

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 07.03.2013

% **Judgment delivered on: 02.04.2013**

+ **W.P.(C) 3802/2004 and C.M. No. 12023/2008**

YOGINDER SHARMA

..... Petitioner

Through: Mr. H.K. Chaturvedi, Ms. Anjali
Chaturvedi & Mohd. Aqil Saifi,
Advocates.

versus

MANGT. OF ARVALI LEASING LTD.

..... Respondent

Through: Mr. Puneet Bajaj, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner workman has preferred the present writ petition under Article 226 of the Constitution of India to assail the award made by the Labour Court-I, Karkardooma Courts, Delhi in I.D. No. 489/1992, whereby the reference made to the Labour Court by the Appropriate Government on 24.05.1989 with regard to the termination of the petitioner's service by the respondent management has been answered against the petitioner.

2. The petitioner was appointed as a Clerk with the respondent management on 01.08.1985. His services were terminated on 27.09.1988. The termination letter Exhibit WW-1/24, *inter alia*, stated that his services were terminated “*on account of indiscipline and negligence on your part. The indiscipline has been caused by you by not complying with instructions of your senior Mr. H.P. Lakhotia who has asked you to collect the deposit from Bahadurgarh on account of the company*”. Admittedly, prior to the termination of the petitioner, no show-cause notice was issued to him by the respondent management and he was not granted any opportunity to defend himself.

3. Before the Labour Court, the respondent management sought to establish the charge against the petitioner, as contained in the termination letter. The management produced Mr. H.P. Lakhotia (MW-2), who filed his affidavit by way of evidence as Exhibit MW-2/A, wherein he stated, *inter alia*, as follows:

“That on 27-09-1988 Shri Yoginder Sharma workman concern in the above noted case caused indiscipline by not complying with my instructions & refused to collect the deposit from Bahadurgarh on account of the company & which was a part of his duty & his services were terminated on 27-09-1988 for the same reason. That earlier as a routine part of his duty he was collecting the deposit & other payments on behalf/account of the company within & outside Delhi. He had been submitting bills for expenses incurred for his such collections made on behalf of the company & the same are Annexure ‘A’ & Annexure ‘B’ to this affidavit. He had been paid by the company for his above said bills & payment vouchers indicating payments made to him are annexed herewith as Annexure ‘C’ & ‘D’”

4. He also stated that the petitioner was used to using abusive language and indecent behaviour. On three earlier occasions prior to his termination the petitioner had committed acts of insubordination and indiscipline. On all occasions he was let off with the warning that he should not repeat the same in future and, on all occasions, he gave an assurance in this regard. The management also produced Mr. D.K. Bhalla as MW-1, who stated similarly in Exhibit MW-2: *“That on 27-09-1988 Shri Yoginder Sharma had refused to collect deposit from Bahadurgarh when he was asked to do so by Shri H.P. Lakhotia, which was a part of his duty”*.

5. MW-3 Mr. J.L. Kabra also deposed for the management, but his deposition was not relevant. Mr. Yogeshwar Dutt appeared as MW-4. He, *inter alia*, stated that the petitioner refused to perform certain duties which he had been performing. He deposed that *“he had refused to do so to Mr. H.P. Lakhotia who was the accountant of the company & later on to Mr. D.K. Bhalla one very senior officer of the co. & also used abusive language with Mr. D.K. Bhalla in my presence”*.

6. The petitioner also led his evidence and he was also cross-examined by the management. The Labour Court has analysed the evidence in the impugned award and concluded that it was a part of the duties of the petitioner to collect payment from the customers of the respondent management. On the basis of the evidence, the Labour Court concluded that the charge against the petitioner stood duly proved. It was held that the petitioner refused to accept the cheque dated 27.09.1988 given to him along with the letter of termination Exhibit WW-1/24, which also contains the charges against him. The alternative submission of the petitioner that the

termination should be deemed to take effect from the date of the award, and that the same would not be effective from the date on which the termination letter Exhibit WW-1/M-24 was served on the petitioner, i.e., 27.09.1988 was rejected by the Labour Court. Consequently, the impugned award has been rendered answering the reference against the petitioner.

7. The first submission of learned counsel for the petitioner is that the management's witnesses were not credible and their testimonies were liable to be rejected. He submits that though the termination letter makes reference to only one instance of the petitioner allegedly not obeying the instructions of Mr. H.P. Lakhotia to collect payment from Bahadurgarh, in his evidence Mr. H.P. Lakhotia, as well as the other management's witnesses sought to inflate the allegations against the petitioner by also stating that the petitioner had used abusive language in the past and that he had repeatedly been warned on that account. However, in their cross-examination, these witnesses could not substantiate the said additional allegations against the petitioner.

