HIGH COURT OF GUJARAT

JAGDISHKUMAR KANJIBHAI CHAUDHARY
Versus
BANASKANTHA DIST CENTRAL CO OP BANK LIMITED

Date of Decision: 14 November 2003

Citation: 2003 LawSuit(Guj) 625

Hon'ble Judges: H K Rathod

Eq. Citations: 2004 4 LLJ 643, 2003 4 GHJ 1009, 2004 105 FJR 855

Case Type: Special Civil Application

Case No: 2023 of 2002

Subject: Constitution

Acts Referred:
Constitution Of India Art 21
Bombay Industrial Relations Act, 1946 Sec 42(4)

Final Decision: Petition allowed

Advocates: Kalpesh Zaveri, Nanavati Associates

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[1] Heard learned senior advocate Mr.S.K.Zaveri on behalf of the petitioner and learned advocate Mr.Krunal Nanavati for respondent - Bank.

[2] At the outset, considering the facts and circumstances of the case and the manner and act of the employer, it is pertinent to note that the observations made by the Bombay High Court [Justice R.J.Kochar, J.] in case of Standard Charered Grindlays Bank Ltd. v. Govind Phopale and another, reported in 2003 [96] FLR 145, of which, the relevant observations made in para-17 and 18 are quoted as under :-

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17. I need not stree the fact tha wage is the real content of the Article 21. If we were to take out the wage content from this Article 21 it would be reduced to a dead letter not worth even for a decoration. IN the absence of the source of livelihood which is protected by Article 21, the other fundamental righs would

sound hollow and empty words and would collapse in no time as a dilapidated house. The workman and his family should not be made to stare merely on the pretext tha proceedings under Section 33[2][b] for approval of the action taken by the emploher is pending though he is told by law that the jural relationship continues and he still carries the label that he is an employee of the applicant employer before the tribunal. This jural sense of employment must put bread in his empty belly. He cannot be denied the wage content of his jural relationship by drawing a fine distinction of law point that he has factually ceased to be in employment as the employer has already passed an order of dismissal / discharge though he still continues to be in the employment of the employer in law. In the case of Fakirbhai, [vide supra], the Supreme Court was very much conscious of the delay in disposal of discharg / dismissal matters where the workmen concerned needed relief very badly. The Supreme Court has, therefore, considering the crucial aspect of the delay has given a great solace to the working class whose fate is covered under Section 33 of the Act as a whole not to be subdivided by the sub-sections.

18. The aforesaid discussion is the essence of the wisdom which I have drawn from the following a few recent judgments of the Supreme Court. I am not quoting the quaotable quotes from the said judgments to state what is very well knwon and well established needing no elaboration : C.E.S.E., Ltd. v. Subhash Chandan Bose, in Para-30, at pages 355 and 356:

"... The right to social jusitce is a fundamental right. Right to livelihood springs from the right to life guaranteed under Article 21. The health and strength of a wroker is an integral facet of right to life. The aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means. To the tillers of the soil, wage earners, labourers, wood cuters, rickshaw pullers, scaverngers and hut dwellers, the civil and political rights are "mere cosmetic" rights. Socio-economic and cultural rights are their means and relevant to them to realise the basic aspeirations of menaingul right to life. The Universal Declaration of Human Rights, International Convention on Economic, social and cultral rights, recognise their needs which include right to food, clothing, housing, education, right to work, leisure, fair wages, decent working condtiions, social security, right to physical or mental health, protection of their families as intergral part of right to life. Our Constitution in the preamble and Part IV reinformce them compendiously as socio-

economic jusice, a bedrock to an egalitarian social order. The right to social and economic justice is thus a fundamental right."

1. In the present petition, the petitioner has challenged the order passed by the Industrial Court at Ahmedabad in Appeal [IC] No.69 / 2001 and Appeal [IC] No.82 / 2001 dated 2 8/11/2001, wherein the appeal filed by the petitioner being Appeal No.82 / 2001 dismissed and appeal filed by the respondent No.69 / 2001 is allowed and the order passed by the Labour Court in T.Application No.2 / 2001 vide Exh.26 dated 4.6.2001 is set aside.

