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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.730 OF 2004

M/s.Empire Dyeing)
414, Senapati Bapat Marg,)
Lower Parel, Mumbai – 400 013.) ...Petitioner

....Versus....

1). Mr.Sandesh Vasudeo Kusam)
Aged 26 years, Son of late)
Vasudev Shivram Kusam)
residing at 711, 7th Floor)
Shree Siddhi Sagar CHS,)
Worli Village, Mumbai – 400 030)
)
2). Rajaram Ramchandra Rode,)
Tawade Chawl, Room No.9,))
Gamdevi Lane, Ghatkoper (W))
Mumbai – 400 086.)
)
3). Presiding Officer,)
Labour Court,)
Bandra-Kurla Complex, Mumbai)
)
4). Member, Industrial Court,)
Bandra-Kurla Complex, Mumbai) ...Respondents

Mr.K.M. Naik, Senior Counsel with Mr.S.P. Salkar, Mr.Hemant Tekay
and Ms.Janki Kadam for the Petitioner.

Ms.Shobana Gopal for the Respondent Nos.1 and 2.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 27TH JULY, 2017
PRONOUNCED ON : 10th OCTOBER, 2017

JUDGMENT :-

1. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks writ of certiorari or any other appropriate writ, order or direction in the nature of writ of certiorari and has impugned the common judgment dated 2nd February, 2002 passed in the Application (BIR) Nos.81 of 1995 and 82 of 1995 by the Labour Court and also has impugned the judgment and order dated 9th February, 2004 passed by the learned Industrial Court in Appeal (IC) 50 of 2002, allowing the applications filed by the predecessor of the respondent no.1 and the application of the respondent no.2 (hereinafter referred as the said employees) and dismissing the appeal filed by the petitioner by the Labour Court and the Industrial Court respectively. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The original respondent no.1 had joined the employment of the petitioner on 5th December, 1964. The respondent no.2 had joined the employment of the petitioner some time in the year 1973.

3. It is the case of the petitioner that on 10th March, 1993, the security officer and the supervisor while taking a round in the factory premises of the petitioner observed that the said employees were consuming hard liquor in the loft of Cotton Finishing Department near the Famatax No.1. The security officer took charge of one bottle of

DSP whisky as also two glasses containing whisky which was being consumed by them and handed over the same to the supervisor Mr. Indersen Singh. The said employees also arrogantly replied when they were directed to come down from the loft of Cotton Finishing Department. By a letter dated 10th March, 1993 issued by the petitioner, the said employees were suspended pending enquiry. The said employees were thereafter issued charge-sheets both dated 13th March, 1993. The following charges were levelled :

- a). Drinking hard liquor during working hours inside the factory of Empire Dyeing ;
- b). Riotous, disorderly and indecent behaviour during working hours on the premises of Empire Dyeing ;
- c). Threatening Security staff of Empire Dyeing without any provocation ;
- d). Commission of any acts subversive of discipline or good behaviour on the premises of the Empire Dyeing.

4. The petitioner thereafter appointed an Enquiry Officer. The said employees were represented at the enquiry by the Vice President of Maharashtra General Kamgar Union. The enquiry was concluded on 19th April, 1995. The Enquiry Officer submitted his report and the findings dated 13th May, 1995 holding that the said employees were guilty of charges levelled against them in the

charge-sheets.

5. It is the case of the petitioner that considering the seriousness of the charges proved against the said employees at the enquiry, the petitioner decided to dismiss them from service of the petitioner. However, while deciding the punishment to be imposed, the petitioner also considered their past service record and it was found that there were no aggravating circumstances against the said employees. The petitioner therefore with a view to give the benefits of one month's notice pay to those employees, decided to use the terminology "discharge" rather than dismissal without notice.

6. The petitioner accordingly issued a letter dated 30th May, 1995 recording charges alleged in the charge-sheets, the enquiry report holding them guilty of the charges contained in the charge-sheets and informing that the petitioner had concurred with the findings of the Enquiry Officer. It was mentioned that taking into consideration the seriousness of the misconduct committed by those employees, the petitioner had been justified in dismissing them from the employment of the company. The petitioner however, had also looked into their past records to find any extenuating circumstances and found none. The petitioner informed that taking into consideration the length of service, the petitioner had decided to take a lenient view in the matter and decided to discharge them from the employment of

the company with effect from the closing hours on 31st May, 1995. It was further stated in the said letters that apart from the legal dues, the petitioner had also decided to pay those employees one month's notice pay in lieu of notice.

7. Being aggrieved by the said order dated 30th May, 1995, those employees filed the Applications bearing Nos.81 of 1995 and 82 of 1995 under the provisions of section 42(4), 78 and 79 of the Bombay Industrial Relations Act, 1946 before the Labour Court at Bombay, *inter-alia* praying for a declaration that the enquiry conducted by the petitioner was not legal, fair and proper, for setting aside the findings rendered by the Enquiry Officer, for reinstatement with full back wages and continuity of service with effect from 31st May, 1995 with interest and for various other reliefs. Both the applications were resisted by the petitioner by filing written statement before the Labour Court at Bombay.

8. By a common judgment dated 2nd February, 2002 delivered by the 5th Labour Court, Mumbai, the Applications (BIR) Nos.81 of 1995 and 82 of 1995 filed by the said employees came to be allowed. The petitioner was directed to reinstate them in service with continuity of service and full back wages. It was however, made it clear that whatever relief was granted by the Labour Court to the said employees must be read subject to the closure and outcome

thereof.

9. It is the case of the petitioner that on 10th March, 2000, the factory of the petitioner was declared as closed. Fifty six employees, including the said employees filed Complaint (ULP) No.232 of 2000 under Item 9(4) of The Maharashtra Recognition Of Trade Unions And Prevention Of Unfair Labour Practices Act, 1971 (For short "MRTU & PULP Act") in the Industrial Court, Maharashtra, Mumbai against the petitioner herein and others challenging the closure. By an order dated 4th March, 2002, the Industrial Court, Mumbai dismissed the said complaint holding that the complainants had failed to prove unfair labour practice under Item 9 of Schedule IV of the said MRTU & PULP Act. It was held that there were less than 100 employees in the employment of the petitioner and thus no permission was required under section 25(O) of the Industrial Disputes Act, 1947 at the relevant time i.e. before 10th March, 2000. It is held that those employees will have to approach the proper authority under the Bombay Industrial Relations Act, 1946.

10. Being aggrieved by the said order dated 4th March, 2000, passed by the Industrial Court, Mumbai, dismissing the said complaint filed by 56 employees including the said employees, the complainants thereto filed a Writ Petition (2894 of 2002) in this Court. By an order dated 22nd and 23rd September, 2008 passed by the

learned single Judge, it was held that since the petitioner herein had denied the relationship of employer and employee with the workmen, the said issue could not have been decided by the Industrial Court and thus the Industrial Court has rightly dismissed the complaint filed by the employees.

