2017 (2) LLJ 434

GUJARAT HIGH COURT

Hon'ble Judges:K.M.Thaker, J.

Gujarat Industrial Mazdoor Sabha Versus Cama Hotels Limited

Special Civil Application No. 10927 of 2004 ; *J.Date :- FEBRUARY 17, 2017

- INDUSTRIAL DISPUTES ACT, 1947 Section - 25F , 25G

Service and Labour - Industrial Disputes Act, 1947 - S. 25F, 25G - misconduct - termination of services - lack of opportunity of hearing - principles of natural justice - Labour Court passed order to pay compensation in lieu of reinstatement - legality and validity - instead of superficially examining the termination order whether the learned Court should have closely examined the termination orders so as to find out actual reason on account of which the company passed the termination orders and to also find out real nature and effect of the order - held, such termination orders could not have passed without granting opportunity of hearing, i.e. without following principles of natural justice - company did not grant opportunity of hearing and defence to the petitioners - termination orders are punitive and fact that services of petitioners were terminated without opportunity of hearing and considering fact that Company had specifically mentioned in pleading and reserved its right and prayed for permission to lead evidence to prove allegation, the said opportunity cannot be denied to company - petitioner company would be entitled to lead evidence to prove charge and allegations and the workmen would be entitled to refute the allegations - therefore, in light of the request made in the written statement, learned Court should have granted opportunity to the company to lead evidence - impugned order set aside - reference case qua the eight petitioners remitted for further consideration and fresh award by the learned Labour Court - petition partly allowed.

Imp.Para: [22] [26] [27]

Cases Referred To :

1. Buckingham Carnatic Co. Ltd. V/s. Workers Of The Co., 1952 0 LAC 490
2. Chartered Bank V/s. Rtered Bank Employees, Union, 1960 3 SCR 441
3. Cooper Engineering Ltd. Case, 1975 0 LabIC(SC) 1441
4. D.K. Yadav V/s. M.A. Industries Limited, 1993 3 SCC 259 : 1993 (2) GLH 174 : 1993 (3) Scale 39 : 1993 (2) LLJ 696 : JT 1993 (3) 617
5. Dhingra s Case, 1958 0 SCR 828
6. Gujarat Steel Tubes Ltd., Etc. V/s. Gujarat Steel Tubes Mazdoor Sabha, AIR 1980 SC 1896
7. Indian Iron And Steel Co. V/s. Their Workmen, AIR 1958 SC 130

8. Murugan Mills, 1965 2 SCR 148

9. Samsher Singh s Case, 1975 1 SCR 814

10. Shambhu Nath Goyal V/s. Bank Of Baroda, AIR 1984 SC 280

11. Shankar Chakravarti V/s. Britannia Biscuit Co. Ltd., AIR 1979 SC 1652

12. U. B. Dutt And Co. V/s. Workmen Of U. B. Dutt And Co., 1962 Supp2 SCR 822

Equivalent Citation(s):

2017 (2) LLJ 434 : 2017 JX(Guj) 504
JUDGMENT :-
K.M.Thaker, J.

1 Heard Mr. Shukla, learned advocate for the petitioner and Mr. Nanavati, learned advocate for the respondent.

2 Initially, the union, which originally sponsored the dispute and conducted reference case before the learned Labour Court, filed this petition. Subsequently, 8 persons, who are concerned claimants / workmen in the reference case, filed an application (i.e. Civil Application No.7733 of 2016) with a request that they may be permitted to join the proceedings of the petition as petitioners No.2 to 9.

2.1 During hearing of the said application, it was also claimed that actually, out of sV/s.everal other original concerned persons / claimants, now only 8 claimants / workmen are prosecuting the matter and the said 8 workmen are the only interested and concerned in the proceedings, whereas other workmen have either abandoned the proceedings or settled the dispute and their claims with the respondent. The said application came to be allowed vide order dated 31.8.2016. In pursuance of the said order dated 31.8.2016, the petition came to be amended and the said applicants have joined the proceedings of present petition as petitioners No. 2 to 9.

3 In present petition, the award dated 20.2.2004 passed by the learned Labour Court at Ahmedabad in Reference (LCA) No.1772 of 1990 is placed under challenge.

3.1 In view of the final direction passed by the learned Labour Court, the respondent company is directed to pay Rs. 15,000/as additional lump sum compensation to petitioner No. 2 - Mr. Bhavarsinh Gemarsinh, petitioner No. 4 - Mr. Sureshbhai Amarbhai, petitioner No. 5 - Mr. Jagdishbhai Premchandbhai, petitioner No. 6 - Mr. Balvantsinh Devisinh and petitioner No.7 - Mr. Manubhai Mohanlal, whereas with regard to other 3 petitioners / claimants, i.e. Mr. Ashok Navdhani (petitioner No.9), Mr. Rajubhai Somabhai (petitioner No.8) and Mr. C.P. Prasad (petitioner No. 8), the respondent is directed to pay Rs. 16,721, Rs. 16,608 and Rs.17,787 respectively. The petitioners are aggrieved by the award and they have prayed that the impugned award may be set aside and the company may be directed to reinstate them with full back wages and other benefits.

4 So far as the factual background is concerned, it has emerged from the record and from the rival submissions by contesting parties that the petitioners herein (workmen concerned in Reference No.1772 of 1990) were employed by present respondent. The respondent is engaged in hotel industry and runs a hotel in Ahmedabad city. The respondent company terminated services of the

claimants - petitioners vide order dated 7.2.1990. The petitioners - claimants felt aggrieved by the said order and that, therefore, they raised industrial dispute. Appropriate Government referred the dispute for adjudication to learned Labour Court at Ahmedabad. The dispute / reference culminated into Reference (LCA) No.1772 of 1990.