2. The brief facts giving rise to the present petition are as under : The petitioner was working with the respondent Bank. He was served with show cause notice dated 6th September, 1999 and on that basis, departmental inquiry was conducted by the respondent Bank on 31st November, 1999 and thereafter, the petitioner was dismissed from service on 31st January, 2001. Against the said dismissal order, the petitioner had approached the labour Court under Section 42 [4] of the Bombay Industrial Relations Act, 1946 to the respondent bank and thereafter, the petitioner had filed T.Application No.2/2001 before the labour court, Palanpur. The said application was filed by the petitioner. The respondent bank has filed reply against the application and documents were produced by both the parties before the labour court. The respondent bank had filed reply vide Exh.8 and 9. Vide Exh.24 the petitioner workman has given Purshis wherein the workman has admitted legality and validity of the departmental inquiry. On the basis of that purshis, both the parties have filed Application Exh.25 closing their oral evidence and thereafter, the matter was kept for argument before the labour court. The labour court has heard both the learned advocates appearing on behalf of the respective parties. Thereafter, the labour court has come to the conclusion that show cause notice dated 6/09/1999 is related to the period from 1984-99 and departmental inquiry was also held by the respondent Bank about misconduct which was committed by the petitioner workman from 1984-99 and ultimately, dismissal order has been passed by the respondent Bank on 3 1/01/2001. Therefore, the labour court has come to the conclusion that show cause notice dated 6/09/1999 related to period from 1984-99 that show cause notice is not legally maintainable but the labour court has not gone to the question on the ground that the workman has admitted legality and validity of the departmental inquiry. Therefore, the labour court has come to the natural conclusion, in other words, that charges levelled against the workman are found to be proved. The labour court has discussed the misconduct which was alleged against the petitioner workman in show cause notice dated 6th September, 1999 which are relating to some irregularities not to remain present on duty for a particular period, leave the place of working without prior permission and

some occasion, refused to make payment to the customers. The labour court has considered the reply given by the petitioner workman about the workload and ultimately the labour court has thought it fit that the workman for the period from 1984-99 committed various misconducts which amounts to breach of standing orders of the respondent Bank and these are all minors and major misconducts committed by the petitioner workman and therefore, just to give one opportunity to the petitioner workman to improve himself, the labour court has thought it fit to deny backwages of the total period but only granted reinstatement which according to opinion of the labour court, would be just and fair in light of the facts and circumstances of the case. Accordingly, the labour court has passed the order on 4/06/2001 granting reinstatement without backwages of the interim period with direction to the respondent Bank to reinstate workman within 30 days from the date of publication of the order. This order has been challenged by both the parties before the Industrial Court under Section 84 of the Bombay Industrial Relations Act, 1946. The Industrial Court, Ahmedabad has entertained both the appeals and passed common order on 2 8/11/2001. The Industrial Court, Ahmedabad has rejected the appeal filed by the petitioner workman about claiming the amount of backwages but allowed the appeal filed by the respondent bank while setting aside the reinstatement order which has been passed by the labour court in favour of the petitioner workman.

3. Learned senior advocate Mr.S.K.Zaveri appearing on behalf of the petitioner workman has submitted that the industrial court has committed gross error in coming to the conclusion that once the inquiry is admitted by the workman, misconduct is found to be proved then, the labour court should not have passed the order of reinstatement and that beyond the purview of the powers under Section 78 & 79 of the Bombay Industrial Relations Act, 1946. Learned advocate Mr.Zaveri further submitted that powers under Section 78-79 which having by the labour court in response to the T.Application filed by the workman is like powers under Section 11-A of the Industrial Disputes Act, 1947 and the labour court can modify the punishment if ultimately the labour court has thought it fit that looking to the misconduct in question if the punishment is harsh, unjustified and unreasonable. Therefore, learned advocate Mr.Zaveri submitted that the workman who has admitted the legality and validity of the inquiry and that aspect has been considered on the ground that misconduct is proved but the labour court has considered the question of punishment and ultimately the labour court has come to the conclusion that looking to the misconducts for the period from 1984-1999 and lapses committed by the workman, punishment of dismissal is harsh, unjustified and unreasonable. Therefore, the labour court has not granted any amount of backwages to the workman by way of penalty and only granted reinstatement with

a view to have some improvement in future in the conduct of the workman and for that, the labour court having powers to pass such order even in case when the misconduct is proved against the workman. Therefore, according to him, the industrial court has committed gross error not appreciating the said legal aspect and come to the conclusion that once misconduct is proved, the labour court has no powers under the provisions of the Bombay Industrial Relations Act to modify the punishment or to consider the question of unjustified punishment imposed by the employer. Therefore, learned advocate Mr.Zaveri submitted that the order of industrial court dismissing the appeal of the petitioner workman and allowing the appeal of the employer is required to set aside.

4. Learned advocate Mr.Krunal Nanavati appearing on behalf of the respondent Bank has submitted that the order passed by Industrial Court is perfectly all right and as such, no error has been committed by the Industrial Court and therefore, this Court may not interfere while exercising the limited jurisdiction under Article 227 of the Constitution of India. He also emphasised that once the misconduct is proved and not challenged the inquiry and no victimization is proved, then the labour court has no powers to modify the punishment imposed by the employer. He also emphasised again that in Industrial Disputes Act, there is specific provision made in the statute under Section 11-A of the Industrial Disputes Act, 1947 which gives the powers to the labour court to modify punishment if labour court is satisfied looking to the misconduct in question, if punishment is unjustified, unreasonable and not legal. Similar powers are not under the statutory provisions of the Bombay Industrial Relations ACT, 1946 and therefore, the labour court cannot modify the punishment once the inquiry is admitted by the workman and misconduct is proved against the workman. Therefore, industrial Court has rightly passed the order allowing the appeal filed by the respondent bank. He also submitted that there is no finding or observation given by the labour court that the punishment is excessive and therefore, the labour court has just granted reinstatement without any reason and therefore, the order is passed by the labour court granting reinstatement is bad which has been rightly set aside by the Industrial Court allowing the appeal of the respondent Bank. Except that, both the learned advocates have not made any further submissions before this Court.