11. The Division Bench of this Court passed an order on 11th December, 2009 in Appeal (Lodging) No.330 of 2009 filed by those employees against the order of the learned single Judge. The Division Bench permitted the employees to raise their dispute by way of demand before the Conciliation Officer within a period of two weeks from the date of the said order. The Conciliation Officer was directed to submit his failure report, if any, within a period of four weeks thereafter. The appropriate Government was directed to take a decision for referring dispute to the appropriate court as per the provisions of the Industrial Disputes Act, 1947 within a period of two weeks after receiving the failure report, if any, from the Conciliation Officer. It was directed that in case the appropriate Government refers the dispute to an appropriate Court, the appropriate Court after receiving the reference from the Government may try to adjudicate the dispute preferably within six months but in any case within a period of one year from the date of receipt of the reference. The Division Bench of this Court disposed of the said appeal.

12. Pursuant to the said order dated 11th December, 2009, on 14th September, 2010 / 20th September, 2010, the Additional Labour Commissioner referred the dispute for adjudication of the Industrial Court Tribunal by exercising powers under section 12(5) of the Industrial Disputes Act, 1947 for a decision on striking down and setting aside the notice dated 5th January, 2000 and to declare the closure with effect from 10th March, 2000 as illegal and unjustified and to reinstate all the workmen with continuity of service and full back wages. The said reference is still pending.

13. On 30th January, 2003, the Industrial Court, Maharashtra, Mumbai partly allowed the Complaint (ULP) Nos.915 of 1988 of 1384 of 1988 filed by the Maharashtra General Kamgar Union against the petitioner herein alleging unfair labour practice within the meaning of Item 9 of Schedule IV of MRTU & PULP Act, 1971. The Industrial Court declared that the petitioner herein had committed unfair labour practice within the meaning of Item 9 of Schedule IV of the MRTU & PULP Act, 1971 and directed the petitioner to desist from continuing to follow unfair labour practice and directed to pay the wages to the complainants for a period between December, 1988 and December, 1989. It was made clear that the amount already disbursed by way of wages by the petitioner amongst those employees shall be adjusted towards those dues. The Industrial Court did not grant wages for the

larger period claimed by the employees. It is the case of the petitioner herein that it had made payment to the employees for the said period between December, 1988 and December, 1989 and nothing more was payable.

14. In the meanwhile the petitioner filed an Appeal under section 84 read with section 85 of the Bombay Industrial Relations Act, 1946 i.e. Appeal (IC) No.50 of 2002 impugning the judgment and order dated 2nd February, 2002 passed by the 5th Labour Court, Mumbai. It is the case of the petitioner that before the Industrial Court, the petitioner brought to the notice of the Industrial Court that the petitioner had declared closure of their factory with effect from 10th March, 2000 and subsequent development in respect of the said declaration of closure of their factory by the petitioner.

15. By an order and judgment dated 9th February, 2004, the Industrial Court at Mumbai dismissed the said Appeal (IC) No.50 of 2002 filed by the petitioner. Being aggrieved by the said judgment dated 9th February, 2004 and also the judgment dated 2nd February, 2002 passed by the Labour Court, the petitioner filed this writ petition, impugning those judgments under Article 226 of the Constitution of India.

16. Mr.Naik, learned senior counsel appearing for the petitioner invited my attention to various orders passed by the Labour

Court and the Industrial Court, including the impugned orders. He also invited my attention to the charge-sheets dated 13th March, 1993 issued by the petitioner against the said employees and also the order dated 30th May, 1995 addressed to those employees placing on record that in the enquiry conducted by the Enquiry Officer, the said employees were found guilty of charges contained in the charge-sheets dated 13th March, 1993. It is submitted by the learned senior counsel that though the said employees were held guilty of misconduct and various charges were proved against them, though the petitioner could have dismissed the said employees from the employment of the petitioner, the petitioner took a lenient view by looking into the past records of the said employees to find out any extenuating circumstances and having found none of such circumstances, after taking into consideration the length of service, the petitioner decided to discharge the said employees from the employment of the petitioner instead of dismissing them from the service. The petitioner also offered the legal dues and also one month's notice pay in lieu of notice.

17. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Dr.Dattatraya Mahadev Nadkarni vs. The Municipal Corporation of Greater Bombay, (1992) 1 CLR 391** and submits that the Supreme Court had adverted to its earlier

judgment in case of **Shyamlal vs. State of Uttar Pradesh, AIR 1954 SC 391** in which it was held that under the Constitution of India removal and dismissal shall stand on the same footing except as to future employment. It was held that removal is nothing but a species of dismissal. Removal, like dismissal, no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal.

18. It is submitted that the Supreme Court in the said judgment has also adverted to its earlier judgment in case of **S.R. Tewari vs. District Board, Agra (1964) 3 SCR 55** holding that form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be merely to camouflage an order of dismissal for misconduct and it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of order. It is held that if the Court holds that the order, though in the form merely of determination of the employment, is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred by statutory rules upon the employees.

19. The Supreme Court in the said judgment in case of **Dr.Dattatraya Mahadev Nadkarni** (supra) held that the impugned

order of punishment was an order of dismissal of service though the order may have used the term of removal from service. Learned senior counsel submits that this judgment of the Supreme Court was not brought to the notice of the Supreme Court in case of **State Bank of India & Ors. vs. T.J. Paul, (1999) II CLR 8 (SC)** which has been adverted to and followed by the Labour Court as well as the Industrial Court.

20. Learned senior counsel for the petitioner placed reliance on the judgment of the Supreme Court in case of **New Shorrock Mills vs. Maheshbhai T. Rao, (1997) I CLR 13 (SC)** and would submit that in that judgment, the Supreme Court had set aside the punishment awarded by the Labour Court and directed discharge of an employee from service which punishment was lesser punishment having been given by the management though the said employee could have dismissed from service considering the fact that he was found guilty of misconduct. He submits that this judgment of the Supreme Court was also not brought to the notice of the Supreme Court in case of **State Bank of India & Ors.** (supra)

21. Learned senior counsel for the petitioner submits that the Labour Court though has allowed the applications filed by the employees by an order and judgment dated 2nd February, 2002, directing the petitioner to reinstate the said employees in service with

continuity and full back wages, the Labour Court had given a finding that the findings of the Enquiry Officer holding the employees guilty of misconduct were not perverse. He submits that the said findings rendered by the Labour Court were confirmed by the Industrial Court in the order and judgment dated 9th February, 2004. The said employees admittedly did not challenge the order and judgment delivered by the Labour Court as well as the Industrial Court and thus the findings of the Enquiry Officer holding the employees guilty of misconduct having been upheld are binding on the said employees.

22. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Gujarat Still Tubes Limited vs. Gujarat Still Tubes Mazdoor Sabha, 1980 (40) FLR 152** and in particular paragraphs 50 to 56, 60, 64 and 65 in support of his submission that the form of an order is not conclusive and the Tribunal can go behind the order to find out the reasons which led to the order and then consider for itself whether the termination was colourable exercise of the power or was a result of victimization or unfair labour practice or not. He submits that the form of order is not decisive as to whether the order is by way of punishment or not. He submits that though the Enquiry Officer had found the said employees as guilty of misconduct which had warranted their dismissal from service, the petitioner had taken liberal view by

considering the order under clause 24(6) of the Standing Orders and had not only offered the legal dues to the said employees but also one month's notice pay though the petitioner could have dismissed those employees from service on account of misconduct proved before the Enquiry Officer.

23. It is submitted by the learned senior counsel that merely because the petitioner had granted lesser punishment to the employees, the petitioner cannot be penalized or made to suffer for granting lesser punishment, though larger punishment could be awarded to the said employees. He submits that the law has to be construed reasonably and not mechanically. He submits that the judgment of the Supreme Court in case of **Gujarat Still Tubes Limited** (supra) was also not brought to the notice of the Supreme Court in case of **State Bank of India & Ors.** (supra).

24. It is submitted by the learned senior counsel that the Court has to lift the veil and find out the punishment that could have been awarded to the employees for committing misconduct. The Court has to consider the reality and not form of order while scrutinizing the complaint whether such penalty / punishment was in accordance with the Standing Orders or not. He submits that merely because the petitioner has granted lesser punishment, the same cannot be declared as bad and illegal. In this case, the discharge of the said

employees was preceded by a full fledged enquiry conducted after complying with the principles of natural justice and law and the Enquiry Officer had found the said employees as guilty of misconduct. He submits that even in the impugned letter of termination, the petitioner had categorically informed the said employees that the Enquiry Officer had held them guilty of misconduct and though their services were liable to be dismissed, considering the past conduct and years of employment with the petitioner, the petitioner had discharged those employees by offering payment of legal dues and one month's notice pay. He submits that the foundation of the order has to be considered.

25. Learned senior counsel invited my attention to the Standing Orders 22 and 24 and would submit that though the petitioner could have simplicitor terminated the services of the employees by giving 14 days notice or of payment of 13 days wages, including all allowance in lieu of notice, the petitioner had offered legal dues and also 30 days notice pay. He submits that the act of drunkenness, the indecent behaviour of the said employees and other charges levelled against them at the factory premises of the petitioner were proved before the Enquiry Officer. The punishment for misconduct described in Standing Order 23 is provided in the Standing Order 24. He submits that the procedure required to be

followed before punishing an employee as prescribed in the said clause was dully followed.

26. It is submitted that though the punishment by way of discharge was not specifically included in Standing Order 24, the term “discharge” being one of the species of dismissal, the petitioner had a right to discharge the said employees by considering the gravity of misconduct, previous record of the employees and extenuating or aggravating circumstances that might exist by awarding punishment under the Standing Orders. He submits that the Labour Court as well as the Industrial Court thus could not have held that the punishment of discharge awarded to the said employees was outside the punishments enumerated in the Standing Orders and on that ground could not have set aside the order of discharge of the employees as bad and illegal.

27. Learned senior counsel gave an illustration before this Court that if an employee is found guilty of an isolated act of committing sexual harassment in the premises of the employer, however considering his past conduct and his undertaking not to commit such act in future, if an employer by invoking clause 24(6) of the Standing Orders does not want to dismiss such an employee from service and decides to award a lesser punishment, it cannot be said that awarding lesser punishment would be in violation and outside the

purview of the punishment provided under the Standing Orders. He submits that the other punishments prescribed under Standing Order 24 are too small considering the nature of misconduct committed by the said employees and would not have been in accordance with the nature of misconduct committed by the said employees.

28. It is submitted that it was not the case of the said employees that by awarding the lesser punishment to them by the petitioner, the petitioner was benefited in any manner whatsoever. He submits that in effect the order passed by the employer was for dismissal but by way of lesser punishment after considering clause 24(6) of the Standing Orders, the employer passed an order of discharge against the employees. He submits that even though the petitioner had punished the employees by way of discharge from service, the basic nature of misconduct committed by the employees would not change. The employer may consider reformation of the employees and may take a liberal view so that such employee can join another employment in future. Such a good gesture shown by the employer cannot be considered as bad and illegal. He submits that there is no provision in the Standing Orders that the employer cannot be liberal while granting the punishment. He submits that the petitioner had balanced equity by awarding lesser punishment to the said employees.

29. Learned senior counsel placed reliance on the Division Bench judgment of this Court in case of **Vasant Gopal Gurav & Anr. vs. P.M. Lyla & Ors. (1968) II LLJ 182** and in particular relevant paragraphs at page 184 and would submit that this Court after holding that after considering the gravity of misconduct, the previous record, if any, of the worker and any other extenuating or aggravating circumstances that may exist, the employer would be fully justified in making the orders of discharge on payment of thirteen days' wages so that the workers may not earn a black-mark and may not be hampered in their service at any other stage. It is held that there may be a case which do not call for extreme punishment of dismissal and unless there is anything which prevents the employer from imposing a lesser punishment, there is no reason why the said Standing Orders should be construed in this limited way. He submits that the judgment of the Division Bench of this Court was not brought to the notice of the Labour Court and the Industrial Court.

30. Learned senior counsel submits that since the earlier judgments of the Supreme Court taking a different view was not cited before the Supreme Court in case of **State Bank of India & Ors.** (supra), the said judgment cannot be considered as binding precedent under Article 141 of the Constitution of India. He submits that both the Courts below have placed reliance on the judgment of

the Supreme Court in case of **State Bank of India & Ors.** (supra) which was not binding precedent in these circumstances stated aforesaid, and thus the said judgment deserves to be set aside on that ground alone.

31. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of **N.S. Giri vs. Corporation of City of Mangalore & Ors., 1999 (82) FLR 938** and in particular paragraph 12. Insofar as full back wages allowed by the Labour Court in favour of the respondent no.1 is concerned, it is submitted by the learned senior counsel that the factory of the petitioner was already closed on 10th March, 2000.

32. By an order dated 4th March, 2000, the Industrial Court had dismissed the complaint filed by the employees' union challenging the closure and had rendered a finding that no permission under section 25(O) of the Industrial Disputes Act, 1947 was required by the petitioner, as the employees were less than 100 in number. The Industrial Court passed an order on 30th January, 2003 holding that there was no workmen in the factory of the petitioner during the period between 1988 till 2000. The said employees were also the parties to the said complaint. The machineries of the petitioner were sold at the behest of the employees' union. He submits that thus no wages were payable to the said employees at all for the period

December, 1988 to December, 1989. He submits that even if something is payable to the said employees by the petitioner, they can claim the back wages only from the date of the order of discharge till the date of closure and not beyond the said period. He submits that the petitioner had already paid 13 months wages to the said employees prior to the order of the Industrial Court.

