(1986) 06 CAL CK 0005

Calcutta High Court

Case No: F. M. A. No. 417 of 1983

Wimco Sramik Union		APPELLANT
	Vs	
Seventh Industrial Tribunal and Others		RESPONDENT

Date of Decision: June 3, 1986

Acts Referred:

- Industrial Disputes Act, 1947 - Section 10, 11A, 33(2)(b)

Citation: 91 CWN 672

Hon'ble Judges: Mahitosh Majumdar, J; M.N. Roy, J

Bench: Division Bench

Advocate: Sunit Krishna Dutta, for the Appellant; D. Paul and P.K. Bhowmick for the Respondent No. 2 and Amar Nath Banerjee and Miss Das for the Respondent Nos. 2 and 3, for the Respondent

Final Decision: Dismissed

Judgement

M.N. Roy, J.

This appeal from original order is directed against the judgment and order dated 23rd February 1982 passed in Civil Order No. 1238 (W) of 1982 by G. N. Ray, J. By the said determinations, the learned Judge has upheld the decision of the Seventh Industrial Tribunal, in a reference made u/s 10 to the effect as to whether the dismissal of Shri Sudev Ghosh was justified and to what relief, if any, was he entitled, made u/s 10 of the Industrial Disputes Act, 1947 (hereinafter referred to as the said Act). The Respondent M/s. Wimco Limited is admittedly a company registered under the Indian Companies Act, 1956 and the same has been stated to be a flourishing one, having monopoly in the manufacture of matches. It has further been stated that the conditions of service and terms of employment of the workmen of the Respondent Company''s factory, were and are governed by a set of Standing Orders certified under the Industrial Employment (Standing Orders) Act, 1946, apart from various settlements, arrived at bipartite and tripartite level, between the

Respondent Company and their workmen represented by the petitioner Union. The employee concerned viz. Shri Sudeb Ghosh was also claimed to be a member of the petitioner Union and it has been stated that he was employed as a Fitter in the W.S.P. Department in the factory of the Respondent Company, since 1950. It has also been alleged that the employee concerned was not only a very old one but also was faithful and sincere to the Respondent Company and he had spotless record for about 26 years. On 7th November 1976, when according to him a concocted incident and a purported charge sheet, purportedly under clauses 52(d) and 52(p) of the Standing Orders was issued under the signature of the Regional Manager of the Respondent Company.

2. The charge-sheet, which is in Annexure-A to the writ petition and was dated 7th November 1976, was issued on the allegations as indicated below :

(1) that on Friday, the 5th November 1976 at about 3-20 p.m. while you were waiting the workers'' Search Gate to go outside the factory after the end of your duty, your movement was found very suspicious, you were immediately challenged by Sri Ramjanam Singh and enquired about your name. In reply you impersonalized yourself as Monoranjan Das and suddenly started retreating from the Search Gate hurriedly towards the factory.

(2) Sri Ramjanam Singh immediately chased you accompanied with Watchman Sri Surendra Nath Jana, Brass No.37 and Sri Mali Tham Bhadur, Brass No. 13 when you throw a brass spare machine parts from your possession under the notice board in front of General Office. Sri Ramjanam Singh immediately picket up the said Brass spare machine parts and reported the incident to Sri S. Chatterjee, Dy. Plant Service Manager and

(3) On suspicion you were also asked to open your drawer thereafter which you opened yourself in presence of Sri P. K. Chanda, Foreman of W.S.P. Deptt., Sri P. R. Mukherjee, Astt. Manager BH Deptt., Sri Ramjanam Singh Asstt. Security Supervisor and Sri Mall Tham Bahadur, Watchmen where one Stainless steel sheet, size 2'' x 1'', which is company''s property were found kept concealed inside your said drawer. On being asked by Sri Chatterjee as to why you kept the said stainless steel sheet in your drawer you could not give any satisfactory explanation. It is therefore obvious that you kept this stainless steel sheet concealed in your drawer and took this spare machine parts with you referred to above on 5.11.76 with ulterior motive to remove the same from the factory for personal gain and the same was said to be issued on the basis of a report by the Assistant Security'' Supervisor Shri Ramjanam Singh. It has also been alleged in the said charge-sheet, that the acts as mentioned and were claimed to have been committed by the employee concerned, amounted to misconduct under the clauses of the Standing Orders as mentioned above. In fact, clause 52(d) of the Standing Orders relates to theft and dishonesty in connection with Company''s property and clause 52(p) relates to impersonation. By the said charge-sheet the employee concerned was asked to give his reply within 48 hours

from the receipt of the same and it would appear that the said employee gave his reply denying inter alia amongst others, all the allegations. It has been stated that such explanation was not accepted by the Respondent Company and without duly considering the said reply they had fixed a departmental enquiry and appointed Shri D. P. Guha, Personnel Manager of the Company, to be the Enquiry Officer.