5. In respect of the first contention raised by the learned advocate Mr.Krunal Nanavati that while exercising the powers under Section 78 & 79 of the Bombay Industrial Relations Act, 1946, the labour court having no powers to interfere with the punishment imposed by the employer when the misconduct is found to be proved before the labour court. This aspect has been examined by the Division Bench of this Court in case of Ahmedabad New Textile Mills v. Textile Labour

Association reported in 1988 [2] G.L.H. 498. The Division Bench of this Court has interpreted the words and phrases "Propriety" is capable of a variety of meanings and after considering Oxford English Dictionary and the Division Bench of this Court has come to the conclusion that the labour court while exercising the powers under Section 78 and 79 to interfere with the punishment when the order of imposing the punishment is proportionate, harsh. The relevant discussion made in Para-6 & 10 produced as under :

"6. The question then is, what is the ambit of the Labour Court's jurisdiction under sub-clause [i] of clause [a] of paragraph A of Section 78[1] of the Act ? Under the said provision the Labour Court is empowered to decide a dispute regarding the propriety or legality of an order passed by an employer acting or purporting to act under the standing orders. Both the tests of legality and propriety have to be satisfied to defeat any action initiated under Section 79 read with the relevant clause of Section 78[1]. Even if an order is legal, that by itself is not enough. It must also be shown to be proper. If an order is not in conformity with the provisions of the Act or the rules or standing orders or is violative of the principles of natural justice and fairplay or the like, it can be interfered with by the Labour Court as being illegal. But even if the order is legal, it can still be questioned on the ground that the same lacks in propriety. In a case where the legality of the order is not questioned, as in the present case, the employer must still show that his order is proper. The expression "propriety" is capable of a variety of meanings. Its shades and nuances would have to be gathered from the context in which that word appears and the facts and circumstances of each case. In the Oxford English Dictionary, Volume VIII, the word "propriety" is stated to mean : that which is proper [in various senses of the adjective], fitness, appropriateness, aptitude, suitability; appropriateness to the circumstances or conditions; conformity with requirement, rule or principle, rightness, correctness, justness, accuracy, etc. Therefore, when the Labour Court is called upon to decide a dispute regarding the propriety of an order passed by an employer, it is open to the labour court to decide whether the said order is proper, fit, appropriate, suitable and in conformity with rightness, correctness, justness and accuracy. In doing so, the Labour Court can also examine whether the punishment imposed by the employer under the impugned order is just and proper in the facts and circumstances of the case because punishment forms part of the employer's order, the propriety whereof is open to scrutiny by the labour court. The employer's order may comprise of the allegations, averments, facts, evidence, both documentary and oral, and reasons in support of the ultimate findings reached by the employer as well as reasons for the punishment proposed to be imposed against the delinquent. It is, therefore, obvious that when the Labour Court is invested with the power to examine the

propriety of the order passed by the employer, the labour court can also consider whether in the facts and circumstances of the case the employer was justified in visiting the employee with the extreme punishment of dismissal. The order imposing the punishment is a part of the employer's order, the propriety whereof is under the scrutiny of the Labour Court and hence the Labour Court would be justified in considering the appropriateness and justness of the said order. In Sarangpur Mill case [Supra] this Court held that the expression "legality and propriety" used in paragraph A of Section 78[1] of the Act does not limit the jurisdiction of the Labour Court to a revisional jusridction.This Court held that the proceedings before the labour court were in the nature of original proceedings and hence the jurisdiction of the labour court is wider than the jurisdiction that a revisional authority exercises while deciding the question of legality and propriety of an order passed by a subordinate authority. We are, therefore, of the opinion that the contention of Mr.Buch that the labour court cannot revise the punishment if it comes to the conclusion that some of the charges levelled against the delinquent were established does not appear to be in consonance with the language of the statute.

10. What emerges from the above discussion is that the labour court is invested with wide jurisdiction to examine the propriety and legality of the employer's under the standing orders. The order passed byt he employer must be shown to be not only in conformity with law but also in conformity with justness and reasonableness. If the order passed by the employer is so disproportionately harsh as to shock judicial conscience, the labour court or the industrial court, as the case may be, would be entitled to interfere with the said order. It is, therefore, not possible to accept the extreme submission of Mr.Buch that the Labour Court or the Industrial Court has no power to interfere with the punishment imposed by the employer on proof of misconduct under the standing orders. If such a view is accepted, it would tantamount to investing the employer with the power to visit the extreme penalty of dismissal from service even for a minor misconduct. We are, therefore, of the opinion that having regard to the language of the statute, the context in which the expression appears and the underlying object of the benevolent legislation it is not possible to accede to the submission of Mr.Buch that once any misconduct mentioned in the standing orders is proved or held established, the labour court or the Industrial Court cannot interfere with the order of punishment, no matter whether it is in the facts and circumstances of the case justified or not."

