to workers' representatives. Before taking a decision on the application the government has to make an enquiry. An

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6. S.17B introduced by clause 11 of the Bill.
7. S.25-O substituted by clause 14 of the Bill.
8. Certain undertakings are excluded from the restrictions. They are undertakings set up for the construction of buildings, bridges, roads, canals and the like. Ibid.

opportunity of being heard shall be given to the employer, to the workmen and other persons interested. In deciding the issue the government has to apply its mind to the genuineness and adequacy of the reasons stated for closure, the public interest and other relevant factors. The reasons in support of the decision granting or refusing permission should be recorded in writing. The order is to be communicated to the employer and also to the workmen. The communication to the employer must be within sixty days of the application. If this is not done the consequence is that permission for closure will be deemed to have been granted. The order remains in force for one year. The government has power to review its order either on its own motion or on application by the employer or by any workmen. Alternatively, government may refer the matter for adjudication and the tribunal has to pass the award within thirty days of reference. Closure without permission is illegal. On illegal closure workmen are entitled to all the benefits as if the undertaking had not been closed. The government has power to exempt any undertaking from the requirement of prior permission in

exceptional circumstances like accident or death of the employer. When an undertaking is closed workmen are entitled to compensation.[9]

Another notable change is the introduction of the provision prohibiting unfair labour practices,[10] and providing for penalty for violation.[11] Certain categories of punitive discharge have been enlisted as unfair labour practices.[12]

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9. Ibid.
10. S.25T introduced by clause 16 of the Bill.
11. S.25U introduced by clause 16 of the Bill.
12. Fifth Schedule to the Act introduced by clause 23 of the Bill. Threatening workmen with discharge or dismissal if they join a trade union; threatening a closure if a trade union is organised; discharging or punishing a workman for having urged other workmen to join or organise a trade union; discharging or dismissing a workman for taking part in any legal strike; discharging office bearers or active members of trade union on account of trade union activities; discharging or dismissing workmen by way of victimisation or in colourable exercise of employer's powers, or by falsely implicating workmen in a criminal case on false or concocted evidence, or for patently false reasons, or on untrue or trumped up allegations of absence without leave, or in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste, or for misconduct of a minor or technical character without regard to the nature of the misconduct or past-record thereby leading to disproportionate punishment; or abolition of the work of a regular nature being done by workmen giving such work to contractor as a measure of breaking a strike, have all been declared as unfair labour practices.

A time limit is fixed for disposal of application seeking approval of discharge or dismissal for a misconduct not connected with the pending industrial dispute.[13] Such applications should be disposed of within a period of three months from the date of receipt of such application. However, the authority dealing with the application for approval has been given power to extend the period. The reasons for such extension should be recorded in writing. Proceedings for approval will not lapse even if the period specified expires without the proceedings being completed.[14]

Workman is given the right to complain about violation of the provisions relating to permission or approval during pendency of proceedings before a conciliation officer, Board and arbitrator. This is a welcome change. Complaints about violation of the requirements of permission or approval filed before the conciliation authorities are to be taken into account in mediating, and promoting settlement of, the pending industrial dispute. The arbitrator, Labour Court,

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13. S.33(5) as amended by clause 17 of the Bill.
14. Ibid.

Tribunal or National Tribunal receiving such complaint has to adjudicate on it as if it were an industrial dispute referred to or pending before it and has to pass an award.[15]

Review of the new provisions.

The National Commission on Labour has emphasized the need for a statutory backing for an effective grievance procedure. The Commission recommended that a 'Grievance Committee' should consist of representatives of management and union, and that in cases where a unanimous decision in the grievance is not possible by the Committee there should be provision for referring the matter to an arbitrator. The Commission also recommended that the workman should be given the right to be represented by a co-worker or an officer of the union.[16]

The provisions in the Bill are silent on the composition of, the procedure for reference of disputes to, and the procedure to be followed by the Authority. These are to be

15. S.33A as amended by clause 18 of the Bill.
16. See Report of the National Commission on Labour (1969) pp.348, 349.

prescribed by rules. The Authority is to decide the dispute. The powers of the authority are thus quasi-judicial in nature. It is not a conciliatory body. A domestic forum for rendering a decision on the dispute is created by this provision. This is a salutory step promoting industrial peace and harmony if it works well. The decision of the Authority is not, however, final. The dispute does not come to an end if the decision of the Authority is not acceptable to one of the parties. A reference of the dispute for settlement, adjudication or arbitration is possible in case of disagreement.

The time limit proposed for disposal of adjudication and approval cases by itself cannot avert the evil of delay. It is all the more so when it is open for the authority to extend the period.