8. Mr. Chaturvedi submits that, had there been any substance in the said additional allegations against the petitioner, the respondent would have mentioned the same in the letter of termination dated 27.09.1988, which was not done.

9. Mr. Chaturvedi has pointed out the following weaknesses/contradictions in the management's evidence to submit that the charge against the petitioner-of insubordination, could not be said to be proved in accordance with law:

“1. That Mr. Lakhotia in his affidavit dated 29.04.1992 in para 4 at inner page 20 of counter-affidavit stated that workman on three occasions earlier to termination had committed acts of insubordination & indiscipline. Whereas to test his veracity in cross examination he stated at page 31 of writ petition 3rd line from top “I do not remember if earlier to termination of service of Sh. Yoginder Sharma had committed act in subordination and indiscipline.” This is material contradiction and proved the falsity of deposition of witness. The witness can not be relied upon.

2. That Mr. Lakhotia in his cross examination at page 30 of writ petition he stated at 8th line from top “In the year 1988 particularly sometime before termination I told Sh. Yoginder Sharma for collection of cheque from Bahadurgarh and then he refused to carry on my instructions, his conduct was not okay. In 1988 I asked him to go for collection of amount due on FD to Bahadurgarh he refused to do this job.” Whereas in further cross at same page 4th line from bottom he stated “It was the first and last incident with me when the workman refused to carry on my instructions.” This is material contradiction and proved the falsity of deposition of witness. The witness can not be relied upon. The deposition shaken his veracity.

3. That Mr. D.K. Bhalla who terminated the services of the petitioner says in his affidavit dt. 29.04.1992 at inner page 17 of the counter-affidavit at para 1 “That Sh. Yoginder Sharma workman concerned in the above noted case used to of using abusive language and insubordination in the office and whenever checked about the same he used to give oral assurance that the he will not repeat the same again.” Whereas in cross examination at page 25 of writ at 11th line stated “No show cause notice was issued about earlier foul language used by the claimant.” Ordinarily, if any employee is in habit of using abusive language then he can not be allowed to work there and there must be some complaints against him. But nothing was filed against the workman in writing in respect of his alleged misbehavior which clearly proves the leveling of false charges against the workman.

4. *The workman in his affidavit and in his cross examination clearly denied such incidents. He stated in his cross that he was assigned work by Mr. D.K. Bhalla, Mr. Mahesh Birla, Mr. Sushil, Mr. Yogesh Kumar. Therefore in cross of Lakhotia he was suggested that the workman was taking instructions from someone else and even on day of incident he as per instructions (from others not from Lakhotia) went to collect the dues on the day of incident.*

5. *That the both above material management witnesses did not support their case and there are material contradictions in their deposition, therefore their deposition can not be relied upon”.*

10. Mr. Chaturvedi submits that since the present was a case of no prior notice being issued, or inquiry being conducted before termination of service, the same would stand on a different footing from that in which an inquiry has been conducted by the management prior to termination of the services of the workman. A case where an inquiry has been held-though the same may have been found to be unfair and illegal by the Industrial Adjudicator subsequently, is different from a case where no inquiry has been held prior to the passing of the termination order. In the latter case, i.e., when no prior inquiry has been held, the termination would take effect only from the date of the award and not prior to that, if the misconduct is established before the Industrial Adjudicator.

11. In support of his submission, Mr. Chaturvedi places reliance on a 3-Judge Bench judgment of the Supreme Court in ***Gujarat Steel Tubes Ltd. Vs. Gujarat Steel Tubes Mazdoor Sabha & Others***, AIR 1980 SC 1896, and in particular to paragraph 152. The said paragraph reads as follows:

“152. Kalyani (1963) 1 LLJ 679 was cited to support the view of relation back of the award to the date of the employer's termination orders. We do not agree that the ratio of Kalyani corroborates the proposition propounded. Juris-prudentially, approval, is not creative but confirmatory and therefore relates back. A void dismissal is just void and does not exist. If the Tribunal, for the first time, passes an order recording a finding of misconduct and thus breathes life into the dead shell of the Management's order, pre-dating of the nativity does not arise. The reference to Sasa Musa AIR 1959 SC 923 in Kalyani enlightens this position. The latter case of D.C. Roy v. Presiding Officer, M.P. Industrial Court, Indore (supra) (1976) 3 SCC 693 specifically refers to Kalyani case and Sasa Musa case and holds that where the Management discharges a workman by an order which is void for want of an enquiry or for blatant violation of rules of natural justice, the relation back doctrine cannot be invoked. The juris-prudential difference between a void order, which by a subsequent judicial resuscitation comes into being de novo, and an order, which may suffer from some defects but is not still-born or void and all that is needed in the law to make it good is a subsequent approval by a tribunal which is granted, cannot be obfuscated.”