Therefore, in respect of the first contention which has been raised by the learned advocate Mr.Nanavati cannot be accepted in light of the observations made by the

Division Bench of this Court as referred to above.

The said principle has also been considered this Court Court in case of RAMESHBHAI ATRARAM PATEL V. FACTORY MANAGER, NEW SHORROCK MILLS LTD., AHMEDABAD reported in 2000 [4] GLR 2835. The relevant observations made in para-6 and 7 are quoted as under :-

"6. .... Xxx .... xxx .... There is another decision of the Division Bench of this Court in case of Rajnagar Textile Mills Ltd. v. Bharat J. Ptel, reported in 1994 [1] GCD 378. In the said decision, the Division Bench has held that, the question of exercising the discretion by the Labour Court and the Industrial Tribunal may be examined from the standpoint of the provisions of Sections 78 & 79 and 84 of the Bombay Industrial Relations Act, 1946. It is true that there is no express provision like Section 11-A of the Industrial Disputes Act,. 1947 which confers power on the Labour Court and other forums created under the Industrial Disputes Act, 1947 in interfering with the order of punishment of dismissal or discharge. As provided under Section 11-A I.D.Act, if the Court is satisfied that the order of discharge or dismissal was not just it may set aside the order of discharge or dismissal and direct reinstatement of workman on such terms and conditions as it may think fit or it may give such other relief to the working, including the award of any lesser punishment in lieu of discharge or dismissal; as the circumstances of the case may require. However, in absence of such specific provision, it does not mean that the Labour Court and Industrial Tribunal shall have no such powers under the Bombay Industrial Relations Act.

7. It is required to be noted that learned Advocate Mr.Gandhi has formally conceded the legal situation that the labour Court and the Industrial Tribunal, while exercising the powers under Secs. 78, 79 and 84 of the Bombay Industrial Relations have analogous powers like that of Section 11-A of the Industrial Disputes Act, 1947. So, that question has not been argued by the learned Advocate Mr.Gandhi. He concedes that the position of law that the labour Court has powers to examine the legality and propriety of the punishment imposed by the employer"

This Court has also considered the decision of the Division Bench of this Court that what should be proper punishment, is the question requires to be decided by punishing authority or by the concerned labour court on the basis of consideration of relevant factors. This aspect has been discussed in para-8 which is quoted as under :

"8. While dealing with the powers of the labour court under Section 11-A of the Industrial Disputes Act, 1947, the Division Bench of this Court in case of Gujarat

State Road Transport Corporation v. Danaji Sukhaji Kodiyar, reported in 1993 [1] GCD 892 : 1994 [1] GLR 87 has held that while exercising powers under Section 11-A of the Act, the Labour Court or the Tribunal is bound to impose some punishment. What punishment should be imposed is ordinarily the question to be decided on the basis of the facts and circumstances of each case and particularly individual circumstances of the delinquent concerned, his family background, his socio-economic background, his service record, length of service and the surrounding circumstances in which he might have been compelled to commit the misconduct are some of the factors which are required to be taken into consideration, while deciding the question of punishment. These factors would naturally vary from case to case and from individual to individual. The Division Bench of this Court has also considered the decision of the Apex Court in case of Rama Kant Misra [Supra]. There is one another decision of the Apex Court in the matter of Jintendrasinh Rathod v. Shri Baidya Nath Ayurved Bhawan Limited, reported in AIR 1984 SC 976.

In the said decision, it has been held that, "the High Court was right in taking a view that when the payment of back wages either in full or part is withheld, it amounts to penalty. Withholding of back wages to the extent of half, in the facts and circumstances of the case, was therefore, by way of penalty referable to prove the misconduct and that situation could not have been answered by the High Court by saying that the relief of reinstatement was granted on terms of withholding half of the back wages, and therefore, did not constitute penalty."

6. The second contention raised by the learned advocate Mr.Nanavati to the effect that there is no observations made by the labour court that punishment is excessive and just granted reinstatement even victimization is also not proved by the employee before the labour court and therefore, the labour court has committed error which was rightly corrected and rectified by the Industrial Court. So far this contention is concerned, observations made by the labour court are relevant. The labour court in terms come to the conclusion that whatever show cause notices were given to the workman at the relevant time for the period from 1984 to 1999, on each occasion, explanations were given by the workman and the same were accepted by the Bank at the relevant time and no departmental inquiry was initiated against the workman at the relevant time, meaning thereby, the management was satisfied with the explanations given by the workman at the relevant time when the particular show cause notice was received by the workman during the period from 1984-99. Therefore, the labour court in terms come to the conclusion that one show cause notice dated 6/09/1999 for a period of misconduct prior to 15 years i.e. for a period from 1984-1999 that itself is not legally proper

but the labour court has also considered Purshis filed by the workman admitting legality and validity of the departmental inquiry. The labour court has also considered misconducts which are minor in nature and explanation of the workman and ultimately, come to the conclusion that looking to the minor and major misconducts, punishment of dismissal is modified while giving chance to improve the petitioner workman while denying the backwages, which would be reasonable and just and proper and therefore, the labour court has passed the order. Therefore, according to my opinion, the labour court has applied his mind in respect of the facts and circumstances of the case and also while keeping in mind that show cause notice dated 6/09/1999 for a period from 1984 to 1999 itself is not legal and not gone into that question because of the Purshis of admitting the departmental inquiry given by the workman. Moreover, the surrounding circumstances has also been kept in mind by the labour court and granted reinstatement and therefore, the observations made by the labour court seem to be with application of mind while granting reinstatement considering the fact that punishment is harsh and unjustified which requires one chance ought to have been given workman to improve himself in future. Therefore, the contention raised by the learned advocate Mr.Nanavati cannot be accepted as it is contrary to the record.