4.1 In the said reference case, the union filed statement of claim with the allegation that the company illegally and arbitrarily terminated services of the concerned workmen. It was also alleged that two workmen were dismissed from service, whereas service of other claimants came to be terminated on payment of retrenchment compensation and notice pay. It was also alleged that the company violated principles of natural justice and statutory provisions viz. section 25F and section 25G of the Industrial Disputes Act, 1947 ('the Act' for short) and that the company also committed unfair labour practise and victimization. The union alleged that the services of the other concerned claimants - workmen (i.e. other than the two workmen who came to be dismissed from service) were terminated without conducting domestic enquiry. With such allegation, the workmen demanded that the retrenchment / termination may be set aside and the company should be directed to reinstate the claimants with consequential benefits.

4.2 The reference was opposed and the demands were resisted by the company. The company filed its written statement and denied the allegations raised by the union / workmen in the statement of claim. The company contended, inter alia, that the services of the claimants have been terminated after following procedure prescribed by law inasmuch as the company had forwarded notice pay and retrenchment compensation to the claimants and upon payment of compensation on complying conditions prescribed for retrenchment, the services were discontinued and that, therefore, the company did not commit any illegality and the demands raised by the claimants and the allegations are baseless and unjustified. The company denied the allegations about unfair labour practise and/or victimization. With reference to the two employees, the company claimed that they were dismissed from service on account of misconduct after conducting enquiry and after following proper procedure. The company narrated relevant facts and in light of which the company took the decision to discontinue service of the petitioners - claimants, upon payment of notice pay and retrenchment compensation and that in light of the said factual background, the company denied the allegations that it had arbitrarily and illegally terminated services of the workmen or that, their services were discontinued in violation of principles of natural justice and by committing breach of statutory provisions. The company contended that there is no illegality or arbitrariness in its action and the demand by the workmen do not deserve to be entertained. The company, with such submission, requested the learned Labour Court to reject the reference.

4.3 When the parties completed their pleadings, the learned Labour Court received oral and documentary evidence from the contesting parties. Upon conclusion of evidence by both sides, the learned Labour Court heard rival submissions of the contesting parties.

Thereafter, the learned Labour Court passed impugned award with above mentioned directions.

5 Mr. Shukla, learned advocate for the union / claimants submitted that the learned Labour Court failed to appreciate that the services of the claimants were terminated because the claimants allegedly committed misconduct. According to learned advocate for the petitioners claimants the impugned orders against the claimants are stigmatic and such stigmatic orders are passed in violation of principles of natural justice and therefore, the termination orders are bad in law and

unsustainable. Mr. Shukla, learned advocate for the claimants would further submit that even if it is assumed that the orders are not stigmatic and/or the services of the claimants have not been terminated because they allegedly committed misconduct, then the employer ought to have complied the conditions prescribed under section 25F and Section 25G before terminating services of the claimants and also ought to have followed procedure prescribed by Section 25H, whereas, in present case, the respondent committed breach of said provisions and therefore also the termination of service of the claimants should be considered bad in law. Mr. Shukla, learned advocate for the claimants further contended that the services of the claimants were terminated with a view to breaking union activity. Mr. Shukla, learned advocate for the claimant clarified that ultimately the reference case was prosecuted before the learned Labour Court in respect of only 10 persons inasmuch as other persons (whose services were terminated) had settled the dispute / claim with the employer. He further clarified that as of now, the petition is being pursued by only 8 persons, out of 10 persons inasmuch as Mr. Sanjay Limba and Mr. Surtaram Daudbhai are not prosecuting the challenge against the reference and they are not party to the proceedings of present petition. Differently put, now there are 8 claimants who are prosecuting the petition against the impugned award dated 20.2.2004. Therefore, in light of the said stipulation and declaration by Mr. Shukla, learned advocate, the scope of this petition and challenge against the award is restricted to 8 claimants. Mr. Shukla, learned advocate for the claimants relied on the decisions in case of Gujarat Steel Tubes Ltd v. Gujarat Steel Tubes Mazdoor Sabha [AIR 1980 SC 1896] and in case of D.K. Yadav v. M.A. Industries Limited [(1993) 3 SCC 259].

6 Mr. Nanavati, learned advocate for the respondent company opposed the petition and submissions by learned advocate for the claimants. He submitted that after carefully assessing and appreciating oral as well as documentary evidence available on record, the learned Labour Court has recorded finding of fact and in light of the finding of fact, the learned Labour Court has reached to the conclusion that the company did not commit any illegality and/or breach of any statutory provisions when the company discontinued services of the claimants. Mr. Nanavati, learned advocate for the respondent company submitted that the company discontinued services of the claimants after payment of retrenchment compensation including notice pay, i.e. after complying the conditions prescribed under section 25F and even the learned Labour Court, after evaluating the evidence, has reached to the finding that the company had diligently complied the conditions prescribed under section 25F and there was no breach of any statutory provisions by the respondent company and that, therefore, the contentions by the petitioners - claimants are without merits. Mr. Nanavati, learned advocate for the respondent company further submitted that the allegations by the claimants that their services have been terminated for misconduct and/or that the orders terminating the services are stigmatic orders, are incorrect and unjustified. He submitted that even on plain reading of the orders, it comes out clearly that the company discontinued services of the claimants by way of discharge simpliciter upon payment of retrenchment compensation and the orders are not stigmatic and/or punitive and that, therefore, the submissions on the ground that the company terminated service for misconduct, without conducting enquiry, are unjustified and without any basis, on facts or in law. According to the respondent, there is no error in the award and the petition deserves to be dismissed.

7 I have considered rival submissions and impugned award as well as other material available on record.

8 The respondent company is engaged in hotel industry and runs a hotel in Ahmedabad city. The petitioners and other concerned workmen were engaged in different categories, viz. Waiter, Cook, Hamaal, etc. According to the company the employees from House Keeping Department and some other Departments had resorted to sit-down strike, demonstrations, slogan shouting and such other acts within and outside the hotel premises.

