# **Whether a disciplinary action is a weapon in the hands of the employer in India** – Judicial Superstructure & Constitutional perspective.

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# DECLARATION:

I hereby declare that this submission is of my own work and that to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for award of any other degree or diploma of the University or other Institute of higher learning, except where due acknowledgement has been made in the text.

Signature:

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Place: Rajkot

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# CERTIFICATE

This is to certify that the present work has been carried out under my supervision by Mr. Shivaji Rao, and I recommend it for being submitted to the examiners for the award of Ph.D Degree in Law.

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Shivai Rao

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# PREFACE

The title of the thesis is "**Whether a disciplinary action is a weapon in the hands of the employer in India** – Judicial superstructure & Constitutional perspective".

**Utility**: This is an original research work. It reveals the critical evaluation and analysis of the procedure, judge made law and substantive and procedure law relating to Disciplinary Enquiry and as to whether it is really a weapon I the hands of the employer?. The form, content case law discussed thereof and the findings arrived and suggestions made in this research work is extremely useful for private employers, public organizations, personnel managers, Industrial Relations Managers, legal executives / mangers, legal researchers, law lecturers / professors / students, legal fraternity and last but not least law makers.

The present research work will make distinctive contribution to create awareness of lack laws / procedure in the arena of Disciplinary / Departmental Enquiry and highlight the lack of transparency, fairness therein. This research work is also touched upon and law and

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procedure required to support and make the machinery of enquiry full-fledged and competent from all respects. This research work also high light and emphasize the need of the hour with effective suggestions and recommendations.

Rajkot

Date : __/07/2005 ( Shivaji Rao)

# *Dedicated*

*to my Parents for their*
*Love and Blessings*

*to my father in-law for his*
*Love, care and blessings*

*to my wife Mrs Manjula Rao for*
*her love and support*

*to my Teachers, Friends and Mentors*

# C O N T E N T S:

## Chapter 03 JUDICIAL STRUCTURE & PERSPECTIVE - I



## Chapter 04 JUDICIAL STRUCTURE & PERSPECTIVE - II



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## INTRODUCTION

The buzz word of the day is the requirement of paradigm shift in labour laws. To facilitate this concern, accordingly, the 2nd National Labour Commission was set up. However, even the 2nd National Labour Commission-2002 have not touched on any of the points related to vital issues of codification and personification of rules and procedure related to Disciplinary Enquiry. The oft-repeated word “discipline” has a wider connotation than what we actually mean in the context of the work place where the workers assemble to do their duties. Every organization whether private or public, governmental or statutory, has its own code of conduct and discipline, which are intended to regulate the conduct of the employees. Breach of rules and regulations is, therefore, treated as misconduct, which is punishable under the disciplinary rules. Minor or Major penalties depending on the nature of the misconduct are imposed on the delinquent employee in accordance with the prescribed procedure and the principles of natural justice. More

or less same pattern is followed by the all organizations, private or public.

Enforcement of rules and regulations under the fear of sanction is an essential factor in the maintaining discipline. It is necessary because all people are not naturally law abiding. A standard of behaviour is to be maintained at work place by such code of conduct and discipline. In modern times, the introduction of sophisticated machinery and electronic devices, work patterns has undergone a sea change resulting in a change of old standard and behaviour pattern of the working class. The languid pattern of work has been replaced by high speed in production requiring a greater alertness and carefulness. It follows therefore more discipline is required at all levels of production *pari passu,* the conduct and behaviour pattern must conform to the work pattern.

In India there are more than 175 Labour Legislations but none of these legislations deal with procedure and nitty-gritty of holding of enquires. That apart, the main pit-fall in the matters

of Disciplinary Enquiries is relating to appointment of enquiry officers. Invariably in every disciplinary proceeding, the enquiry officers appointed by the employer dose not inspire the confidence of the delinquent employee.

It must be mentioned here that the development of legal system and the decisions of the Law Courts play a very important role, particularly the *ratio decidendi*. Some times *obiter dicta* verdicts also help to arrive at a plausible conclusion. This is why we see that in spite of the absence of the provisions of the domestic enquiries have now become almost obligatory for every employer.

There is maxim that nobody should be condemned unheard. In view of this, the need of the domestic enquiry is fully justified because they are held in accordance with the principles of natural justice in the absence of codified law. In domestic enquiries opportunity is given to the person against whom certain actions are proposed to be taken to defend himself and tell the enquiry officer who records the evidence of the parties

and gives its findings to the effect whether the charges levied have been proved or not. In Radhey Shyam Gupta vs. U.P State Agro Industries Corporation Ltd., and Anr.[1], it was observed – purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry.

As of today, more than 90 percent of cases pending for adjudication pertain to dismissal and discharge of workmen. Gone are the days when the employer could dispense with the service of an employee at his whims and fancies. With the disappearance of the principle of *lassie faire* which were governing the relationship between an employer and employee, an employer cannot dismiss or discharge an employee howsoever undisciplined, undesirable or unwanted he may be. The current labour legislation, judicial pronouncements which have for their objective the amelioration of the lot and the betterment of the service conditions of the working class, have

[1] (1999) 2 SCC 21

to a great extent restricted rights of an employer and secured to the corresponding extent the job security of a workmen.

When we talk of disciplinary proceedings in private employment, a domestic enquiry is that of mistrust which arises essentially because the charge sheet is given by the employer and the enquiry is also held by an officer or an outsider appointed by the employer. The employer, as such, represents the both, the prosecutor and the judge. A suspicion of bias is inevitable in such a situation. This is the main reason that the delinquent employee does not have faith in the enquiry officer. They participate reluctantly and take every possible step to frustrate the enquiries. They raise number of objections including that of the validity of the appointment of the enquiry officer. They also demand to be represented either by the lawyer or the union leader. They ask for number of documents, whether relevant or not. Also the delinquent employees or their representatives do not restrict the cross examination of the witnesses and enquiry officer has to take decision under the given circumstances.

In the existing set of procedure / practice espouses the suspicion in the minds of the workmen that the management has already taken a decision to get rid of them and the enquiry is only a postmortem to comply with legal formalities, the enquiry officer, howsoever impartial he may be, does not inspire the confidence of the delinquent workman. This feeling frustrates the very essence of natural justice.

**No written Rule exists to guide enquiry proceedings**:

To regulate employer and employee relations which includes the formation of trade unions, defining, with reasonable degree of precision, the conditions of service and communicating them to workmen; provisions for machinery for the investigation and settlement of Industrial disputes and regulation of industrial actions such as strikes, lockouts, lay-off and retrenchment. Among the existing Statutes, the following constitute the Industrial Relations legislations:

(1) Trade Unions Act, 1926
(2) Industrial Employment (Standing Orders) Act, 1946
(3) Industrial Disputes Act, 1947

It is pertinent to mention here that none of the afore-said legislations provide any kind of procedure to be followed during the enquiry proceedings much less to say about the language and forms / contents to be pressed in to service. The existing setup and scheme of things on the subject under context are not adequate and full proof to say that the same is free from bias, free from social stigma, free from prejudice.

Every employer / entrepreneur is free to adopt his own frugal rules / procedure to conduct disciplinary enquiry until and unless the same is held void by the law courts. Protection available against the said purported action of the employer is equal to nil, save and except desolate remedy provided under section 11 of the Industrial Disputes Act, 1947. All the more, the said remedy is only restricted to “workmen” category as defined under the Industrial Disputes Act 1947, rest of the workforce left virtually with no remedy.

It has been rightly said that efficiency and discipline are two essential factors for successful Industrial set-up. The big is the industry and the task of enforcement of disciple among thousands of workmen who belong to different ethnic groups is the hefty. There are different ways of effective disciplinary control. No organization can go without it whatever be the consequences. The main purpose of the disciplinary proceedings is just to find out the truth of the allegations made against the concerned worker, and if the truth of the allegation is established after an 'impartial' enquiry. However the regulatory set up provided for as stated *supra* apparently does not contain the nitty-gritty / procedure of the disciplinary enquiry.

Under reference to the context of peculiar employment situation and the grounds and norms regulate the relationship of 'master and servant' the purported power vested with employer to dispense the services of employee under the nomenclature of

‘disciplinary enquiry’ throws open flood of questions about its legality, propriety and its procedure.

The Scheme of Thesis writing and compartmentalization / Chapterization has been arranged in the manner provided herein below. Chapter – 1 to chapter 7 and chapter 8 deals-

- ✍✍ Meaning of the term misconduct and how it has been read and presumed under Industrial Jurisprudence, Constitutional perspective, master – servant relationship

- ✍✍ Scope and purpose of Disciplinary Enquiry and applicability of principles of natural justice

- ✍✍ Initiation of Disciplinary proceedings, charge-sheet, Enquiry officer, Presenting officer, stay of Enquiry by law courts

- ✍✍ Delinquent employee represented by legal practitioner, disciplinary proceedings vis-à-vis criminal proceedings, witness, bias in the enquiry

- ✍✍ Form and content of enquiry report by the enquiry officer, supply of enquiry report, imposition of penalty and remedies available
- ✍✍ Practice and procedure adopted by the employers – collection of data through structured questionnaire as well as oral interface / interview with professionals and people associated with the subject under context.

- ✍✍ Critical analysis of the existing practice and procedure of the Disciplinary Enquiry.

- ✍✍ And Chapter -8 of the research work deals with conclusion and suggestions.

# Chapter 01: MISCONDUCT

1.1 Concept of the term ‘misconduct’

1.2 Literary meaning of the word ‘misconduct’

1.3 Perception of the word ‘misconduct’ in the industrial jurisprudence

1.4 Judicial perspective on the word ‘misconduct’

1.5 Constitutional perspective of the term ‘misconduct’

## MISCONDUCT:

It is true that the relationship between the employer and employee is contractual, it can be said to be a private bilateral contractual arrangement. Un-noticingly the state becomes party to the said contract by way of enforcement and implementation of various Social Security and Social welfare Legislations. In view of the tripartite contract between employer, employee and the State, it is quite difficult for employer to dispense with the services of the employee without the knowledge of the State or violating the laws of State which have guaranteed security of employment on the reason of misconduct. Again the term misconduct is relative term which is not defined any of the legislations in India.

## 1.1 Concept of the term 'misconduct'-

Misconduct is a transgression of some established rules of action, where no discretion is left except what necessity may demand. It is a violation of definite law, a forbidden act. It differs from careless[2]. Misconduct is a specific connotation. It cannot be mere inefficiency or slackness. Something more than a positive and deliberate disobedience of any order of a superior authority will be one species of misconduct – Presidency Talkies vs. N.S. Nagarajan[3].

Any conduct on the part of an employee inconsistent with the faithful discharge of his duties towards his employer would be misconduct. Any breach of the express or implied duties of an employee towards his employer, therefore, unless it is of a trifling nature, would constitute an act of misconduct. However, the act of misconduct must have some relation with employee's duties towards his employer – Victoria Co. Ltd., vs. P.O Industrial Tribunal.[4]

Misconduct comprises positive acts and not mere neglect or failure. It differs from carelessness. Every breach of discipline may amount to misconduct, the penalty for which varies with gravity thereof. It is difficult to lay down exhaustively what constitutes misconduct and indiscipline. The conclusion depends on the examination of the facts in each case.

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[2] Ballentine's Law Dictionary, Edn.1948
[3] (1968) II LLJ 801
[4] (1970) Lab IC 337

Misconduct, even it is an offence under the Indian Penal Code, is equally misconduct – Assam Oil Company Ltd., vs. L. N. Mohan[5]. The Supreme Court held that acts of employees who were detrimental to the interest and prestige of the employer amount to misconduct[6].

In Industrial Law there are two types of misconduct viz:

i. major misconducts which justify the punishment of dismissal or discharge,
ii. minor misconducts which do not justify punishment of dismissal or discharge but may call for lesser punishments.[7],

The Industrial Employment (Standing Orders) Rules framed under the Industrial Employment (Standing Orders) Act, 1946 under clause 14 (3) provides limited list of misconducts. However, the employer is at liberty to frame his own standing orders to the peculiar to their nature and status of their industries and establishments. It is not possible to provide for every type of misconduct in the standing orders for justifying disciplinary action against the workmen held in Express Newspaper (P) Ltd., vs Industrial Tribunal[8].

In the absence of standing orders, however the question will have to be dealt with reasonably with commonsense. Acts of

[5] 1952 IAC 488
[6] M.H Devendrappa vs. KSSIDC, AIR 1998 SC 1064
[7] Caltex India Ltd., vs. Labour Court, Patna, AIR 1966 SC 1729.
[8] (1961) I LLJ 100

misconduct would then depend on the facts and circumstances of each case- Agnani vs. Badri Das[9].

In the case of workmen of Dewan group of Tea Estate vs. P.O Labour Court, Assam[10], and his Lordships of the Supreme Court[11] , observed that the Standing Orders of the establishment describes a class of misconducts and the same cannot be exhaustive of all the species of misconduct which a workmen may commit. Even though a given misconduct may not come within the specific term of misconduct describes in the standing orders, it may still be misconduct, in the special facts of the case and if the workman is held guilty of such misconduct, appropriate action can be taken by the employer.

The following acts have not been considered as misconduct:-

(1) In the case of Bawa Gockery House vs. RN. Bhowmick[12], it has been held that absence for a short time from the place of work has not been treated as misconduct.

(2) In the case of Northern Railway Co-operative Credit Society Ltd., vs. Industrial Tribunal[13] it has been held that refusal to carry orders which are not enforceable under any rule cannot be the basis discharge or dismissal.

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[9] (1963) I LLJ 684, 690(SC)

[10] (1981) Lab.IC 713
[11] in AIR 1967 SC 2962
[12] (1954 LAC 293),
[13] (1967) II LLJ 46 (SC)

(3) In the case of agnani vs. Badri Das[14] it has been held that a private quarrel between the employee of an establishment and a citizen outside the factory premises cannot ordinarily fall within the category of misconduct.

(4) In the case of Andhra Scientific Co., Ltd., vs. Sheshagiri Rao[15] it has been held that refusal of a workman to do the work, which he is not obliged to do would not constitute misconduct.

(5) An order to do work which involves a reasonable apprehension of danger to the life or person of the workman or unlawful order would not constitute misconduct.

(6) In the case of Banchelal vs. State of UP[16], it has been held that the passing of a resolution or seconding a resolution to resort to pen-down strike will not constitute misconduct.

(7) In the case of Itti Cheria vs. State of kerala[17], it has been held that acts constituting mere irregularities are not misconduct.

(8) Impossibility, illegality or ambiguity of orders or mistake in the orders would be valid defence against the charge of insubordination or disobedience of orders held in M.C.Donald vs. Moller line (UK) Ltd[18]

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[14] (1963) I LLJ 46 (SC)
[15] (1961) II LLJ 117 (SC)
[16] (1957) II LLJ 231
[17] (1958) II LLJ 724
[18] (1953)2 Lloyds Rep 662

(9) A speech exhorting workmen to take steps for the removal of the manager or any officer is not a misconduct amounting to insubordination or subversion held in Laxmi Debi Sugar Mills Ltd. vs. Nand Kishore[19],

(ii) What is not a 'misconduct': The Supreme Court in the case of Orissa Cement Ltd. vs. Habibulla[20], held that is would be difficult to accede to the argument that if the evidence given by an employee in an industrial adjudication is disbelieved that is self without anything more would constitute misconduct.

In another case the Supreme Court held[21], that the private quarrel between an employee and a stranger with which the employer is not concerned falls outside the categories of misconduct.

## 1.2 Literary meaning of the word 'misconduct'-

Black's Law Dictionary[22], defined 'misbehaviour' as "ill conduct, improper or unlawful behaviour. 'Misconduct' was defined at p. 999 as "A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour; its synonyms are misdemeanor, misdeed, misbehaviour,

[19] AIR 1957 SC 7
[20] 1960(I) LLJ.522
[21] 1978 (I) LLJ 508
[22] 6th Edition, p. 998

delinquency, impropriety, mismanagement, offence, but not negligence or carelessness. 'Misconduct in office' was defined as "Any unlawful behaviour by a public officer in relation to the duties of his office, willful in character. The term ‘misconduct’ embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act". In Encyclopedic Law Dictionary[23], at p. 720 'misbehaviour' was defined as "improper or unlawful conduct, generally applied to a breach of duty or propriety by an officer, witness, etc. not amounting to a crime. P. Ramanathan Aiyar's 'The Law Lexicon[24], defines 'misbehaviour' as "ill conduct; improper or unlawful behaviour. 'Misconduct' was defined at p. 821 as "the term "misconduct' implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude". The word 'misconduct' is a relative term, and has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. 'Misconduct' literally means wrong conduct or improper conduct", 'Misconduct in office' was defined as "unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected ".

[23] 3rd Edition
[24] Reprint Edition, 1987 at page 820.

## 1.3 Perception of the word 'misconduct' in the industrial Jurisprudence -

The expression 'misconduct' has not been defined either in the Industrial Disputes Act or the Industrial Employment (Standing Orders) Act, 1946. The Industrial Employment (standing orders) Central Rules, 1946 under clause 14 (3) inter-alia denotes 11 kinds of acts and omissions as 'misconduct'.

The employers are at liberty to have such terms and condition of employment depends upon the kind of employer under whom the employee is working. Rule 14 (1) of the said Rules *inter-alia* empowers the employer to add such omissions as misconducts. In the Indian context an aspect of employment covers Public Employment comprising Government employees, employees of statutory corporations, Public Sector Undertakings, Banks, Educational Institutions and employees of Private Organizations and Private companies. Employees associated with non-governmental bodies, private organizations and private companies and their service conditions are governed by the Standing Orders or the respective State Shops and Commercial Establishments Acts. So for as kinds of punishment are concerned Industrial Law basically recognizes two kinds of misconduct, viz;

a) major misconducts which justify the punishment of dismissal or discharge, and

b) minor misconduct which do not justify punishment of dismissal or discharge, but may call for lesser punishments, as held by the Supreme Court in the case of Caltex India Ltd., vs, Labour Court, Patna[25]***.***

Further, 'misconduct' in Industrial employment can be broadly be dealt with under three categories, viz:-

(i) misconduct relating to duty,
(ii) misconduct relating to discipline,
(iii) misconduct relating to morality,

However, the said categorization is an illustrative and cannot be treated as watertight compartments.

Any action with regard to initiation of disciplinary proceedings against an employee on the charges of misconduct and on other lapses generally be under the relevant rules of the institution. Whereas, with regard to employees holding public employment comprising Government employees, employees of statutory corporations, Public Sector Undertakings and other Governmental bodies shall have service rules to regulate the terms and conditions as well as conduct of the employees. Simultaneously, such service rules are amenable to judicial scrutiny when they are alleged to be inconsistence with provisions of the Indian Constitution. In the case of M. H. Devendrappa, vs. The Karnataka State Small Industries Development Corporation[26]**,** the Supreme Court has observed

[25] AIR 1966 SC 1729
[26] AIR 1998 SC 1064

that, where the appellant Asst. Manager of Karnataka State Small Industries Development Corporation had made a direct public attack on the head of his organisation and had also, in the letter to the Governor, made allegations against various officers of the Corporation with whom he had to work, his conduct is clearly detrimental to the proper functioning of the organisation or its internal discipline. Making public statements against the head of the organisation on a political issue amounted to lowering the prestige of the organisation in which he worked. On a proper balancing, therefore, of individual freedom of the appellant and proper functioning of the Government organisation, which had employed him, the employer was entitled to take disciplinary action under Rule 22. Rule 22 of the Service Rules is not meant to curtail freedom of speech or expression or the freedom to form associations or unions. It is clearly meant to maintain discipline within the service, to ensure efficient performance of duty by the employees of the Corporation, and to protect the interests and prestige of the Corporation. Therefore, under Rule 22 an employee who disobeys the service Rules or displays negligence, inefficiency or in-subordination or does anything detrimental to the interests or prestige of the Corporation or acts in conflict with official instructions or is guilty of misconduct, is liable to disciplinary action. R. 22 is not primarily or even essentially designed to restrict, in any way, freedom of speech or expression or the right to form associations or

unions. A Rule which is not primarily designed to restrict any of the fundamental rights cannot be called in question as violating Art. 19(1) (a) or 19(1) (c). The restraint is against doing anything which is detrimental to the interests or prestige of the employer. The detrimental action may consist of writing a letter or making a speech. It may consist of holding a violent demonstration or it may consist of joining a political organisation contrary to the Service Rules. Any action, which is detrimental to the interests or prestige of the employer, clearly undermines discipline within the organisation and also the efficient functioning of that organisation. Such a Rule could be construed as falling under "public order" clause under Art. 19(4). The same requirements of R. 22 can be better looked at from the point of view of Art. 19(6) as requirements in furtherance of the proper discharge of the public duties of Government service. Rules which are directly linked to and are essential for proper discharge of duties of a public office would be protected under Art. 19(6) as in public interest. If these Rules are alleged to violate other freedoms under Art. 19, such as, freedom of speech or expression or the freedom to form associations or unions or the freedom to assemble peaceably and without arms, the freedoms have to be read harmoniously so that Rules which are reasonably required in furtherance of one freedom are not struck down as violating other freedoms.

## 1.4 Judicial perspective of the word ‘misconduct’ -

The Supreme Court had occasion to deal with the term misconduct in the case of State of Punjab and others, vs. Ram Singh ex-constable[27]**,** and thus observed “The word `misconduct' though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour, unlawful behaviour, willful in character, for bidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty, the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The term misconduct is *perse* inter-linked to the word ‘misbehaviour’

There is a sharp conflict of opinion upon the meaning to be given to the word "misconduct" amongst the various High Courts as was illustrated by the numerous decisions cited at the bar. Three views, which have been taken, are set out in the judgment of Venkataramana Rao, J., in N. M. Roshan Umar Karim and Co. vs. M. and S. M. Rly. Co. Ltd,[28]. One view is that

[27] AIR 1992 SC 2188
[28] AIR 1936 Mad 508

taken by Guha J. in M. and S. M. Rly. Co. Ltd. vs. Sunderjee Kalidas.[29] There the learned Judge had said -

> "It may be taken to be well settled now, that 'misconduct is not necessarily established by proving even capable negligence. Misconduct is something opposed to accident or negligence. It is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be."

A similar view has been taken in some other cases. The *second view* is that expressed in Bengal Nagpur Railway Co. Ltd. vs. Moolji Sicka and Co.,[30], and certain other cases. There, Suhrawardy, J. has observed at p. 593 (of ILR Cal): (at p. 819 of AIR), as follow:

"Misconduct is distinguished from accident and is not far from negligence not only gross and culpable negligence and involves that a person misconducts himself when it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing or to persist in the act, failure or omission or acts with carelessness. . . , the word 'misconduct' as used in the new risk note is wide enough to include wrongful commission and omission, intentional or unintentional any act which it wrongfully did or which it

[29] ILR 60 Cal 996 at p. 1000: (AIR 1933 Cal 742 at p. 744)
[30] ILR 58 Cal 585 (AIR 1930 Cal 815)

wrongfully neglected to do, or, to put it in another way, did what it should not have done or did not do what it should have done. . . . . I am not inclined to accept the view that misconduct only refers to acts of gross or culpable negligence and the term does not ordinarily cover acts of mere negligence. In my judgment the word 'misconduct' denotes any un-business like conduct and includes negligence or want of proper care which a bailee is to take under S. 151 of the Indian Contract Act. The immunity which the risk note brings to the railway company is by shifting the burden of proof."

The *third view* is represented in the judgments of Fawcett, Ag. C. J. in M. and S. M. Rly., vs. Jumakhram[31], and Kemp, Ag. C. J. in B. B. and C. I. Rly, vs. Rajnagar Spinning Co. Ltd.,[32]

In the latter it was observed:

"I am not prepared to accept the test of the meaning of the word 'misconduct' as what a reasonable man would have done under the circumstances. I think the word suggests that a railway servant had been guilty of doing something which was inconsistent with the conduct expected of him by the rules of the company."

The aforementioned *three* facets of ‘misconduct' has been discussed by the Supreme Court in the case of S. Jeet Singh vs. The Union of India[33]**.**

[31] AIR 1928 Bom 504,
[32] AIR 1930 Bom 129

With view to avoid confusion, misuse of charging misconduct against employee by the employer, every employer is bound to list out the misconducts in his administrative rules or conduct rules. The Supreme Court In the case of M/s. Glaxo Laboratories (I) Ltd, vs. Presiding Officer, Labour Court, Meerut and others[34]**,** had occasion to observe that "numerous acts of misconduct such as drunkenness, fighting indecent or disorderly behaviour, use of abusive language, wrongfully interfering with the work of other employees etc. are not *per se* misconduct. Each one of them has correlation to the time or place where it is committed. Such acts of misconduct would be misconduct punishable only if committed within the premises of the establishment or in the vicinity there of. What constitutes establishment or its vicinity would depend upon the facts and circumstances of each case. To enable an employer to peacefully carry on his industrial activity the Industrial Employment Standing Orders Act confers powers on him to prescribe conditions of service including enumerating acts of misconduct when committed within the premises of the establishment. The employers have hardly any extra territorial jurisdiction. Employer is not the custodian of general law and order situation nor the Guru or mentor of his workmen for there well regulated cultural advancement. If the power to regulate the behaviour of the workmen *out side the duty hours* and at any place wherever they may be was conferred upon the

[33] AIR 1965 SC 1666
[34] AIR 1984 SC504

employer, contract of service may be reduced to contract of slavery. The employer is entitled to prescribe the conditions of service more and less specifying the acts of misconduct to be enforced within the premises where the workmen gather together for rendering service. The employer has both the power and jurisdiction to regulate the behaviour of workmen within the premises of the establishment, or for peacefully carrying the industrial activity in the vicinity of the establishment. Where the standing order of an establishment provide that certain acts would constitute misconduct if "committed within premises of the establishment or in the vicinity thereof" then any misconduct committed anywhere irrespective of the time-place content where and when it is committed cannot be comprehended to be the misconduct within the meaning of the Standing Orders merely because it has some remote impact on the peaceful atmosphere in the establishment. The words 'committed within premises of the establishment or in the vicinity thereof are words of limitation and they must cut down the operation of the standing order. The misconduct prescribed in a Standing Order which would attract a penalty has a causal connection with the place of the work as well as the time at which it is committed which would ordinarily be within the establishment and during duty hours. The causal connection in order to provide linkage between the alleged act of misconduct and employment must be real and

substantial, immediate and proximate and not remote or tenuous.

In the said case the Supreme Court has further observed that some misconduct neither defined nor enumerated and which may be believed by the employer to be misconduct ex-post facto would not expose the workmen to a penalty. It cannot be left to the vagaries of management to say *ex post facto* that some acts of omission or commission nowhere found to be enumerated in the relevant Standing Order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant Standing Order but yet a misconduct for the purpose of imposing a penalty.

The Bombay High Court in Sharda Prasad Onkar Prasad Trivedi vs. Central Railway,[35] the divisional bench has enumerated broadly the following specific illustrative cases of acts of misconduct, commission of which would justify dismissal of the delinquent employee:

(i). an act or conduct prejudicial or likely to be prejudicial to the interest or reputation of the master

(ii). an act or conduct inconsistent or incompatible with due or faithful discharge of his duty to his master;

(iii). an act or conduct making in unsafe of the employer to retain him in service;

[35] (1960) 1 LLJ 167, 170,

(iv). an act or conduct of an employee so grossly immoral that all reasonable men may say that they cannot be trusted;

(v). an act or conduct of the employee which may make it difficult for the master to rely on the faithfulness of the employee;

(vi). an act or conduct of the employee opening before him temptations for not discharging his duties properly;

(vii). an abusive act or an act disturbing the peace at the place if employment;

(viii). insulting or insubordinate behaviour to such a degree as to be incompatible with the continuance of the relation of master and servant;

(ix). habitual negligence in respect of the duties for which the employee is engaged; and

(x). an act of neglect, even though isolated, which tends to cause serious consequences.

## 1.5 Constitutional perspective on the term 'misconduct' -

*Relevance & importance of the term 'misconduct' under Indian Constitution, Instrumentalities of 'State' and others*: - The terms and condition of employment depends upon the kind employer under whom the employee is working. In the Indian context an aspect of employment covers Public Employment comprising Government employees, employees of statutory corporations,

Public Sector Undertakings, Banks, Educational Institutions and employees of private organizations and private companies. Employees associated with non-governmental bodies, private organizations and private companies and their service conditions are governed by the Standing Orders or the respective State Shops and Commercial Establishments Act. Action with regard to initiation of disciplinary proceedings against an employee on charges of misconduct and other lapses that with regard to employees holding public employment comprising Government employees, employees of statutory corporations, Public Sector Undertakings and other Governmental bodies shall have service rules to regulate the terns and conditions as well as conduct of the employees. Simultaneously, such service rules are amenable to judicial scrutiny when they are alleged to be inconsistence with provisions of the Indian Constitution. In the case of M. H. Devendrappa, Appellant vs. The Karnataka State Small Industries Development Corporation[36], the Supreme Court has observed that, where the appellant Asst. Manager of Karnataka State Small Industries Development Corporation had made a direct public attack on the head of his organisation and had also, in the letter to the Governor, made allegations against various officers of the Corporation with whom he had to work, his conduct is clearly detrimental to the proper functioning of the organisation or its internal discipline. Making public

[36] *Supra*

statements against the head of the organisation on a political issue amounted to lowering the prestige of the organisation in which he worked. On a proper balancing, therefore, of individual freedom of the appellant and proper functioning of the Government organisation, which had employed him, the employer was entitled to take disciplinary action under Rule 22. Rule 22 of the Service Rules is not meant to curtail freedom of speech or expression or the freedom to form associations or unions. It is clearly meant to maintain discipline within the service, to ensure efficient performance of duty by the employees of the Corporation, and to protect the interests and prestige of the Corporation. Therefore, under R. 22 an employee who disobeys the service Rules or displays negligence, inefficiency or in-subordination or does anything detrimental to the interests or prestige of the Corporation or acts in conflict with official instructions or is guilty of misconduct, is liable to disciplinary action. R. 22 is not primarily or even essentially designed to restrict, in any way, freedom of speech or expression or the right to form associations or unions. A Rule which is not primarily designed to restrict any of the fundamental rights cannot be called in question as violating Art. 19(1)(a) or 19(1)(c). The restraint is against doing anything which is detrimental to the interests or prestige of the employer. The detrimental action may consist of writing a letter or making a speech. It may consist of holding a violent demonstration or it may consist of joining a political organisation contrary to the

Service Rules. Any action which is detrimental to the interests or prestige of the employer clearly undermines discipline within the organisation and also the efficient functioning of that organisation. Such a Rule could be construed as falling under "public order" clause under Art. 19(4). The same requirements of R. 22 can be better looked at from the point of view of Art. 19(6) as requirements in furtherance of the proper discharge of the public duties of Government service. Rules which are directly linked to and are essential for proper discharge of duties of a public office would be protected under Art. 19(6) as in public interest. If these Rules are alleged to violate other freedoms under Art. 19, such as, freedom of speech or expression or the freedom to form associations or unions or the freedom to assemble peaceably and without arms, the freedoms have to be read harmoniously so that Rules which are reasonably required in furtherance of one freedom are not struck down as violating other freedoms.

Further the employees form part of latter, either directly or through respective service rules of the undertaking invariably protected under the Constitutional protection of Article 311 of the Indian Constitution, under clause (2) of Article 311 “No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Provided that where it is proposed after such inquiry, to impose upon him any such

penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed. In this context it is imperative to have a birds eye view on the land mark judgment delivered by the Hon'ble Supreme Court, where in the court has traced the history of public employment and Doctrine of Pleasure and the provisions enshrined in the Indian Constitution in the following manner[37] :

**Civil Servants:**

Justice Oliver Wendell Holmes in his book "The Common Law", consisting of lectures delivered by him while teaching law at Harvard and published just one year before he was appointed in 1882 an Associate Justice of the Massachusetts, Supreme Judicial Court said:

"The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is we must know what it has been and what it tends to become."

It will not, therefore, be out of place to begin with a brief historical sketch of the civil services in India as also of the law

[37].Union of India vs. Tulsiram Patel AIR 1985 SC 1416

applicable to civil servants and the changes, which have taken place in it from time to time.

Civil servants, that is, persons who are members of a civil service of the Union of India or an all-India Service or a civil service of a State or who hold a civil post under the Union or a State, occupy in law a special position. The ordinary law of master and servant does not apply to them. Under that law, whether the contract of service, is for a fixed period or not, if it contains a provision for, its termination by notice, it can be so terminated. If there is no provision for giving a notice and the contract is not for a fixed period, the law implies an obligation to give a reasonable notice. Where no notice in the first case or no reasonable notice in the second case is given, the contract is wrongfully terminated and such wrongful termination will give rise to a claim for damages. This is subject to what may otherwise be provided in industrial and labour laws where such laws are applicable. The position of civil servants both in England and in India is, however, vastly different.

**The Civil Service in England:**

Our civil services are modelled upon the British pattern though in some respects there are important differences between the two. In England, except where otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown or *durante bene*

*placito* ("during good pleasure" or "during the pleasure of the appointer") as opposed to an office held *dum bene se gesserit* ("during good conduct"), also called *quadiu se bene gesserit* ("as long as he shall behave himself well"). When a person holds office during the pleasure of the Crown, his appointment can be terminated at any time without assigning cause. The exercise of pleasure by the Crown can, however, be restricted by legislation enacted by Parliament because in the United Kingdom Parliament is sovereign and has the right to make or unmake any law whatever and all that a court of law can do with an Act passed by Parliament is to interpret its meaning but not to set it aside or declare it void. Blackstone in his Commentaries has thus described the unlimited legislative authority of Parliament:

"It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown; as was done in the reign of Henry

VIII, and William III. It can after the established religion of the land; as was done in a variety of instances, in the reigns of King Henry VIII and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo."

Jean Louis De Lolme, the eighteenth-century Swiss constitutionalist in his "Constitution de 1 "Angleterre" ("Constitution of England"), which gave many on the Continent their ideas of the British Constitution, summed up the position of Parliament in the English constitutional law in the following apophthegm quoted in Dicey's Introduction to the Study of the Law of the Constitution[38]

> "It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman."

So far as the pleasure doctrine in England is concerned, Lord Diplock in Chelliah Kodeeswaran vs. Attorney-General of

[3]8. See 10 th Edition, P. 43

Ceylon 1970 AC 1111, 1118, (PC) has succinctly stated its position in English law as follows:

> "It is now well established in British Constitutional theory, at any rate as it has developed since the eighteenth century, that any appointment as a Crown servant, however subordinate, is terminable at will unless it is expressly otherwise provided by legislation."

In practice, however, a dismissal would take place only as the result of well-established disciplinary processes.

In recent years though the Crown still retains the right to dismiss at pleasure, the legal position of civil servants has radically changed as a result of legislation, and legally binding collective agreements can be entered into between the Crown and representatives of its staff and those representatives can sue for breaches of any conditions of service covered by these agreements. Further, a civil servant can bring an action for unfair dismissal or sue on his conditions of service. But just as an ordinary employee cannot insist on continuing in employment, so also a civil servant cannot insist on continuing in employment. The remedy in both cases is to recover damages for wrongful dismissal[39].

[39]. Halsbury's Laws of England, Fourth Edition, Volume 8, paras 1106 and 1303.

**The Pre-Constitution Civil Services in India:**

It is unnecessary to go back more than two centuries to trace the origin and development of the Civil Service in India. The East India Company sent out to India its own servants and so did the Crown, and from the earliest times, under the various Charters given to the East India Company, the Crown could at its pleasure remove any person holding office, whether civil or military, under the East India Company. The Court of Directors of the East India Company had also the power to remove or dismiss any of its officers or servants not appointed by the Crown. Section 35 of the Act of 1793 (33 Geo. III, C. 52) made it lawful to and for the King's Majesty, his heirs and successors, by any writing or instrument under his or their sign manual, countersigned by the President of the Board of Commissioners for the affairs of India, to remove or recall any person holding any office, employment or commission, civil or military, under the East India Company; while section 36 of that Act provided that nothing contained in that Act should extend, or be construed to extend, to preclude or take away. the power of the Court of Directors of the East India Company from removing or recalling any of its officers or servants and that the Court of Directors shall and may at all times have full liberty to remove, recall or dismiss any of such officers or servants at their will and pleasure in the like manner as if that Act had not been passed. Similar provisions were made in the Act of 1833 by sections 74 and 75 of that Act. Section 74 made it lawful "for His Majesty by

any Writing under His Sign Manual, countersigned by the President of the said Board of Commissioners, to remove or dismiss any person holding any office, employment or commission, civil or military, under the said Company in India, and to vacate any Appointment or Commission of any person to any such office or employment." Section 75 provided that nothing contained in that Act would take away the power of the Court of Directors to remove or dismiss any of the officers or servants of the Company "but that the said Court shall and may at all times have full Liberty to remove or dismiss any of such officers or servants at their will and pleasure."

By the end of the nineteenth century a well-organized civil service has developed in India, the control over it being vested in the executive, and the members of the "civil service of the Crown in India" were governed in the matter of their appointments as also the regulation of the conditions of their service, such as, classification, methods of recruitment, pay and allowances, and discipline and conduct, by rules made by the executive.

The Government of India Act, 1858, which vested in the British Crown the territories under the government of East India Company, repealed certain sections of the Government of India Act, 1853 in so far as they applied to or provided for the admission or appointment of persons to the Civil Service of the

East India Company and conferred upon the Secretary of State in Council the power to make regulations for the admission of candidates to the Civil Service of India as also with respect to other matters connected therewith. Three years later the Indian Civil Service so envisaged received statutory recognition by the enactment of the Indian Civil Service Act, 1861

The above Acts were repealed by the Government of India Act of 1915. Part VIII of the 1915 Act conferred upon the Secretary of State in Council, with the aid and advice of the Civil Service Commissioners, the power to make rules for the Indian Civil Service examination.

None of the above Acts nor the Government of India (Amendment) Act, 1916 made any reference to the tenure of members of the civil service in India. This was for the first time done by the Government of India Act, 1919 which introduced several amendments in the 1915 Act including the insertion of Part VII A consisting of sections 96B to 96E.

**Section 96B provided as follows**:

*96B. The civil services in India*. - (1) Subject to the provisions of this Act and of rules made there under, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty but no person in

that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a governor's province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the governor of the province in order to obtain justice, and the governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of services, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local governments, or authorize the Indian legislature or local legislatures to make laws regulating the public services.

Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the civil service of the Crown in India shall retain all his existing or accruing rights, or shall receive such compensation, for the loss of any of them as the Secretary of State in Council may consider just and equitable.

(3) The right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof.

Nothing in this section or in any rule there under shall prejudice the rights to which any person may, or may have, become entitled under the provisions in relation to pensions contained in the East India Annuity Funds Act, 1874.

(4) For the removal of doubts it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the civil

service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied or added to by rules or laws made under this section."

The Fundamental Rules, the Civil Service (Classification, Control and Appeal) Rules of 1930 and the Civil Service (Governors Provinces Classification) Rules are instances of rules made under authority conferred by section 96B. Section 96C provided for the establishment of a Public Service Commission. Sub-section (1) of section 96D provided for an Auditor-General to be appointed by the Secretary of State in Council who was to hold office during ”His Majesty's pleasure", and conferred upon the Secretary of State in Council the power to make rules providing for the Auditor-General's pay, powers, duties and conditions of employment.

Thus, after the 1919 Act, the civil services of India continued to be under the control of the Secretary of State in Council who was to regulate by rules the classification of the civil services, the methods of recruitment, the conditions of services, pay and allowances, and discipline and conduct. Such rules could also provide for delegation of the rule-making power to the Governor-General in Council or the local Governments or authorize the Indian Legislature or Local Legislatures to make laws regulating the public services but only to the extent and in

respect of matters as were prescribed by the rules. Thus, even the power of making rules as also the authority to the Indian Legislature and the Local Legislatures to enact Acts regulating the public services was derived by delegation of power made by the Secretary of State in Council.

What is really material for the purposes of the present Appeals and Writ Petitions is that section 96B of the Government of India Act, 1919, for the first time expressly stated that every person in the civil service of the Crown in India held office "during His Majesty's pleasure". This was, however, made subject to three safeguards, namely –

(1) a civil servant could not be dismissed by any authority subordinate to that by which he was appointed;
(2) the Secretary of State in Council had the power, unless he provided to the contrary in the rules, to reinstate any person in service who had been dismissed; and
(3) if a civil servant appointed by the Secretary of State in Council thought himself wronged by an order of an official superior in a Governor's Province and on due application made to that superior did not receive the redress to which he considered himself entitled, he could, without prejudice to any other right of redress, complain to the Governor of the Province in order to obtain justice and the Governor had to examine such complaint and require such action to

be taken thereon as might appear to him to be just and equitable.

The position which prevailed with respect to the civil services in India during the intervening period between the Government of India Act, 1919, and the Government of India Act, 1935 was that the top echelons of the important services, especially those working under the Provincial Governments, consisted of what were known as the "all India services", which governed a wide variety of departments. There were, in the first place, the Indian Civil Service and the Indian Police Service, which provided the framework of the administrative machinery.

The said position received legislative recognition and sanction under the Government of India Act, 1935 often cited with the year and chapter of the Act in pursuance of which it was reprinted, namely, the Government of India (Reprinting) Act, 1935. Part X of the 1935 Act dealt with the services of the Crown in India. Chapter II of Part X made provisions with respect to the civil services. Section 240 provided for the tenure of office of persons employed in civil capacities in India and conferred upon them certain statutory safeguards as regards dismissal or reduction in rank. Section 241 dealt with their recruitment and conditions of service. Under that section power to make appointments was vested in respect of central services in the Governor-General and in respect of the Provincial

services in the respective Governors. In the same manner the power to regulate conditions of service of the members of these services was conferred upon the Governor-General or the Governor, as the case may be. The Governor-General as also the Governor could authorize such person as he might direct to make appointments and rules with respect to the conditions of service. Provision was also made for enactment of Acts by appropriate Legislatures to regulate the conditions of service of persons in the civil services. It is unnecessary to look into the details of these provisions as the federal structure envisaged by the 1935 Act never came into existence as it was optional for the Indian States to join the proposed Federation and they did not give their consent thereto. Chapter III of Part X provided for the setting up of a Federal Public Service Commission and a Public Service Commission for each Province. A provision was also made for two or more Provinces to agree to have a joint Public Service Commission or for the Public Service Commission of one of these Provinces to serve the needs of the other Provinces.

Section 240 of the 1935 Act provides as follows:

"240. Tenure of office of persons employed in civil capacities in India.

(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India,

or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this sub-section shall not apply –

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b)where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a. member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of

> compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

While under the 1935 Act, as under the 1919 Act, every person who was a member of the civil service of the Crown in India or held any civil post under the Crown in India held office "during His Majesty's pleasure", greater safeguards were provided for him under the 1935 Act than under the 1919 Act. Those safeguards were: (1) under sub-section (2) of section 240, such a person could not be dismissed from service by any authority subordinate to that by which he was appointed, and (2) under sub-section (3) of section 240, such a person could not be dismissed or reduced in rank until he had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

The safeguard as regards a reasonable opportunity of showing cause provided for in section 240(3) did not exist in the 1919 Act. The proviso to sub-section (3) of section 240, however, took away this safeguard in the two cases set out in clauses (a) and (b) of the said proviso. These two cases were: (a) where a civil servant was dismissed or reduced in rank on ground of conduct which had led to his conviction on a criminal charge, and (b) where an authority empowered to dismiss him or

reduce him in rank was satisfied that for some reason, to be recorded by that authority in writing, it was not reasonably practicable to give to that person an opportunity of showing cause.

**The Civil Services under the Indian Constitution -**

Provisions with respect to services under the Union and the States are made in Part XIV of the Constitution of India. This Part consists of two Chapters, Chapter I dealing with services and Chapter II dealing with Public Service Commissions for the Union and the States. Article 308, as originally enacted, defined the expression "State" occurring in Part XIV as meaning, unless the context otherwise required, "a State specified in Part A or B of the First Schedule". This Article was amended by the Constitution (Seventh Amendment) Act, 1956, which was passed in order to implement the scheme for reorganization of States. The amended Article 308 provides, "In this Part, unless the context otherwise requires, the expression 'State' does not include the State of Jammu and Kashmir." Article 309 provides for recruitment and conditions of service of persons serving the Union or a State, Article 310 for the tenure of office of such persons, and Article 311 for the mode of dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State. Article 312 deals with all-India services and inter-alia provides that where the Council of State has declared by resolution supported by not less than two thirds of

the members present and voting that it is necessary or expedient in the national interest so to do, Parliament might by law provide for the creation of one or more all-India services common to the Union and the States and subject to the other provisions of Chapter I regulate the recruitment and conditions of service of persons appointed to any such service; and it further provides that the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under Article 312. Article 313 provides for the continuance in force, so far as consistent with the provisions of the Constitution, of all the laws in force immediately before the commencement of the Constitution and applicable to any public service or any post which continued to exist after the commencement of the Constitution as an all-India service or as service or post under the Union or a State until other provision was made in this behalf under the Constitution. Under clause (10) of Article 366 the expression "existing law" means "any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation." Thus, all Acts, rules and regulations applicable to different services immediately before the commencement of the Constitution continue to apply to such services in so far as they were consistent with the provisions of the Constitution until amended,

varied, revoked or replaced by Acts, rules or regulations made in accordance with the provisions of the Constitution.

From what has been stated above it will be seen that the provisions with respect to civil services in the Government of India Act, 1935, were taken as the basis for Chapter I of Part XIV of the Constitution.

**Articles 309, 310 and 311**:

Articles 309 and 310 were amended by the Constitution (Seventh Amendment) Act, 1956, to omit from these Articles the reference to the Rajpramukh. Articles 309 and 310, as so amended, read as follows:

"309. Recruitment and conditions of service of persons serving the Union or a State. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in

that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

"310: *tenure of office of persons serving the Union or a State*.

(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

Article 311 as originally enacted was in the following terms:

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him :

Provided that this clause shall not apply -

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

(b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or Governor or Rajpramukh, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give to that person such an opportunity.

(3) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final."

The words "or Rajpramukh" in clause (c) of the proviso to Article 311(2) were omitted by the Constitution (Seventh Amendment) Act, 1956.

By the Constitution (Fifteenth Amendment) Act, 1963, clauses (2) and (3) of Article 311 were substituted by the following clauses:

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply -

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

The Constitution (Forty-second Amendment) Act, 1976, made certain amendments in the substituted clause (2) of Article 311 with effect from January 3, 1977. Article 311 as so amended reads as follows:

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State. - (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been

informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply –

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

From the original and amended Article 311 set out above it will be noticed that of the original Article 311 only clause (1)

remains unaltered, while both the other clauses have become the subject of Constitutional amendments. No submission was founded by either party on the substitution of the present clause (3) for the original by the Constitution (Fifteenth Amendment) Act, 1963, for the obvious reason that such substitution was made only in order to bring clause (3) in conformity with clause (2) as substituted by the said Amendment Act.

A comparison of Article 311 of the Constitution with section 240 of the Government of India Act, 1935, shows that the safeguards provided to civil servants by Article 311 are very much the same as those under section 240 with this difference that while Article 311 also affords safeguards against removal from service section 240 did not. Further, though the proviso to section 240(3) is reproduced in what originally was the only proviso and is now the second proviso to Article 311(2), an addition clause, namely, clause (c) has been added thereto. A provision similar to clause (3) of Article 311 was also absent from the Government of India Act, 1935. Thus, while on the one hand Article 311 enlarges the protection afforded to civil servants, on the other hand it increases by one the number of cases in which that protection can be withdrawn.

**The Pleasure Doctrine**:

The concept of civil service is not new or of recent origin. Governments - whether monarchical, dictatorial or republican -

have to function; and for carrying on the administration and the varied functions of the government a large number of persons are required and have always been required, whether they are constituted in the form of a civil service or not. Every kingdom and country of the world throughout history had a group of persons who helped the ruler to administer the land, whether according to modem notions we may call that group a civil service or not because it is not, possible for one man by himself to rule and govern the land and look after and supervise all the details of administration. As it was throughout history, so it has been in England and in India.

In England, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown and their services can be terminated at will without assigning any cause. By the expression "the pleasure doctrine" is conveyed this right of the Crown. This right is, however, subject to what may be provided otherwise by legislation passed by Parliament because in the United Kingdom, Parliament has legislative sovereignty.

The foundations of modern European civil services were laid in Prussia in the late seventeenth and eighteenth centuries and by Napoleon's development of a highly organized hierarchy (a model copied by many countries in the nineteenth century); and they are the basis of modern European civil services. In

England civil servants were originally the monarch's personal servants and members of the King's household. Clive's creation from 1765 of a civil service to govern such parts of India as were under the dominion of the East India Company and McCauley's report on recruitment to the Indian Civil Service provided the inspiration for the report of 1854 on the organization of the permanent civil service in Britain which recommended recruitment by open competitive examination, the selection of higher civil servants on the basis of general intellectual attainment, and the establishment of a Civil Service Commission to ensure proper recruitment.