12. Mr. Chaturvedi also places reliance on ***D.T.C. Vs. Prem Chand, Ex Sweeper***, 176 (2011) DLT 476 (DB), where the Supreme Court judgment in ***Gujarat Steel Tubes Ltd.*** (supra) has been applied while observing that what is *ab initio* void is void and does not exist. Mr. Chaturvedi submits that a termination order, which is punitive in nature, if passed without holding an inquiry is void and, therefore, even if the charge is proved before the Industrial Adjudicator, the termination would not relate back to the date when such a void termination order was passed.

13. The next submission of Mr. Chaturvedi is that even if one were to proceed on the basis that the charge stood proved, it could not be said that the services of the petitioner could be justifiably terminated as the alleged misconduct was not grave or serious enough to warrant such a punishment. He submits that the punishment was disproportionate to the proved misconduct.

14. On the other hand, the submission of learned counsel for the respondent is that the charge was duly proved against the petitioner. He has also pointed out what, according to him, are various contradictions in the stand of the petitioner. The contradictions brought out by the respondent in the evidence led by the petitioner workman are as follows:

“INCONSISTENT MOTIVES PLEADED BY PETITIONER

In the notice dated 12.10.1998, Statement of Claim before the Conciliation Officer as also Statement of Claim before the Ld. Tribunal no motives whatsoever have been alleged against the management for the termination of services. In affidavit by way of evidence dated 31.01.1992 it is stated that the management was not making payment as per minimum wages and since the petitioner insisted on enhancement, his services were terminated. In the affidavit in rebuttal dated 13.03.2003 it is stated by the petitioner that due to the request of the workman for increasing the salary his services were terminated. In his cross examination dated 29.08.1996 he was stated that his services were terminated as the management had to appoint their own person in his place. Subsequently in his cross examination he has stated ‘Though I have stated that my salary be increased but I do not know the reason why my services were terminated’.

***CONFLICTING & CONTRADICTIONARY POSITION
REGARDING THE INCIDENT***

In the notice dated 12.10.1988, Statement of Claim dated 21.11.1998 before the Ld. Conciliation Officer and Statement of Claim dated 12.10.1989 before the Ld. Tribunal makes no reference to the incident at all which led to the termination. In the rejoinder there was no specific denial of the incident and the incident and it was stated that 'In fact, it was not the part of his duty and this work was never assigned to the workman concerned'.

Petitioner in his cross examination dated 29.08.1996 stated that 'There was no Mr. Lakhotia in the mgt... I was never given any order or direction by Mr. Lakhotia'. That the averments made by the workman was inconsistent with the documents exhibited on record. In his affidavit in rebuttal evidence dated 13.03.2003 it is stated that the workman was never asked by Mr. H.P. Lakhotia to collect the deposit from Bahadur Garh and the management alleged false refusal. In his cross examination dated 09.07.2003 he stated 'It is correct that Mr. H.P. Lakhotia was working for the mgt.' That the workman was not sitting in the hall rather was sitting in a room along with five or six people. Workman in cross examination suggested it is incorrect to suggest that I refused to collect payment from Bahadurgarh & used filthy language. Thereby admitting that there was instruction but he did not refused any instruction.

MW-1 Shri D.K. Bhalla, in his cross examination, categorically stated that he was present in the hall when the incident took place. That there was no suggestion in the evidence of Mr. Bhalla, that he was not present in the hall or the incident never took place in his presence. It is further not suggested that false allegations has been leveled against the workman. It was further suggested that claimant never refused to obey Mr. Lakhotia, thereby bringing on the defence that the workman obeyed the instructions of Mr. Lakhotia.

MW-2 Shri H.P. Lakhotia, the inconsistencies in defence brought forward by workman was further evident from the cross examination of MW-2. That the witness was suggested

that on the date of incident workman was never instructed by witness. It was further suggested that on the day of the incident workman went to collect the dues as per instructions and he did his duty and never refused. That the suggestion brings forth that the workman obeyed the instructions of Mr. Lakhota, thus the said suggestion was totally contradictory to the earlier stand where it was suggested that the said incident never occurred.

That the counsel for the workman during arguments has suggested that the said incident never occurred and he has been victimized.

MW-4 Shri Yogeshwar Dutt, has deposed in regard to incident, however he has not been cross examined on the said aspect and he has only been cross examined on the aspect that he was not aware of the working of the company. That the witness in his examination in chief has clearly stated the incident and he further stated that he was functioning in the same hall. That the evidence of the witness thus remained unrebutted.

INCONSISTENT PLEAS

That the petitioner on the one hand has denied any disobedience of orders by his seniors and at the same time he is trying to prove that the punishment meted out to him is too harsh for the act he committed and hence the very foundation of the petition is contradictory.”