3. The enquiry as indicated hereinbefore, was claimed by the employee concerned to have been initiated without any basis or justification and he also claimed the report which was the. basis of the enquiry to be a baseless one. In fact, it was claimed by the employee concerned that the Regional Manager of the Respondent Company was not the proper authority under the Standing Orders, but by his letter dated 16th December, 1976, he directed his dismissal from the service of the Respondent-Company with immediate effect. It was also alleged by the employee concerned that certified Standing Orders of the Respondent: Company inter alia provides that before resorting to the extreme punishment of dismissal the Manager was to take into account the gravity of the misconduct, the previous record of the workman concerned, if any, and also any other extenuating or aggravating circumstances, but in the instant case, those factors were not at all considered. In fact, it has been stated that the Respondent Company as a matter of policy, for some time past, was intending to retire or to get rid of their employees concerned, who during the course of their service had completed 55 years instead of 58 years, by dismissal on various concocted charges and sham enquiry and according to the employee concerned, perhaps in his case, the Respondent Company took recourse to such unfair labour practice. It was also claimed by the employee concerned that the Regional Manager of the Respondent Company was not the competent authority under the certified Standing Orders as he was neither the Manager nor the Factory Manager as contemplated in the said Standing Orders, in passing the order of dismissal against him and furthermore the said Regional Manager, failed and neglected to consider various clauses of the concerned Standing Orders and more particularly the fact that the employee concerned had to his credit a clean record of 26 years of service with the Respondent company.

4. It would appear that at the relevant time a dispute was pending between the Respondent Company and its workmen represented by the petitioner Union and as such over the dismissal of the employee concerned in this case, an application u/s 33(2)(b) of the said Act was filed, seeking the necessary approval of the action as taken, before the Respondent Seventh Industrial Tribunal, who by an order of 24th May, 1978, on an application filed by or on behalf of the workmen concerned held inter alia-that since the dispute as involved could easily be gone into duly and he appropriately u/s 10 of the said Act, on which a reference was made gave its approval to the action of the Respondent Company in dismissing the employee concerned and in that manner, on concession, disposed of the concerned application u/s 33(2)(b). Thereafter, a reference u/s 10 in the manner and form as indicated hereinbefore, was made by the appropriate Government, for adjudication

before the Respondent Tribunal on 6th September, 1980.

5. In their written statement the petitioner Union claimed and contended that the employee concerned, was their member, he had an unblemished record of service with the Respondent Company since 1950 and that upon a purported charge-sheet, bringing in some false allegations against him, the Respondent Company, on the basis of a pretended domestic enquiry dismissed the employee concerned and that too without appropriately considering his past service record and gravity of the misconduct as alleged. It was claimed that the punishment that has been imposed and that too, for the charges as levelled, was highly disproportionate. The Respondent Company on the other hand claimed that the dismissal of the employee concerned was for proved misconduct after a fair, proper and bonafide domestic enquiry. They claimed that the validity of such enquiry was impeached and duly determined in favour of the Respondent company u/s 33(2)(b) of the said Act and that being the position, the said dispute cannot be question any further. It was also stated that the employee concerned was charge-sheeted for committing misconduct and after a proper domestic enquiry and on the findings of the concerned enquiry or on consideration of all the facts as required under the law, the employee concerned was dismissed.

6. It was the allegation of the petitioner Union that the employee concerned was really not placed in a position of trust or responsibility and such stand was never taken by the Respondent Company in their, pleadings or at any stage, although they had ultimately averred or raised the plea of loss of confidence. Admittedly, after this, parties lead their evidence and the learned lawyer appearing for the petitioner Union, on the question of the preliminary issue as to the validity of the domestic enquiry, conceded before the Respondent Tribunal that the validity of the enquiry could not be gone into in the instant proceeding as the same was already enquired in a proceedings u/s 33(2)(b) and on such concession, which was claimed by the petitioner Union, to have been given by their learned Advocate on misconception, it has been stated that the Respondent Tribunal by his order No. 10 dated 11th June 1981, disposed of the same on consent of the parties. It was also claimed by the petitioner Union that by its very nature, the proceedings u/s 33(2)(b) and those u/s 10 of the said Act were and are different and cannot by any stretch of imagination, be equated with each other.

7. On merits, the petitioner Union contended that assuming the workmen concerned was guilty of the alleged misconduct, nevertheless, considering his past record for long 26 years of service with the Respondent Company and the gravity of the misconduct, the punishment of dismissal was harsh and highly disprotionate since the alleged misconduct involved only a sum of Rs. 150/- and such being the position, according to the petitioner Union, there was victimozation which called for an interference by the Respondent Tribunal u/s 11A of the said Act, which deals with the powers of Labour Courts, Tribunals and National Tribunals, to give appropriate

relief in'' case of discharge or dismissal, of workmen. The said provisions of the 11A of the said Act was inserted with effect from 15th December 1971, by section 3 of Act 45 of 1971 and admittedly the said provisions had or has no retrospective operation and the same not only deals with procedural matters, but also has an effect of altering law laid down by the Supreme Court in. this respect by abridging the rights of the employer and the same has also given power to the, authority as mentioned for the first time to differ both on a finding of misconduct arrived at by as well as with the punishment imposed by an employer. In fact, the above would be the position in terms of the determinations of the Supreme Court in the case of The Workmen of M/s. Firestone Tyre and Rubber India (P) Ltd. v. The Management & Ors., 1973 Lab. I.C. 351 which is also reported in The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, . The said determination, apart from other observations as would be indicated hereinafter, has observed that section 11A, is prospective in its operation. That when, it applies only to disputes referred to an adjudication on or after the date of its coming into force (15.12.1971).