In the United Kingdom, until about the middle of November 1981, the Civil Service Department, which was set up in 1968 with the Prime Minister, as Minister for the Civil Service, as its Head, looked after the management and personnel functions in connection with the Civil Service, which were until then being looked after by the treasury. These functions included the organization and conduct of the Civil Service and the remuneration, conditions of service, expenses and allowances of persons serving in it; mode of recruitment of persons to the Civil Service; the pay and allowances of, and the charges payable by, members of the armed forces; with certain exceptions, superannuation and, injury payments, compensation for loss of employment or loss or diminution of emoluments or pension rights applicable to civil servants and

others in the public sector and to members of the armed forces; the exercise by other persons and bodies of powers to determine, subject to the minister's sanction, the pay or conditions of service of members of public bodies (excluding judicial bodies), or the numbers, pay or conditions of service of staff employed by such bodies or by the holders of certain non-judicial offices; and the appointment or employment and the remuneration, conditions of service, personal expenses or allowances of judges and judicial staff [40]

The Permanent Secretary to the Civil Service Department was the Head of the Home Civil Service and gave advice to the Prime Minister as to civil service appointments, decorations, etc. The Civil Service Department was abolished on November 12, 1981, and its functions, instead of reverting to the Treasury, were divided between the Treasury and the newly created Management and Personnel Office.

In India, the pleasure doctrine has received constitutional sanction by being enacted in Article 310(1). Unlike in the United Kingdom, in India it is not subject to any law made by Parliament but is subject only to what is expressly provided by the Constitution.

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[40] Halsbury's Laws of England, Fourth Edition, Volume 8. para 1162.

The pleasure doctrine relates to the tenure of a government servant. "Tenure" means "manner, conditions or term of holding something" according to Webster's Third New International Dictionary, and "terms of holding; title; authority" according to the Oxford English Dictionary. It, therefore, means the period for which an incumbent of office holds it.

The first time that a statute relating to the government of India provided that civil servants hold office during His Majesty's pleasure was the Government of India Act of 1919 in section 96B of that Act. The marginal note to section 96B did not, however, refer to the tenure of civil servants but stated "The Civil Services in India". This was because, section 96B in addition to dealing with the tenure of civil servants also dealt with matters relating to their recruitment, conditions of service, pay, allowances, pensions, etc. The marginal note to section 240 of the Government of India Act. 1935, however, was "Tenure of office of persons employed in civil capacities in India." The marginal note to Article 310 of the Constitution also refers to "tenure" and states "Tenure of office of persons serving the Union or a State". Thus, it is the tenure of government servants which Article 310(1) makes subject to the pleasure of the President or the Governor of a State, except as expressly provided by the Constitution.

As pointed out by Lord Hobhouse, the pleasure doctrine is founded upon the principle that the difficulty which would otherwise be experienced in dismissing those whose continuance in office is detrimental to the State would be such as seriously to impede the working of the public service[41]. Subsequently the Court of Appeal in England held that it was an implied term of every contract of service that servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown. In that case Lord Herschell observed:

"It seems to me that it is the public interest which has led 'to the term which I have mentioned being imported into contracts for employment in the service of the Crown. The cases cited shew that, such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown, except in certain exceptional cases where it has been deemed to be more for the public good that some restrictions should be imposed on the power of the Crown to dismiss its servants."

In the same case Kay, L.J., said, “It seems to me that the continued employment of a civil servant might in many cases be as detrimental to the interests of the State as the continued employment of a military officer." In this case as reported in the

[41] Shenton vs. Smith, 1895 AC 229

Law Times Reports series the judgments of the three learned judges who decided the case, though in substance the same, are given in very different language and the passages extracted above do not appear in that report. The report of the case in the All England Law Reports Reprint series is with very minor variations the same as the report in the Times Law Reports series but somewhat abridged. This is because the All England Law Reports Reprint series is a revised and annotated reprint of a selection from the Law Times Reports for the years 1843 to 1935. The report from which the above extracts are given is the one in the Law Reports series published by the Incorporated Council of Law Reporting which was established in 1865 and which report is, therefore, more authoritative.

The Judicial Committee of the Privy Council further held that where by regulations a civil service is established prescribing qualifications for its members and imposing some restriction on the power to dismiss them, such regulations should be deemed to be made for the public good[42].

The position that the pleasure doctrine is not based upon any special prerogative of the Crown but upon public policy has been accepted by the Supreme Court[43]. This Court has also accepted the principle that society has an interest in the due

[42] Gould vs. Stuart 1896 AC 575, 578-9 JC
[43] State of Uttar Pradesh vs. Babu Ram Upadhya (1961) 2 SCR 679, 696: (AIR 1961 SC 751 at P. 759) and Moti Ram Deka vs. General Manager, N.E.F. Railways, Maligaon, Pandu, (1964) 5 SCR 683,734-5: (AIR 1964 SC 600 at Pp. 620-21)

discharge of their duties by government servants[44]. "It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules, which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of nights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules, which may be unilaterally altered by the Government without the consent of the employee. It is true that Art. 311 impose constitutional restrictions upon the power of removal granted to the President and the Governor under Art. 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of

[44] Roshan Lal Tandon vs. Union of India (1968) 1 SCR 185: (AIR 1967 SC 1889)

which powers and duties are exclusively determined by law and not by agreement between the parties concerned."

Ministers frame policies and legislatures enact laws and lay down the mode in which such policies are to be carried out and the object of the legislation achieved. In many cases, in a Welfare State such as ours, such policies and statutes are intended to bring about socio-economic reforms and the uplift of the poor and disadvantaged classes. From the nature of things the task of efficiently and effectively implementing these policies and enactments, however, rests with the civil services. The public is, therefore, vitally interested in the efficiency and integrity of such services. Government servants are after all paid from the public exchequer to which everyone contributes either by way of direct or indirect taxes. Those who are paid by the public and are charged with public administration for public good must, therefore, in their turn bring to the discharge of their duties a sense of responsibility. The efficiency of public administration does not depend only upon the top echelons of these services. It depends as much upon all the other members of such services, even on those in the most subordinate posts. For instance, railways do not run because of the members of the Railway Board or the General Mangers of different railways or the heads of different departments of the railway administration. They run also because of engine drivers, firemen, signalmen, booking clerks and those holding hundred

other similar posts. Similarly, it is not the administrative heads who alone can see to the proper functioning of the post and telegraph service. For a service to run efficiently there must, therefore, be a collective sense of responsibility. But for a government servant to discharge his duties faithfully and conscientiously, he must have a feeling of security of tenure. Under our Constitution, this is provided for by the Acts and rules made under Article 309 as also by the safeguards in respect of the punishments of dismissal, removal or reduction in rank provided in clauses (1) and (2) of Article 311. It is, however, as much in public interest and for public good that government servants who are inefficient, dishonest or corrupt or have become a security risk should not continue in service and that the protection afforded to them by the Acts and rules made under Article 309 and by Article 311 be not abused by them to the detriment of public interest and public good. When a situation as envisaged in one of the three clauses of the second proviso to clause (2) of Article 311 arises and the relevant clause is properly applied and the disciplinary inquiry dispensed with, the concerned government servant cannot be heard to complain that he is deprived of his livelihood. The livelihood of an individual is a matter of great concern to him and his family but his livelihood is a matter of his private interest and where such livelihood is provided by the public exchequer and the taking away of such livelihood is in the public interest and for public good, the former must yield to the latter. These

consequences follow not because the pleasure doctrine is a special prerogative of the British Crown which has been inherited by India and transposed into our Constitution adapted to suit the Constitutional set up of our Republic but because public policy requires, public interest needs and public good demands that there should be such a doctrine.

It is thus clear that the pleasure doctrine embodied in Article 310(1), the protection afforded to civil servants by clauses (1) and (2) of Article 311 and the withdrawal of the protection under clause (2) of Article 311 by the second proviso thereto are all provided in the Constitution on the ground of public policy and in the public interest and are for public good.

**The Scope of the Pleasure Doctrine**:

While under section 96B (1) of the Government of India Act of 1919 the holding of office in the civil service of the Crown in India "during His Majesty's pleasure" was "Subject to the provisions of this Act and the rules made there under", under section 240(1) of the Government of India Act, 1935, the holding of such office during His Majesty's pleasure was "Except as expressly provided by this Act." Similarly, the pleasure doctrine as enacted in Article 310(1) is not an absolute one and is not untrammelled or free of all fetters, but operates "Except as expressly provided by this Constitution". The constitutional restrictions on the exercise of pleasure under

Article 310(1) other than those contained in Article 311 will be considered later but what is immediately relevant is the group of Articles consisting of Articles 309, 310 and 311. These three Articles are interlinked and form an integrated whole. There is an organic and thematic unity running through them and it is now necessary to see the interplay of these three Articles.

These Articles occur in Chapter I of Part XIV of the Constitution. Part XIV is entitled "Services under the Union and the States" and Chapter I thereof is entitled "Services". While Article 309 deals with the recruitment and conditions of service of persons appointed to the public services and posts in connection with the affairs of the Union or a State, Article 310 deals with the tenure of office of members of the defence services and of civil services of the Union and the States and Article 311 provides certain safeguards to persons employed in civil capacities under the Union or a State but not to members of the defence services. The first thing which is required to be noticed about Article 309 is that it itself makes no provision for recruitment or conditions of service of government servants but confers power upon the appropriate Legislature to make laws and upon the President and the Governor of a State to make rules in respect of these matters. The passing of these Acts and the framing of these rules are, however, made "Subject to the provisions of this Constitution". This phrase which precedes and qualifies the power conferred by Article 309 is significantly different from the

qualifying phrase in Article 310(1) which is "Except as expressly provided by this Constitution".

With reference to the words "conditions of service" occurring in section 243 of the Government of India Act, 1935, under which the conditions of service of the subordinate ranks of the various police forces in India were to be determined by or under Acts relating to those forces, the Judicial Committee of the Privy Council held that this expression included provisions which prescribed the circumstances under which the employer would be entitled to terminate the service of an employee, whether such provisions were constitutional or statutory[45].

The Supreme Court held that the expression "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment until his retirement and even beyond it in matters like pension etc. and would include the right to dismiss such persons from service[46]. Thus, as pointed out a law can be made by the appropriate Legislature or a rule by the appropriate executive under Article 309 prescribing the procedure and the authority by whom disciplinary action can be taken against a government servant[47]. Thus the functions with respect to the civil service which in England until 1968 were being performed by the

[45] North-West Frontier Province vs. Suraj Narain Anand (1948) 75 Ind App 343, 352-3: (AIR 1949 PC 112 at P. 114)
[46] State of Madhya Pradesh vs. Shardul Singh (1970) 3 SCR 302, 305-6
[47] Sardari Lal vs. Union of India AIR 1971 SC 1547 at P. 1549

Treasury and thereafter by the Civil Service Department and from mid-November 1981 are being performed partly by the Treasury and partly by the Management & Personnel Office are in India under Article 309 of the Constitution to be performed with respect to not only persons, employed in civil capacities but with respect to all persons appointed to public services and posts in connection with the affairs of the Union or any State by authorities appointed under or specified in Acts made under Article 309 or rules made under such Acts or made under the proviso to that Article.

As the making of such laws and the framing of such rules are subject to the provisions of the Constitution, if any such Act or rule violates any of the provisions of the Constitution, it would be void. If any such Act or rule trespasses upon the rights guaranteed to government servants by Article 311, it would be void. Similarly, such Acts and rules cannot abridge or restrict the pleasure of the President or the Governor of a State exercisable under Article 310 (1) further than what the Constitution has expressly done. In the same way, such Act or rule would be void if it violates any Fundamental Right guaranteed by Part III of the Constitution[48].

Which would be the appropriate Legislature to enact laws or the appropriate authority to frame rules would depend upon the

[48] Moti Ram Deka's case AIR 1964 SC 600,

provisions of the Constitution with respect to legislative competence and the division of legislative powers. Thus, for instance, under Entry 70 in List I of the Seventh Schedule to the Constitution, Union Public Services, all-India Services and Union Public Service Commission are subjects which fall within the exclusive legislative field of Parliament, while under Entry 41 in List II of the Seventh Schedule to the Constitution, State Public Services and State Public Service Commission fall within the exclusive legislative field of the State Legislatures. The rules framed, by the President or the Governor of a State must also, therefore, conform to these legislative powers. It is, however, not necessary that the Act of an appropriate Legislature should specifically deal with a particular service. It is sufficient if it is an Act as contemplated by Article 309 by which provision is made regulating the recruitment and conditions in a service[49].

It was at one time thought that the right of a government servant to recover arrears of salary fell within the ambit of the pleasure doctrine and a servant of the Crown, therefore, cannot sue for his salary, it being a bounty of the Crown and not a contractual debt[50]. The Constitution Bench of the Supreme Court pointed out that the attention of the Judicial Committee was not drawn to section 60 and the other relevant provisions of the Code of Civil Procedure, 1908, and that the rule of

[49] Ram Pal Chaturvedi vs. State of Rajasthan, (1970) 2 SCR 559, 564)
[50] Mulvenna vs. The Admiralty, 1926 SC (Sessions Cases) 842

English law that a Crown servant cannot maintain a suit against the Crown for recovery of arrears of salary did not prevail in India as it has been negatived by the provisions of statutory law in India[51].

As seen earlier, in India for the first time a fetter was imposed upon the pleasure of the Crown to terminate the service of any of its servants by section 96B of the Government of India Act, 1919, but that was only with respect to the authority, which could dismiss him. In that section the holding of office "during His Majesty's pleasure" was made subject to both the provisions of that Act and the rules made there under. Under the Government of India Act, 1935, the reference to the rules to be made under the Act was omitted and the tenure of office of a civil servant was to be "during His Majesty's pleasure except as expressly provided" by that Act. Article 310(1) adopts the same phraseology as in section 240 of the 1935 Act. Under it also the holding of an office is during the pleasure of the President or The Governor "Except as specifically provided by this Constitution". Therefore, the only fetter which is placed on the exercise of such pleasure is when it is expressly so provided in the Constitution itself, that is, when there is an express provision in that behalf in the Constitution. Express provisions in that behalf are to be found in the case of certain Constitutional functionaries in respect of whose tenure special

[51] State of Bihar vs. Abdul Majid AIR 1954 SC 245

provision is made in the Constitution as, for instance, in clauses (4) and (5) of Article 124 with respect to Judges of the Supreme Court, Article 218 with respect to Judges of the High Court, Article 148(1) with respect to the Comptroller and Auditor-General of India, Article 324(1) with respect to the Chief Election Commissioner, and Article 324(5) with respect to the Election Commissioners and Regional Commissioners.

Clauses (1) and (2) of Article 311 impose restrictions upon the exercise by the President or the Governor of a State of his pleasure under Article 310(1). These are express provisions with respect to termination of service by dismissal or removal as also with respect to reduction in rank of a civil servant and thus come within the ambit of the expression "Except as otherwise provided by this "Constitution" qualifying Article 310(1). Article 311 is thus an exception to Article 310 and was described as operating as a proviso to Article 310(l) though set out in a separate Article[52]. Article 309 is, however, not such an exception. It does not lay down any express provision which would derogate from the amplitude of the exercise of pleasure under Article 310(l), It merely confers upon the appropriate Legislature or executive the power to make laws and frame rules but this power is made subject to the provisions of the Constitution. Thus, Article 309 is subject to Article 310(l) and any provision restricting the exercise of the pleasure of the

[52] Parshotam Lal Dhingra vs. Union of India, AIR 1958 SC 36 at P. 41

President or Governor in an Act or rule made or framed under Article 309 not being an express provision of the Constitution, cannot fall within the expression "Except as expressly provided by this Constitution" occurring in Article 310(l) and would be in conflict with Article 310(l) and must be held to be unconstitutional. Clauses (1) and (2) of Article 311 expressly restrict the manner in which a Government servant can be dismissed, removed or reduced in rank and unless an Act made or rule framed under Article 309, also conforms to these restrictions, it would be void The restrictions placed by clauses (1) and (2) of Article 311 are two: (1) with respect to the authority empowered to dismiss or remove a Government servant provided for in clause (1) of Article 311; and (2) with respect to the procedure for dismissal, removal or reduction in rank of a government servant provided for in clause (2). The second proviso to Article 311 (2), which is the central point of controversy in these Appeals and Writ Petitions, lifts the restriction imposed by Article 311 (2) in the cases specified in the three clauses of that proviso.

None of these three Articles (namely, Articles 309, 310 and 311) sets out the grounds for dismissal, removal or reduction in rank of a government servant or for imposition of any other penalty upon him or states what those other penalties are. These are matters which are left to be dealt with by Acts and rules made under Article 309. There are two classes of

penalties in service jurisprudence, namely, minor penalties and major penalties. Amongst minor penalties are censure, withholding of promotion and withholding of increments, of pay. Amongst major penalties is dismissal or removal from service, compulsory retirement and reduction in rank. Minor penalties do not affect the tenure of a government servant but the penalty of dismissal or removal does because these two penalties bring to an end the service of a government Servant. It is also now well established that compulsory retirement by way of penalty amounts to removal from service. So this penalty also affects the tenure of a government servant. Reduction in rank does not terminate the employment of a government servant and it would, therefore, be difficult to say that it affects the tenure of a government servant. It may, however, be argued that it does brink to an end the holding of office in a particular rank and from that point of view it affects the government servant's tenure in the rank from which he is reduced.

**Exercise of Pleasure**:

A question which arises in this connection is whether the pleasure of the President or the Governor under Article 310(1) is to be exercised by the President or the Governor personally or it can be exercised by a delegate or some other authority empowered under the Constitution or by an Act or Rules made under Article 309. This question came up for consideration

before a Constitution Bench of the apex court[53]. The majority of the Court (speaking through Subba Rao, J., as he then was) stated the conclusions it had reached in the form of seven propositions. These propositions are:

(1) In India every person who is a member of a public service described in Article 310 of the Constitution holds office during the pleasure of the President or the Governor, as the case may be, subject to the express provisions therein.

(2) The power to dismiss a public servant at pleasure is outside the scope of Article 154 and, therefore, cannot be delegated by the Governor to a subordinate officer, and can be exercised by him only in the manner prescribed by the Constitution.

(3) This tenure is subject to the limitations or qualifications mentioned in Article 311, of the Constitution.

(4) The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310, as qualified by Article 311.

(5) The Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the

[53] Babu Ram Upadhya's case AIR 1961 SC 751.

Governor under Article 310 of the Constitution read with Article 311 thereof.

(6) The Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of reasonable opportunity' embodied in Article. 311 of the Constitution; but the said law would be subject to judicial review.

(7) If a statute could be made by Legislatures within the foregoing permissible limits, the rules made by an authority in exercise of the power conferred there under would likewise be efficacious within the said limits.

The question came to be reconsidered by a larger Bench of seven Judges[54]. While referring to the judgment of the majority in Babu Ram Upadhya's case *supra* the Court observed "What the said Judgment has held is that while Art. 310 provides for tenure at pleasure of the President or the Governor, Art. 309 enables the legislature or the executive, as the case may be, to make any law or rule in regard, *inter alia*, to conditions of service without impinging upon the overriding power recognised under Art 310. In other words, in exercising the power conferred by Art. 309 the extent of the pleasure recognised by Art. 310 cannot be affected, or impaired. In fact, while stating the conclusions in the form of proposition the said judgment has observed that the Parliament or the Legislature can make a law

[54] Moti Ram Deka's case AIR 1964 SC 600

regulating the conditions of service without affecting the powers of the President or the Governor under Art. 310 read with Art. 311. It has also been stated at the same place that the power to dismiss a public servant at pleasure is outside the scope of Art. 154 and, therefore, cannot be delegated by the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. In the context, it would be clear that this latter observation is not intended to lay down that a law cannot be made under Art 309 or a Rule cannot be framed under the proviso to the said Article prescribing the procedure by which, and the authority by whom, the said pleasure can be exercised. This observation which is mentioned as proposition number (2) must be read along with the subsequent propositions specified as (3), (4), (5) & (6). The only point made is that whatever is done under Art. 309 must be subject to the pleasure prescribed by Art. 310."

The Supreme Court it was held that where the President or the Governor, as the case may be, if satisfied, makes an order under clause (c) of what is now the second proviso to Article 311(2) that in the interest of the security of the State it is not expedient to hold an inquiry for dismissal or removal or reduction in rank of an officer, the satisfaction of the President or the Governor must be his personal satisfaction[55]. The correctness of this view was considered by a seven-Judge

[55] Sardari Lal vs. Union of India AIR 1971 SC 1547

Bench of the Supreme Court.[56] It was categorically stated in that case that the majority view in Babu Ram Upadhya's case was no longer good law after the decision in Moti Ram Deka's case. Referring to these two cases the Court observed "This Court in Babu Rarn Upadhya's case held that the power of the Governor to dismiss at pleasure, subject to the provisions of Article 311, is not an executive power under Article 154 but a Constitutional power and is not capable of being delegated to officers subordinate to him. The effect of the judgment in Babu Ram Upadhya's case (supra) was that the Governor could not delegate his pleasure to any officer nor could any law provide for the exercise of that pleasure by an officer with the result that statutory rules governing dismissal are binding on every officer though they were subject to the overriding pleasure of the Governor. This would mean that the officer was bound by the Rules but the Governor was not. "In Babu Ram Upadhya's case (supra) the majority view stated seven propositions of the report. Proposition No. 2 is that the power to dismiss a public servant at pleasure is outside the scope of Article 154 and therefore cannot be delegated by the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. Propositions Nos. 3 and 4 are these. The tenure of a public servant is subject to the limitations or qualifications mentioned in Article 311 of the Constitution. The Parliament or the Legislatures of States cannot make a law

[56] Shamsher Singh vs. State of Punjab AIR 1974 SC 2192

abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310 as qualified by Article 311. That the Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 311. Proposition No. 6 is that the Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of reasonable opportunity' embodied in Article 311, but the said law would be subject to judicial review. "As these propositions were reviewed by the majority opinion of this Court in Moti Ram Deka's case (supra) and this Court restated that proposition No. 2 must be read along with the subsequent propositions specified as propositions Nos. 3, 4, 5 and 6. The ruling in Moti Ram Deka's case (supra) is that a law can be framed prescribing the procedure by which and the authority by whom the said pleasure can be exercised. The pleasure of the President or the Governor to dismiss can therefore not only be delegated but is also subject to Article 311. The true position as laid down in Moti Ram Deka's case (supra) is that Articles 310 and 311 must no doubt be read together but once the true scope and effect of Article 311 is determined the scope of Article 310 (1) must be limited in the sense that in regard to cases falling under Article 311 (2) the: Pleasure mentioned in

Article 310(2) must be exercised in accordance with the requirements of Article 311. "The majority view in Babu Ram Upadhya's case (supra) is no longer good law after the decision in Moti Ram Deka's case (supra). The theory that only the President or the Governor is Personally to exercise pleasure of dismissing or removing a public servant is repelled by express words in Article 311 that no person who is a member of the civil service or holds a civil post under the Union or a State shall be dismissed or removed by authority subordinate to that by which he was appointed. The words dismissed or removed by an authority subordinate to that by which he was appointed indicate that the pleasure of the President or the Governor is exercised by such officers on whom the President or the Governor confers or delegates power." The Court then stated its conclusion as follows "For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister as the head in the case of the Union and the Chief Minister as the head in the case of State in all matters which vest in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally."

The position, therefore, is that the pleasure of the President or the Governor is not required to be exercised by either of them, personally, and that is indeed obvious from the language of

Article 311. Under clause (1) of that Article a government servant cannot be dismissed or removed by an authority subordinate to that by which he was appointed. The question of an authority equal or superior in rank to the appointing authority cannot arise if the power to dismiss or remove is to be exercised by the President or the Governor personally. Clause (b) of the second proviso to Article 311 equally makes this clear when the power to dispense with an inquiry is conferred by it upon the authority empowered to dismiss, remove or reduce in rank a government servant in a case where such authority is satisfied that for some reason, to recorded by that authority in writing it is not reasonably practicable to hold such inquiry, because if it was the personal satisfaction of the President or the Governor, the question of the satisfaction of any authority empowered to dismiss or remove or reduce in rank a government servant would not arise. Thus, though under Article 310 (1) the tenure of a government servant is at the pleasure of the President or the Governor, the exercise of such pleasure can be either by the President or the Governor acting with the aid and on the advice of the Council of Ministers or by the authority specified in Acts made under Article 309 or in rules made under such Acts or made under the proviso to Article 309; and in the case of clause (c) of the second proviso to Article 311(2) the inquiry, is to be dispensed with not on the personal satisfaction of the President or the Governor but on

his satisfaction arrived at with the aid and on the advice of the Council of Ministers.

**The Second Proviso to Article 311 (2)**

Clause (2) of Article 311 gives a constitutional mandate to the principles of natural justice and the *audi alteram partem* rule by providing that a person employed in a civil capacity under the Union or a State shall not be dismissed or removed from service or reduced in rank until after an inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges. To this extent, the pleasure doctrine enacted in Article 310(l) is abridged because Article 311(2) is an express provision of the Constitution. This safeguard provided for a government servant by clause (2) of Article 311 is, however, taken away when the second proviso to that clause becomes applicable. The safeguard provided by clause (1) of Article 311, however, remains intact and continues to be available to the government servant, The second proviso to Article 311(2) becomes applicable in the three cases mentioned in clauses (a) to (c) of that proviso. These cases are:

(a) where a person is dismissed or remove or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; and

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

The construction to be placed upon the second proviso and the scope and effect of that proviso were much debated at the Bar in the Supreme Court[57] as follows: "In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear. Ordinarily a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so called proviso has substantially altered the main section."

[57] Hira Lal Rattan Lal vs. State of U. P. AIR 1973 SC 1034

The language of the second proviso is plain and unambiguous. The keywords in the second proviso are "this clause shall not apply" By "this clause" is meant clause (2). As clause (2) requires an inquiry to be held against a government servant, the only meaning attributable to these words is that this inquiry shall not be held. There is no scope for any ambiguity in these words and there is no reason to give them any meaning different from the plain and ordinary meaning, which they bear. The resultant effect of these words is that when a situation envisaged in any of the three clauses of the proviso arises and that clause becomes applicable, the safeguard provided to a government servant by clause (2) is taken away. As pointed out earlier, this provision is as much in public interest and for public good and a matter of public policy as the pleasure doctrine and the safeguards with respect to security of tenure contained in clauses (1) and (2) of Article 311.

Before, however, any clause of the second proviso can come into play the condition laid down in it must be satisfied. The condition for the application of each of these clauses is different. In the case of clause (a) a government servant must be guilty of conduct deserving the penalty of dismissal; removal or reduction in rank, which conduct, has led to him being convicted on a criminal charge. In the case of clause (b) the disciplinary authority must be satisfied that it is not reasonably

practicable to hold an inquiry. In the case of clause (c) the President or the Governor of a State, as the case may be, must be satisfied that in the interest of the security of the State, it is not expedient to hold an inquiry. The paramount thing, however, to bear in mind is that the second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all, because Article 311 (2) is itself confined only to these three penalties. Therefore, before denying a government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry. The extent to which a government servant can be denied his right to an inquiry formed the subject-matter of considerable debate at the Bar and we, therefore, now turn to the question whether under the second proviso to Article 311(2) even though the inquiry is dispensed with some opportunity at least should not be afforded to the government servant so that he is not left wholly without protection, As most of the arguments on this part of the case were common to all the

three clauses of the second proviso, it will be convenient at this stage to deal at one place with all the arguments on this part of the case, leaving aside to be separately dealt with the other arguments pertaining only to a particular clause of the second proviso.

**The Extent of Denial of Opportunity under the Second Proviso -**

That an inquiry consists of several stages and, therefore, even where by the application of the second proviso the full inquiry is dispensed with, there is nothing to prevent the disciplinary authority from holding at least a minimal inquiry because no prejudice can be caused by doing so. It was further submitted that even though the three clauses of the second proviso are different in their content, it was feasible in the case of each of the three clauses to give to the government servant an opportunity of showing cause against the penalty proposed to be imposed so as to enable him to convince the disciplinary authority that the nature of the misconduct attributed to him did not call for his dismissal, removal or reduction in rank. For instance, in a case falling under clause (a) the government servant can point out that the offence of which he was convicted was a trivial or a technical one in respect of which the criminal court had taken a lenient view and had sentenced him to pay a nominal fine or had given him the benefit of probation. It was further submitted that apart from the opportunity to show

cause against the proposed penalty it was also feasible to give a further opportunity in the case of each of the three clauses though such opportunity in each case may not be identical. Thus, it was argued that the charge-sheet or at least a notice informing the government servant of the charges against him and calling for his explanation thereto was always feasible. It was further argued that though under clause (a) of the second proviso an inquiry into the conduct which led to the conviction of the government servant on a criminal charge would not be necessary, such a notice would enable him to point out that it was a case of mistaken identity and he was not the person who had been convicted but was an altogether different individual. It was urged that there could be no practical difficulty in serving such charge-sheet to the concerned government servant because even if he were sentenced to imprisonment, the charge sheet or notice with respect to the proposed penalty can always be sent to the jail in which he is serving his sentence. So far as clause (b) is concerned, it was argued that even though it may not be reasonably practicable to hold an inquiry, the explanation of the government servant can at least be asked for with respect to the charges made against him so that he would have an opportunity of showing in his written reply that he was not guilty of any of those charges. It was also argued that assuming such government servant was absconding the notice could be sent by registered post to his last known address or pasted there. Similar arguments as in

case of clause (b) were advanced with respect to clause (c). It was submitted that the disciplinary authority could never make up its mind whether to dismiss or remove or reduce in rank a government servant unless such minimal opportunity at least was afforded to the government servant. Support for these contentions was sought to be derived from (1) the language of Article 311 (2) and the implications flowing there from, (2) the principles of natural justice including the *audi alteram partem* rule comprehended in Article 14, and (3) the language of certain rules made either under Acts referable to Article 309 or made under the proviso to that Article. We will consider the contentions with respect to each of these bases separately.

So far as Article 311(2) was concerned, it was said that the language of the second proviso did not negative every single opportunity, which could be afforded to a government servant under different situations though the nature of such opportunity may be different depending upon the circumstances of the case. It was further submitted that the object of Article 311(2) was that no government servant should be condemned unheard and dismissed or removed or reduced in rank without affording him at least some chance of either showing his innocence or convincing the disciplinary authority that the proposed penalty was too drastic and was uncalled for in his case and a lesser penalty should therefore, be imposed upon him.

The language of the second proviso to Article 311(2) read in the light of the interpretation placed upon clause (2) of Article 311 as originally enacted and the legislative history of that clause wholly rule out the giving of any opportunity. While construing Ruler 55 of the Civil Services (Classification, Control and Appeal) Rules and the phrase "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" occurring in sub-section (3) of section 240 of the Government of India Act, 1935.

The very phrase "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" in sub- section (3), of section 240 of the Government of India Act, 1935, was repeated in clause (2) of Article 311 as originally enacted, that is, in the said clause prior to its amendment by the Constitution (Fifteenth Amendment) Act, 1963. Approving the construction placed by the Judicial Committee upon this phrase, the Supreme Court held as follows[58]: "It is true that the provision does not, in terms, refer to different stages at which opportunity is to be given to the officer concerned. All that it says is that the government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. He must not only be given an opportunity but such opportunity must be a reasonable

[58] Khem Chand vs. Union of India AIR 1958 SC 300

one: In order that the opportunity to show cause against the proposed action may be regarded as a reasonable one, it is quite obviously necessary that the government servant should have the opportunity, to say, if that be his case, that he has not been guilty of any misconduct to merit any punishment at all and also that the particular punishment proposed to be given is much more drastic and severe than he deserves. If it is open to the government servant under this provision to contend, if that be the fact, that he is not guilty of any misconduct then how can he take that plea unless he is told what misconduct is alleged against him? If the opportunity to show cause is to be a reasonable one it is clear that he should be informed about the charge or charges levelled against him and the evidence by which it is sought to be established, for it is only then that he will be able to put forward his defence. If the purpose of this provision is to give the government servant an opportunity to exonerate himself from the charge and if this opportunity is to be a reasonable one he should be allowed to show that the evidence against, him is not worthy of credence or consideration and that he can only do if he is given a chance to cross-examine the witnesses called against him and to examine himself or any other witness in support of his defence. All this appears to us to be implicit in the language used in the clause, but this does not exhaust his rights, In addition to showing that he has not been guilty of any misconduct so as to merit any punishment, it is reasonable that he should also have an

opportunity to contend that the charges proved against him do not necessarily require the particular punishment proposed to be meted out to him. He may say, for instance, that although he has been guilty of some misconduct it is not of such a character as to merit the extreme punishment of dismissal or even of removal or reduction in rank and that any of the lesser" punishments ought to be sufficient in his case.

To *summarize*: the reasonable opportunity envisaged by the provision, under consideration includes:-

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant

tentatively proposes to inflict one of the three punishments and communicates the same to the government servant.

In short the substance of the protection provided by rules, like R. 55 referred to above, was bodily lifted out of the rules and together with an additional opportunity embodied in S. 240 (3) of the Government of India Act, 1935 so as to give a statutory protection to the government servants and has now been incorporated in Art. 311 (2) so as to convert the protection into a constitutional safeguard.

As for the concern under clause (a) of the second proviso a government servant could be wrongly dismissed, removed or reduced in rank mistaking him for another with the same name unless, he is given an opportunity of bringing to the notice of the disciplinary authority that he is not the individual who has been convicted, it can only be described as being too fanciful and far-fetched for though such a case of mistaken identity may be hypothetically possible, it is highly improbable. As in all other organizations, there is in government service an extremely active grapevine, both departmental and interdepartmental, which is constantly active, humming and bumming with service news and office gossip, and it would indeed to strange if the news that a member of a department was facing prosecution or had been convicted were' to remain a secret for long. Assuming such a case occurs, the government servant is not without any

remedy. He can prove in a departmental appeal which service rules provide for, save in exceptional cases, that he has been wrongly mistaken for another, Similarly, it not possible to accept the argument that unless a written explanation with respect to the charge is asked for from a government servant and his side of the case known, the penalty which would be imposed upon him, could be grossly out of proportion to his actual misconduct The disciplinary authorities are expected to act justly and fairly after taking into account all the facts and circumstances of the case and if they act arbitrarily and impose a penalty which is unduly excessive, capricious or vindictive, it can be set aside in a departmental appeal. In any event, the remedy by way of judicial review is always open to a government servant.

The position which emerges from the above discussion is that the keywords of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a government servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a Constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311 (2) or from giving any kind of opportunity to the concerned government servant. There is thus no scope for introducing into the second proviso sonic kind of inquiry or opportunity by a process of inference or implication. The maxim "expressum facit cessare tacitum" ("when there is express mention of

certain things, then anything not mentioned is excluded")[59] this well-known maxim is a principle of logic and common sense and not merely a technical rule of construction. The second proviso expressly mentions that clause (2) shall not apply where one of the clauses of that proviso becomes applicable. This express mention excludes everything that clause (2) contains and there can be no scope for once again introducing the opportunities provided by clause (2) or any one of them into the second proviso.

After all, it is not as if a government servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely, departmental appeal and judicial review.

Article 14 and the Second Proviso: "Does Article 14 make any difference to the consequences which flow from the second proviso to Article 311(2)?" It was submitted very oftenly the government servants that Article 14 in which the principles of natural justice are comprehended permeates the entire Constitution and, therefore, Article 14 must be read into the second proviso to Article 311 (2) and accordingly, if not under that proviso read by itself, under it read with Article 14 a government servant is entitled to an opportunity both of showing cause against the charges made against him as also

[59] B. Shankara Rao Badami vs. State of Mysore AIR 1969 SC 453

against. the penalty proposed to' be imposed upon him, though such opportunity may not extend to the holding of a complete and elaborate inquiry as would be the case where clause (2) of Article 311 applies; According to learned Counsel this is what is required by the *audi alteram partem* rule which is one of the two main principles of natural justice. In the alternative it was submitted that though an order may be valid and supportable under the second proviso to Article 311(2), it could none the less be void under Article 14 on the ground that the principles of natural justice have been wholly disregarded. These arguments are based upon an imperfect understanding of the principles of natural justice in their application in courts of law to the adjudication of causes before them and the function of Article 14 vis-a-vis the other provisions of the Constitution and particularly the second proviso to Article 311(2).

The principles of natural justice are not the creation of Article 14. Article 14 is not their begetter but their Constitutional guardian. Principles of natural justice trace their ancestry to ancient civilizations and centuries long past. Until about two centuries ago the term "natural justice" was often used interchangeably with "natural law" and at times it is still so used. The expression "natural law" has been variously defined. In. Jowitt's Dictionary of English Law[60] it is defined as "rules derived from God, reason or nature, as distinct from man-made

[60] (Second Edition, page 1221)

law." Black's Law states: "This expression, 'natural law,' or *jus naturale*, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral, and physical constitution. The point of departure for this conception was the Stoic doctrine of a life ordered 'according to nature, which in its turn rested upon the purely supposititious existence, in primitive. times, of a state of nature; that is, a condition of society in which men universally were governed, solely by a rational and consistent obedience to the needs, impulses, and promptings of their true nature, such nature being as yet undefaced by dishonesty, falsehood, or indulgence of the baser passions. In ethics, it consists in practical universal judgments which man himself elicits. These express necessary and obligatory rules of human conduct which have been established by the author of human nature as essential to the divine purposes in the universe and have been promulgated by God solely through human reason."

There are certain basic values which man has cherished throughout the ages. But man looked about him and found the ways of men to be cruel and unjust and so also their laws and

customs. He saw men flogged, tortured, mutilated, made slaves, and sentenced to row the galleys or to toil in the darkness of the mines or to fight in an arena with wild and hungry beasts of the jungle or to die in other ways a cruel, horrible and lingering death. He found judges to be venal and servile to those in power and the laws they administered to be capricious, changing with the whims of the ruler to suit his propose. When, therefore, he found a system of law, which did not so change, he praised it. Thus, the Old Testament in the Book of Esther (I, 19) speaks admiringly of the legal system of the Achaemenid dynasty (the First Persian Empire) in which "a royal commandment" was, "written among the laws of the Persians and the Medes, that it be not altered." Man saw cities and towns sacked and pillaged, their populace dragged into captivity and condemned to slavery the men to labour, the women and the girls to concubinage, and the young boys to be castrated into eunuchs their only crime being that their ruler had the misfortune to be defeated in battle and to lose one of his cities or towns to the enemy. Thus, there was neither hope nor help in man-made laws or man-established customs for they were one-sided and oppressive, intended to benefit armed might and monied power and to subjugate the down-trodden poor and the helpless needy. If there was any help to be found or any hope to be discovered, it was only in a law based on justice and reason which transcended the laws and customs of men, a law made by someone greater and mightier than those

men who made these laws and established these customs. Such a person could only be a divine being and such a law could only be "natural law" or "the law of nature" meaning thereby "certain rules of conduct supposed to be so just that they are binding upon all mankind". It was not "the law of nature" in the sense of "the law of the Jungle" where the lion devours the lamb and the tiger feeds upon the antelope because the lion is hungry and the tiger famished but a higher law of nature or "the natural law" where the lion and the lamb lie down together and the tiger frisks with the antelope.

Most, if not all, jurists are agreed that "reason" and "the nature of man" constitute the fountain-head of natural law but there is a considerable divergence of opinion amongst them as also amongst philosophers about the nature and meaning of that law and its relation to positive law. Among the ancient Greeks the Sophists, Aristotle in his treatises on "Logic" and "Ethics", and the Stoics developed different theories. The theory propounded by Aristotle in his "Logic" adhered substantially to the point of view of the Sophists, namely, that man is a natural creature but is also endowed with reason. Later, in his "Ethics", Aristotle came to distinguish between natural and legal or conventional justice and postulated that natural law had authority everywhere and was discoverable by the use of reason. The ancient Romans were not given to philosophical speculations or creative originality in art. They preferred to borrow these from

the Greeks. The Romans were a hard-headed, practical race of conquerors, administrators and legislators. Roman jurists, therefore, used the concept of natural law-, that is, jus naturale (or His naturale as the Romans wrote it because Roman alphabet had no letter "J" or "j" in it) to introduce into the body of law those parts of laws and customs of foreigners, that is, non-Roman people with whom they came in commercial contract or whom they subjugated. The rules which the Romans borrowed from these laws and customs were those which were capable of general application and they developed them into general legal principles, which came to form *jus gentium* or the law of nations. In doing so they acted upon the principle that any rule of law which was common to the nations (gentes) they knew of must be basically in consonance with reason and, therefore, fundamentally just. They applied jus gentium to those to whom jus civil (civil law) did not apply, that is, in cases between foreigners or between a Roman citizen and a foreigner. On this basic formulation that what was common to all known nations must be in consonance with reason and justice, the Roman jurists and magistrates proceeded to the theory that any rule which instinctively commanded itself to the sense of justice and reason would be part of the jus gentium. The jus gentium of the Romans was different from what we call international law and should not be confused with it, for the scope of the *jus gentium* was much wider than our international law. Because of the theory of its identity with justice and

reason, the term "*jus gentium*" came at times to be used for aequitas, that is, equity as understood by the Romans, which was the basis of praetorian law or the power of the praetors to grant remedies where none existed under the jus civile. In the Dark Ages the expression "natural law" acquired a theological base and the Fathers of the Church, particularly St. Ambrose, St. Augustine and St. Gregory, held the belief that it was the function of the Church to bring about the best possible approximation of human laws to Christian principles.

As a result of the infusion of new ideas during the Renaissance and the Reformation, the intellectual authority of reason again came to be substituted for the spiritual authority of divine law as the basis of natural law. This new or rather resuscitated basis of natural law was laid by Grotius (Huigh de Groot) in his "De Jure Belli ac Pacis" the precursor of modern public international law.

Reason as the theoretical basis for natural law, however, once again suffered a reversal at the hand of David Hume. According to Hume, only knowledge obtained by mathematical reasoning was certain; knowledge obtained from other sciences being only probable. His theory of justice was that it served both an ethical and a sociological function. He contended that public utility was the sole origin of legal justice and the sole foundation of its merit, and that for a legal system to be useful, it must adhere to its rules even though it may cause injustice in

particular cases. He did not make a formal analysis of law but distinguished equity or the general system of morality, the legal order, and law, as a body of precepts. According to him, the authority of civil law modified the rules of natural justice according to the particular convenience of each community.

Blackstone, however, in his, "*Commentaries on the Laws of England" had this to say about natural law:*

> "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times : no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."

In the nineteenth and twentieth centuries there was a reaction against natural law as the basis of law. The French Revolution had enthrowned reason as a goddess. The excesses of the French Revolution, however, led to a reaction against the theory that reason was the basis of law. The utilitarian view was that the basis for law was the practical inquiry as to what would most conduce to the general benefit (*greatest happiness of gratest number*). The spirit of scientific inquiry which pre-dominated the nineteenth and twentieth centuries could not favour hypotheses which were vague and unprovable. In the

twentieth century, disillusionment with the theory that good could come out of the power of the State and positive law has, however, once again brought about a revival of interest in natural law.

Apart from providing the subject-matter for philosophical dissertations and speculative theories on the origin and attributes of natural law, the concept of natural law has made invaluable contribution to the development of positive law. It helped to transform the rigidity of the *jus civile* of the Romans into a more equitable system based on the theory of the *jus gentium*. It provided arguments to both sides in the struggle during the Middle Ages between the Popes and the Emperors. It inspired in the eighteenth century the movement for codification of law in order to formulate ideas derived from the concept of natural law into detailed rules. In England, the idea of natural law and natural justice has influenced its law in several respects. The origin and development of equity in England owed much to natural law. It also served as the basis for the recognition or rejection of a custom. It was looked to for support in the struggle for supremacy, which took place between the judges and Parliament in the seventeenth century. The concept of natural law and natural rights influenced the drafting of the Constitution of the United States of America and many of the amendments made thereto as also the Constitutions of its various States, It has provided a basis for

much modem international law and International Conventions, Covenants and Declarations. Above all, it has enriched positive law by introducing into it the principles of natural justice, divested of all their philosophical, metaphysical and theological trappings and disassociated from their identification with, or supposed derivation from, natural law.

How then have the principles of natural justice been interpreted in the courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing' the principles of natural justice in judicial process including there in quasi-judicial and administrative processes. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "*nemo judex in causa sua*" or "nemo debet esse judex in propria "causas" that is, "no man shall be a judge in his own cause", "aliquis non debet esse judex in propria causa quia non potest esse judex et pars" that is, "no man ought to be a judge in his own cause, because he cannot act as judge and at the same time be a party". The form "nemo potest esse simul actor et judex", that is, "no one can be at once suitor and judge" is also at times used. The second rule and that is the rule, with which we are concerned in these Appeals and Writ Petitions is "audi alteram partem", that is, "hear the other side". At times

and particularly in continental countries the form "audietur et altera pars" is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely, "qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum fecerit", that is, "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right" or, in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done".

The above two rules and their corollary are neither new nor were they the discovery of English Judges. They were recognized in many civilizations and over many centuries. Roman law recognized the need for a judge to be impartial and not to have a personal interest in the case before him and Tacitus in his "Dialogus" referred to this principle. Under Roman law a judge who heard a cause in which he had an interest was liable as on a quasi-delict to the party prejudiced thereby (Justinian's Institutes IV, 5 pr.; as also Justinians Codex III, 5, 1). Even the Kiganda tribesmen of Buganda have an old proverb which literally translated means *"a monkey does not decide an affair of the forest"*. The requirement of he arriving both sides before at a decision was part of the judicial oath in Athens. It also formed the subject-matter of a proverb which was often referred to or quoted by Greek playwrights, as for

instance, by Aritophanes in his comedy "The Wasps" and Euripides in his tragedies "Heracleidae" and "Andromache", and by Greek orators, for instance, Demosthenes in his speech "De Corona". Among the Romans, Seneca in his tragedy "Medea" referred to the injustice of coming to a decision without a full hearing.

The two rules "*hemo judes in causa sua*" and "*audi alteram partem*" and their corollary that justice should not only be done but should manifestly be seen to be done have been recognized from early days in English courts. References to them are to be found in the Year Books - a title preferred to the alternative one of "Books of Years and Terms" - which were a regular series, with a few gaps, of law reports in Anglo-Norman or Norman French or a mixture of English, Norman - French and French, which had then become the court language, from the 1270s to 1535 or, as printed after the invention of the printing press, from 1290 to 1535, that is, from the time of Edward II to Henry VIII. The above principles of natural justice came to be firmly established over the course of centuries and have become a part of the law of the land. Both in England and in India they apply to civil as well as to criminal cases and to the exercise of judicial, quasi-judicial and administrative powers. The expression "natural, justice is now so well understood in England that it has been used without any definition in statutes of Parliament, for example, in section 3(10) of the Foreign

Compensation Act, 1969, and section 6(13) of the Trade Union and Labour Reforms Act, 1974, which was later repealed by the Trade Union and Labour Relations (Amendment) Act, 1976. These rules of natural justice have been recognized and given effect to in many countries and different system of law. They have now received international recognition by being enshrined in Article 10 of the Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations by Resolution 217A (III) of December 10, 1948. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which came into force on September 3, 1953, and Article 14 of the International Covenant on Civil and Political Rights adopted by the General Assembly Resolution 2200A (XXI) of December 16, 1966 which came into force on March 23, 1976.

Article 14 does not set out in express terms either of the above two well-established rules of natural justice. The question which then arises is "Whether the rules of natural justice form part of Article 14 and, if so, how?"

Article 14 of the Constitution provides as follows:

**"*14 Equality before law*:**

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 14 thus contains an express constitutional, injunction against the, State as defined in Article 12 prohibiting the State

from denying to any person (1) equality before the law, or (2) the equal protection of the laws. Neither of these two concepts are new. They are based upon similar provisions in other Constitutions. One instance is section 40(l) of the Constitution of Eire of 1937, which occurs in the Chapter entitled Fundamental Rights in that Constitution. The Constitution of Eire begins on a strong religious note. It starts by stating:

"In the name of the Most Holy Trinity, from whom is all authority and to Whom, as our final end, all actions both of men and States must be referred.
We, the people of Eire,
Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial ....."

Section 40(1) of that Constitution provides as follows:

"All Citizens shall, as human persons, be held equal before the law.
This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social functions."

Another instance is Article 3(1) of the Constitution of the Federal Republic of Germany of 1948 which states:
"All persons shall be equal before the law."

Yet another instance is section 1 of the Fourteenth Amendment to the Constitution of the United States of America which reads:
"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Constitutions of some other countries also have similar provisions but as these Constitutions have suffered political vicissitudes, it is unnecessary to refer to them. Provisions similar to Article 14 are to be found in International Charters and Conventions. Thus, Article 7 of the Universal Declaration of

Human Rights of 1948, provides as follows:
"All are equal before the law and are entitled without any discrimination to equal protection of the law."

Article 14 is divided into two parts. "The *first* part of article 14, which was adopted from the Irish 'Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The

*second* part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances."