15. Learned counsel for the respondent submits that in a later decision in ***R. Thiruvirkolam Vs. Presiding Officer & Another***, (1997) 1 SCC 9, the Supreme Court has held that the dismissal would take effect from the date when the dismissal order was passed, and not from the date when the same was upheld by the Industrial Adjudicator.

16. Learned counsel for the petitioner, however, interjects and submits that this was a case where an inquiry was held prior to the termination of the workman, which was found to be defective, and on further inquiry before the Industrial Adjudicator the charge was proved by the management. It is in those circumstances that the Supreme Court concluded that the termination would relate back to the date when the order for the said purpose was passed by the management.

17. Learned counsel for the respondent, on the other hand, submits that this decision clarifies that there is no difference in a case where prior inquiry is held and a termination order is passed, and a case where no inquiry is held prior to the passing of the termination order. In both cases, the position would be the same, i.e., that the termination order would take effect from the date on which it is passed if, eventually, before the Industrial Adjudicator the charge is proved and the order of termination is found to be justified.

18. In his rejoinder, Mr. Chaturvedi has submitted that since the judgment of the Supreme Court in ***Gujarat Steel Tubes Ltd.*** (supra) is a decision of three Hon'ble Judges, whereas the judgment relied upon by the respondent in ***R. Thiruvirkolam*** (supra) is a judgment of two Hon'ble Judges, it is the earlier judgment in ***Gujarat Steel Tubes Ltd.*** (supra) which would bind this Court and should be followed, and not the subsequent judgment. In support of this submission, he places reliance on a Full Bench judgment of this Court in ***Devender Roy & Others Vs. District and Sessions Judge, Delhi & Others***, 192 (2012) DLT 602 (FB), to submit that when there are two conflicting decisions, the judgment of the larger bench would prevail.

19. Having heard learned counsel for the parties, considered the impugned award, the record, and the respective submissions, I am of the view that there is no merit in this petition and the same is liable to be dismissed. I have set out hereinabove the submissions made by both counsel with regard to the evidence brought on record by the parties, on the basis of which the finding of guilt has been returned against the petitioner by the Industrial Tribunal. The purpose of extracting the relevant part of the evidence of the management and the respective submissions of the parties is to demonstrate that the present is not a case of “no evidence”. It is also not a case where the finding of guilt can be said to be contrary to the evidence brought on record. Though the management’s witnesses may not have substantiated the allegations beyond those which are contained in the termination order, so far as the allegations contained in the termination order are concerned, they stand substantiated and proved on the basis of the evidence of the parties. I may set out herein below the discussion in the impugned Award – analyzing the evidence led by the parties, on the basis of which the learned Industrial Adjudicator has arrived at the find of guilt against the Petitioner. The same reads as follows:

“8. The main witness of the management Shri H.P.Lakhotia deposed in support of the charges in his affidavit Ex.MW2/A that on 27.09.88, the claimant committed indiscipline by not complying with his order/instructions as refused to collect the deposits from Bahadurgarh which was a part of his duty being done in routine within and outside Delhi i.e. collection of deposits and other payments on behalf/account of the company. The witness also proved the bills of the expenses incurred by the claimant as Annexures A & B and the payment vouchers made to the claimant vide Annexures C & D for collection of deposits within and outside Delhi.

9. This witness further deposed that claimant used abusive language in indecent behaviour in the office. Earlier also, the claimant had committed act of in subordination and indiscipline and he was let off after warning. The witness also deposed that during conciliation proceedings, the claimant was offered to join the company but he failed to do so. In support of the deposition of Shri Lakhota, another witness of the management Shri D.K.Bhalla also deposed that claimant used to use abusive language and caused insubordination in the office who was working as General Dealing Clerk and used to collect deposits on behalf of the management within and outside Delhi. He also corroborated that on 27.09.88, when he was asked by Shri Lakhota to collect deposits from Bahadurgarh, the claimant refused and as such caused insubordination leading to termination of his service. Similarly, MW4 Shri Yogeshwar Datt Vats deposed in corroboration of testimony of other witnesses. However, there is substance in the submissions by Ld. A.R. for the claimant and MW3 has not supported the case/charges while MW4 added without corroboration that claimant had also abused Shri D.K.Bhalla in his presence.

10. Regarding past conduct of the claimant, Shri Lakhota admitted during his cross-examination that incident dated 27.09.88 was the first and last incident with him when the workman refused to carry on his instructions. Further he was not able to remember whether prior to termination of services, the claimant had committed any act of insubordination or indiscipline.

11. In fact, the defence of the claimant as put to this witness was that he had gone to collect the dues on the day of incident as per the instructions and never refused. The claimant in fact has taken contradictory stand as it was not so suggested to MW1 Shri D.K.Bhalla that claimant went to collect the dues and never refused to obey the instructions. It is also not a case of the claimant in his affidavit wherein the claimant's case was that his services were terminated on 27.09.88 on account of demand of enhancement in the salary and false charge of

indiscipline leveled vide termination letter dated 27.9.88. The claimant admitted that he was maintaining dispatch register and was also going to bank to deposit cheques etc, however, he denied during cross-examination that he was ever sent to make collection of the dues.