8.1 From the record, it has emerged that the conflict between the company / management and the body of workmen started when one Mr. Ajiz Rajabhai was promoted and appointed as Executive in House Keeping Department which was not liked by other employees of House Keeping Department, more particularly two employees of House Keeping Department. The workmen started noncooperation and disobedience of the instructions by newly appointed Executive of House Keeping Department. The employees of House Keeping Department and other workmen also started disobedience to shift rotation fixed by the Executive of House Keeping Department. Somewhere around 22.4.19990, the company / management was conveyed that the employees will not work as per the shift rotation fixed by the Department Head. The said developments led to charge-sheet against two employees. The said employees were placed under suspension. It appears that on 23.4.1990, the employees of House Keeping Department struck work with the intimation that they will not work until the suspension against two employees is withdrawn. It appears that on 24.4.1990, the employees of first shift joined their duties, however, subsequently, the employees, allegedly, started gathering at one place and they commenced sit-down strike with the demand that the suspension of two employees should be withdrawn. It appears that this demonstration galvanized and led to slogan shouting and other demonstration by the workmen which continued over a period of time so much so that it was extended and continued beyond 31.5.1990 demonstration and slogan shouting were carried on.

8.2 In this backdrop and on account of strike and demonstration, etc. services of original claimants including the petitioner/s came to be terminated. This is evident from the affidavit (in lieu of chief examination) of company's witness filed before the learned Labour Court whereby the witness deposed that:

"Aforesaid activities committed by the workmen were such which would create stigma on the reputation of the hotel, violative of the settlement arrived at on 23.10.89 and yet these workmen had not given simple undertaking demanded by the hotel. I hereby state that those persons who had assembled at the reception counter of the hotel on 6.5.90 and 7.5.90 at different times for slogan shouting and since the attempts to persuade them had failed, undertaking was demanded from them to the effect that they will not indulge into such illegal and serious type of activity and, therefore, the company had been compelled to discharge them by paying them all benefits including retrenchment compensation."

(Emphasis supplied)

8.3 The workman, therefore, raised industrial dispute which was referred for adjudication. The company opposed the reference.

8.4 According to the case set up by the company in its written statement the workmen started agitation and indulged in strike and slogan shouting without and outside the hotel premises in support of the demands of the house keeping workers, viz. that the show cause notices issued

against above referred two workers viz. Smt. Asha Jija and Smt. Sonali Roy and the orders of suspension against them should be withdrawn. According to the company the conduct of the workmen hurt the prestige and business interest of the company and their conduct amounted to breach of settlement dated 23.10.1989.

8.5 During the proceedings before the learned Labour Court, the company examined one Mr. Bhatnagar as its witness. The said witness of the company almost reiterated in his deposition / affidavit in lieu of chief examination, the details mentioned by the company in its written statement and he also mentioned several other facts and details in his deposition / affidavit.

9 From the award, it comes out that the learned Labour Court considered the details and facts mentioned in the company's written statement as well as the deposition / affidavit of the company's witness.

9.1 It is pertinent to note that on reading the award it comes out that on one hand the learned Labour Court based its final decision and direction on its findings and conclusions that (a) the workman had resorted to and participated in strike and demonstrations; (b) the conduct of the claimants amounted to breach of settlement with the union whereby the union had undertaken and agreed that they will not resort to strike and demonstrations and slogan shouting and such other measures; and (c) that the employer / company had asked the claimants to submit undertaking (Bahedhari Patrak), however, the claimants did not submit undertaking; and (d) immediately thereafter the employer passed the orders and terminated services of the claimants.

9.2 On the other hand the learned Labour Court, even after having reached to and having recorded such findings, held that since the company had forwarded retrenchment compensation and one month's salary to the claimants at their residential address and thereby the company had complied conditions prescribed by Section 25F of the Industrial Disputes Act, there was no illegality in company's action. The learned Labour Court also recorded that out of 10 claimants, 5 claimants viz. Mr. Bhavarsinh Gemarsinh, Mr. Sureshbhai Amarbhai, Mr. Jagdishbhai Premchandbhai, Mr. Balvantsinh Devisinh and Mr. Manubhai Mohanlal had accepted the amount of compensation and notice pay, whereas other 5 claimants, i.e. Mr. Ashok Navdhare, Mr. P.D. Prasad, Mr. Sanjay Limba, Mr. Surtaram Daudbhai and Mr. Rajubhai Somabhai did not accept the compensation.

10 On reading the award it also comes out that the learned Labour Court proceeded in the case without addressing the principal contention of the petitioners viz. their services were actually terminated by way of punishment and not by way of discharge simpliciter and the Court decided the case merely on the premise that the company had forwarded compensation and salary in lieu of notice. The learned Labour Court, without addressing and deciding relevant aspects involved in the case, held that there was no illegality in company's action. The learned Labour Court also did not address and did not decide the contention raised by the petitioners viz. that though the company terminated their services on the premise that they had participated in strike, demonstration, slogan shouting, etc. the company did not grant opportunity of hearing and defence and thereby company violated principles of natural justice.

11 In this view of the matter, the question which would arise is: instead of superficially examining the termination order whether the learned Court should have closely examined the termination orders so as to find out actual reason on account of which the company passed the termination

orders and to also find out real nature and effect of the order i.e. whether the termination orders are punitive in nature and effect or they are orders of retrenchment or they are orders of discharge simpliciter, as claimed by the company.

11.1 In this context, it is profitable and appropriate to take into account observation by Hon'ble Apex Court in decision in case of Gujarat Steel Tubes Ltd., etc. v. Gujarat Steel Tubes Mazdoor Sabha and others [AIR 1980 SC 1896] wherein Hon'ble Apex Court has observed, inter alia, that:

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

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

52. If the severance of service is effected, the first condition is fulfilled and if the foundation or causa causans of such severance is the servant's misconduct the second is fulfilled. If the basis or foundation for the order of termination is clearly not turpitudinous or stigmatic or rooted in misconduct or visited with evil pecuniary effects, then the inference of dismissal stands negated and vice versa. These canons run right through the disciplinary branch of master and servant jurisprudence, both under Article 311 and in other cases including workmen under managements. The law cannot be stultified by verbal haberdashery because the court will lift the mask and discover the true face. It is true that decisions of this court and of the High Courts since Dhingra's case (1958 SCR 828) : (AIR 1958 SC 36) have been at times obscure, if cited dehors the full facts. In Samsher Singh's case (1975) 1 SCR 814 at p. 880 : (AIR 1974 SC 2192) the unsatisfactory state of the law was commented upon by one of us, per Krishna Iyer, J., quoting Dr. Tripathi for support:

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

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

parade in different combinations without communicating precise situations or entities in the world of facts'.