Article 14 contains a guarantee of equality before the law to all persons and a protection to them against discrimination by any law. Sub-clause (a) of clause (3) of Article 13 defines law as follows: "'law' includes any Ordinance, order, bye law, rule, regulation, notification, custom or usage having in the territory of India the force of law". What Article 14 forbids is discrimination by law, that is, treating persons similarly circumstance differently or treating those not similarly circumstance in the same way or, as has been pithily put, treating equals as unequals and unequals as equals. Article 14 prohibits hostile classification by law and is directed against discriminatory class legislation. The propositions deducible from decisions of this Court on this point have been set out in the form of thirteen propositions in the judgment of Chandrachud, C.J[61]. The first of these propositions which describes the nature of the two parts of Article 14 has been extracted earlier. We are not concerned in these Appeals and Writ Petitions with the

[61] In re The Special Courts Bill, 1978 (AIR 1979 SC 478)

other propositions set out in that judgment In early days, this Court was concerned with discriminatory and hostile class legislation and it was to this aspect of Article 14 that its attention was directed. As fresh thinking began to take place oh the scope and ambit of Article 14, new dimensions to this guarantee of equality before the law and of the equal protection of the laws emerged and were recognized by this Court. It was realized that to treat one person differently from another when there was no rational basis for doing so would be arbitrary and thus discriminatory. Arbitrariness can take many forms and shapes but whatever form or shape it takes; it is none the less discrimination. It also became apparent that to treat a person or a class of persons unfairly would be an arbitrary act amounting to discrimination forbidden by Article 14. Similarly, this Court recognized that to treat a person in violation of the principles of natural justice would amount to arbitrary and discriminatory treatment and would violate the guarantee given by Article 14.

Subba Rao, C.J speaking for the Court, said "Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately[62]."

[62] State of Andhra Pradesh vs. Nalla AIR 1967 SC 1458

While considering Article 14 and Article 16, Bhagwati, J., in a passage which has become a classic said “Art 14 is the genus while Art. 16 is a species Art. 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose, J., 'a way of life' and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with in aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view equality antithet to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment' it is also violative of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on, relevant principles applicable alike to all similarly situate and it must not be guided by any- extraneous or irrelevant considerations

because that would be denial of equality Where the operative., reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Arts. 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice, in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16."[63]

The same learned Judge, speaking for the Court said,[64] "The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that the Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a

[63] E. P. Royappa vs. State of Tamil Nadu AIR 1974 SC 555
[64] Ajay Hasia vs. Khalid Mujib Sehravardi AIR 1981 SC 487

rational relation to the object sought to be achieved by the impugned legislative or executive action."

The principles of natural justice have thus come to be recognized as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality, which is the subject matter of that Article. Shortly put, the syllogism runs thus: violation of a rule of natural justice results in arbitrariness which is the same as discrimination. Where discrimination is the result of State action, it is a violation of Article 14: therefore, a violation of a principle of natural justice by a State action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of "State" in Article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially.

The rule of natural justice with which we are concerned in these Appeals and Writ Petitions, namely, the *audi teram partem* rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the

allegations and charges against him, be given an opportunity of submitting his explanation thereto, have, the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence; both oral and documentary, in his defence. The process of a fair hearing need not, however, conform to the judicial process in a court of law, because judicial adjudication of causes involves a number of technical rules of procedure and evidence which are unnecessary and not required for the purpose of a fair hearing within the meaning of *audi alteram partem* rule in a quasi judicial or administrative inquiry. If we look at clause (2) of Article 311 in the light of what is stated above, it will be apparent that that clause is merely an express statement of the *audi alterarn partem* rule which is implicitly made part of the guarantee contained in Article 14 as a result of the interpretation placed upon that Article by recent decisions of this Court Clause (2) of Article 311 requires that before a government servant is dismissed, removed or reduced in rank, an inquiry must be held in which he is informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The nature of the hearing to be given to a government servant under clause (2) of Article 311

has been elaborately set out by this Court in Khem Chand's case[65] in the passages from the judgment extracted above. Though that case related to the original clause (2) of Article 311, the same applies to the present clause (2) of Article 311 except for the fact that now a government servant has no right to make any representation against the penalty proposed to be imposed upon him but, as pointed out earlier,[66] such an opportunity is not the requirement of the principles of natural justice and neither the ordinary law of the land nor industrial law requires such an opportunity to be given. If, therefore, an inquiry held against a government servant under clause (2) of Article 311 is unfair or biased or has been conducted in such a manner as not to give him a fair or reasonable opportunity to defend himself, undoubtedly, the principles of natural justice would be violated, but in such a case the order of dismissal, removal or reduction in rank would be held to be bad as contravening the express provisions of clause (2) of Article 311 and there will be no scope for having recourse to Article 14 for the purpose of invalidating it.

Though the two rules of natural justice namely, *nemo judex in causa sua* and *audi alteram partem*, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are none the less not statutory rules. Each of these rules yields

[65] AIR 1958 SC 300
[66] Suresh Koshy George vs. University of Kerala AIR 1969 SC 198

to and changes with the exigencies of different situations They do not apply in the same manner to situations which are not alike these rules are not cast in a rigid mould nor can they be put in a legal strait-jacket They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and also by the constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is governed. There is no difference in this respect between the law in England and in India.

Hegde, J., observed "What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case"[67].

Chinnappa Reddy, J., in his dissenting judgment[68] summarized the position in law on this point as follows: "The principles of natural justice have taken deep root in the judicial conscience of our people, nurtured by the Apex Court[69]. They are now

[67] A. K. Kraipak vs. Union of India AIR 1970 SC 150
[68] Swadeshi Cotton Mills vs. Union of India AIR 1981 SC 818
[69] Mohnider Singh Gill case, AIR 1978 SC851, Maneka Gandhi case-AIR 1978 SC 597

considered as fundamental as to be 'implicit in the concept of ordered liberty' and, therefore, implicit in every decision making function, call it judicial, quasi-judicial or administrative. Where authority functions under a statute and the statute provides for the observance of the principles of natural justice in a particular manner, natural justice will have to be observed in that manner and in no other. No wider right than that provided by statute can be claimed nor can the right be narrowed. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice. The implication of natural justice be presumptive it may be excluded by express words of statute or by necessary intendment. Where the conflict is between the public interest and the private interest, the presumption must necessarily be weak and may, therefore, be readily displaced."

In this connection, it must be remembered that a government servant is not wholly without any opportunity. Rules made under the proviso to Article 309 or under Acts referable to that Article generally provide for a right of appeal except in those cases where the order of dismissal, removal or reduction in rank is passed by the President or the Governor of a State because they being the, highest Constitutional functionaries, there can be no higher authority to which an appeal can lie from an order passed by one of them. Thus, where the second proviso applies, though there is no prior opportunity to a

government servant to defend himself against the charges made against him, he has the opportunity to show in an appeal filed by him that the charges made against him are not true. This would be a sufficient compliance with the requirements of natural justice.

**The Second Proviso - Clause (a)**:

Not much remains to be said about clause (a) of the second proviso to Article 311(2). To recapitulate, briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For, that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challappan's case[70]. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a

[70] AIR 1975 SC 2216

criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate .in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, the Apex Court[71] set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the court should always order

[71] Shankar Dass vs. Union of India AIR 1985 SC 772

reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case.

**The Second Proviso - Clause (b)**:

As regards clause (b) of the second proviso to Article 311(2) was that whatever the situation may be a minimal inquiry or at least an opportunity to show cause against the proposed penalty is always feasible and is required by law. The arguments with-respect to a minimal inquiry were founded on the basis of the applicability of Article 14 and the principles of natural justice and the arguments with respect to an opportunity to show cause against the proposed penalty were in addition founded upon the decision in Challappan's Case (supra).

The next contention was that even if it is not reasonably practicable to hold an inquiry, a government servant can be placed under suspension until the situation improves and it becomes possible to hold the inquiry. This contention also cannot be accepted. Very often a situation which makes it not reasonably practicable to hold an inquiry is of the creation of the concerned government servant himself or of himself acting in concert with others or of his associates. It can even be that he himself is not a party to bringing about that situation. In all such cases neither public interest nor public good requires that salary or subsistence allowance should be continued to be paid

out of the public exchequer to the concerned government servant. It should also be borne in mind that in the case of a serious situation which renders the holding of an inquiry not reasonably practicable, it would be difficult to foresee how long the situation will last and when normalcy would return or be restored. It is impossible to draw the line as to the period of time for which the suspension should continue and on the expiry of that period action should be taken under clause (b) of the second proviso. Further, the exigencies of a situation may require that prompt action should be taken and suspending the government servant cannot serve the purpose. Sometimes not taking prompt action may result in the trouble spreading and the situation worsening and at times becoming uncontrollable. Not taking prompt action may also be construed by the trouble-makers and agitators as a sign of weakness on the part of the authorities and thus encourage them to step up the tempo of their activities or agitation. It is true that when prompt action is taken in order to prevent this happening, there is an element of deterrence in it but that is an unavoidable and necessary concomitance of such an action resulting from a situation which is not of the creation of the authorities. After all, clause (b) is pot meant to be applied 'in ordinary, normal situations but in such situations where it is not reasonably practicable to hold an inquiry.

The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform capable of being put into practice, done or accomplished: feasible". Further, the words used are not, "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a. reasonable view of the prevailing situation. 'It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together, with his associates, so terrorizes, threatens

or intimidate witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely. in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a se the court will strike down the order dispensing with the inquiry as also the

order imposing penalty. The case of Arjun Chaubey vs. Union of India[72] is an instance in point. In that case the appellant was working as a senior clerk in the office of the Chief Commercial superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter o the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on .the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was, being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter.

[72] AIR 1984 SC 1356

It is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated against a government servant. Such a situation can also come into existence subsequently during the course of an inquiry, for instance, after the service of a charge-sheet upon the government servant or after he has filed his written statement thereto or even after evidence has been led in part. In such a case also the disciplinary authority would be entitled to apply clause (b) of the second proviso because the word "inquiry" in that clause includes part of an inquiry. It would also not be reasonably practicable to afford to the government servant and opportunity of hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it the government servant absconds and cannot be served or will not participate in the inquiry. In such cases, the matter must proceed *ex-parte* and on the materials before the disciplinary authority. Therefore, even where a part of an inquiry has been held and the rest is dispensed with under clause (b) or a provision in the service rules analogous thereto, the exclusionary words of the second proviso operate in their full vigour and the government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided by Article 311(2).

The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority

should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a Constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional.

It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. The reason for dispensing with the inquiry need not, therefore find a place in the final order. It would be usual, to record the reason separately and then considers the question of the penalty to be imposed and pass the order imposing the penalty. It would, however, be better to record the reason in the final order in order to avoid the allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated. The reason for dispensing with the inquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of clause (b) of the second proviso. For instance, it would be no compliance with the requirement of clause (b) for the disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any inquiry. Sometimes a situation may be such that it is not reasonably practicable to give detailed reasons for dispensing with the inquiry. This would not, however, per se invalidate the order. Each case must be

judged on its own merits and in the light of its own facts and circumstances.

If reasons are not recorded in the final order, the need of communicating them to the concerned government servant to enable him to challenge the validity of the reasons in a departmental appeal or before a court of law does not arise. As the constitutional requirement in clause (b) is that the reason for dispensing with the inquiry should be recorded in writing. There is no obligation to communicate the reason to the government servant. At clause (3) of Article 311 makes the decision of the disciplinary authority on this point final, the question cannot be agitated in a departmental appeal, revision or review., The obligation to record the reason in writing is provided in clause (b) so that the superiors of the disciplinary authority may be able to judge whether such authority had exercised its power under clause (b) properly or not with a view to judge the performance and capacity of that officer for the purposes of promotion etc. It would however, be better for the disciplinary authority to communicate to the government servant its reason for dispensing with the inquiry because such communication would eliminate the possibility of an allegation being made that the reasons have been subsequently fabricated. It would also enable the government servant to approach the High Court under Article 226 or, in a fit case, this Court under Article 32. If the reasons are not communicated to the government servant

and the matter comes to the court, the court can direct the reasons to be produced and famished to the government servant and if still not produced, a presumption should be drawn that the reasons were not recorded in writing and the impugned order would then stand invalidated. Such presumption can, however, be rebutted by a satisfactory explanation for the non-production of the written reasons.

**The Second Proviso - Clause (c)**:

We now turn to the last clause of the second proviso to Article 311(2), namely, clause (c). Though it's exclusionary operation on the safeguards provided in Article 311(2) is the same as those of the other two clauses, it is very different in content from them. While under clause (b) the satisfaction is to be of disciplinary authority, under clause (c) it is to be of the President or the Governor of a State, as the case may be. Further, while under clause (b) the satisfaction has to be with respect to whether it is not reasonably practicable to hold the inquiry, under clause (c) it is to be with respect to whether it will not be expedient in the interest of the security of the State to hold the inquiry. Thus, in one case the test is of reasonable practicability of holding the inquiry, in the other case it is of the expediency of holding the inquiry, while clause (b) expressly requires that the reason for dispensing with the inquiry should be recorded in writing, clause (c) does not so require it, either expressly or impliedly.

The expressions "law and order", "public order" and "security of the State" have been used in different Acts. Situations which affect "public order" are graver than those which affect "law and order" and situations which affect "security of the State,, are graver than those which affect "public order". Thus, of those situations those which affect "security of the State" are the gravest. Danger to the security of the State may arise from without or within the State. The expression "security of the State" does not mean security of the entire country or a whole State. It includes security of a part of the State. It also cannot be confined to an armed rebellion or revolt. There are various ways in which security of the State can be affected. It can be affected by State secrets or information relating to defence, production or similar matters being passed on to other countries, whether inimical or not to our country; or by secret links with terrorists. It is difficult to enumerate the various ways in which security of the State can be affected. The way in which security of the State is affected may be either open or clandestine. Amongst the more obvious acts which affect the security of the State would be disaffection in the Armed Forces or para-military Forces. Disaffection in any of these Forces is likely to spread, for disaffected or dissatisfied members of these Forces spread such dissatisfaction and disaffection among other members of the Force and thus induce them not to discharge their duties properly and to commit acts of

indiscipline, insubordination and disobedience to the orders of their superiors. Such a situation cannot be a matter affecting only law and order or public order but, is a matter affecting vitally the security of the State. In this respect, the Police Force stands very much on the same footing as a military or a para-military force for it is charged with the duty of ensuring and maintaining law and order and public order, and breaches of discipline and acts of disobedience and insubordination on the part of the members of the Police Force cannot be viewed with less gravity than similar acts on the part of the members of the military or para-military Forces. How important the proper discharge of their duties by members of these Forces and the maintenance of discipline among them is considered can be seen from Article 33 of the Constitution. Prior to the Constitution (Fiftieth Amendment) Act, 1984, Article 33 provided as follows:

"33. Power to Parliament to modify the tights conferred by this Part in their application to forces Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

By the Constitution Fiftieth Amendment) Act, 1984, this Article was substituted. By the Substituted Article the scope of the

Parliament's power to so restrict or abrogate the application of any of the Fundamental Rights is made wider. The substituted Article 33 reads as follows:

"33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc. Parliament may, by law, determine to what extent any of the rights conferred by this Part shall in their application to, -

(a) the members of the Armed Forces; or

(b) the members of the Forces charged with the maintenance of public order; or

(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c),be restricted or abrogated so as to ensure the proper discharge of: their duties and the maintenance of disc line among them."

Thus, the discharge of their duties by the members of these Forces, and the maintenance of discipline amongst them is

considered of such vital importance to the country that in order to ensure this the Constitution has conferred power upon Parliament to restrict or abrogate any of the Fundamental Rights in their application to them.

The question under clause (c), however, is not whether the security of the State has been affected or not, for the expression used in clause (c) is "in the interest of the security of the State". The interest of the security of the State may be affected by actual acts or even the likelihood of such acts taking place. Further, what is required under clause (c) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is not expedient to hold an inquiry as contemplated by Article 311(2). The satisfaction of the President or Governor must, therefore, be with respect to the expediency or inexpediency of holding an inquiry in the interest of the security of the State. The Shorter Oxford English Dictionary, Third Edition, defines the word "inexpedient" as meaning "not expedient, disadvantageous in the circumstances, unadvisable impolitic" The same dictionary defines "expedient" as, meaning *inter alia* "advantageous; fit, proper, or suitable to the circumstances of the case" Webster's Third New International Dictionary also defines the term "expedient" as meaning inter alia "characterized by suitability, practicality, and efficiency in

achieving a particular end, fit, proper, or advantageous under the circumstances". It must be borne in mind that the satisfaction required by clause (c) is of the Constitutional Head of the whole country or of the State. Under Article 74(1) of the Constitution, the satisfaction of the President would be arrived at with the aid and advice of his Council of Ministers with the Prime Minister as the Head and in the case of a State by reason of the provisions of Article 163(l) by the Governor acting with the aid and advice of his Council of Ministers with the Chief Minister as the Head: Whenever, therefore, the President or the Governor in the constitutional sense is satisfied that it will not be advantageous or fit or proper or suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under clause (c). The satisfaction so reached by the President or the' Governor must, necessarily be, a subjective satisfaction. Expediency involves matters of policy. Satisfaction may be arrived at, as a result of 'secret information received by the Government about the brewing danger to the security of the State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information may very often result in disclosure of the source of such information. Once known, the particular source

from which the information was received would no more be available to the Government. The reasons for the satisfaction reached by the President or Governor under clause (c) cannot therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public.

In the case of clause (b) of the second proviso, clause (3) of Article 311 makes the decision of the disciplinary authority that it was hot reasonably practicable to hold the inquiry final. There is no such clause in Article 311 with respect to the satisfaction reached by the President or the Governor under clause (c) of the second proviso. There are two reasons for this. There can be no departmental appeal or other departmental remedy against the satisfaction reached by the President or the Governor; and so far as the Court's power of judicial review is concerned, the Court cannot sit in judgment over State policy or the wisdom or otherwise of such policy The Court equally cannot be the Judge of expediency or inexpediency. Given a known situation, it is not for, the Court' to decide whether it was expedient or inexpedient in the circumstances of the case to dispense with the inquiry. The satisfaction reached by the President or Governor under clause (c) is subjective satisfaction and. therefore, would not be a fit matter for judicial review, Relying upon the observations of Bhagwati, J.[73] it was submitted that the power of judicial review is not excluded

[73] State of Rajasthan vs. Union of India AIR 1977 SC 1361,1414 and 1415

where the satisfaction of the President or the Governor has been reached *mala fide* or is based on wholly extraneous or irrelevant grounds because in such a case, in law there would be no satisfaction of the President or the Governor at, all. It is unnecessary to decide this question because in the matters under clause (c) before us, all the materials, including the advice tendered by the Council of Ministers, have been produced and they clearly show that, in those cases the satisfaction of the Governor was neither reached malafide nor was it based on any extraneous or irrelevant ground.

# Chapter 02: PURPOSE & SCOPE

2.1 Purpose of Disciplinary Enquiry

2.2 Scope of Disciplinary Enquiry

2.3 Principles of Natural Justice and their application in the Disciplinary Enquiry.

## 2.1 PURPOSE OF DISCILIANRY ENQUIRY:

The necessity to have a proper disciplinary enquiry procedure is to maintain effective discipline in the organisation and to have effective control over the etiquette of the employees in an organization. The objective is not to punish somebody but is to improve his conduct & behaviour, if an employee has failed anywhere. It is mainly to "regulate" the behaviour of an employee other than to punish him. In the case of Union of India and others, Appellants vs. J. Ahmed[74], the Supreme Court has observed that

> "what would constitute misconduct for the purpose of disciplinary proceeding a look at the charges framed against the respondent would affirmatively show that the

[74] AIR 1979 SC 1022

charge *inter alia* alleged failure to take any effective preventive measures meaning thereby error in judgment in evaluating developing situation. Similarly, failure to visit the scenes of disturbance is another failure to perform the duty in a certain manner. Charges Nos. 2 and 5 clearly indicate the shortcomings in the personal capacity or degree of efficiency of the respondent. It is alleged that respondent showed complete lack of leadership when disturbances broke out and he disclosed complete inaptitude, lack of foresight, lack of firmness and capacity to take firm decision. These are personal qualities which a man holding a post of Deputy Commissioner would be expected to possess. They may be relevant considerations on the question of retaining him in the post or for promotion, but such lack of personal quality cannot constitute misconduct for the purpose of disciplinary proceedings. In fact, charges 2, 5 and 6 are clear surmises on account of the failure of the respondent to take effective preventive measures to arrest or to nip in the bud the ensuring disturbances. We do not take any notice of charge No. 4 because even the Enquiry Officer has noted that there are number of extenuating circumstances which may exonerate the respondent in respect of that charge. What was styled as charge No. 6 is the conclusion, viz., because of what transpired in the inquiry, the Enquiry Officer was of the view that the

> respondent was unfit to hold any responsible position. Somehow or other, the Enquiry Officer completely failed to take note of what was alleged in charges 2, 5 and 6 which was neither misconduct nor even negligence but conclusions about the absence or lack of personal qualities in the respondent. It would thus transpire that the allegations made against the respondent may indicate that he is not fit to hold the post of Deputy Commissioner and that if it was possible he may be reverted or he may be compulsorily retired, not by way of punishment. But when the respondent is sought to be removed as a disciplinary measure and by way of penalty, there should have been clear case of misconduct, viz., such acts and omissions which would render him liable for any of the punishments set out in Rule 3 of the Discipline and Appeal Rules, 1955. No such case has been made out".

In the case of Madan Gopal, vs. The State of Punjab and others[75], the Supreme Court further observed that ------

> "Where an enquiry made by the Officer is made with the object of ascertaining whether disciplinary action should be taken against the Govt. servant for his alleged misdemeanour, it is an enquiry for the purpose of taking punitive action including dismissal or removal from service if the servant is found to

[75] AIR 1963 SC 531

have committed the misdemeanour charged against him".

As stated herein before, a very significant arena of service jurisprudence is the maintenance of discipline in the precincts of employment and the need for initiating disciplinary proceedings against an employee on the charges of misconduct and other lapses by adhering the rules of natural justice and providing reasonable opportunity to delinquent employee before any final order of penalty is passed by the disciplinary authority. The Supreme Court, in the case of Sur Enamel and Stamping Works Ltd., vs. The Workmen[76], held that the mere form of an enquiry would not satisfy the requirements of complete adjudication to protect the disciplinary action against a workman. An enquiry cannot be said to have been properly held unless:

(i) the employee proceeded against has been informed clearly of the charges levelled against him

(ii) the witnesses are examined - ordinarily in the presence of the employee-in respect of the charges

(iii) the employee is given a fair opportunity to cross examine witnesses

[76] AIR 1963 SC 1914

(iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and

(v) the enquiry officer records his findings with reasons for the same in his report.

In the recent judgment the supreme court of India in the case of Union of India and others, vs. Mohd. Ramzan Khan[77], once again reiterated that Disciplinary inquiry is quasi-judicial in nature. There is a charge and a denial followed by an inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principles of natural justice. With the Forty-Second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his; conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a

[77] AIR 1991 SC 471

finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected.

As discussed in chapter – 1, there exists no watertight definition for the terms “discipline”, “misconduct” in the Industrial Jurisprudence. According to Mr.K.P Chakravarti in his book “Domestic Enquiry and Punishment”[78], it has been stated that three main points involved in the term discipline is (a) Positive aspect (b) negative aspect (c) it implies maintenance of control over the rank and file of the subordinates. And the basic idea of discipline linked with master and servant relationship, it is implied in the every master and servant relationship that a master has right to exercise his control lover his servant, not only control over his work, but also disciplinary control over his conduct. While exercise of that inherent right, the master can punish his servant by way of discharge, dismissal or stoppage of increment or promotion, etc for any misconduct justifying such punitive action in consonance with the applicable rules.

Master and servant relationship has been reflected by way of contracts, appointment letter and by following certain work

[78] 3rd Edition -1998 at page 3

etiquette's and express and implied disciplinary rules. Nonetheless, the basic obligation of the employee is to serve the employer faithfully and honestly. In the present Industrial Jurisprudence scenario too, the rights of the employer to terminate the services of the employee on the ground of "loss of confidence" have remained unfettered the apex court and the courts below have interfered[79] in such kind of terminations very often terming that the same are falls under the category of "termination simplicitor" in other words summary termination sans enquiry process whatsoever.

The Supreme Court has been succinctly laid down the touchstones of the principles of the relationship between the employer and the employee[80] as follows:

(a) Servant must be obedient to and amenable to the directions of the master; and
(b) The master must have the power to discharge or dismiss him.

In case, the above ingredients are absent in the relationship, there cannot be a master and servant relationship and master has no power and jurisdiction to initiate disciplinary action or such employee has no case to make against such employer.

[79] AIR 1984 SC 229, AIR 1999 SC 983, AIR 1996 SC2618, AIR 1985 SC1128, AIR 1982 SC 1062
[80] AIR 1951 SC 4

The common law right of the employer “to hire and fire” has been largely modified and changed by the concept of *social justice* as well as statutory provisions of the state (welfare state like India). The disciplinary action must have now the sanction of law and has to be conducted according to the established procedure and due process of law. In the wake of the changes brought in by the concept of *welfare state* and *social justice* in the relationship of the master and servant, discipline now largely depend upon the mutual co-operation between the employer and the employees and willing to obedience of the employees to the rules of the establishment. To ensure better discipline in the industry mutual efforts of the employers and the employees are very necessary. Accordingly, it is pertinent to mention here that the observations of V.R Krishna Iyer in his work Law and the People, as follows:

“The doctrine of ‘laissez faire’ which held sway in the world since the time of Adam Smith has particularly given place to a doctrine which emphasizes the duty of the State to interfere in the affairs of the individuals in the interest of social well being of the entire community. As Julian Huxley remarks in his essay on Economic Man and Social Man, ‘many of our old ideas must be translated, so to speak, in to a new language. The democratic idea of freedom, for instance must loose its nineteenth century meaning of individual liberty in the economic sphere, and become adjusted to new conception of social duties and

responsibilities. When a big employer talks about his democratic rights and individual freedom, meaning thereby a claim to socially irresponsible control over the lives of tens of thousands of human beings whom it happens to employ, he is talking in dying language"[81]

In an approach to ensure the industrial peace and discipline in the industry, the following principles may serve as guidelines for both the employers and employees:

ON THE SIDE OF THE EMLOYERS / MANAGEMENT:

- ?? No undue change in the work procedures
- ?? The disciplinary action and procedure thereof shall be clearly laid down and well publicized.
- ?? Fair and just application of the rules and regulations.
- ?? No vindictive attitude.
- ?? Penalty to be imposed in proportionate to the misconduct.

ON THE SIDE OF THE EMPLYEES:

- ?? Employees should abide by the rules of the company, standing orders and other lawful orders of the management vogue in from time to time.
- ?? Discharge duties to the utmost honest and faithfulness.
- ?? Avoid absenteeism.

[81] Law and the People – A collection of Essays – V.R. Krishna Iyer. J

- ?? Not to cause damage reputation and interest of the management.
- ?? Strikes and other such activities to be avoided.
- ?? Amicable settlement of disputes at floor / plant / Industry level.

In the public utility service, the workers responsibility is greater because their acts and omissions largely affect the public, in other words they are responsible to the public for their acts and omissions, and the same has been reiterated by the Supreme Court in the recent judgment[82].

It has been quoted very often that efficiency and discipline are essential factors among other factors for success of any organization. Meanwhile, it is very difficult to maintain these factors, especially the "discipline" in the work place as the workers have been protected by various social security and social welfare legislations. However, disciplinary action is resorted to enforce discipline in the work place. No organization can ever function without resorting to disciplinary action is being taken against errant employees. As the matter of maintenance of discipline in the Industry is of utmost relevant, as in the contemporary society, the "industry" whatever nature it may be called as temples of modern Society. One can easily predict and presume the impact of indiscipline; consequences of

[82] T.K Rangarajan vs. Govt. of T.N & ors (2003) 6 SCC 581

haphazard and nontransparent disciplinary enquiry process will have negative impact on the society as a whole and colossal loss to the economy of any society. In other words, it goes to suggest that a systematic, transparent and codified disciplinary enquiry process will serve long way to keep up better Industrial Relations.

METHOD OF ENFORCEMENT OF DISCIPLINE:

It is fact that maintenance of internal discipline in an organization is the responsibility of the management and the no outside agency can interfere with the way it should manage its internal affairs. As stated *supra* that the employer has inherent right to maintain efficiency of work and regulate the conduct of the workmen in the work place. However, while resorting to the said inherent right the employer should not be vindictive, unfair, and unjust and not be biased. Disciplinary action is nothing but a method of enforcement of discipline by punishing a delinquent employee and making thereof a mark of deterrent effect on the rest of employees, which will enable employer to maintain efficiency and discipline in the work place.

Disciplinary action thus contemplates certain procedure to be followed by the management. The procedure is based mainly on the principles of natural justice and equity. The intention of following the principles of natural justice that there exist no codified law to regulate the procedure of disciplinary enquiry,

unlike procedural laws of criminal procedure code and the civil procedure code to regulate the criminal and civil disputes respectively. Therefore, full and fair opportunity will be provided to the delinquent to prove his side of the story and defend the charges leveled against him. The Disciplinary action broadly consists of several stages viz;

(a) Initiation of disciplinary enquiry by way of complaint / preliminary enquiry / *suo-moto* action of the management;
(b) Charge-sheet;
(c) Suspension if circumstances necessitates;
(d) Appointment of Enquiry Officer;
(e) proceedings before Enquiry Officer which includes; delinquent to be represented by the lawyer, enquiry proceedings vis-à-vis criminal proceedings, record of evidence, Enquiry Report, and action of the management on the finding of the enquiry officer.

Thus the disciplinary proceedings are not an empty formality. It is a serious matter of concern not only with disciplining of the individual workman, but as stated *supra* it is intended to maintain probity of the administration of an Industry as a whole.

## 2.2 SCOPE OF DISICPLINARY ENQUIRY:-

The procedure should be strictly followed and the delinquent employee should be given enough opportunity to defend his

case. The opportunity given should not only be fair but it should also appear to be fair. As per the conduct / disciplinary rules of the respective organization, whenever the disciplinary authority is of the opinion that there are grounds for enquiring to the truth thereof. The departmental enquiry should be conducted within the frame work of the established rules and by following principles of Natural Justice and conduct / disciplinary Rules, i.e.:

- One should not be judged on his own cause.
- A fair opportunity should be given to a delinquent and nothing shall be done behind his back.

Normally, the High Court and the Supreme Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of 'guilt' is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But, if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings

would not be interfered with[83]. The Writ Court while exercising writ jurisdiction will not reverse a finding of the enquiring authority on the ground that the evidence adduced before it is insufficient. If there is some evidence to reasonably support the conclusion of the enquiring authority, it is not the function of the Court to review the evidence and to arrive at its own independent finding. The enquiring authority is the sole Judge of the fact so long as there is some legal evidence to substantiate the finding and the adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings.

The *scope* of the enquiry called for when the question which calls for determination in all such cases is whether the facts satisfy the criterion repeatedly laid down by this Court that an order is not passed by way of punishment, and is merely an order of termination simpliciter, if the material against the Government servant on which the superior authority has acted constitutes the motive and not the foundation for the order. The application of the test is not always easy. In each case it is necessary to examine the entire range of facts carefully and consider whether in the light of those facts the superior authority intended to punish the Government servant or, having regard to his character, conduct and suitability in relation to the post held by him it was intended simply to terminate his services. The function of the court is to discover the nature of

[83] Kuldeep Singh, vs. The Commissioner of Police and others, AIR 1999 SC 677

the order by attempting to ascertain what was the motivating consideration in the mind of the authority which prompted the order[84].

The expression 'misconduct' covers a large area of human conduct. On the one hand, are the habitual late attendance, habitual negligence and neglect of work, on the other hand, are riotous or disorderly behaviour during working hours at the establishment or acts subversive of discipline, willful insubordination or disobedience. In the word of Shah, J., "misconduct spreads over a wide and hazy spectrum of industrial activity'; the most seriously subversive conducts rendering an employee wholly unfit for employment to mere technical default are covered thereby[85]".

Misconduct falling under any one or several of the heads of misconduct my not always involve direct loss or damage to the employer, but may render the functioning of the establishment impossible or extremely hazardous. For instance, assault on the manager of an establishment may not directly involve the employer in any loss or damage which could be equated in terms of money, but it would render the working of the establishment impossible. Several acts of misconduct may also be envisaged not directly involving the establishment in any

[84] Nepal Singh, vs. State of U.P. and others, AIR 1980 SC1459
[85] Delhi Cloth & Genl. Mills Ltd., vs. Workmen, 1969-II-LLJ, 755 (772) (SC)

loss, but which are destructive of discipline and cannot be tolerated[86].

For modulating the quantum of punishment, a distinction has to be made between mere technical misconduct which leaves no trial of indiscipline on one hand and a misconduct resulting in damage to the employer's property or serious misconduct resulting in damage, may be conducive grave indiscipline for instance acts of violence against officers of the management or other employees or riotous behaviour, in or near the place of employment, on the other. But the scope of the misconduct for the purpose of industrial adjudication is wider than that of criminal offence such as theft. To some extent, misconduct is civil crime, which is visited with civil and pecuniary consequences[87].

**Some conditions precedents and subsequent on the part of the management while resorting to the inherent power of discipline in the workplace**:-

As discussed in the part of purpose of disciplinary enquiry – it is will within the managerial powers to maintain internal discipline. In order to maintain discipline, punitive action against the erring employees has often been taken. But there are certain conditions like every punitive action cannot be taken in isolation without the enquiry. In other words before imposition of penalty

[86] New victoria mills Co., Ltd., vs. L.C, 1970 Lab IC 428 (431) (All), *per* Beg.J
[87] Rama kant misra vs. State of U.P, 1982 Lab IC 1790 (SC).

(major) enquiry is must. We have already seen the history and evolution of doctrine of pleasure and the protection available for civil servants under Article 311 of the Indian constitution in chapter – 1 herein before. Accordingly, the concept of termination simpliciter (termination without due process of law / enquiry) is withering away from the text of the industrial jurisprudence. Law courts of the country, now very often held that such actions are not tenable at law.

In the landmark judgement of the Supreme Court in Secretary, Haryana State Electricity Board vs. Suresh & ors.[88] though this judgment is not exactly about the termination employees sans enquiry also known as termination simplicitor, but still, it is worth while to refer the observations of the apex court:

"Continuation of contract labour when the work is of perennial nature and the contractor does not obtain the licence under the Contract Labour (R&A) Act or the principal employer is not registered under the said Act. The judgement clarifies about determination of relationship of 'employer and employee' when the contract labour is engaged through contractor and such workers have completed 240 days of their service. In that eventuality such workers will become the employees of the principal employer."

[88] 1999 LLR 433

However, in each and every case of cessation of relationship between the employer and employee, employers need not to hold the enquiry. Employment relationships like, fixed term contractual appointments will come to an end as per the stipulations mentioned thereof. In such type of relationships and discontinuation thereof neither disciplinary enquiry warrants nor the Section 25 F of the Industrial Disputes Act, 1947 attracts. By stating above, we are not saying that there is a statutory guard available to the entrepreneur to hire the services on fixed term contract basis. As we have already said, the basis for the relationship between the employer and employee is a contract. In this perceptive, in the year 1984 a new clause was added to the definition of retrenchment u/s 2(oo) namely sub sec. (bb) of the Industrial Disputes Act, 1947 which reads as under:

> "Termination of service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein" .....does not amount to retrenchment.

With the protection of the above amended clause, the employer segment bravely and enthusiastically started deploying labour on contract for a fixed term / through contractor. However, over the period a large part of the employers particularly private

entrepreneurs used (mis-used) the said clause to the maximum extent at their convenience & advantage. So at this point of anti-thesis, the judiciary particularly the Supreme Court and the various High Courts pitched-in and has been trying to build consensus / resolve the existing problems with regard to interpretation of the said amended clause under the Industrial Disputes Act.

It is relevant to mention here that the views of the Supreme Court expressed in some of the recent land marked judgements passed by it with regard to termination of casual / temporary / fixed term contract employment.

It depends upon the supervision, control and the nature of activities being carried out by the employees as engaged through the contractor. The most important factor is that the nature of work which is of temporary and / or perennial nature. It is pertinent to refer one case where the petitioner, a residential university having 14 hostels to accommodate students and cafeterias to provide food services to the resident of hostels and others. There were about 175 employees in cafeterias and they claimed to be employees of the petitioner university with regular pay scales. The two disputes were referred to Labour Court for adjudication and Labour Court held in their favour and High Court in writ petition confirmed the same. Hence, an appeal was filed in Supreme Court. While

rejecting the appeal it has been held that the hostel and cafeterias regulations framed under UP Agricultural University Act lead to unmistakable conclusion that the employees of the cafeterias cannot be but termed to be employees of the university in as much as the university has control over the running of the cafeterias. The concerned expressed by the Supreme Court[89] on the deployment of contract labour against the perennial work is quoted hereunder:

"*There are questions remain unanswered*: The society shall have to thrive: The society shall have to prosper and this prosperity can only come in the event of there being a wider vision for a total social good and benefit: It is not bestowing any favour to any body to it is a mandatory obligation to see that the society thrives. The deprivation of the weaker section we had for long but time has now come to cry halt and it is for the law courts to rise up to the occasion and grant relief to a seeker of a just cause and just grievance. Economic justice is not a mere legal jargon but in the new millennium, it is the obligation for all to confer this economic justice to a seeker: society is to remind society justice is the order and economic justice is the rule of the day. Narrow pedantic approach to statutory documents no longer survives. The principle of corporate jurisprudence is now being imbibed in the industrial jurisprudence and there is a long catena of cases in regard

[89] GB Panth University of Agriculture and Technology vs. State of UP, 2000 LLR 1189(SC)

thereto - the law thus is not a state of fluidity since the situation is more or less settled. As regards interpretation widest possible amplitude shall have to be offered in the matter of interpretation of statutory documents under industrial jurisprudence. The draconian concept is no longer available. Justice - social and economic as noticed above ought to be made available with utmost expedition so that the socialistic pattern of the society as dreamt of by the founding fathers can thrive and have its foundation so that the future generation do not live in the dark and cry social and economic justice. "

The similar views were also held by the Supreme Court in the earlier cases namely Parimal Chandra Raha vs. LIC[90] In this case, the contract labour engaged in the canteens of Life Insurance Corporation held the labour deployed in the canteens are the employees of the LIC.

As we have stated above that the intervention of the Judiciary depends on the supervision and control and the nature of activities being carried out by the employees as engaged through contractor or for a fixed term contract. There are some instances wherein SC has intervened when the employees have been terminated on cessation of the contract. In the case of Director, Institute of Management Development, UP vs. Smt.

[90] 1995 JT(3) SC 268.

Pushpa Srivastava[91] in this case the Apex Court has held that where the appointment is purely on ad-hoc basis and is contractual and by efflux of time, the appointment comes to an end, the person holding such post can have no right to continue in the post. This is so with the person is continued from time to time on ad hoc basis for more than a year. He cannot claim regularisation in service on the basis that he was appointed on ad-hoc basis for more than a year.

In one case the Allh. High Court[92] held that workman appointed on 5.6.86 as an English Typist and continues to work till 29.2.92 he was given an ad-hoc appointment with breaks. Last letter was given on 19.6.91 for fixed term employment till 1992. No doubt that the award of the Labour Court to reinstate him is illegal that the termination of the workmen appointed for fixed period amount to retrenchment but the termination amount to discrimination since two persons engaged subsequent to the appointment of the workman were working. The award is modified and the workman is to be reinstated. In another case Pramod Kumar Tiwari vs. Hindustan Fertilizer Corporation Ltd[93], the MP High Court held that the termination of a contractual appointment of a workman will not amount to retrenchment, since the same will be covered by Sec. 2(oo)(bb) of the Industrial Disputes Act which excludes certain terminations

[91] AIR 1992 SC 2070,
[92] (2000 LLR 56)
[93] 1994 LLR 465

from the definitions of retrenchment. In the instant case an employee appointed for a project, which lasted for 8 years, on closure of the project termination of such employee will not amount to retrenchment.

The recent judgement of Supreme Court in the case of Deepa Chandra vs. State of UP & ors.[94]. In this case a dispute was raised by the appellant on the ground that though he had put in more than 240 days in each year of service from 1982 - 1988 he had been retrenched without following procedure prescribed under Sec. 25F of Industrial Disputes Act. The Industrial Tribunal, therefore, on adjudication came to the conclusion that termination of service of the appellant is bad and in particular notice that persons have been employed subsequent to the appellant have been continuing in service, whereas the services of the appellant had been put to an end. In the circumstances, the Labour Court made an award granting the reinstatement with back wages with other consequential benefits that may follow from it. The High Court approached the matter; the High Court set aside the award of the Labour Court. Subsequently, the Supreme Court approached the matter and held that the High Court lost the sight of the point in issue i.e. where an employee had put in service more than 240 days in each year for several years whether his services can be put to an end without following procedure prescribed u/s 25 F of

[94] 2001 LLR 312

Industrial Disputes Act. If there has been violation that of such an employee will have to be reinstated in his original service on the same terms and conditions in which he was working earlier. Accordingly, the order passed by the Labour Court was restored by the Supreme Court.

In another case Keshod Nagarpalika vs. Pankajgiri Jhavergiri[95] The Gujarat Hihg Court has held that Sec. 25F of the Industrial Disputes Act, conditions precedent for retrenchment of workman. A workman must have worked for 240 days. In the present case, the workman has pleaded that he has worked for 16 months; the management did not contradict it, the award of the Labour Court granting him reinstatement with full back wages cannot be set aside.

In view of the above explained settled position of law, if an employee works more than 240 days in a year even the guard stipulated under section 2(oo) (bb) is of no use. Because one of the condition precedents u/s 25F denotes that “no workman employed in an industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until .....(condition precedents)”. Therefore, the word continuous service has to be understood as defined in Sec. 25B where the employee had completed service of 240 days, the provisions of Sec. 25F would be attracted. If a person

[95] 2000 LLR 416

is a workman as defined in the Industrial Disputes Act and the employer is the same, he earns continuous service by working for 240 days within a period of 12 calendar months preceding the date of retrenchment the same view was held by the Hon'ble High Courts of Rajasthan and Madhya Pradesh. For the purpose of Sec. 25F a period of 240 days has to be counted from the day of the workman had joined the services even though on ad-hoc basis. This was held by Supreme Court in the case of Krishna Kumar vs. UP SFEC Corporation[96].

Further, the labour deployed who completes more than 240 days they may be required to be paid retrenchment compensation on their termination under Sec.25 (F) of the Industrial Disputes Act. Even on their non-completion of their said period and to avoid the magic of calculation of 240 days it is advisable to pay the said compensation by way of an abundant caution. Thereby even if the employee makes claim for retrenchment compensation, the management would be in a better position to contend that it has been paid retrenchment compensation as an abundant caution and thereby it has followed the procedure prescribed under Sec.25 (F) of the Industrial Disputes Act.

The above discussions witness that the approach and concept of social justice adopted by the judicial system has taken away

[96] (1994) III LLJ (supp.) 254 (SC)

much of the common law right of the employer. The exercise of managerial power is now subject to statutes, awards, settlements, and regulations. The absolute power of hire and fire has been restricted largely because:-

(a) Security of service of the Industrial worker no longer depends upon the sweet will of the employer.
(b) No punitive action will be justified if the procedure followed is not in accordance with the provisions of the law / natural justice.

Having said so, it is pertinent to reiterate again that as there exist no codified law in this regard, thus still lot of room left with employer to influence, coerce the enquiry proceedings and much less to say ultimately he may reverse the finding of the enquiry officer and much less to say that ultimately, employer may reverse the findings of the enquiry officer. All these aspects and their validity and judicial interference there to, is being dealt in the below mentioned chapters.

Generally, the scope of initiation of disciplinary enquiry against such alleged misconducts committed within the premises of the establishment and in the course of the employment.

Let us analyze views of the law courts on this complex and dynamic aspect of the disciplinary proceedings initiated against

delinquent employee for alleged misconduct committed within the premises of the work precincts and / or during the course of the employment and otherwise:

M/s. Glaxo Laboratories (I.) Ltd, vs. Presiding Officer, Labour Court, Meerut,[97] The ratio held in this case "To enable an employer to peacefully carry on his industrial activity, the Act confers powers on him to prescribe conditions of service including enumerating acts of misconduct when committed within the premises of the establishment. The employer has hardly any extra-territorial jurisdiction. He is not the custodian of general law and order situation nor the Guru or mentor of his workmen for their well regulated cultural advancement. If the power to regulate the behaviour of the workmen outside the duty hours and at any place wherever they may be was conferred upon the employer, contract of service may be reduced to contract of slavery. The employer is entitled to prescribe conditions of service more or less specifying the acts of misconduct to be enforced within the premises where the workmen gather together for rendering service. The employer has both power and jurisdiction to regulate the, behaviour of workmen within the premises of the establishment, or for peacefully carrying the industrial activity in the vicinity of the establishment".

[97] AIR 1984 SC 504

When the broad purpose for conferring power on the employer to prescribe acts of misconduct that may be committed by his workmen is kept in view, it is not difficult to ascertain whether the expression 'Committed' within the premises of the establishment or in the vicinity thereof would qualify each and every act of misconduct collocated in clause 10 or the last two only, namely, *'any act subversive of discipline and efficiency and any act involving moral turpitude'*. To buttress this conclusion, one illustration would suffice. Drunkenness even from the point of view of prohibitionist can at best be said to be an act involving moral turpitude. If the misconduct alleging drunkenness as an act involving moral turpitude is charged, it would have to be shown that it was committed within the premises of the establishment or vicinity thereof but if the misconduct charged would be drunkenness the limitation of its being committed within the premises of the establishment can be disregarded.

*Para 15 of the judgment:* The misconduct prescribed in a Standing Order which would attract a penalty has a causal connection with the place of the work as well as the time at which it is committed which would ordinarily be within the establishment and during duty hours. The *causal connection* in order to provide linkage between the alleged act of misconduct and employment must be real and substantial, immediate and proximate and not remote or tenuous.

*Para 23 of the judgment*: Some misconduct neither defined nor enumerated and which may be believed by the employer to be misconduct ex-post facto would not expose the workmen to a penalty. It cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant Standing Order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant Standing Order but yet a misconduct for the purpose of imposing a penalty.

Mulchandani Electrical and Radio Industries Ltd., Appellant vs. The Workmen,[98] Standing order no.24 (misconduct) was subjected judicial scrutiny, which reads as:-
(1) Commission of any act subversive of discipline or good behaviour within the premises or precincts of the establishment:
xx xx xx xx xx xx xx"

Assault by operator on charge-man of same factory would be an act subversive of discipline. The fact that the assault was committed outside the factory (in a suburban train while the charge-man assaulted was going (home) would not take it out of the above standing order. The words "within the premises or precincts of the establishment" refer not to the place where the act which is subversive of discipline or good behavior is

[98] AIR 1975 SC 2125

committed but where the consequence of such an act manifests itself. In other words, an act, wherever committed, if it has the effect of subverting discipline or good behaviour within the premises or precincts of the establishment, will amount to misconduct under Standing Order 24 (1).

Central India Coalfields Ltd., Calcutta, vs. Ram Bilas Shobnath,[99] The Supreme Court held that "It is common ground that quarters are provided by the appellant to its employees and they are situated on the coal bearing area at a distance of about 200 feet from the pit-mouth according to the appellant and at a distance of 2000 feet according to the respondent. Standing Order No. 29(5) provides that drunkenness, fighting, riotous or disorderly or indecent behaviour constitutes misconduct, which entails dismissal. Normally this Standing Order would apply to the behaviour on the premises where the workmen discharge their duties and during the hours of their work. It may also be conceded that if a quarrel takes place between workmen outside working hours and away from the coal premises that would be a private matter which may not fall within Standing Order No. 29(5); but in the special circumstances of this case it is clear that the incident took place in the quarters at a short distance from the coal bearing area and the conduct of the respondent which is proved clearly amounts both to drunkenness as well as riotous, disorderly and

[99] AIR 1961 SC 1189

indecent behaviour". In the matter of Tata Oil Mills Co. Ltd., vs. The Workmen,[100] Standing Order 22 (viii) of the Certified standing orders of the Tata Oil Mills Co. Ltd., provided that without prejudice to the general meaning of the term "misconduct," it shall be deemed to mean and include, *inter alia,* drunkenness, fighting riotous or disorderly or indecent behaviour within or outside the factory.

The Supreme Court held that:

(i) it would be unreasonable to include within Standing Order 22(vii) any riotous behaviour without the factory which was the result of purely private and individual dispute and in course of which tempers of both the contestants became hot. In order that Standing Order 22(viii) may be attracted, it must be shown that the disorderly or riotous behaviour had some rational connection with the employment of the assailant and the victim.

(ii) Where, what the occasion for the assault by the charge-sheeted workman on another workman was and what motive actuated it, had been considered by the domestic tribunal, the findings of the domestic tribunal on these points must be accepted in proceedings before Industrial Tribunal, unless they were shown to be based on no evidence or were otherwise perverse.

[100] AIR1965 SC 155

(iii) If the charge-sheeted workman assaulted another workman solely for the reason that the latter was supporting the plea for more production, that could not be said to be outside the purview of Standing Order 22 (viii).