8. It was claimed by the petitioner Union that the Respondent Tribunal, without appreciating the arguments on the point of law as advanced before it in the facts of the case or without properly applying its mind to the materials on record, by the Award dated 24th August 1981 helding inter alia amongest others that "I find no reason to invoke by jurisdiction u/s 11A of the Industrial Disputes Act and answer the issue of justification of dismissal of Shri Sudev Ghosh in the affirmative".

9. It was the contention of the petitioner Union before the learned Trial Judge that section 11A of the Industrial Disputes Act has for the first time clothed the Respondent Tribunal with powers to interfere with the punishment or dismissal meted out to the workman by the management upon satisfaction and also to give any other relief to the workman, including the imposing of lesser punishment having to regard to the circumstances and the materials on record and such discretion as given to the Respondent Tribunal under the statute, was not judicially used or exercised in the instant case by the Tribunal, in making the impugned Award and it was also contended that while making the concerned Award, the Respondent Tribunal did not apply its mind to the facts and circumstances of the case or the submissions as made before him. We feel that the observations of the Respondent Tribunal to the following effect :

I have perused the evidence on record - both oral and documentary. I have heard the Id. Advocate with rapt attention and perused the decision that have been cited from the bar. I do not find any charge of victimisation or unfair labour practice against the company within the four corners of the pleadings as made out by the union. Mere allegation, vague suggestion and insinuations in the pleading are not enough. Such pleading, if taken, by any party, is required to be proved by him by cogent and direct evidence. In the instant case the evidence on behalf of the union

is practically nil. The commission of theft of company''s property cannot be lightly ignored. The charge that was made against the workman concerned is of serious nature. I have persued the documentary evidence on record with meticulous care. The workman concerned was given all possible opportunities to defend himself before the enquiry officer. Commission of theft is preceded by a deliberate plan hatched up within one''s mind in cool temperment, and act is committed in order to carry-out the plan once formed in one''s mind. The valuation of the property that is actually stolen away by a particular person cannot be held to be a sufficient ground for considering the case in a lenient manner. Since the workman concerned was held to have been guilty of the charges levelled against him for commission of theft of company''s property and since no question has been raised as regards validity of the domestic enquiry, I find no reason to invoke my jurisdiction u/s 11A of the I. D. Act, should be incorporated in our determination as those findings ware the real basis on which the Award by the Respondent Tribunal was made.

10. The learned Trial Judge, on consideration of the determination of the Respondent Tribunal has not made any interference, since he was of the view that the Respondent Tribunal had adverted to the question of inflicting lesser punishment in the facts of the case and was of the view that lenient view should not be taken. That being the position, the learned Trial Judge, made no interference with such discretion as exercised by the Respondent Tribunal.

11. Mr. Dutt, appearing in support of the appeal submitted that the learned Judge failed to appreciate and consider that the Award as impeached, suffered from non-exercise of jurisdiction duly, as the Respondent Tribunal. failed, neglected and refused to enter into the question of the validity of the domestic enquiry or to adjudge in the validity of the same on the basis of the concession made by the learned lawyer for the petitioner Union, more particularly when, such concessions made by the lawyer concerned, was not only improper but the same was manifestly without jurisdiction, authority and competence. The punishment, or for the offences for which the employee concerned was penalised being too harsh and excessive, it was contended that u/s 11A of the said Act, the Respondent Tribunal, in due and appropriate use of power and jurisdiction, should have interferred with the same and should have also prescribed a lesser punishment, since the employee concerned had an unblemished record of service under the Respondent Company for about 26 years. In fact, it was contended that in not acting in the manner as indicated above, the Respondent tribunal has caused a grave miscarriage of justice and the impugned Award was void and illegal, apart from being irregular, since in making the same, the Respondent Tribunal has not entered or arrived at an independent satisfaction on the question of the proof of the offences as alleged or that of the validity of the domestic enquiry, particularly when, the charge of theft as brought, was claimed by the employee concerned to be false, frivolous, concocted and fictitious.