12. On the face of contradictions and the submissions made by the claimant that it was not part of his duty to collect payment from the customers for the company/management, the management is able to prove the charges against the claimant as per evidence adduced by the management on charge. The claimant also admitted that he had refused to accept the cheque dated 27.9.88 which was given to him along with letter of even date i.e. Ex.WW1/M24 which contains the charges against him.”

20. The purpose of setting out the respective submissions is also to demonstrate that the endeavour of the petitioner is to require this Court to re-appreciate the evidence, as if this Court is sitting in appeal over the impugned award. However, ld. Counsel has not been able to point out any perversity, or fundamental error of approach in the impugned Award. It is well-settled that this Court-while exercising power of judicial review under Article 226 of the Constitution of India, in respect of an order passed by a Tribunal, does not sit in appeal and it is not for this Court to re-appreciate the evidence on merits. Consequently, the finding of guilt returned by the Labour Court does not call for interference by this Court in exercise of writ jurisdiction.

21. Learned counsels have made substantial arguments on the second plea of the petitioner, i.e., with regard to the date from which the termination order should take effect. The submission of the petitioner is that because the respondent management did not hold any domestic inquiry whatsoever

before issuing the letter of termination dated 27.09.1988 and the inquiry was conducted for the first time before the Labour Court and, on that basis, the termination order has attained legality, the date of termination should be taken as date of the award and the petitioner should have been held as entitled to pay & allowances up to the date of the award, i.e., 06.11.2003. The petitioner has sought to place reliance on **Gujarat Steel Tubes Ltd.** (supra) in support of this submission.

22. The earlier decision in **Sasa Musa** (supra) as well as the later decision in **D.C. Roy** (supra) and other decisions were considered by the Supreme Court in **R. Thiruvirkolam** (supra). No doubt, **R. Thiruvirkolam** (supra) was a case where a defective domestic inquiry had been conducted prior to the issuance of the order of dismissal, however, what is of significance is that the Supreme Court in **R. Thiruvirkolam** (supra) examined threadbare the decision in **Gujarat Steel Tubes Ltd.** (supra) and held the same to be *per incuriam* on the ground that it was not in conformity with **Kalyani** (supra). The distinction sought to be drawn by the Supreme Court in **Gujarat Steel Tubes Ltd.** (supra) between the two kind of cases, namely, one in which the order of termination is preceeded by a domestic inquiry (though the same may be found to be illegal by the Labour Court) and the other, where the order of termination is not preceeded by any domestic inquiry, has been obliterated in view of the judgment in **R. Thiruvirkolam** (supra).

23. I may first refer to the decision of the Supreme Court in **Sasa Musa** (supra). This decision was rendered by a bench of three Hon'ble Judges, namely B.P. Sinha, P.B. Gajendragadkar and K.N. Wanchoo, JJ. This was a case where the management had not passed any orders of termination. The

management had applied to the Industrial Tribunal under Section 33 of the Act to seek permission to dismiss the delinquent workman. Though, the Industrial Tribunal found on the basis of evidence that some of the workmen were guilty of misconduct, it rejected the application of the management under Section 33 of the Act. Eventually, when the matter landed before the Supreme Court, the Supreme Court, *inter alia*, held that all the workmen were guilty of serious misconduct and the management was entitled to grant of permission to dismiss them. The Supreme Court proceeded to hold;

“.....But as the management held no enquiry after suspending the workmen & proceedings under Section 33 were practically converted into the inquiry which normally the management should have held before applying to the Industrial Tribunal, the management is bound to pay the wages of the workmen till a case for dismissal was made out in the proceedings under Section 33; (see the decision of this Court in Management of Ranipur Colliery v. Bhuban Singh, ('59) C.A. No. 768 of 1957, D/- 21.4.1959:(AIR 1959 SC 833). As already pointed out, this is the view taken by the Industrial Tribunal while dealing with the application under Section 33-A which stood confirmed by the dismissal of the appeal by the workmen in that behalf. The management will therefore have to pay the wages during the period of suspension till the award of the Industrial Tribunal.”

