(2001) 12 DEL CK 0138

Delhi High Court

Case No: CWP No. 3651 of 2000 and CM No. 5538 of 2000

Delhi Transport Corporation		APPELLANT
	Vs	
Sardar Singh and Another		RESPONDENT

Date of Decision: Dec. 21, 2001

Acts Referred:

- Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 - Regulation 14(10)
- Industrial Disputes (Amendment) Act, 1964 - Section 18
- Industrial Disputes (Amendment) Act, 1982 - Section 17
- Industrial Disputes (Appellate Tribunal) Act, 1950 - Section 22, 34
- Industrial Disputes (Central) Rules, 1957 - Rule 10
- Industrial Disputes Act, 1947 - Section 10, 11

Hon'ble Judges: Vikramajit Sen, J

Bench: Single Bench

Advocate: Vibhu Shankar, for the Appellant; B.S. Charya, for the Respondent

Judgement

Vikramajit Sen, J.

In these petitions the Delhi Transport Corporation (for short ''DTC'') has challenged sundry Orders of the Industrial Tribunal, Delhi, not granting its ''approval'' u/s 33(2)(b) of the Industrial Disputes Act, 1947 (Hereinafter referred to as ''the I.D. Act) to dismissal orders of various workmen passed by the DTC. The practice invariably adopted by the Tribunal was that on receiving the application under this Section, it had mechanically framed a preliminary issue as to validity of the Enquiry, and called upon the Management to lead its evidence. It is not in dispute that the Enquiry Report/records always accompanied the ''approval application'' and that the authenticity of the Report/records had not been challenged by the Workmen. The workmen had instead assailed the validity of the Enquiry. The two questions which have to be addressed is whether firstly this procedure followed by the Tribunal is in

accordance with law and secondly, does the ''treating of the absence of the workmen as on leave without pay exonerate and extinguish the absence''.

2. In CWP 3651/2000, which is symptomatic of the legal controversy in these petitions, the DTC had by its letter dated 28.11.1988 charge-sheeted the workman for having been absent from duty for 171 days during the period form 1.11.1987 to 31.10.1988 and had called for his Explanation as to why disciplinary action under para 15(2) of the Delhi Road Transport Authority (Conditions of Appointment & Service) Regulations, 1952 read with Delhi Transport Laws (Amendment) Act, 1971 (hereinafter referred to as ''the Standing Orders'') should not be taken. In his reply it was explained by the workman that he was suffering from continued illness and, Therefore, the Charge-Sheet should be withdrawn. An Enquiry was held in which the workman neither asked any question of the Management''s witnesses nor produced any of his own. The Report records that on a perusal of the leave record, the workman had availed 138 days leave without pay and 33 days leave without pay on medical grounds. The Enquiry Officer was of the opinion that the workman did not take interest in the work of the Corporation and that Para 19(h) of the Standing Orders was applicable. Thereupon by memorandum dated 18.1.1989 the Depot Manager indicated to the workman that it was proposed to remove him from the services of the DTC he should show-cause against such action being taken against him. The workman asked for an inspection of documents by his letter dated 30.1.1989 but simultaneously represented that the "report of the enquiry officer is quite illegal, mala fide and based on conjectures and as such the said report must not be relied upon''; thus, it is manifest that he did not deny the authenticity of the records filed by the DTC along with its approval application. The DTC removed the workman from service, by the Order dated 6.7.1990 of the Depot Manager. On the same day the Industrial Tribunal was moved u/s 33(2)(b) of the I.D. Act, and one month''s wages were tendered to the workman. The records of the Enquiry accompanied this application. In his Reply the workman has vaguely stated, inter alia, that the enquiry had not been conducted properly; that he was not allowed to defend his case; that he was retrenched illegally; but it does not appear that he had contended even at this stage that since his absence had been recorded/regularized in the records of the DTC as ''leave without pay'' the contemplated action was illegal. On 9.12.1991 the following preliminary issue was framed-

"Whether the applicant held a legal and valid enquiry against the respondent according to the principles of natural justice. OPA."

3. The following impugned Order was thereafter passed on 9.2.1996.

"Present Shri Vivek Kalra, Advocate for the applicant.

Shri R.N. Guglani, Advocate for the respondent.

Respondent in person.

Mr. Kalra has today filed his letter of authority for the applicant and he also seeks an adjournment of evidence as its evidence has not come. Time is also sought for making payment of previous costs which were imposed on 9.2.1994 when it had sought adjournment for its evidence. Request for adjournment is opposed. In this case preliminary issue regarding the validity of the enquiry was applicant has not able to conclude its evidence. Even the costs imposed way back in Feb., 1994 have not been sanctioned by the applicant, as stated by Shri Kalra. Mr. Kalra is not in a position to give ny reason as to why the witness has not come today. In all these circumstances, request for adjournment made by Mr. Kalra is rejected. Evidence of the applicant on the preliminary issue framed on 9.12.91 is closed. In view of this counsel for the respondent states that he does not want to give any evidence on this issue and both the counsel say in these circumstances they have nothing more to say on the issue of enquiry.

Since the onus of proof of preliminary issue which was on the plea of the applicant that it had held a legal and valid enquiry against the respondent was on the applicant and it having failed to lead any evidence in support thereof, the onus of proof does not stand discharged. Consequently the preliminary issue framed on 9.12.91 is decided against the applicant and the enquiry relied upon by its stands vitiated.

The applicant had in its application u/s 33(2)(b) of I.D. Act also sought an opportunity for adducing evidence before this tribunal to prove the alleged misconduct in the event of enquiry being vitiated and Therefore, it has to be given an opportunity for that purpose.

Accordingly, following issues are framed:-

1. Whether the respondent committed misconduct as mentioned in charge sheet dated 28.11.88?

2. Relief.

Put up for evidence of the applicant by way of affidavits on 27.5.96.

I.T-II."

4. Since it is the contention of the DTC that the procedure adopted by the Tribunal was contrary to law. The obvious question that arises is why it has not assailed the Order immediately and had instead taken opportunities to leave evidence. Learned counsel for the DTC had submitted that this was impermissible in view of the pronouncements of the Hon''ble Supreme Court in The Cooper Engineering Limited Vs. Shri P.P. Mundhe, in which it was made "clear that there will be no justification for any party to stall final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage." It must at once be pointed out that

in this case a Reference under the Industrial Disputes Act had been made; and for that short reason the observations may not be relevant to applications u/s 33(2)(b) of the I.D. Act where the scope of jural scrutiny is comparatively superficial, inasmuch as the Court is expected only to satisfy itself of the existence of a prima facie case, and the absence of perversity or victimisation. However, these observations of the Apex Court indubitably appear to be relevant to the argument put forward by learned counsel for the DTC. Very recently, the Constitution Bench of the Hon''ble Supreme Court has opined in Karnataka State Road Transport Corpn. Vs. Smt. Lakshmidevamma and Another, , that even in Section 33(2)(b) of the I.D. Act the request for leading evidence if made in the pleading should be allowed and if not so done would thereafter be permitted only if the Court thinks it proper. The prevailing view thus is that evidence can be called for in approval applications also. In these circumstances it is not fatal that the DTC did not immediately assail the Orders dated 9.2.1996, and instead availed of opportunities to lead evidence. Perhaps the Apex Court would consider, in the future, that it would be advantageous for an expeditious disposal of disputes, to carve out an exception to the Cooper Engineering rule thereby permitting the High Courts to entertain petitions in which the contention is that the proceedings should have culminated at that stage. As exemplified in these petitions the dispute have dragged on for a decade, needlessly.

5. The second impugned order was passed by the Industrial Tribunal on 8.10.1997 and the approval application was dismissed. The order reads as follows:-

"Order

Delhi Transport Corporation filed this application u/s 33(2)(b) of the Industrial Disputes Act, 1947 seeking approval of its decision taken on 6.7.90 for the removal of the respondent for its service for having availed of 171 days leave without pay which according to it amounted to misconduct. It was alleged that this decision was taken after holding proper enquiry against the respondent.