Palghat BPL & PSP Thozhilali Union vs. BPL India Ltd.,[101] The workers of BPL were on strike and threw stones on officers and also hit an officer with a stick near the BPL bus stop. According to the relevant standing Orders, "*any act of subversive discipline committed either within or outside the premises of the company*" was also misconduct. The workmen's counsel contended that the action of the workmen did not amount to misconduct. The Supreme Court rejected the contention and held that:

Any act subversive of discipline committed outside the premises is also misconduct. Any act unrelated to the service committed outside the factory would not amount to misconduct. But when a misconduct vis-à-vis the officers of the management is committed outside the factory, certainly, same would be an act subversive of discipline.

Agnani vs. Badri Das[102] The Supreme Court has held that though it is true that private quarrel between an employee and

[101] 1996 II LLJ 335 (SC)

[102] (1963-1 Lab LJ 684) (SC)

a stranger with which the employer is not concerned as falls outside the categories of misconduct, it cannot be reasonably disputed that acts which are subversive of discipline amongst employees or misconduct or misbehaviour by an employee which is directed against another employee of the concern may in certain circumstances constitute misconduct so as to form the basis of an order of dismissal or discharge. S. Govinda Menon vs. Union of India[103] In para 6 of the judgment the apex court has observed that "In our opinion, it is not necessary that a member of the Service should have committed the alleged act or omission in the course of discharge of his duties as a servant of the Government in order that it may form the subject-matter of disciplinary proceedings. In other words, if the act or omission is such as to reflect on the reputation of the officer for his integrity or good faith or devotion to duty, there is no reason why disciplinary proceedings should not be taken against him for that act or omission even though the act or omission relates to an activity in regard to which there is no actual master and servant relationship. To put it differently, the test is not whether the act or omission was committed by the appellant in the course of the discharge of his duties as servant of the Government. The test is whether the act or omission has some reasonable connection with the nature and condition of his service or whether the act or omission has cast any reflection

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**103** AIR 1967 SC 1274

upon the reputation of the member of the Service for integrity or devotion to duty as a public servant. We are of the opinion that even the appellant was not subject to the administrative control of the Government when he was functioning as Commissioner under the Act and was not the servant of the Government subject to its orders at the relevant time, his act or omission as Commissioner could form the subject-matter of disciplinary proceedings provided the act or omission would reflect upon his reputation for integrity or devotion to duty as a member of the Service". The Court relied on the observations made by Lopes, *L. J. in Pearce. vs. Foster, (1886) 17 QBD 536 at p. 542*:

> *"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified. not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant."*

Let us also see and analyze the scope of the disciplinary enquiry vis-à-vis when the delinquent admits / confess the charges and the views of the law courts and their limitation and parameter set thereof to the effect of admission of guilt:

**Evidentiary Value of the expression of admission / confession of guilt**: In the case of Sahoo vs. State of U.P,[104] the Supreme Court has observed “It is said that one cannot confess to himself; he can only confess to another. This raises an interesting point, which falls to be decided on a consideration of the relevant provisions of the Evidence Act. Section 24 to 30 of the Evidence Act deal with the admissibility of confession by accused persons in criminal cases. But the expression "confession" is not defined. The Judicial Committee in Pakala Narayanaswami vs. Emperor[105] has defined the said expression thus:

> "A confession is a statement made by an accused which must either admit in terms the offence or at any rate substantially all the facts which constitute the offence."

A scrutiny of the provisions of Ss. 17 to 30 of the Evidence Act discloses, as one learned author puts it that statement is a genus, admission is the species and confession is the sub-species. Shortly stated, a confession is a statement made by an accused admitting his guilt. What does the expression "statement" mean? The dictionary meaning of the word "statement" is "the act of stating, reciting or presenting verbally or on paper." The term "statement", therefore, includes both

[104] *AIR 1966 SC 40*
[105] 66 Ind App 66: (AIR 1939 PC 47)

oral and written statements. It is also a necessary ingredient of the term that it shall be communicated to another? The dictionary meaning of the term does not warrant any such extension; or the reason of the rule underlying the doctrine of admission or confession demands it. Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence presumably on the grounds that, as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession does not depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission or confession, as the case may be".

In the case of K.S Srinivasan vs. Union of India,[106] the apex court has held that Admission - Probative value - - An admission is not conclusive proof of the matter admitted, though it may in certain circumstances operate as an estoppel. Relying on the ratio of the said judgment the court in the case of Allahabad Bank vs. Pronab Kumar Mukherjee[107], has held that an admission may not in all cases do away with the requirement of holding an enquiry. Even if no enquiry is

[106] AIR 1958 SC 419
[107] 1993 I LLJ 390

required to be held in a particular case, the conditions laid down in the relevant rules should be strictly followed

**No enquiry necessary when guilt is admitted** – In the case of Central Bank of India vs. Karunamoy Banerjee,[108] the Supreme Court has observed that "We must, however, emphasize that the rules of natural justice, as laid down by this Court, will have to be observed, in the conduct of a domestic enquiry against a workman. If the allegations are denied by the workman, it is needless to state that the burden of proving the truth of those allegations will be on the management; and the witnesses called, by the management, must be allowed to be cross-examined, by the workman, and the latter must also be given an opportunity to examine himself and adduce any other evidence that he might choose, in support of his plea. But, if the workman admits his guilt, to insist upon the management to let in evidence about the allegations, will, in our opinion, only be an empty formality". In nutshell, if a workman, against whom disciplinary proceedings are instituted, admits his guilt, there is no necessity for the management to hold any enquiry.

The Apex Court in the case of Channabasappa Basappa Happali, vs. The State of Mysore,[109] , has observed that – "it was contended on the basis of the ruling reported in R. vs. Durham Quarter Sessions; Ex parte Virgo, (1952 (2) QBD 1)

[108] AIR 1968 SC 266
[109] AIR 1972 SC32

that on the facts admitted in the present case, a plea of guilty ought not to be entered upon the record and a plea of not guilty entered instead. Under the English law, a plea of guilty has to be unequivocal and the Court must ask the person and if the plea of guilty is qualified the Court must not enter a plea of guilty but one of not guilty. The Police constable here was not on his trial for a criminal offence. It was a departmental enquiry, on facts of which due notice was given to him. He admitted the facts. In fact his counsel argued before us that he admitted the facts but not his guilt. We do not see any distinction between admission of facts and admission of guilt. When he admitted the facts, he was guilty. The facts speak for themselves. It was a clear case of indiscipline and nothing less".

In case a workman admits the charge against him or makes an unconditional and unqualified confession then there is nothing more to be done away of enquiry and it cannot be argued that the procedure of departmental enquiry should have been applied notwithstanding such admission or confession held in J.L Toppo vs. Tata Locomotive & Engg. Co. Ltd.,[110]

Andhra Pradesh High Court in the case of Instrumentation Ltd., vs. P.O. Labour Court,[111] has held that - Section 58 of the Evidence Act lays down that facts admitted need not be proved, and therefore, where the facts are admitted and those are

[110] 1964 ICR 586 (IC).
[111] 1988 II LLJ 492

sufficient to make out a case of misconduct, any further departmental enquiry would be an empty formality.

In the case of P.K Thankachan vs. Thalandu services Co-op Bank,[112] the Hon'ble High Court of Kerala has held that - evidence is required to prove disputed facts and no admitted facts. Where an admission is made after knowing the charges, no evidence is required to be held. It would be a different matter if the admission of guilt is by an employee who could not understand what the charges were or if he was induced or coerced into admitting his guilt.

In the case of Manger Boisahabi tea Estate vs. P.O. Labour Court,[113] the Hon'ble Guwahati High Court has held that - a misconduct owned and admitted by the delinquent is antithesis of the violation of principles of natural justice or victimisation as understood in industrial relations, as the question of prejudice does not arise under such circumstances.

In the case of Manjunatha Gowda vs. Director General of Central Reserve Police Force,[114] held by the Karnataka High Court that, there is no infringement whatsoever of the rules of natural justice if no enquiry is conducted after the charge is admitted by the delinquent employee. The Andhra Pradesh

[112] 1994 II LLJ 423,
[113] 1981 Lab IC 557,
[114] 1995 (70) FLR 659

High Court has further clarified in the case of K. Venkateshwarlu vs. Nagarjuna Gramin Bank,[115] , that even if the employer holds a departmental enquiry in-spite of such admission of guilt, and the Court finds some flaw or defect in such unnecessary enquiry conducted by the employer, the Court cannot set aside the order made by the employer imposing punishment. It is so because even if a defective enquiry is conducted, no prejudice is caused to the delinquent because action could have been taken against him on the basis of admission.

**Do's and Don'ts which administer the admission / confession:** - The Apex Court in the case of *Jagadish Prasad Saxena vs. Sate of M.P,*[116] held that, as the statements made by the appellant did not amount to a clear or unambiguous admission of his guilt, failure to hold a formal enquiry constituted a serious infirmity in the order of dismissal passed against him, as the appellant had no opportunity at all of showing cause against the charge framed against him and so the requirement of Art. 311(2) were not satisfied. - - Even if the appellant had made some statements which amounted to admission, it was open to doubt whether he could be removed from service on the strength of the said alleged admissions without holding a formal enquiry as required by the rules.

[115] 1995 II LLJ 492
[116] AIR 1961 SC 1070

It is of the utmost importance that in taking disciplinary action against a public servant a proper departmental enquiry must be held against him after supplying him with a charge-sheet, and he must be allowed a reasonable opportunity to meet the allegations contained in the charge-sheet. The departmental enquiry is not an empty formality; it is a serious proceeding intended to give the officer concerned a chance to meet the charge and to prove his innocence. In the absence of any such enquiry it would not be fair to strain facts against the appellant and to hold that in view of the admissions made by him the enquiry would have served no useful purpose. That is a matter of speculation which is wholly out of place in dealing with cases of orders passed against public servants terminating their services.

In Allahabad Bank vs. Pronab Kumar Mukherjee,[117] it has been held that an admission has to be construed strictly because it deprives a delinquent employee of his right to show that the allegations against him have no basic at all and that he is innocent. An admission of guilt is different from acceptance of moral obligation. If the employee denies the charges levelled against him but makes good the shortage considering that as in-charge of the department it is his moral obligation, it cannot be taken to be an admission of his guilt. The disciplinary authority should enquire as to whether it was an act of the employee as

[117] 1993 I LLJ 390,

in-charge or of the other employees under him which resulted in the shortage.

In the case of ACC Babock Ltd., vs. Bhimsa,[118] it has been held, if a person admits the allegation but gives reasons for the same, it does not amount to admission of guilt. It only amounts to accepting the fact of allegation but under extenuating circumstances which may be justified. In such a case, an enquiry is to be held as the workman has a right to lead evidence to support the plea of extenuating circumstances which may lead the management to take a lenient view.

Further it has been held in the case of P.Selvaraj vs. M.D Kattabamman Transport Corpn. Ltd.,[119] it has been held that where the employee stated in his statement that whatever that had happened, had happened because of the problems which were created by the passengers and their quarrel with him and that he had not consciously committed any mistake, it was held that this observation could not be taken to be an admission. Merely picking out a single sentence from the entire explanation, and treating the statement of the employee as amounting to admission of guilt could not be sustained.

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[118] (1987) 71 FJR 384

[119] *1999 I LLJ 1186*

In Associated Cement Co. Ltd., vs. Abdul Gaffar,[120] the workman had contended that his confession of guilt during the inquiry was given on an assurance by the inquiry office that the workman would not be dismissed from service. This was denied by the inquiry officer. The Court felt on an examination of the relevant facts that the workman's plea appeared to be an afterthought. It was further observed by the Court that as a rule of prudence, whenever there is a conflict of versions, the version given by the inquiry officer should normally be accepted.

**Fall-out from the aforementioned the judicial decisions and which are required to be kept in mind, viz;**

Principles regarding admission must be complied with:

(1) Confession statements should be scrutinized with utmost care & caution
(2) Confession should be in terms of the misconduct / charges.
(3) All the ingredients of the charge must be admitted in the confession.
(4) Confession should be interpreted as whole and an admission along with explanations / reasons does not amount to confession.

[120] *1980 Lab IC 683*

(5) Confession should be unconditional & unqualified.

(6) Confession should be secured without threat or coercion.

(7) Confession is also vitiated by inducement.

(8) Admission or confession before issue of charge sheet can be used as evidence but does not obviate enquiry.

**When admission is withdrawn**– When a confession / admission is retracted it becomes doubtful and therefore, the principles of natural justice mandates that it should be corroborated. In the case of Thotapalli Radhakrishnamurthy vs. Divisional Manager, United India Insurance Co.,[121] the court has observed that it is not safe to act upon the admission of the delinquent when it is denied and when it is alleged to have been extracted by coercion. Further in the case of Madikal Service Co-op. Bank ltd., vs. Labour Court [122] it has been held that where the charge-sheeted employee had made some inculcator statement before the audit part and also give a general statement in a letter that he had committed mistakes and was, therefore, guilty, but in his written statement of defence denied every one of the charges and also challenged the said inculpatory statement as being not voluntary, it was held that the Labour Court was justified in concluding that the employee did not pleas guilty to the charges. There should have been a proper enquiry examining the witnesses and the

[121] 1982 Lab IC 1745
[122] (1987) 71 FJR 322,

employee being allowed to cross-examine the witnesses and adduce evidence.

**When fact of misconduct has to be established inspite of admission** – In Natvarbhai S. Makwana vs. Union Bank of India[123], it was held by a Single Judge of the Gujarat High Court (at p. 302) that even in case of admission, the factum of misconduct must be established. Dealing with a case of theft or misappropriation of Bank money, the Court observed that it might happen that the bank authorities may *bona fide* believe that there is theft or misappropriation, and later on in audit, it might be discovered that there was accounting mistake and no theft or misappropriation whatsoever. To avoid such possibility, it is always necessary that the factum of misconduct be established. The delinquent employee may be induced to confess the guilt for various reasons. It is submitted that, putting it in simple language, the Court held that it should first be proved that the misconduct has been committed, and the admission would be relevant only with regard to the question whether the employee concerned is guilty of the said misconduct. It is submitted that such a dictum may hold good only in respect of a limited class of cases like theft or misappropriation, and it would be safer in such cases for the employer to prove the occurrence of theft on misappropriation

[123] 1985 II LLJ 296

and also consequent loss caused thereby even in case of admission.

## 2.3 APPLICABILITY OF PRINCIPLES OF NATURAL JUSTICE: -

It is universally understood that where there is no codified law, the principles of natural justice may be applicable. As well in the disciplinary / departmental enquiries there is no hard and fast written procedure as such, hence the principle of natural justice will acts as a variable to meet the ends of justice. In this direction there are catena of case laws, which decided by various courts of the land as to the degree of applicability, scope, purpose, objectivity etc., of the principles of natural justice in the process of Disciplinary Enquiry. Let us further analyze the evolution and applicability of the “principles of natural justice” under Indian context, though some extent, we have covered in chapter – 1 above.

The concept of hire and fire has been abandoned. Since the rights of the employees in Private as well as Public sectors employment, almost been recognized either through Statutes or through the pronouncements / precedents of law courts. Even the doctrine of ‘pleasure’ which still finds a place in our democratic constitution has been restricted by the provisions contained in Articles 309 and 311 of Constitution.

An employer expects loyalty, honesty and hard work from his employees and if an employee fails to fulfill his expectations the employer by virtue of master-servant relationship has a right to punish the defaulting employee. The employer or the master has not been given absolute authority to inflict any punishment on his employees. He has to be just even in awarding the punishment. An employer should not be actuated by any motive of victimization and his action of awarding punishment should be fair, bonafide and just. He cannot punish an employee unless he has given an opportunity to him to prove his innocence. This opportunity is afforded to an employee in domestic enquiries.

The principles of natural justice mean the principles relating to the procedure required to be followed by authorities entrusted with the task of deciding disputes between the parties when no procedure is laid down by rules. The principles of natural justice only lay down the procedure and they have nothing to do with the merits of the case. The can as well be called the principles of procedural justice.

The principles to ensure fair procedure are generally called “the principles of natural justice” on account of historic reasons. Previously it was believed that such principles had got the divine origin and they were imbedded in the heart of man by the nature itself i.e. “*Justice”*, “*equity”* and “*good conscience”*. Thus,

the principles acquired the nomenclature of “principles of natural justice”. The name is however, a misnomer. The principles arose out of crystallization of the judicial thinking regarding necessity to evolve minimum norms of fair procedure and they do not owe their origin to either nature or any divine agency.

**Natural Justice in Enquiry**:

The principles of ‘natural justice’ and reasonable opportunity have a special significance in domestic proceedings. English courts have been applying the principles of ‘natural justice’ without defining the term or fixing its connotation. Lord Evershed felt that the principles of natural justice were easy to proclaim but their precise extent was far less easy to define. The principle of natural justice is contained in the maxim ‘audi alteram partam’ which means ‘hear the other side’. This phrase is, of course, used only in a popular sense and must not be taken to mean that there is any natural justice among men. Under the English law the following elements are considered essential for natural justice:-

1. *Memo debet esse judex in propria cause* i.e., no man can be a judge in his own case; and
2. *Audi alteram partam* i.e., both sides are to be heard.

The first principle requires that a judge should be free from bias. The judge can have withered pecuniary or legal interest in the matter before him.

In the industrial jurisprudence, discipline on the part of the employee in an establishment is accepted as natural phenomenon and indiscipline as unnatural behaviour. Indiscipline is something which is against the interest of the society. Punishing a delinquent employee for his acts of omissions or commissions in a day-to-day working or any other misbehaviour is, therefore, fulfillment of social obligation. Enforcement of discipline, so long as the methods and manners adopted are in conformity with the accepted principles of social and natural justice, can never be discarded.

As stated above, the principles of natural justice require than no man should be condemned unheard to consequences resulting from alleged misconduct without having an opportunity of making his defense. The Supreme Court has laid down the following principles *inter-alia* stating that an enquiry cannot be said to be held in conformity with the principles of "natural justice" unless:[124]

(i) The employee proceeded against has been informed clearly of the charges leveled against him;

[124] Sur Emmanel and Stamping works Ltd., vs. Workmen, AIR 1963 SC 1914 ; AK Kraipak vs. Union of India, AIR 1970 SC150,

(ii) The witnesses are examined – ordinarily in the presence of the employee – in respect of the charges.

(iii) The employee is given a fair opportunity to cross-examine witness

(iv) He is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter; and

(v) The enquiry officer records his findings with reasons for the same in his report.

**Bias in an Enquiry**:

The first principle of natural justice consists of the rule against bias or interest and is based on three maxims:

i) No man shall be a judge on his own cause.

ii) Justice should not be done, but manifestly and undoubtedly be seemed to be done

iii) Judges like Caesar's wife should be above suspicion.

The first requirement of natural justice is that the judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially

and to decide the matter objectively. This principle applies not only to judicial proceedings but also to quasi-judicial as well as administrative proceedings[125]. There are variety of bias among those these three are the basic types of bias viz;

I) pecuniary bias

ii) personal bias

iii) official bias or bias as to subject matter.

In this regard there are catena of cases which decided by the different courts of the land. Let us browse through some such matters referred to and adjudication by the Law Courts:-

A complaint was lodged by an officer and thereafter he appeared as a witness in the enquiry. The proceedings are said to be biased[126].

It is obvious that pecuniary interest, however small it may be in a subject matter of the proceedings, would wholly disqualify a member from acting as a judge[127]. One of the Committee members of a departmental enquiry was biased. Entire exercise of conducting enquiry by such committee would be futile. It would be violative of principles of natural justice.[128]

[125] AIR 1984 SC 1572
[126] 1990 II LLJ 23 (AP).
[127] AIR 1957 SC 425 (429)
[128] FLR 1988 (57) (Kar HC) 496

**Bias - tests to determine**:

A predisposition to decide for or against one party without proper regard to the merits of the list is bias. Personal bias is one of the three major limits of bias, viz. pecuniary, personal and official bias. The test is not whether in fact a bias has affected the judgement, the test is always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the Tribunal. It is in this sense that justice must not only be done must also appear to be done.[129]

Constitution of enquiry committee of three members - Appellant alleging bias against one of the members of the committee on ground of enemity - rejected, said member appeared as witness in the enquiry deposed against him to prove charge no.12 also participated in the enquiry proceedings as its member - whether enquiry proceedings are vitiated - Held YES[130]. Bias of Disciplinary authority will vitiate enquiry[131].

Reasonable apprehension..... Petitioner was an active member of Union had earlier filed a complaint against the enquiry officer ---- raised objection against the appointment of EO to conduct

[129] 1993 LLR 6557(SC) - See Also : AIR 1961 SC 705, AIR 1978 SC 597, AIR 1957 SC 227, 1988 SC 651
[130] 1993 LLR 657. Also See : AIR 1961 SC 705, 1970 SCR 457, 1968 SCR 186, AIR 1957 SC 227
[131] 1968 SLR 470 (Raj.HC). 1993 CLR 1 (SC)

enquiry against him..... request denied..... whether justified? held No[132] .

There are various aspects, which are to be taken in to consideration so that an enquiry ordered to be held against employee should not appear as an empty formality. The cardinal rule is for domestic enquiry that the principles of natural justice should be followed and the concerned employee is to be given an opportunity to defend himself and to cross-examine the witnesses of the management. Also the enquiry officer should be an impartial person. An enquiry by an officer, who participated in the proceedings against an employee resulting in his suspension, will be certainly biased and not impartial. [133]

The authority, who issued show cause notice, initiated disciplinary proceedings and acted as appellate authority. Bias likely to arise, Possibility of predisposition hovering over the mind of adjudicator could not be ruled out.

**Pecuniary Interest**:

It is now well settled that a pecuniary interest, howsoever slight will disqualify even though it is not proved that the decision was in any way affected by it. In jeejeebhoy vs. Asst. Collector of

[132] 1994 LLR 677 (Delhi) also see: 1987(4) SCC 611, AIR 1983 SC 109, AIR 1991 SC 1221, 1969 (1) QB 125, 1970 AC 403., AIR 1972 SC 217., 1986 LAB IC 613

[133] B. Harischandra vs. Academy of General Education, 1995 LLR 420 (Kar. HC)

thane[134], Chief Justice Gajendragadker reconstituted the bench on objection being taken on behalf of the interveners in the court on the ground that the Chief Justice who was the member of the Bench was also a member of the Cooperative Society of which the disputed land had been acquired.

**Personal Interest:**

Personal interest is the inclination of the adjudicator in favour or against one of the parties and may be reflected by word or deed so the judge which could be the result of -

(a) Close personal relationship;
(b) Professional, business or other vocational relationship;
(c) The relation of employer or employee;
(d) Strong personal animosity;
(e) Close personal friendship.

**General Interest / Legal Interest:**

A judge may have a bias in the subject matter, which means that he is himself a party or has one direct connection with the litigation so as to constitute a legal interest. A legal interest mean that the judge is in such a position that bias must be assumed. There may not be any personal ill-will, yet the judge may be imbued with the desire to promote the departmental policy or may have an interest in the subject matter of litigation. The smallest legal interest may disqualify the judge. The

[134] AIR 1965 SC 1065

interest has to be specific. General interest will not disqualify. For instance when in a disciplinary case, the inquiry officer got himself examined as prosecution witness, he was held to have legal interest in the case, and, therefore, disqualified from functioning as inquiry officer[135].

It is of the utmost importance that the officer selected to make an inquiry should be a person with an open mind and not one who is either biased against the person against whom action is sought to be taken or has pr-judged the issue. Bias is relevant not only in the punishing authority but also in the inquiry officer even where the inquiry officer is a different person from the punishing authority.

The Supreme Court has also held that judges should be able to act impartially, objectively and without any bias and the authority empowered to decide the dispute between opposite parties bust be without bias towards one side or the other. The principle of natural justice properly extended to all cases where an independent mind as to be applied to arrive at fair decision between the rival claims of the parties. The strict standards applied to courts justice are now coming to be applied increasingly to administrative bodies. The result is that area of operation of the principles is expanding day by day and several

[135] State of U.P vs. Moh. Nooh, AIR 1958 SC 86

administrative decisions are also now required, to be taken in accordance with these principles.

These principles are now considered almost to be so fundamental as to be implicit in every decision making function, may it be quasi-judicial or administrative. It is now well settled where civil consequences follow or the authority has the scope for discretion to the disadvantage of a party, its decision must be taken in accordance with the principles of natural justice. In other words, a statutory body which is entrusted by statute with discretion must act fairly and afford hearing to other party before taking a final decision. This principle has been fully endorsed by the Supreme Court in the case of Dr Binapani Devi[136], wherein justice J.C Shah, speaking of the court observed:

> "It is true that the order is administrative in character but even an administrative order which involves civil consequence …..must be made consistently with the rules of natural justice…."

It may, however, be added that where the statute is silent about the observance of the principles of natural justice such statutory silence is taken to imply compliance with these principles. The implication of natural justice being presumptive, it may be

[136] AIR 1967 SC 1269

included by the expressed words of statute, or by necessary intendment.

**Rules of Natural Justice do not supplant the law but supplement it**:

Rules of natural justice, are not embodies rules nor can they be elevated to the position of fundamental rights. The aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law but supplement it. These are the observations the Supreme Court in the case mentioned *supra*[137]

**Area of applicability of the principles of natural justice**:

If a statutory provision either specifically or by necessary implication excludes application of any or all the rules of principles of natural justice, then the court cannot ignore the mandate of the legislature and read in to the concerned provision the principles of natural justice[138].

Where a particular situation is covered by the express provisions of the law or the rules, the applicability of the principles of natural justice to that extent is excluded. For instance, where a statutory rule provides that a disciplinary

[137] AIR 1970 SC 150
[138] Union of India vs. JN Sinha & Ors, AIR 1971 SC 40

authority may either himself hold an enquiry in to the charges or appoint an inquiring authority for the purpose, the holding of the inquiry by the disciplinary authority himself shall not be barred by the rule of natural justice that no person shall be judged in his own cause. But, where the rules are silent on a point, the gap can be filled by the rules of natural justice.

**Other principles, which have evolved in course of time**:

In addition to afore mentioned two principles, which are basic, the following two principles are natural and logical consequence of the said principles:

(1) The decision must be made in good faith without bias and not arbitrarily or unreasonably.

*(2)* An order must be a speaking order.

**Requirement of Good faith:**

The principle that decision must be made in good faith implies that the judge has bestowed due consideration to the facts and evidence adduced during the trial or inquiry and has not taken in to account any extraneous matter not adduced during inquiry and that he arrived at the decision without favour to any of the parties.

**Speaking Orders**:

Whether the judge has considered all the aspects of a matter before him can only be ascertained if the order which he makes

is a speaking order. A speaking order means that it should contain the reasons for the conclusions reached. In the case of Bhagat raja vs. Union of India[139] , it has been held that if an order does not give any reasons it does not fulfill elementary requirements of a quasi-judicial process.

The Supreme Court in Siemens Engineering Vs. Union of India[140] it has been held that the rule requiring reasons to be recorded by qusi-judcial authorities in support of the order passed by them is a basic principle of natural justice. This is one of the most valuable safe guards against any arbitrary exercise of power by authorities.

A serious study of certain decision of Indian courts on reasonable opportunity goes to establish that the following ingredients constitute reasonable opportunity:

(i) The person proceeded against should be clearly and specifically told of the charges standing against him;
(ii) He should be given full and adequate opportunity to explain;
(iii) He should be allowed show cause against the punishment; and
(iv) The whole thing must be an honest fair deal done with a sense of responsibility

[139] 1967 SCR 302
[140] AIR 1976 SC 1785

However, if an employee fails to appear before the enquiry officer although the enquiry was adjourned several times in order to enable him to appear and finally he wrote back to the enquiry officer that he would not participate in the enquiry, cannot complain that no opportunity of hearing in respect of the charges was given at the enquiry.

The Madras High Court in the case of Gabrial vs. State of Madras, has succinctly set out the requirements of an enquiry in the following terms:

> "All the enquiries in to the conduct of the individuals must conform to certain standards. One is that the person proceeded against must be given a fair and reasonable opportunity to defend himself. Another is that the person charged with the duty to hold the enquiry must discharge that duty without bias and certainly without vindictiveness. He must conduct himself objectively and dispassionately not merely during the procedural stages of enquiry, but also in dealing with the evidence and the material on record when drawing up the final order / report. A further requirement is that the conclusion must be rested on the evidence and not matters out side the record. And when it is said that the conclusion must be rested on the evidence, it goes without saying that it must not be based on a misreading of the evidence. These requirements are basic and cannot be

whittled down, whatever be the nature of enquiry, whether it be judicial, departmental or other"

To conclude, the extent and application of the doctrine of natural justice cannot imprison within the straight jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority; upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case.

Let us further peruse, as to how the law courts have reacted to the situation and applicability of the natural justice in the proceedings of the disciplinary enquiry:

If a delinquent employee wants certain documents and if they are not supplied to him on the ground that the copies are not available the inability would violate principles of natural justice if sufficient explanation is not forthcoming justifying their unavailability.[141] Documents on which reliance is placed, copies thereof must be supplied for provisions of reasonable opportunity.[142]

[141] 1989 (I) LLJ 106
[142] 1986 II LLJ 468 (SC)

A copy of the enquiry report has not given to the applicant. Held this deprived him to file an effective appeal and ordered to supply copy of enquiry report and give chance to file appeal.[143] Natural justice not violated on account of change in personnel of the enquiry committee by transfer of some members.[144] Rules violated if witnesses are examined in absence of a charged person or previously recorded statements are taken on record.[145]

Neither charge of serious misconduct in spite of written request - nor copy of relevant documents supplied - nor request to engage advocate considered - enquiry conducted and concluded. Held, enquiry was neither fair nor proper and was not conducted in accordance with law.[146] Neither copy of the enquiry report supplied nor petitioner was given opportunity to explain the material contained in the enquiry report - Termination of services based on enquiry report, held is clearly contrary to the principles of natural justice and statutory rules.[147]

Disciplinary proceedings - non supply of copy of enquiry report - effect of - In this case the court viewed as the supply of enquiry report along with the recommendations, if any, in the matter of proposed punishment to be inflicted could be in composed by

[143] CAT (Cal.) 1988 (I) 594
[144] (1970) II LLJ 279
[145] 1961 LLJ 372
[146] LLR 1993 P.968 (Bombay HC)

[147] LLR 1993 P.881 (P&H HC); Union of India vs. Moh. Ramsan 1990 (61) FLR 736 (SC)

the rules of natural justice and the delinquent therefore be entitled to supply of copy thereof. In one case[148], held that even if there is no recommendation relating punishment, furnishing copy of the enquiry report is mandated before imposing punishment by the rules of natural justice. The object of supply of enquiry report is not merely to show cause against the proposed punishment but also become aware of factors, which may influence the mind of the disciplinary authority.

Not giving an opportunity to the delinquent to explain why enquiry be not conducted against him. Held does not vitiate the enquiry on this sole ground.[149]

Whether general provisions of principles of natural justice, as prevailing under common law would be applicable before imposing the penalty or damages. Held - YES the rules of 'Audi Alterm Partem' is applicable to the each and every case - i.e. No man shall condemned unheard.[150]

Necessity of second opportunity against proposed punishment - Principles of natural justice does not warrant. In this case[151] the court observed that no doubt principles of natural justice are

[148] AIR 1969 SC 1294
[149] LLR 1993 P.425 (AP HC). Also See : 1973-1-LLJ 278, 1975-II LLJ 379, 1983-II-LLJ-425, 1982-I-LLN 332, 1984-I-LLJ-386, 1991-II-LLJ-412, 1988-I-LLJ-341
[150] 1993 LLR 247 (Alhd. HC). See Also AIR 1976 SC 676, AIR 1979 Lab. I.C.27, AIR 1981 SC 818, AIR 1986 SC 180, 1986(4) SC 876
[151] 1993 LLR 9 (Ker. HC)

facts of Art.14 of the constitution and one opportunity generally necessary before imposition of punishment, a second opportunity by way of furnishing enquiry report is not imperative. In certain cases falling under reasonable classifications, if principles of natural justice are excluded, Art-14 cannot be said to be violated.

Application of principles of natural justice - Non-supply of enquiry report - consequences thereof: - The proposition of law laid down by the Supreme Court in the case of Union of India vs. Mah. Ramzan[152] has been held that the delinquent workman be supplied with a copy of the enquiry report to enable him to make a representation to the disciplinary authority before passing the final order of punishment. However, the Bombay High Court has held contrary to the views of the Apex Court *inter-alia* stating that this principle would not apply to domestic enquiry where there are no such provisions of service rules or standing orders of that establishment[153].

Non-supply of complaint - effect on disciplinary proceedings - The complaint, which is the basis of entire proceedings against the petitioner, when not supplied to the petitioner, vitiated the

[152] AIR 1991 SC 471
[153] 1993 LLR 588 (Bom.HC)

proceedings by a failure to observe the principles of natural justice.[154]

Non supply of copy of documents relied upon to the delinquent - effect: It is well settled that if prejudice has been caused on account of non-supply of certain documents then prejudice would be deemed to have been caused and there would be violation of principles of natural justice. In the instant case, the entire case of the respondent corporation is based on the documents. The documentary evidence was material evidence and was used against the petitioner. Thus a conclusion can be legitimately drawn that the prejudice was caused to the petitioner. The fact that such a finding was recorded by the Labour Court cannot be ignored.[155]

Applicability of rule of Audi Altern parten: It is well known latin maxim, mandates that no person should be condemned unheard - no decision must be taken which will affect the right of the concerned person without his/her first being informed of the case and giving him/her as opportunity of putting forward his/her case. An order of entailing civil consequences must be made in accordance with the principles of natural justice. There

[154] 1993 LLR 304

[155] AIR 1961 SC 1623; 1994 LLR 980 (MP)

are any number of judicial pronouncements of the appeal court and this court reiterating this proposition of law.[156]

The Supreme Court held that the finding of the High Court that punishment of removal from service is vitiated for non-supply of enquiry report / documents relied in the enquiry in view of the recent decision of the constitution Bench of the Supreme Court in Managing Director, ECIL Hyderabad vs. B. Karunakar & Others [157]

Request of workman on 5.7.82 to the Enquiry Officer to adjourn the proceedings till 2 p.m as their representative would come by that time – Enquiry Officer waited up to 12.30 p.m refused to adjourn upto 2.30 pm closed the case and fixed the same for his report. Whether refusal to adjourn amounts to violation of principles of natural justice - Held 'NO'.[158]

Enquiry Officer found charges are not proved - Disciplinary authority disagreeing with the findings of Enquiry Officer - Held charges proved imposed minor penalty without any notice - single judge of Gujarat High Court held principles of natural justice have been violated as no fresh opportunity was given

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[156] 1994 LLR 589

[157] 1994 LLR 391; 1994 LLR 563 (SC) Also see : 1982 (3) ALL.E.R. 141, 1992 Suppl. (2) SCR 312, AIR 1983 SC 1723, AIR 1963 SC 779, 1969-II-LLJ 743, 1989-II-LLJ-57, 1983-II-LLJ 1, 1972-I-LLJ 1, 1985, LLJ 206, 1985-II-LLJ 184

[158] 1994 LLR 434 (Bom) Also see : AIR 1984 SC 273, AIR 1965 SC 155, AIR 1963 SC 1914, 1983 (47) FIR 390, 1975-I-LLJ 399, 1993-LLR-71, 1969(3) SCC 392, 1988-I-CLR 154

before recording a finding that charges are proved. Divisional Bench of the same court upheld the view of single judge[159].

Deprivation of employee's right for appeal and review - Higher authority than the disciplinary authority exercised his power and imposed punishment, thereby delinquent deprived the right of appeal and review[160].

Non-supply of copy of statements of witnesses recorded during preliminary inquiry - despite of demands - whether workman has been prejudiced in his defence and inquiry is illegal? Held YES.[161]

Request made by the petitioner for summoning records in the custody of management, rejected by the Enquiry Officer saying that he has no power to do so - Whether petitioner (delinquent employee) has been denied right to defend. HELD YES.[162]

Non supply of relevant documents with charge-sheet can vitiate enquiry - Held Yes, Non-supply of enquiry report before passing the order of dismissal violates the principles of natural justice. It causes serious prejudice to the aggrieved person.[163]

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[159]1994 LLR 728 (Guj.)
[160]1995 LLR 593 (SC)
[161]1995 LLR 430 (MP) See Also : AIR 1988 SC 117 & AIR 1984 SC 289
[162]1995LLR 339(Karn.) Also See : AIR 1983 SC 109, AIR 1960 SC 914, AIR 1965 SC 1392, AIR 1991 SC 1221, AIR 1990 SC 307, AIR 1984 SC 1789, AIR 1989 SC 1185
[163] 1995 LLR 153. Also See : 1993 (67) FLR 1230(SC); LLR 1995 P.1003 (Bom.HC)

Non-supply of the copies of the statements of witnesses examined in the preliminary enquiry and in raising plea of violation of the Principles of Natural Justice is wholly unreasonable and in-fact nowhere the appellant has mentioned what prejudice she has suffered. There was no prejudice caused to the appellant on account of non supply of the statements in the preliminary enquiry[164] .

The principles of natural justice cannot be reduced to any hard and fast formulas. They cannot also be put in to a straight jacket. Their applicability depends upon the context and facts and circumstances of each case. The objective is to ensure fair hearing, a fair deal to the person whose rights are affected. A complaint of violation of facet of natural justice has to be examined on the touch – stone of prejudice[165].

The requirements of principles of natural justice, which are required to be observed, are:

(1) workman should know the nature of the complaint or accusation;

(2) an opportunity to state his case; and

[164] Ms.Gupra vs. CMD Engineering India Ltd., 1997 LLR 372
[165] State Bank of Patiala vs. SK Sharma, 1997 LLR 269 SC

(3) the management should act in good faith which means that the action of the management should be fair, reasonable and just.

It is no point laying stress on the principles of natural justice without understanding their scope or real meaning. As stated herein before, there are two essential elements of natural justice which are: (a) no man shall be judge in his own cause; and (b) no man shall be condemned, either civilly or criminally, without being afforded an opportunity of being heard in answer to the charge made against him. In course of time by various judicial pronouncements these two principles of natural justice have been expanded, e.g., a party must have due notice when the Tribunal will proceed; Tribunal should not act on irrelevant evidence or shut out relevant evidence; if the Tribunal consists of several members they all must sit together at all times; Tribunal should act independently and should not be biased against any party; its action should be based on good faith and order and should act in just, fair and reasonable manner. These in fact are the extensions or refinements of the main principles of natural justice stated above.[166]

In Mclean vs. workers' union[167] Ch. Maugham J., observed "all that is meant by compliance with rules of natural justice by a

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[166] Syndicate Bank, vs. General Secretary, Syndicate Bank Staff Association and another, AIR 2000 SC 218

[167] (1929) I

domestic tribunal is that the tribunal must act honestly and in good faith and must give the delinquent a chance of explanation and defence. If the rules postulate an inquiry, the delinquent must have a reasonable opportunity of being heard and, of correcting and contradicting a relevant statement prejudicial to his view".

In Byrne vs. kinemetograph renters' society[168], it was observed that "Firstly, I think the person accused should know the nature of accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really anything more"

Union of India vs. T.R Varma[169], the Supreme Court has observed that "stating it broadly and without intending to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, the evidence of the opponent should be taken in his presence, and that he should be given an opportunity of cross-examining the witnesses examined; the Supreme Court has held that party and that no materials should be relied on against him without his being given an opportunity of explaining them".

[168] (1958) 2 All ER 579
[169] 1957 SC 882

**Applicability of principles of natural justice - charge-sheet**:

The issuance of charge-sheet is an essential requirement. The employee must be told what are the charges leveled against him and the allegations on which they are based[170]. He must also be informed of the evidence on which the charges are sought to be established so that he can put forward his defence.

The charge-sheet should be issued in writing. A hasty verbal reading of the charge-sheet does not constitute service of charge[171]. The charge must not be vague. The allegations should be concrete and specific with full particularity and should not leave out anything which the charged employee should know to make out his defence[172].

However, the charge-sheet is a matter of substance and not of form. Where full particulars were communicated through the memos, the Supreme Court did not accept the contention that no formal charge-sheet had been issued. There is no magic in the word charge-sheet – the court observed[173]. The charge sheet cannot be issued by any higher authority. It can be issued only either the disciplinary authority itself or any authority so authorized by the statutory rules[174].

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[170] Khme Chand vs. Union of India AIR 1958 SC 300
[171] K.S Tewari vs. G.M. High Explosives Factory, GB CB (1988) ATC 984
[172] Surath Chandra Chakravarty vs. The State of West Bengal, AIR 1971 SC 752
[173] Kirshna Chandra Tandon vs. Union of India AIR 1974 SC 1589
[174] State of M.P vs. Shardul Singh (1970) 1 SCC 108

Even the disciplinary authority cannot take the proceedings, if the matter concerns himself or when he is a witness in the case[175]. This requirement is based on the principle that no person shall be judged on his own cause. The reason is beautifully stated by Lord Hewart CJ., in R.V Susses JJ. Exparte McCarthy (1924) I KB 256):

> "It is not merely of some importance, but is of fundamental importance that justice should not be done but should manifestly and undoubtedly be seem to be done"

Communication of the charges to the employee concerned is also an essential requirement. No *ex-parte* proceedings can be taken unless the charges have been communicated.

**Applicability of principles of natural justice - appointment of Enquiry Officer**:

An enquiry held by a biased officer is bad in law. While pecuniary interest, howsoever small, shall disqualify the inquiry officer from deciding the matter, the test applied in the case personal interest is that there must be real likelihood of bias; whether the subject was really prejudiced or not, not being the relevant question. In Manak Lal vs. Dr. Singhvi[176] the Supreme Court has stated the principles in the following words:

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[175] Arjun Chaubey vs. Union of India AIR 1984 SC 1356, State of U.P vs. Moh. Nooh, AIR 1958 SC 86

[176] *supra*

"it is well settled that every member of the tribunal that is called upon to try the issue in judicial or quasi-judicial proceedings must be able to act judicially; and it is of essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without bias, In such cases, the test is not whether in fact bias has affected the judgment, the test always is and must be whether a litigant could reasonable apprehend that a bias attributable to the member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it often said that justice must not only be done but must also appear to be done"

If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudices that is sufficient to quash the decision[177]. However, there must be a real likely-hood of bias. Surmises and conjunctures would not be enough.

**Right to defence assistance from a fellow employee / outside – applicability of principles**:

Though there is right to defence assistance from a fellow employee, there is no right of defence assistance from a particular employee if his services cannot be spared in the interest of the public service[178]

[177] S. Parthasarthi vs. State of A.P, AIR 1973 SC 2701
[178] H.C. Sarin vs. Union of India AIR 1976 SC 1686

**Defence assistance from a legal practitioner**:

Board of Trustees of the Port of Bombay Vs. PR Nadkarni[179] The Supreme Court has held that in appropriate cases, having legal overtones or involving legal or factual complexities or where the status of the presenting officer so warrants, denial of permission to engage legal practitioner shall result in breach of natural justice.

Rule 14(8) of the Central Civil Services (Classification, Control & Appeal) Rules, 1965, provides that an employee has been given the choice of being represented in the disciplinary proceedings through a co-employee.

In Kalindi vs. Tata Locomotive & Engineering Company Ltd.[180], a Three-Judge Bench observed as under (Paras 3 to 5 of AIR) "Accustomed as we are to the practice in the Courts of law to skilful handling of witnesses by lawyers specially trained in the art of examination and cross-examination of witnesses, our first inclination is to think that a fair enquiry demands that the person accused of an act should have the assistance of some person, who even if not a lawyer may be expected to examine and cross-examine witnesses with a fair amount of skill. We have to remember however in the first place that these are not enquiries in a Court of law. It is necessary to remember also

[179] AIR 1983 SC 109

[180] AIR 1960 SC 914

that in these enquiries, fairly simple questions of fact as to whether certain acts of misconduct were committed by a workman or not only fall to be considered, and straightforward questioning which a person of fair intelligence and knowledge of conditions prevailing in the industry will be able to do will ordinarily help to elicit the truth. It may often happen that the accused workman will be best suited, and fully able to cross-examine the witnesses who have spoken against him and to examine witnesses in his favour".

In the above premise, in the case of Bharat Petroleum Corporation Ltd., vs. Maharashtra General Kamgar Union and others[181], the Apex court arrived at conclusion that a workman against whom an enquiry is being held by the management has no right to be represented at such enquiry by a representative of his Union; though of course an employer in his discretion can and may allow his employee to avail himself of such assistance."

In another decision, namely, Dunlop Rubber Company vs. Workmen[182] it was laid down that there was no right to representation in the disciplinary proceedings by another person unless the Service Rules specifically provided for the same.

[181] AIR 1999 SC 401
[182] AIR 1965 SC 1392

The matter again came to be considered by a Three Judge Bench of this Court in Crescent Dyes and Chemicals Ltd., vs. Ram Naresh Tripathi[183], and Ahmadi, J. (as he then was) in the context of Section 22(ii) of the Maharashtra Recognition of Trade Unions and Unfair Labour Practices Act, 1971, as also in the context of domestic enquiry, upheld the statutory restrictions imposed on delinquent's choice of representation in the domestic enquiry through an agent. It was laid down as under:-

"11. A delinquent appearing before a Tribunal may feel that the right to representation is implied in the larger entitlement of a fair hearing based on the rule of natural justice. He may, therefore, feel that refusal to be represented by an agent of his choice would tantamount to denial of natural Justice. Ordinarily it is considered desirable not to restrict this right of representation by counsel or an agent of one's choice but it is a different thing to say that such a right is an element of the principles of natural Justice and denial thereof would invalidate the enquiry. Representation through counsel can be restricted by law as for example, Section 36 of the Industrial Disputes Act, 1947, and so also by certified Standing Orders. In the present case the Standing Orders permitted an employee to be represented by a clerk or workman working in the same

[183] (1993) 2 SCC 115

department as the delinquent. So also the right to representation can be regulated or restricted by statute."

In para 12 of the judgment the Apex court has concluded “it is therefore, clear from the above case law that the right to be represented through counsel or agent can be restricted, regulated by statute, rules, regulations or standing orders. A delinquent has no right to be represented through counsel or agent unless the law specifically confers such right. The requirement of rule of natural justice in so far as the delinquent’s right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent…”

The earlier decisions in Kalindi vs. Tata Locomotive & Engineering Co. Ltd Dunlop Rubber Co. vs. Workmen and Brooke Bond India (P) Ltd. vs. Subba Raman[184], were followed and it was held that the law in this country does not concede an absolute right of representation to an employee as part of his right to be heard. It was further specified that there is no right to representation as such unless the Company, by its Standing Orders, recognizes such a right. In this case, it was also laid down that a delinquent employee has no right to be represented in the departmental proceedings by a lawyer unless the facts involved in the disciplinary proceedings were of

[184] Supra

a complex nature in which case the assistance of a lawyer could be permitted.

The age-old concept “a man not only has right to speak from his own voice, but also has right to speak from his representative voice when his life, liberty and lively-hood is at stake” – this concept seems to be withering away day by day. The Hon’ble Gujarat High Court in the case of K.C Mani vs. Central Warehousing Corporation[185]., has laid down illustrative tests to determine such request for soliciting an assistance of legally trained mind / co-employee :

- ✍✍ Whether it is really a fight between two unequals?

- ✍✍ Whether the nature of charge is simple or complex?

- ✍✍ Whether the charge is such that some documents are required to be proved or disproved either because they are false or fabricated?

- ✍✍ Is it a case where there are number of witnesses to be examined and re-examined?

- ✍✍ Whether any expert witness is to be cross examined?

[185] 1994 LLR 312

- What is the intellectual capacity, status and experience of the delinquent facing the departmental proceedings?

# Chapter 03: JUDICIAL STRUCTURE & PERSPECTIVE - I



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**Prelude:** This chapter – 3 and next two chapters are being dealt with demand of delinquent to be represented by the lawyer, disciplinary proceedings vis-à-vis criminal trial, communications and notice in the enquiry, witnesses, evidence and admission in the enquiry, element of bias in the enquiry (chapter-4). Enquiry report by the Enquiry Officer, Supply of enquiry report and second show cause notice, act of imposition of penalty and remedies (chapter-5). The said topics are being discussed with the help of judicial pronouncements of various Indian law courts including the Supreme Court, New Delhi, India.

**3.1 Initiation of Disciplinary Enquiry**:

It is a general understanding that every legal action is espoused by one or the other cause. In the same way disciplinary proceedings also is not an exception to that general

understanding. The object of preliminary enquiry on the spot is made by the concerned department to satisfy the genuiness of the complaint against the delinquent employee. If it is found that the complaint is justified, the concerned departmental head contacts the Personnel department and seek their advice. He may be required to give written complaint and also obtain the statements of the complainant and defendants and witnesses if any. In the realm of initiation of disciplinary enquiry, its legality or otherwise has been referred to the wisdom of the court of law. The Law Courts have developed mass of case law in this area of initiation of enquiry. Some of the case laws in this regard has been discussed / mentioned in the relevant headings of this chapter:

BASIC STEPS ideally to be resorted in THE DOMESTIC / DISCIPLINARY ENQUIRIES:

1. Preliminary (if necessary to be held) after the report of the complaint

2. Issue of show-cause notice / charge-sheet

3. Explanation of workman complained against the issue of charge-sheet

4. In case explanation is not satisfactory. Management may appoint an enquiry officer.

5. Enquiry Notice

6. Oral enquiry if required.

7. Reports of the findings and conclusions

8. Disciplinary authority to issue second show cause notice with a copy of the Enquiry Report as to why proposed penalty should not be imposed and accept the findings of the Enquiry Officer.