7. The third contention that victimization has not been proved by the workman because there was no oral evidence led by the workman before the labour court. It is true that the workman was not examined before the labour court. For proving victimization, it is not necessary to lead oral evidence if the Court is satisfied looking the record itself that show cause notice dated 6/09/1999 relate to the misconduct from 1984-99 and why management waited for 15 years, as to why not issued any show cause notice and initiated departmental inquiry, no explanation for that and as such, no justification for that given by the employer. The observations made by the Labour Court that on each occasion during the period from 1984-99, notices were given to the employee which was replied by him and ultimately the Management was satisfied and no further action was taken. Therefore, all of sudden, what was the real cause to issue show cause notice dated 6th September, 1999 for a period from 1984-99 but this aspect remained without any explanation from the employer and that itself is sufficient to hold that it is clear case of legal victimization. For that, there is no need to lead any oral evidence from the workman. Therefore, from the record, once legal victimization is proved, that is suffice to alter the punishment or to interfere with the punishment by the labour court. Some times, the conduct and decision of the employer itself suggest victimization, for that, it is not necessary that in each and every case of victimization, oral evidence is required to be led before the labour court. Therefore,

according to my opinion, it is clear case of legal victimization and hence, there is no need to have any oral evidence before the labour court by the workman and therefore, contention which has been raised by the learned advcoate Mr.Nanavati cannot be accepted.

8. The Apex Court considered instances of legal victimization in case of COLOUR CHEM LTD v. ALASPURKAR A.L. & OTHERS reported in 1998 [1] LLJ 694. The relevant observations made in para-14 are reproduced as under :

"14. The term "victimisation" is not defined by the present Act. Sub-section [18] of Section 3 of the Act which is he Definition Section lays down that, "words and expressions" used in this Act not defined therein, but defined in the Bombay Act, shall, in relation to an industry to which the provisions of the Bombay Act apply, have the meanings assigned to them by the Bombay Act, an in any other case, shall have the meanings assigned to them by the Central Act. Bombay Act is the Bombay Industrial Relations Act, 1946 and the Central Act is the Industrial Disputes Act, 1947 as laid down by definition Section 3[1] and 3[2] of the Act. The term "victimisation " is defined neither by the Central Act nor by the Bombay Act. Therefore, dictionary meaning. IN Concise Oxford Dictionary, 7th Edn., the term "Victimisation" is defined at page 1197 as follows : "Make a victim; cheat; make suffer by dismissal or other exceptional treatment."

Thus if a person is made to suffer by some exceptional treatment it would amount to victimisation. The term "victimisation" is of comprehensive import. It may be victimisation in fact or in law. Factual victimisation may consist of diverse acts of employers who are out to drive out and punish an employee for no real reason and for extraneous reasons. As for example a militant trade union leader who is a thorn in the side of the management may be discharged or dismissed for that very reason camouflaged by another ostensibly different reason. Such instances amount to unfair labour practices on account of factual victimisation. Once that happens Clause [a] of Item 1 of Schedule IV of the Act would get attracted even apart from the very same act being covered by unfair labour practices envisaged by Clauses [b], [c], [d] and [e] of the very same Item 1 Scheduled Iv. But it cannot be said that Clause [a] of Item 1 which deals with victimisation convers only factual victimisation. There can be in addition legal victimisation and it is this type of victimisation which is contemplated by the decision of this Court in Hind Construction [supra]. It must, therefore, be held that if the punishment of dismissal or discharge is found shockingly disproportionate by the Court regard being had to the particular major misconduct and the past service record of the delinquent or is such as no reasonable employer could ever impose in like circumstances, it would be unfair labour practice by itself being an instance of victimisation in law or legal

victimisation independent of factual victimisation, if any. Such an unfair labour practice is covered by the present Act by enactment of Clause [a] of item 1 of Schedule IV of the Act as it would be an act of victimisation in law as clearly ruled by this Court in the aforesaid decision. On the same lines is a later decision of this Court in the case of Bharat Iron Works v. Bhagubhai Bulubhai Patel & Ors. 1976 2 SCR 280, wherein a Bench of three learned Judges speaking through Goswami, J. laid down the parameters of the term "Victimisation" as understood in labour laws and as contemplated by industrial jurisprudence. It has been observed that ordinarily a person is victimised if he is made a victim or a scapegoat and is subjected to persecution, prosecution or punishment for no real fault or guilt of his own. If actual fault or guilt meriting punishment is established, such action will be rid of the taint of victimisation. The aforesaid observations obviously refers to factual victimisation. But then follows further elucidation of the term "victimisation" to the following effect :