The provision for payment of full wages to the workman when an order of reinstatement is challenged by the employer in further proceedings before High Court or Supreme Court is laudable. Unnecessary and protracted litigation against the award ordering reinstatement of a dismissed workman is discouraged by this measure. If the management insists upon

further litigation it is made a costly affair. It has, however, to be pointed out that workmen ordered to be reinstated in an arbitration proceeding are discriminated without reason. The provision does not direct the management to pay full wages in similar circumstances when proceedings are taken before higher courts against awards of arbitrator. Provision for payment of wages in such cases should not be discriminatory.

The restriction on closure help prevent _mala fide_ closure. The absolute right in the employer to close down his undertaking as and when he wishes is sought to be restricted. This will prevent closing down the industrial establishment with a view to punishing workmen engaged in class action. Closure as a punishment for trade union activity has been declared to be an unfair labour practice. The provision on closure has been recast in view of the observations of the Supreme Court in _Excel Wear_ v. _Union of India_[17] striking down section 25-O of the Act relating to closure.

17. A.I.R. 1979 S.C. 25. For a comment on this case see Rajan K.E. Varghese, "Employer's Right to Close down a Business. Can it be Negatived?," [1979] C.U.L.R. pp.245-250.

The old provision which was struck down provided that the employer has to apply for permission to close down the undertaking ninety days in advance. It empowered government to direct the employer not to close down the undertaking if it was satisfied that the reasons for the intended closure were not adequate and sufficient or such closure was prejudicial to the public interest. The Supreme Court held that the right to close down an industrial undertaking is part of the Fundamental Right to carry on business[18] and that the provision restricting closure are unreasonable restrictions on this right.[19] Even though the reasons given by the employers were correct, adequate and sufficient, permission could be refused by government under the old provision if government considered the closure to be against public interest. Government was not bound to state any reasons in support of its order. No appeal was provided against the order of government. The new provision seeks to cure the defects. The provisions for enquiry and reasonable opportunity, for

18. Id. at p.34 per Untwalia, J.
19. Id. at pp.43, 44.

reasons and objectivity in closure decisions and considera-tion of relevant factors including the interests of the public show a leap forward in the law. A review of the order by the government or reference of the dispute for adjudica-tion is provided for. The new provisions seek to control *mala fide* closures only.

The provision prohibiting unfair labour practice is a welcome measure. The National Commission on Labour recommended that the law should enumerate the unfair labour practices and should provide for penalties for committing such practices.[20] This is sought to be achieved by the new provision. The National Commission also suggested that the various items of unfair labour practices listed by the 'Committee on Unfair Labour Practices' set up by the Government of Maharashtra could form a suitable basis for the enumeration of the various unfair labour practices in the Act.[21] All those items have been included in the unfair labour practices enumerated in the

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20. *Op.cit.* 336.
21. *Id.* The items listed by the Maharashtra Committee is given in Annexure II to the Report of the National Commi-ssion. (at pp.340-341).

Fifth Schedule.

The clause seeking to amend S.33A providing a right to workmen to file a complaint against non-observance of the requirements of permission or approval before a conciliation officer, Board and arbitrator attempts to cure the defect in the existing provisions. But the provision does not provide for an adjudication of the question. On the other hand, it only provides that the conciliation officer or Board may take into account the complaint in promoting settlement of the pending dispute. A complaint before the arbitrator is to be disposed of as if it were an industrial dispute referred to it. This modification is certainly an improvement. It gives a right of complaint to the workmen in cases of violation of the requirement of permission or approval during pendency of arbitration proceedings.

Chapter XV

CONCLUSIONS.

Dismissal is the extreme punishment in industrial employment. Its evil effects are manifold. Its social and economic impact is severe.

The employer had a prerogative in the past — the right to hire and fire. Today it is no longer a prerogative. The right to dismiss is subject to many restrictions. This development is not confined to India. It is a phenomenon in almost all democracies.

The Industrial Disputes Act 1947 aims at industrial peace and harmony. The agencies under the Act are designed to promote this paramount objective. Primarily they are entrusted with the responsibilities of resolving industrial disputes. Industrial disputes are collective disputes in general. They reflect the collective grievance of workmen. In the past individual grievances had to transform themselves into collective ones in order to move the dispute resolving

machinery. The workman had to bring the dispute within the range of the law. For this he had to seek support from other workmen or union of workers. This position of surrendering oneself to a group of workers or a union of workers to vindicate one's grievances against dismissal was obviously unsatisfactory. More often than not this exercise created a real hurdle to the dismissed workman in his quest for justice. For upholding the dignity and worth of the individual a change in the law was necessary. Law makers understood the felt needs of the day. They acted. S.2A was introduced. Today, an individual dispute over dismissal is deemed to be an industrial dispute under the Act.