24. The issue with regard to the date till when the workmen would be entitled to wages, in a case where a domestic inquiry is held to be bad and the charge is subsequently proved before the Industrial Tribunal and, on that basis, the order of termination upheld, came up for consideration before the Constitution Bench of the Supreme Court in **Kalyani** (supra). Two of the Hon'ble Judges, who were party to the judgment in **Sasa Musa** (supra), namely P.B. Gajendragadkar and K.N. Wanchoo, JJ were also parties to the

decision in **Kalyani** (supra). Pertinently, both the decisions were authored by K.N. Wanchoo, J. The relevant facts noted in **Kalyani** (supra) with respect to **Sasa Musa** (supra) were that the management had sought permission to dismiss the employees “***though no inquiry whatsoever had been held by the employer and no decision taken that the employees be dismissed. It was in those circumstances that a case for dismissal was made out only in the proceedings under Section 33(1) and, therefore, the employees were held entitled to their wages till the decision of their application under Section 33***”. It was observed that the matter would have been different if an inquiry had been held “***and the employer had come to the conclusion that dismissal was the proper punishment and then had applied under Section 33(1) for permission to dismiss. In those circumstances, the permission would have related back to the date when the employer came to the conclusion after an inquiry that dismissal was proper punishment and had applied for removal of them by an application under Section 33(1)***”. The Supreme Court further observed “***The observations therefore in M/s. Sasa Musa Sugar Company's case, (1959) Supp (2) SCR 836 :(AIR 1959 SC 923) on which the appellant relies apply only to a case where the employer had neither dismissed the employee nor had come to the conclusion that a case for dismissal had been made out.***”. (emphasis supplied)

25. From the above, it appears that in **Kalyani** (supra) the Constitution Bench highlighted two aspects peculiar to **Sasa Musa** (supra). Firstly, the fact that no departmental inquiry was held before applying under Section 33(1) to the Industrial Tribunal to seek permission for dismissal of the

workmen and, secondly, that no decision was taken by the management to dismiss workmen prior to making of the application. Since there was no order of dismissal/termination, the relationship of employer & employee continued between the parties till the date the Industrial Tribunal found merit in the application under Section 33(1) moved by the management to seek permission to dismiss the workmen.

26. In the present case, there is a decision taken by the management to dismiss the petitioner. So far as the aspect of a domestic inquiry not being held prior to the passing of the order of dismissal is concerned, that aspect, to my mind, is squarely covered by the decision in ***R. Thiruvirkolam*** (supra). The Supreme Court in ***R. Thiruvirkolam*** (supra) observes that ***Gujarat Steel Tubes Ltd.*** (supra) strikes a discordant note. Even though ***Kalyani*** (supra) is referred therein, the basis of the observations in ***Gujarat Steel Tubes Ltd.*** (supra) is that “*a void dismissal is just void and does not exist*”. The Supreme Court questioned the aforesaid assumption jurisprudentially. It goes on to examine whether the observations in ***Gujarat Steel Tubes Ltd.*** (supra) are in consonance with ***Kalyani*** (supra) and ***D.C. Roy*** (supra). I consider it appropriate at this stage to extract the discussion found in the judgment in ***R. Thiruvirkolam*** (supra):

“8. The above extract from Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] which contains the ratio of the decision clearly indicates that the above observations in Gujarat Steel [(1980) 2 SCC 593 : 1980 SCC (L&S) 197 : (1980) 2 SCR 146] are not in conformity with Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] . In Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] it was held that the defect found in the domestic inquiry is

*nullified by proof of misconduct on the basis of evidence adduced before the Labour Court so that there is no ground available for the Labour Court to set aside the order of punishment. The question before the Labour Court is whether the order of punishment should be set aside on any ground and when the Labour Court ultimately reaches the conclusion that even though the inquiry was defective, there is material to justify in the punishment awarded, it rejects the challenge to the order of punishment which continues to operate. It is not as if the order of punishment becomes effective only on rejection of the challenge to its validity. **Unless set aside by a competent court on a valid ground, the order of punishment made by the employer continues to operate. The operation of the order of punishment made by the employer does not depend on its confirmation by the Labour Court to make it operative. Unless set aside by a competent authority, the order of punishment made by the employer continues to be effective. Obviously this is the ratio of the decision in Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] .***

9. *The decision in D.C. Roy [(1976) 3 SCC 693 : 1976 SCC (L&S) 484 : (1976) 3 SCR 801] is by a two-Judge Bench to which Krishna Iyer, J. is a party. Therein also it was held that the award of the Labour Court relates back to the date when the order of dismissal was passed by the employer when it found the inquiry to be defective but reaches the conclusion on the evidence adduced before it that the dismissal was justified. After referring to Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] it was held in D.C. Roy [(1976) 3 SCC 693 : 1976 SCC (L&S) 484 : (1976) 3 SCR 801] as under: (SCR p. 805 : SCC p. 697, para 8)*

“These observations directly cover the case before us because though the Labour Court, in the instant case, found that the inquiry was defective as it infringed the principles of natural justice, it came to the conclusion after considering the evidence adduced before it, that the dismissal was justified. The award of the Labour Court must therefore relate back to the date when the order of

dismissal was passed on the termination of the domestic inquiry.”