9. Communication of disciplinary orders to employee concerned

**ESSENTIAL REQUIREMENTS IN EACH STEP**:

**REPORT OR COMPLAINT AGAINST THE DELINQUENT**:

(i) The report must contain specific date and time.

- Specific acts or omission of the employee against whom complaint has reported
- Effect of such act or omission on the organization
- Names of the persons who were eyewitnesses

(ii) The report must be made immediately after the occurrence of the act or omission.

(iii) The report must be made by the supervisor/reporting officer concerned or affected with the matter of complaint

(iv) It should be addressed to the head of the Department.

(v) It must be noted through proper channel.

(vi) It must be forwarded in original with his remark to the appointing authority / Disciplinary Authority.

**ACTION ON THE REPORT / COMPLAINT BY THE MANAGEMENT**:

(a) The officer concerned should give his opinion in brief about the reported acts or omission. And record if disciplinary action is necessary with reasons.

(b) The forwarding officer / complainant should send all the papers and documents connected with or throwing light on the acts or omissions and the behaviour in the department / section / plant of the employee concerned.

**PRELIMINARY ENQUIRY**:

(i) If the employee is to be corrected in the department itself, it may serve the purpose; the workman may apologize.

(ii) It can be useful where the facts are complicated or the employer for his satisfaction wants to ascertain the truth of the complaint or take action if desired.

(iii) Nature of preliminary enquiry:-

A preliminary enquiry is of very informal character and the methods are likely to vary in accordance with the requirements

of each case. The delinquent employees have no vested right in any form or procedure of holding preliminary enquiry. The procedure is wholly at the discretion of the officer holding the enquiry. After the preliminary enquiry, the disciplinary authority need not record its satisfaction in writing nor is it required to give reasons for initiating the regular departmental enquiry. *Ex - parte* subjective satisfaction can be reached regarding *prima facie* case. The authority need not give any opportunity to the delinquent to have his say in the preliminary enquiry. Principles of rationality and fairness in action cannot be read into such enquiry. The doctrine of principles of natural justice is not applicable to preliminary enquiries.

Preliminary inquiry is only for the purpose of satisfaction of the disciplinary authority as to the existence of a prima facie case against the concerned employee for instituting a regular departmental inquiry. The disciplinary authority can get a fresh preliminary inquiry conducted by another officer and institute a regular departmental inquiry on its basis if it was not satisfied with the investigation and report of an earlier preliminary inquiry.

Wherein and whenever conducted it must be -

a) under oral instructions or written orders.

b) conducted on the same day or as early as possible

c) statements need not be recorded.

d) only some explanatory questions to the employee complained against and one or two or three eye witnesses if any may be asked.

**Who should conduct the preliminary enquiry**:-

There cannot be a broad and unqualified proposition that an officer who conducted a preliminary enquiry is disqualified from acting as a disciplinary authority on the ground of bias. Also, there is no proposition that official bias can never be attributed to the authority who conducted a preliminary enquiry and later on held the disciplinary enquiry as well. It depends on the facts and circumstances of each case. In a given case there may be circumstances to show that a disciplinary authority who was a party to the preliminary enquiry report was so overwhelmed by his findings in the preliminary report that had approached the entire issue with a closed mind. The manner of conducting the disciplinary enquiry and process of decision making may be suggestive of an inference that the disciplinary authority considered the domestic enquiry as a mere formality to fortify his own view point. In such cases, bias can be a ground for invalidating the decision of the disciplinary authority. But where the order passed by the disciplinary authority indicates that he scanned and made an independent appraisal of the entire evidence and gave additional reasons in support of its conclusions and was not mechanically led away by what was

said in the preliminary enquiry report, an inference of strong likelihood of bias may not be drawn. However, it would be prudent for the disciplinary enquiry not to conduct the preliminary enquiry himself. The same view was held in the case of *Rajendra Prasad Singh vs. Union of India*[186]

Generally, either the head of the department or under his instructions someone else of the department who is possibly should not be junior to the complainant.

a) Someone other than the complaining officer.

b) Not by one who is to be appointed as Enquiry Officer in the matter.

Submission of report of the Preliminary enquiry:-

a) The officer conducting preliminary enquiry should as far as possible submit a written report to the Head of the Department who had ordered the Preliminary enquiry.

b) The Head of the Department should forward preliminary report along with the report of the complainant to the disciplinary authority.

c) Even if the employee has apologized, the head of the department should always send his report to the disciplinary authority.

[186] 1996 I LLJ 1003 (Cal. H.C )

An employee cannot complain that the preliminary enquiry was not properly conducted and, therefore, the enquiry is vitiated by the principles of natural justice. The preliminary enquiry has nothing to do with the enquiry conducted after the issue of the charge sheet. After full-fledged enquiry is held, the preliminary enquiry loses its importance and no judicial interference with preliminary enquiry.

1. **ISSUE OF SHOW-CAUSE NOTICE OR CHARGE-SHEET TO THE DELINQUENT:**

1) If any action whether it is punishing or pardoning, the employee complained against, is contemplated by the management, show cause notice or charge-sheet should be issued. It may however be issued in those cases also if the objective is to drop the enquiry or if the delinquent realizes his lapses or defaults and tenders apology.

2) The show cause notice or charge-sheet is the very basis of any disciplinary action. The scope of charges mentioned in the show cause notice or charge-sheet will never be widened at any time after issuance of show cause notice or charge-sheet.

3) If the disciplinary enquiry has to be carried to its conclusions a charge-sheet should be issued and not a show-cause notice. If the object is merely reprimand the delinquent or enquiry is not intended in any reason, a show-cause notice may be issued.

## 2. DRAFTING OF CHARGE-SHEET OR SHOW CAUSE NOTICE:

As per the staff rules / Conduct Rules of the organization where it is proposed to hold an enquiry, the disciplinary authority shall frame the definite charges on the basis of the allegations against an employee. The charges together with a statement of the allegations, on which they are based, a list of documents by which and a list of witnesses by whom the articles of charges are proposed to be sustained, shall be communicated in writing to the employee who shall be required to submit within such time as may be specified by the disciplinary authority (not exceeding 15 days), a written statement whether he admits or denies of or all the articles of charges.

**Explanation**

It will not be necessary to show the documents listed with the charge-sheet or any other document to the employee at this stage.

There is no standard or prescribed form, for drafting charge-sheet or show cause notice, it may be in a form of a letter or a notice. However the following essentials ought to mention:

It should be signed by the Disciplinary authority/appointing authority.

3. **SHOW-CAUSE NOTICE/CHARGE-SHEET MUST BE SERVED ON THE DELINQUENT** :

(a) If not served on the delinquent no enquiry could be proceeded with.

(b) The service must be on the delinquent employee himself unless otherwise provided by the service rules or standing orders.

(c) The service may be -

i) By hand delivery

ii) By displaying on the Notice Board

If the Service Rules provide and authorise the same.

iii) By Registered AD Post Acknowledgement Due.

iv) Through newspaper as a last resort.

Refusal to accept the notice or charge-sheet by the workman when delivered in persons or by Registered post with acknowledgement due.

If the workman refuses to take delivery of the letter, there should be record of this fact with signatures of the persons effecting the delivery and the witnesses to the (minimum 2). Whereas service under Postal Certificate is not a conclusive proof of service.

4. **WORKMAN'S EXPLANATION AND HOW TO DEAL WITH IT** :

The workman complained against may or may not submit his explanation.

The explanation when received -

(i) Must be received by putting thereof the date and time of its receipt.

(ii) Must be immediately forwarded to appointing authority/disciplinary authority through Administration Division.

(iii) Must be minutely examined vis-à-vis the show cause notice or the charge sheet.

(iv) Should be from and be signed by the workman concerned and not by any person or representative on his behalf unless it is accompanied by written authority or unless the representative is a legal practitioner.

(v) Its contents should be brought to the notice of the complaining Head of the Department.

5. **ADMISSION OF CHARGES AND ACTION THEREOF**:

(a) If the workman complained against accepts the charges levelled in the Show Cause Notice or Charge-sheet the management may take the matter in view of the gravity of the

offences from the nature of an apology tendered by him in explanation. If in any case of absolute apologies, a warning for the sake of record must be issued to the workmen concerned though this time he is being excused or let off with minor punishments, he would be dealt with seriously if he indulges often again in similar or other misconduct.

(b) Admission should be unconditional.

(c) If the explanation is not satisfactory, the case should be fixed for enquiry and the delinquent should be informed accordingly.

6. **ENQUIRY NOTICE**:

A. (i) Drafting of notice

The Enquiry Officer should clearly inform the delinquent about -

(a) Place, date and time of the enquiry;

(b) Name or names of officer(s) who would conduct the enquiry;

(ii) The enquiry notice should mention -

(a) The delinquent would be allowed to be assisted by another workman of the same department. As per the Staff Rules of the organization the employee may take the assistance of any other employee of the organization but may not engage a legal practitioner for the purpose.

(b) That in case the delinquent workman fails to attend the enquiry, the same would be held *ex-parte* and that whatever the decision would be binding on him.

(c) It should be signed by the management in case of first notice and later on by the Enquiry Officer.

B. Copy of notice to Enquiry Officer:

Copy of enquiry notice or separate letter must also be addressed to the Enquiry Officer authorizing him to hold the enquiry at the stipulated time and submit his report of finding after satisfactory completion of the enquiry.

C. Nomination of Presenting Officer:

The management should nominate any of its officers to present its side in the enquiry proceedings.

**7. COMMENCEMENT OF ORAL ENQUIRY**:

Oral enquiry : Name of:

(a) Object: The very purpose of holding the enquiry is to give a chance of hearing to the workman so that he is not punished without getting a reasonable and proper opportunity to explain the charges made against him.

(b) Distinguished with the court trials:

The domestic or departmental enquiry differs from the ordinary court trial in as much as the court trials are held and according to well laid and codified laws of the land, the domestic enquiries are guided and regulated by principles of natural justice.

(c) A domestic enquiry should be started as soon as possible, should not be un-necessarily prolonged.

8. **WHO SHOULD BE THE ENQUIRY OFFICER**?

(I) The Enquiry Officer could be an outsider and also an advocate but as far as possible the EO should be from within the organization.

(II) He should act independently of his other duties towards the parties.

(III) The EO should not have before hand personal knowledge of misconduct or its facts - he should not be witness.

(IV) He should be impartial man with an open mind and not biased against the delinquent.

(V) As per the existing Staff Rules of the organization, where the disciplinary authority itself enquiries or appointing an enquiry officer for holding an enquiry, it may by an order appoint a person to known as the presenting officer on its behalf the case in support of the articles of charge.

9. **INQUIRY PROCEEDINGS**:

(I) It is desirable that the EO maintains written records of the inquiry proceedings.

(II) Enquiry Officer should -

a) Record the adjournment of the proceeding.

b) Sign the proceedings himself, besides taking signatures of management representative as well as the delinquent workman in duplicate.

c) Every page of the proceedings should also be marginally signed or initiated by both the parties as well as the EO.

d) On the first date, the EO read over the charges to the delinquent workman and ask him whether he wants to add in his explanation and this should be recorded.

(I) As per the Staff Rules of the organization on the date fixed by the EO, the employee shall appear before the EO at the time, place and date specified in the notice. The Enquiry Officer shall ask the employee whether he pleads guilty or has any defence to make and if he pleads guilty to anyone of the charges levelled against him, the Enquiry Officer shall record the plea, sign the record and obtain the signatures of the charge-sheeted employee thereon. The EO shall return a finding of guilt in respect of those charges to which the employee concerned pleads guilty.

If the employee does not plead guilty, the inquiry officer shall adjourn the case to a later date not exceeding 30 days, after recording an order that the employee may, for the purpose of preparing his defence:

(i) Inspect the document listed with the charge-sheet;

(ii) Submit a list of additional documents and witness that he wants to examine, and

(iii) Be supplied with the copies of the statements of witnesses if any, listed in the charge-sheet.

**10. WHETHER CONDUCTING ENQUIRY *EX-PARTE* IS LEGAL**:

(a) If the delinquent workman does not appear at the scheduled enquiry and has not applied for adjournment or if applied it has been refused, the EO may proceed to complete the inquiry *ex-parte*.

(b) If the inquiry is conducted *ex-parte* the EO should mention in the proceedings before recording the statements whether or not the inquiry notice has been served on the workman complained against.

(c) The EO should allow some grace time for the delinquent workman and should record the same mentioning the specific time allowed by him. This is, however, essential every time and is under the discretion of the EO.

(d) If the workman comes to participate thereafter, he may be read over the proceedings so far recorded and be allowed to join thereafter.

(e) Even in case of *ex-parte* enquiry, the EO has to be satisfied that the mis-conducts are proved by the reliable evidence.

11. **DELINQUENT WORKMAN'S REPRESENTAION AT THE ENQUIRY**:

(a) As an offshoot of one, principles of natural justice it is now well established that the workman should be allowed to be assisted or represented by another workman from the same department and if not available from the same department, the same establishment.

(b) The workman's representative is only to watch the proceedings and assist the workman but not to interfere in the conduct of inquiry.

(c) The EO has discretion to permit representation of delinquent workman by an outsider like a lawyer or trade union representative. If the facts of the enquiry or the charges are completed or the management is represented by a lawyer through in employment of the employer or in the interest of justice he thinks if necessary.

## 12. RULES OF EVIDENCE:

Although the Indian Evidence Act is not applicable to the departmental proceedings yet, the fundamental principles of evidence and their appreciation are no doubt applicable. Before a worker is held guilty there must be reliable and legal evidence from which an inference of guilt can be drawn.

## 13. HOW TO RECORD STATEMENT / ORAL EVIDENCE IN AN INQUIRY:

(a) Statement is the oral evidence given by witness before the EO.

(b) Every statement comprises of three parts and should be recorded in the following order:

i) First: Chief of direct examination conducted, the party calling the witness.

ii) Second: Cross-examination conducted by the opposite party.

iii) Third: Re-examination conducted by the party conducting the direct Examination.

(a) In the above the Enquiry Officer, may if he thinks fit essential and not otherwise put any questions to the witnesses.

14. **CLOSING PROCEEDINGS**:

As soon as the workman closes his evidence, the Enquiry Officer should write in the end that "workman concerned has no more witnesses to examine and the proceedings closed" and sign the statement himself and should also get the same signed by the management representative or the complainant workman - complained against and his representative.

**15. REPORT OF FINDING AND CONCLUSIONS IS NECESSARY:**

After the completion of the enquiry the Enquiry Officer should immediately start preparing his report of the enquiry conducted, however, he should examine very minutely not orally the proceedings recorded by him, but also the show cause notice/charge-sheet and the reply received from the employee concerned.

As per the staff rules of the organization once the enquiry officer concludes enquiry, the report shall prepared, which shall contain:

(a) a gist of the articles of charge and the statement of the imputations of misconduct or misbehaviour;

(b) a gist of the defense of the employee in respect of each articles of charge.

(c) As assessment of the evidence in respect of each article of charge.

(d) The finding on each article of charge and the reasons thereof.

The report of the finding should be submitted by the Enquiry Officer to the appointing authority/disciplinary authority.

As per the staff rules, the disciplinary authority, if it is not itself the enquiry authority may, for reasons to be recorded by it in writing remit the case to the enquiry officer for fresh or further enquiry and report, and the enquiry officer shall thereupon proceed to hold the further enquiry according to the provisions of the Staff Rules.

**16. PASSING ORDERS OF PUNISHMENT ON REPORT** :

The Disciplinary authority while passing the order should mention that -

(i). He/she has gone through the report of the findings as well as,

(ii). The entire record of the enquiry and

(iii). Confirms of disagree with the views of the Inquiry Officer

(iv). Thereafter the Disciplinary authority should mention that he/she has considered the circumstances of the case, gravity of misconduct and past record of the workman and

propose appropriate punishment in his/her opinion would meet the ends of justice.

As per Staff Rules of the organization orders made by the disciplinary authority shall be communicated to the employee concerned, who shall also be supplied with a copy of the report of the enquiry.

(v). The order must also reveal that decision taken by him/her is necessary for the sake of discipline in the Board.

(vi). Should be given minimum 15 days time to delinquent to explain himself against the proposed punishment.

**17. IMPOSING OF PUNISHMENT**:

On receiving the explanation from the delinquent, the appointing/disciplinary authority may pass order of the proposed punishment or may reduce depending on any extenuating circumstances which might have been brought out by the workman in his explanation and if disciplinary authority things it necessary to do so.

**18. APPEALS**:

As per the Staff Rules of the organization the appeal over the decision of the appointing authority will be with CEO/BOD.

An appeal shall be preferred within the stipulated period from the date of the communication of the order appealed against.

The appeal shall be addressed tot he appellate authority as aforesaid and submitted to the authority whose order is appealed against. The authority whose order is appealed against shall forward the appeal together with its comments and the records of the case to the appellate authority within stipulated period. The appellate shall consider whether the findings are justified or whether the penalty is excessive or in adequate and pass appropriate order. The appellate authority may pass order confirming, enhancing, reducing or setting aside the penalty or remitting the case to the authority which impose the penalty or to any other authority within such direction as it may deem fit in the circumstances of the case.

A very significant arena of service jurisprudence is the maintenance of discipline in the precincts of employment and the need for initiating disciplinary proceedings against an employee on the charges of misconduct and other lapses by adhering the rules of natural justice and providing reasonable opportunity to delinquent employee before any final order of penalty is passed by the disciplinary authority. The Supreme Court in the case of Sur Enamel and Stamping Works Ltd., vs. The Workmen[187], held that the mere form of an enquiry would not satisfy the requirements of complete adjudication to protect the disciplinary action against a workman. An enquiry cannot be said to have been properly held unless:

[187] AIR 1963 SC 1914

(i) the employee proceeded against has been informed clearly of the charges levelled against him

(ii) the witnesses are examined - ordinarily in the presence of the employee-in respect of the charges

(iii) the employee is given a fair opportunity to cross examine witnesses

(iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and

(iv) the enquiry officer records his findings with reasons for the same in his report.

In the recent judgment the supreme court of India in the case of Union of India and others, vs. Mohd. Ramzan Khan[188], once again reiterated that Disciplinary inquiry is quasi-judicial in nature. There is a charge and a denial followed by an inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principles of natural justice. With the Forty-Second Amendment, the delinquent officer is not

[188] AIR 1991 SC 471

associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his; conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected.

Every aspect of disciplinary enquiry beginning from initiation of disciplinary enquiry, issuing of charge-sheet, Initiation of Disciplinary Proceedings, Enquiry Officer, Representation by Lawyer, Disciplinary Proceedings vis-a-vis Criminal Trial, Notice of Enquiry Proceedings, applicability of Principles of Natural Justice, Bias in Enquiry, *Ex-parte* Enquiry, Witness in Enquiry, Evidence in Enquiry, Suspension Allowance, Enquiry Report, Validity of an Enquiry, Appeal,

**Initiation of Enquiry (Charge sheet served) after retirement-** The Andhra Pradesh High Court in the case of T. Narsiah vs. State Bank of India[189], has observed that it might happen that the irregularities of misfeasance of an employee could not be detected well before his retirement so as to initiate and complete disciplinary enquiry in the matter and again there might be a case where disciplinary enquiry was initiated but could not be completed before the delinquent employee attained the age of superannuation. The Court noted that there was no provision in the Service Rules of the Bank providing for extension of service of an employee to enable the authorities to complete the disciplinary enquiry against him which power was available under the Government Service Rules. The Court said even if an enquiry was pending against an employee there was nothing to stop him from retiring on his attaining the age of superannuation. The enquiry could not continue after his retirement. The Court was, therefore, of the opinion that it was for that reason that the Bank had reserved to itself the power to sanction the pensionary benefits under Rule 11 and if there was nothing wrong with the service of an employee throughout, the Bank would naturally sanction the pension, but if there was sufficient material disclosing grave irregularities on the part of the employee, the Bank might be well within its power in refusing to sanction the pensionary benefits, or in sanctioning

[189] (1978) 2 Lab LJ 173

them only partly. The learned single Judge of the Andhra Pradesh High Court then went on to hold as under:

"Of course, such a decision has to be arrived at fairly, which necessarily means after holding an enquiry, giving a fair opportunity to the concerned officer to defend himself against the accusation. Such an enquiry would not be a 'disciplinary enquiry' within the ordinary meaning of the term, but an enquiry confined to the purposes of the rules, viz., whether the employee should be granted any pensionary benefits; and if so, to what extent? Such an enquiry can also be made after the retirement (of an employee; and particularly in cases of retirement) on attaining the age of superannuation; probably such enquiries will have to be conducted only after retirement."

The Court, therefore, gave direction as to how the enquiry was to be conducted against the officer so as to entitle him the pensionary benefits if he was exonerated.

However the Supreme Court differs from the said observations of Andhra Pradesh High Court and held that “We are afraid that this view of the Andhra High Court does not commend to us. By giving such an interpretation to Rule 11 the Andhra Pradesh High Court has, in effect, lent validity to disciplinary proceeding against an employee even after his superannuation for which no provision existed either in Pension Rules or in the Service

Rules and when the High Court had itself observed that an enquiry even if initiated during the service period of the employee could not be continued after his retirement on superannuation. Further held that Inquiry initiated for purposes of determining pension and not for penalty and therefore held invalid, held in The State Bank of India, vs. A. N. Gupta[190].

Holding of enquiry after retirement held, not permissible. This issue was come up before Kerala High Court, the Court observed that, the position is well settled by various decisions of the Supreme Court & High Court that disciplinary proceedings intended to visit the employees with punishment for misconduct cannot be initiated or continued after the relation of the employer-employee has ceased to exist by retirement or otherwise.[191] The Lordships of the Patna High Court held that the power of disciplinary control is a necessary concomitant of employer and employee or master and servant relationship. Once the relationship ceases to exist, the power of disciplinary control also comes to an end unless there are rules to the contrary. In this case the Superannuation had taken place and no rule was shown which permitted continuation of disciplinary proceedings after superannuation.[192]

[190] AIR 1998 SC 159
[191] (FLR 1988 (57) 883 Ker.)
[192] 1993 II LLJ 1162 (Pat. D.B)

**Can an Enquiry be continued against an employee after retirement?**

Where the question before the Supreme Court was whether the departmental enquiry entrusted to and conducted by a bank officer stood vitiated if the said officer proceeded with the enquiry and concluded the same after his superannuation during the pendency of the enquiry. It was held that in the facts and circumstance of the case, the defacto doctrine can have no application. The defacto doctrine can be invoked in cases where there is an appointment to the office is defective, but not withstanding the defect to the title of this office, the decision made by such a *defacto* officer allotted with powers and functions of the office would be as efficacious as those made by *de-jure* officer. Instant is a case more or less akin to a case tried by a court lacking in inherent jurisdiction[193].

Order of dismissal issued to employee two days after his attaining age of 58 years i.e. date of superannuation as per R.29 of M.P. State Municipal Service (Executive) Rules (1973) - Order of dismissal sought to be justified on ground that superannuation would be effective on the last day of the month in which employee completes his 58 years in view of notification issued by State Govt. i.e. administrative instructions - Dismissal

[193] Central of India vs. C. Bernard 1991 LLR 1 (SC)

invalid, as statutory rule would prevail over notification it being in nature of administrative instruction.[194]

**Initiation of Domestic Enquiries - Procedure**: - The Patna High Court in the case of Laxman Shastri vs. State[195], and Calcutta High Court in the case of Bibhuti Bhusan Poul vs. State of West Bengal[196], the following, theme has been laid down:

"At the very outset it is made clear that an enquiry has to be held in accordance with the principles of natural justice since there is no legislation to this effect. On the first date of enquiry, the EO should first of all bring home to the workman concerned in clear and precise language the charge-sheet levelled against him by reading out to him the contents of the charge-sheet and then asked him if he admits or denies. In case he denies, the charges, then the management should be called upon to put forward the case against him with all evidence that it wants to rely upon the workman concerned to state what he wants to submit in his defence. This procedure for initiating the enquiry is based on the analogy of Sec.255 of the Criminal Procedure Code which requires that the charges should be read out and explained to the accused person and he should be asked whether he is guilty or has any defence to make and in case he does not admit the charges then the prosecutor is asked to

[194] C.L. Verma, vs. State of M.P. and another, AIR 1990 SC 463
[195] AIR 1957 Patna 160
[196] AIR 1967 Cal. 29

state the enquiry. But in case the workman has already submitted a detailed explanation in reply to the charge-sheet then asking him again to admit or deny is mere superfluity. Thereafter the EO is required to decide as to which procedure he would adopt in conducting the domestic enquiry". When, however, two different procedures are provided for major penalty and minor penalty then a tentative decision has to be made before the enquiry is started. The EO should be very sympathetic and he should extend helping hands to the delinquent in explaining the procedure and giving him due facilities and assistance to participate in the enquiry consistent with his understanding and ability because a mere knowledge of principles of natural justice may not be wholly sufficient to affectively discharge the role of EO.

The decision to initiate disciplinary proceedings cannot be subsequent to the issuance of the charge-sheet, since issue of the charge sheet is a consequence of the decision to initiate disciplinary proceedings. Framing the charge-sheet, is the first step taken for holding the enquiry into the allegations, on the decision taken to initiate disciplinary proceedings. The charge-sheet is framed on the basis of the allegations made against the Government servant; the charges-sheet is then served on him to enable him to give his explanation; if the explanation is satisfactory, the proceedings are closed, otherwise, an enquiry is held into the charges; if the charges are not proved, the

proceedings are closed and the Government servant exonerated; but if the charges are proved, the penalty follows. Thus, the service of the charge-sheet on the Government servant follows the decision to initiate disciplinary proceedings; and it does not precede or coincide with that decision. The delay, if any, in service of the charge-sheet to the Government servant, after it has been framed and dispatched, does not have the effect of delaying initiation of the disciplinary proceedings, inasmuch as information to the Government servant of the charges framed against him, by service of charge-sheet, is not a part of the decision-making process of the authorities for initiating the disciplinary proceedings.

'Issue' of the charge-sheet in the context of a decision taken to initiate the disciplinary proceedings must mean, as it does, the framing of the charge-sheet and taking of the necessary action to dispatch the charge-sheet to the employee to inform him of the charges framed against him requiring his explanation; and not also the further fact of service of the charge-sheet on the employee. It is so, because knowledge to the employee of the charges framed against him, on the basis of the decision taken to initiate disciplinary proceedings, does not form a part of the decision making process of the authorities to initiate the disciplinary proceedings, even if framing the charges forms a part of that process in certain situations. The meaning of the word 'issued' has to be gathered from the context in which it is

used. The issue of a charge-sheet, therefore, means its dispatch to the Government servant, and this act is complete the moment steps are taken for the purpose, by framing the charge-sheet and dispatching it to the Government servant, the further fact of its actual service on the Government servant not being a necessary part of its requirement[197].

Whether first show cause notice prior to issuance of charge sheet is mandatory?

This question has been answered by the supreme court in the case of Employers of Firestone Tyre and Rubber Co. (Private) Ltd., vs. The Workmen[198] that - - Although in a domestic enquiry, it may be desirable to call for an explanation before serving a charge-sheet on a delinquent workman, there is no principle which compels such a course. The calling for an explanation can only be with a view to making an enquiry unnecessary, where the explanation is good but in many cases it would be open to the criticism that the defence of the workman was being fished out. If after a preliminary enquiry there is prima facie reason to think that the workman was at fault, a charge-sheet setting out the details of the allegations and the likely evidence may be issued without offending against any principle of justice and fair play.

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[197] Delhi Development Authority, Appellant vs. H.C. Khurana, Respondent AIR 1993 SC 1488

[198] AIR 1968 SC 236

***Fresh or de novo enquiry - When can be ordered by Disciplinary Authority - Enquiry Officer taking letters as oral statements - It is in violation of Rules and results in miscarriage of Justice - Fresh enquiry can be ordered by Disciplinary Authority.***

The Enquiry Officer conducted an enquiry on the aforesaid charges and made a report to the Disciplinary Authority. The Disciplinary Authority noticed certain irregularities in the conduct of the enquiry which were of vital nature, in particular, that the Enquiry Officer acted on the letters of one U.N. Chaini, who was a witness on behalf of the department and K.M. Verghese, who was a witness on behalf of the respondent on the basis of a representation made by them stating that they are not in a position to attend the enquiry proceedings but indicating the facts within their knowledge. The concerned authority was of the view that the witnesses should have been examined in person and the procedure adopted by the Enquiry Officer was contrary to the relevant rules in taking their letters as statements. The Enquiry Officer did not ascertain the facts necessary for the conclusion of the case. Therefore, he set aside the findings recorded by him and directed *de novo* enquiry by an order made on May 19, 1995 which was communicated to the respondent on June 7, 1995. Challenging this order, the respondent preferred a writ petition in the High

Court of Guwahati. The learned single Judge directed issue of rule but did not grant any interim order on the basis that Rule 15 of the Disciplinary Rules enables the authority to remit the matter to the Enquiry Officer for further enquiry and that the power has been exercised by the authority under Rule 15 and mere use of expression "*de novo*" will not change the tenor of the order. A writ appeal was preferred against the said order and the Division Bench of the High Court granted initially an interim order staying further proceedings in the enquiry and thereafter by an order made on December 15, 1997 allowed the appeal by taking the view that in an appeal arising out of an order of punishment made by the Disciplinary Authority accepting or rejecting the conclusion reached by the enquiry authority, the appellate authority could direct a fresh or de novo enquiry and such power is not available to the Disciplinary Authority. Whereas the Supreme Court held: In the present case the basis upon which the Disciplinary Authority set aside the enquiry is that the procedure adopted by the Enquiry Officer was contrary to the relevant rules and affects the rights of the parties and not that the report does not appeal to him. When important evidence, either to be relied upon by the department or by the delinquent official, is shut out, this would not result in any advancement of any justice but on the other hand result in a miscarriage thereof. Therefore we are of the view that Rule 27(c) enables the Disciplinary Authority to record his findings on the report and to pass an appropriate order including ordering a

de novo enquiry in a case of present nature. Held in Union of India and others, vs. P. Thyagarajan[199].

In the case of K. R. Deb, vs. The Collector of Central Excise, Shillong[200], the supreme court has held that, If there is some defect in the inquiry conducted by the Inquiry Officer, the Disciplinary Authority can direct the inquiry Officer to conduct farther inquiries in respect of that matter but it cannot direct a fresh inquiry to he conducted by some other Officer.

**Disciplinary proceedings** - ***Delay and laches*** - Department aware of involvement of officer in alleged irregularities - No satisfactory explanation for inordinate delay in issuing the charge memo - Disciplinary proceedings initiated against delinquent after more than 12 years - Liable to be quashed. Held in State of M.P., vs. Bani Singh and another[201].

Delay in initiation of Disciplinary Enquiry / proceedings - proceedings related to the allegation of year 1972 - Departmental proceedings initiated after lapse of 8 years. Held proceedings should not allow to continue.[202] Delay in initiating enquiry against the employees for procuring jobs on bogus

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[199] AIR 1999 SC 449

[200] AIR 1971 SC 1447

[201] AIR 1990 SC 1308

[202] Binay Kumar Singh vs. State of Bihar & ors 1994 LLR 280 (Patna H.C)

certificates will not vitiate the enquiry as held in the case of R. Fakruddin & ors vs. APSEB,[203]

**Initiation of disciplinary action after acquittal from criminal court:**

Article 226 of the Indian Constitution - After acquittal of an offence from the criminal court, continuation of departmental enquiry - no bar against management. Held in K.V Dinshan vs. Vijaya Bank & Ors[204] relied and referred to the case of G. Chandra Shekar vs. Madras Port Trust.[205] However it is further held that ordering fresh enquiry after conclusion of enquiry not permissible[206].

Initiation of disciplinary proceedings after acquittal of the petitioner of the charges of rash and negligent driving - on technical grounds as material witness turned hostile - Held initiation of disciplinary proceedings in respect of the same is not barred[207].

The petitioner was contended that once criminal court disposed of the matter, the employer shall not initiate enquiry on same

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[203] 1999 LLR 149

[204] 19993 LLR 1993 382 (Mad.HC)
[205] 1990 LLN- II 839
[206] 1993 LLR 304
[207] G. Simhachalam vs. The Depot Manger, APSRTC., 1994 LLR 817 (AP. H.C).

cause. Held that the degree of proof in domestic enquiries is different than that of the criminal proceedings[208].

Acquittal of employee by the Criminal Court - whether acquittal bars the jurisdiction of the authorities to initiate proceedings on the same charges Held: No - The ordinary rule is that normally where the accused is acquitted honourably and completely exonerated of the charges, it is not expedient to continue a departmental enquiry on the very same charges or grounds or evidence. This is a rule of prudence and thus it does not take away the power of the authority concerned to continue the departmental / domestic enquiry. It also does not fetter the discretion of the authority concerned. It is, however, importance to note that before deciding to continue the enquiry, after acquittal by a criminal court and exoneration of charges by criminal court, is it proper to punish an employee departmentally or by the management by holding against the employee and accepting as proved all the charges or evidence, which ahs been rejected by the criminal court. There can be a reason, which could invite the challenge to any action by the employer in case where, for no apparent reason, a domestic enquiry is held in to the very same charges and on the basis of

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[208] Vasant Rama Bhagade vs. Bombay Port Trust, 1995 LLR 149 [Bom. HC]. Also see. Shakti Capacitors vs. H B Sahastrabudha & another, 1988 M.L.J. 340; Kazi vs. J.C Agarwal & ors., 1981-II- LLJ 410; Shaik Liyas Ayyub vs. Deputy Chairman, 1993 II CLR 539; The Board of Trustees of Port of Bombay vs. D.R Nadkarni & ors.,1983-1-LLJ-1-46(SC); A.L Karla vs. The Project & Equipment Corporation of India Ltd., AIR 1984 SC 1361; Glaxo Laboratories vs. Presiding Officer, Labour Court, Meerut; AIR 1984 SC 505

the same evidence, which is not accepted by the court of law. Such an act of employer is taken as violative of article 14 of the Constitution of India[209].

An employer is within its right to hold an enquiry against an employee who has been acquitted by the Criminal Court.[210]

**Other general instances of initiation of enquiry**:

Disciplinary proceedings can be taken even in cases where the act complained of, is done by an officer in a quasi-judicial\judicial proceeding[211]

Disciplinary action can be initiated for action/misconduct outside working hours provided it has relation with the employment and whether it is committed within the precincts of the concern[212]

Article 226. Petitioner was placed under suspension on 24.4.1992 in contemplation of enquiry. More than nine months expired. Neither enquiry initiated nor charge-sheet served, held that the order is not sustainable.[213] Impracticability to hold enquiry - Art.226 - on the ground that it was not reasonably practicable to hold enquiry - Action based on solitary act of abusing, assaulting an officer of the company. Held, that resort

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[209] Special; Office, Salem, NGO's co-operative Stores, Salem & anr., 1995 LLR 648 [Mad. HC] Also see. Corporation of Nagpur Vs. Ramchandra G. Medak, 1982-1-LLN 227 (SC).
[210] Babulal V/s. State of Haryana & Ors. 1991 (78) FLR 489 SC
[211] 1992 FLR 1059 (SC)
[212] (1970) II LLJ 478
[213] LLR 1993 P.976 (Allh HC) also see AIR 1984 SC 153

to dispense with the enquiry can be had in exceptional and glaring cases and not in routine. Held order is *malafide* and liable to be quashed.[214]

Holding of enquiry when the workman admits the charges, but pleads leniency – Holding of the enquiry is imperative[215]. Misconduct once condoned by the employer - cannot be reopened in future[216].

Action against absence of an employee - Enquiry will be imperative - if an employee remain absent more than 8 consecutive days, in accordance with the certified standing orders, has abandoned the job and when his name is struck off from the muster rolls - such certified standing orders has struck down by the Supreme Court in D.K. Yadav vs. J.M. Industries Ltd.,[217].

It is not imperative that an enquiry must be held at a place where the incident pertaining to misconduct has taken place[218]. When the guilt is admitted by the delinquent employee, the enquiry is not necessary[219].

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[214] LLR 1993 P.678. (Delhi HC) - Also see - AIR 1986 SC 1416
[215] ACC Babcock Ltd. vs. Bimsha & Ors. 1987 FJR (71) 384 (Karn HC).
[216] MP State Road Transport Corp. vs. Om Prakash Joshi & Ors. 1990 (60) FLR 15 (MP)
[217] 1993 (67) FLR 111 (SC), 1993 LLR 584
[218] 1987 FLR (54) Del. HC.
[219] Krishndev Puri vs. UOI 1984 LIC. 532 Delhi HC

The enquiry may be initiated at the instance of the Courts' order. In one case Rajastan High Court took serious note of inaction on the part of official of the department and observed that the present case is fit where enquiry should be made and erring official held responsible for negligence[220].

When an employee is absent more than 15 days amounts to misconduct, wherein initiation of the disciplinary action is imperative. Whereas automatic abandonment of services on remaining absent for 15 consecutive days is unconstitutional held by the Allahabad H.C. M/s U.P State Textile Corporation Spinning Mills Jhansi vs. State of U.P & ors[221]:

The Supreme Court has defined "Sexual Harassment" and has further directed that where such conduct amounts to misconduct in employment as defined by the different Service Regulations appropriate disciplinary action should be imitated by the Employer[222]. With regard to initiation of disciplinary proceedings, it is now well settled law that it is necessary that the competent authority who imposes the penalty must alone initiate domestic enquiry proceedings and that the proceedings

[220] State of Rajasthan vs. Smt. Lassi 1997 LLR 368

[221] 1997 LLR 391, also see National Engineering Industries Ltd., Jaipur vs. Hanuman, AIR 1968 SC 33; Backingam & Carnatic Co., Ltd., vs. Venkataish & ors, AIR 1964 SC 1272; Delhi Cloth and General Mills Co. vs. Ludhbudh Singh, AIR 1972 SC 65; Union f India & ors, vs. M/s Jalyan Udyog & anr (1994) 1 SCC 318; D.K Yadav vs. JMA Industries Ltd., 1993 LLR 584

[222] Vishaka vs. State of Raj. 1997 LLR 991

can be initiated by any superior authority who may be an officer subordinate to the appointing authority[223].

It is well settled by the Supreme Court that initiating the domestic enquiry proceedings for and passing orders of dismissal, removal or reduction in rank of a Govt., Servant who has been convicted by a criminal court is not barred merely because of the sentence or order is suspended by the appellate Court or on the ground that the Dy. Director of Collegiate Education[224].

Assault on a co-worker for a matter connected with the establishment committed outside the premises of the establishment is a misconduct and is covered by the clause "Commission of any act subversive of discipline of good behaviour" - Mahindra & Mahindra Ltd. vs. S.A. Patil & Ors[225].

A disciplinary action was initiated against the acts that the delinquent has written letter to Governor stating bad administration, corruption, nepotism and alleging appointment of several persons not properly qualified but recruited at the instance of the Ministers and Political leaders. Also issued a press statement published in Newspaper welcoming the dismissal of the Chairman Congress Committee. Management

[223] Inspector General of Police vs. Thavasiappan 1996 (2)SLR 470
[224] 1995 (3) SCC 377, K. Sampath Kumar vs.FCI 1996 (3) SLR 666
[225] 1993 I LLN 770 (Bom.HC)

initiated disciplinary action, meanwhile he filed civil suit - injunction refused, and he failed to participate in the enquiry. Enquiry concluded and TWO charges proved. Held Art.19 is not free and as per the Service regulations of the Corporation the management has entitle to take action[226].

The Supreme Court in the catena of judgments held that no disciplinary action against delinquent can be initiated or taken in respect of an act / misconduct not defined in the Standing Orders certified under the Industrial Employment (Standing Orders) Act, 1946 or the Service Regulations or even in case where such acts are vaguely defined[227]. The Madras High Court has held that refund of misappropriated money does not absolve from initiation of action[228]. Abandonment of an employment by an employee enquiry will be imperative[229].

Misconduct – moral turpitude – the observation of the Supreme Court in the case of Pawan Kumar vs. State of Haryana & anr, (1996) 4 SCC 17, that whatever may be the meaning which may be given to the term "moral turpitude" it appears that one of the most serous offences involving 'moral turpitude' would be where a person employed in a Banking company dealing with

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[226] MH Devendrappa vs. Karnataka Small Industries Dev. Corpn. 1998 LLR 356 SC

[227] Glaxo Industries Ltd., vs. P O Labour Court Meerut AIR 1984 SC 505; AL Karla Vs. Project & Equipment Corpn of India 1984 LIC 961 (SC); RV Patel vs. Ahmedabad Municipal Corpn 1985 LLR –8 (SC); Phalghat BPL & PSP ThoZilali Union vs. BPL India 195 LLR 1019 (SC)

[228] Chief GM, SBI vs. P O, I.T & anr, 1996 (74) FLR 15 (Mad – HC)

[229] DK Yadav vs. JMA Industries 1993 LLR 584 (SC), Uptron India Ltd., vs. Shammi Ban, 1998 LLR 385 (SC)

money of the general public, commits forgery and wrongfully with draws money which he is not entitled to withdraw[230].

Misconduct in a departmental enquiry is never considered to be a crime. It is quite often described as a civil wrong or civil offence. Therefore, the proof of the charge is required to be grounded on preponderance of probabilities and not on the basis of mens-rea or guilty mind[231]. Disciplinary enquiry - Initiation of - Rules does not require that charge memo has to be issued only by appointing authority - Charge memo issued by Dy. Supdtt. of Police who was not appointing authority of Police Constable concerned - Not invalid[232].

Disciplinary proceedings, initiated by one of competent disciplinary authorities - Need not be completed by that authority alone - Proceedings initiated by one disciplinary authority - Dismissal order passed by another competent disciplinary authority - Not void[233]. Charges related to holding of assets disproportionate to known sources of income and for having acquired assets without permission of Dept. in violation of A.P. Civil Services (Conduct) Rules, 1964 - Criminal case pending against delinquent officer for possessing disproportionate assets - Subsequent acquittal in criminal case - Disciplinary proceedings for very same charge, cannot be held

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[230] Allahabad Bank vs. D.K. Bhola 1997 LLR 608 SC
[231] T.Sudharshan vs. Labour Court & ors, 1997 LLR 124
[232] Govt. of T.N. and others, vs. S. Vel Raj, AIR 1997. SC 1900
[233] Allahabad Bank, Appellant vs. Prem Narain Pande and others, AIR 1996 SC 492

- It is, however, open to Disciplinary Authority to proceed with other charge relating to acquisition of assets without permission of Dept. Govt. of A.P. and another, vs. C. Muralidhar[234].

Proceedings - Initiated by one of competent disciplinary authorities - Need not be completed by that authority alone - Proceedings initiated by one disciplinary authority - Dismissal order passed by another competent disciplinary authority - Not void. Under the Regulations it is not necessary that the entire gamut of the departmental enquiry against the officer must be conducted from beginning to end by only one disciplinary authority and one competent disciplinary authority, which initiated the proceedings cannot get changed in midstream by another equally competent disciplinary authority.

The delinquent officer was serving in the bank in junior management scale-I. Under the regulations both the Dy. General Manager as well as the Asstt. General Manager is disciplinary authorities who can initiate proceedings against the officer in Scale 1 and who can also pass the final penalty order. In the instant case the Dy. General Manager, Lucknow Division, initiated the disciplinary proceedings as Disciplinary Authority under Regulation 6 (3) by framing charges and appointing the Enquiry Officer. The enquiry was completed by him, but before the stage of Regulation 7 was reached, the Enquiry Officer's

[234] AIR 1997 SC 3005

report as per Regulation 6 sub-regulation 21 (ii) came to be sent to another equally competent Disciplinary Authority, namely, Asstt. General Manager, Patna Branch. The dismissal order was passed by Asst. General Manager. Held, the order of dismissal passed by Asst. General Manager could not be said to be void. There is nothing in the Regulations to suggest that once a competent disciplinary authority, namely, Dy. General Manager has initiated disciplinary proceedings by framing charges and appointing enquiry officer as per Regulation 6 sub-regulation (3), it is only that Disciplinary Authority, namely, the Dy. General Manager who must necessarily complete the proceedings till they are terminated and final orders are passed under Regulation 7. It could not be said that the transfer of disciplinary proceedings from one authority to other was likely to result in two conflicting orders of two equally competent authorities. Such a situation would never arise for the simple reason that for one disciplinary enquiry against a concerned officer at a given point of time there would be only one disciplinary authority. After transfer of proceedings to Asst. General Manager it was only the Asst. General Manage who remained the sole disciplinary authority in the field. It could not also be said that the change of disciplinary authority before completion of the enquiry would whittle down the right of appeal available to the concerned delinquent[235].

[235] Allahabad Bank, vs. Prem Narain Pande and others, AIR 1996 SC 492

### 3.2 CHARGE SHEET:

The charge sheet is the charter of disciplinary enquiry. It should always specific and consonance with the standing orders / rules of the institution. In the charge sheet the charges leveled against the delinquent employee should be phrased in a clear specific terms. The date, time and the place of the incident should be mentioned in the charge sheet. The charges should be leveled quoting the appropriate clauses of the Standing Orders / conduct rules as the case may be. It is imperative that the competent authority should issue the charge sheet and he should not the accuser. The language of the charge-sheet shall merely indicate that the workman what he supposed to or alleged to have done. In case the delinquent employee refuses to accept the charge sheet, the refusal be recorded in writing in the presence of two witnesses. A copy of the charge sheet can also be sent by registered pos with acknowledgement due to his last known address. When the employee does not understand English, the contents of charge sheet should be explained to him in Hindi or other language known to him in the presence of two witnesses and they should be made to sign on the charge sheet as token of having explained the contents in the language understood by the delinquent employee. Under this chapter too, there are catena of cases which are decided by the court of law, viz:-

If a charge-sheet *is vague*, not precisely setting out the allegations of misconduct, then enquiry held on the basis of such charge-sheet is bad[236].

Petitioner was given charge-sheet with several counts of misconducturing the enquiry one of the charges withdrawn by the employer whether amounts to victimization of the petitioner? The court held that this act cannot be construed against the management. It is a demonstration of balance attitude on the part of the employer. The said act of dropping of one charge does not amount to victimization on the ground the management was anxious to victimize the workman[237].

***Failure to issue a specific charge-sheet*** - Enquiry is vitiated - especially when charges are such that involve consequences of termination. If a person is not told clearly and definitely what the allegations are on which the charges preferred against him are founded he cannot possibly, by projecting his own imagination, discover all the facts and circumstances that may be in the contemplation of the authorities to be established against him. The whole object of furnishing the statement of allegations is to give all the necessary particulars and details, which would satisfy the requirement of giving a reasonable opportunity to put up defence. So, in spite of the, Government servant repeatedly objecting to the vagueness of charges and non-furnishing of

[236] Miraj Tluka Gimi Kamgar vs. The Manager Shree Gajanan Mills Sangli & Ors, 1992 LLR 105 [Bom. HC]

[237] C.B Bidkar vs. Mather & Platt (India) Ltd., 1992 LLR 113 [Bom. HC]

statement of allegations, the failure to supply him the facts, circumstances and particulars relevant to the charges even at the stage of second show cause notice would amount to denial of proper and reasonable opportunity of defending himself in complete disregard of principles of natural justice[238].

Where the charges framed against the delinquent officer were vague and no allegations regarding it have been made by him before the enquiry officer or before the High Court, the fact that he has participated in the enquiry would not exonerate the department to bring home the charges. The enquiry based on such charges would stand vitiated being not fair. Held, that the report of the enquiry officer finding the delinquent officer guilty could not be sustained as the charges were vague and it was difficult to meet the charges fairly by the delinquent officer. The evidence adduced was perfunctory and did not at all bring home the guilt of the delinquent officer. Consequently the order of termination of service of delinquent officer would be liable to be set aside[239]. Charge-sheet not issued in a language known by the charged official - violation of principles of natural justice[240].

No prescribed format for a charge-sheet, a statement of commission of certain irregularities was held to be a charge

[238] Surath Chandra Chakravarty vs. The State of West Bengal, AIR 1971 SC 752
[239] Sawai Singh, vs. State of Rajasthan, AIR 1986 SC 995
[240] 1992 (1) SLJ 161 (CAT)

sheet based on which a warning was issued. The Deptt. issued a second charge sheet on the ground that the first was just 'letter', contention negatived[241].

A charge-sheet if *issued by a subordinate authority* does not vitiate disciplinary enquiry. When such a charge-sheet is issued with the implicit approval of the superior / appointing authority[242]. A charge memo can be issued to an officer, for his conduct in his capacity as a judicial officer. No defence can be taken that such act is done by him not in discharge of his duty as a govt. servant[243].

Applicant served with a vague charge sheet, such charge sheet was defective, as it did not enable him to prepare defence. Held that Departmental Enquiry was defective and has not been done properly[244]. The charge must not contain any expression, which gives rise to an apprehension that the management has made up its mind regarding guilt[245].