The respondent contested the approval application inter alias on the grounds that no proper enquiry was held and also that availing of leave without pay was no misconduct. In view of the fact that the respondent had challenged the validity of the enquiry against him a preliminary issue regarding the validity of enquiry was framed. Vide my order dated 9.2.96 that issue was decided against the applicant-DTC. However in view of the fact that applicant had also made a prayer for an opportunity to adduce evidence in this tribunal to establish the alleged misconduct of the respondent in the even of preliminary issue being decided against it, I framed the following additional issues:-

1. Whether the respondent committed misconduct as mentioned in charge sheet dated 28.11.88?

2. Relief.

The applicant filed an affidavit of one Shri Musadhi Lal, who was the Assistant in charge in the Nangloi Depot at the relevant time, to be read as his evidence.

The case was fixed today i.e. 8.10.97 for cross examination of this witness. However, A.R. of the respondent Shri R.N. Guglani, Advocate, submitted that there was no point in cross examining the said witness of the management and further that on the basis of the averments made in the approval application as well as the documents filed by the applicant itself the entire approval application can be reject ed straightaway. The learned counsel for DTC also has no objection if the entire matter was heard today itself. Accordingly counsel for both parties where heard.

The respondent was admittedly ordered to be removed from service form DTC for having availed of leave without pay for 171 days from 1.11.87 to 31.10.88. Accordingly to the applicant that depicted lack of interest in the work of the Corporation on the part of the respondent. Learned counsel for the respondent however, submitted that availing of leave without pay is no misconduct at all and Therefore the decision of the application taken for the removal of the respondent from its service for his having availed of leave without pay cannot be accorded approval by this tribunal as has been prayed for by the applicant in the present approval application. Learned Counsel for the DTC simply stated that if an employee takes excessive leave without pay it is quite clear that he has no interest in the work of his employers and consequently he could be removed from service.

I am in full agreement with the submission of the learned counsel for the respondent that availing of leave by an employee cannot be said to be misconduct at all, attracting any punishment much less that of removal from service.

That leave without pay is no misconduct was also held to be so by Andhra Pradesh High Court in a Judgment G. Papaiah Vs. Assistant Director, Medical Services, Secunderabad, and following that judgment same view was later on taken in a decision reported as 1978 All ISLJ 614.

For the foregoing reasons, the prayer of the applicant/DTC for according approval to the removal of the respondent from service cannot be accepted. Consequently the approval application is hereby dismissed.

Dated-8.10.97

Sd/-

(P.K.Bhasin)

P.O: Industrial Tribunal No.II."

6. It is in this sequential background that the law is to be applied. Section 33 of the I.D. Act is reproduced below, and its first and second sub-sections are placed in juxtaposition for convenient comparison, in order to highlight the intrinsic distinctions between them. The first sub-section of Section 33 contemplates prior

permission whereas the second sub-section of Section 33 postulates post-facto approval. The exercise in each would thus essentially be different.

"33. Conditions of service, etc. to remain unchanged under certain circumstances during pendency of proceedings-

(1) During the pendency (2) During the pendency of any of any conciliation

(emphasis supplied)

Section 33 (3) of the I.D. Act which reads as under, highlights the differences between the two foregoing sub-section and places ''protected workman'' no parity with all other workmen who are sought to be penalised for some alleged misconduct connected with the general and pending dispute. Inasmuch as it takes pains to specifically state that it is notwithstanding any thing contained in the foregoing sub-section [i.e. Section 33(2)], it emphasises and brings to the fora the differences between Section 33(2) and Sections 33(1) and 33(3) of the I.D. Act. It may Therefore be a misnomer and an illogicality to paint all three sub-sections with the same procedural brush. Accordingly, while it may be appropriate to let in evidence in the first and third sub-sections where ''permission'' has to be given, it may be superfluous in the second sub-section where approval is to be accorded, which is not an interactive exercise.

"Section 33(3) Notwithstanding anything contained in Sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

Save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.- For the purposes of this sub-section, a "protected workman", in relation too an establishment, means a workman who, being a member of the executive or other officer-bearer of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(underlining added)

7. The scheme of the Industrial Disputes Act is that where the services of any workman have been terminated by the Management, this constitutes an industrial dispute which in the normal course should be adjudicated u/s 10 by the Union or even directly by the individual workman concerned. In such adjudication, the Labour Court would have to consider whether an enquiry was a prerequisite and if so,

whether it was properly conducted. In this connection the provisions of Clause 14(10)(c) of the D.R.T.A. (Conditions of Appointment and Service) Regulations, 1952 should be referred to. It embodies the statutory rights of the Management to deem that the workman has resigned from service if he does not report back from duty on the expiry of his leave. This Regulation is adverted to since it permits the Management to dispense with the holding of an enquiry provided the principles of natural justice have been complied with. The delinquent workman may avail of the opportunity to show-cause granted to him prior to a final decision being taken under this Regulation. Alternatively he can furnish an Explanation which after due and proper consideration may be found by the Management no to disclose any ground which would persuade the Management to desist from invoking the said Regulation and deem/assume the workman to have resigned his service. It is possible that unlike in the DTC cases, some service conditions expressly or impliedly, may permit the termination of services without mandating the holding of a domestic enquiry. In all these instances, if an industrial dispute is pending adjudication, and the termination orders are unconnected to it, the management has nonetheless to obtain the approval of the Industrial Tribunal u/s 33(2)(b) of the I.D. Act before the termination becomes conclusively and legally effective. In such eventualities, the Tribunal must investigate that the principles of natural justice have been complied with, that there is a prima facie case, and that the decision is not perverse; that there is not victimisation or unfair labour practice. If it is satisfied that these factors favorably exist for the management it must grant approval. The only discretion available with the Tribunal for not according its approval is if the action of the Management is mala fide, or perverse and/or arguably that the punishment of termination of services is not commensurate with the misconduct committed by the delinquent workman. This consideration must be read into the section since otherwise its avowed salutary intention of maintaining industrial peace, while discord is ominously and malevolently prevailing, would be defeated. The provisions seek to ensure that the Management should not succeed in browbeating, intimidating and harassing the workforce into subjugation by dismissing one or some of them for minor misconduct. Such decisions would be mala fide and perverse. But even in the situations where an enquiry is not mandatory, and was thus not conducted by the Management, the Tribunal/Court may in cases u/s 10 or Section 33(1) of the I.D. Act, proceed to hold an enquiry under these provisions, as has been held in somewhat similar circumstances in Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory, The scope and ambit of such an enquiry would be much wider than that u/s 33(2)(b) of the I.D. Act.

8. Section 33 of the Industrial Dispute Act, 1947 has undergone numerous legislative changes by amendment carried out in 1950, 1956 and 1964. The Section at the time of enactment of the Industrial Disputes Act 14 of 1947 read as follows:-

"33. Conditions of Service etc., to remain unchanged under certain circumstances during pendency of proceedings - No employer shall during the pendency of any

conciliation proceedings or proceedings before a Tribunal, in respect of any industrial dispute, alter to the prejudice of the workman concerned in the dispute, conditions of service applicable to them immediately before the commencement of such proceedings, nor save with the express permission in writing of the Conciliation Officer, Board or Tribunal, as the case may be, shall during the pendency of such proceedings discharge, dismiss or otherwise punish such workmen, except for mis-conduct not connected with the dispute."

(underlining added)

Thereafter, the Industrial Disputes (Appellate Tribunal) Act 48 of 1950 was enacted which amended and substituted the above provisions of Section 33 of the I.D. Act with those extracted in the judgment in the Automobile Products of India case (infra). These provisions were again substituted in 1956 by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 36 of 1956 whereby Sub-sections 1 to 5 were introduced vide Section 21 of the Act with effect from 10.3.1957. Sub-sections (1) & (2) of Section 33 of the I.D. Act were lastly amended in 1964 by the Industrial Disputes (Amendment) Act, 1964 and brought to their present form. The following amendments were made by the Industrial Disputes (Amendment) Act 36 of 1964:-

(i) In Sub-section (1), after the words "any proceedings before" the words "an arbitrator or" have been inserted;

(ii) In Sub-section (2) after the words "the Standing Orders applicable to a workman concerned in such dispute," the words "or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied between him and the workman" have been inserted.