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

53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, 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 misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

54. On the contrary, even if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cutback on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situations here.

55. What is decisive is the plain reason for the discharge, not the strategy of a non enquiry or cleaver avoidance of stigmatising epithets. If the basis is not misconduct, the order is saved. In Murugan Mills, (1965) 2 SCR 148 (at pp. 151152) : (AIR 1965 SC 1496) this Court observed:

"The right of the employer to terminate the services of his workman under a standing order, like Clause 17 (a) in the present case, which amounts to a claim "to hire and fire" an employee as the employer pleases and thus completely negative security of service which has been secured to industrial employees through industrial adjudication; came up for consideration before the Labour Appellate Tribunal in Buckingham Carnatic Co. Ltd. v. Workers of the Co. 1952 LAC 490). The matter then came up before this Court also in Chartered Bank v. Chartered Bank Employees' Union (1960) 3 SCR 441: (AIR 1960 SC 919) and the Management of U. B. Dutt and Co. v. workmen of U. B. Dutt and

Co. 1962 Supp (2) SCR 822 : (AIR 1963 SC 411), wherein the view taken by Labour Appellate Tribunal was approved and it was held that even in a case like the present the requirement of bona fides was essential and if the termination of service was a colourable exercise of the power or as a result of victimisation or unfair labour practise the industrial tribunal would have the jurisdiction to intervene and set aside such termination. The form of the order in such a case is not conclusive and the tribunal can go behind the order to find the reasons which led to the order and then consider for itself whether the termination was a colourable exercise of the power or was a result of victimisation or unfair labour practise. If it came to the conclusion that the termination was a colourable exercise of the power or was a result of victimisation or unfair labour practise it would have the jurisdiction to intervene and set aside such termination."

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

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

113. Likewise, the further blot on the strike, of being unjustified, even if true, cuts no ice. Unjustified, let us assume; so what? The real question is, did the individual worker, who was to pay the penalty, actively involve himself in this unjustified misadventure? Or did he merely remain a quiescent

nonworker during the explosive period? Even if he was a passive striker, that did not visit him with the vice of activism in running an unjustified strike. In the absence of proof of being militant participant the punishment may differ. To dismiss a worker, in an economy cursed by massive unemployment, is a draconian measure as a last resort. Rulings of this Court have held that the degree of culpability and the quantum of punishment turn on the level of participation in the unjustified strike. Regrettably, no individualised enquiry has been made by the Arbitrator into this significant component of delinquency. Did any dismissed worker instigate, sabotage orindulge in vandalism or violence?" (Emphasis supplied)

Above quoted observations by Hon'ble Apex Court in the decision in case of Gujarat Steel Tubes Ltd. (supra), it is appropriate to also consider relevant factual backdrop in light of which the case was examined and decided by Hon'ble Apex Court with above quoted observations. In this context, it is appropriate to refer to paragraphs No.26, 29, 31 and 32 of the decision:

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

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

29. Parallel negotiations were going on even while mailed fist manoeuvres were being played up thanks to the basic goodwill and tradition of dispute settlements that existed in this company. Even amidst the clash of arms, bilateral diplomacy has a place in successful industrial relations. The Management and the Sabha allowed the talks to continue which, at any rate, clarified the area of discord. One thing that stood out of these palavers was that both sides affirmed the precondition of negotiations before arbitration over differences although the content, accent and connotation of 'negotiations' varied with each side. No tangible results flowed from these exercises and the inevitable happened on February 21, 1973 when the Management blotted out the entire lot of 853 workmen from the roster, by separate orders of discharge from service, couched in identical terms. The essential terms read thus:

"Your services are hereby terminated by giving you one month's salary in lieu of one month's notice and accordingly you are discharged from service. You should collect immediately from the cashier of the factory your one month's noticepay and due pay, leave entitlements and gratuity, if you are entitled to the same. The payment will be made between 12 noon and 5 p. m.

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

31. ... .

Final Conclusion

The services of all the workmen who are on illegal and unjustified strike since 2711973 should be terminated by way of discharge simpliciter and they should be offered all their legal dues immediately.

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

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

11.2 From above quoted observation by Hon'ble Apex court it comes out that if the facts of the case so demand then the Court not only can but the Court should lift the veil and examine the substance and real effect and nature of the order and the Court, in light of the factual background of the termination order, can find out real reason behind the order and/or foundation of the order and/or the motive of the employer.

12 So as to appreciate relevance and applicability, in present case, of above quoted observations by Hon'ble Apex Court, it is appropriate to take into account the case set up by the company before the learned Labour Court through its written statement and through its witness.

13 In present case it is pertinent to note that most of the findings and conclusions recorded by the learned Labour Court are based on the details stated by the company in its written statement and the details stated by its witness in his deposition.