Petitioner was called upon by a simple notice to explain his absence satisfactorily and if he fails, his name will be struck from rolls - whether giving of notice can be equated to an enquiry - Held No.[246]

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[241] 1992 (3) SLJ 20
[242] Gramophone (India) Co. vs. west Bengal, 1991 (1) LLJ 536 (Cal. H.C)
[243] 1990 (1) LLJ 243 (Ker.)
[244] CAT (Gaw) 1988 I 442
[245] 1965 II LLJ 101
[246] 1993 LLR P.600

***Charge sheet - who can issue***. The general law is that any person who has got power to appoint the employees has also the power to take disciplinary action. It is well settled that an authority competent to impose penalty or dismiss the employee can issue or frame charge sheet.[247]

***Non-issuance of charge-sheet – consequences***: Although no procedure is prescribed for initiating disciplinary action against an employee either under Industrial Disputes Act or the Industrial Employment (Standing Orders) Act, 1946, but it is always advisable to issue a charge sheet to the delinquent employee as a first step to initiate disciplinary action against him. Notwithstanding that in one case the Kerala High Court has held that absence of specific charge-sheet issued by the management itself before domestic enquiry commenced is immaterial. It was further held that when the entire matter is before the Labour Court, there will be pleading before him, that is, statement on behalf of the management and reply there to. Specific issues can be framed, and the parties will be able to know what exactly is the case they have to meet. The issue of determination remains as to whether the employee is guilty of the misconduct alleged against him. This is to be examined by the Lab. Court on the basis of pleadings and issues raised on evidence as adduced before it. No doubt, the management can take shelter of the decision of the Kerala High Court in case a

[247] AIR 1959 SC 512, 1986 (68) FJR 349 (P&H, HC)

charge sheet has not been issued but the law is otherwise well settled that charge-sheet must be issued as a preliminary step for initiating disciplinary proceedings against an employee[248].

***Misconduct of bribery against the petitioner*** – charge-sheet alleging that the petitioner planned to deliver unaccounted stock of scrap to the contractor in expectation of bribe - no specific charges when the delinquent demanded or received bribe. Held charge sheet is invalid, enquiry report and the final order are liable to be quashed. Further the High court has observed about the requirement and object of valid and proper charge-sheet as – Fair hearing pre-supposes a precise and definite catalogue of charges so as that the person charged may understand and effectively meet it. If the charges are imprecise and indefinite, the person charged could not be able to understand them and defend himself effectively and the resulting enquiry would not be fair and just enquiry. If a vague charge is given to delinquent, it is a fatal defect, which vitiates entire proceedings. Vagueness in the charge is not excused on the plea that the employee concerned should be deemed to have known the facts correctly. It should not be left to the delinquent official to find out or imagine what the charges against him are and it is for the employer to frame specific charges with full particulars[249].

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[248] 1992 1 LLJ 777 (Ker.HC)

[249] G. Chandrakant vs. Guntur Dist. Milk Producers Union Ltd., 1994 LR 984 (AP. HC)

Language of charge-sheet - while drafting charge sheet steps should be taken that it is in a language which the delinquent worker can easily understand[250]. The language of the charge-sheet assumes importance because if the delinquent is not in a position to understand, then he would not have reasonable opportunity to defend himself. In order that the worker must know correctly the charges levelled against them[251]. Mentioning particular clause of standing order in the charge sheet not imperative - Held by their Lordships of Karnataka High Court.[252]

***Vague charge-sheet - effect of it***: - It has been repeatedly held by the Supreme Court and the courts below that if the charge-sheet is vague, and then there has been no proper enquiry. Since the delinquent has to meet the charge, he must know in certain, and intelligible language, what he is accused of? The absence of a reasonably certain and particularized charge, robs the enquiry of its substance. Such enquiry with the charge is bound to be vitiated.[253]

***Vague charge-sheet*** - whole disciplinary proceedings will be quashed. The particulars of the misconduct not incorporated in the charge-sheet that is not the charge sheet at all. The barest requirement of the charge-sheet must contain particulars and

[250] AIR 1953 SC 241
[251] Harikisan, vs. State of Maharashtra and others, AIR 1962 SC 911

[252] 1990 (61) FLR 8
[253] 1981 Lab IC 1110 and 1993 LLN 798 (Kerala HC)

special instances of misconduct, so as to enable the delinquent employee to defend himself.[254]

Petitioner - storekeeper was served with charge-sheet for misconduct - petitioner demanded detail particulars - not supplied - dismissed after enquiry, the order of dismissal was quashed in lieu of violation of principles of natural justice. The court further held that the charges leveled are vague and no reasonable person could have effectively replied to them or effectively defended against them[255].

***Charge-sheet its essentials and authority competent to issue***: The general law is that any person who has got power to appoint the employees has also power to take disciplinary action. In other words, the appointing authority has got power to frame and issue the charge-sheet. It is well settled that the authority competent to impose penalty or to dismiss the employee can issue the charge-sheet. Thus if the charge sheet is not issued by the competent authority / person, the whole disciplinary proceedings would be vitiated. This was observed in the case of Amulya Ratan Mukharjee vs. Dy., Chief Mechanical Engineer.[256]

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[254] Miraj Tluka Gimi Kamgar vs. The Manager Shree Gajanan Mills Sangli & Ors, 1992 LLR 236 (Bom. H.C.)
[255] Sundar Lal Dhanraj Kasliwal vs. Karmaveer Kakasaheb Wagh Skhar Ltd., 1995 LLR 247 [Bom. HC]
[256] AIR 1961 Cal.40 and in State of U.P & ors. vs. C.H Pathak 1995(71) FLR 434.

A charge-sheet is a charter of disciplinary action which specifically sets out all charges which the workman is called upon to show cause and also should state all relevant particulars without which he cannot defend himself. The object of this requirement is that the delinquent employee must know that he is charged with and have the amplest opportunity to meet the charge. It ahs been held that if the charges are imprecise or indefinite, the person charged would not be able to understand them and defend himself effectively and the resulting enquiry would not be fair and just. It has also been held that if the charges are vague and the workman has no opportunity to reply to them and the particulars of such charges are not disclosed t the workman, the enquiry will not be in conformity with rules of natural justice. This view has held in catena of case to mention a few which are : Sisir Kumar Das vs. Sate of West Bengal, AIR 1995 Cal.183; J.K Cotton Spinning & Weaving Mills Co. Ltd., vs. Jagan Nath (1963) I – LLJ 475; Northern Railway Coop. Credit Society vs. Industrial Tribunal (1967) II LLJ 46 (SC); Miraj Taluka Girini Kamgar Sangh (supra).

***Charge sheet - when not vague***: - It depends on the facts of each case. Normally charge-sheet be specific and must contain in all the allegations. But these can be exceptions under specific circumstances. For instance, in one case, the petitioner employee was charge-sheeted for misconduct for using filthy

and vulgar language. Filthy and vulgar language is not stated in the charge-sheet. Even the concerned witness did not depose of the said words but wrote the same on a piece of paper and gave the same to EO which is put on exhibit. The words were so horrible that etiquette and decency impelled them not to resort to verbal utterance regarding the same. In the circumstances, the pleas that charge sheet is vague is rejected.[257]

***Defective charge-sheet - consequences thereof*** - A charge sheet is the charter of disciplinary action which specifically sets out all charges which the workman is called upon to show cause against and also should state all relevant particulars without which he cannot defend himself. The object of this requirement is that the delinquent employee must know that he is charged with and have the ample opportunity to meet the charges. It has been held by the Calcutta High Court that if the charges are either imprecise or indefinite or vague, the person charged would not be able to understand them and defend himself effectively and the resulting enquiry would not be fair and just. In another case also, it has been held that for initiating disciplinary action the department should have issued specific charge-sheet containing such allegations or any other allegation intended to be proved in the disciplinary proceedings. It is not permissible to allege a fact not intended to be proved.

[257] 1994 - II - LLN 181 (Mad. HC).

Disciplinary proceedings should succeed or fail on the basis of the charge-sheet. In view of setting aside of the order of dismissal on the basis of a charge-sheet, the delinquent employee must be deemed to be in service and as such the department will be free to take steps to proceed with the other disciplinary proceeding[258].

The charges should contain particulars of the alleged offences - which should be specific and not vogue. When a worker given a reply then he cannot later on say that the charge is vague the other contentions decided by the Court that a charge of indiscipline cannot be viewed with same strictness as a charge for an offence triable under Criminal Law. Delay in passing the order coupled with reasonable reasons shall be fatal to the enquiry.[259]

When an allegation of misconduct is made against a workman he should be given a charge-sheet and a domestic enquiry should be held against him giving him full opportunity of hearing. This is the basic principle of industrial law. In dealing with industrial disputes under the Industrial Disputes Act and other similar legislation, Industrial Tribunals, Labour Courts, Appellate Tribunals and finally the Supreme Court have by a

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[258] Amulya Ratan Mukerjee vs. Dy. Chief Mechanical Engr. AIR 1961 Cal. 40; Steel Authority of India Ltd. & Anr. vs. Ujjal Kumar Bhowmick, 1989 (59) FLR 188 (Cal HC)

[259] D. Anand Kumar vs. The Indian Airlines 1997 LLR 395. Relied upon SBJ vs. P.D Grover J.T. 1995(7) SC 207

series of decisions laid down the law that, even though under contract law, pure and simple, an employee may be liable to dismissal, without anything more, industrial adjudication would set aside the order of dismissal and direct reinstatement of the workmen where dismissal was made without proper and fair enquiry by the management or where, even if such enquiry had been held the decision of the Enquiring Officer was perverse or the action of the management was *malafide* or amounted to unfair labour practice or victimization, subject to this that even where no enquiry had been held or the enquiry had not been properly held the employer would have an opportunity of establishing its case for the dismissal of the workman by adducing evidence before an industrial Tribunal. It is reasonable to think that all this body of law was well known to those who where responsible for enacting the C. P. and Berar Industrial Disputes Settlement Act, 1947 and that when they used the words "in accordance with law" in Cl.3 of Sch. 2 of the Act they did not intend to exclude the law as settled by the Industrial Courts and the Supreme Court as regards where a dismissal would be set aside and reinstatement of the dismissed workmen ordered. If the word "law" in Sch.2 includes not only enacted or statutory law but also common law, there is no reason why it would not include industrial law as it has been evolved by industrial decision. Therefore, even where under the terms of an employment, an employee is liable to dismissal without any enquiry, the management is bound in law to hold an

enquiry before dismissing such an employee, held in Provincial Transport Services vs. State Industrial Court,[260]

When the *charge-sheet is defective*, the whole disciplinary action as initiated by the employer will be vitiated held in Steel Authority of India Ltd. vs. Ujjal Kumar Bhowmik[261]. It is well settled that a charge-sheet contains the details of the charges including date and time when the delinquent employee has committed the same. However, in one case it has been held that a charge-sheet of disciplinary proceedings is different than that under Criminal Law and no rigid principles of law of confidence will be applicable. It has also been held that a charge-sheet will be deemed as vague when an employee has submitted detailed reply to the same.[262]

The purpose of a charge-sheet is to know as to what exactly is the case the workman alleged to be guilty of misconduct(s) as to answer. Though different situation will require different charge-sheet, one requisite feature of every charge-sheet is that it should be specific in all possible details. Besides being accurate so that the acts of misconduct on the part of the delinquent employee must be brought home, because otherwise the entire disciplinary proceeding will come to naught. The whole object of furnishing a charge-sheet is to give

[260] AIR, 1963 SC 114; Sur Enemel & Stamping Works vs. their workmen 1963 (7) FLR 236 SC
[261] 1990 LLR 77
[262] D. Anantkumar vs. India Air Lines. 1997 LLR 395 (Kar. HC)

an opportunity to the person who is charged with misconduct and the principles of natural justice also require that a person charged with an offence should know preciously the nature of the offence so that he may be able to explain what he has to say about it and prove his innocence in the matter. So, the purpose of the charge-sheet being to acquaint fully the employee about the nature of the charges levelled against him, it must contain full details and must be in writing and must be signed by the disciplinary authority and should not be vague as held by Mad. High Court in A. Narayan vs. Southern Railways[263]. A charge-sheet for gross negligence without alleging or giving particulars pertaining to negligence will be vague and will result in perversity of the enquiry held against the delinquent employee who established by evidence produced in the enquiry to the effect that he was diligent[264].

The charge-memo was issued by the director of the appellant whereas their appointing / disciplinary authority being the Managing Director of the Appellant. The Supreme Court held that the judgment of the High Court could not be sustained as the authority who issued the charge-sheet was the controlling authority and therefore it was invalid[265].

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[263] 1956 1 LLJ 29

[264] Arvind Kumar Hiralal Mehta vs. BOB 1993 LLR 30

[265] SAIL vs. RK Divakar 1998 LLR 343, Director Gen. ESIC vs. T. Abdul Razak 1996 (II) LLJ 765, Inspector General of Police vs. Thavasiappan 1997 I LLJ 191, PV Srinivas Shastri vs. C&AG 1993 I LLJ 284, State of MP vs. Shardul Singh 1970 (I) SCC 108.

*Serving of charge-sheet* – charge-sheet sent by Regd. Post returned with postal remarks “not found” - does not amount to tendering to the addressee - cannot be treated to have been served. Delinquent was an employee of the appellant. His personal file and the entire service record were available in which his home address also had been mentioned. The charge sheet which was sent to the respondent was returned with the postal endorsement "not found." This indicates that the charge sheet was not tendered to him even by the postal authorities. A document sent by registered post can be treated to have been served only when it is established that it was tendered to the addressee. Where the addressee was not available even to the postal authorities, and the registered cover was returned to the sender with the endorsement "not found," it cannot be legally treated to have been served. The appellant should have made further efforts to serve the charge sheet on the respondent. Single effort, in the circumstances of the case, cannot be treated as sufficient. That being so, the very initiation of the departmental proceedings were bad. It was *ex-parte* even from the stage of charge sheet, which, at no stage, was served upon the respondent.

So far as the service of show cause notice is concerned, it also cannot be treated to have been served. Service of this notice was sought to be effected on the respondent by publication in a newspaper without making any earlier effort to serve him

personally by tendering the show-cause notice either through the office peon or by registered post. There is nothing on record to indicate that the newspaper in which the show-cause notice was published was a popular newspaper which was expected to be read by the public in general or that it had wide circulation in the area or locality where the respondent lived. The show-cause notice cannot, therefore, in these circum-stances, be held to have been served on the respondent. In any case, since the very initiation of the disciplinary proceedings was bad for the reason that the charge sheet was not served, all subsequent steps and stages, including the issuance of the show-cause notice would be bad. Where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service is essential as the person to whom the charge-sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also, when the show-cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. Since in both the situations, the employee is given an opportunity to submit his reply, the theory of "Communication" cannot be invoked and "Actual Service" must be proved and established[266].

In the case of State of Punjab, vs. Khemi Ram[267], the Supreme Court has discussed the words ‘communication’ & ‘effective

[266] Union of India & Ors, vs. Dinanath Shantaram Karekar & Ors, AIR 1998 SC 2722
[267] AIR 1970 SC 214

communication. The ordinary meaning of the word 'communicate' is to impart, confer or transmit information. It is the communication of the order which is essential and not its actual receipt by the officer concerned and such communication is necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. The word "communicate" cannot be interpreted to mean that the order would become effective only on its receipt by the concerned servant unless the provision in question expressly so provides. Actually knowledge by him of an order where it is one of dismissal, may, perhaps, become necessary because of certain consequences. But such consequences would not occur in the case of an officer who has proceeded on leave and against whom an order of suspension is passed because in his case there is no question of his doing any act or passing any order and such act or order being challenged as invalid.

Like-wise, mere passing of an order of dismissal is not effective unless it is published and communicated to the officer concerned. An order of dismissal passed by an appropriate authority and kept on its file without communicating it to the officer concerned or otherwise publishing it does not take effect

as from the date on which the order is actually written out by the said authority; such an order can only be effective after it is communicated to the officer concerned or is otherwise published. This view was held by the Supreme Court in the case of State of Punjab, vs. Amar Singh Harika,[268]

*Service of charge-sheet - Proper procedure:* The Standing Orders of the employer company provided that the workmen charged with an offence should receive a copy of such charge and that a workman who refused to accept the charge-sheet should be deemed to have admitted the charge made against him. The charge-sheets in the case were sent to eleven workmen by registered post and returned un-served, because they were not found in their villages. On the same day on which the charge-sheets were sent by registered post notices were issued in certain newspapers informing the workmen, without mentioning their names, that charge sheets were sent individually to the workers who had taken part in the illegal strike and had also been displayed on the notice boards both inside and outside the office gates of the factory and the workers concerned were required to submit their explanations by certain date. There was no provision in the Standing Orders for affixing charge-sheets on the notice board; Held that it could not be said that the workmen would have notice that they were among those to whom charge-sheets had been sent or about

[268] AIR 1966 SC1313

whom charge-sheets had been displayed on the notice boards. The proper course was when the registered notices came back un-served in the case of these workmen to publish notices in their names in some newspaper in the regional language with a wide circulation in the State along with the charges framed against them[269].

The Supreme Court in the case of Laxmi Devi Sugar Mills Vs. Nand Kishore Singh[270], held that - - the charge sheet, however, only complained about the speech which he had made on 10-6-1952, wherein, among other defamatory remarks, he, the respondent, had instigated the workers to take steps for the removal of the General Manager. The acts of insubordination calculated to undermine the discipline, in the factory which we have adverted to above were neither the subject matters of the charge nor were they relied upon by the General Manager in his report as the grounds of misconduct entitling the management to dismiss the respondent from its employ. The charge-sheet which was furnished by the appellant to the respondent formed the basis of the enquiry which was held by the General Manager and the appellant could not be allowed to justify its action on any other grounds than those contained in the charge sheet. The respondent not having been charged with the acts of insubordination which would have really justified the appellant in dismissing him from its employ, the appellant

[269] The Bata Shoe Co., (P) Ltd., vs. D. N. Ganguly and ors, AIR 1961 SC 1158
[270] AIR 1957 SC 7

could not take advantage of the same even though these acts could be brought home to him.

It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him. In an enquiry into charges against certain workmen, of participation in an assault by many workmen on the manager and assistant managers of a tea estate, conducted by the assaulted officers themselves, only certain questions were put to each workman in turn. Neither was any witness examined in support of the charge nor was any statement made by any witness tendered in evidence. There was no opportunity to the persons charged to cross-examine the officers assaulted who were not only in the position of judges but also of prosecutors and witnesses and they drew upon their own knowledge of the incident and instead cross-examined the persons charged: It was held that the

enquiry was vitiated because it was not held in accordance with the principles of natural justice. There was such a travesty of those principles that the Tribunal was justified in rejecting the findings and asking the company to prove the allegations against each workman de novo before it. Meenanglas Tea Estate vs. Its Workmen[271]

Enquiry - Mere fact that employee did not appear on date fixed for enquiry will not satisfy requirement of principles of natural justice that he should be told about details of charges and that material available in support of charges be disclosed to him. In one case, The Supreme Court has held that - That circumstance however will not make the enquiry valid, unless it be held that an adequate opportunity was given to Kanraj to meet the charges framed against him. The charges, as we have indicated above which were served on Kanraj were very vague and he had no opportunity to give a reply to them. The material which was available in support of these charges was also never disclosed to him. The mere fact that Kanraj did not appear on the date fixed for the enquiry will not, in these circumstances, satisfy the requirement of the principles of natural justice that he should have been told of the details of the charges and the

[271] AIR 1963 SC 1719

material available in support of these charges should have been disclosed to him[272].

Mr.Ziakh vs. Firestone Tyre and Rubber Co. Limited,[273] where it was held that there cold be go-slow even where wages are being paid on piece-rate basis. Assuming that to be so, we are of opinion that that does not affect the validity of the conclusion as to base or standard in the present scheme at which we have arrived: It may be possible to punish for go-slow even where wages are paid on a piece-rate system because the employee deliberately does not produce what he had been normally producing.

The delinquent bank employee absented himself from work for a period of 90 or more consecutive days. The Bank sent show cause notice to delinquent for his continued absence and to report back for work before mentioned date failing which he would be deemed to have been voluntarily retired from the services of the Bank for his continued absence. The said notice was sent by registered post but it was returned with the report of the postal authority that he refused to receive the same. The Bank by virtue of Clause 16 of the Bipartite Settlement treated the delinquent as having voluntarily abandoned his services. This order of the Bank was similarly sent to delinquent under

[272] Management of the Northern Railway Co-operative Credit Society Ltd., Jodhpur, vs. Industrial Tribunal, Rajasthan-Jaipur and another, AIR 1967 SC 1182
[273] 19541 Lab LJ 281 (Bom)

registered cover but was returned with the endorsement of the postal authority "not found during delivery time". Industrial dispute was raised by the union, which led the reference by Government to the Tribunal for adjudication. The Tribunal was of the view that since the Bank did not examine the postman that delinquent in fact refused to receive the notice, it could not be said that there was service of notice to him[274].

The charge-sheet issued by subordinate authority, which is later supported by the disciplinary authority, whether it can be said that domestic enquiry is vitiated and the consequent order of dismissal liable to be set aside. This issue was settled by the High Court of Calcutta in the case of Gramophone Co. of India Ltd., vs. State of West Bengal & ors,[275]. The court has held that there is no proposition of law that under no circumstances any person or authority subordinate to the disciplinary authority cannot issue charge-sheet or initiate departmental proceedings. If it can be established that such subordinate authority has either express or implied approval to the same by the disciplinary / appointing authority, then the departmental proceedings initiated at the instance of such subordinate authority cannot be vitiated. The Court has relied on the earlier judgments viz; Mahananda Bhaduri vs. Astt. Commercial Superintendent, Khargpur[276], M C. Vasudevan vs. SNDP

[274] Syndicate Bank, vs. General Secretary, Syndicate Bank Staff Association and another, AIR 2000 SC 2198
[275] 1991-I LLJ 536
[276] 1974 Lab.IC 1954

Yogan[277], Workmen of Indian Overseas Bank vs. Indian Overseas Bank & anr[278], State of Madhya Pradesh vs. Surdal Singh[279]

**Non acceptance of charge-sheet – legal implications**:

While the delinquent employee refuses / avoids accepting the charge-sheet – the following steps among the other are resorted to:

In case the employee refuses to accept charge-sheet, the guidelines have to be taken from the Civil Procedure Code vide Order 5 Rule 1. In one case it has been held by Tribunal that if a worker avoids receiving a notice on the plea that it does not contain his full name, then the management is not bound to adopt other mode of affective service, such as publication of the charge in the Newspaper. It has been held by the Supreme Court that charge-sheet sent by Registered post, if received back un-served then it should be published in news paper[280].

However, when a worker refuse to accept the charge-sheet when sent by Registered Post, then the management can proceed with further action presuming that the service of charge sheet on the employee has been effected. It has also been held by Supreme Court that when a registered envelop is tendered by the Postman to the addressee, but he refuses it to accept it,

[277] AIR 1958, 164. (Kerala)
[278] 1973 -I – LLJ 316
[279] (1971) 1 SCC 108
[280] AIR 1961 SC 428

there is due service effected upon the addressee by the refusal. The addressee must therefore be imputed with knowledge of the complaint thereof and this flow upon presumption, which are raised under Sec.2 of the General Clause Act, 1897 and Sec.114 of the Evidence Act.

If the delinquent does not accept personally or is already placed under suspension then the same may be sent by Registered Post with Acknowledgement Due. If such notice comes back with postal endorsement 'refused', a presumption is drawn that the addressee has refused to accept the same. It has been held that more denial of the service of the charge-sheet by post unaccompanied by any other evidence is not sufficient to rebut the presumption relating to services of registered cover. The burden to rebut the presumption lies on the party challenging the service. The respondent failed to discharge this burden as he failed to place material before court to show that the endorsement made by the postal authorities was wrong and incorrect. It was further held that mere denial by respondent in the circumstances of the case will not be justified[281].

Whether law laid down in the Mahomad Ramzan's case will apply to all establishment - public, private, government or non-governmental undertaking ? Held YES. Electronic Corporation of India Ltd., vs. B. Karunakar[282]

[281] 1990 II LLN 715 [Cal.HC]
[282] 1994 LLR 392 (SC).

Application of Mahhomad Ramzan's case to those other than govt. servants - in the Year 1993 this issue was came up before their Lordship of Kerala HC. In Mahomad Ramzan vs. UOI,[283] the Supreme Court held that the supply of Enquiry Report before inflicting the proposed punishment is must, otherwise the same may vitiate enquiry. But the Kerala High Court observed in the year 1976 itself i.e. the Constitution 42nd Amendment, dispensing with the second opportunity under Art.311 at the stage of imposing penalty. And the court viewed that giving second opportunity before imposing punishment proposed is part and parcel of the principles of natural justice. It is applicable to all employees irrespective of govt. and non-government servants.

### 3.3. APPOINTMENT OF ENQUIRY OFFICER (EO):

Appointment of Enquiry Officer (EO) is a vital stage in the disciplinary proceedings. Each and every Organization may prescribe the qualification and essentials regarding appointment of Enquiry Officer (EO). Generally, Organizations prefer outsiders to conduct enquiry proceedings. But as mentioned above since the procedure to be followed by the Enquiry Officer to hold enquiry is not codified and the proposition in this regard is based on the judge made law. Therefore, there are series of case laws decided by the law

[283] AIR 1991 SC 471

courts from time to time witnesses the development of precedents in this particular area of subject.

Merely because EO is an advocate, proceedings are not vitiated. No bar that an advocate cannot be appointed as E.O. In the case of M/s. Dalmia Dadri Cement Ltd., vs. Murari Lal Bikaneria[284], the Supreme Court has observed that “we find ourselves unable to accept the conclusions arrived at by the Tribunal. The Tribunal seems to have been greatly impressed by the fact that instead of appointing someone in the appellant's factory itself as the Enquiry Officer the Works Manager had brought in an outsider who was no other than a junior advocate occasionally assisting Anand Prakash, their counsel in some matters. The Tribunal's view that this was wholly unwarranted and done with the purpose of loading the dice against the workmen appears to be unreasonable. Merely because the Enquiry Officer was a junior advocate and that he had on occasions been engaged by the appellant, it is not possible to take the view that he would necessarily be biased against the workmen. Evidently some of the workmen had behaved rudely to some members in the managerial cadre and it would not have been at all difficult for the Works Manager to appoint as Enquiry Officer some person of the factory itself over whom he was likely to have greater influence than on an outsider. As he himself was going to be a witness in the enquiry he entrusted the appointment of the Enquiry Officer to the Director of the

[284] AIR 1971 SC 22

Company. We find nothing unfair in this and are unable to take any exception to the course adopted. The same view was adopted by the Andhra Pradesh High Court in T. Raja Reddy vs. Labour Court , Hyderabad[285]. The Bombay High Court in the case of K.K Bhogade vs. Kalyani Steel Ltd., & ors[286] held that it is by now well settled law that, as long as no bias can be imputed to the Enquiry Officer, the fact whether he was paid professional or a whole time employee of the employer, does not affect the validity of the enquiry held by him.

When EO himself cross-examines the delinquent employee, whose conduct is subject to of enquiry he acts both as prosecutor / judge, this violates principles of natural justice. That is no man shall judge on his own cause (Nemo Judice Cause Sua). No bar to put questions on witness, by the EO, the enquiry not vitiated merely because the EO examines witness[287].

There may be no absolute prohibition to a presenting officer, also being witness. However it should be avoided as a prosecutor would become a witness[288]. Enquiry officer not to be lower rank than fact finding officer. Held EO was not a competent person[289]. Domestic enquiry must be presided over

[285] 1992 LLR 618 (AP.HC)
[286] 1995 LLR 253
[287] 1989 II LLJ 277
[288] 1992 (2) FLR 3 (Bom) (summ)
[289] CAT (Hyd.) 1988 (I) 458

by a person not disqualified by bias/prejudice/personal interest. If so, then it is bad in law[290].

Enquiry unfair if the victim of assault for which enquiry is held against a worker is EO. It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him. In an enquiry into charges against certain workmen, of participation in an assault by many workmen on the manager and assistant managers of a tea estate, conducted by the assaulted officers themselves, only certain questions were put to each workman in turn. Neither was any witness examined in support of the charge nor was any statement made by any witness tendered in evidence. There was no opportunity to the persons charged to cross-examine the officers assaulted who were not only in the position of judges but also of prosecutors

[290] AIR 1963 - 1756 (1963) I LLJ 79

and witnesses and they drew upon their own knowledge of the incident and instead cross-examined the persons charged: Held that the enquiry was vitiated because it was not held in accordance with the principles of natural justice. There was such a travesty of those principles that the Tribunal was justified in rejecting the findings and asking the company to prove the allegations against each workman de novo before it[291].

**Duty of Enquiry Officer to explain procedure of Enquiry**:

Enquiry Officer's (EO) function and duties in the conduct of domestic enquiry … it is not the function of the EO to propose only punishment even after EO records findings of guilt against the delinquent employees. Much less can the EO do so at the stage of serving the charges on the employee? It is for the disciplinary authority to propose the punishment after receipt of the report of the EO which suggests that before the authority proposes the punishment, it must have applied its mind to evidence and the findings recorded by the EO[292].

**Questions by EO not prohibited** -

There is no such law prohibiting the EO to put any question to delinquent employee in the enquiry. In order to bring out the

[291] Meenglas Tea Estate, vs. The Workmen, AIR 1963 SC 1719.
[292] Electronic Corporation of India Ltd., vs. B. Krunakar 1994 LLR P.393

truth, the EO is always within his right to put some questions to the delinquent employee[293].

Refusal to participate in the enquiry when justified: Right of representation of an employee through an office bearer of a trade union in an enquiry cannot be claimed by him as a matter of right since it depends upon the circumstances of each case including the service rules of standing orders. In one case, the employee declined to participate in the enquiry because of refusal of permission to be represented by office bearer of a trade union of which he was a member, which right has been conferred on him by model standing orders. It has been held that employee's refusal to participate in the enquiry proceedings cannot be faulted since it is amounted to the violation of principles of natural justice[294]. Whereas the SC in this case held that if the delinquent refused to participate in enquiry without valid reasons, he cannot be permitted to complain later[295].

**In case EO is paid professional whether enquiry is bad! -** Legality of the above hypothetical issue has been discussed by Bombay High Court in the case of K.K Bhogade vs. Kalyani Steel Ltd[296]., and held it is by now well settled law that, as long

[293] 1988 (557) FLR (Cat.) (Sum.)
[294] 1994-LLJ 1207 Del. HC
[295] Bank of India vs. Apurba Kumar Shah 1994 LLR 166 (SC)
[296] 1995 LLR 254

as no bias can be imported to the EO, the fact whether he was paid professional or a whole time employee of the employer, does not affect the validity of the enquiry held by him.

**Enquiry Officer junior to the delinquent validity of** - Such an enquiry will be liable to be vitiated on the ground of bias of the enquiry officer. It is pertinent to refer to one case decided by the Divisional Bench of Kerala High Court in holding that the learned Single Judge was wrong in coming into conclusion that the writ petitioner would not be permitted to raise the question of real likelihood of bias, as he did not raise the same during the course of the enquiry proceedings. Admittedly, the inspector, who conducted the enquiry, was immediate subordinate to the delinquent. The entire enquiry was thus held to be vitiated[297].

**Enquiry Officer cannot impose punishment** - The scope of an enquiry to be held by an EO is restricted to give his findings on the basis of evidence as produced by the parties in an enquiry as held by him. He has no right even to recommend the punishment much less imposing the penalty upon a workman. In one case before the Karnataka High Court in clarifying that the power to frame charges and to initiate or dispense with the holding of enquiry in to the same vests in the disciplinary

[297] Abusali vs. The Commandant 1995 LLR 61 (Ker. HC DB). Also see: R.L Sharma vs. Managing Committee, Dr. Hari Ram (Co-edn.) H.S. School, AIR 1993 SC 2155

authority and not the EO. Also the disciplinary authority may either hold the enquiry itself or appoint an EO. Even if the EO absolves the delinquent of the charges, the disciplinary authority is entitled to take a different view upon independent evaluation of the material available against the employee. The decision to accept those findings or to arrive at a conclusion different than the one arrived at by the EO is discretion of the disciplinary authority[298].

In order to inspire the confidence in the charge-sheeted employee, it is necessary that the enquiry officer should be a person who is known for his open mindedness and unbiased attitude. He should not nurse any pre-conceived notions and he must be independent in his approach to his task. That a person who is in any way whatsoever personally involved in an enquiry as an eye witness to the incident form in the cause of action, or else he is a person due to whose behaviour the workman has to face a charge of misconduct, if he is involved in the cause of enquiry in any other way, in such circumstances a person cannot be an EO. In the case of Nageshwar Rao vs. APSRTC[299], the Supreme Court observed that it is a fundamental principle of natural justice that in the case of quasi judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute. It is also a matter of fundamental

[298] Miagaiah vs. Cauvery Gramin Bank, Mysore LLJ Aug. 1995 P.389 (Kar.HC)
[299] AIR 1959 SC 308

importance that a person interested in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the case. This is on the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

**Enquiry Officer - who has held preliminary enquiry - Violation of Natural Justice -**

The enquiry will be against the principles of natural Justice if the Enquiry Officer as appointed by the disciplinary authority or management happens to be the same person who has held the preliminary enquiry against the delinquent employee. It is, therefore, essential that the person holding the regular enquiry should be totally unbiased. A person holding the preliminary enquiry is bound to have been influenced during the course of factual investigation which he has made in the preliminary enquiry[300].

The appointment of EO shall be as stipulated in the certified standing orders. They will have binding force and must be followed meticulously. If the certified standing orders provide that only an officer of the establishment can be appointed as

[300] Aipal Singh vs. Dist. Panchayath Raj Adhikari, Firozabad & Ors. 1996 LIC 855

EO, then appointment of an outsider as EO will be violative in law[301].

It has been held by the Supreme Court that merely because the enquiry officer is an associate of legal advisor of the management and that he had on occasions been engaged by the management, it is not possible to take he would be necessarily be biased against the workman[302].

An enquiry officer should be impartial and not a witness to the misconduct alleged against the delinquent workmen. In one case it had been held that enquiry should not be entrusted to a person who is witness to the misconduct. When enquiry officer holding the enquiry has been held as not proper thus vitiated. A person who is associated himself with certain proceedings culminating in the suspension of the workmen cannot be expected act as an independent enquiry officer[303]

Advocate, a person outside company appointed as an Enquiry Officer by Management - He can give findings as to misconduct of the employee. Where an advocate not being an employee of company could be appointed as an enquiry officer, the advocate would, have all the normal powers of an enquiry

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[301] Hotel Kanishka vs. Delhi Admn. & Ors. 1996 LLR 227 (Del. HC)

[302] Dalmia Dadri Cement ltd., vs. M Billimoria 1970 (21) FLR 201 (SC), T. Raja Reddy vs. Labour Court Hyderabad, 1992 LLR 618 (AP – HC), Sree Meenaxi Mills Credit Co-op., Society Madurai vs. D.C. Labour, Madurai, 1997 LIC 2148 (Mad HC)

[303] Lamba bai Tea Estate vs. Its workmen, LLJ 1996 -II- 315 - SC, B. Harish chander vs. Academy of General Education, 1995 LLR 42 (Karnataka H C)

officer including the power to give findings as to misconduct of the employees. No distinction can be made between the powers of an enquiry officer who is an employee of the Company and an outsider. If the Manager was entitled to appoint an enquiry officer in either case the appointee, in his capacity as an enquiry officer, would have the same powers. The advocate, being an outsider has the power to give findings as to misconduct of the employees[304].

Enquiry officer being junior advocate and at times appearing on behalf of management - No bias to be inferred. Merely because the Enquiry Officer was a junior advocate and that he had on occasions, been engaged by the Management he would not necessarily be biased against the workmen. So also as the Works Manager was going to be a witness in the enquiry there was nothing unfair in entrusting the appointment of the Enquiry Officer to the Director of the Company[305].

The enquiry was held by the Enquiry Officer and pursuant to the report of the Enquiry Officer the ad hoc disciplinary authority has imposed the punishment of removal from service. This was challenged by the respondent before the Central Administrative Tribunal, Ernakulam Bench. The Tribunal has set aside the proceedings and the order of the disciplinary authority only on the ground that the Enquiry Officer was appointed by the

[304] Mgmt. of Thanjavur Textiles Ltd., vs. B. Purushotham and others, AIR 1999 SC 1290
[305] AIR 1971 SC 22

original disciplinary authority and not by the ad hoc disciplinary authority appointed in respect of the present case. There is no material to indicate that any prejudice was caused to the respondent as a result of the appointment of an Enquiry Officer and a presenting officer by the original disciplinary authority. It is not even alleged that any such prejudice was caused to the respondent. No allegation of any kind whether of bias or *mala fides* has been made against the Enquiry Officer or the presenting Officer so appointed in the conduct of the enquiry? The actual order against the respondent has been passed by the ad hoc disciplinary authority after taking into account the report of the Enquiry Officer and the evidence led in the case. In the absence of any prejudice or any allegations of *mala fides*, the enquiry should not have been set aside and the action of the disciplinary authority should not have been quashed only on a technical ground that instead of the ad hoc disciplinary authority, the actual disciplinary authority had appointed the Enquiry Officer in respect of the present case[306].

In Tilak Chand Magatram Obhan vs. Kamala Prasad Shukla[307], the Principal of a school who was a member of the Inquiry Committee "was deeply biased against the delinquent. He had given notice to the delinquent for initiating defamation proceedings against him." It was held that the presence of the Principal on the Committee had vitiated the atmosphere for a

[306] Asstt. Supdt. of Post Offices and others, vs. G. Mohan Nair, AIR 1999 SC 2113
[307] 1995 Suppl (1) SCC 21

free and fair inquiry. It was also observed that the entire inquiry was bad and the fact that there was an appeal did not cure the defect. It was stated:

> "Where the lapse is of the enquiry being conducted by an officer deeply biased against the delinquent or one of them being so biased that the entire enquiry proceedings are rendered void, the appellate authority cannot repair the damage done to the enquiry. Where one of the members of the Enquiry Committee has a strong hatred or bias against the delinquent of which the other members know not or the said member is in a position to influence the decision making, the entire record of the enquiry will be slanted and any independent decision taken by the appellate authority on such tainted record cannot undo the damage done. Besides where a delinquent is asked to appear before a Committee of which one member is deeply hostile towards him, the delinquent would be greatly handicapped in conducting his defence as he would be inhibited by the atmosphere prevailing in the enquiry room. Justice must not only be done but must also appear to be done. Would it so appear to the delinquent if one of the members of the Enquiry Committee has a strong bias against him."

The leading case on the question of reasonable likelihood of bias is the one of Rattan Lal Sharma vs. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School[308], The

[308] (1993) 4 SCC 10 : (1993 AIR SCW 2400 : AIR 1993 SC 2155 : 1993 Lab IC 1808)

Supreme Court held in that case that the test was one of 'real likelihood' of bias even if such bias was not in fact the direct cause. It was held there a real likelihood of bias means at least substantial possibility of bias. The question depends not upon what actually was done but upon what might appear to be done. The test of bias is whether a reasonable intelligent man, fully apprised of all circumstances, would feel a serious apprehension of bias.

"The test is not whether in fact, a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done."

Where the inquiry officer examined witnesses, recorded their statements and gave a clear finding of the appellant accepting a bribe and even recommended his termination. All these were done behind the back of the appellant. The Managing Director passed the termination order the very next day. It cannot in the above circumstances be stated, by any stretch of inspection that the report is a preliminary inquiry report. Its findings are definitive. It is not a preliminary report where some facts are gathered and a recommendation is made for a regular departmental inquiry. It is an obvious case where the report and

its findings are the foundation of the termination order and not merely the motive. Termination order passed is punitive and is violative of principles of natural justice[309].

Advocate, a person outside company appointed as an Enquiry Officer by Management - He can give findings as to misconduct of the employee. Where an advocate not being an employee of company could be appointed as an enquiry officer, the advocate would, have all the normal powers of an enquiry officer including the power to give findings as to misconduct of the employees. No distinction can be made between the powers of an enquiry officer who is an employee of the Company and an outsider. If the Manager was entitled to appoint an enquiry officer in either case the appointee, in his capacity as an enquiry officer, would have the same powers. The advocate, being an outsider has the power to give findings as to misconduct of the employees[310].

Bye-law no.27 of the Guntur Dist. Milk Union Ltd., denotes about the initiation of the disciplinary action against its employees. Further the said bye-law does not permit the disciplinary authority to appoint an outsider as enquiry officer. It is also settled position in law is that if an enquiry is held by the incompetent and unauthorized person under the relevant

[309] Radhey Shyam Gupta, vs. U. P. State Agro Industries Corporation Ltd. and another, AIR 1999 SC 609
[310] AIR 1999 SC 1290

conduct regulations or rules, then it invalidates the entire proceedings and such a defect cannot be considered as mere irregularity and consequently it cannot be regularized by showing that the competent authority itself had applied its mind reviewed the enquiry records. Even if such a competent officer went through the enquiry records and recorded his agreement with the findings by the incompetent enquiry officer it is not sufficient when the rules do not permit the disciplinary authority to appoint an outsider as enquiry officer[311].

## 3.4 STAY OF ENQUIRY PROCEEDINGS BY LAW COURTS:

Stay of Enquiry Proceeding by Civil Court - not permissible. The jurisdiction of the Civil Courts to stay the Enquiry Proceedings against an employee is barred by the provisions of Industrial Disputes Act, 1947. Also the Civil Court cannot interfere at the stage of show-cause notice after the conclusion of domestic enquiry against the employee as any relief prayed for by the employee at the stage would fall within the domain of the forums as created under the Inudtrial Disputes Act only. The same issue was discussed by the Madras High Court in the case of Indian Oxygen Ltd., Madras vs. Ganga Prasad[312].

Criminal prosecution initiated on the same facts during pendency of domestic enquiry, Domestic inquiry not necessarily

[311] G. Chandrakant vs. Guntur Dist. Milk Producers Union Ltd., 1994 LLR 983 ( AP.HC)
[312] LLR 1990 page 115

to be stayed.[313] Also see Kushwashwer Dube vs. M/s. Barat Cooking Coal Ltd[314].

Whether Civil Court has jurisdiction to grant stay? Held No. It is settled position of law that the civil court has no jurisdiction to enforce a personal contract. The right to continue in service is a right conferred on the Industrial worker by the Industrial Disputes Act. De hors, the statute a termination of the service may give rise to a cause of action to claim damages and not reinstatement. Granting of the letter relief will amount to enforcement of personal contract, which is not the province of civil court.[315]

At a time three proceedings initiated a disciplinary proceedings, a criminal proceeding, and a civil suit on the same set of facts - Disciplinary proceedings should normally be stayed pending disposal of the criminal case - even if it has been proceeded with - And even if the trial in the Criminal case has not yet commenced[316]. Here in the instant case the High Court distinguished the rule laid down by the Supreme Court in Dube's case[317] and to the present case and allowed the Writ Petition. and ordered to stay the disciplinary proceedings till the disposal of criminal charges.

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[313] LLR 1994 page 193 (Bom)

[314] 1988 (37) FLR 562 (SC)
[315]1985 LLR 636 (Kar. HC)
[316] 1993 LLR 482 (Karn. HC)
[317]1958 (57) LLR 5562

Whether departmental proceedings against the petitioner should remain in abeyance once as criminal case has been registered against him on the same facts[318]. Held that the question as to whether departmental proceedings are required to be stayed merely because a criminal case stands registered against the delinquent or because cognizance has been taken by a criminal court has been subject matter of several decisions. Thus, the view discernable from the aforesaid judgments of the Supreme Court and other judgments is that the question as to whether departmental enquiry requires to be stayed or not is a question of fact to be decided by the taking into consideration as to how much complicate the case is. Also see[319].

Departmental Proceedings vis-à-vis criminal action on the same charges – stay of departmental proceedings. It is for the charge sheeted employee that the materials for proving that the charges in the criminal trial are similar to materials required to prove the charges in the departmental proceedings in abeyance until criminal court finally decides the issue. Held that both criminal and departmental action may go along. This was held in the case of Samudrapu Somalappudu & ors Vs. Nellimarala Jute Mills Co., Ltd.[320].

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[318] 1995 LLR 827 [MP HC

[319] 1993 LLR 482, AIR 1969 SC 30, AIR 1962 MP 72, AIR 1965 SC 155, AIR 1968 SC 1050, LLR 1993 461

[320] 1996 LLR 405.

Staying of departmental proceedings on pendency of criminal proceedings is purely based on facts and circumstances of the each and every case[321]. Naseen Ishaque vs. Indian Trade Promotion Organization[322]. However, Disciplinary enquiry need not be stayed when criminal proceedings are on[323]. It is pertinent to state that this aspect of the enquiry has been delat at length in the forthcoming chapter(s).

[321] Naseen Ishque vs. Indian Trade Promotion Organisation, 1998 LLR 146
[322] 1998 LLR 146 Del, HC; OP Gupta vs. Union of India AIR 1987 SC 2257; Allahabad Bank vs. Deepak Kumar Bhola JT 1996 (3) SCC 539, State Bank of Rajstahn vs. BK Meena JT 1996 (8) SC 684
[323] Deokumar Singh vs. Unnion of India, 1997 FLR (75) 971, HAL employees association vs. HAL 1991 LLR 230

# Chapter 04: JUDICIAL STRUCTURES & PERSPECTIVE – II



## 4.1 DEMAND OF DELINQUENT TO BE REPRESENTED BY A LAWYER

At the cost of the repetition, it has been reiterated that as there exists no codified laws or rules, all the differences, doubts raised in this particular aspects of Disciplinary proceedings are frequently referred to the law courts for adjudication. Accordingly, there are catenas of cases decided by various courts of law. The outcome of the case depends upon the facts and circumstances of the each and every case.

**Proposition of law and limitations on the choice of delinquent employee while opting for assistance in the matters of disciplinary enquiry.** The basic principle is that an employee has no right to

representation in the departmental proceedings of another person or a lawyer unless the Service Rules specifically provide for the same. The right to representation is available only to the extent specifically provided for in the Rules. For example, Rule of the Railway Establishment Code provides as under:

"The accused railway servant may present his case with the assistance of any other railway servant employed on the same railway (including a railway servant on leave preparatory to retirement) on which he is working.

The right to representation, therefore, has been made available in a restricted way to a delinquent employee. He has a choice to be represented by another railway employee, but the choice is restricted to the Railway on which he himself is working, that is, if he is an employee of the Western Railway, his choice would be restricted to the employees working on the Western Railway. The choice cannot be allowed to travel to other Railways.

Similarly, a provision has been made in Rule 14(18) of the Central Civil Services (Classification, Control & Appeal) Rules, 1965, where too, an employee has been given the choice of being represented in the disciplinary proceedings through a co-employee. In Kalindi vs. Tata Locomotive & Engineering Company Ltd[324]. a Three-Judge Bench observed as under (Paras 3 to 5 of AIR) "Accustomed as we are to the practice in the Courts of law to skilful handling of witnesses by lawyers

[324] AIR 1960 SC 914

specially trained in the art of examination and cross-examination of witnesses, our first inclination is to think that a fair enquiry demands that the person accused of an act should have the assistance of some person, who even if not a lawyer may be expected to examine and cross-examine witnesses with a fair amount of skill. We have to remember however in the first place that these are not enquiries in a Court of Law. It is necessary to remember also that in these enquiries, fairly simple questions of fact as to whether certain acts of misconduct were committed by a workman or not only fall to be considered, and straightforward questioning which a person of fair intelligence and knowledge of conditions prevailing in the industry will be able to do will ordinarily help to elicit the truth. It may often happen that the accused workman will be best suited, and fully able to cross-examine the witnesses who have spoken against him and to examine witnesses in his favour."

(*emphasis added*)

It is helpful to consider in this connection the fact that ordinarily in enquiries before domestic tribunals the person accused of any misconduct conducts his own case. Rules have been framed by Government as regards the procedure to be followed in regards the procedure to be followed in enquiries against their own employees. No provision is made in these Rules that the person against whom an enquiry is held may be represented by anybody else. When the general practice adopted by domestic tribunals is that the person accused

conducts his own case, we are unable to accept an argument that natural justice demands that in the case of enquiries into a charge-sheet of misconduct against a workman he should be represented by a member of his Union. Besides, it is necessary to remember that if any enquiry is not otherwise fair, the workman concerned can challenge its validity in an industrial dispute.

In the above premises, in the case of Bharat Petroleum Corporation Ltd. vs. Maharashtra General Kamgar Union and others[325], the Apex Court arrived at a conclusion that a workman against whom an enquiry is being held by the management has no right to be represented at such enquiry by a representative of his Union; though of course an employer in his discretion can and may allow his employee to avail himself of such assistance."

In another decision, Dunlop Rubber Company vs. Workmen[326] it was laid down that there was no right to representation in the disciplinary proceedings, by another person unless the Service Rules specifically provided for the same.