(Section 18 of the Act of 64).

The Proviso to Sub-section 5 of Section 33 was introduced by Section 17(b) of Industrial Disputes (Amendment) Act, 1982, w.e.f. 21.8.1984. Once the annals of the Section are analysed it will be evident that initially the distinction between punitive action, as is presently made in the first two sub-Sections of Section 33 had not been demarcated. It will be further clear that the legislature had not dictated the difference in approach - viz. between according approval when the Management''s action was unconnected with the dispute, and permission where it was connected.

9. The distinction between the first two sub-sections of Section 33 of the I.D. Act is of great import. In the former the management has to obtain the permission, and in the latter the approval of the Tribunal/Court. The words are not synonymous. The distinction is drawn in the Law Lexicon in these words - "Ordinarily the difference between approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. Black''s Law Dictionary also ascribes different meanings to these words.

When two different words are used by the Legislature in such close proximity of each other, it must be presumed that this was intentional, and with the purpose of conveying that different roles wee envisaged in the two sub-sections. It must also follow logically that the consideration of industrial adjudicator would also be different in the two disparate situation. In the former i.e. u/s 33(1), the scrutiny is expected to be intense and minute since a presumption may be reasonably drawn that every management would want to dismiss the workmen directly involved with it in an industrial dispute so as to coerce the workforce into ending the ongoing agitation; hence prior permission is required. In the latter situation, the nexus of the workman with the agitation/industrial dispute is not direct and the danger of victimization by the Management is somewhat diluted. Therefore, u/s 33(2) of the I.D. Act if prima facie it is evident to the industrial adjudicator that the principles of natural justice have been complied with, and a case for action against the workman exists, and no unfair labour practice has been followed, the approval should be given. A detailed consideration should be given to the rival cases when the industrial dispute is raised by the workman and referred by the Government for adjudication.

10. Section 33 of the I.D. Act as it stood at that time, can be found in paragraph 9 of the judgment delivered in the case of The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others, . The Section and the opinion of the Court are reproduced.

"(9) To fill up the lacuna in the 1947 Act Section 34 of the 1950 Act provided for certain amendments of the 1947 Act. Amongst other things, it substituted a new section for the old Section 33 of the 1947 Act. The new Section 33 runs as follows:

"33. During the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, no employer shall-

(a) alter, to the prejudice of the workman concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(b) discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the conciliation officer, Board or Tribunal, as the case may be."

It will be noticed that this section has made several changes. Thus under this section provision is made for obtaining permission as a condition precedent both for altering the conditions of service and for discharging or punishing the workman and no exception is made for a case of misconduct unconnected with the pending dispute.

(13) The object of Section 22 of the 1950 Act like that of Section 33 of the 1947 Act as amended is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimisation by the employer on account of their having raised industrial disputes or their continuing the pending

proceedings. It is further the object of the two sections to ensure that the proceedings in connection with industrial disputes already pending should be brought to a determination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate the already strained relation between the employer and the workmen.

To achieve this object a ban has been imposed upon the ordinary right which the employer has under the ordinary law governing a contract of employment. Section 22 of the 1950 Act and Section 33 of the 1947 Act which impose the ban also provide for the removal of that ban by the granting of express permission in writing in appropriate cases by the authority mentioned therein. The purpose of these two sections being no determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under these section is to accord or without permission. And so it has been held-we think rightly-by the Labour Appellate Tribunal in - ''Carlsbad Mineral Water Mfg. Co. Ltd. v. Their workmen'', (1953) 1 Lab LJ 85 (E), which was a case u/s 33 of the 1947 Act. Even a cursory perusal of Section 33 of the 1947 Act will make it clear that the purpose of that section was not to confer any general power of adjudication of disputes."

11. The views on this subject of the Hon''ble Supreme Court were thereafter encapsulated in Caltex (India) Ltd. Vs. E. Fernandes and Another, , in these words -

"7. This appeal raises the identical question which has been the subject-matter of our decision in Atherton West and Co. Ltd. Vs. Suti Mill Mazdoor Union and Others, . The The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others, as also Lakshmi Devi Sugar Mills Ltd. Vs. Pt. Ram Sarup, . We have clearly laid down there that the Industrial Tribunal has no jurisdiction while entertaining an application u/s 33 of the Industrial Disputes Act, 1947, to consider whether the punishment sought to be meted out by the employer to the workman is harsh or excessive. The measure of punishment to be so meted out is within the sole discretion of the employer who is to judge for himself what is the punishment commensurate with the offence which has been proved against the workman. The only jurisdiction which the Industrial Tribunal has u/s 33 is to determine whether a prima face case for the meeting out of such punishment has been made out by the employer and the employer is not actuated by any mala fides or unfair labour practice or victimization. Once the Industrial Tribunal came to the conclusion in the present case that the enquiry which was conducted by the appellants was fair and no principles of natural justice had been violated in the conduct of the enquiry and the appellants bona fide came to the conclusion that dismissal was the only punishment which should be meted out by them to the first respondent the Industrial Tribunal had no power to substitute another punishment for one which was sought to be meted out by the appellants to the first respondent nor to impose any conditions on the appellants before the requisite permission could be granted to them. The whole approach of

the Industrial Tribunal was wrong, and, in so far as the Industrial Tribunal had sought to impose on the appellants the conditions set out hereinabove before the requisite permission could be granted to them, the Industrial Tribunal was exercising a jurisdiction which was not vested in it by law and a substantial question of law in regard to the jurisdiction of the Industrial Tribunal did arise in the appeal which was filed by the appellants before the Labour Appellate Tribunal. That being so, the Labour Appellate Tribunal had jurisdiction to entertain the appeal and the decision of the Division Bench of the High Court at Bombay in exercise of its appellant jurisdiction holding that the Labour Appellate Tribunal had no jurisdiction to entertain such appeal was clearly wrong."

12. A cautious caveat calls to be cast, and it is that these observations of the Hon''ble Supreme Court have been made in the context of Section 33 of the I.D. Act as it then existed. Prior to amendment of the section it postulated the provisions which are now contained in Section 33(1) of the I.D. Act. At that stage there was no distinction between the dismissal/discharge having or not having a connection with the pending industrial dispute. This dichotomy should not be over looked. The Constitution Bench of the Apex Court has construed Section 33 of the I.D. Act [corresponding to the present Section 33(1) in Patna Electric Supply Co., Ltd., Patna Vs. Bali Rai and Another, to require the Tribunal to restrict itself only to the following consideration:-

"The discharge of the respondents was a discharge simplicities in exercise of the rights of the employer under Clause 14(a) of the Standing Orders and was not a punitive discharge under Clause 17(b)(viii) thereof and if it was merely a discharge simpliciter, then no objection could be taken to the same and the appellant would be well within its rights to do so, provided, however, that it was not arbitrary or capricious but was bona fide. The only question relevant to be considered by the Industrial Tribunal would be that in taking the step which it did the appellant was not guilty of any unfair labour practice of victimization. If the Industrial Tribunal did not come to a conclusion adverse to the appellant on these counts, it would have no jurisdiction to refuse the permission asked for by the appellant. Once the Industrial, Tribunal was of opinion that the application dated 6.12.1952, and the discharge of the respondents for which the permission of the Industrial Tribunal was sought were in the honest exercise of the appellant''s rights, no question of law, much less a substantial question of law could arise in the appeal filed by the respondents against the decision of the Industrial Tribunal and the Labour Appellate Tribunal was clearly in error when it entertained the appeal."

13. In Martin Burn Ltd. Vs. R.N. Banerjee, Section 22 of the Industrial Disputes (Appellate Tribunal) Act 1950, which corresponds with Section 33(1) of the I.D. Act, had to be construed. Even in respect of these provisions the Hon''ble Supreme Court observed as under:

"....While determining whether a prima facie case had been made out, the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record".