14 Thus, at this stage, it is appropriate to turn to and to take into account the written statement filed by the company and the evidence of its witness. It would be appropriate to first turn to the written statement filed by the company before learned Labour Court and then to also take into account relevant statement by the Company's witness in his deposition / affidavit dated 27.11.2002. In its written statement, the company averred and stated, inter alia, that:

"(d) The company submits that some of the workers working in the hotel leaving their place of duty, assemble near reception counter i.e. Front office and started indulging in slogan shouting on 0451990 at different hours such as 11.00, 2.00 and 7.00 in the evening on 651990 also they continued slogan shouting at different hours, leaving their place of duties, assembled near reception counter. The language of slogans were also abusive and filthy. In this respect it is submitted that the workers had indulged in the slogan shouting as aforesaid, in support of the demands of the house keeping workers, viz. that the show cause notices issued against the above referred two day workers viz. Smt. Asha Jija and Smt. Sonali Roy and the orders of suspension against them be withdrawn. It is to be noted that the workers had chosen the timing of slogan shouting at the reception counter because the same were peak hours for outgoing and incoming guest customers and, therefore, creation of such disturbances at the said hours would adversely affect the prestige and business

interest of the Company. The company submits that the aforesaid activities of the workers of slogans shouting etc., in a manner that would adversely affect the prestige and business interest of the company was against the terms of settlement dated 23/10/89 ad indicated above, and as stated above they had deliberately chosen such hours as would lead to maximum damage in respect of outgoing and incoming guest customers. The names of the workers who had indulged in the aforesaid activities of slogans shouting on 06/05/90 at different timings mentioned in their respective notices were:

1. Shri Harising P. Rathod

2. Shri Dalbahadoor

3. Shri Vijaybhai

4. Shri Rambahadoor

5. Shri Andrews

6. Shri Ashok Navghre

7. Shri Gurtaram

8. Shri Sanjaybhai

9. Shri Jagdishbhai

10. Shri Dalpatbhai (resigned)

11. Shri Devabhai

12. Shri Natwarsingh

13. Shri Hiraram.

Further Shri Harisinh P. Rathod was the worker who had taken active part in leading and/ or instigating the workers in slogans shouting. The company thought it advisable and proper to terminate immediately the services of Shri Rathod on that very day on account of his taking leading and active part in instigating the workers as aforesaid and in view of his recent past record. All the remaining workers, who had taken part in slogan shouting on 6/5/1991 were intimated that unless and until they gave the undertaking that they would not indulge in slogan shouting that they would not as they had done on the aforesaid day and that they would not leave their respective places of work and would not disturb the working of the hotel, they would not be allowed to enter the hotel premises. It is submitted that the said workers did not come forward for giving undertaking as sought for by the Company.

(e) Next day i.e. on 751990 another batch of workers consisting of the following:

1. Shri Prasad Pathan

2. Shri Vithalbhai D.

3. Shri Laxmanbhai

4. Shri Dashrathbhai

5. Shri Laxmanbhai V.

6. Shri Chandubhai

7. Shri Rajubhai

8. Shri Harkhabhai (Settled)

9. Shri John Peter (")

10. Shri Madonbhai

11. Shri Bhavarsinh

12. Shri Jayram

13. Shri Bipin

14. Shri Ramjag (settled)

15. Shri Mamlesh (resigned)

assembled near the reception counter at different timings and indulged in slogans shouting, some of which were abusive and filthy. The said workers indulged in the slogans shouting twice on that day as mentioned in their notices at different timings during their duty hours. The aforesaid workers were also intimated by the notice on the next day i.e. 8/5/1990 that unless they gave an undertaking to the effect that they would not leave their respective place of work and would not indulge in slogan shouting and would not create disturbances in the working of the hotel, they would not be permitted to enter the hotel premises. It is submitted that the conduct of all the workers, who had indulged in slogan shouting was detrimental to the interest of the hotel and in breach of the terms of settlement dated 23/10/89. It is submitted that the aforesaid workers also did not come forward to give the under taking as sought for by the company."

14.1 The Company had examined one Mr. Bhatnagar as its witness, and he had filed affidavit-in-reply (in lieu of Chief Examination). In addition to the said affidavit in lieu of Chief examination, his further Chief examination was recorded before the Court [which was restricted to the Company's case that it had recorded (videograph) the incident on 05.05.1990, 23.05.90, 31.5.90, 1.06.90]. In his affidavit / deposition the said witness of the company stated, inter alia, in his evidence "Affidavit in lieu of Chief examination" that:

"I hereby further state that certain workmen working in the hotel had on 4.5.90 while leaving the place of their work, shouted slogans at the reception counter at different time means at 11.00 and 2.00 by assembling there. In such a manner, by unauthorisedly leaving their work place, assembled at the reception counter at different time and had continued to shout slogans. In slogan shouting, bad and nasty language was being used. The slogan shouting was being done in respect of the demand of the workmen of the house keeping and for withdrawal of the charges on two females.

Time for such slogan shouting was selected in such a manner that it would be the time of arrival and departure of the customers. I hereby state that the workmen had by leaving the place of their work in an unauthorized manner, committed serious type of misconduct affecting the profession and reputation of the hotel.

I hereby state that on 6.5.90 the workmen who shouted slogans by leaving the place of their work are as under:

(1) Shri Harising P. Rathod

(2) Shri Dalbahadur

(3) Shri Vijaybhai

(4) Shri Ram Bahadur

(5) Shri Andrews

(6) Shri Ashok Navdhare

(7) Shri Surtaram

(8) Shri Sanjaybhai

(9) Shri Jagdishbhai

(10) Shri Dalpatbhai

(11) Shri Devabhai

(12) Shri Natvarsing

(13) Shri Hiraram.

I hereby state that Shri Harising P. Rathod had played lead role in instigating the workmen for slogan shouting. Therefore, considering his such actions activities and his past record, the Hotel had thought it proper to discharge Shri Harising Rathod on the same day. Undertaking in writing was demanded from the workmen who made slogan shouting on 6.5.90 except Harising P. Rathod that they will not participate in the activity of leaving the place of their work and slogan shouting but such simple undertaking demanded as per the settlement dated 23.10.89 was not given by the workmen.

By drawing the attention of the Hon'ble Court, I hereby state that the batch of the below mentioned workmen had on 7.5.90 at different time near reception counter i.e. at the time of arrival and departure of the customers, had shouted slogans in bad nasty language.

(1) Prasad Pothan (2) Vithalbhai D. (3) Laxmanbhai (4) Dashrathbhai (5) Laxmanbhai V. (6) Chandubhai (7) Rajubhai (8) Harkhabhai (9) Jahin Peter (10)Madanbhai (11) Bhavarsing (12) Jayram(13) Bipinbhai (14) Ramjag (15) Kamleshbhai. Aforesaid workmen had been shouting slogans twice a day as stated in the notices issued to them at different time during the course of their duty.