An employee may be either overtly dismissed or covertly sent out. The contract of service may provide for a clause for discharge. Invoking this clause the employer may discharge an employee. He may do so covertly as a punitive measure. Will this clandestine move be dismissal? This is a vexed question. A new test was evolved by the judiciary - the doctrine of 'cause or consequence.' A discharge is dismissal if it has a 'punitive flavour.' If in cause or

consequence the discharge has a punitive element, it is dismissal. The cause for termination and its effect on workmen are both material in deciding the issue. From a realistic and functional angle this test appears to be more suited to protect the interests of workmen.

The restrictions of permission and approval in pendency operate as a safeguard only for the workmen concerned in the dispute. The purpose of the restrictions is to provide a check against victimisation. Workmen who raise industrial disputes may be victimised. Even those workmen who get themselves involved otherwise in such disputes may be victimised. Indubitably the protection should be made available to all workmen who stand against the management in a pending dispute. This makes it imperative to give a wider coverage to the expression 'workmen concerned.'

Application for permissions filed during pendency should not lapse when the pendency ceases. The authority should continue to have jurisdiction in disposing such application even after pendency. The restriction on dismissal should not

disappear the moment the pending dispute is disposed of. Necessarily, it should operate even beyond the pendency.

The limited jurisdiction of the authority in the cases of permission or approval has resulted in duplication of proceedings. A dismissal effected with permission or approval of a tribunal may become again the subject matter of an industrial dispute. It may be referred to adjudication. To avoid this duplication, the tribunal should be given wider jurisdiction. It should have power to examine the merits. It should not cease at this point but should go further. It should have the power to examine the question of punishment. The tribunal should examine the question whether or not the punishment is excessive in the circumstances of a particular case.

When the employer dismisses a workman in violation of the requirements of permission or approval the workman has a remedy. He can file a complaint before the tribunal. This remedy is however limited. It is confined to pendency of proceedings before a Labour Court, Tribunal or National

Tribunal. It is essential that in all cases of violation of the provisions imposing restrictions on dismissal during pendency, the workman aggrieved should have the right to file a complaint before a tribunal. The procedure should be available in cases of pendency before conciliation and arbitration agencies.

The jurisdiction of Tribunal in complaint proceedings should be limited to the examination of the question of violation of the provisions. Now it extends further. The tribunal is to examine not only whether the provisions are violated but also whether the dismissal is justified on merits. This enables the employer to sustain his action of dismissal effected in gross violation of the statutory restrictions. The law needs modification. The employer should be compelled to observe the statutory requirements. This can be done if the Tribunal is authorised to examine only the question of violation of the provisions. When such violation is established the authority should order reinstatement without looking into the merits of the dismissal.

The management should not dismiss a workman without affording him an opportunity to show cause against the proposed action. It is imperative that a domestic enquiry be a condition precedent to dismissal. It is imperative that this enquiry must be properly held. It is imperative that the enquiry officer should be an unbiased person.

Pitted against competent managerial personnel, the workman, often illiterate and ignorant, is seldom equipoised. He should have the right to be represented by competent persons. The right to representation should form part of the rules in domestic enquiries. The opportunity rendered to the workman should be meaningful, effective and proper. It should not be an empty formality.

A mechanism has to be evolved in which domestic enquiries are held not by managerial personnel but by an independent agency. If this is not done a person agreeable to both parties must be the enquiry officer.

Arbitration as a dispute resolving mechanism has an advantage over adjudication. The arbitrator is appointed

on the volition of both parties to the dispute. The recent judicial pronouncement widening the jurisdiction of arbitrator strikes a welcome note. It equates the jurisdiction of arbitrator to that of the tribunal under section 11A of the Act. Thus it does away with an unwarranted, fallacious and illogical difference in jurisdiction between the two. Obviously the judicial pronouncement is an excellent example of judicial creativity and opens a functional approach to the progressive development of the law.

Introduction of Section 11A in the Act is a revolutionary step. This has widened the jurisdiction of Tribunal. The tribunal can now examine the merits of dismissal. The tribunal can also examine whether the punishment is excessive. This new provision is an attempt to bring the law in conformity with international norms. Still a cloud lingers on. The provision does not give a workman aggrieved by the dismissal direct access to the Tribunal. A reference by the government is required before a tribunal gets jurisdiction to adjudicate over the dispute. Rule of law requires absence of arbitrariness, executive prerogative and even of wide

discretionary power. In a country where rule of law is respected access to justice should not depend upon executive discretion. This warrants an amendment of the Act conferring on the dismissed workman the right to appeal to a tribunal.

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