14. In Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh, the Apex Court had to interpret Section 33(1)(b) and not Section 33(2)(b) of the I.D. Act, since the alleged misconduct was considered to be connected with the dispute in question. After considering the precedents on this issue, the Apex Court made observations on these two aspects, as is clear from the following extracts-

"37. The Industrial Tribunal has to consider whether the appellant has made out a prima facie case for permission being granted for the action proposed to be taken against the workmen for that purpose the Tribunal was justified in considering the nature of the allegations made against the workman, the findings recorded by the Enquiry Officer and the materials that were available before the Enquiry Officer, on the basis of which such findings had been recorded. Accepting the contention of Mr. Anand that it was within the jurisdiction of the Enquiry Officer to accept the evidence of Sujan Singh and Rampal will be over-simplifying the matter and denying the legitimate jurisdiction of the Tribunal in such matters to consider whether the findings are such as no reasonable person could have arrived at on the basis of the materials before the Enquiry Officer. If the materials before the Enquiry Officer are such, from which the conclusion arrived at by the Enquiry Officer could not have been arrived at by a reasonable person, then it is needless to state, as laid down by this Court in Central Bank of India Ltd. Vs. Prakash Chand Jain, that the finding has to be characterised as perverse. If so the Industrial Tribunal has ample jurisdiction to interfere with such a finding."

x x x x x

60. From the above decisions the following principles broadly emerge:

(1) If no domestic enquiry had bene held by the management, or if the management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightaway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider the evidence so adduced before it, on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by it, in the first instance, and alternatively and without

prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more, that the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and also simultaneously adduce evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management, are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favor of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decide against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself

of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference u/s 10 or by way of an application u/s 33 of the Act.

61. Having due regard to the above principles, as could be gathered from the decisions, referred to above, in our opinion, the application filed by the management for permission to adduce evidence was highly belated. We have already emphasised that the enquiry proceeding before the Tribunal is a composite one, though the jurisdiction of the Tribunal to consider the validity of the domestic enquiry and the evidence adduced by the management before it, are to be considered in two stages. It is no doubt true that the management has got a right to adduce evidence before the Tribunal in case the domestic enquiry is held to be vitiated. The Tribunal derives jurisdiction to deal with the merits of the dispute only if it has held that the domestic enquiry has not been held properly. But the two stages in which the Tribunal has to conduct the enquiry are in the same proceeding which relates to the consideration of the dispute regarding the validity of the action taken by the management. Therefore, if the management wants to avail itself of the right, that it has in law of adducing additional evidence, it has either to adduce evidence, simultaneously with its reliance on the domestic enquiry or should ask the Tribunal to consider the validity of the domestic enquiry as a preliminary issue with a request to grant permission to adduce evidence, if the decision of preliminary issue is against the management. An enquiry into the preliminary issue is in the course of the proceedings and the opportunity given to the management, after a decision on the preliminary issue, is really a continuation of the same proceedings before the Tribunal."

15. In Air-India Corporation, Bombay Vs. V.A. Rebellow and Another, the Supreme Court again emphasised the limited scope of Section 33 of the I.D. Act in these words :

"The basic object of these two sections broadly speaking appears to be to which form the subject-matter of pending conciliation proceedings or proceedings by way of reference u/s 10 of the Act against victimisation by the employer on account of raising or continuing such pending disputes and to ensure that those pending proceedings are brought to expeditious termination in a peaceful atmosphere undisturbed by any subsequent cause tending to further exacerbate the already strained relations between the employer and the workmen. To achieve this objective a ban, subject to certain conditions, has been imposed by Section 33 on the ordinary right of the employer to alter the terms of his employees'' to services to their prejudice or to terminate their services under the general law governing contract of employment and Section 33A provides for reliefs against contravention of Section 33, by way of adjudication of the complaints by aggrieved workmen considering them to be disputes referred or pending in accordance with the provisions of the Act. This ban, however, is designed to restrict interference with the general rights and liabilities of the parties under the ordinary law within the limits truly necessary for accomplishing the above object. The employer is accordingly left free to deal with the employees when the action concerned is not punitive or mala fide or does not amount to victimisation or unfair labour practice. The anxiety of the Legislature to effectively achieve the object of duly protecting the women against victimisation or unfair labour practices consistently with the preservation of the employer''s bona fide right to maintain discipline and efficiency in the industry for securing the maximum production in a peaceful harmonious atmosphere is obvious from the overall scheme of these sections. Turning first to Section 33, Sub-Section (1) of this section deals with the case of a workman concerned in a pending dispute who has been prejudicially affected by an action in regard to a matter connected with such pending dispute and Sub-section (2) similarly deals with workman concerned in regard to matters unconnected with such pending disputes. Sub-section (1) bans alteration to the prejudice of the workman concerned in the conditions of service applicable to him immediately before the commencement of the proceedings and discharge or punishment whether by dismissal or otherwise of the workman concerned for misconduct connected with the dispute without the express permission in writing of the authority dealing with the pending proceeding. Sub-section (2) places a similar ban in regard to matters not connected with the pending dispute but the employer is free to discharge or dismiss the workman by paying wages for one month provided he applies to the authority dealing with the pending proceeding for approval of the action taken. In the case before us we are concerned only with the ban imposed against orders of discharge or punishment as contemplated by Clause (b) of the two sub-sections. There are no allegations of alteration of the complainant''s terms of service. It is not necessary for us to decide whether the present case is governed by Sub-section (1) or Sub-section (2) because the relevant clause in both the sub-sections is couched in similar language and we do not find any difference in the essential scope and purpose of these two sub-sections as far as the controversy before us is concerned. It is noteworthy that

the ban is imposed only in regard to action taken for misconduct whether connected or unconnected with the dispute. The employer is, Therefore, free to take action against his workmen if it is not based on any misconduct on their part. In this connection reference by way of contrast may be made to Sub-section (3) of Section 33 which imposes an unqualified ban on the employer in regard to action by discharging or punishing the workmen whether by dismissal or otherwise. In this sub-section we do not find any restriction such as is contained in Clause (b) of Sub-sections (1) and (2). Sub-section 3 protects "protected workman" and the reason is obvious for the blanket protection of such a workman. The Legislature in his case appears to be anxious for the interest of healthy growth and development of trade union movement to ensure for him compete protection against every kind of order of discharge or punishment because of his special position as an office of a registered trade union recognised as such in accordance with the rules made in that behalf. This explains the restricted protection in Sub-sections (1) and (2)."

16. u/s 33(1) of the I.D. Act, the industrial adjudicator has to give his express permission in writing, in contradistinction to ''approval'' u/s 33(2) of the I.D. Act, before a workman can be dismissed. He has to perform a proactive role and his compete satisfaction is essential and the dismissal of the workman is predicated on his decision. He can garner satisfaction from a perusal of the enquiry proceedings, if these had been conducted by the Management. In the event that he finds them to have deficiencies or short-comings, he can call for evidence to be led before him. At the risk of repetition, he can do this because the dismissal of the workman is predicated wholly on his satisfaction. Where permission is granted u/s 33(1) of the I.D. Act the decision is not of the Management; it is only taken at the instance of and on the request of the Management. Therefore, there may be a need to record evidence by the industrial Authority so that he can be sure and satisfied that his decision is prima facie. correct. If, even in these circumstances, he is expected only to take a prima facie view [reference para 37 of the Delhi Cloth and General Mills case (supra)] and not ''satisfaction to the hilt'' as in Section 10, a fortiori, nothing more is expected when merely approval is to be granted u/s 33(2) of the I.D. Act. It seems to be incongruous to assign the same role to the industrial adjudicator under both the said sub-sections of Section 33 of the I.D. Act. Under Sub-section (2) of Section 33 of the I.D. Act, the entire exercise is post-decision, thus leading to the conclusion that approval has either to be granted or declined; there may not be any scope for the Court''s calling for evidence at the request of the Management. The observations in the precedents mentioned above apply to Section 33(1) of the I.D. Act and not to Section 33(2) of the I.D. Act; the latter provision either did not exist at the time the judgment was delivered or did not fall for consideration. A consideration of Section 33(2) of the I.D. Act specifically arose for the first time in the case of The Lord Krishna Textile Mills Vs. Its Workmen, and at once the Apex Court was quick to bring home the distinction in the two provisions, in the following passage :