Therefore, by giving notice to the aforesaid workmen dated 8.5.90, it was informed that unless and until they will not stop their activity of leaving the place of their work, participation in the activity of slogan shouting and will not stop activity which may affect the daily routine of the hotel, they will not be allowed to enter in the hotel.

Aforesaid activities committed by the workmen were such which would create stigma on the reputation of the hotel, violative of the settlement arrived at on 23.10.89 and yet these workmen had not given simple undertaking demanded by the hotel.

I hereby state that those persons who had assembled at the reception counter of the hotel on 6.5.90 and 7.5.90 at different times for slogan shouting and since the attempts to persuade them had failed, undertaking was demanded from them to the effect that they will not indulge into such illegal and serious type of activity and, therefore, the company had been compelled to discharge them by paying them all benefits including retrenchment compensation. If at the reception counter, activities of slogan shouting takes place at the time of arrival and departure of the customers, then the business of the hotel would not run and, therefore, keeping in view the interest of all the workmen, such action was required to be taken for the activities done by certain workmen." (Free translation from Gujarati language)

15 Above quoted averments in the company's reply and the statements in the deposition by company's witness are in nature of company's admission about the reason behind the termination of services of the petitioners. The said statements and averments are clear admission by the company and they give out the reasons for which and the circumstances in backdrop of which the services of the petitioners' came to be terminated.

15.1 The said details not only brought out and placed on record the factual background in light of which the company terminated the services of the petitioners but the said details also brought out and disclosed or clarified real motive behind the orders as well as actual reason on account of which the company discontinued the services of the workmen including the petitioners.

16 On this count it is relevant to note that when an employer passes order(s) in backdrop of incidents which are in nature of and/or which amount to misconduct (e.g. strike and demonstration and slogan shouting) and when employer takes such action on ground of alleged participation of workmen in such incidents (i.e. for participation in alleged misconduct) then such orders could be punitive order(s) and when employer passes such order(s) in garb of simple termination, then it may amount to circumventing the requirement to act in consonance with principles of natural justice.

16.1 Ordinarily, such method is adopted to avoid or circumvent the obligation to prove the allegation by following principles of natural justice and/or to shield victimization under pretext of simple termination and/or 'retrenchment'.

16.2 When order(s) terminating service of an employee is preceded by or occasioned on account of alleged incident of acts subversive of discipline or for other misconduct and when such termination order(s) are passed in breach of principle of natural justice, then such termination would give rise to and would justify the need to pierce the veil to find out actual reason behind such order as well as substance and effect of the order and to find out as to whether the termination order, which appear and sound as discharge simpliciter is result of colourable exercise of power.

16.3 Further, having regard to the fact that Section 2(oo) excludes from its purview termination as a penalty, it is all the more important and necessary that the employer should satisfy the Court that the action (i.e. termination of services of the workman) is pure and bona fide discharge simpliciter not connected with and not on account of misconduct and it is not a punitive action in garb of simple discharge.

16.4 When termination of service is effected in backdrop of events or acts of indiscipline and/or for misconduct however without granting opportunity of hearing and the employee comes out with specific allegation that actually he is punished for alleged misconduct and he is dismissed from service in garb of discharge simpliciter or retrenchment then instead of being mechanically influenced by the name or style and colour of the order or being influenced by the form of the order or the jargon used by the employer the learned Court can, rather the Court should, as explained and emphasized by Hon'ble Apex Court in the decision in case of Gujarat Steel Tubes (supra), lift the veil and find out real nature and effect of the order(s) and actual reason behind the order(s).

17 In light of the fact that in present case the service of present petitioners came to be terminated on account of and on the ground (as stated by the company's witness) of alleged participation of the petitioners in strike, demonstration and slogan shouting in and outside the Hotel premises (i.e. for their alleged misconduct) the learned Court should have examined the substance of the order as well as the object, real nature and effect of the order(s) and the learned Court should have addressed the issue (a) whether the orders were punitive in nature and effect (b) whether form of the order should be mechanically accepted or the Court should examine and find out real reason behind the order and the purpose as well as nature and effect of the order (c) whether impugned orders are facade whereby the company, in garb of discharge simpliciter, circumvented proper and necessary procedure for imposing penalty for misconduct and imposed penalty in breach of principles of natural justice.

17.1 Above mentioned factual details involved int eh case of Gujarat Steel Tubes Ltd. (supra) bring out that in present case, like in Gujarat Steel Tubes Ltd. case, also the termination of the petitioners occurred in the backdrop of and on account of or on ground of strike, demonstration and slogan shouting and alleged participation of the petitioners in said activities.

17.2 Above quoted observations by Hon'ble Apex Court and the factual background (mentioned by the company in its written statement filed before the learned Labour Court) in which the orders against the claimants came to be passed and the deposition / affidavit by company's witness provided ample justification for the learned Labour Court to pierce the veil and examine the substance of termination order and actual reason for the action of discontinuing services of the petitioners, instead of deciding the case by merely considering the form of the order and the linguistic facade created by the company by clothing the termination orders in name and style of discharge simpliciter. The learned Court should have addressed the issue whether orders passed against the claimants are punitive in nature and in effect or they are order of simple discharge as claimed by the company and whether the impugned orders are unsustainable on ground of breach of principles of natural justice.

17.3 Unfortunately, the learned Labour Court overlooked or ignored these aspects and neither examined the matter in light of said observation, nor appreciated the evidence on that count and

the Court has not considered and not recorded any finding and conclusion with regard to said allegations.