33. It is submitted that the original respondent no.1 would have even otherwise retired in normal course in the year 2001 and the original respondent no.2 would have retired in the year 2007. The original respondent no.1 has already expired on 1st May, 2012. It is submitted that the question of any reinstatement of the original respondent no.1 or the original respondent no.2 did not arise. On the issue as to whether the Labour Court could have awarded full back wages or not is concerned, learned senior counsel for the petitioner placed reliance on the judgment of the Supreme Court in case of **Surendra Kumar Verma etc. vs. The Central Government Industrial Tribunal-cum-Labour Court, New Delhi & Anr. 1980 LAB.I.C. 1292** and in particular paragraph 6 thereof. He submits that any order of full back wages would place most burden on the petitioner in the aforesaid circumstances and thus no such back wages could have been awarded by the Labour Court.

34. Mrs.Shobana Gopal, learned counsel appearing for the

said employees on the other hand submits that the issue as to whether the factory of the petitioner was closed in accordance with law or not is *sub-judice* before appropriate Court. The order of the Labour Court was made subject to the out come of the closure proceedings. Learned counsel placed reliance on the objects and reasons of the Industrial Employment (Standing Orders) Act, 1946. She submits that admittedly the certified Standing Orders as settled by the Commissioner of Labour under section 35(2) of the Bombay Industrial Relations Act, 1946 was made applicable to the employees working in the establishment of the petitioner.

35. It is submitted that the said provisions of the Standing Orders are statutory in nature and were binding on the petitioner. She submits that the conditions prescribed under the said Standing Orders are sacrosanct and have to be fulfilled strictly by the parties. Clause 24 of the Standing Orders does not enumerate any punishment / penalty in the nature of discharge of an employee. The punishment / penalty specifically prescribed in the Standing Orders has to be followed strictly otherwise there would be utter confusion in the mind of the parties. She submits that the punishment of discharge inflicted by the petitioner was not enumerated as one of the punishment under the Standing Order 24 at all. The petitioner thus could not have inflicted such punishment of discharge upon the

employees.

36. Learned counsel appearing for the said employees invited my attention to the Standing Order 24 and would submit that various punishments against the employees for committing misconduct are already enumerated in the said Standing Order 24 and thus even if her clients were proved to be guilty of misconduct, the petitioner could have awarded only such punishment as specifically enumerated in that Standing Order and not outside such Standing Orders. She submits that the Court cannot lift veil of the punishment awarded if such punishment was not one of the punishment enumerated in the Standing Orders. No deviation from any of the conditions prescribed in the Standing Orders is permissible. She submits that both the Courts below have thus rightly declared the decision of the petitioner discharging the employees as illegal on the basis of the said punishment following outside the provisions of the Standing Orders.

37. It is submitted by the learned counsel for the said employees that in Schedule IV of MRTU & PULP Act, 1971, the term “discharge” or “dismissal” both are provided, whereas in the Standing Orders, the term “discharge” is not provided. None of the judgments thus relied upon by the learned senior counsel for the petitioner dealing with the provisions of Schedule IV of MRTU & PULP Act,

1971 would be relevant for the purpose of deciding the issue and are clearly distinguishable.

38. Learned counsel for the said employees distinguished the judgment of the Supreme Court in case of **Lokmat Newspapers Pvt. Ltd. vs. Shankarprasad, 1999 II CLR 433** included in the compilation filed by the petitioner on the ground that in the said judgment, the Supreme Court had considered the term “discharge” or “dismissal” under Schedule IV of the MRTU & PULP Act, 1971 and not the provisions of the Standing Orders. She submits that the provisions considered by the Supreme Court in the said judgments were totally different and thus the said judgments would not assist the case of the petitioner.

39. Learned counsel for the said employees distinguished the judgment of the Supreme Court in case of **New Shorrock Mills** (supra) on the ground that there was no issue before the Supreme Court in that judgment that the punishment awarded by the employer was outside the purview of the Standing Orders. She submits that none of the provisions of the Standing Orders provide for lesser punishment than the punishment specifically enumerated in the Standing Order 24. She submits that the said judgment of the Supreme Court in case of **New Shorrock Mills** (supra) thus is clearly distinguishable in the facts and circumstances of this case and would

not assist the case of the petitioner.

40. Learned counsel for the said employees placed reliance on the judgment of the Supreme Court in case of **State Bank of India & Ors.** (supra) which was referred to and relied upon by the two Courts below and more particularly on paragraphs 10, 12, 18 and 20. It is submitted that the facts before the Supreme Court in the said judgment were identical to the facts of this case and was thus binding on the two Courts below, the parties and also binding on this Court. She submits that the said judgment of the Supreme Court is not *per-incuriam*.

41. Learned counsel for the said employees placed reliance on the judgment of this Court in case of **Press Trust of India Employees Union & Anr. vs. Press Trust of India Limited & Anr. (2007) 1 CLR 173** and in particular paragraphs 9 to 11 and would submit that in the said judgment delivered by this Court, Standing Order 22 has been considered and it is specifically held that while reducing the punishment, it is not open to the Disciplinary Authority to impose the punishment which is not prescribed by the certified Standing Orders. She submits that in the said judgment delivered by the learned single Judge of this Court, the judgment of the Supreme Court in case of **State Bank of India & Ors. vs. T.J. Paul** (supra) which was adverted to and followed by the two Courts below has

been referred to and followed by this Court. She submits that the said judgment of this Court squarely applies to the facts of this case and is binding on this Court.

42. Learned counsel for the said employees also placed reliance on the judgment delivered by the single Judge of this Court in case of **Sadhna Textile Industries Pvt. Ltd. vs. Bulabchand Gayadin & Ors., (1993) II CLR 512** and in particular paragraphs 10 and 12 and would submit that even the powers of the Court to decide the propriety or legality of an order passed by the employer acting under the Standing Orders are restricted. She submits that this judgment delivered by the learned single Judge of this Court is delivered interpreting Standing Order 22 squarely applies to the facts of this case. She submits that according to the said judgment, even the Courts are circumscribed by the provisions of the Standing Orders and cannot confer any punishment beyond the punishments enumerated in the Standing Orders.

43. Learned counsel for the said employees distinguished the judgment of the Supreme Court in case of **Dr.Dattatraya M. Nadkarni** (supra) on the ground that the facts before the Supreme Court in the said judgment were totally different and are clearly distinguishable.

44. Learned counsel for the said employees invited my

attention to paragraph 8 of the order passed by the Labour Court recording that the Labour Court would have considered the legality and propriety of the order passed by the employer if the punishments would have been inflicted as per the provisions of the Standing Orders. She submits that since the Labour Court as well as the Industrial Court took a view that since the punishment inflicted by the petitioner was not enumerated in the Standing Orders and thus the order of punishment was bad and illegal, none of the Courts below considered the legality or propriety of the order passed by the petitioner at all. She submits that if this Court comes to the conclusion that the orders passed by the two Courts below deserves to be set aside on the ground that the petitioner could have inflicted lesser punishment of discharge upon the employees, since the two Courts below have not decided the legality or propriety of the punishment inflicted by the petitioner, the matter shall be remanded back to the Labour Court for the purpose of deciding the legality or propriety of the punishment inflicted by the petitioner and more particularly as to whether the petitioner of discharge was proportionate to the nature of misconduct committed by the said employees or not.