"Victimisation may partake of various types, as for example, pressuring an employee to leave the union or union activities, treating an employee in a discriminatory manner or inflicting a grossly monstrous punishment which no rational person would impose upon an employee and the like ... "

The aforesaid observations in this decision fall in line with the observations in the earlier decision of this Court in Hind Construction [supra]. Consequently it must be held that when looking to the nature of the charge of even major misconduct which is found proved if the punishment of dismissal or discharge as imposed is found to be grossly disproportionate in the light of the nature of the miscondcut or the past record of the employee concerned involved in the misconduct or is such which no reasonable employer would ever impose in like circumstances, inflicting of such punishment itself could be treated as legal victimisation. On the facts of the present case there is a clear finding reached by the labour court and as confirmed by the Industrial Court and as confirmed by the Industrial Court that the charges levelled against the respondent delinquents which were held proved even though reflecting major misconducts, were not such in the lights of their past service record as would merit imposition of punishment of dismissal. This factual finding would obviously attract the conclusion that by imposing such punishment the appellant management had victimised the respondent delinquent. Imposition of such schokingly disproportionate punishment by itself, therefore, has to be treated as legal victimisation apart from not being factual victimisation as on the latter aspect the labour court has held against the respondent workmen and that finding has also remained well sustained on record. Thus it must be held that the management even though not guilty of factual victimisation was guilty of legal

victimisation in the light of the proved facts which squarely attracted the ratio of the decisions of this Court in Hind Construction [supra] and Bharat Iron Works [supra]. It is easy to visualise that no reasonable management could have punished a delinquent workman who in the later hours of the night shift by about 03.30 a.m. head gone to sleep keeping the machine in a working condition especially in the absence of any gross misconduct reflected by the past service record, with the extreme penalty of dismissal. It is also interesting to note that this was a peculiar case in which the Plant In-charge found during his surprise visit at 03.30 a.m. in the early hours of the dawn entire work force of 10 mazdoors and 2 operators like the respondents and the supervisor all asleep. It is also pertinent to note that so far as 10 mazdoors were concerned they were let off for this very misconduct by mere warning while the respondents were dismissed from service. it is of course, true that the respondents were assigned more responsible duty as compared to mazdoors, but in the background of surrounding circumstances and especially in the light of their past service record there is no escape from the conclusion that the punishment of dismissal imposed on them for such misconduct was grossly and shockingly disproportionate, as rightly held by the labour court and as confirmed by the revisional court and the High Court. By imposing such grossly disproportionate punishment on the respondents the appellant management had tried to kill the fly with a sledge hammer. Consequently it must be held that the appellant was guilty of unfair labour practice. Such an act was squarely covered by Clause [a] of Item 1 of Schedule IV of the Act being legal victimisation, if not factual victimisation. The ultimate finding of the labour court about maintainability of the complaint can be supported on this ground. The second point is answered in the affirmative against the appellant and in favour of the respondent - workmen."

9. Recently also, the Bombay High Court has considered the decision of the Apex Court as referred to above, in case of K.M. PARANJPE v. MUNICIPAL CORPORATION OF GREATER BOMAY reported 2003 Lab.I.C. 532. The relevant observation made in para-17 are referred to below :

"17. .... She being a responsible officer, I believe her statement that she had telephoned her superior for the purpose of leave. We cannot presume that people always behave irresponsibly or that they turn bad over night. Her past record has been by and large good. She had never been disobedient or negligent in her working in the past. Very often in life people get caught in such a vulnerable situation which compel them to act in a particular manner which surely goes against the simple working of the administration. We, therefore, have to bear in mind that law is not life. Besides, it is not that she had remained absent for a very long period without any intimation or without getting her leave sanctioned. She has

surely taken care to apply for leave even after her absence without intimation. We have to be more more considerate as far as the working women are concerned. We must appreciate that they are always required to work for two establishments viz. office and house. Furthermore, the unfortunate circumstances of the will of her father-in-law placed her in a very crucial situation where she was required to litigate in criminal court. We cannot lose sight of a mandatory rule that municipal servant is permitted to remain away from duty upto a period of five years. In the present case, it is only question of 8 1/2 days assuming that she was guilty of such an act of misconduct. In my opinion, the punishment of dismissal inflicted by the respondent in such circumstance is harsh and shockingly disproportionate which can be covered under the term "legal victimisation" as evolved by the Supreme Court in the case of Colour Chem Ltd. Alaspurkar A.L. reported in [1998] 1 Cur LR 638 : [1998] 3 SCC 192 : [1998 Lab IC 974]. In the context of the industrial jurisprudence the Kernel of the term victimisation has remained the same as explained by the Supreme Court in the case of the Hind Construction and Engineering Co. Ltd. v. Workmen, reported in AIR 1965 SC 917 [at p.919] as under :

"But where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimisation or unfair labour practice."