The matter again came to be considered by a Three Judge Bench of the Supreme Court in Crescent Dyes and Chemicals Ltd. vs. Ram Naresh Tripathi,[327] and Ahmadi, J. (as he then was) in the context of Section 22(ii) of the Maharashtra Recognition of Trade Unions and Unfair Labour Practices Act,

[325] AIR 1999 SC 401
[326] AIR 1965 SC 1392
[327] 1993 AIR SCW 1106

1971, as also in the context of domestic enquiry, upheld the statutory restrictions imposed on delinquent's choice of representation in the domestic enquiry through an agent. It was laid down as under:

"11. A delinquent appearing before a Tribunal may feel that the right to representation is implied in the larger entitlement of a fair hearing based on the rule of natural justice. He may, therefore, feel that refusal to be represented by an agent of his choice would tantamount to denial of natural Justice. Ordinarily it is considered desirable not to restrict this right of representation by counsel or an agent of one's choice but it is a different thing to say that such a right is an element of the principles of natural Justice and denial thereof would invalidate the enquiry. Representation through counsel can be restricted by law as for example, Section 36 of the Industrial Disputes Act, 1947, and so also by certified Standing Orders. In the present case the Standing Orders permitted an employee to be represented by a clerk or workman working in the same department as the delinquent. So also the right to representation can be regulated or restricted by statute".

In para 12 of the judgement the Apex Court has concluded that "it is therefore, clear from the above case law that the right to be represented through counsel or agent can be restricted, regulated by statute, rules, regulations or standing orders. A delinquent has no right to be represented through counsel or

agent unless the law specifically confers such right. The requirement of rule of natural justice in so far as the delinquent's right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent….." The said proposition of law has been reiterated in the case of M/s. CIPLA Ltd. And others, vs. Ripu Daman Bhanot and another[328].

The earlier decisions in Kalindi vs. Tata Locomotive & Engineering Co. Ltd, Dunlop Rubber Co., vs. Workmen and Brooke Bond India (P) Ltd., vs. Subba Raman[329], were followed and it was held that the law in this country does not concede an absolute right of representation to an employee as part of his right to be heard. It was further specified that there is no right to representation as such unless the Company, by its Standing Orders, recognizes such a right. In this case, it was also laid down that a delinquent employee has no right to be represented in the departmental proceedings by a lawyer unless the facts involved in the disciplinary proceedings were of a complex nature in which case the assistance of a lawyer could be permitted.

The age old judicial concept **"a man not only has right to speak from his voice, but also has right to speak from his representative voice when his life, liberty, and lively-hood**

[328] AIR 1999 SC 1635
[329] ibid

**is at stake"** – this concept seems to be withering away day by day. The Hono'ble Gujarat High Court in the case of K.C. Mani vs. Central Warehousing Corporation[330] has laid down illustrative tests to determine such request for soliciting an assistance of legally trained mind / co-employee:

- ✍✍ Whether it is really a fight between two unequals?
- ✍✍ Whether the nature of charge is simplex or complex?
- ✍✍ Whether the charge is such that some documents are required to be proved or disproved either
- ✍✍ Because they are false or fabricated
- ✍✍ Is it a case where there are number of witnesses to be examined and re-examined?
- ✍✍ Whether any expert witness is to be cross-examined?
- ✍✍ What is the intellectual capacity, status and experience of the delinquent facing the departmental proceedings?

If the enquiry officer is a 'trained personnel' that by itself does not mechanically vest any right in the delinquent to have a legal assistance irrespective of facts and circumstances. The answer rests on facts and circumstances and on the answer to the following two questions.

[330] 1994 LLR 312

- ✍✍ Whether the case presents any legal and factual complexity making the delinquent totally handicapped to defend his case.
- ✍✍ Whether the delinquent is academically and psychologically fit and competent enough to defend himself in absence of outside legal assistance.

To conclude, right to be represented by a counsel or an agent of one's own choice under the decision of the English Courts is not absolute right and cannot be controlled, restricted or regulated by law, rules or regulations. However, if the charges are of serious nature, the delinquent request to be considered. So far as the law applicable in India is concerned, there is no right to representation as such unless the company by its Standing Orders recognizes such right. It was held that right to be represented through counsel or agent can be restricted, controlled or regulated by Statutes, rules, regulations or Standing Orders.

Let us also look at other decisions of the law courts on this aspect of disciplinary enquiry.

When the presenting officer is a man with legal background, rules of natural justice require that a delinquent be allowed to engage a counsel. This becomes even more important when the charges are grave held in J.K. Agarwal vs. Haryana Seeds Development Corpn. Ltd., & ors[331].

[331] 1992 LLR 21 (SC), AIR 1991 SC 1221, AIR 1983 SC 109

Whether there is violation of service rules in refusing permission to engage an advocate can be adjudicated upon ultimately. High Court will not interfere in enquiry stage with the management prerogative[332].

Representation by lawyer not a right and denial would not violate natural justice. However, if E.O. acts as a prosecutor and a judge or E.O acts as a prosecutor and a Judge or E.O acts with haste or is biased in the facts of this case, it was held since serious consequences would be suffered legal assistance ought to be provided[333]. If Department is represented by a legally trained mind, delinquent must be allowed a legal practitioner even if it is contrary to the rules.

Even when the presenting officer is not a lawyer, but is trained in technique of disciplinary proceedings, the delinquent officer should be permitted to engage legally trained person - dissenting ruling. Merely because the presenting officer possesses a degree in law, it does not entitle the delinquent employee to ask for the services of a legal practitioner.

The petitioner not allowed to engage a lawyer, but, however permitted to be represented by an employee of the Corporation principles of natural justice violated[334]. If the management in the enquiry is not being represented by a law graduate, the employee cannot be represented by an advocate[335].

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[332] A.A Bordekar vs. The National Small Industrial Corp. Ltd., 1992 LLR 233 (Bom. HC)
[333] Nilgiri Tea Estates Ltd., vs. Its Workman, 1992 LLR 296
[334] FLR Bom. HC 234 1988 (57)
[335] 1990 LLR 601

The certified standing orders provided that an employee can be represented in an enquiry by any of his employees. Hence refusal to allow an outsider office bearer of trade union leader will not violate the principle of natural justice. This has been held by the High Court of Rajasthan in the case of M/s. Derby Textiles Ltd., Jodhpur vs. Mahamantri Derby Textiles Karmachari & Shramik Union, Jodhpur[336]. However, it has been held that engagement of a junior advocate who is a total outsider does not vitiate enquiry.

Workman cannot as of right claim to be represented by Union representatives. Employer has discretion[337], representation by a lawyer in enquiry may not be permissible. There is no absolute rule by which the services of lawyer are necessarily to be made available to an officer who is charged with misconduct. There s not duty cast upon the respondent authorities to tell the workman as to various aspects of law of natural justice or as to what work of representation he might have in law in case he so chooses to ask for the same.

Discrimination under Article 14 of the Constitution of India – contention that workman being allowed to be represented by president and vice president of Trade Union who are practicing lawyers. Applicant not being allowed to represent the management on the ground that he is a lawyer – The court held

[336] 1991 LLR 329 (Raj.HC)
[337] Kalandi vs. Telco *supra*

that for deciding whether an advocate can be taken to be an officer, he is to be regular officer of the association, or an officer bearer of the association, or in the employment of the association. In the instant case the applicant does not satisfy any of the conditions, as he has merely been co-opted to the executive committee and nominated as an officer to give legal advice to conduct cases on behalf of the association. Law does not permit to treat the applicant as an officer of the association. Indeed any other review could have circumvented the provisions of section 36(4), such denial does not amounts to discrimination[21.] Request for gant of legal assistance – Denial of such request – Enquiry conducted by a legally trained officer – held right of delinquent to have legal assistance depends upon the facts and circumstances of the case and facts[338].

Advocate as an E.O – A practicing lawyer accepting from the management can be appointed as an EO. There cannot be a ground that the advocate holding enquiry was biased[339.]

Request of petitioner to engage lawyer to defend his side was denied – Circumstances under when such request can be considered explained – The denial of permission to engage an advocate to assist delinquent the foregoing judgements placed before the court; J.K. Agarwal vs. Haryana Seeds Development

[338] Kalinga Studios Ltd., vs. I.T & ors., 1994 LLR 662 (Orissa HC)
[339] 1979 Lb. IC 422 (Ker HC)

Corpn., Ltd.[340], in this decision it is noted that the presiding officer of the employer corporation was a “man of Law” in that context and taking into account the Supreme Court stated thus: “on a consideration of the matter, we are persuaded to the view that the refusal to sanction the service of a lawyer in the enquiry was not a proper exercise of the decision under the rue resulting in a failure of natural justice; particularly, in view of the fact the Presenting Officer was a person with legal attainment and experience. It was said that appellant was no less adept having been in the position of senior executive and could have defended, and did defend, himself competently; but was observed by the learned Master of Rolls in Pett vs. Greyhound Racing Association, 1968 (2) All ER 549 (CA) that in defending himself one may tend to become “nervous” or “tongue-tied”. Moreover, appellant, it is claimed, has had no legal background. The refusal of the service of the lawyer, in the facts of this case, results in denial of natural justice.” In fact in the preceding paragraph, the Hon’ble Supreme Court indicates the fact of granting of permission to engage services of a lawyer is in fact a matter of discretion. This is what stated in para – 8 of the judgment:” ….The rule itself recognizes that where the charges are as serious as to entail a dismissal from service the enquiry authority may permit the services of lawyer. This rule vests in discretion. In the matter of exercise of this discretion one of the relevant factors are whether there is

[340] 1991 –II-LLJ 412

likelihood of the combat of being unequal entailing a miscarriage of failure of justice and denial of real and reasonable opportunity for defence by reasons of the appellant being petted against a Presenting Officer who is trained in law. A legal advisor and lawyer are for this purpose somewhat liberally construed and must include "Whoever assists or advises on facts and in law must be deemed to e in the position of a legal advisor."

This question again came up for consideration by larger bench of the Supreme Court in Crescent Dyes and Chemicals Ltd., vs. Ram Naresh Tripathi[341]. In para – 10, their Lordships stated as follows: "….a delinquent appearing before a Tribunal may feel that the right to representation is implied in the large entitlement of a fair hearing based on other rule of natural justice. He may, therefore, feel that refusal to be represented by an agent of his choice would tantamount to denial of natural justice. Ordinarily it is considered desirable not to restrict this right of representation by Counsel or agent of one's choice, but it is a different thing to say that such a right is an element of the principles of natural justice and denial thereof would invalidate the enquiry…"

Later in the same paragraph, after analyzing various English Authorities, their Lordships stated as "….from the above decisions of the English Courts, it seems clear to us that the right to be represented by a Counsel or agent of one's own

[341] *supra*

choice is not an absolute right and can be controlled, restricted or regulated by law, rules or regulations. However, if the charge is of a serious and complex nature, the delinquent's request to be represented through a counsel or agent could be conceded." As regards law India, after a detailed survey of leading decisions, their Lordships concluded as follows: "….12. It is therefore, clear from the above case law that the right to be represented through counsel or agent can be restricted, regulated by statute, rules, regulations or Standing Orders. A delinquent has no right to be represented through Counsel or agent unless the law specifically confers such a right. The requirement of the rule of natural justice in so far as the delinquent's right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent[342]…"

Representation by lawyer by the delinquent employee-Not as a matter of right unless the rule so permit or the employer is being represented by legally trained person or that the social or financial status of the delinquent employee is likely to be ruined or where several complicated questions are raised which the delinquent employee is likely to be ruined or where several complicated questions are raised which the delinquent employee is unable to comprehend. It is further held that seeking relief for representation through an advocate by a delinquent employee and agitating of his right is not a common

[342] K.G. Shenoy vs. Disciplinary Authority, 1995 LLR 139 (Kar HC)

law right but a right acquired by the worker under Industrial Law. In other words, what he really intends is to safeguard his interest to further the rights conferred on him under the industrial law.

**Advocate as an Enquiry Officer**:-

There is no bar in appointing as an Enquiry Officer for holding of an enquiry. So much so, the Supreme Court has held that even an associate of the legal adviser of the Company can be appointed as an Enquiry Officer. The Andhra Pradesh High Court has also held that there is nothing to indicate that there was any reasonable apprehension in the mind of the employee concerned that the advocate who was appointed as an enquiry officer was biased against the employee. However, if the byelaws standing orders or service rules of an establishment prohibit an outsider including an advocate then appointment of an advocate as an Enquiry Officer will not be valid. In one case the enquiry officer as appointed has been an advocate. Submission as been made by the delinquent employee that an outsider cannot be appointed as Enquiry Officer as there is prohibition to do so by be-law 27 applicable to the parties. The said bye-law provides that the Disciplinary Authority may itself hold an enquiry or to appoint any other authority superior in rank to the employee charged. Thus there is prohibition to appoint any outsider. The appointment of an advocate as

Enquiry Officer will be illegal. Enquiry held by such incompetent and unauthorized person invalidates entire proceedings[343].

Where the regulations are silent would be difficult to hold that a court must read into the Regulation either way and conclude that the denial of legal assistance would initiate the Enquiry. There is an undergoing requirement of fair conduct of proceedings, which is the essence behind the courts having repeatedly taken the view that legal assistance must be permitted in several situations. Those principles can and be called out to read that where the allegations are extremely grave and where the status and condition of the concerned is such that the person is completely incompetent, ignorant, inexperienced and unable to get the assistance of any qualified persons and would therefore be rendered completely handicapped so much so that no valid defence can be pleaded or put up nor can the presenting authority's evidence be tested or rejected, that in such situation alone if demonstrated to a court can a party contend that the enquiry stands vitiated[344].

Non appointment of presenting officer denying the enquiry whether the enquiry is valid – It was not necessary to appoint a Presenting Officer (PO) since the provisions of the Act of the Rules did not oblige the Municipal Commissioner or the

[343] Dalmia Dadri Cement Ltd., vs. M Bikaneria 1970 (21) FLR 201 (SC)
[344] Secretary Bangalore Turf Club vs. Prakash Srivastava 1996 LLR 181; Sheriff vs. State of Madras, AIR 1954 SC 397

disciplinary authority to appoint the PO and as such an appointment of PO did not effect the validity of enquiry[345].

The delinquent's request for permission to present through a lawyer was rejected by the EO on the ground that Presenting Officer (PO) is law graduate and not practicing, the charges imposed are simple in nature, and issues involved in the case are simple in nature. Under the said circumstances no prejudice caused to the delinquent[346].

Generally the delinquent is entitled to an opportunity to defend himself either in person or co-employee – assistance of retired employee, though he was not legal practitioner prohibited to appear and assist delinquent, in reality amounted to permitting him to have regular practice – High Court commited error in giving such direction[347].

Where the model standing orders permit representation of the workman by an office bearer of the trade upon of which he is a member, the EO must grant permission to the workman. In one case the workman made request that he should be represented by a Trade Unionist but EO rejected his request. The enquiry was thus held to be unfair and vitiated[348]. However, a contrary view has been expressed where the standing orders of the company provided that an employee can be represented in an enquiry by any office co-employee hence refusal to allow an

[345] Pravin Retail Dudhara vs. Municipal Corp. of Bombay, 1996 LLR 350
[346] BA Prabhakar Rai vs. GM, Vijaya Bank, 1997 LLR 820
[347] FCI vs. Bant Singh 1997 LLR 807
[348] Abdul Kadar vs. Lab. Court Hyd. LLR 352 AP HC

outsider office bearer of Trade Union leader will not violate the principles of natural justice[349]. In another case the workman requested to be represented by the President of Mercantile Employees Association which was rejected on the ground that nominated person was an outsider and not the member of the Union. The workman boycotted the enquiry which was then held ex-parte and fair enquiry - a dismissal order was passed. The court rule that it was against the principles of natural justice[350].

Representation of delinquent by another workman – disallowed by the Enquiry Officer on the grounds of his being an active member of Union. The action of Enquiry Officer held valid based on that to maintain congenial atmosphere during the enquiry. The delinquent never participated after that in the enquiry. It was held that it was presumed that he was given full and fair opportunity. Proportionate penalty of dismissal was passed based on the charges proved. Further held that the proved charges are commensurate to the proportionate penalty. This view was expressed in Motir Rehman vs. Presiding Officer, LC, Patna[351]. Board of Trustees of the Port of Bombay vs. PR Nadkarni[352].

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[349] M/s. Derby Textiles Ltd., Jodhpur vs. its Union 1991 LLR 329 (Raj. HC)
[350] M/s. Delhi Bottling Co. Pvt Ltd. vs. Shri AN Tripathi 1993 LLR 510 (Del. HC)
[351] 1998 LLR 908
[352] Supra

Representation by an official of the Trade Union, a practicing lawyer certified standing orders as applicable permit representation in enquiry by an official of a Trade Union of which the delinquent employee is member. The court has held that an office bearer of the Trade Union advocate entitled to represent the employee in the enquiry[353].

Validity of an enquiry was challenged on the ground that legal assistance was denied. He has participated in the enquiry and cross examined the management witness, co-worker was allowed to denial of legal assistance, hence enquiry is valid. Further held that a copy of one document was not given, however that document was gone through by the delinquent and witnesses were cross examined on the basis of it – no prejudice was caused to him. This view was held in S Ravindra Kamath vs. P.O, Labour Court Ernakulam[354], and Jitendra Singh Rathore vs. Shree Baidhyantha Ayurvedha Ashram[355].

There was no request what so ever by workman to the Enquiry Officer to provide him the assistance of lawyer. In the absence of any such request it is not necessary to the management to volunteer the services of an advocate to the delinquent employee. However this objection was raised, when the order of dismissal was passed. The workman cannot have any

[353] Mukul Sharma vs. Govt. of NCT of Delhi 1998 LLR 571
[354] 1998 LLR 632
[355] 1984 (3) SCC 5

grievance at all in this regard. An employee has no right to representation by an advocate in departmental enquiry unless service rules so provided. Held in Bharat Petroleum vs. Maharashtra general kamgar union & ors[356]. Representation by a lawyer once granted cannot be withdrawn – held in N. Balasubramaniam vs. Can Bank financial Services[357].

It was held that a delinquent employee has no right to be represented by an advocate in the departmental proceedings and that if a right to be represented by co-workmen is given to him, the departmental proceedings would be bad only for the reasons that the assistance of an advocate was not provided to him[358].

## 4.2 DISCIPLINARY PROCEEDINGS VIS-A-VIS CRIMINAL TRIAL:

There is no legal yardstick to allow or not to allow the Disciplinary Proceedings at par with the criminal trial on the same set of facts simultaneously. However, there are series of judicial pronouncements about as to when can be allowed or not to be allowed such parallel proceedings.

When a delinquent has been acquitted in a criminal trial, it is not open for the management to ignore the judgment of the

[356] 1999 LLR 180 (SC)
[357] 1996 LLR 995 (Kar. HC).
[358] Supra 350

Criminal Court. The Disciplinary authority is bound to give weight-age to the judgment[359].

There is no hard and fast rule that disciplinary proceedings have to be withheld when there is a criminal proceedings[360]. Departmental Enquiry can be proceeded with when the Criminal Proceedings are in progress for the same charge. However, it would only be fair that the employer should stay their hands. There is however no bar for such enquiry. Applicability of Rules of evidence is separate[361].

If enquiry is concluded before Criminal proceedings conclusions in the enquiry not vitiated even if the court acquits the worker on technical grounds or on merits. If criminal Court finds a worker guilty and so also does the enquiry on independently assessed evidence. Subsequent acquittal on appeal does not vitiate findings of enquiry. If there is a judgment of the court earlier, EO must apply his mind to the judgment[362].

At a time three proceedings initiated a disciplinary proceedings, a criminal proceeding, and a civil suit on the same set of facts - Disciplinary proceedings should normally be stayed pending disposal of the criminal case - even if it has been proceeded with - and even if the trial in the Criminal case has not yet

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[359] (1989) II LLJ 608/1986 II LLJ 473/1985 II LLJ 364/1985 II LLJ 145/1985 II LLJ 500/1982 LLJ 309; 1981 II LLJ 6

[360] 1988 II LLJ 470 (SC)

[361] 1990 I LLJ 245

[362] (1970) I LLJ 481

commenced[363]. Here in the instant case the High Court distinguished the rule laid down by the Supreme Court in Dube's case[364] and to the present case and allowed the Writ Petition and ordered to stay the disciplinary proceedings till the disposal of criminal charges.

Whether criminal court order is binding on domestic enquiry - Disciplinary enquiry and criminal trial initiated against the petitioner based on the same misconduct of having assaulted a worker - Acquitted by criminal court - findings of the criminal court are not binding on the disciplinary enquiry[365].

After acquittal of petitioner by criminal court - plea of estoppel is applicable and department is barred from initiating the departmental proceedings after acquittal - Difference between departmental enquiry and criminal trial and their purpose explained. - There is no constitutional bar on the basis of which it can be held that departmental enquiry is bad in view of the order of acquittal recorded by a criminal court. Once the cardinal difference between a criminal proceeding and disciplinary proceedings are kept in mind there would be no scope for any confusion on this account. The dominant purpose of criminal proceedings is to achieve the protection of the society at large and the public while that of the disciplinary

[363] 1993 LLR 482 (Karn. HC)
[364] 1958 (57) LLR 5562
[365] 1993 LLR 705 (Bom. HC), Also see - AIR 1986 SC 236, AIR 1984 SC 273, AIR 1968 SC 850

proceedings is parity and efficacy of public service. Obviously therefore, the fields of operation of the two proceedings are quite different and independent to the principle of issue estoppel has nor application to departmental proceedings and applies to criminal proceedings only - neither Art. 20(3) of the constitution nor the principles of issue estoppel can absolutely bar disciplinary proceedings after acquittal[366].

Petitioner a bus conductor - found carrying 37 passengers without tickets by checking staff - initiation of departmental proceedings - in respect of said misconduct criminal case also registered against him and chalan filed - whether departmental proceedings against the petitioner should remain in abeyance once as criminal case has been registered against him on the same facts[367] - Held that the question as to whether departmental proceedings are required to be stayed merely because a criminal case stands registered against the delinquent or because cognizance has been taken by a criminal court has been subject matter of several decisions. Thus, the view discernable from the aforesaid judgments of the Supreme Court and other judgments is that the question as to whether departmental enquiry requires to be stayed or not is a question of fact to be decided by the taking into consideration as to how much has been complicated the case is[368].

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[366] 1995 LLR 831 (Ori. HC)
[367] 1995 LLR 827 [MP HC]
[368] 1993 LLR 482, AIR 1969 SC 30, AIR 1962 MP 72, AIR 1965 SC 155, AIR 1968 SC 1050

Domestic enquiry vis - a - vis criminal proceedings / trial – effect of acquittal – Enquiry neither to be vitiated nor the punishment of dismissal to be set aside. It is held that the legal position is well settled with parallel proceedings, one by way of disciplinary proceedings and the other in the criminal court can be taken to with regard to the same allegation. Once the employer found guilty of misconduct for the serious charge of theft by taking employers property from the factory, no lesser punishment than the dismissal from service is a proper punishment in such cases. The above principles of rationality were laid down by the law courts in the following cases:

(1) Suraj Prakash vs. The judge Labour Court, Kota, 1996 LLR 29,
(2) Jung Bahdur Singh vs. Brij Nath Tiwari, AIR 1969 SC 30,
(3) Kushweshwar Dubey vs. Bharat Cooking Coal Ltd.,AIR 1988 SC 2118,
(4) Moh. Uman vs. Rajsthatn State Electricity Board & ors.,1993 (1)WLC 253,
(5) Nelson Motis vs. Union of India, 1992 (2) LLJ 744 SC

Whether an employee can be dismissed on his conviction without holding an enquiry against him – No Enquiry is imperative and essential. It was held in Ramsuk vs. RSRTC[369].

[369] 1995 LLR 1072

Departmental Proceedings vis-à-vis criminal action on the same charges – stay of departmental proceedings. It is for the charge sheeted employee that the materials for proving that the charges in the criminal trial are similar to materials required to prove the charges in the departmental proceedings in abeyance until criminal court finally decides the issue. Held that both criminal action and departmental action may go along. This was held in the case of Samudrapu Somalappudu & ors vs. Nellimarala Jute Mills Co., Ltd[370].

The Supreme Court held that acquittal from the criminal court does not automatically gives delinquent the right to be reinstated in to the service. It would still open to competent authority to take decision whether the delinquent can be taken in to the services or disciplinary action should be initiated[371].

There would be no bar to proceed simultaneous with departmental enquiry and trial of criminal case unless charges in criminal case were of grave in nature involving complicated question of facts and law. What is required to be seen was whether departmental enquiry would seriously prejudice delinquent in his defense at trial in criminal case. Departmental charges against delinquent for failure to anticipate accident and prevention thereof and nothing to do with culpability of an

[370] 1996 LLR 405
[371] Union of India vs. Biharilal Sidhana 1997 LLR 498

offence under section 304A and 338 of Indian Penal Code. Accordingly, held that the High Court was not right to stay departmental enquiry proceedings[372].

Mere acquittal of an employee will not debar the employer to initiate disciplinary proceedings against him. In one case Delhi High Court held that it is well settled that nature and scope of criminal case is different from that of disciplinary proceedings held in Antony Aria vs. Indian School of Certificate Examination & ors[373]. In the criminal matters mens rea and in the civil / departmental enquiries the requird element is the propondernace of probabilities.

Staying of departmental proceedings on pendency of criminal proceedings is purely based on facts and circumstances of the each and every case held in Naseen Ishaque vs. Indian Trade Promotion Organization[374].

Disciplinary proceedings vis-à-vis criminal trail standard of proof in criminal trial and departmental enquiry is different. Technical rules of evidence and proof *beyond reasonable doubt* not applicable in departmental enquiry. In departmental enquiry preponderance of probabilities are sufficient. Burden of proof

[372] APSRTC vs. Moh. Yusuf Miya, 1997 LLR 265, SC.
[373] 1996 LLR 733
[374] 1998 LLR 146 Del.HC

lies on delinquent to prove that he has not committed the misconduct[375].

The disciplinary proceedings were delayed due to pendency of criminal proceedings. The employee remained under suspension for 10 years. Enquiry commenced after about 13 years, contended that there is undue delay in completing the enquiry would cause prejudice to the concerned employee. The court agreed with the contention of the concerned employee and quashed the enquiry proceedings[376].

Stay of enquiry proceedings during pendency of criminal trial – temporary injunction restraining employer from proceeding with departmental enquiry not justified. Criminal proceedings arising out of the same conduct are to be dealt with by different authorities under different law, standards and by adopting different procedure. More over employer cannot be restrained from taking disciplinary action till disposal of criminal case[377].

## 4.3 COMMUNICATION AND NOTICES IN THE ENQUIRY:

In absence of material to show that enquiry was conducted in a language which the delinquent did not understand and more

[375] Canara Bank vs. Union of India, 1998 LLR 966
[376] NK Soloman vs. FCI & ors, 1998 LLR 576
[377] Hidustan Steel Works Construction Ltd., vs. S R Kishan Bhatia 1998 LLR 492

over when an office bearer representing them was present. Principles of natural justice not violated[378].

In absence of evidence, if a finding is based on mere surmises and conjectures, inferences by writs court may be justified[379]. Delay in holding departmental proceedings would amount to denial of reasonable opportunity and would amount to vitiating enquiry[380].

A notice of the enquiry must be sent to the accused employee. The enquiry officer cannot be absolved of this duty even if reply has been given of the charge sheet[381]. Not strictly the evidence as in civil and criminal proceedings standard of proof is required not beyond reasonable doubt. The enquiry proceedings stand only on preponderance of probabilities held in Singaneri Collieries Co. vs. Industrial tribunal Hyderabad[382].

A notice of enquiry must be sent to the delinquent employee. The enquiry officer cannot be absolved of this duty even if reply has been given of the charge sheet. Not strictly the evidence as in civil and criminal proceedings standard of proof is required not beyond reasonable doubt. The enquiry proceedings stand only on preponderance of probabilities.

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[378] 1992 LLR 588 (Bom.)
[379] 1992 (I) FLR II (Guj.)
[380] 1990 LLJ 470
[381] 1992 (2) FLR 674 (Aud.)
[382] 1998 LLR 221 (AP. HC)

Applicant served with a chargesheet. He did not submit his defence. He did not appear in the enquiry and he was given opportunity at all stages but he did not avail. Held enquiry is valid[383]. Holding of exparte enquiry without notice in one sitting unnatural, when delinquent participated in many other sittings for which notice has given[384].

**Exparte enquiry**: When the delinquent has been arrested by the police, in one case, before the Patna High Court, the workers who was arrested by the police not at the instance of the management and as such they could not attend the enquiry because they were in jail, it has been held that the exparte enquiry did not vitiate the rules of natural justice[385]. In another case the petitioner who was suspended had gone to his village home. He was given a reply to show cause notice. However, he was not given notice of enquiry about the next date even though it was within the knowledge of the enquiry office held exparte enquiry. It was held that the exparte enquiry shall be quashed[386]. However, the Calcutta High Court held that if despite opportunities to participate an employee remains absent in an enquiry he can be proceeded exparte[387].

[383] CAT 1988 Mad.(I) 110
[384] CAT Mad.1988(i) 253
[385] 1984 LLN 395
[386] 1993 LLR 114 Patna HC
[387] 1993 LLR 377

**Non-appearance of an employee in an enquiry can be proceeded exparte**:

If the delinquent employee does not appear in the enquiry despite notices sent to him for his appearance the EO can proceed against him by holding enquiry exparte. In the instant case notices were issued to the employee intimating the time, date and venue of the enquiry by registered post with acknowledgment due which have returned back with the endorsement that the addressee refused to accept on four occasions. Thereafter the enquiry was held exparte and ultimately the report was submitted by the enquiry authority. It has been held that adequate opportunity was afforded to the delinquent employee to participate in enquiry and as such there was no violation of the principles of natural justice in holding the ex-parte enquiry against the delinquent employee[388].

In a case before Patna High Court, it has been held that the workers who were arrested by Police not at the instance of the management and as such they could not attend the enquiry because they were in the jail. It has been held that the ex-parte enquiry did not violate the rules of natural justice[389].

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[388] Banamali Pali vs. Steel Authority of India Ltd., 1989 (58) FLR (Ori.) (Sum.)

[389] Tata Locomotative vs. State of Bihar. 1983 (II LLJ 246)

The delinquent present in the enquiry and cross-examined the witness of the management, thereafter he disappeared. The enquiry concluded. It cannot be said as expate enquiry. Further it has held that in the middle stage of the enquiry denial of request to change enquiry officer will not amount to violation of the principles of natural justice[390].

## 4.4 WITNESSES, EVIDENCE AND ADMISSION IN THE ENQUIRY:

Enquiry adjourned on a number of times - all documents asked for, either supplied or opportunity given to examine them. It was held that no irregularities were done. A witness produced and examined in the enquiry. No chance given to the delinquent to cross-examine him. Held this could not be done and was against rules[391].

When presenting officer appearing as a witness in the enquiry - If enquiry vitiated for violation of principles of natural justice. Held, there is nothing wrong in allowing presenting officer to appear as a witness[392].

Presenting Officer (P.O) as witness - Yes, Presenting Officer can appear as witness. In one case i.e. Management of Glaxo India Ltd., Madras vs. Presiding Officer Labour Court, Guntur &

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[390] J.K Industries vs. Dy. Commissioner of Labour, 1997 LLR 173
[391] CAT (Cal.) 1988 (I) 477
[392] LLR 1993 P.425 [AP. HC]

Anr[393] the question arose as to whether P.O. can examine himself as a witness in the enquiry? It has been held by A.P. High Court that an enquiry will not be vitiated merely because the P.O. also appeared as a witness.

Summoning of witnesses by the EO - An EO has no power to summon the witness like a court hence the objection of the delinquent employee that the EO did not summons the witness will be on sustainable[394]. However, in one case[395]; the Delhi High Court has held that an EO can send a letter of request to a particular witness if the management or the employee makes such a request to him.

The EO officer merely asked clarificatory questions to the witnesses examined on behalf of the Corporation. Mere erroneous use of the word “cross examination” at the foot of the proceedings while recording the evidence of this witness does not mean that the EO had in fact cross examined the Corporation witnesses as such. In this view of the matter, the ratio of the judgement of the Supreme Court[396] in the above referred case is clearly applicable. This view has been held by the Supreme Court in the following cases:

(a) Pravin Ratilal Dudhana vs. Municiple Corp. of Greater Bombay 1996 LLR 350 (Bom. HC)

[393] 1993 LLJ 626 (AP HC)
[394] [1993(I) LLN 63 Ker.HC]
[395] 1987(54) FLR 9
[396] AIR 1975 SC 2125

(b) Mulchandhari Electrical and Radio Industries Ltd., vs. The workmen AIR 1975 SC 2125.

(c) Somnath Sahu vs. The State of Orissa & Ors. 1969(3) SC 384

The Supreme Court in the case of State of U.P., vs. Om Prakash Gupta[397], held that - - It is true that an enquiry under Section 311 (2) of the Constitution must be conducted in accordance with the principles of natural justice. Those principles are not embodied principles. What principle of natural justice should be applied in a particular case depends on the facts and circumstances of that case. All that the courts have to see is whether the non-observance of any of those principles in a given case is likely to have resulted in deflecting the course of justice. This Court has repeatedly laid down that the fact that the statements of the witnesses taken at the preliminary stage of the enquiry were used at the time of the formal enquiry does not vitiate the enquiry if those statements were made available to the delinquent officer and he was given opportunity to cross-examine the witnesses in respect of those statements.

**Evidence in Enquiry:** Examining the delinquent before the examination of departmental witness is against the statutory provision[398].

[397] AIR 1970 679
[398] CAT (MAD) (I) 1988 515

During the enquiry the main witness, who had detected the delinquent committing misconduct not called, though other much relevant ones called. Held enquiry was bad in law[399].

If the delinquent employee is not supplied with a copy of handwriting expert and refusal by the enquiry officer to permit him to engage the services of another expert for cross examination, the enquiry will be violative of principles of natural justice[400].

No evidence is imperative if charges are admitted - Leading of evidence in support of charges as levelled in a charge sheet is required to prove disputed facts and not admitted facts. Where on admission is made by the delinquent employee after knowing the charges, no evidence needs to be led by the management. It would, however, be a different matter if the admission of quilt is by an employee. Who could not understand what the changes were or if he was induced or coerced into admitting his guilt[401].

*Applicability of Evidence Act* - It is by now well settled that in a domestic enquiry strict rules of evidence do not apply and all materials which are logically probative are permissible. Even hearsay evidence can be taken note of provided it has reasonable nexus and credibility though the departmental

[399] CAT (Hyd.) 1988 (I) 458
[400] 1990 LLR 336 MP HC

[401] 1994 LLR 364, 1991-II-LLN-412

authorities and Tribunals have to be careful in evaluating such evidence. A domestic tribunal whose procedure is not regulated by a statute is free to adopt a procedure of its own so long as it conforms to the Principles of Natural justice. They can, unlike courts obtain all formation and material for the points under enquiry from all sources without being hampered by rules of procedure which governs court proceedings. The only requirement is that whatever material they collect cannot be used by them unless it is put to the party against whom it is to be used[402].

*Evidence of female employee in the enquiry will be necessary* - Denying to a delinquent employee the right to cross examine a witness who has deposed against him - strikes at the root of the enquiry process. In one case the J&K High Court held that when the charge-sheet against an employee pertains to his misbehaviour with a female employee, the delinquent cannot be denied a right to cross examine the complainant employee and the ground that if she is subject to cross examination by the delinquent with regard to the allegations levelled by the female complainant against him, she will subject to mental harassment or that her reputation and honour would be jeopardized or put at stake[403]. Enquiry to be vitiated when opportunity for cross

[402]1995 LLR 514 (P&H HC) Also refer: AIR 1977 SC 1512. 1976(2) SLR 690

[403] 1994 LIC 1902 (J&K HC

examination is not given[404]. Evidence in an enquiry can be recorded in a narrative form of a statement. But it is advisable to record it in Question and answer thereto and for the proper analysis of the evidence.

The procedure relating to holding enquiry, as given above is lengthy and complicated for a layman but it has to be followed as closely as possible if the management intends to exercise its rights of punishment on delinquent employee without fear of its being upset later on by an Industrial Tribunal or should it be made by a subject matter of an industrial dispute. However, it has not meant that unless the above procedure followed strictly, the decision of the management, punishing an employee is bound to be upset. The rules and procedures are not only handmaids of justice and unless it could be shown that the employee was misled in his defence and subsequently there has been a failure of justice on account of some error or omission on the part of the EO, in the observations of correct rules of procedure for holding an enquiry, such error or omission would not be deemed to be material enough to vitiate the enquiry proceedings, and becomes case for upsetting of the decision of the management based thereon. Moreover it is generally realized by the Tribunals that the persons holding domestic enquiry are usually not well versed in law and as such rigid observations of the rules and procedure prescribed by the

[404] N. Radhakrishnan vs. Tamil Nadu Civil Supply Corp. 1995 - II - LLN - 1081 (Mad. HC)

Criminal Procedure Code 1973 or Evidence Act, 1872 cannot be expected from them. As a matter of fact, as long as s it can be shown that a fair opportunity was given to the accused workman

(a) to remain present at the enquiry

(b) to examine his own witnesses

(c) to cross-examine the witnesses of the employer;

minor irregularities will not vitiate the enquiry proceedings, which nevertheless should be avoided[405].

The few questions which were disallowed by the EO were of trivial nature and were not really germane to the main controversy. It is therefore not possible to agree with the view taken by the Labour Court that this entire enquiry has been vitiated on account of the ..... of the EO disallowing certain questions during the cross examination of management's witness. No satisfactory explanation given as to how the workman was prejudiced in any manner by disallowing such questions denying the course of cross-examination. On the other hand, on perusal of the enquiry proceedings it is revealed that the EO has given maximum latitude to the representative of the workman in the cross examination of the management

[405] D. Anandkumar vs. Indian Airlines 1987 LLR 395 (Kar. HC)

witness. The enquiry has thus been conducted in full compliance with the principle of natural justice[406].

The EO questioning / cross-examining the delinquent in the beginning of the enquiry regarding the admitted factual aspects of the case - whether procedure adopted by the EO if violative of principles of natural justice and the proceedings are vitiated. The Kerala High Court, held no[407].

Documents taken on file during the course of an enquiry giving opportunity to delinquent to peruse the same, but serial nos., were given after conclusion o the enquiry. Held, not violation of the principles of natural justice. Enquiry Officer acted impartially, High Court cannot correct the holding of the enquiry. Action of the departmental enquiry sustained[408].

It is well settled that technical rules of Evidence Act are not applicable in a domestic enquiry, since enquiry proceedings being quasi-judicial in nature are governed by the principles of natural justice[409].

Mere suspicion should not be allowed to take the place of proof even in domestic enquiries. It may be that the technical rules

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[406] Balmer Lawrie Van leen Ltd. vs. BS Gopal and Ors. 1996 LLR 515 (Bom.HC), D.P. Maheshwari vs. Delhi Admn. & Ors. 1984 (I) LLN

[407] LLR 1996 603 (Ker.HC)

[408] Director General of Indian Council of Medical Research vs. Anil Gosh & ors, 1998 LLR SC 861

[409] S.K. Aswathy vs. M.R. Bhope, P.O, 1994 FLR (68) 841 (Bom. HC)

which govern criminal trials in courts may not necessarily apply to disciplinary proceedings, but nevertheless, the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as much to regular criminal trials as to disciplinary enquiries held under the statutory rules[410].

It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender or independence of judgment vitiates the conclusions reached, such finding, even though of a domestic tribunals cannot be held good. However, the courts below misdirected themselves,

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[410] Union of India vs. H.C Goel. AIR 1964 SC 364

perhaps in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The 'residuum' rule to which counsel for the respondent referred, based upon certain passages from American Jurisprudence does not go to that extent nor does the passage from Halbsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence - not in the sense of the technical rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept[411].

In the case of K. L. Shinde, vs. State of Mysore[412], the Supreme Court has observed that - - It is well settled that whether a delinquent had a reasonable opportunity of effectively defending himself is a question of fact depending upon the circumstances of each case and no hard and fast rule can be laid in that behalf. In the instant case, the order restricting the movement of the appellant on which strong reliance has been placed on him behalf for assailing the impugned order of his dismissal was not such as can be said to have deprived his of the reasonable opportunity of making his defence. The order, it would be noted, did not place any embargo on the appellant's going to Belgaum for the purpose of and in connection with the departmental enquiry. In fact the appellant fully participated in the enquiry held at that place. He

[411] State of Haryana and another. vs. Rattan Singh, AIR 1977 SC 1512
[412] AIR 1976 SC 1080

also made full use of the assistance of a policeman (called police friend) provided to him to conduct the defence on his behalf. The police friend appeared on his behalf before the Enquiry Officer and cross-examined all the witnesses whom the prosecution examined or tendered for cross-examination. He was also furnished with copies of the statements of the three police constables recorded by the Cantonment P. S. I, and allowed an adequate opportunity of cross-examining them. There is also nothing to indicate that the appellant's request for an opportunity to examine any witness in his defence was refused. In fact he did examine some witnesses in his defence. In view of all this, it cannot be held that a reasonable opportunity of defending himself as contemplated by Article 311 of the Constitution was denied to the appellant.

Regarding the appellant's contention that there was no evidence to substantiate the charge against him, it may be observed that neither the High Court nor this Court can re-examine and re-assess the evidence in writ proceedings. Whether or not there is sufficient evidence against a delinquent to justify his dismissal from service is a matter on which this Court cannot embark. It may also be observed that departmental proceedings do not stand on the same footing as criminal prosecutions in which high degree of proof is required. The present case is, in our opinion, covered by a decision of

this Court in State of Mysore vs. Shivabasappa[413], where it was held as follows:-

"Domestic tribunals exercising quasi-judicial functions are not courts and therefore, they are not bound to follow the procedure prescribed for trial of actions in courts nor are they bound by strict rules of evidence. They can, unlike courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedure which govern proceedings in court. The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against who it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case, but where such an opportunity has been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in courts".

In respect of taking the evidence in an enquiry before such tribunal, the person against whom a charge is made should know the evidence which is given against him, so that he might be in a position to give his explanation. When the evidence is oral, normally the explanation of the witness will be in its entirety, take place before the party charged who will have full opportunity of cross-examining him. The position is the same

[413] AIR 1963 SC 375

when a witness is called, the statement given previously by him behind the back of the party is put to him, and admitted in evidence, a copy thereof is given to the party and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statement should be repeated by the witness word-by-word and sentence-by-sentence, is to insist on bare technicalities and rules of natural justice are matters not of form but of substance. They are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged and he is given an opportunity to cross-examine them."

In the case of Khardah Co. Ltd. vs. Their Workmen[414], this aspect was noted by this Court as follows:-

"Normally, evidence on which the charges are sought to be proved must be led at such an enquiry in the presence of the workman himself. It is true that in the case of departmental enquiries held against public servants, this Court has observed in the State of Mysore vs. Sivabasappa[415], as, if the deposition of a witness has been recorded by the enquiry officer in the absence of the public servant and a copy thereof is given to him, and an opportunity is given to him to cross-examine the witness after he affirms in a general way the truth of his statement already recorded, that would conform to the

[414] 1964-3 SCR 506
[415] AIR 1968 SC 375

requirements of natural justice; but as has been emphasized by this Court in M/s. Kesoram Cotton Mills Ltd. vs. Gangadhar[416], these observations must be applied with caution to enquiries held by domestic Tribunals against the industrial employees. In such enquiries, it is desirable that all witnesses on whose testimony the management relies in support of its charge against the workman should be examined in his presence. Recording evidence in the presence of the workman concerned serves a very important purpose. The witness knows that he is giving evidence against a particular individual who is present before him, and therefore, he is cautious in making his statement. Besides, when evidence is recorded in the presence of the accused person, there is no room for persuading the witness to make convenient statements, and it is always easier for an accused person to cross-examine the witness if his evidence is recorded in his presence. Therefore, we would discourage the idea of recording statements of witnesses ex parte and then producing the witnesses before the employee concerned for cross-examination after serving him with such previously recorded statements, even though the witnesses concerned make a general statement on the latter occasion that their statements already recorded correctly represent what they stated."

[416] AIR 1964 SC 708

In one case[417] the Supreme Court has held:- "The minimum that we shall expect where witnesses are not examined from the very beginning at the inquiry in the presence of the person charged, is that the person charged should be given a copy of the statements made by the witnesses which are to be used at the inquiry well in advance before the inquiry begins and when we say that the copy of the statements should be given well in advance, we mean that it should be given at least two days before the inquiry is to begin. If this is not done and yet the witnesses are not examined-in-chief fully at the inquiry, we do not think that it can be said that principles of natural justice which provide that the person charged should have an adequate opportunity of defending himself are complied with in the case of a domestic inquiry in an industrial matter."

The Supreme Court in the case of Central Bank of India Ltd., vs. Prakash Chand Jain[418], held that - - It is true that, in numerous cases, it has been held that domestic tribunals, like an Enquiry Officer, are not bound by the technical rules about evidence contained in the Evidence Act, but it has nowhere been laid down that even substantive rules, which would form part of principles of natural justice, also can be ignored by the domestic tribunals. The principle that a fact sought to be proved must be supported by statements made in the presence of the person against whom the enquiry is held and that statements

[417] AIR 1964 SC 708
[418] AIR 1969 SC 983

made behind the back of the person charged are not to be treated as substantive evidence, is one of the basic principles which cannot be ignored on the mere ground that domestic tribunals are not bound by the technical rules of procedure contained in the Evidence Act.

Non-supply of document - Copies of certain documents which delinquent wanted to pursue was not relevant to charge - Non-supply of it by Enquiry Officer-Delinquent cannot be said to be deprived of reasonable opportunity of defending himself[419].

When more than one delinquent officers are involved, then with a view to avoid multiplicity of the proceedings, needless delay resulting from conducting the same and overlapping adducing of evidence or omission thereof and conflict of decision in that behalf, it is always necessary and salutary that common enquiry should be conducted against all the delinquent officers. The competent authority would objectively consider their cases according to Rules and decide the matter expeditiously after considering the evidence to record findings on proof of misconduct and proper penalty on proved charge and impose appropriate punishment on the delinquent. If one charged officer cites another charged officers as a witness, in proof of his defence, the enquiry need not per se be split up even when the charged officers would like to claim an independent enquiry

[419] Secretary to Government and others, vs. A.C.J. Britto, AIR 1997 SC 1393

in that behalf. If that procedure is adopted, normally all the delinquents would be prone to seek split up of proceedings in their/his bid to delay the proceedings, and to see that there is conflict of decisions taken at different levels. Obviously, disciplinary enquiry should not be equated as a prosecution for an offence in a Criminal Court where the delinquents are arrayed as co-accused. In disciplinary proceedings, the concept of co-accused does not an. Therefore, each of the delinquents would be entitled to summon the other person and examine on his behalf as a defence witness in the enquiry or summon to cross-examine any other delinquent officer if he finds him to be hostile and have his version placed on record for consideration by the disciplinary authority. Under these circumstances, the need to split up the cases is obviously redundant, time consuming and dilatory. It should not be encouraged[420].

## 4.5 ELEMENT OF BIAS IN AN ENQUIRY:

The first principle of natural justice consists of the rule against bias or interest and is based on the three maxims:

i) No man shall be judged on his own cause

ii) Justice should not be done, but manifestly and undoubtedly be seemed to be done.

iii) Judges like Caesar's wife should be above suspicion.

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[420] Balbir Chand, vs. Food Corporation of India Ltd. and others, AIR 1997 SC 2229

The first requirement of natural justice is that the judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in position to act judicially and to decide the matter objectively. This principle applies not only to judicial proceedings but also to quasi-judicial as well as administrative proceedings[421]. There are variety of bias among those these three are the basic types of bias viz;

**I) Pecuniary bias**

**ii) Personal bias**

**iii) Official bias or bias as to subject matter.**

With regard to the principles of natural justice, we have already dealt exhaustively under chapter 03 hereinabove. Nonetheless, we shall be now discussing the catena of judicial pronouncements passed by different law courts in this regard.

A complaint was lodged by an officer and thereafter he appeared as a witness in the enquiry. The proceedings are said

[421] AIR 1984 SC 1572

to be biased[422]. It is obvious that pecuniary interest, however small it may be in a subject matter of the proceedings, would wholly disqualify a member from acting as a judge[423].

One of the Committee members of a departmental enquiry was biased. Entire exercise of conducting enquiry by such committee would be futile. It would be violative of principles of natural justice[424].

A predisposition to decide for or against one party without proper regard to the merits of the *lis* is bias. Personal bias is one of the three major limits of bias, viz. pecuniary, personal and official bias. The test is not whether in fact a bias has affected the judgement, the test is always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the Tribunal. It is in this sense that justice must not only be done must also appear to be done[425].

Constitution of enquiry committee of three members - Appellant alleging bias against one of the members of the committee on ground of enemity - rejected, said member appeared as witness in the enquiry deposed against him to prove charge no.12 also

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[422] 1990 II LLJ 23 (AP)
[423] AIR 1957 SC 425 (429)
[424] FLR 1988 (57) (Kar HC) 496

[425] 1993 LLR 6557) – Also see: AIR 1961 SC 705, AIR 1978 SC 597, AIR 1957 SC 227, 1988 SC 651

participated in the enquiry proceedings as its member - whether enquiry proceedings are vitiated - held yes[426]. Bias of Disciplinary authority will vitiate enquiry[427].