12. Dr. Pal, appearing for the Respondent Company and opposing the appeal, first placed the portions of the Award or the finding made by the Respondent Tribunal, the relevant particulars whereof have been indicated hereinbefore and further pointed out that the Respondent Tribunal was actually justified in making the impugned Award, since firstly, the fact of theft has not been denied, secondly the case under consideration was not one of victimisation, thirdly, there has been no violation of the principles of natural justice or any lack of opportunity, so far the employee concerned was involved and fourthly, the findings of the Respondent Tribunal were not perverse. Dr. Pal contended that really the scope of enquiry before or by the Respondent Tribunal was, whether the punishment as imposed on the employee concerned, on the proved facts, was justified and offence if any, was established and in fact, which was established, was enough to justify the Award as made. It was Dr. Pal''s specific, contention that this case would not come of fall in any sensitive zone and in fact it is not case falling under any sensitive zone, which would empower or authorise this Court to interfere with the Award as made.

13. In the case of Ruston Hornsby (P) Ltd. v. T. B. Kadam, AIR 1975 SC 2023, the Supreme Court, in a case of dismissal of a workman, who was a watchman, as a result of domestic enquiry on the basis of charges of dishonesty in connection with Company''s property, has observed that the charges, if proved, would deserve dismissal. Dr. Pal. on a specific reference to those observations submitted that the charges in this case viz. attempt to steel, which were proved for or in the manner as indicated hereinbefore, would bring this case within the mischief of the above determinations of the Supreme Court and such specified dishonesty of attempting to steel Company''s property, having been proved and established before the Respondent Tribunal, there would be no justification in making any interference with the Award.

14. While on the question of the scope of section 11A of the said Act, Dr. Pal referred to the determinations in the case of Sri Gopalakrishna Mills Pvt. Ltd. Vs. Labour Court and Another, , which decision has considered, if length of service would be a factor to be taken into consideration and when past conduct of an employee would be of relevant consideration in the matter of determining the quantum of punishment and what criteria is to be followed. In fact, on the facts of that case it has been observed that motive of the workman in doing the act attributed to him may not be quite material. Once refusal to do his work and disobedience to the orders of the superiors are admitted or proved, seriousness of the charges will not be mitigated with reference to the motive with which the workman behaved. It has also been observed that merely because the workman, who has admittedly seriously misconducted himself cannot, by giving an undertaking not to do so in future or by saying that he had no intention to cause lass to management, escape the penal consequences of such misconduct. Apart from holding that whether an undertaking not to commit misconduct in future or whether the workman had any notice in committing the misconduct to be considered with reference to the gravity of

charges levelled against him and not de hors them. In that it has also been indicated that the length of service of a workman is not relevant in the imposition of the punishment for proved misconduct. If a workman has to be in a longer, service, he cannot be taken to be licensed to commit misconduct.

15. Apart from the above, while on his submissions on section 11A of the said Act, Dr. Pal also relied on the determinations in the case of Sarabhai M. Chemicals (S.M. Chemicals and Electronics) Limited Vs. M.S. Ajmere and Another, , where the Division Bench of the Bombay High Court, amongst others had occasion to decide what is indiscipline and insubordination and when and where Labour Court can interfere with punishment u/s 11A. In fact, on the question, whether disciplinary action can be taken for a solitary act of insubordination or indiscipline and what are the powers of the Labour Court u/s 11A, it has been observed that any person who is disobedient becomes insubordinate and his conduct amounts to insubordination. Therefore, where the workman disobeys a lawful order, he can be said To be guilty of insubordination and it needs hardly to be stared that a misconduct of disobedience and insubordination would also amount to indiscipline. It was further been observed that There is no difficulty in holding, on the findings in that case by the Labour Court, that it was part of the workman''s duty to type the delivery chalans and his declining to do so would clearly amount to insubordination and indiscipline. It has also been observed in that case that it cannot be said that the disciplinary proceedings for misconduct can never be taken against an employee on a charge of insubordination arising out of solitary instance of a lawful order and that for sustaining such charge of insubordination several repeated instances of disobedience are necessary. The workman in that case which was put forward on behalf of the workman that some other punishments should have been awarded in lieu of dismissal, was held, would not entitle the Labour Court to interfere with the order of punishment as pointed in the determinations in Hind Construction and Engineering Co. Ltd. Vs. Their Workmen, , the Tribunal is not required to consider the propriety or adequacy of punishment or whether the same is excessive or too server. It has been observed that, in case the punishment is shocking by disproportionate, regard being had to the particular conduct of the workman, the test is that no reasonable employer will ever impose such punishment to like circumstances and then alone, the Tribunal would be entitled to treat the punishment as amounting to victimization or unfair labour practice. Thereafter, Dr. Pal referred to the case of The State of Punjab & Anr. v. Surat Singh & Anr., 1985 Lab. I.C. 10. Where the termination of service of a conductor of State Road Ways, on allegation of fraud was in issue and on a question with regard to the power of the Labour Court, it has been observed that it is well settled that u/s 11A, the Labour Court has power to alter punishment only in those cases where the punishment is so harsh as to suggest victimization. In that case, the Labour Court had observed that the enquiry as held against the conductor was fair and proper and that after enquiry the workman was found guilty of the charge of defrauding the