10. I have perused the order passed by the labour court and the industrial court. On perusal of the impugned orders, it transpires that the Industrial Court has committed gross error while observing as under :

"As discussed earlier, the learned Judge, Labour Court has also come to the conclusion that the appellant has committed the breach of standing order and has also committed misconduct. In my opinion, no such concession of reinstatement with back wages is required to be given to the person, who commit breach of standing orders and commits misconduct and whose misconduct is proved in the departmental enquiry. Besides, in the present case before this Court, the appellant has not proved his case regarding victimization or backwages and on the contrary, he has admitted the legality and propriety of the enquiry. The appellant was working as a Clerk in the respondent bank and it was his bounden duty to carry out the work of the respondent bank in a responsible way adhering to all the rules and regulations of the respondent bank and as he has committed breach of standing order has also committed misconduct, which is proved in the domestic enquiry, he is not entitled to reinstatement and therefore, the order passed by the learned

Labour Court Judge, Palanpur on 4.6.2001 in T.Application No.2/ 2001 vide Exh.26 is to be set aside."

11. I fail to understand the industrial court being the appellate forum, has not appreciated the facts that what happened during the period from 1984-99 which required and / or created compelling circumstances for the respondent Bank to issue show cause notice dated 6th September, 1999 and what is real cause behind it. But it is surprising that the industrial court has not inquired into. Therefore, it is clear that the industrial court has committed gross error which is considered to be perverse finding. Moreover, the industrial court has not considered even the question of punishment whether it is adequate, just and proper or not. It was the duty of the industrial court while considering the order of the labour court which was passed under Section 78 & 79 to see that whether punishment which has been imposed by the employer is proper or not, whether justified or not. If any excessive punishment looking to the misconduct in question, then the Industrial Court should have interfered with the quantum of punishment and could have modified the punishment imposed by the employer. But this aspect has been totally ignored by the industrial court while allowing the appeal of the respondent bank. This is a basic error committed by the industrial court which invites this Court to interfere with the order passed by the Industrial Court. Section 78 and 79 of the Bombay Industrial Relations Act, 1946, wherein the order which has been passed by the employer under the provisions of the Standing Orders is required to be scrutinised by the labour court and legality and property of such orders must have to be examined by the labour court which gives powers to the labour court to examine the punishment whether looking to the nature of the misconduct, punishment imposed by the employer is justified or not, whether excessive or disproportionate or not. This is the duty of the labour court to consider which the industrial Court has failed and the labour court has rightly interfered with the punishment. Therefore, the industrial court has committed gross error in allowing the appeal of respondent bank.

12. It is also submission of the learned advocate Mr.Nanavati that once the departmental inquiry is admitted by the workman, finding is also established, then the labour court should not have passed the order granting reinstatement just for improvement or reformative measure, for that, the labour court has no power. This aspect has been considered by the Apex Court in case of SCOOTER INDIA LTD v. LABOUR COURT, LUCKNOW reported in AIR 1989 SC 149. The Apex Court has observed that termination of service of the employee where domestic inquiry found to be proper and findings were not vitiated in any manner, that by itself would not be ground for non interference with order of termination of service by Labour

Court. Direction by the labour court in the facts, for reinstatement of employee with 75 % backwages, on ground that erring workman should be given opportunity to reform himself and prove to be loyal and disciplined employee of company, not illegal and arbitrary. The relevant observations made by the Apex Cout in aforesaid decision of Scooter India in para-7 are reproduced as under :

"7. The High Court has considered at length the nature of the powers conferred on the Labor Court by Section 6[2A] of the Act for setting aside an order of discharge or dismissal of a workman and substituting it with an order of lesser punishment and as such it cannot be said that the High Court has failed to consider the facts in their entirety. As regards the third contention, we may only state that the labour Court was not unaware of the nature of the charges framed against the respondent or the findings rendered by the Inquiry Officer and the acceptance of those findings by the Disciplinary Authority. The Labour Court has observed as follows :-

"The workman has unfortunately to blame himself for much of the bad blood which has developed between him and the management and therefore his conduct, motivated by ideals which are not relevant has been far from satisfactory. In so far as it was sought, bordering on rudeness and with highly exaggerated sense of his duties. In these circumstances it will meet the ends of justice if back wages to the extent of 75 % are allowed to the workman. I would make my award accordingly but there shall be no order as to costs."

It cannot therefore be said that the Labour Court had exercised its powers under Section 6[2A] of the Act in an arbitrary manner and not in a judicial manner. The labour court has taken the view that justice must be tempered with mercy and that the erring workman should be given an opportunity to reform himself and prove to be a loyal and disciplined employee of the petitioner company. It cannot therefore be said that merely because the labour court had found the enquiry to be fair and lawful and the findings not to be vitiated in any manner, it ought not to have interfered with the order of termination of service passed against the respondent in exercise of its powers under Section 6[2A] of the Act."