45. Mr.Naik, learned senior counsel in rejoinder reiterates his submission that none of the judgments cited by the petitioner which were delivered by the Supreme Court prior to the date of the

judgment of the Supreme Court in case of **State Bank of India & Ors.** (supra) were brought to the notice of the Supreme Court taking a different view and thus the said judgment of the Supreme Court is *per-incuriam* and was not binding upon the two Courts below and on this Court. He submits that insofar as the judgments of this Court in case of **Press Trust of India Employees Union & Anr.** (supra) and in case of **Sadhana Textile Industries Pvt. Ltd.** (supra) are concerned, those cases are also decided without noticing law laid down by the Supreme Court prior to the judgment delivered in case of **State Bank of India & Ors. vs. T.J. Paul** (supra) and thus both these judgments delivered by the learned single Judge of this Court are also *per-incuriam* and are thus not binding on this Court.

46. It is submitted that in any event the facts before this Court in both the judgments were totally different. The question as to whether the term “discharge” amounts to dismissal or is species of term “dismissal” or not was not an issue before this Court in case of **Press Trust of India Employees Union & Anr.** (supra) and in case of **Sadhana Textile Industries Pvt. Ltd.** (supra). He submits that both these judgments are even otherwise distinguishable in the facts of this case. He submits that the Supreme Court in case of **Shyam Lal** (supra) had considered the punishment of removal based on the misconduct, which judgment has been subsequently followed by the

Supreme Court in later judgment. He submits that the punishment contemplated as punitive action amounted to dismissal. If the petitioner would have simpliciter dismissed the said employees from service with one month salary, they could have challenged such action on the part of the petitioner on the ground that what was required to consider was the foundation of the action initiated by the petitioner and veil ought to have been lifted by this Court and such order of simpliciter dismissal ought to have been set aside by this Court on that ground.

47. It is submitted by the learned senior counsel that the powers and rights of the employer to inflict higher punishment includes lesser punishment also. Instead of inflicting higher punishment for committing misconduct by the said employees, the petitioner had taken a liberal view by considering the conditions under the Standing Orders 26(4) and awarded the lesser punishment. He submits that the two Courts below ought to have interpreted the provisions of the Standing Orders harmoniously and ought to have considered the intention of the petitioner while inflicting lesser punishment before declaring the action of the petitioner as bad and illegal. He submits that if an employer had lower rights, such employer could not exercise higher rights however if he had higher rights, he could exercise lower rights and the same cannot be

declared as bad and illegal. He submits that all the cases of dismissal includes discharge. He submits that discharge in place of dismissal is different than simplicitor discharge.

48. Insofar as the submission of the learned counsel for the said employees that since the two Courts below have not decided the legality and validity of the punishment inflicted by the petitioner and thus this Court shall remand the matter back to the Labour Court for adjudication of that judgment is concerned, it is submitted by the learned senior counsel that no such decision of the Labour Court not to decide that issue was challenged by the said employees before the Industrial Court or before this Court and thus no such request can be made by the said employees for remand before Labour Court at this stage. He submits that in any event, since both the employees have otherwise retired in normal course and the factory of the petitioner is already closed as far back as in the year 2002, no purpose would be served by remanding the matter to the Labour Court as canvassed by the learned counsel for the said employees.

REASONS AND CONCLUSION :

49. It is not in dispute that the original respondent no.1 had joined the employment of the petitioner on 5th December, 1964. The original respondent no.2 had joined the employment of the petitioner

some time in the year 1973. The parties are governed by the certified Standing Orders as settled by the Commissioner of Labour under section 35(2) of the Bombay Industrial Relations Act, 1946. It is not in dispute that both the employees were permanent operatives under clause 3(1)(a) of the Standing Orders. Both the employees were charge-sheeted on 30th May, 1995 by the petitioner and were charged with various acts of misconduct such as (a). Drinking hard liquor during working hours inside the factory of Empire Dyeing; (b). Riotous, disorderly and indecent behaviour during working hours on the premises of Empire Dyeing ; (c). Threatening Security staff of Empire Dyeing without any provocation and (d). Commission of any acts subversive of discipline or good behaviour on the premises of the Empire Dyeing.

50. The petitioner had conducted an enquiry against both the employees by appointing an Enquiry Officer to conduct an enquiry and to submit a report in respect of those charges against both the employees. The said employees had appeared before the Enquiry Officer. The Enquiry Officer submitted a report holding both the employees as guilty of all the charges including serious misconduct levelled against them.

51. Both the employees thereafter filed their explanation dated 15th March, 1993 and pleaded "not guilty" to the charges levelled

against them. By an order dated 30th May, 1995, the petitioner referred to the charges levelled against the employees by the petitioner, the report submitted by the Enquiry Officer holding both the employees as guilty of the charges contained in the charge-sheets dated 13th March, 1993 and that the petitioner had concurred to the findings of the Enquiry Officer. It was mentioned in the said order that taking into consideration the seriousness of the misconduct committed by those employees, the petitioner had been justified in dismissing them from the employment of the company. The petitioner however, had also looked into the past records of those employees to find out any extenuating circumstances and found none of such extenuating circumstances against them. It was further stated that however, taking into consideration the length of service, the petitioner had decided to take a lenient view in the matter to discharge them from the employment of the company with effect from the closing hours of 31st May, 1995. It was further mentioned that apart from the legal dues, the petitioner had also decided to pay to those employees one month's notice pay in lieu of notice.

52. Both the employees had impugned the said order by filing separate applications before the Labour Court under sections 42(4), 78 and 79 of the Bombay Industrial Relations Act, 1946 on various grounds including the alleged perversity in the report submitted by the

Enquiry Officer holding the employees as guilty of misconduct. The employees had also raised an issue that the punishment of discharge inflicted by the petitioner was not one of the punishment prescribed in the Standing Order 24. The said application was resisted by the petitioner by filing the written statement by the petitioner. It was contended in the written statement by the petitioner that the punishment of discharge was given by the petitioner to the employees looking into the seriousness and gravity of misconduct. The petitioner also contended that the petitioner had considered the past records of the employees before awarding the punishment.

53. The Labour Court framed following three issues and the following conclusions rendered thereon :

1) Whether findings of the enquiry officer are perverse ? **....No**

2). Do the applicants prove that the punishment of discharge awarded to them is illegal and improper ? **...Yes**

3). Do the applicants prove that they are entitled to the relief of reinstatement with continuity and full back wages ? **...Yes**

4). What order ?
...Applications are partly allowed as per order below."