management to the tune of Rs.7.45. However, the Labour Court found that the order of dismissal was harsh justifying invocation of section 11A to award lesser punishment and the same, ordered reinstatement of the workman with continuity of service and 50% of back wages. On such facts, it has been held that in the impugned award there is no finding that the punishment was suggested for victimization and the said award was singularly silent, not only on that respect but also on the broader aspect as to whether it would be prudent to put the workman back to the same employment involving day to day handling of money. It has also been observed that the Labour Court having found the workman to have indulged in fraud, reinstatement justifiably could not be ordered to the post of a conductor and if the punishment was to be mitigated for being harsh so as to suggest victimization, the same could have been brought down to other milder forms. A reference was also made by Dr. Pal to. the case of New Victoria Mills Co. Ltd. Vs. Presiding Officer, Labour Court and Others, , where while dealing with misconduct by theft of property by an employee it has been observed that the offence of theft, wherever theft is committed by an employee, shows that the employee is dishonest and his reliability as a worker may be affected for that reason.

16. In that case, the employee concerned was a sweeper and it has also been observed that such a defect as mentioned above in case'' of sweeper, who necessarily has access to residential premises of the employer and opportunities of committing theft is particularly dangerous. Therefore, a Workman employed as a sweeper, who has either been proved to have committed a theft or to have so acted as to facilitate or aid theft may very well be guilty of such misconduct as to merit dismissal. All that has to be shown is that the alleged misconduct affects the competence of the employee for the particular kind of work he does. The misconduct for which an employee can be dismissed need not necessarily have been committed in the course of his employment. It is enough if it is of such a nature as to affect his suitability for a particular employment. It is then reasonably connected with the question whether the workman can be retained in that employment and it has also been held the absence of any evidence about the ownership of the property alleged to have been stolen could not make the decision of the domestic tribunal perverse. Apart from the above, further reference was made to the case of J. K. Cotton Spinning and Weaving Co. Ltd. v. Its workman., 1965 (II) L.L.J. 153, where also the workman concerned was charged with the theft of Company''s property and was convicted for such offence in a Criminal Court and pending appeal by him against the conviction, a departmental enquiry was conducted by the employer, where he refused, to participate. On the basis of available evidence, the Enquiry Officer found the employee concerned guilty of the charges as levelled and subsequently, the employee concerned got an acquittal in his appeal, the Industrial Tribunal on the basis of the evidence as available before it so also those, as available in the Criminal proceedings, held the domestic enquiry to be fair and proper. The Supreme Court, in that case while considering as to what

should be the approach of the Tribunal in such a case has indicated that it has been pointed out time and again that an industrial tribunal to which a dispute arising from dismissal of an industrial employee 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 the workman was not actuated by any ulterior motive and where the principles of natural justice have not been infringed. It is beyond the powers of ah 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. The industrial tribunal, while adjudicating upon an industrial dispute referred to it, does not possess the power of renewing the evidence adduced before the domestic tribunal or of taking fresh evidence adduced before it except in the limited class of cases as referred to in the decision in Mckenzie and Co. Ltd. Vs. Its Workmen and Others, . In the case under consideration, it has further been observed that in the instant case the employee was dismissed for having been found guilty of the charge of theft levelled against him. The enquiry was conducted after the concerned workman was convicted of the offence of theft by a Criminal Court. As the concerned workman refused to participate in the domestic enquiry, was evidence ex parte and the enquiry officer, after considering the evidence on record before him, found the concerned workman guilty of the charge levelled against him. He did not rely on the conviction of the worker by the criminal Court for corning to the conclusion against the concerned workman. Subsequently the worker was acquitted in appeal. The industrial tribunal, considering the evidence on record and the evidence adduced before it, came to the conclusion that the charge was not made out. No defect in the domestic enquiry was found. The industrial tribunal held that the domestic enquiry was based on the conviction of the workman by the criminal Court which was set aside in appeal and hence no value could be attached to the finding arrived at the enquiry. The award was confirmed in appeal by the Labour Appellate Tribunal, apart from holding that the appeal by special leave preferred by the Company against the award of the Labour Appellate Tribunal was allowed. It was held that there was nothing in the report of the enquiry officer to show that he was influenced by the conviction of the workman by the criminal Court.

17. It is true that the said Act is a beneficial price of legislation for the workman at large and as such the provisions of the same including those of section 11A should receive, as observed in the case of The Workmen of M/s. Firestone Tyre and Rubber Co. of India (P) Ltd. v. The Management & Ors., (supra) a beneficent rule of construction and as far as possible, such construction should be given, which would

not only keep and. maintain the policy and object of the said Act, but would also give beneficial- assistance to the workmen concerned and further keeping in mind in terms of the determination of the Supreme Court decision as indicated above, when an Act is intended to improve and safeguard the service condition of the employees, the same should be liberally interpreted and that too according to its plain meaning and without doing violance to the language used by the Legislature. The case as cited above has also laid down that even where the dismissal of a workman by an employer on ground of misconduct is preceded by a proper and valid domestic enquiry, section 11A how empowers the Labour Court or Tribunal to reappraise the evidence and examine the correctness of the finding threat. Section 11A further empowers it to interfere with the punishment and alter the same and the mere fact that no enquiry or defective enquiry has been held by the employer does not by itself render the dismissal of workman illegal. The right of the employer to adduce evidence justifying his action for the first time in such a case is not taken away by the proviso to section 11A.