10. We may now refer to the juristic principle on which the above-quoted observations in Gujarat Steel [(1980) 2 SCC 593 : 1980 SCC (L&S) 197 : (1980) 2 SCR 146] appears to be based. There is a very useful discussion of the topic under the heading “Void and Voidable” at pp. 339 to 344 in Administrative Law by Wade, 7th Edn. The gist of the discussion in Wade is as under: (pp. 341-44)

“... Here also there is a logical difficulty, since unless an order of the court is obtained, there is no means of establishing the nullity of the list. It enjoys a presumption of validity, and will have to be obeyed unless a court invalidates it. In this sense every unlawful administrative act, however invalid, is merely voidable. But this is no more than the truism that in most situations the only way to resist unlawful action is by recourse to the law. In a well-known passage Lord Radcliffe said:

‘An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.’

** * **

‘Void’ is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of legal relativity is borne in mind, confusion over ‘void or voidable’ can be avoided.”

(emphasis supplied)

11. With great respect, we must say that the above-quoted observations in Gujarat Steel [(1980) 2 SCC 593 : 1980 SCC (L&S) 197 : (1980) 2 SCR 146] at p. 215 are not in line with the decision in Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] which was binding or with D.C. Roy [(1976) 3 SCC 693 : 1976 SCC (L&S) 484 : (1976) 3 SCR 801] to which the learned Judge, Krishna Iyer, J. was a party. It also does not match with the underlying juristic principle discussed in Wade. For these reasons, we are bound to follow the Constitution Bench decision in Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] which is the binding authority on the point.

12. We may now refer to later decisions of this Court in Desh Raj Gupta v. Industrial Tribunal IV, U.P. [(1991) 1 SCC 249 : 1991 SCC (L&S) 303 : 1990 Supp (1) SCR 411] and Rambahu Vyankuji Kheragade v. Maharashtra Road Transport Corpn. [1995 Supp (4) SCC 157 : 1996 SCC (L&S) 173] In Rambahu [1995 Supp (4) SCC 157 : 1996 SCC (L&S) 173] , Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] and D.C. Roy [(1976) 3 SCC 693 : 1976 SCC (L&S) 484 : (1976) 3 SCR 801] were followed by a two-Judge Bench and similar view was taken that the order of dismissal takes effect from the date on which it was originally passed and not from the date of the Labour Court's award when the Labour Court, after holding the domestic inquiry to be defective reaches the conclusion on the evidence adduced before it that the punishment awarded was justified. However, in Desh Raj Gupta [(1991) 1 SCC 249 : 1991 SCC (L&S) 303 : 1990 Supp (1) SCR 411] the observations in Gujarat Steel [(1980) 2 SCC 593 : 1980 SCC (L&S) 197 : (1980) 2 SCR 146] were relied on for taking a different view without any reference to either Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] or D.C. Roy [(1976) 3 SCC 693 : 1976 SCC (L&S) 484 : (1976) 3 SCR 801] which appear to have been overlooked. In these circumstances the decision in Desh Raj Gupta [(1991) 1 SCC 249 : 1991 SCC (L&S) 303 : 1990 Supp (1) SCR 411] cannot be treated as an authority on the point. Both these decisions were by a two-Judge Bench.

13. As a result of the aforesaid decision it must be held that the only point involved for decision in the appeal is concluded against the appellant by the Constitution Bench decision of this Court in Kalyani [(1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679] and the observations to the contrary in Gujarat Steel [(1980) 2 SCC 593 : 1980 SCC (L&S) 197 : (1980) 2 SCR 146] are, therefore, per incuriam and not binding. The order of punishment in the present case operated from 18-11-1981 when it was made by the employer and not from 11-12-1985, the date of Labour Court's award. The appellant is, therefore, not entitled to any relief."

(Emphasis supplied)

27. In the light of the aforesaid discussion, reliance placed by the petitioner in **Gujarat Steel Tubes Ltd.** (supra) appears to be misplaced. I agree with the submission of learned counsel for the respondent that the distinction sought to be drawn by the petitioner, as aforesaid, is not a relevant or material distinction. The dismissal of the petitioner – whether, or not, it was preceded by a domestic inquiry would relate back to the date of the order, if the charge on the basis of which the petitioner was dismissed is established before the Labour Court for the first time.