54. Insofar as the issue as to whether the findings of the Enquiry Officer were perverse or not, the Labour Court held that the

same were not perverse and decided the said issue against the employees. However, the Labour Court held that the punishment inflicted by the petitioner of discharge was not specifically provided in the Standing Orders and therefore, the action of the petitioner in inflicting the punishment of discharge against the employees was illegal, improper and against the provisions of the Standing Orders. The Labour Court though referred to various judgments referred to and relied upon by the petitioner including the judgment in case of **Dr.Dattatraya M. Nadkarni** (supra) and in case of **New Shorrock Mills** (supra) which are relied upon by the petitioner before this Court also did not deal with the said judgments in the impugned order and judgment. The entire judgment was based on the judgment of the Supreme Court in case of **State Bank of India & Ors.** (supra).

55. The Labour Court accordingly allowed the said two applications filed by the employees and directed the petitioner to reinstate them in service with continuity and full back wages. It was however, made clear that whatever relief was granted by them in favour of the employees must be read subject to closure and outcome thereof. The Industrial Court formulated two points for determination. The employees did not challenge the findings of the Labour Court holding that the findings rendered by the Enquiry Officer were not perverse.

56. The Industrial Court also confirmed the findings of the Labour Court. Before the Industrial Court, the petitioner placed reliance on the judgment of the Supreme Court in case of **Lokmat Newspapers Pvt. Ltd.** (supra), the judgment of the Division Bench of this Court in case of **Vasant G. Gurav & Anr.** (supra), the judgment of the Supreme Court in case of **Shyam Lal** (supra), the judgment of the Supreme Court in case of **S.R. Tewari** (supra) and few other judgments which are relied upon by the petitioner also before this Court. The Industrial Court however, followed the judgment of the Supreme Court in case of **State Bank of India & Ors.** (supra) and held that the petitioner had no right or authority to impose punishment beyond gradation of punishments prescribed in the Standing Orders. It is accordingly held by the Industrial Court that since the punishment like discharge was not prescribed in the Standing Orders, even if misconduct was proved, the action of the petitioner imposing penalty of discharge was not sustainable in law and thus no interference was warranted with the order and judgment passed by the Labour Court and dismissed the said appeal filed by the petitioner.

57. The questions that arise for consideration of this Court are :

- (a) Whether the real intention of the petitioner and the punishment inflicted by the petitioner was infact the punishment of dismissal ?

(b) If the punishment inflicted upon the employees was not of dismissal in true sense, whether the punishment of discharge not having been enumerated as one of the punishment in the Standing Orders applicable to the parties could have been inflicted at all though not enumerated in the Standing Orders even by way of lesser punishment than what employees were liable to be inflicted upon out of the punishments enumerated in the Standing Orders ?

58. The Supreme Court in case of **Gujarat Steel Tubes Ltd.** (supra) has held that the form of the order in a case is not conclusive and the Tribunal can go beyond the order to find out the reasons which led to the order and then consider for itself whether the termination was colourable exercise of the power or was a result of victimization or unfair labour practice. If the Court comes to the conclusion that exercise of power was a colourable exercise or was a result of victimization or unfair labour practice, it would have jurisdiction to intervene and set aside such termination. It is possible that the form may be merely a camouflage for an order of misconduct.

59. In my view the form of order is not deceive as to whether the order is by way of punishment or not. There may be a situation where the employer may give different nomenclature in the order

which is other than the real intention of the employer. The court has to lift the veil in such a situation to find out as to whether the true and correct punishment was inflicted as reflected in the order or the nomenclature of the punishment was not as actually intended or was camouflage.

60. It is held by the Supreme Court that if the discharge has been ordered by the employer in the *bonafide* exercise of his power, then the industrial tribunal may not interfere with it, but the words used in the order of discharge and the form which it may have taken are not conclusive in the matter and the industrial tribunal would be entitled to go behind the words and form and decide whether the discharge is a discharge simpliciter or not. If it appears that the purported exercise of power to terminate the services of the employee was in fact the result of the misconduct alleged against him, then the tribunal would be justified in dealing with the dispute on the basis that, despite its appearance to the contrary, the order of discharge is in effect an order of dismissal. It is held that in the matter of an order of discharge of an employee as understood within the meaning of the Industrial Dispute Act, the form of the order and the language in which it is couched are not decisive.

61. In my view, though the petitioner has used the word "discharge" in the letter of termination, which is not specifically

provided in the Standing Order 24 applicable to the parties, it is not in dispute that in this case, pursuant to the charge-sheets issued against the said employees alleging misconduct described in the Standing Orders under clause 22(k), a full fledged enquiry was conducted by the petitioner. The Enquiry Officer has followed the principles of natural justice and had given an opportunity to the said employees to represent themselves in the enquiry proceedings. There is also no dispute that in the findings rendered by the Enquiry Officer the said employees were found guilty of all the charges levelled against them in the charge-sheets and such findings were accepted by the petitioner. The two Courts below have also rejected the specific contention of the said employees in the proceedings filed by them challenging the findings rendered by the Enquiry Officers that the findings were not perverse. It is not in dispute that the findings rendered by the two Courts below that the findings of the Enquiry Officer were not perverse have not been challenged by the said employees by filing a separate writ petition in this Court.

62. In my view, Mr.Naik, learned senior counsel for the petitioner is thus right in his submission that the Court cannot decide merely on the basis of the form of punishment inflicted by the employer but can see the foundation of initiating such a disciplinary enquiry. The petitioner after considering the explanation rendered by

the said employees, vide its letter of termination dated 30th May, 1995 made it clear that the petitioner had concurred with the findings of the Enquiry officer and the petitioner had been justified in dismissing the said employees from the employment of the company. It is clear that the petitioner however considered the past records to find out any extenuating circumstances and having found none of such extenuating circumstances and having taking into consideration the length of service, the petitioner chose to reduce the quantum of punishment against the said employees by offering the legal dues and also one month's notice pay in lieu of notice.

63. It is thus clear that the Enquiry Officer had recommended dismissal of the said employees. The petitioner had alleged serious misconduct against the said employees in the charge-sheet. The petitioner accepted the findings rendered by the Enquiry Officer and rejected the explanation rendered by the said employees. The petitioner had intended that the said employees shall not be continued in the employment of the petitioner. The principles laid down by the Supreme Court in case of **Gujarat Steel Tubes Ltd.** (supra) squarely applies to the facts of this case.

64. The Supreme Court in case of **S.R. Tewari** (supra) has held that the form of order under which the employee or a servant is determined is not conclusive of the true nature of the order. The form

may be merely of camouflage order of dismissal or misconduct and it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of order. The Court would not be debarred merely because of the form of order in giving effect to the rights conferred by the statutory rules upon the employee.