18 In present case following picture has emerged from the facts and details which are mentioned in the written statement and those stated by company's witness:

(a) according to the case of the company, the employees, including present claimants, had started agitation to protest against disciplinary action initiated / taken against two employees and the said agitation developed into sitdown strike as well as demonstration and slogan shouting within and outside the premises of the hotel;

(b) according to the case setup by the company before the learned Labour Court (in its written statement), the company clearly and specifically contended that the workmen, including present petitioners, had resorted to and had indulged into sit-down strike, demonstration and slogan shouting and that the said conduct not only amounted to misconduct but also amounted to breach of previous settlement;

(c) in the written statement as well as in the deposition / affidavit by the company's witness, names of present petitioners have been specifically mentioned as the persons who resorted to and indulged into above mentioned activities and it is also claimed that despite instructions by the company, they did not submit the undertaking;

(d) in that background and due to such incident, the company / management demanded written undertaking from the employees, including present petitioners, however, the petitioners did not submit the undertaking demanded by the company;

(e) in such factual background the company terminated services of present petitioners (who had, according to the case of the company, indulged into and participated in above mentioned activities) without granting any opportunity of hearing and without conducting domestic enquiry;

(f) the company, around that time, terminated services of other workmen also;

(g) the written statement / reply filed by the company and the deposition / affidavit by the company's witness also emphasized that the foundation as well as reason and ground for termination of services of the claimants was their alleged participation in strike, demonstration and slogan shouting (i.e. misconduct).

19 The factual backdrop mentioned by the company in its reply and through its witness has brought out that (a) according to the company the petitioners had indulged in the acts of indiscipline and they had, thereby, committed misconduct; (b) the company has, through its reply and through its witness, admitted that:

"The said workers indulged in the slogans shouting twice on that day as mentioned in their notices at different timings during their duty hours. The aforesaid workers were also intimated by the notice on the next day i.e. 8/5/1990 that unless they gave an undertaking to the effect that they would not leave their respective place of work and would not indulge in slogan shouting and would not create disturbances in the working of the hotel, they would not be permitted to enter the hotel premises. It is submitted that the conduct of all the workers, who had indulged in slogan shouting was

detrimental to the interest of the hotel and in breach of the terms of settlement dated 23/10/89. It is submitted that the aforesaid workers also did not come forward to give the under taking as sought for by the company."

"I hereby state that those persons who had assembled at the reception counter of the hotel on 6.5.90 and 7.5.90 at different times for slogan shouting and since the attempts to persuade them had failed, undertaking was demanded from them to the effect that they will not indulge into such illegal and serious type of activity and, therefore, the company had been compelled to discharge them by paying them all benefits including retrenchment compensation."

(c) all of these aspects establish that the company terminated services of the petitioners because the petitioners had, allegedly, indulged in the acts of indiscipline and misconduct. So far as the company is concerned this is undisputed, rather admitted, position; (d) the foundation of the action and the cause for the orders was the incident and alleged conduct of the workmen and (e) the motive of the company was to put end to the service of the persons who allegedly participated in the strike and in demonstration and slogan shouting, however, the Company did not grant opportunity of hearing and defence to the petitioners and it did not comply principles of natural justice but, in colourable exercise of power, it passed impugned orders in name and style of 'discharge simpliciter'.

20 The findings and observations recorded by learned Labour Court in the award brings out that the learned Court has believed and accepted the case of the employer that the petitioners had indulged in and had participated in strike, demonstration and slogan shouting and that the company terminated their service on account of their such conduct. This is evident from the observations in the award, more particularly from the observation by the Court that (a) the workman had resorted to and participated in strike and demonstrations; (b) the conduct of the claimants amounted to breach of settlement with the union whereby the union had undertaken and agreed that they will not resort to strike and demonstrations and slogan shouting and such other measures; and (c) that the employer / company had asked the claimants to submit undertaking (Bahedhari Patrak), however, the claimants did not submit undertaking; and (d) the employer, therefore, passed the orders and terminated services of the petitioners.

21 From the said details and facts stated by the company through its witness and its reply, it becomes clear that the services of the petitioners came to be terminated in light of the incidents and on account of alleged participation of the petitioners in the said incidents. Meaning thereby the orders passed by the company are punitive. Though the company covered and dressed up the orders in garb of 'discharge simpliciter' the factual backdrop on account of which the company passed the orders stares in the face of the company and the said facts and details establish that the company terminated services of the petitioners by way of punishment for their alleged participation in above mentioned acts of indiscipline. The said narration of factual backdrop establishes that the action of the company against the petitioners, i.e. terminating their services, was taken and effected by way of punishment.

22 Therefore, such termination orders could not have passed without granting opportunity of hearing, i.e. without following principles of natural justice. Undisputedly, the company did not grant opportunity of hearing and defence to the petitioners. Therefore, the termination orders are invalid and are not legally sustainable.

23 At this stage, the question would arise before the Court as to whether the said conclusion by the Court would put end to and would close the matter and whether the consequences for illegal termination would automatically follow.

24 Ordinarily, that would be the position. However, it is appropriate at this stage to take into account the observation made in case of Shankar Chakravarti v. Britannia Biscuit Co. Ltd. and another [AIR 1979 SC 1652], wherein the Hon'ble Apex Court has observed that:

"34. Having given our most anxious consideration to the question raised before us, and minutely examining the decision in Cooper Engineering Ltd. case (1975 Lab IC 1441) (SC) 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. Cooper Engineering Ltd. case merely specifies the stage at which such opportunity is to be given, if sought. It is both the right and abligation 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 by specific request. If such an opportunity is sought in the course of the proceeding the Industrial Tribunal or the Labour Court, as the case may be, should grant the opportunity to lead additional evidence to substantiate the charges. 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 motu to call upon the employer to adduce additional evidence to substantiate the charges."