28. Reliance placed by Mr. Chaturvedi on **Prem Chand** (supra) is of no avail since this decision proceeds on the basis of **Gujarat Steel Tubes Ltd.** (supra), which has been held to be *per incuriam*, as aforesaid, and the decision in the later decision in **R. Thiruvirkolam** (supra) was not brought to the notice of the Division Bench when it rendered its decision in **Prem Chand** (supra). The argument of Mr. Chaturvedi that **Gujarat Steel Tubes Ltd.** (supra) being a decision of three Hon'ble Judges, whereas the decision

in ***R. Thiruvirkolam*** (supra) being a decision of two Hon'ble Judges, the decision in ***Gujarat Steel Tubes Ltd.*** (supra) should be followed by this Court, has no merit. This is for the reason that the Supreme Court while deciding ***R. Thiruvirkolam*** (supra) has examined all the relevant decisions on the subject including ***Gujarat Steel Tubes Ltd.*** (supra) in the light of the Constitution Bench judgment in ***Kalyani*** (supra) and has concluded that ***Gujarat Steel Tubes Ltd.*** (supra) is *per incuriam*. That being the position it is not for this Court to disregard the later decision in ***R. Thiruvirkolam*** (supra). Consequently, the decision in ***Devender Roy*** (supra) has no application in the facts of the present case.

29. There is yet another aspect that needs to be taken note of. The employer has two options while dealing with delinquent workman. The employer may serve a charge-sheet on the delinquent workman, hold a departmental inquiry and then take disciplinary action against the workman. Alternatively, it may take disciplinary action against the workman on the basis of the misconduct which it may attribute to the workman. In the first case, if an industrial dispute is raised and the punishment is questioned, the Industrial Adjudicator would firstly determine the issue with regard to the validity of the domestic inquiry. If the domestic inquiry is found to be in compliance with the principles of natural justice, and the applicable rules, the Industrial Adjudicator would examine whether the findings returned in the domestic inquiry are perverse, or not. The scope of the examination undertaken by the Industrial Adjudicator in relation to the domestic inquiry- once it is held to be in compliance of the principles of natural justice and validly held, is limited. The Industrial Adjudicator does not sit as a Court of

appeal. Therefore, unless the findings returned in the domestic inquiry are perverse, the Industrial Adjudicator does not interfere with the same. Even if the Industrial Adjudicator would have come to a different conclusion on the appreciation of the evidence on record, it is no ground for the Industrial Adjudicator to interfere with the findings reached in the domestic enquiry, if the view taken by the Inquiry Officer is a plausible view.

30. In the situation where the domestic inquiry is not held at all, and the delinquent workman is punished by the management without such an inquiry, but is later or simultaneously made aware of the charges against him, the management consciously takes the decision that in case the workman raises an industrial dispute, it would have to establish the charge before the Industrial Adjudicator by leading evidence. Therefore, the management by straightaway taking disciplinary action against the delinquent workman conveys its willingness to establish the charge before the Industrial Adjudicator. The scope of the inquiry before the Industrial Adjudicator in this eventuality is much wider, since the Industrial Adjudicator decides for itself whether, or not, the charge is established by the management.

31. The second situation, i.e., where no prior inquiry is held before the delinquent workman is punished, would be a situation which places the delinquent workman in a more advantageous position inasmuch, as, the inquiry is conducted before an independent judicial officer and not in-house by the employer-where the scope of interference by the Industrial Adjudicator is somewhat limited. In my view, there is no reason why a management-which is willing to prove the charge before an Industrial Court,

rather than resort to an in-house inquiry, should be burdened with payment of wages up to the date of the award even when the charge against the delinquent workman stands proved before the Industrial Court.

32. Lastly, the submission of Mr. Chaturvedi that the punishment of dismissal from service was not justified, even if the charges are assumed to be proved, may be examined. The order of dismissal makes allegations of indiscipline and negligence on the part of the petitioner. Indiscipline has been attributed on account of non-compliance of the instructions by the petitioner of his senior Mr. H.P. Lakhotia, who had asked the petitioner to collect deposit from Bahadurgarh on account of the company. This charge stands duly proved. This charge, by itself, is serious enough to warrant dismissal from service. Refusal by workman to obey the orders given to him which fall within the scope of his duties clearly tantamounts to insubordination. Such insubordination strikes at the very root of the employer and employee relationship, as the employee is duty bound to obey lawful and justified instructions of the employer. If the employee does not obey orders of the management which are legitimately given, and is still allowed to continue in employment, the same would completely destroy and vitiate the atmosphere in the industry. It would breed indiscipline, insubordination and make it impossible for the industry to thrive. Others would be encouraged to adopt such conduct without fear of termination. It would adversely affect the interest of the larger body of workmen who believe in disciplined conduct, as the industry would suffer due to the misconduct of a handful of indisciplined workmen. Such indiscipline should

certainly invite the punishment of dismissal from service. The said punishment cannot be said to be unjustified or disproportionate.

33. For the aforesaid reasons, in my view, the impugned award does not call for interference. Accordingly, the writ petition is dismissed leaving the parties to bear their respective Costs.

(VIPIN SANGHI)
JUDGE

APRIL 02, 2013
BSR