65. The Supreme Court in case of **New Shorrock Mills** (supra) has held that the Labour Court had over looked the finding of the Enquiry Officer, the respondent had misbehaved with his superior officer and was guilty of misconduct and thus the employer could have dismissed the respondent from service. The employer however, chose not to do so and instead had passed an order of discharging the respondent from service. It is held that the lesser punishment having been given by the management itself there was no justifiable reason for the Management to have set aside the punishment so awarded. In this case it was not the case of the said employees that the punishment of discharge inflicted by the petitioner with payment of legal dues and notice pay inspite of the findings of the Enquiry Officer that all charges of misconduct were proved against the said employees, was lower than the punishment of dismissal that could have been awarded by the employer against the said employees.

66. The said employees did not dispute before the two Courts

below that the punishment of discharge inflicted by the petitioner against them was lesser punishment than what could have been inflicted upon them by the petitioner in view of the findings of the Enquiry officer holding the said employees guilty of all charges of misconduct as levelled in the charge-sheets. The only argument advanced before the two Courts below while challenging the legality and validity of the punishment of discharge inflicted by the petitioner was that the same was outside the punishment enumerated in the Standing Orders and more particularly clause 24 of the Standing Orders. Both the Courts below have though rendered the findings in favour of the petitioner that the findings of the Enquiry Officer were not perverse, has declared the punishment of discharge as bad and illegal on the ground that the same was not enumerated as one of the punishment in clause 24 of the Standing Orders.

67. Supreme Court in case of ***Dr.Dattatraya M.Nadkarni*** (supra) held that it was never the case of the employer in the written statement that they wanted to impose the punishment of removal with an intention not to disqualify the appellant from future employment. In the show cause notice, the employer had clearly mentioned that the disciplinary authority wanted to impose the punishment of dismissal. Supreme Court held that the court has to go behind the form and ascertain the true character of the order. It is accordingly held that the

impugned order of punishment was an order of dismissal from the service though the order may have used the term of removal from service.

68. Supreme Court in the case of the ***State Bank of India & Ors. (supra)*** has considered the Bank of Cochin Service Code providing for Discipline and Disciplinary action against the employees. High Court had allowed the writ petition filed by the employer partly, however, had observed that the employer could impose punishment for minor misconduct as per the rules of Bank of Cochin Service Code. Division Bench of the High Court dismissed the appeal filed by the employer. Supreme Court held that the appellate authority once having come to the conclusion that the punishment of dismissal was not warranted in the facts of the case, it could not have awarded the punishment of removal which was not one of the enumerated under Rule 22(v) of the Bank of Cochin Service Code applicable to the employees. It is held that since the rules of Bank of Cochin had enumerated and listed out the punishment for major misconduct, the punishment of removal could not have been imposed by the appellate authority and all that permissible was that the bank may impose one or other punishments for major misconduct enumerated in para 22(v) of the Rules other than dismissal without notice.

69. Supreme Court in that judgment upheld the judgment of the High Court for removal, however, remitted the matter back to the appellate authority for considering which of the punishments other than dismissal without notice under para 22(v) of the Rules could be imposed on the respondent. The judgment of Supreme Court in the case of ***Shyamlal Vs. State of UP & Anr. (supra)***, in the case of ***Dr.Dattatraya M.Nadkarni Vs. The Municipal Corpn. of Greater Bombay (supra)***, in the case of ***Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad (supra)***, in the case of ***Tewari Vs. District Board, Agra (supra)*** and in the case of ***New Shorrock Mills Vs. Maheshbhai T. Rao (supra)*** were not considered by the two courts below though the same were applicable to the facts of this case and were binding on the two courts below.

70. In my view the two courts below ought to have lift the veil and to find out the correct nature and true intent of the petitioner in granting the punishment to the said employees. In my view the actual punishment was an order of dismissal.

71. Single Judge of this Court in the case of ***Sadhna Textile Industries Pvt. Ltd. (supra)*** has considered an issue whether the employer while deciding the question of punishment to be awarded to a workman found guilty of any misconduct under Standing Order could have awarded any punishment other than one of those

specified in Standing Order No.21 which provided various punishments in case of misconduct by an employee. This Court held that the powers of the employer does not extend beyond the punishment specified in the Standing Order. This Court also considered whether the power of the Court is restricted or limited to decide which of the punishments specified in the Standing Order would be proper punishment for the misconduct in question or whether it can modulate the punishment in any manner it thinks fit and proper.

72. The learned single Judge of this Court in the case of ***Press Trust of India Employees Union & Anr. Vs. Press Trust of India Limited & Anr.*** (supra) has considered the similar Standing Order and has held that where the certified standing orders provide for enumerated penalties, it is not open to the management to impose a penalty that is not contemplated therein. Undoubtedly a disciplinary authority upon considering the representation of the employee against the punishment that is proposed to be imposed upon the report of the enquiry officer is entitled to impose a lesser punishment if it comes to the conclusion that such an action is warranted. However, the punishment that is imposed has to be in consonance with the standing orders which statutorily constitute a part of the terms and conditions of service. This Court adverted to

and followed the judgment of the Supreme Court in the case of **State Bank of India & Ors. (supra)** and held that discretion of the disciplinary authority to reduce the punishment cannot be doubted. The authority in doing so is governed by the discipline of the certified standing orders and must confine itself to one of the punishments enumerated thereunder.

73. The learned single Judge also referred to the judgment of the Division Bench of this Court in the case of **Vasant G. Gurav & Anr. (supra)** and also the judgment of the Supreme Court in the case of **State Bank of India & Ors. (supra)** and held that the judgment of the Division Bench of this Court must be considered together with the subsequent judgment of the Supreme Court in the case of **State Bank of India & Ors. (supra)** in which the Supreme Court has held that in the context of service rules must apply a fortiori to certified Standing Orders which have the force of an Act of Parliament viz. The Industrial Employment (Standing Orders) Act, 1946. This Court accordingly, though did not interfere with the finding of the enquiry committee, has interfered with the order of the disciplinary authority holding that the past record of the workman provided an extenuating circumstances, proceeded to impose a punishment which was not enumerated in the certified standing orders.

74. This Court accordingly remitted the matter back to the disciplinary authority to re-consider what other punishment should be imposed on the second petitioner in the light of its finding that a reduction of the penalty was warranted in the light of past clean record of the workman. This Court accordingly set aside the order of punishment to facilitate a determination on remand. It is the submission of the learned senior counsel for the petitioner that since the judgment of the Supreme Court in the case of **State Bank of India & Ors. (supra)** is per incurium, the judgment of the learned Single Judge of this Court in the case of **Press Trust of India Employees Union & Anr. Vs. Press Trust of India Limited & Anr.** (supra) following the judgment of the Supreme Court in the case of **State Bank of India & Ors. (supra)** is also per incurium and is not binding on this Court.

75. In the case of **M/s.Glaxo Laboratories (I) Ltd. Vs. Presiding Officer, Labour Court, Meerut & Ors., reported in AIR 1984 SC 505**, Supreme Court has held that the scheme of the Industrial Employment (Standing Orders) Act, 1946 would show that the certified standing orders have more or less a statutory flavour. If that be so, ordinary cannons of construction of statutes would be attracted where the dispute arises about construction or interpretation of certified standing orders.