18. The terms and language of section 11A of the said Act clearly indicates that the authorities as mentioned therein, may assume jurisdiction only when the order of discharge or dismissal has been passed as a measure of disciplinary action and the said section as observed in the case of Rallis India Limited, Madras Vs. K. Natarajan and Another, , would not come into operation with respect to cases of termination of service under any contract, i.e. discharge simplicitor or retrenchment since such termination or termination as a measure of retrenchment, would not be punishment. In terms of the determinations in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, , only in cases of discharge or dismissal by way of punishment u/s 11A of the said Act, vests the discretionary jurisdiction with the authorities as mentioned in the section to direct reinstatement with or without an terms or conditions or to vary the punishment as the circumstances of a case may warrant and furthermore, the said section applies only to the punishment or discharge or dismissal and does not apply to other minor punishments e.g. warming fine, withholding of increment, demotion and suspension etc. Its has been observed that in cases where the workmen challenge the discharge simplicitor on the ground that in fact such discharge order was penal in nature, the authorities concerned can go behind the order to sec the substance of the challenge rather than form and, if satisfied that the discharge in fact was by way of punishment calculable to some act of misconduct, they will have the jurisdiction to adjudicate upon the dispute u/s 11A.

19. The expression "misconduct" has not admittedly been defined either in the said Act or in the Industrial Employment (Standing Orders) Act. 1946 and the Dictionary meaning of the said words are improper behaviour; intentional wrong doing or deliberate violation of a rule of standard of behaviour. There is no doubt that in a relationship arising out of industrial employment, a workman has certain expressed or implied obligations towards the employer and any conduct, on his part which is

inconsistent with the faithful discharge of his duties towards the employer, would be a misconduct, apart from, the fact that any breach, of the express or implied duties of the employee concerned, towards the employer, therefore, unless the same is of a trifling nature, would constitute an act of misconduct. It cannot also be disputed that in industrial adjudication, the said word "misconduct" has acquired a specific meaning and the same cannot mean inefficiency or slackness and would mean something far more positive and certainly deliberate. The charge of "misconduct", therefore, should thus be of some positive Act or of conduct, which would be quite inconsistent with the express or implied terms of relationship of the employee to the employer and has observed in the case of N. M. Appama v. Badri Das (1963) I L.L.J. 684, what is misconduct, will certainly depend upon the circumstances of each case and it can be said without any doubt that deliberate disobedience of any order of superior authority would be one basis of misconduct. To find out whether an act would be an act of misconduct, several tests are required to be considered and fulfilled and they are, if the act-(1) is inconsistent with the fulfilment of the express or implied conditions of service or (II) is direct link with the general relationship of an employer or employee and (III) has a direct connection with the contentment or comfort of the men at work or has a material bearing on the smooth and efficient working of the concern and if the answer to any of the criteria, as mentioned above is in the affirmative, the act in question would certainly amount to an act of misconduct. As observed in the case of Tata Oil Mills Co. Ltd. Vs. Its Workmen, in any case, the act of misconduct must have some relationship with the employees duties to the employer. In other words, there must be some rational connection with the employment of the employee with the employer and we feel that if such an act is condoned or, is found to have some relationship to the affairs of the establishment, having a tendency to affect or disturb the peace good order of the establishment or be subversive or indisciplited in any direct or proximate sense, such act would amount to misconduct and that being the position, when in the instant case, the employee concerned was really guilty of stealing Company''s property, his or actions can certainly to deemed to be an act of misconduct and while on this point we agree with Dr. Pal''s submissions that unless such an employee of the present nature, who was found guilty of such misconduct of stealing mentioned above, is allowed to proceed with or such admitted finding of the guilty conduct is allowed to executed by a lesser punishment u/s 11A of the said Act, it would be very difficult for the employer to maintain discipline in the organisation. Such being the fact and when on the basis of the findings of the Respondent Tribunal it is abundantly clear that the Respondent Company in the instant case, took necessary steps in terms of their certified Standing Orders, there was no violation of any natural justice or lack of any opportunity to the employee concerned and over and above that there was concession made by the learned lawyer appearing for and on behalf of the employee concerned on the point as indicated hereinbefore, the Respondent Tribunal was justified in making the impugned award. We observe so and we are also of the view that although section 11 A of the said Act gives some discretionary