13. Recently also, the Apex Court has considered the scope of Section 11-A of the Industrial Disputes Act, 1947 in case of KAILASH NATH GUPTA v. ENQUIRY OFFICER [R.K.RAI], ALLHABAD BANK AND OTHERS reported in 2003 LAB.I.C. 2290. The Apex Court has considered procedural irregularity and punishment of dismissal against the Bank Officer. The Apex Court has observed that small advances become irrecoverable due to procedural irregularities. However, no evidence to show that he misappropriated any money or had committed any act of fraud. If any loss has been caused to the bank that can be recovered from the

delinquent employee. At the most there is some procedural irregularity which cannot be termed to be negligence to warrant the extreme punishment of dismissal from the service. The relevant observations made by the Apex Court in para-11 of the above decision runs as under :

"11. In the background or what has been stated above, one thing is clear that the power of interference with the quantum of punishment is extremely limited. But when relevant factors are not taken note of, which have some bearing on the quantum of punishment, certainly the Court can direct re-reconsideration or in an appropriate case to shorten litigation, indicate the punishment to be awarded. It is stated that there was no occasion in the long past service indicating either irregularity or misconduct of the appellant except the charges which were the subject matter of his removal from service. The stand of the appellant as indicated above is that though small advances may have become irrecoverable, there is nothing to indicate that the appellant had misappropriated any money or had committed any act of fraud. If any loss has been caused to the bank [which he quantifies at about Rs.46,000.00] that can be recovered from the appellant. As the reading of the various articles of charges go to show, at the most there is some procedural irregularity which can not be termed to be negligence to warrant the extreme punishment of dismissal from service."

14. Similarly, looking to the facts of this case also, it was not the case of the respondent bank before the labour court even before the industrial court, and nor even before this Court that act of the misconduct which has been alleged against the workman for the period from 1984-99 are relating to either dishonesty or misappropriation or fraud, meaning thereby, that no procedural irregularities committed by the workman. Therefore, it is obvious that there was no serious misconduct in past for the period from 1984-99 committed by the workman and even it is not case of the respondent bank that the workman has committed any misconduct relating to dishonesty, misappropriation or fraud.

15. To issue a show cause notice to the petitioner by the respondent Bank for the lapses committed by him for the period from 1984-99 all of sudden without any justification or without expalining any delay. I faile to understand why such show cause notice issued after period of 15 years. Such delay itself is fatal and no action can be taken by the employer after this much delay. There must be something behind the curtains that why all of sudden managment has become so harsh against the present petitioner when they tolerated the lapses as alleged in the show cause notice for the period from 1984-99. However, it is submissions made by the leanred advocate Mr.Zaveri that the brother of the petitioner has filed criminal complaint againt some officers of the bank which resulted into such harsh attitude

and conduct on the part of the management. The view taken by the Division Bench of this Court in case of K.B.TRIVEDI VS. STATE OF GUJARAT reported in 2002 Lab.I.C. 1198 that after the delay of 15 years, if chargesheet is served in respect of incident which occurred prior to 15 years without any explanation of delay, such chargesheet itself is bad and contrary to the principle of natural justice and also hit by the Article 14 of the Constitution of India. Therefore, the labour court has rightly observed that show cause notice for the lapses committed by the petitioner from 1984-1999 itself is not legal and valid and that all these aspects proved legal victimisation of the petitioner without any further evidence.

16. In view of above observations made by this Court relying on the decisions of the Apex Court and the decision of the Apex Court and considering the fact that the labour court having powers under Section 78 and 79 while examining the legality, validity and propriety of the order which includes the powers to consider the question of punishment whether excessive or not in light of the misconduct committed by the workman. Therefore, the industrial court has committed gross error while not examining the question of punishment whether it is disproportionate or not looking to the misconduct and therefore the industrial court has committed gross error in allowing the appeal of the respondent bank as setting aside reinstatement order passed by the labour court. Therefore, according to my opinion, after perusing the order passed by the labour court, which considered to be just and fair in light of the facts and circumstances granting reinstatement with reformative measure and denying the backwages to the workman and therefore, appeal filed by the workman challenging the directions of denying backwages is also rightly dismissed by the Industrial Court. But the Industrial Court has committed error in allowing the appeal of the respondent bank and hence, the order passed by the Industrial Court in Appeal No.69 / 2001 filed by the respondent Bank by order dated 28/11/2001 is hereby quashed and set aside and the order passed by the labour Court vide Exh.26 in T.Application No.2/2001 is restored and confirmed by this Court wherein reinstatement has been granted in favour of the workman with continuity of services without backwages of the interim period.

17. Accordingly, present petition is partly allowed. The respondent Bank is directed to reinstate the present petitioner in service with continuity of service with all consequential benefits without any backwages of the interim period from the date of termination i.e. 31.1.2001 to 4/06/2001 within one month from the date of receiving the copy of this order. However, the respondent bank is directed to pay regular salary from 4.6.2001 which was received by the petitioner at the time of termination till the date of actual reinstatement within three months from the date of receipt of copy of this order.

[3] Rule is made absolute with no order as to costs accordingly.