"In view of the limited nature and extent of the enquiry permissible u/s 33(2)(b) all that the authority can do in dealing with an employer''s application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquiry whether the conditions prescribed by Section 33(2)(b) and the proviso are satisfied or not. Do the standing orders justify the order of dismissal? Has an enquiry been held as provided by the standing order? Have the wages for the month been paid as required by the proviso? and, has an application been made as prescribed by the proviso? This last question does not fall to the decided in the present appeal because it is common ground that the application has been properly made Standing Order 21 specifies acts of omission which would be treated as misconduct, and it is clear that under 21(s) threatening or intimidating any operative or employee within the factory premises is misconduct for which dismissal is prescribed as punishment. This position also is not in dispute. 1 There is also no dispute that proper charge-sheets were given to the employees in question, an enquiry was properly held, and opportunity was given to the employees to lead their evidence and to cross-examine the evidence adduced against them; in other words, the enquiry is found by the Tribunal to have been regular and proper. As a result of the enquiry the officer who held the enquiry came to the conclusion that the charges as framed had been proved against the workmen concerned, and so orders of dismissal were passed against them. In such a case it is difficult to understand how the Tribunal felt justified in refusing to accord approval to the action taken by the appellant.

It has been urged before us by the appellant that in holding the present enquiry the Tribunal has assumed powers of an appellate court which is entitled to go into all questions of fact; the criticism to us to be fully justified. One has merely to read the order to be satisfied that the Tribunal has exceeded its jurisdiction in attempting to enquire if the conclusions of fact recorded in the enquiry were justified on the merits. It id not hold that the enquiry was defective or the requirements of natural justice had not been satisfied in any manner. On the other hand it has expressly proceeded to consider questions of fact and has given reasons some of which would be inappropriate and irrelevant if not fantastic even if the Tribunal was dealing with the relevant questions as an appellate court. "The script in which the statements have been recorded"; observes the Tribunal, "is not clear & fully decipherable". How this can be any reason in upsetting the findings of the enquiry it is impossible to understand. The Tribunal has also observed that the evidence adduced was not adequate and that it had not been properly discussed. Accordingly to the Tribunal the charge-sheets should have been more specific and clear and the evidence should have been more satisfactory. Then the Tribunal has proceeded to examine the evidence, referred to some discrepancies in the statements made by witnesses and has come to the conclusion that the domestic enquiry should not have recorded

the conclusion that the charges have been proved against the workmen in question. In our opinion. In making these comments against the findings of the enquiry the Tribunal clearly lost sight of the limitations statutorily placed upon its power an authority in holding the enquiry u/s 33(2)(b). It is well known that the question about the adequacy of evidence or its sufficiency or satisfactory character can be raised in a court of facts and may fall to be considered by an appellate court which is entitled to consider facts: but these considerations are irrelevant where the jurisdiction of the court is limited as u/s 33(2)(b). It is conceivable that even in holding an enquiry u/s 33(2)(b) if the authority is satisfied that the finding recorded at the domestic enquiry is perverse in the sense that it is not justified by any legal evidence whatever, only in such a case it may be entitled to consider whether approval should be accorded to the employer or not; but is essential to bear in mind the difference between a finding which is not supported by any legal evidence and a finding which may appear to be not supported by sufficient or adequate or satisfactory evidence. Having carefully considered the reasons given by the Tribunal in its award under appeal, we have no hesitation in holding that the appellant is fully justified i n contending that the Tribunal has assumed jurisdiction not vested in it by law, and consequently its refusal, to accord approval to the action taken by the appellant is patently erroneous in law."

17. The Hon''ble Supreme Court recommended that this restricted enquiry should be pursued in Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another, when it opined :-

"the position that emerges from the above quoted decisions of this Court may be stated thus: In proceeding u/s 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the position settled by the decisions of this Court i Bengal Bhatdee Coal Co. Vs. Ram Prabesh Singh and Others, Hind Construction and Engineering Co. Ltd. Vs. Their Workmen, The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others, and Management of Eastern Electric and Trading Co. Vs. Baldev Lal, that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee and (v) whether the employer has simultaneously or within such

reasonably short time as to form part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him. If these conditions are satisfied, the Industrial, Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of the dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him."

18. The fundamental distinction between Section 10and Section 33 came up for consideration before a Division Bench of this Court in DTC v. Ram Kumar, 1982 (2) LLJ 199. Relying on the pronouncement of the Hon''ble Supreme Court in Atherton West and Co. Ltd. Vs. Suti Mill Mazdoor Union and Others, , and Lakshmi Devi Sugar Mills Ltd. Vs. Pt. Ram Sarup, it was held that proceeding under the two are distinct, and if approval is accorded u/s 33 it would not operate as res judicata in Reference u/s 10. The Division Bench further took support of the opinion of the Apex Court expressed in Mckenzie and Co. Ltd. Vs. Its Workmen and Others, , to the effect that "the purpose of Section 33 of the Act is merely to give or withhold permission and not to adjudicate upon an industrial dispute, any finding u/s 33 would not operate as res judicata and bar the raising of an industrial dispute." The Division Bench further observed that the Apex Court "has already laid down that what is done u/s 33(2)(b) is not adjudication. That Section 11-A has not enhanced the power of the Tribunal while dealing with an application u/s 33 was also emphasised in The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others,

19. For very sound reasons, the powers of the Management to dismiss a workman during the pendency of conciliation or adjudication has been statutorily regulated. Protected workmen cannot be dismissed during the pendency of a dispute without the express permission in writing of the concerned Authority. Similarly, for a misconduct connected with the pending dispute a workman cannot be dismissed without the express permission in writing of the concerned Authority. However, for a misconduct not connected with such a dispute, the workman can be dismissed, but the post facto approval of the concerned Authority is to be obtained subsequently. It must also be kept in perspective that Section 33 of the Act is not intended to apply in every case; it becomes operative only where a general dispute is receiving the attention of the industrial authority concerned. As is manifest from this batch of cases, a general dispute pertaining to pay revision was pending for some years, and hence every individual dispute had to be subjected to Section 33 of the Act, whereas otherwise the workman would have to resort to Section 10, (as he

can still do), after the decision in Section 33 proceedings. The Legislature surely did not anticipate or foresee that general dispute would be pending more often than not, making Section 33 a precursor to Section 10 almost in the normal course.

20. Mr. Dubey who appears for some of the workmen has contended that the procedure followed by the Tribunals is to call on the workman to file his written statement/reply. Thereafter it proceeds with the application in a manner similar to the practice adopted in all other matters. He is unable, however, to show any legal sanction for adhering to the extant procedure. It is significant that Rule 10-B, of the Industrial Disputes (Central) Rules, 1957, introduced by amendment with effect from 18.8.1984, is not applicable to applications u/s 33. Rule 60 indicates that applications for permission u/s 33(1) and (3) must be in Form J and those in Section 33(2) in Form K. This fact also underscores the significant distinction between these sub-section, which has already been discussed above. In the course of the disposal of applications u/s 33(2)(b) what is expected of the industrial authority is to peruse the contents of the application and the Enquiry Report and records, if any, with a view to granting or declining its approval of the dismissal order that has already been passed. The scope of the enquiry should only be what has been laid down in the Lord Krishna Mills case (supra). In this exercise, the recording the evidence may not have any role to play. Since the Hon''ble Supreme Court has assumed that evidence can be recorded even in Section 33(2) proceedings, even though the distinction between the three sections was not argued in detail it must be presently held that this exercise is within the contemplation of the Section. However, it is very clear that this would only be at the second stage, i.e. when once the Court has arrived at a finding on the so called preliminary issue that the action of the Management, as pleaded and portrayed in the application, is insufficient to render a decision. The Preliminary Issue that is usually framed is whether a proper and valid inquiry has been held in conformity with natural justice. The manner in which the issue is framed inexorably misdirects the Labour Court into looking at the Enquiry as would an Appellate body, ignoring that its only function is to ensure that the Management''s decision is prima facie justified and is in consonance with natural justice. This misdirection is obvious if it is borne in mind that it is not legally mandatory in every case that a domestic enquiry should be the precursor of the dismissal decision. In these batch matters ti is mandatory because the Service/Conduct Rules prescribe so. In this analysis, the Preliminary Issue should Therefore invariably be - whether the dismissal order is prima facie justified and is in consonance with natural justice. This issue would take within its sweep the legality of the domestic Enquiry, the absence of unfair labour practices and victimization, and thirdly the existence of a prima facie case for the dismissal.