powers to the authorities as mentioned therein, to interfere with the punishment as imposed in some cases, but such discretionary power is not absolute and the same must be used and exercised reasonably, justly and sparingly and in a proper case or in such a case, where the employee concerned has not been found to be guilty of the offence charged under the certified Standing Orders and there has been no violation of any principles of natural justice and fundamentals of fair play. It is also true and as observed in the case of Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others, that the Standing Orders of a Company only describe certain cases of misconduct and the same cannot be exhaustive of all the steps of this conduct which a workman may commit. We have in other words observed earlier that even though a conduct as alleged may not come within the specific terms of misconduct under a Standing Orders, the same would still be misconduct in a special fact''s of the case and which may not be possible to condone by the employer, here in this case, as indicated earlier, we feel that if such an employee or of such character, of the employee concern as involved in this case and who was found guilty of stealing Company''s materials, is allowed to continue with his work or is exonerated of the charges by giving a lesser punishment, that would not be fair to the employer and that too for the purpose of maintaining discipline by them. In this case, of course the act as complained of against the employee concerned was a misconduct under the Certified Standing Orders of the Company and more particularly under clauses 52(d) and 52(p). The offence as alleged against the employee concerned, in our view, would expose him to penal consequences under the Standing Orders of the Respondent Company and considering the gravity of the offence, we also feel that the order of dismissal as was passed, was not unjustified. We further feel that the offence of theft, as in this case, which was committed by the employee concerned, showed that he was dishonest and his suitability and reliability to continue in service may be affected by that reason and would have a bearing on his contract of service and as such, in terms of the observations in J.K. Cotton Spinning and Weaving Company Ltd. v. Its Workmen, (supra) the said offence would be a good ground for dismissing the employee concerned from the service. While on the point of theft, we also feel that in inflicting the punishment for the misconduct of theft, the nature of theft will have an important bearing and in this case, on the basis of the offence as committed, the punishment as imposed was neither harsh nor improper or unwarranted. Such being the position, the submissions of Mr. Dutt that the Respondent Tribunal, while making the impugned Award, should have considered the long period of unblamished service rendered by the employee concerned to his employer, had no merit in terms of the determinations in Ruston Hornsly (P) Ltd- v. T. B. Kadam (supra), even an attempt to steal the employer''s property on the part of the workman was a serious charge and deserve nothing short of the dismissal.

20. We further feel and held that relief u/s 11A of the said Act could only be granted when the order of discharge or dismissal as complained of is found to be unjustified or illegal and not when the authorities as mentioned in the section find, those

orders to be justified and as such in view of the findings of the Respondent Tribunal, the determination as impeached cannot be said to be unjustified or unauthorised and that too when the order in the instant case has been.found to be valid, justified and not malafide. Since the Award in the instant case has established with due and cogent reasons that the charges against the delinquent employee were proved, we find no justification to interfere with the impugned Award. We should also keep it on record that in addition to his submissions as indicated hereinbefore, Mr. Dutt produced the copy of the order No. 17 dated 28th March 1978 as made by the Respondent Tribunal in the concerned section 33(2)(b) proceedings under the said Act, apart from producing a copy of the order No. 18 dated 24th May, 1978. From the first order as mentioned above, it would appear that in section 33(2)(b) proceedings the workman concerned claimed that the departmental proceedings or enquiry was nothing but a sham one and the same was intended only to find him guilty and to dismissed him. It would also appear from the order in question that Respondent Tribunal effectively perused the record of proceedings and found nothing therein on the basis whereof the allegations of the employee concerned could be established or justified. The other order-sheet specifically shows that a petition was filed by and on behalf of the employee concerned considering that the action taken against him should be approved. Apart from the above, on a reference to the impugned Award it also appeared before us that the Respondent Tribunal went through the service record (Ext. 10) of the employee concerned and in coming to the decision, placed reliance on the said service record. Such and above being the position, it cannot be said that there was non application of mind by the Respondent Tribunal or that the relevant materials and facts were either over-looked or were not taken into consideration by the said Tribunal.

21. Dr. Pal further advanced his submission on the conduct of the concerned employee. He submitted that the Court cannot overlook the enormity of the charges levelled against the employee concerned and the Tribunal, after duly and properly considering the said charges and active consideration of the materials on record passed an Award. Dr. Pal also raised the plea that the petitioner-union cannot be allowed to take up a different plea before this Hon''ble Court nor the Court would allow the said petitioner union to take recourse to a stand, contrary to the admitted position, as would appear from the order No. 18. During the course of submissions, Dr. Pal also emphasised that the other charges that the concerned employee kept one stainless steel sheet size 2'' x 1'' concealed in the drawer and impersonalized himself as Monoranjan Das, in view of the facts what would appear from the records of the case, warrant the imposition of such punishment, as is inflicted upon him by the Company.