76. Since this Court is of the view that the punishment inflicted upon the said employees by the petitioner was in fact the punishment of dismissal in view of the petitioner having accepted the findings

rendered by the learned Enquiry Officer which punishment is admittedly one of the punishment enumerated in the Standing Order 24, this Court need not go into the issue raised by the learned senior counsel for the petitioner that the punishment described in the order of termination as discharge was species of the punishment 'dismissal' or that the petitioner was not precluded from imposing a lesser punishment than what was contemplated in the Standing Orders. The principles laid down by the Supreme Court in case of **New Shorrock Mills** (supra) and also the judgment of the Division Bench of the Court in case of **Vasant G. Gurav & Anr.** (supra) relied upon by the learned senior counsel for the petitioner thus need not be dealt with by this Court.

77. This Court consequently also need not deal with the issue whether the judgments of the Supreme Court referred to and relied upon by the learned senior counsel which were delivered prior to the judgment of the Supreme Court in the case of **State Bank of India & Ors. vs. T.J. Paul** (supra) not having been cited and/or referred to in the judgment of the Supreme Court in case of **State Bank of India & Ors.** (supra), the judgment in case of **State Bank of India and another**, would be *per-incuriam* or not. In my view, the reliance placed by the two Courts below on the judgment of the Supreme Court in case of **State Bank of India & Ors.** (supra) is thus misplaced in the facts of this case.

78. Insofar as the judgment of this Court in case of **Sadhna Textile Industries Pvt. Ltd.** (supra) and in case of **Press Trust of India Employees Union & Anr.** (supra) relied upon by the learned counsel for the said employees is concerned, in my view since this Court is of the view that the petitioner had in fact inflicted the

punishment of dismissal though the nomenclature used by the petitioner was “discharge” as is apparent from the contents of the show cause notice, the report of the Enquiry Officer, letter of termination issued by the petitioner, reliance placed by the learned counsel for the said employees on the aforesaid two judgments of this Court is also misplaced and in any event would not assist the case of the said employees.

79. Insofar as the judgment of the Supreme Court in case of **N.S. Giri** (supra) relied upon by the learned senior counsel for the petitioner in support of his submission that the earlier judgments delivered by the Larger Bench of the Supreme Court were not brought to the notice of the Supreme Court in case of **State Bank of India & Ors.** (supra) and thus the said judgment in case of **State Bank of India & Ors.** (supra) is *per-incuriam* is concerned, in my view since this Court has accepted the submission of the learned senior counsel for the petitioner that the Court has to lift the veil to ascertain the true and correct intention of the employer while inflicting the punishment and shall not go as per the nomenclature or the wordings used in the letter of termination, this Court need not go into the issue whether the judgment of the Supreme Court in case of **State Bank of India & Ors.** (supra) is *per-incuriam* or not.

80. Similarly the judgment of the Supreme Court relied upon

by the learned senior counsel for the petitioner in case of **Surendra Kumar Verma Etc.** (supra) in support of his submission that the said employees could not have been awarded full back wages by the two Courts below also need not be considered by this Court in view of the fact that this Court has taken a view in the judgment that the impugned orders passed by the two Courts below deserves to be set aside on the ground that the punishment inflicted by the petitioner on the said employees was one of the punishment enumerated in the Standing Order 24.

81. Learned counsel for the said employees however rightly invited my attention to paragraph 8 of the impugned order and judgment dated 2nd February, 2002 passed by 5th Labour Court, Mumbai, allowing Application (BIR) Nos.81 of 1995 and 82 of 1995 filed by the said employees and submits that the Labour Court has not considered the legality and propriety of the order passed by the employer as to whether the same was disproportionate to the misconduct alleged of the said employees or not. In my view, learned counsel for the said employees is right in her submission that if this Court comes to the conclusion that the conclusion drawn by the two Courts below that the punishment inflicted by the petitioner was not the punishment enumerated in the Standing Order 24, this Court will have to remand the matter back to the Labour Court to consider the

legality of quantum of punishment awarded by the petitioner and whether the same was disproportionate to the act of misconduct alleged to have been committed by the said employees or not.

82. In my view, though the petitioner had conveyed to the said employees in the letter of termination itself that the employer had accepted the findings rendered by the learned Enquiry Officer and the services of the said employees deserves to be terminated, the petitioner however, while inflicting the punishment upon the said employees though had granted part of the service benefits to the said employees, that would not change the nature of punishment of dismissal inflicted upon by the petitioner upon the said employees.

83. I am not inclined to accept the submission of the learned senior counsel for the petitioner that the said employees not having challenged the said part of the impugned orders passed by the two Courts below by filing a separate writ petition, this Court cannot remand the matter back to the Labour Court for this limited enquiry. The said employees have succeeded before the two Courts below and the punishment inflicted by the petitioner having been set aside by the two Courts below in favour of the said employees, in my view the said employees were not required to challenge that part of the order of the Labour Court not dealing with the issue of legality, propriety and quantum of punishment inflicted by the petitioner upon

the said employees and whether the same was disproportionate to the act of misconduct alleged/proved against the said employees.

84. Since this Court is of the view that the punishment of discharge inflicted by the petitioner upon the said employees was in fact the punishment of dismissal enumerated in the Standing Order 24, the impugned orders passed by the two Courts below taking a contrary view deserves to be set aside. In such a situation, the Labour court will have to decide whether the punishment of dismissal inflicted upon by the petitioner upon the said employees is whether disproportionate to the act of misconduct alleged/proved against the said employees before the learned Enquiry officer. It is made clear that the Labour Court cannot re-open the issue whether the enquiry proceedings were properly conducted or not and whether the findings rendered by the learned Enquiry Officer were perverse or not, since such findings have already attained finality in view of the said employees not having challenged the same by filing a separate writ petition.

85. I therefore, pass the following order :-

- a). The writ petition is made absolute in terms of prayer clause (a).
- b). The Application (BIR) Nos.81 of 1995 and 82 of 1995 filed by the said employees are restored to file. The Labour Court shall

decide the issue as to whether the punishment of dismissal inflicted by the petitioner upon the said employees was excessive and disproportionate to the act of misconduct committed by the said employees or not in the fact situation of this case or not after hearing both the parties and shall pass a reasoned order in accordance with law. The Labour Court would be at liberty to pass appropriate order for consequential benefits including continuity in service and backwages based on the finding as may be rendered by the Labour Court on the limited issue. The Labour Court shall dispose off the applications filed by the said employees to this limited extent within six months from the date of communication of this order.

- c). Rule is made absolute in aforesaid terms.
- d). The parties as well as the Labour Court shall act on the authenticated copy of this order.
- e). There shall be no order as to costs.

(R.D. DHANUKA, J.)