21. There may be scope for calling for evidence in Section 33(1), since an active role as against a passive role in Section 33(2) is envisaged, viz. granting permission in contradistinction to according approval. In both sub-sections, the Authority is not called upon to be satisfied that the Management has made out its case to the hilt,

since that is essentially the scope of Section 10 proceedings. Mr. Dubey had also argued that the industrial authority cannot be reduced to a mere post office, in Section 33(2)(b) proceedings. The immediate caution is that it does not act as an appellate authority. It must review the decision of the Management and if in arriving at such decision the Management has complied with natural justice by giving an opportunity to the delinquent workman to present his defense, and there is prima facie support for the dismissal decision, which is not malafide/perverse, approval should be granted. Mr. Dubey relies on Cominco Binani Zink Limited v. K.N. Mohanan and Anr. , 1993 Lab.I.C. 1298, but on a compete reading of this judgment his submission run counter to the ratio set down in it, which in essence is that of Lord Krishna Mills case (supra). The Division Bench presided over by Hon''ble the Chief Justice M. Jagannadha Rao (As his Lordship then was) observed as follows:-

"As stated earlier, first respondent was charge-sheeted as per the provisions contained in the Certified Standing Orders of the company for disobedience of reasonable orders, failure to carry our the work in accordance with the instructions given by officers of the company and for willful or serious defect in workmanship. He was further charge-sheeted for refusal to accept the first charge-sheet in terms of the provisions of the Standing Orders. A domestic enquiry was held into the charges leveled against the first respondent. On the side of the appellant MW 1 to MW 4 were examined and Exhibits M-1 to M-8 were proved. First respondent the workman, in his turn examined DW1 to DW9 and proved Exhibits D-1 to D-6. After appreciating this evidence, enquiry officer found all the charges leveled against the workman to have been proved. This report was accepted by the appellant. Consequently, by order dated 4.10.1986, first respondent was dismissed from service. In view of the pendency of conciliation proceedings before the second respondent an application for approval of the dismissal was filed under proviso to Section 33(2)(b) of the Act and first respondent was paid a month''s wages as required by law. When an authority under the Industrial Disputes Act is called upon to give its approval to an order of dismissal u/s 33(2)(b) of the Act, it can either approve or refuse to approve the order after considering whether a prima facie case for according approval is made out by the employer or not. The enquiry contemplated by that authority u/s 33(2)(b) is of a very limited nature, It can disregard the findings entered by the enquiry officer only if they are perverse. A finding can be said to be perverse in case it is not supported by any legal evidence. If a finding arrived at by the enquiry officer is such that no reasonable person could h ave arrived at that finding on the materials before it, then also the finding can be said to be perverse. If the finding is not a perverse one in the above sense and if there is prima facie evidence to support the findings, the authority under the Act cannot refuse to grant approval to the order passed by the Management.

Jurisdiction of the Labour Court or Tribunal, as the case may be, while exercising powers on applications u/s 33(1) and 33(2) are different. The power of that authority while dealing with a petition u/s 33(1) is wider since its permission is required for the

employer to pass an adverse order against the workmen. But in exercising the power u/s 33(2), what is required is only its approval. The different terminology used in Clauses (1) and (2) of Section 33 of the Act made it clear that the jurisdiction is different. This difference in jurisdiction, we are afraid, has not been properly understood or appreciated by the second respondent while refusing the application filed by the appellant u/s 33(2)(b) of the Act."

A Division Bench of the Punjab and Haryana High Court in Meters and Instruments Pvt. Ltd. v. Devi Dayal Sharma and Anr., 1983 Lab. I.C. 104, on the strength of the pronouncements in the Patna Electric Supply co. case (supra) opined that once it was found by the Tribunal that unfair labour practice or victimization was absent from the Management''s conduct, the Tribunal had no jurisdiction to refuse permission u/s 33(2)(b) of the I.D. Act.

22. The proper procedure to be adopted in respect of ''approval applications'' u/s 33(2)(b) is to issue notice to the workman so that he is given an opportunity of being heard, in order to ascertain his response to the material presented by the Management. If the Court finds that there is a genuine doubt as to the authenticity of the material/records produced by the Management, it amy be called upon to prove them. No other evidence is relevant at this stage. The Court should thereupon peruse the material in order to return a findings as to whether the test enunciated in the Lord Krishna Textiles Mills case (supra) have been successfully answered. If not, the approval should be declined at that stage. If, however, the Court requires further material/evidence for arriving at a conclusion vis-a-vis its granting approval, after disclosing the reasons in writing, it may proceed to the second stage and allow evidence. The Court must always keep in perspective that it is not adjudicating upon the dispute since that is the province of Section 10 proceedings. Calling for evidence would be the exception and not the rule. This procedure commends itself also because Section 33 also contemplates action being taken by a Conciliation Officer, who uncontrovertibly does not have the power to record evidence. Yet he has the power to grant approval if the general dispute is pending before him.

23. Let us now revert to the petition in hand. It is the admitted case of the parties that the workman was dismissed for a misconduct not connected with the industrial dispute and hence Section 33(2)(b) is the relevant statuary provisions to be applied. At the time when the impugned order dated 9.2.1996 was passed by the Labour Court the evidence recorded in the enquiry proceedings conducted by the DTC was available to it for its perusal. Instead of immediately perusing those proceedings and the material placed before it along with the approval application, as the Labour Court was duty-bound to do, after mechanically framing the preliminary issue, it proceeded to insist on the management leading evidence. The Court ought to have, at least in the first instance, investigated whether (a) the requirements of natural justice had already been met, (b) a prima facie case for dismissal existed, and (c) the order was not perverse or malafide. In not doing so it lost sight of the distinction

between the first two sub-sections of Section 33 and its role u/s 10. Again, at the pain of repetition, the Labour Court was not called upon to satisfy itself whether it should permit the dismissal, but rather whether it should "approve" of the dismissal which decision had already been taken by the Management. The Labour Court incorrectly equated the discharge of the onus of proof of the preliminary issue with the leading of evidence by the Management. These two exercises are unconnected with each other. Invariably, the court should approve or reject the Management''s application on the basis of the material placed before it. In my view the preliminary issue in essence is the only issue before the Tribunal u/s 33(2)(b) of the I.D. Act, whereas it may be a threshold consideration in proceedings u/s 10 and arguably u/s 33(1)(b). In Section 10 the Court is called upon to return a conclusive finding about the legal propriety of the dismissal order, but not so in Section 33(2)(b) where the approval should given once it is found that a prima facie case exists. For this precise reason the latter does not operate as res judicata on the former. The Labour court failed to record the reasons which prevailed upon it to conclude that the dismissal of he workman by the DTC offended the principles of natural justice, or was contrary to law. It also did not disclose any ground which convinced it that the existing evidence gathered/presented by the Management was insufficient or inadequate even for making out the existence of a prima facie case in support of the dismissal order.

24. Assuming for the sake of argument, with a view to clarify the entire issue, that the Court had rightly not been satisfied with the domestic enquiry proceedings. As has been observed in Lakshmiratan Cotton Mills Co. Ltd. Vs. Its Workmen, , the course for the Court to charter would arguably have been that as had been adumbrated in the fourth and fifth propositions of the Delhi Cloth and General Mills case (supra). viz. give the Management an opportunity to lead evidence. It is necessary to point out that in the Delhi Cloth Mill case (supra), as well as in Lakmirttan Cotton Mills case (supra) the proceedings were u/s 33(1) of the Industrial Disputes Act where permission was prayed for passing the order of dismissal of the workman. In the latter case, it was found in paragraph 3 that - "All the workmen participated in the illegal strike, but out of them, there are fifty- three who, according to the appellant, held meetings inside the mill premises without the previous written permission of the appellants and also shouted slogan and made demonstrations inside the mill premises. The acts amounted to misconduct within the meaning the Clauses (ii), (xv) and (xx) of the Standing Order 25(1)(A)." Assuming that the illegal strike was the pending industrial dispute, the alleged subsequent misconduct would have been connected with the strike, thus attracting Section 33(1). Since the satisfaction of the Court was essential before granting its permission, an opportunity to lead further evidence would be perfectly in order.