22. In his reply, Dr. Dutt also referred to the case of R. M. Parmer v. Gujarat Electricity Board, Baroda, 1982 (2) Lab. I.C. 1031, while dealing with section 11A of the said Act or on the interpretation thereof has recorded that an employee facing a proceeding which could result in his economic death has a right to contest and

resist it. He is not bound to admit the charges or to plead guilty in order to enable him to invoke the jurisdiction of the Court u/s 11A to reduce the penalty. No such condition was engrafted by the Legislature and the Labour Court cannot amend the stature by introducing such a rider. That he is ultimately found guilty at the departmental proceeding does not necessarily mean that he was in fact guilty. But even if he is in fact guilty of the charges levelled against him he has the right to invoke the powers of the Labour Court u/s 11A for reduction of the penalty. The prevision itself postulates a finding of guilt warranting a punishment recorded after a contest and empowers the Labour Court to reduce the punishment all the same. Claiming reducing of penalty is his right and not something for which the employee has to beg of the Labour Court on bended knees and folded hands, apart from holding that by insisting that the dismissed workman had to plead, guilty for exercise of power u/s 11 A, the Labour Court had abdicted its jurisdiction altogether and scuttled the purpose and policy of the Legislature. The Labour Court was required to consider the question of reduction of penalty in accordance with law, having regard to the facts and circumstances of the case and uninfluenced by the circumstance that the concerned workman did not plead guilty. In that case, while on the subject, it has also been stated that certain relevant factors should be borne in mind, in exercising powers u/s 11 A, which was brought on the Statute Book by section 3 of the Industrial Disputes (Amendment) Act, 1971. It has also been recorded that such provisions were brought on the Statute Book on account of the felt needs of the time as is evident from clauses 2 and 3 of the statement of objects and reasons as appearing from the Extraordinary issues of the Gazette of India (Part-II), section 2page 564. In that case it has further been observed that taking of a petty article by a work in a moment of weakness when he yields to a temptation, does not call for an extreme penalty of dismissal from service. More particularity when, he does not held a sensitive post of trust. It has also been observed that a worker brought up and living in an atmosphere of property and want when faced with temptation, ought not to but may yield to it in a moment of weakness. Apart from holding that it cannot be approved, but it can certainly be understood particularly in an age when even the rich commit economic offences to get richer and do so by and large with impunity. The case under consideration has also indicated that a penalty of removal from service is therefore not called for when a poor worker yields to a ''momentary temptation and commits an offence which often passes, under the honourable name of kleptomania when committed by the rich. On the basis of this determination, Mr. Dutt claimed that since the employee concerned committed the office of theft in this case which was perhaps attributed for circumstances beyond his control and perhaps he had committed such offence in a moment of weakness, the Respondent Tribunal should have given due weight and consideration for the same. The view as expressed in the above determination, we feel, cannot be considered to an absolute finding in a case of the present nature of theft and the circumstances as indicated therein, may apply to such sensitive zones of Trade-union activities. That being the position, with due respect we feel

that the observation as indicated hereinbefore, would not apply in this case. Then Mr. Dutt referred to the case of Gujarat State Road Transport Corporation, Ahmedabad v. Jamnadas Becharbhai, 1983 Lab. I. C. 1349, where also section 11A of the said Act was considered and construed. In that case, a bus conductor was found collecting money without issuing any ticket and it has been observed that, where a But conductor employee by the State Road Transport Corporation had collected fare, pocketed the same, and robbed the National Exchequer, and the State Road Transport Corporation dismissed him for those acts the Labour Court would not be justified in ordering reinstatement of the conductor. The Labour Court could, depending upon facts and circumstances of the case and of the offender direct that he should be absorbed in the workshop section or some other similar post which does not invoice daily handling of money. That must, be left to the Labour Court. And the Labour Court would have to Decide the issue having regard to the facts and circumstances of each case and the demands of the situation in the context of each matter. The determinations as above, were made on the basis of the other Division Bench judgment of the Gujarat High Court in R. N. Parmer''s case (supra.).'' In this case it has further been observed that be it administration of criminal law or the exercise of disciplinary jurisdiction in departmental proceedings, punishment is not and cannot be the ''end'' in itself. Punishment for the sake of punishment cannot be the moto and the Court has indicated the factors which must be considered while deliberating upon the jurisprudential dimension. Mr. Dutt also submitted that victimization in a case of the present nature, was not required to be pleaded and infact, on the basis of the evidence as available, the Respondent Tribunal should have no difficulty in arriving at a conclusion that the employee concerned was sought to victimised by the Company.

23. Thereafter, Mr. Dutt referred to the case of M/s. Throne''s (P) Ltd. & Anr. v. State of West Bengal & Ors., 1980 (2) C.L.J. 448. While dealing with the question of concession and it was submitted on the basis of the determination as mentioned above, that the concession as made by the learned lawyer of the Respondent employee would not bind the employee, on whose behalf the necessary concession was made. At this stage, we should refer to the petition as filed before the Respondent Tribunal by or on behalf of the workman concerned and a xerox copy whereof was filed in Court by Mr. Dutt. We direct the said copy to be kept in the record. On a" reference to that application, it would appear that the concession by the learned lawyer concerned, was made not only on the point of law but also on question of fact and as such, we feel that the determination as referred to by Mr. Dutt would be distinguishable in the facts of this case and would not really help the employee concerned. For the views which we have indicated earlier, we are of the view that there is no merit in this appeal and as such, the same should be dismissed and we order accordingly.

The appeal is thus dismissed. There will be no order as to costs.

Mahitosh Majumdar, J.

I agree.