24.1 Reference can be had to the observations by Hon'ble Apex Court in case of Shambhu Nath Goyal v. Bank of Baroda and others [AIR 1984 SC 280], wherein Hon'ble Apex Court has observed, inter alia, that:

"It is now well-settled by a number of decisions of this Court that where an employer has failed to make an enquiry before dismissing or discharging a workman it is open to him to justify the action, before, the Tribunal by leading all relevant evidence before it. In such a case the employer would not have the benefit which he had in cases where domestic inquires have been held. The entire matter would be open before the tribunal which will have jurisdiction not only to go into the limited questions open to a tribunal where domestic inquiry has been properly held (see Indian Iron and Steel Co. v. Their Workmen (1958 SCR 667) : (AIR 1958 SC 130); but also to satisfy itself on the fact adduced before it by the employer whether the dismissal or discharge was justified ..... A defective enquiry in our opinion stands on the same footing as no enquiry and in either case the tribunal would have jurisdiction to go into the facts and the employer would have to satisfy the tribunal that on facts the order of dismissal or discharge was proper."

... ...

We think that the application of the management to seek the permission of the Labour Court or Industrial Tribunal for availing the right to adduce further evidence to substantiate the charge or charges framed against the workmen referred to in the above passage is the application which may be filed by the management during the pendency of its application made before the Labour Court or

Industrial Tribunal seeking its permission under Section 33 of the Industrial Disputes Act. 1947 to take a certain action or grant approval of the action taken by it. The management is made aware of the workman's contention regarding the defect in the domestic enquiry by the written statement of defence filed by him in the application filed by the management under Section 33 of the Act. Then, if the management chooses to exercise its right it must make up its mind at the earliest stage and file the application for that purpose without any unreasonable delay. But when the question arises in a reference under Section 10 of the Act after the workman had been punished pursuant to a finding of guilt recorded against him in the domestic enquiry there is no question of the management filing any application for permission to lead further evidence in support of the charge or charges framed against the workman, for the defect in the domestic enquiry is pointed out by the workman in his written claim statement filed in the Labour Court or Industrial Tribunal after the reference had been received and the management has the opportunity to look into that statement before it files its written statement of defence in the enquiry before the Labour Court or Industrial Tribunal and could make the request for the opportunity in the written statement itself. If it does not choose to do so at that stage it cannot be allowed to do it at any later stage of the proceedings by filing any application for the purpose which may result in delay which may lead to wrecking the morale of the workman and compel him to surrender which he may not otherwise do."

24.2 It emerges from above quoted observations that in case involving penal termination if employer seeks, at first opportunity (i.e. in the written statement), leave to adduce evidence to prove the allegations / charge, then the Court should grant such permission.

25 In this background the respondent relied on the request made in the written statement to support its submission that at first available opportunity it had sought permission and reserved its right to lead evidence and prove allegation and charge against the petitioners before the Court viz. if the Court comes to the conclusion that termination of claimant's service was punitive.

25.1 In this context, it is necessary to take into account the submission by the Company in Para 7(f) and (g) of the Company's written statement which reads thus:

"7 (f). The company submits that as all the efforts of the company to persuade the aforesaid workers who had indulged in slogan shouting on 06.05.1990 and 7.5.1990 to give the undertakings to the effect that they would hot indulge in such activities which were detrimental to the interest of the hotel and in breach of settlement dated 23/10/89, it became necessary for the company to terminate their services by way of discharge simpliciter n payment of all their dues including notice pay, retrenchment compensation as per the provisions of the Industrial Disputes Act, 1947 .

(g) The company craves leave to lead necessary evidence to justify the aforesaid actions of terminating the services of the above mentioned workers and it is prayed that the Hon'ble Court may be pleased to grant leave for the same."

25.2 At the same time, it is also be appropriate to take into account below quoted submission in the Company's submission and in written statement:

"However, for any reason the Hon'ble Court is pleased to take a view that the inquiry conducted against the aforesaid two lady workers was not proper, fair and as per requirement of principles of natural justice or vitiated or defective for any reason whatsoever and/ or that the said two lady

workers were not given proper opportunity for defence then in that event the Company desires to lead necessary evidence before the Hon'ble Court for providing the allegations of misconducts alleged against them and the Hon'ble Court may be pleased to grant such an opportunity to the Company."

26 Having regard to the fact that the termination orders are punitive and the fact that the services of the petitioners were terminated without opportunity of hearing and considering the fact that the Company had specifically mentioned in the pleading and reserved its right and prayed for permission to lead evidence to prove the allegation, the said opportunity cannot be denied to the company. The petitioner company would be entitled to lead evidence to prove the charge and allegations and the workmen would be entitled to refute the allegations. In view of above discussed aspects and facts of present case and in light of the request made in the written statement the learned Court should have granted opportunity to the company to lead evidence.

27 Above discussed aspects are not taken into account by the learned Labour Court while passing impugned award. The learned Labour Court failed to undertake the said process. Therefore, the resultant effect of this position is that the reference case qua the eight petitioners is required to be remanded for further consideration and fresh award by the learned Labour Court. Therefore, following order is passed:

(a) The impugned award dated 20.2.2004 qua eight petitioners is set aside;

(b) The reference case being Reference (LCA) No.1772 of 1990 shall, qua eight petitioners, stand remanded to learned Labour Court who shall decide the case afresh on merits after granting opportunity to both sides to lead evidence and put forward further submissions;

(c) It is clarified that this order and direction is restricted only qua present eight petitioners viz. Mr. Bhavarsinh Gemarsinh Chundavath; jubhai alias Sureshbhai Somabhai Solanki, Mr. Sureshbhai Amrabhai Solanki, Mr. Jagdish Premchandbhai Makwana, Mr. Balvantsingh Devisingh Chauhan, Mr. Manubhai Mohanlal Solanki, Mr. Pothen Pailo Christian (C.P. Prasad), Mr. Ashok Mukaji Navghare and not in respect of all other claimants who were before the learned Labour Court but, at different stage of proceedings either, walked out from the proceedings before the learned Labour Court or abandoned the proceedings or settled their individual cases with the employer;

(d) This order and direction would also not be applicable to Mr. Sanjay Limba and Mr. Surtaram Daudbhai who, though part of the group of ten claimants, have not joined present proceeding and either settled the dispute with the employer or have abandoned the proceedings after the learned Labour Court passed impugned award. With the aforesaid clarifications, directions and observations, the petition is partly allowed.

Rule is made absolute to the aforesaid extent.