25. Very recently a Constitution Bench of Apex Court in Karnataka State Road Transport Corpn. Vs. Smt. Lakshmidevamma and Another, was called upon to settle the divergence of opinion on the issue of the stage at which a request for leading evidence before the Labour Court should be made. The Bench had been constituted

because of the apparent irreconcilability between the decisions in Shambhu Nath Goyal Vs. Bank of Baroda and Others, and Rajendra Jha Vs. Presiding Officer, Labour Court, Bokaro Steel City, District Dhanbad and Another, . Hon''ble Justice Santosh Hegde on behalf of Hon''ble Mr. Justice S.P. Barucha favored the position that the request should be made in the approval application. Hon''ble Justice Y.K. Sabharwal was of the view that such a request could be made before the close of proceedings; he also observed that Shambhu Nath''s case (supra) was decided without reference to the views of a coordinate Bench in The Cooper Engineering Limited Vs. Shri P.P. Mundhe, . All the learned Judges in unison were at pains to reiterate that the opportunity to allow evidence to be led was with the objective of putting an end to the dispute. Hon''ble Justice Shivraj V. Patil (also on behalf of Hon''ble Justice V.N. Khare) concurred with the judgment of Hegde J., but recorded the rider that "this should not be understood as placing fetters on the powers of the Court/Tribunal requiring or directing parties to lead additional evidence including production of documents at any stage of the proceedings before they are concluded if on facts and circumstances of the case it is deemed just and necessary in the interests of justice." The ratio of the Constitution Bench thus appears to be that if a party makes the request to lead evidence in its pleadings this would be granted as of right, and thereafter it would be entirely dependent on the discretion of the Court. This case does not lay down that evidence must be led in Section 33(2)(b) proceedings, but assumes so.

26. Keeping the plethora of precedents in perspective on the question of the propriety of leading evidence before the Court/Tribunal it would be of advantage to categorise them under three heads-(i) where the dispute is u/s 10; (ii) where the dispute is u/s 33 prior to the amendment in 1956 and; (iii) where it was directly u/s 33(2) of the I.D. Act. This is necessary to vindicate the theory that the Hon''ble Supreme Court has unintended extrapolated the ratio pertaining to Section 10 of the I.D. Act and Section 33(1) of the I.D. Act on cases u/s 33(2) of the I.D. Act, and thereby had unconsciously categorised the ''approval'' u/s 33(2) of the I.D. Act on parity with adjudication envisaged by the other two provisions.

27. Let us now consider the impugned order dated 8.10.1997 in terms of which the approval application of the DTC was rejected at the ''second stage'' of Section 33(2) proceedings. The Management had lead evidence by way of the affidavit of Shri Musadhi Lal, Assistant in charge of the Nangloi Depot. The opportunity to cross-examine this witness was declined, since the counsel for the workmen was of the opinion that the removal was illegal since his absence had been regularised by treating him as on leave without pay. Two conclusions call to be drawn in favor of the DTC-viz (a) that the evidence before the Tribunal was otherwise sufficient and the Management''s conduct was in conformity with natural justice and (b) that the DTC''s contention is correct that if an employee takes excessive leave it would be reasonable to hold that he had lost interest in his work. This conclusion is inevitable since the Tribunal has not dealt with either of these points. Instead, in response to

the workmen''s sole contention at this final stage, the Tribunal has returned the finding that availing of leave without pay is not a misconduct. Reliance was placed on the decisions in Tito Francisco Pereira v. Administrator of Goa Daman And Diu and Ors., 1978 All I SLJ 614. I shall presume that in pursuing this line of enquiry, the Tribunal was not exercising appellate jurisdiction, which it does not possess in Section 33, but was investigating whether the punishment accorded to the workmen was commensurate with the misconduct or whether the misconduct was at all punishable since these factors would disclose possible ''perversity''. In The Management of Swatantra Bharat Mills, New Delhi v. Ratan Lal, AIR 1961 SC 1156 the Apex Court has observed that an appellate approach is not correct. It opined - "Where an application for approval of its decision to dismiss an employee is made by the management of a Mill u/s 33(2)(b), Industrial Disputes Act the jurisdiction of the tribunal is limited to the enquiry as to whether a prima facie case has been made out by the employer against the employee or not. Where the enquiry officer''s report is a well considered document wherein he has examined the evidence adduced before him and has given elaborate reasons in support of his final conclusion, it is not open to the Industrial Tribunal to sit in appeal over the findings of the Enquiry Officer and to reappreciate the evidence for itself. That is not the scope of the enquiry u/s 33(2)(b). If the Tribunal has dismissed the application by going into the merits of the rival contentions as if it was trying the case itself, the Tribunal has exceeded its jurisdiction and that makes its award wholly unsustainable."

28. It must not be overlooked that the workman has his own remedy u/s 10 of the I.D. Act to challenge the legality of the dismissal order. This right continues even in the event that approval is granted to the Management under the first two Sub-section 33 of the I.D. Act. One further question needs to be addressed touching upon the Tribunal''s failure to permit the DTC to lead evidence to prove its case. This controversy is rendered otiose since I have take the view that approval ought to have been granted. Suffice it to reiterate that the occasion for leading evidence before the Tribunal/Court would arise in proceedings u/s 33(1) of the I.D. Act, since the dismissal decision envisaged therein would essentially have been that of the Tribunal/Court on the proposal or initiation of the Management. u/s 33(2) the Tribunal/Court can either approve or disapprove the decision of the Management based on the records presented to it. Arguably, if the Tribunal/Court felt the need to record evidence the logical conclusion is that it had not found a prima facie case to have existed on the basis of the available records and Therefore it should have declined to grant its approval. There appears to be much wisdom in restricting the ambit of enquiry u/s 33 to whether the conduct of the Management is fair and reasonable and does not suffer from the vice of victimisation, leaving it to the workman to initiate his own remedy if the outcome of this exercise is in favor of the Management. In proceedings u/s 33, the Court is not called upon to give its imprimatur to the correctness of the dismissal order since this exercise can be

appropriately completed when the workman assails the order by raising an industrial dispute. Mention should be made at this stage to the recent pronouncements of the Apex court in M.D., Tamil Nadu State Transport Corporation Vs. Neethivilangan Kumbakonam, to the effect that where approval u/s 33(2)(b) is refused the order of dismissal has to be treated as non est and the employer is bound to treat the employee as continuing in service. It has further been held that if all the consequential benefits are not granted the employees can seek their enforcement though a writ petition. The Hon''ble Supreme Court reiterated with emphasis its earlier observations in Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, that "the dismissal of the workman would be void and inoperative, but, that would be because the Tribunal having held that no prima facie case has been made out by the employer or there is victimisation or unfair labour practice, it refused to lift the ban." In a nutshell this is the approach expected of the Tribunal.

29. On the question of the legal propriety of dismissing the workman for his absence even though he has been treated as on leave without pay, in CWP No. 3805/1994 entitled Rama Nand v. Delhi Transport Corporation, decided on 17th April, 2001 Hon''ble Dr. Mukandakam Sharma, J. has held in favor of the DTC. I have the advantage of reading the judgment of my learned brother and I respectfully agree with his view. On the contrary, Learned counsel for the Workmen have relied on the Order passed by N.G. Nandi, J. entitled Delhi Transport Corporation v. Chander Sain bearing CWP No. 6281 of 2000 in which the petition was dismissed in limini. Since my learned Brother Mukandakam Sharma, J. has rendered a judgment after hearing detailed arguments the former view is more persuasive. No precedents were considered in the latter case. By way of amplification and in the process of dispelling the doubts that had arisen in my mind, I thought it appropriate to revert to the decision of the Hon''ble Supreme Court in State of Madhya Pradesh v. Harihar Gopal (SC) , 1969 SLR 274, the salient paragraphs of which are reproduced below:-

"7. It was urged before the High Court on behalf of the State that the order granting leave was only for the purpose of regularising the absence from duty and for maintaining a true account of absence from duty, and had not the effect of first sanctioning leave to the respondent to which he was entitled, and then removing him from service for absence from duty. The High Court rejected this contention observing:

".....When the leave was granted even though belatedly, it had the effect of authorising with retrospective effect the petitioner''s (respondent''s) absence from duty during the period for which it was sanctioned. Having thus authorised the petitioner''s (respondent''s) absence from duty, it was not open to the State Government to proceed on the basis that his absence was unauthorized."

These observations proceed upon a misconception of the sequence in the orders passed by the State Government and the true effect of the order granting leave. The order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service, and adjustment of leave due to the respondent and for regularising his absence from duty. Our attention has not been invited to any rules governing the respondent''s service conditions under which an order regularising absence form duty subsequent to termination of employment has the effect of invalidating termination. Both the orders one terminating the employment of the respondent and the other granting leave are mae "by order and in the name of the Governor of Madhya Pradesh", and they are signed by L.B. Sarje, Deputy Secretary to the Government of Madhya Pradesh, General Administration Department. We are unable to hold that the authority after terminating the employment of the respondent intended to pass an order invalidating the earlier order by sanctioning leave so that the respondent was to be deemed not to have remained absent from duty without leave duly granted.

8. There is another aspect of the case which also does not appear to have been considered by the High Court. The charge against the respondent was that he had absented himself "without obtaining leave in advance". The Enquiry Officer characterized the conduct of the respondent as "irresponsible in extreme and can hardly be justified." the Enquiry Officer clearly intended that in failing to report for duty and remaining absent without obtaining leave, the respondent had acted in manner irresponsible and unjustified. On the finding of the Enquiry Officer that charge was proved and the order, dated March 9, 1962, had no effect on the charge that the respondent had remained absent without obtaining leave in advance."

30. Without considering these pronouncement the Apex Court had, in The State of Punjab and Others Vs. Bakshish Singh, apparently held to the contrary, as contended by counsel for the workmen. However, the factual matrix in both the cases was different, inasmuch as in the latter case, a finding of fact had been returned in favor of Bakshish Singh that his "unauthorized absence form duty having been regularised by treating the period of absence as leave without pay, the charge of misconduct did not survive." In this analysis, both the decision of the Apex Court, in Harihar Gopal and in Bakshish Singh are reconcilable. As has been highlighted by Hon''ble Dr. Mukandakam Sharma, J. it was open to the DTC to proceed under Sub-clause (h) of Clause 19 which contemplates "habitual negligence of duties and lack of interest in the Authority''s work, which is distinct from the charge of overstaying leave or being absent without obtaining leave. In the second case it may be arguable that no charge of misconduct can survive once the period is ''regularised'' as ''leave without pay''. It cannot possibly be predicated that where a workman does not even apply for leave, he can nonetheless be granted leave with or without pay. In a batch of petitions concerning ''deemed resignation'' of the workman of the DTC I had taken note of the fallacy, with far-reaching consequences

detrimental to the workman''s cause, in ''sanctioning'' leave without any application having been made by the workman, under Regulation 14(10)(b) and thereafter the Management conveniently invoking Regulation 14(10)(c) and thereby deeming/treating the workman as having reigned from his employment. Furthermore, in the present case the workmen have failed to present any cogent argument against the invocation of Para 19(h) of the Standing Orders.

31. In Ex. Constable Maan Singh Vs. Union of India and Others, , an Hon''ble Division Bench of this Court had occasion to consider the pronouncement of the Apex Court in the cases of Harihar Gopal and Bakshish Singh. In the opinion of Bench the dicta laid down in Harihar Gopal''s case (supra) is unambiguously to the effect "that it is open to the Punishing Authority to direct the Record Keeper to complete the service record by treating the period of absence as one without pay." The Bench also expressed the view that the judgment in Bakshish Singh''s case (supra) was per incuriam since it neither overruled nor differentiated the earlier judgment in Harihar Gopal''s case (supra). In fact the latter case was neither cited not considered. This view has also been expressed by learned Division Benches in Delhi Administration and Another Vs. Constable Yasin Khan, , Ex Head Constable (Dri.) Kali Ram v. Union of India, 2000(3) SLR 785 and in CWP 2611 of 1999 entitled Dy. Commissioner of Police v. Jorawar Singh.

32. In view of the pronouncements of the Apex court, it would not be very relevant to revert to the opinion of a Single Judge of the Andhra Pradesh High Court in the case of G. Papaiah Vs. Assistant Director, Medical Services, Secunderabad, . However, on a reading thereof, it would be evident that the learned Judge was impressed with the fact that while exercising the quasi-judicial powers the Disciplinary Authority failed to disclose the reasons why he did not accept the Enquiry Officer''s recommendation that the delinquent workman should have been admonished. The learned Judge was also convinced that since extra ordinary leave had been granted to the workman he could not have been proceeded against for his absence. The case does not appear to be one where the period of absence was merely regularised in the Management''s records as ''leave without pay''. Almost without exception, the DTC has used the words "treated" (and not "granted" or "sanctioned") the workman to have been on ''leave without pay''. This is clearly indicative of their intention. It cannot to be even faintly inferred that the DTC had consciously granted leave. For this reason the letter/memo dated 14.12.1988 of the DTC is of no avail to the workman. For these very reasons the decisions of a Single Judge of the Gujarat High Court in Bhursinh Hasminh Rajput v. The State of Gujarat and Anr. , 1982 (1) All I SLJ 697, where Harihar Gopal''s case (supra) was not even cited, does not advance the case of the workman. For the same reason, State of Punjab v. Chaman Singh, 1988 (3) AISLJ 216 is also per incuriam. It is clear, Therefore, that in treating the workman as on leave without pay, his absence has not been regularised or sanctioned. On the contrary the DTC had only sought to set its records in some order. Further, even if the workman had been treated as on

leave without pay, it was nonetheless open to the DTC to invoke Para 19(h) of the Standing Orders.

33. The present disputes have been lingering like a festering sore for over a decade and to remand the case would only compound injustice further. The scheme of the I.D. Act postulates a quick disposal of the application u/s 33(2) of the I.D. Act. If a prima facie case for dismissal exists, approval should be granted forthwith. If not, the approval should be declined; in this eventuality it would be most sanguine for the Management to expect that its decision would have received jural sanction in proceedings u/s 10, since it has failed even to make out a prima facie case. Once approval is granted the concerned workman can initiate a reference of the adjudication of the dispute u/s 10 of the I.D. Act, if he has not already done so. An expeditious conclusion of the lis is in the interests of the workman, who because of his economic weakness, would be in a position of weakness in protracted proceedings. Hence it would be appropriate for this Court to peruse the enquiry proceedings itself so that the dispute can be put to an end. As has been condensed in the beginning of this judgment, the workmen was afforded every opportunity to put forward his defense and the only demands and demur which he recorded was when the show-cause in respect of the proposed punishment was served on him. In fact, the workman did not dispute the charges leveled against him, but instead explained that his lack of constancy in duty was because of his ill health. On a review, it will be prima facie evident that the enquiry was conducted in a fair and legal manner and the punishment was in accordance with the statutory regulations. Prima facie, there was a case for the passing of the punitive orders. There is not even a hint of unfair labour practice, or victimisation. The Labour Court needlessly waited for evidence, and ignored all the material that was already available before it. The impugned Order cannot be sustained. The approval u/s 33(2)(b) is hereby accorded to the dismissal/removal order of the DTC dated 6.7.1990.

34. The writ petition is accordingly allowed.

35. Since the writ petition has itself been disposed off the miscellaneous application is rejected.

36. These observations, being essentially prima facie in character, will not be taken into consideration by the appropriate Court if and when an industrial dispute is raised by the workman concerned.