Reasonable apprehension..... Petitioner was an active member of Union had earlier filed a complaint against the enquiry officer --------- raised objection against the appointment of EO to conduct enquiry against him..... request denied..... whether justified? held no[428].

There are various aspects, which are to be taken in to consideration so that an enquiry ordered to be held against employee should not appear as an empty formality. The cardinal rule is for domestic enquiry that the principles of natural justice should be followed and the concerned employee is to be given an opportunity to defend himself and to cross-examine the witnesses of the management. Also the enquiry officer should be an impartial person. An enquiry by an officer, who participated in the proceedings against an employee resulting in his suspension, will be certainly biased and not impartial[429]. The authority, who issued show cause notice, initiated disciplinary proceedings and acted as appellate authority - bias likely to arise. Possibility of predisposition hovering over the mind of adjudicator could not be ruled out.

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[426] 1993 LLR 657

[427] 1968 SLR 470 (Raj.HC) also refer - 1993 CLR 1 (SC)

[428] LLR 1994 P.677 (Delhi)

[429] B. Harischandra vs. Academy of General Education, 1995 LLR 420 (Kar. HC)

The Madhya Pradesh High Court held vide its decision in Mahesh Kumar Kanskar vs. Mandla Balaghat Kshetriya Gramin Bank & anr[430] that "in administrative law, rules of natural justice are foundational and fundamental concepts and law is now well settled that the principles of natural justice are part of the legal and judicial procedures. There should not only be fairness in action, but fairness should be writ large. There may not be direct proof of bias required in the case where a witness is required to adjudge while sitting as a disciplinary authority". And consequently held that the orders passed by the disciplinary authority are liable to be quashed only on the ground that he himself acted as disciplinary authority while he was a crucial witness in the instant case.

In Moh. Mia vs. State of West Bengal & ors[431] held that the participation of the presenting officer as a witness in the instant case rendered the enquiry and the entire proceedings inoperative and without jurisdiction on the basis that "criterion should be that the prosecutor cannot be witness applies in a departmental proceedings. The act of the Presenting Officer in having his own testimony recorded in the case beyond any shadow of doubt evidences a state of mind, which clearly demonstrates a considerable bias existed. It is completely foreign to the fundamentals of the Service Rules and Service jurisprudence that a Presenting Officer should be allowed to participate as witness. Whatever could not be said otherwise

[430] 2002 LLR 838 (MP)
[431] 2000 LLR 999 (Cal)

before the Enquiry Officer was sought to be filled up by the deposition of the Presenting Officer as a supplemental to the case of fee prosecution" However, relying on the decision of the Bombay High Court rendered in N.N Rao vs. Greaves Cotton & Co, the Andhra Pradesh High court has held in Management of Glaxo India Ltd., Madras vs. Presiding Officer, LC, Guntur[432] took a dissenting view to hold that he participation of the presenting officer as witness does not vitiate the proceedings.

***Whether enquiry offcer can reach a finding on the basis of his personal knowledge?***

In Associated Cement Companies Ltd., vs. its workmen[433] the apex court clarified that where, without order intimating about the holding of the enquiry, the concerned workman was called upon the participate in the domestic enquiry and the enquiry officer having personal knowledge cone to the conclusion against he concerned workman. It was held that the cross examination at the beginning of the domestic enquiry of the concerned workman was not proper.

***How the bias is be proved by the delinquent against the enquiry officer?***

In the case of International Airport Authority of India vs. K.D Bali[434] it was held that the onus of proving bias is on the person who alleges it. The allegation must be clearly proved, of the

[432] 1993 LLR 425
[433] 1963-II LLJ 396 (SC)
[434] AIR 1988 SC 1049

proceedings sought to be set aside. It is not very suspicion held by a party must lead to the conclusion that the authority hearing the proceedings is based. The apprehension must judged from healthy, reasonable and average point of view and not on mere apprehension o any whimsical person. The reasonable apprehension, it may be noted must be based on cogent materials. In Rattan Lal Sharma vs. Managing Committee[435] it was held that the court can entertain the plea of bias even if it was not raised before the appellate authority who decided the appeal.

[435] 1993(3) JT SC 487

# Chapter 05: JUDICIAL STRUCTURE & PERSPECTIVE - III

5.1 Enquiry Report by an Enquiry Officer

5.2 Supply of Enquiry Report and second show cause notice

5.3 Act of imposition of penalty

5.4 Remedies available to delinquent employee.

## 5.1 ENQUIRY REPORT BY AN ENQUIRY OFFICER:

**Essential ingredients of an enquiry report**: - It is well settled legal proposition that a domestic enquiry is a quasi-judicial proceedings and Enquiry Officer has to act judicially. The Supreme Court has held that the report of the Enquiry Officer (EO) must be speaking order in the sense that the conclusions drawn by the Enquiry Officer are to be supported by the reasons. When the EO could not apply his mind to the evidence and merely reproduces in his report the stages through which the enquiry had passed, there would be no enquiry worth the name. The order of the termination of the services based on such report will be unsustainable[436].

[436] Anil Kumar vs. L.C Jalandhar, AIR 1985 SC 1121

In another case, the High Court of Karnataka has held that failure to give reasons in the Enquiry report for the finding of guilt arrived at by the EO amounts to violation of principles of natural justice. An unreasonable enquiry report will vitiate the enquiry[437].

Dismissal of an employee on his conviction without enquiry cannot be held to be illegal. In one case, an employee employed with RSRTC was convicted by criminal court for a period of 3 years. The corporation dismissed the employee from service without holding an enquiry. When the employer challenged the dismissal the High Court held the no enquiry was imperative. It has been further held that if the RSRTC consider the conviction of an employee who has been convicted u/s. 376 IPC and decided that dismissal would meet the ends of justice, no fault can be found with such decision. Moreover when the employee is convicted and sentenced for 3 years imprisonment, he is unable to serve the employer for 3 years and asking the employer not to dismiss such an employee 3 years leave to enable him to serve his sentence. A fair and reasonable opportunity in the matter of employment would not mean a right to continue in employment even if the employee has not been able to serve the employer for

[437] LIC 1994 110 (Kar.HC)

particular period during which he is incarcerated on being convicted by the criminal court[438].

**Validity of an Enquiry:** Voluntary withdrawal of workman from enquiry does not absolve EO from holding an Enquiry. If he closes the enquiry and dismisses the workman; dismissal held illegal[439].

No enquiry at all had been conducted by Enquiry Officer - no opportunity afforded to repel the charges levelled - opposite parties even not called for to adduce evidence. Once no enquiry was held, the enquiry report itself is vitiated. It is *non-est* and no meaning in the eyes of law[440].

**Essentials of enquiry**: - The first and the foremost requirement is that in domestic enquiries, the principles of natural justice be complied with. In private employment domestic enquiry is that of mistrust which arises essentially because the charge sheet is given by the employer and the enquiry is also held by an officer or an outsider appointed by the employer. The employer, as such, represents the both, the prosecutor and the judge. A suspicion of bias is inevitable in such a situation. This is the main reason that the delinquent employee does not have faith in the enquiry officer. They participate reluctantly and take

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[438] Ram Sukh V/s. R.S.R.T.C & Anr. 1995 LLR 1072 (Raj.HC)

[439] AIR 1961 SC 1348 (1961) II LLJ 414

[440] LLR 1994 P.588 (Alld. HC)

every possible step to frustrate the enquiries. In one case[441], it has been held that there are 3 essential ingredients of a departmental enquiry viz:

1. that there are definite charges,

2. that evidence is adduced during the enquiry

3. that a reasonable opportunity, of being heard in respect of those charges is given to the person concerned.

The enquiry is to be held into the charges which have been communicated to the delinquent and the penalty is to be inflicted on the basis of the result of the enquiry. The evidence adduced during the enquiry, serves the dual purpose of establishing the charges and determining the penalty. If no evidence is adduced, during the enquiry, the right to reasonable opportunity of being heard in respect of the charges will be illusory. It is only on the basis of evidence adduced during the enquiry that the person facing the enquiry may effectively exercise his right to being heard in respect of the charges against him.

It will not out of place to state here that introduction of Sec.11 A to the Industrial Disputes Act, the Labour Court or the Industrial Tribunal is vested with the power to decide the jurisdiction of the decision of the employers. Thus when it is found that the

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[441] Dilip Singh Rana vs. State of UP 1994 LIC 491 (Allahabad HC DB)

domestic enquiry is not held proprly, it will stand vitiated and the Labour Court or Industrial Tribunal would set aside the Order of punishment by giving appropriate relief including that of lesser punishment or even no punishment resulting in reinstatement to the concerned workman. This is entirely a new dimension given to the adjudication of industrial disputes concerning discharge or dismissal of a workman.

**Essential ingredients of valid enquiry:** The law relating to holding of enquiry is based on the principles of natural justice and there is no proper laid down / prescribed procedure either in Industrial Disputes Act or other statutes for holding of an enquiry. In fact law relating to holding of enquiries has developed by precedents decided by the Supreme Court and various High Courts. In order to stall the possibility of getting the enquiry vitiated or to be held as perverse, the reference is made to the case decided by Calcutta High Court[442] wherein their Lordships held that the findings of enquiry officer will be treated as perverse if-

- ✍✍ the EO has come to the finding of no evidence.
- ✍✍ the EO has based on the findings of materials not admissible and has excluded the relevant materials and as excluded relevant materials.

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[442] The Collector of Customs vs. B. Mukerjee, 1974 LLJ 251 Cal HC D.B., Dhirendranath Kunduv vs. Union of India and others 1994 L.I.C 718

- ✍✍ The EO has not applied his mind to all the relevant materials and has not considered the same in coming to the conclusion.

- ✍✍ The EO has come to the conclusion by considering materials, which is irrelevant, or by considering material which is partly relevant and which is partly irrelevant.

- ✍✍ The EO has disabled himself in reaching a fair decision by some consideration extraneous to the evidence and the merits of the case.

- ✍✍ The EO has based his findings upon conjunctures, surmises and suspicion.

- ✍✍ The EO has based the findings upon a view of the facts which cannot reasonably be entertained or the facts grounds are such that no persons acting judicially / quasi-judicially and properly instructed as to the relevant law could have found and,

- ✍✍ If the EO in conducting the enquiry, as acted in flagrant disregard the rules or procedures or has violated the principles of natural justice where no particular procedure is prescribed.

Against the petitioner for same misconduct and same witness in both proceedings petitioner acquitted in criminal case, factum of acquittal ignored in the department proceedings had no

weightage was given to the judgment of the criminal court by the EO and petitioner was dismissed ..... held enquiry vitiated[443]. In absence of valid evidence, if findings are based on surmises, the enquiry will be vitiated - the same is against the principles of natural justice[444].

Enquiry Officer junior to the delinquent validity of - Such an enquiry will be liable to be vitiated on the ground of bias of the EO. It is pertinent to refer to one case decided by the Divisional Bench of Kerala High Court in holding that the learned single judge was wrong in coming to the conclusion that the writ petitioner could not be permitted to raise the question of real likelihood of bias, as he did not raise the same during the course of the enquiry proceedings. Admittedly, the Inspector, who conducted the enquiry was immediately subordinate to the complainant in the case, the real likelihood of bias is writ large on the face of the enquiry. The entire enquiry was thus held to be vitiated and accordingly entire proceedings including the penalty were quashed[445].

**Termination of services by the authority subordinate to the appointing authority will be legal?**

No such a termination will be illegal, void and untenable. In one case petitioner was dismissed by Deputy General Manager re-designated as General Manager. He was inferior to appointing

[443] 1995 LLR 1076 (BOM HC)
[444]1995 LLR 5515 (P&H HC)
[445]1995 LLR 61 (Kerala H.C)

authority. Termination or dismissal of the petitioner could not be sustained as it was passed by authority inferior to that which he was appointed[446].

Earlier, the Punjab & Haryana High Court while following the Supreme Court judgments has also held that with the efflux of time and by age old recognized relationship of master and servant, it has become an integral part of service jurisprudence, that the authority subordinate to the appointing authority cannot terminate the service of an employee[447].

The Labour Court (L.C) set aside the enquiry on the sole ground that in the charge sheet wrong numbers of standing orders were mentioned. The award of the LC was set aside after serving that charge sheet and there are no other certified standing orders subsequent to the earlier ones. LC directed to hear the parties afresh on other points also[448]. It is well settled that the civil court cannot sit on judgment over the findings arrived in a departmental enquiry or domestic enquiry. The appropriate remedy in challenging the validity of an enquiry is provided under the Industrial Disputes Act[449]. The Karnataka High Court has also held that the civil court has no jurisdiction to grant stay of domestic enquiry since the courts under Civil

[446] 1993 LIC 2597 (Del HC)
[447] 1991 LLR 497 [P&H HC]

[448] V.V.F. Ltd., vs. Sarva Shramik Sangh & ors, 1998 LLR 585 (Bom.HC)
[449] Jitendranath Biswas vs. Empire India & Cylon Tea Co., & ors, 1990 LLR 1 SC

Procedure Code have no jurisdiction to enforce a personal contract[450].

None of the witnesses or cross-examined in the enquiry, Enquiry Officer gave corroborate reasons – no infirmity – charges of dereliction of duty of petitioner a Branch manager, Gramin Bank found established during enquiry – imposition of penalty was challenged on the ground that for proof charges, none of the witnesses examined nor opportunity was given to cross-examine them – charges were that petitioner failed to safe guard the interest of Bank by securing adequate security and not ensured supply of goods to loans – It were based on documents, part of record. No manifest error apparent on fact of warranting interference. Enquiry Officer elaborately discussed each charge and gave reasons – Enquiry Officer and appellate authority were not like civil court thus no infirmity in the enquiry[451].

Procedural steps followed and the dismissal order passed thereof become final High Court in writ jurisdiction cannot re-appreciate the evidence and also cannot reverse the findings[452].

That no prejudice has resulted to the respondent on account of not furnishing the copies of the statement of witness, that cannot be said that the respondent did not have a fair hearing

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[450] Amco Battaries Bangalore vs. RamMohan, 1995 LLR 636

[451] Tara chand Vyas vs. Chirman & Disciplinary authority & ors, 1997 LLR 409

[452] Raibareli Kshetrya Gramin Bank vs. Bolanath Singh & ors, 1997 LLR 698

or the disciplinary enquiry against him was not fair[453]. Questions by the Enquiry Officer – the Supreme Court took the view that the enquiry authority is entitled to question the witness, so long as the delinquent employee is permitted to cross-examine the witness. This will not violate the enquiry or make it unfair[454].

Enquiry will be vitiated if the appeal by the employee is heard by the same officer who had issued show cause notice and rejected the explanation[455]. Non-payment of subsistence allowance to a suspended employee by the employer during pendency of enquiry will vitiate the enquiry[456].

## 5.2 SUPPLY OF ENQUIRY REPORT AND SECOND SHOW CAUSE NOTICE:

**Enquiry report – non-supply to an employee - -** unable to show prejudice caused to him due to non-supply of the enquiry report. High Court declined to interfere with the major punishment or removal; from service – held no illegality[457].

Mere non-furnishing of enquiry proceedings will not violate enquiry since enquiry report was furnished to the employee and after considering his explanation the punishment has been

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[453] State Bank of Patiala vs. S R Sharma, 1997 LLR 268 SC

[454] Mulchandani Electricals & Radio Industries vs. Its workmen, AIR 1975 SC 2125

[455] M. Sachidananda vs. AGM, Vijaya Bank, 1999 LLR 142

[456] The Western India Tanneries Ltd., vs. M.R. Bhope, 1991 LLR 505

[457] S.K Singh vs. Central Bank of India, 1997 LLR 162

inflicted. It is necessary to plead and prove prejudice on account of non-furnishing of enquiry proceedings by employer to the delinquent[458].

A copy of the enquiry report was not furnished to the employee. Labour Court held that employee has been deprived of reasonable opportunity. Set aside the orders of dismissal, the award of labour court was challenged contending that the Tribunal / labour court is not mechanically set aside orders of punishment on the ground of non-supply of copy of the enquiry report by the employer and has to give reasons and therefore and should set aside the orders if it finds the furnishing of report would have made difference to the result[459].

Consequence of non-supply of enquiry report – when no prejudice is caused – Officer of the Bank suspended for misconduct prior to his promotion from clerk, served with four charge-sheets for embezzlement, mis-appropriation and other acts of unbecoming of a Bank officer. Enquiry initiated, delinquent officer attended few dates of enquiry, thereafter proceeded with *ex-parte*. Charges proved in the enquiry, dismissed from service. Aggrieved by the same the dismissal order was challenged in the High Court. High Court directed reinstatement, directed disciplinary authority to furnish the enquiry report. Management of the Bank preferred an appeal to

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[458] G.Anandam vs. Temilnadu Electricity Board, 1997 LLR 248

[459] Apha Toyo Ltd., Faridabad vs. Shri.Srichand Tyagi & ors. 1997 LLR 48

the Supreme Court, appeal admitted, order of the High Court set aside, dismissal confirmed. Held that the High Court erroneously assumed that the enquiry report was not furnished to the respondent or any prejudice was caused. In fact a copy of the enquiry report appears to be served when he filed statutory appeal / representation before the appellate authority. The high Court has failed to apply its judicial mind to the facts and circumstances of the case[460].

The enquiry report was served on delinquent only along with main show cause notice – amounts to denial f reasonable opportunity and violative of the principles of natural justice. Held the delinquent is entitled to have a copy of the report of the enquiry before disciplinary authority takes its decision on the charges[461]. A copy of the enquiry report was not given to the applicant. Held this deprived him to file effective appeal and ordered to supply copy of enquiry report and give chance to file appeal again[462].

In the absence of specific provision for furnishing a copy of enquiry report to workman, the enquiry will not be vitiated of report is not furnished[463]. But the Supreme Court in the case of

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[460] Union Bank of India vs. Vishwa Mohan, 1998 LLR 420 SC, MD, ECIL,, Hyderabad vs. B. Karunakar 1994 LLR 391 SC

[461] *Supra*

[462] [CAT (Cal.) 1988 (I) 594]

[463] 1990 LLR 391

Electronic Corporation of India vs. B. Karunalkara over rules this view[464].

It has been held that delinquent employee is entitled to be furnished copy of the enquiry report to enable him to make representation to the disciplinary authority to prove his innocence[465].

A report is required to be furnished even when the punishment imposed is other than the major punishment of dismissal, removal or reduction in rank. A report should be furnished even when the statutory rules laying down procedure for holding an enquiry are silent or against it[466].

Entitlement of workman from the date of termination till the date of award rendered by the Labour Court when charges are proved - It is settled law that if guilt of the workman is established before the Labour Court for the first time, he is entitled to wages for the period when he was terminated till such time the award was rendered by the court. While remitting this case to the Labour court for determining the controversy as indicated above, a direction is given to the respondent management to pay the petitioner his wages from when his services were terminated till the date of award[467]. Findings

[464] 1994 LLR 391
[465] LLR 1994 SC P.391 (SC)
[466] LLR 1994 P.392 (SC)
[467] 1994 LLR 368

cannot be challenged unless shown that the findings are perverse or based on no evidence at all.

Non furnishing of list of witnesses to the employees along with the chargesheet and furnishing of day to day proceedings to the workman - whether amounts to violation of principles of natural justice - Held No[468]. After acquittal of petitioner by Criminal Court - is plea of estoppel applicable and department is debarred from initiating the departmental proceedings after acquittal. Difference between departmental enquiry and criminal trial and their purpose has been touchedupon in the matter[469].

**Second Show Cause Notice:** The enquiry report was served on delinquent only along with main show cause notice – amounts to denial f reasonable opportunity and violative of the principles of natural justice. Held the delinquent is entitled to have a copy of the report of the enquiry before disciplinary authority takes its decision on the charges[470]. Second show cause for inflicting punishment - not absolute rule[471].

The Supreme Court has made abundantly clear that the requirement of giving second show cause notice cannot be extended to disciplinary enquiries in private employment in the absence of binding rule. Neither the ordinary rule of law nor industrial law requires an employer to give such a notice and

[468] LLR 1994 P.434 (Bom)
[469] 1995 831 (Orissa HC)

[470] L.Manickavasgam vs. Tamilnadu Electricity Board, 1998 LLR 699 (Mad. H.C)
[471] 1993 LLR 193

the only class of cases in which a notice held necessary are those arising under Article 311(2) of the Constitution. It has been pointed out by the Supreme Court that to import such a requirement from Article 311 (2) of the Constitution in industrial matters does not appear either necessary or proper and would be equating industrial employees with civil servants for which there is no justification and besides such requirement would necessarily prolong disciplinary enquiries which in the interest of the industrial peace, should be disposed of in a short time as possible[472].

Whereas in the 42nd amendment to the constitution provision of issuing show cause notice has been deleted in article 311(2); there is no obligation to issue second show cause notice before awarding punishment. So far as Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 are concerned there is no provision for issuing a second show cause notice. It is also well settled that issue of second show cause notice before awarding punishment is not part of requirement of the principles of natural justice. Therefore, Allahabad High Court has held that if a person is found guilty of such charges for which only punishment is dismissal from service, then no second show cause notice is necessary and there is no principle of natural justice that such a notice should be given[473].

[472] Management vs. S S. Railway workers Union, AIR 1969 SC 513
[473] Ganga Singh vs. Administrator, Dist., Co-op Federation Ltd., 1975 Lab.IC 1520

## 5.3 ACT OF IMPOSITION OF PENALTY:

**Guidelines to be followed by the employer prior to inflicting punishment**: - The punishing authority would do well to follow the following principles[474] before passing final order of punishment:

(i) The punishing authority should not pass order mechanically

(ii) The punishing authority not to refer past record of the employee

(iii) The punishing authority should apply its mind on each and every charge

(iv) The punishing authority should not be discriminate and prejudiced.

(v) The punishing authority should not be pass order with retrospective effect.

(vi) The punishing authority should not be too vindictive and or too lenient.

**Duties of the competent authority after Enquiry / criteria for inflicting punishment: -**

In a fair exercise of discretion the punishment should not be ridiculously low nor unduly harsh. For an instance, punishment

[474] 3rd Edn., 1998- Domestic enquiry & punishment by K.P Chakravarti – pp.495/96

of a dismissal for isolated absence on part of workman will not be justified but if the absence of the workman is habitual than such a severe punishment of dismissal will be proportionate to the misconduct. In one case it has been held by the Allahabad High Court also that for a single act of misconduct the punishment may be lighter. For repeated act of misconduct a punishment may be harsh. Even on the regular criminal side there is Probation of First Offenders Act where under an accused committing an offence of the specified nature cannot be sent to jail. The first offence is a mitigating circumstance. Again an accused may be dealt with leniently if he shows remorse and the punishing authority get assurance that the remorse is a genuine and accused with not commit offence again[475].

The matter of misconduct as proves as to be kept in mind while imposing punishment and the punishment to be inflicted must necessarily be commensurate with the gravity of misconduct. Even if the workman has put in unblemished lengthy service with the employer, but the charges proved against him like that of misappropriation of money, making false entry in the balance books, continuous absenteeism are serious. Then sheer seriousness of the charges brings a total cloud on the previous good record of the workman only in such type of cases, the

[475] 1989(58) FLR 388 (Allh.)

punishment of dismissal will be commensurate with the charges proved[476].

Can employer held fresh enquiry? Held No. On acceptance of the Enquiry report a disciplinary authority took final decision in the matter. It is not open to the disciplinary authority to order a fresh enquiry or an additional enquiry[477].

Disciplinary enquiry ordering second enquiry not justified - Once the EO has arrived at a finding and made his report, it is open to accept it or to come to finding upon the record other than that of the EO. It is however not open to him to scrap the finding / report and to subject the delinquent to the hazard and travail of a second enquiry. To do so will be violative of principle of natural justice and fair play as held by the Bombay High Court in Murali Ramchand Joshi vs. LIC of India and Ors[478].

Necessity of giving reasons by disciplinary authority while imposing punishment - In case the disciplinary authority does not agree with the findings of the EO then the reasons must be given by the disciplinary authority while imposing punishment upon the delinquent employee[479]. However, where the disciplinary authority agrees with the findings of the EO then it is not imperative to give reasons. In one case Div. Bench of Bombay High Court held that submission of respondent is that

[476] 1993 (II) CIR 1078 BOM HC

[477] LLR 1995 655 (Kar)
[478] 1997 (54) FLR 723 BOM
[479] 1995 LLR 547 (MP HC)

the disciplinary authority while passing an order of his dismissal failed to give reasons and thus the principles of natural justice (PNJ) is violated. This submission is rejected following the decision of the Supreme Court[480] in holding that when the punishment authority accepting the findings and the reasons given by the EO, the disciplinary authority is not required once again to give reasoned order and in the circumstances dismissal order is not vitiated.

Bus conductor charge sheeted and dismissed from the services after domestic enquiry - challenged - Labour Court held that the misconduct not proved - directed reinstatement of the respondent with 50% back wages. In appeal, Industrial Tribunal moulded the relief to reinstatement with full back wages - The High Court held that the discretion exercised by the Labour Court was fair and just and it should not have been highly interfered with by the Inudstrial Tribunal in the absence of good cause for interference[481].

Report of the findings of the enquiry officer - copy of the report has to be furnished to the employee. Affording him opportunity to comment upon or explain the findings of the enquiry officer before a decision on his guilt or otherwise is taken then only to issue second show cause notice to show cause against the

[480] 1987 Lab IC 1980 (SC)

[481] Municipal Corporation of Bombay vs. Sopan Yashwant Mohite 1996 LLR 853 (BOM.HC)

proposed punishment[482]. In the whole of the writ petition the petitioner did not specify as to what subsistence allowance would be payable and what has not been paid actually, mere fact that some amount has not been paid in making some calculation regarding the subsistence allowances would not mean that the petitioner was justified in boycotting the Enquiry proceedings. The petitioner has not pointed out any letter written by the petitioner with regard to the rules. The petitioner was suspended in October 1989 and the subsistence allowance was being deposited in his own account in the bank every month. It is not understood if there was any miscalculation in deposit of subsistence allowance in any month why the petitioner remained silent for such a long period. We do not find any merit in this contention as well[483].

Bus conductor alleged to have collected fare from passengers amounting to Rs.6 without issuing tickets - amount misappropriated being meager one - punishment of dismissal was disproportionate and that too when employee is aged 55 years and also harsh to remove him from service at the fag end of his life. Employee is directed to be reinstated with continuity of service but without back wages[484].

Failure to give proper weightage by the disciplinary authority while imposing punishment order of acquittal of an employee

[482] DSP Rao vs. APSRTC & Ors 1996 LLJ 879
[483] J.P. Sharma vs. Punjab National Bank, 1996 LLR 92
[484] 1996 LLR 1053 AP HC

will vitiate enquiry. In one case the Bombay High Court has held that when witnesses were the same both in criminal trial as well as in the domestic enquiry and when the learned magistrate has given honourable acquittal to the accused, the EO is bound to consider the reasoning of Magistrate while giving hon'ble acquittal[485].

Dismissal for theft will be justified? - Once the delinquent of found guilty of misconduct for a serious charge of committing theft by employers property from the factory, no lesser punishment than dismissal from service is proper punishment in such case[486]. Disciplinary authority may differ with the findings of the EO normally non-disclosure of reasons for disagreement by the Disciplinary authority can be fatal[487].

Where the charge memo was served on the delinquent and enquiry was conducted by the Deputy Superintendent of Police, the order of compulsory retirement cannot be said to be illegal on the ground that only that penalty could have been lawfully imposed upon the delinquent which was within the powers of the Deputy Superintendent of Police and that as the Deputy Superintendent of Police was not competent to award the penalty of compulsory retirement, imposition of that penalty even by Deputy Inspector General of Police should be regarded

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[485] JN Burude vs. UOI & Ors. 1995 LLR 1076 Bom. HC

[486] Suraj Prakash vs. Judge, Lab. Court 1996 LLR 29 (Raj. HC)

[487] Ram Krishan vs. UOI, 1995 (71 FLR 929 SC)

as illegal. Generally speaking, it is not necessary that the charges should be framed by the authority competent to award the proposed penalty or that the enquiry should be conducted by such authority. Moreover there is nothing in the relevant rules which would induce one to read in Rule 3(b) (i) such a requirement. Consequently the view taken by the Tribunal that in a case falling under Rule 3(b) the charge memo should be issued by the disciplinary authority empowered to impose the penalties referred to therein and if the charge memo is issued by any lower authority then only that penalty can be imposed which that lower authority is competent to award is clearly erroneous[488].

In disciplinary proceedings punishment imposed to seek retribution as to give vent to the feeling of wrath. It is well recognized that the object of punishment is to deter. In any case, the quantum of punishment is a matter within the discretion of the management[489]. Security watchman sleeping during night duty - He was holding responsible job requiring continuous alertness on his part. Sleeping during night duty hours could have disastrous effect on safety and security of the installation, punishment of dismissal for such misconduct held appropriate[490].

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[488] Inspector General of Police and another, vs. Thavasiappan, AIR 1996 SC 1318

[489] (1959) II LLJ 512

[490] Barister Prasad vs. BPCL, 1997 LLR 583 (Bom.H.C)

Ordinarily the High Court does not interfere with the quantum of punishment awarded by the Labour Court. In view of section 11 A of Industrial Disputes Act, 1947, it is for the Tribunal / Labour Court to decide the quantum of punishment. However in the instant case the facts are so shocking that no other punishment except dismissal was called for[491].

Consideration of past conduct, while imposing punishment – It is desirable that past conduct of the employee should be taken in to consideration, but at the same time long service with unblemished record will not mean that the employer should award milder punishment when the charges are of grave and serious nature. It is pertinent to refer one case wherein it has been held by the court that the number of years of service cannot be relevant in the matter of imposition of punishment for proved misconduct, if a worker has put in a longer service, he cannot be taken to be licensed to commit misconduct[492].

Claiming reimbursement of money against false medical bills is a serous misconduct and can be a good cause for dismissal of an employee[493]. The disciplinary authority has to consider the evidence on record and give reasons in case it disagrees with the findings of the enquiry officer. Such findings cannot be distributed unless it is shown that such findings cannot be

[491] Triveni Structurals L:td., vs. Sstate of U.P, 1997 LLR 672

[492] Sri Gopalakrishna Mills (P) Ltd., vs. LC, 1980 I LLN 211

[493] Indian Oil Corporation vs. AK Arora, 1997 LLR 335 (SC)

distributed unless it is shown that such findings are pervasive or not based on the evidence on record or it is non-consideration of any material fact. The disciplinary authority may disagree with the findings of the enquiry officer[494].

Disobedience by an employee dismissal will be justified. As employee is appointed and paid essentially for performance of certain set of duties. Nonobservance of duties entrusted to him is therefore, the first and foremost misconduct[495].

For loss of confidence it is well settled law that objective, set of facts and motivation are to be proved by the employer before inflicting punishment of dismissal[496]. Guilty of an offence involving moral turpitude – employee convicted for allowing passenger to travel without ticket – Dismissal of an employee not justified, since it did not constitute major misconduct. Dismissal of workman for guilty of instigating the workers resort to strike will be justified[497] Punishment of dismissal of an employee guilty of theft will be proportionate to the misconduct[498].

Nature of penalty that can be imposed - Not limited to penalties which authority is using charge memo could impose - Charge

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[494] JP.Sinha vs. Indian Telephone Industries Ltd., 1992 (80) FJR 267 (Kar. H.C)
[495] Textile Corporation of Marathwada vs. PB.Deshpande, 1997 (2) LLJ 466 (Bom H.C);
[496] Hindmazdoor Sabha & anr., vs. State of UP, LLR 1999, P 47.
[497] M/s Eicher Good earth Ltd. vs. P.O Labour Court 1999 LLR 1156

[498] Surajprakash vs. Judge LC, 1996 LLR 29 (Raj, H.C)

memo served by Deputy Superintendent of Police on Inspector - Imposition of penalty of compulsory retirement - Not illegal on ground that Deputy Superintendent of Police who issued charge memo was not competent to award such penalty. Where the charge memo was served on the delinquent and enquiry was conducted by the Deputy Superintendent of Police, the order of compulsory retirement cannot be said to be illegal on the ground that only that penalty could have been lawfully imposed upon the delinquent which was within the powers of the Deputy Superintendent of Police and that as the Deputy Superintendent of Police was not competent to award the penalty of compulsory retirement, imposition of that penalty even by Deputy Inspector General of Police should be regarded as illegal. Generally speaking, it is not necessary that the charges should be framed by the authority competent to award the proposed penalty or that the enquiry should be conducted by such authority. Moreover there is nothing in the relevant rules which would induce one to read in Rule 3(b)(i) such a requirement. Consequently the view taken by the Tribunal that in a case falling under Rule 3(b) the charge memo should be issued by the disciplinary authority empowered to impose the penalties referred to therein and if the charge memo is issued by any lower authority then only that penalty can be imposed which that lower authority is competent to award is clearly erroneous[499].

[499] *supra*

It is a general rule as laid sown by the Supreme Court in Bhagat Ram vs. State of Himachal Pradesh[500] that the penalty imposed must be commensurate with the gravity of the misconduct and punishment which is disproportionate to the gravity of misconduct would be violative of Article 14 of the constitution. In this particular case a junior officer of the Forest Department was removed from the service on the ground of negligence, arising out of his performance in the matter of felling trees in the forest.

The workman cannot be visited with penalty not provided in the Standing Orders or Rules. When the rules provide that no workman shall be demoted to any post lower than which he was initially appointed, it is held that demotion is contrary to rules[501].

**Communication of the punishment order and effective date**: The law on this point is that the order of dismissal or removal must be communicated to the delinquent employee concerned. Until the order is communicated and the person concerned knows about it, the order does not become operative. In this connection the Supreme Court's ruling in State of Punjab vs. Amar Singh Harike[502] hold good in every case of removal or dismissal irrespective of whether the employee belongs to private or public undertakings. Where in a

[500] (1983) 2 SLJ 323
[501] Natarajan vs. Madras SEB (1968) 16 FLR 136
[502] AIR 1966 SC 1313

case, as laid down by the Supreme Court, the order of dismissal passed against govt., official, but kept on his file without communication to the concerned or publication. The order cannot said to be taken effect unless the officer concerned knows about it or otherwise communicated to him.

The order of punishment cannot be retrospective. In the case of Jeevaratnam vs. State of Madras[503] the Supreme Court has held that when a retrospective order is made it will be valid from the date of the order and not from the earlier date that is, the date on which the employee placed on suspension, that the two parts of the order being severable one part being invalid, that is, it is effective from retrospective date, there is no reason why the other part that is order of dismissal should not be given effect.

**Let us briefly touch upon the issues of under what circumstances, retrospective law can be made and put in to force:**

**RETROSPECTIVE OPERATION OF LAW**: In Maxwell on the Interpretation of Statutes[504], the statement of law in this regard is stated thus:

> "Perhaps no rule of construction is more firmly established than thus - that a retrospective operation is not to be given to a statute so as to impair an existing

[503] AIR 1966 SC 51
[504] 12th Edn.

> right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language, which is fairly capable of either interpretation, it ought to be construed as prospective only. The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

In *Francis Bennion's* Statutory Interpretation[505], the statement of law is stated as follows:

"The essential idea of legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex-post facto law is enshrined in the United States Constitution and in the Constitution of many American States, which forbid it. The true principle is that *lex prospicit non respicit* (law looks forward not back). As Willes, J. said

[505] 2nd Edn.

retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transaction carried on upon the faith of the then existing law."

In Garikapati Veeraya vs. N. Subbiah Choudhry[506], the Supreme Court observed as thus: "The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."

In Smt. Dayawati vs. Inderjit[507], in Para 10, it is held thus:

"Now as a general proposition, it, may be admitted that ordinarily a Court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke whose maxim - a new law ought to be prospective, not retrospective in its operation - is off-quoted, Courts have looked with dis-favour upon laws which take away vested rights or affect pending cases. Matters of procedure are, however, different and the law affecting procedure is always retrospective. But it does not mean that

[506] AIR 1957 SC 540
[507] AIR 1966 SC 1423

there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the Court of appeal must have regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance."

In Hitendra Vishnu Thakur vs. State of Maharashtra[508] this Court laid down the ambit and scope of an *amending Act and its retrospective operation* as follows:

"(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new

[508] AIR 1994 SC 2623

disabilities or obligations or to impose new duties in respect of transactions already accomplished:

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in Operation unless otherwise provided, either expressly or by necessary implication."

In K. S. Paripoornan vs. State of Kerala[509], this Court while considering the effect of amendment in the Land Acquisition Act in pending proceedings held thus in Para 47 thereof as:

‘‘...In the instant case we are concerned with the application of the provisions of Sub-sec. (1-A) of S.23 as introduced by the Amending Act to acquisition proceedings which were pending on the date of commencement of the Amending Act. In relation pending proceedings, the approach of the Courts in England is that the same are unaffected by the changes in the law so far as they relate to the determination of the substantive rights and in the absence of a clear indication of a contrary intention in an amending enactment, the substantive rights of the parties to an action fall to be determined by the law as it existed when the fiction was commenced and this is so whether the law is change before the hearing of the case at the first instance or while an appeal is pending”.

[509] AIR 1995 SC 1012

In State of M.P. and another, vs. G.S. Dall & Flour Mills[510], the Apex Court in Para 21 of the judgment the Apex Court has observed that

“the notification of 3/71187 amending the 1981 notification with retrospective effect so as to exclude what may be described in brief as 'traditional industries' though, like Rule 14 of the deferment rules, the exclusion extends' even to certain other non-traditional units operating in certain situations. Though this notification purports to be retrospective, it cannot be given such effect for a simple reason. We have held that the 1981 notification clearly envisages no exclusion of any industry which fulfils the terms of the notification from availing of the exemption granted under it. In view of this interpretation, the 1987 amendment has the effect of rescinding the exemption granted by the 1981 notification in respect of the industries mentioned by it. Section 12 is clear that, while a notification under it can be prospective or retrospective, only prospective operation can be given to a notification rescinding an exemption granted earlier. In the interpretation we have placed on the notification, the 31, 7, 87 notification cannot be treated as one merely clarifying an ambiguity in the earlier one and hence capable of being retrospective; it enacts the rescission of the earlier exemption and, hence, can operate only prospectively. It cannot take away the exemption conferred by the earlier notification”.

[510] AIR 1991 SC 772

In the case of Mithilesh Kumari and another, vs. Prem Behari Khare[511], the Apex Court in Para 21 of its judgment as:

"A retrospective operation is not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. Before applying a statute retrospectively the Court has to be satisfied that the statute is in fact retrospective. The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of past transaction, or impair contracts, or impose new duty or attach new disability in respect of past transactions or considerations already passed, However, a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing. The general scope and purview of the statute and the remedy sought to be applied must be looked into and what was the former state of law and what the legislation contemplated has to be considered. Every law that impairs or takes away rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive. But laws made justly and for the benefit of individuals and the community as a whole may relate to a time antecedent to their commencement. The presumption against retrospectivity may in such cases be rebutted by necessary implications from the

[511] AIR 1989 SC 1247

language employed in the statute. It cannot be said to be an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section, which had to be construed. The question is whether on a proper construction the legislature may be said to have so expressed its intention".

In the case of Hukam Chand etc. vs. Union of India and others[512], the Apex court had occasion to deal with the following aspects of the subject under context and held:

In the Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954), S.40 & 49 - there is nothing in Sec. 40 from which power of the Central Government to make retrospective rules may be inferred. In the absence of any such power, the Central Government acted in excess of its power in so far as it gave retrospective effect to the Explanation to Rule 49. The Explanation could not operate retrospectively and would be effective for the future from the date it was added.

The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Sec. 40 of the Act. The laying referred to in Sec. 40 (3) is of the category of 'laying subject to negative resolution' because the above sub-section contemplates that the rule would have effect unless modified or

[512] AIR 1972 SC 2472

annulled by the House of Parliament. The act of the Central Government in laying the rules before each House of Parliament would not, however, prevent the courts from scrutinizing the validity of the rules and holding them to be ultra vires if on such scrutiny the rules are found to be beyond the rule making power of the Central Government.

**CONSTITUTIONAL PROVISO**:

Constitution of India, Art.245 - Subordinate legislation - Extent of power - Rule making authority has to act within limits of power delegated to it. Unlike Sovereign Legislature, which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled. Further, retrospective effect cannot be given to a subordinate legislation unless it is authorized by the parent statute or a validating statute.

**THE CONCEPT OF ULTRA VIRES**: In India, when the Legislature delegates legislative power to an administrative

authority without offering any guide lines, the validity of the relevant statute may be attacked on following grounds, viz;

(a) The statute offends against Arts. 14 & 19 of the Constitution on the ground of unreasonable or arbitrary on the part of the legislature to confer uncontrolled discretionary power upon an administrative authority.
(b) That the statute is invalid because of excessive delegation of abdication of legislative power by the legislature.
(c) retrospective effect cannot be given to a subordinate legislation unless it is authorized by the parent statute or a validating statute

It is crystal clear that the *Statutes dealing with substantive rights* - is prim facie / generally prospective unless it is expressly or by necessary implications made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect the vested rights or impose new burdens or to impair existing obligations. *Statutes dealing with procedure* - In contrast to statutes dealing with substantive rights, statutes dealing with merely matters of procedure are presumed to retrospective unless such a construction is textually inadmissible. According to Lord Dennig:

> “The rule that an Act of Parliament is not be given retrospective effect applies only to statutes which affect

vested rights. It does not apply to statutes which only alter the form of procedure or the admissibility of evidence, or the effect which the courts give to evidence"

In the light of the above judgments, and the principles laid down therein that the new Act / Rule affecting, existing rights or creating new obligations, is presumed to be prospective only.

## 5.4 REMEDIES AVAILABLE TO DELINQUENT EMPLOYEE:

**Right of Appeal**: When the Standing Orders provide that the order passed by the appointing authority would be appealed to the appellate authority of the management, however there is no appeal for an order of suspension pending enquiry[513] when there is inbuilt enabling proviso of appeal is provided in the service rules / Standing Orders, then the principles of natural justice demand the aggrieved employee should be granted hearing. However delinquent employee cannot claim oral hearing as right in every case[514]. Workman dismissed after enquiry challenged without availing remedy of reference under the Industrial Disputes Act – writ petition is not maintainable[515].

**Whether the appellate authority can impose higher penalty that the Disciplinary Authority**: ***Held No***. In one case the petitioners was imposed the punishment of stoppage of four

[513] CHC Tannary vs. P.O L.C, 1969 Lab IC 1253
[514] Bahgat Ram vs. RN Tagore, AIR 1956 Cal 357
[515] 1994 LLR 229

increments with cumulative effect, after holding domestic enquiry. The petitioner carried the matter by way of appeal before the second respondent; Appellate authority instead of passing appropriate orders on the appeal filed by the petitioner, choose to issue further show-cause notice contemplating punishment of dismissal from service. Although the petitioner submitted his reply to the said show cause notice that the appellate authority i.e. the second respondent issued impugned proceedings dismissing the petitioner from the service. It has been held that an appeal preferred against the order of the disciplinary authority has to necessarily either reject or accept the appeal but cannot impose higher punishment than what was imposed by the disciplinary authority[516].

Imposition of penalty by the appellate authority will not be justified since such an action will deprive the delinquent right to the appeal to the appellate authority. It has been held by the Supreme Court that when an appeal is provided to the higher authority against the order of the disciplinary authority / lower authority and the higher authority passed a punishment order, the employee concerned will be deprived of the remedy of appeal which there is a provision of appeal against the order of the disciplinary authority and when the appellate / higher authority against whose order there is no appeal, exercise the

[516] D. Subhashchandra Bose Babu vs. Andhra Pradesh Electricity Board & Ors. 1995 II CLR 1030 (AP HC)

power of the disciplinary authority in a given case, it rebutted in discrimination against the employee concerned[517].

**Remedy with Labour Courts**: Section 11 A of the Industrial disputes Act, 1947 provides an unique remedy for the cases of discharge and dismissal. This particular section was inserted in the year 1972. Sec. 11 A reads as under:

**"11A. Powers of Labour Court Tribunal, and National Tribunal to give appropriate relief in case of discharge or dismissal of workmen**

- - Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

PROVIDED that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may

[517] Sajith Joshi vs. CMD, United Commercial Bank & ors

be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter".

In the case of Indian Iron & Steel Co., Ltd., vs. Workmen[518] the apex court has observed that only under the following circumstances the Labour Court / Industrial Tribunal can interfere:

(a) When there is want of good faith

(b) When there is victimization or unfair labour practice

(c) When the management is guilty of basic error or violation of principles of natural justice

(d) When on the material of the findings are completely baseless or perverse.

The said four principles were reiterated by the Supreme Court in G. Mckenzie & Co., Ltd., vs. Workmen[519]. Even after holding the enquiry fair and proper, the Labour Court / Industrial Tribunal can modify / alter the punishment as awarded by an employer to workman[520].

**High Courts power to decide on the adequacy / inadequacy of punishment**: Generally High courts have no jurisdiction to modify the punishment. As stated above, Section 11 A of the Industrial Disputes Act, 1947 empowers Labour Courts and Industrial Tribunals to give such relief. Imposition of punishment obviously the discretion of the disciplinary authority. It is open to

[518] AIR 1958 SC130
[519] (1961) II LLJ 99
[520] RSRTC vs. Ramkaran Chauhan 1995 LLR 319

the appellate authority to interfere with and not high court at the first instance. In case the said authorities act in a perverse manner, against such action one can invoke writ jurisdiction of the High Courts[521].

In a case decided by the Supreme Court[522] it has been observed that the High Court could, in its appellate jurisdiction, exercise such powers as are exercisable by the Industrial Tribunal under section 11 A of the Industrial Disputes Act, 1947. Therefore, it would open to the High Court to consider what would be the adequate punishment for the misconduct found to have been committed by the delinquent employee.

**Termination without enquiry - legality:**

a) *Termination of employee sans notice:-*

Based upon the constitutional guarantee of every citizen of India and the principles of natural justice as propounded by the judicial decisions, it is not permissible to employer to dispense with the services of a confirmed employee at his whims and fancies. However , unwarranted and indiscipline employee may be, an employer has to follow a meticulous procedure while dispensing with his services e.g. giving him show cause notice and holding an enquiry when such employee denies the charges as enumerated in the charge sheet. In one case the petitioner was confirmed employee and his services was

[521] Mgt., of Craigmore Estate vs. L.C, 1981 II LLJ 23
[522] Wormen of Bharat Fritz Werner ltd vs. Bharat Fritz Wrner Ltd, AIR 1990 SC 1054

terminated by the employer. The petitioner had not been afforded reasonable opportunity to show cause. He was served with the notice and not given hearing. The allegation was never rebutted by the employer. The Court cannot keep its eyes shut where a confirmed employee taken on the rolls for an unspecified period is robbed by his bread, butter and dignity by not even following the principles of natural justice and notwithstanding the constitutional guarantee enshrined in Article 14 and 16 of the Constitution[523].

b) *Termination sans Enquiry*:-

Even when appointment is illegal - Such a termination of an employee will be violative of the principles of natural justice. First rule of natural justice is “no man shall be judged in his own cause” and second rule is “hear the other side” and corollary has been deduced from the above two rules and that is “justice should not only be done but should manifestly be seem to be done”. The *audi alterm partem* rule made in its full amplitude means that a person be informed of the allegations against him, he be given an opportunity to submit his explanation. The respondents had sufficient time to serve a show cause and for giving an opportunity of being heard before terminating the services of the petitioners. The question whether the appointment was in breach of the procedure provided in the

[523] V.C. Jain vs. National Textile Corpn. 1994 LIC 1183 (Del.HC)

Rules and was void, could be decided in an inquiry after giving an opportunity of being heard to the petitioners[524].

The Supreme Court in the case of Workmen of Hindustan Steel Ltd. and another, vs. Hindustan Steel Ltd., and others[525], observed that "in our opinion, when the decision of the employer to dispense with enquiry is questioned, the employer must be in a position to satisfy the Court that holding of the enquiry will be either be counter-productive or may cause such irreparable and irreversible damage which in the facts and circumstances of the case need not be suffered. This minimum requirement cannot and should not be dispensed with to control wide discretionary power and to guard against the drastic power to inflict such a heavy punishment as denial of livelihood and casting a stigma without giving the slightest opportunity to the employee to controvert the allegation and even without letting him know what his misconduct is".

*Termination of Probationer's service* - Order terminating his services on ground of unsatisfactory work is stigmatic - Regular enquiry and opportunity of hearing is a must. A probationer, or a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of a natural justice. The termination order

[524] 1989 (58) FLR (Raj)
[525] AIR 1985 SC 251

founded on the ground that the probationer had failed in the performance of his duties administratively and technically. Ex facie, is stigmatic. Such an order which, on the face of it, is stigmatic, could not have been passed without holding a regular enquiry and giving an opportunity of hearing to the probationer. Plea that, probationer cannot claim any right on post as his services could be terminated at any time during the period of probation without any notice, as set out in the appointment letter, cannot be countenanced[526].

Termination of service - Temparary employee or probationer - Order if simple or punitive - Determination - "Motive" or foundation theory – Explained by the Supreme Court in the case of Chandra Prakash Shahi, vs. State of U.P. and others[527], as under :-

The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and it is on the basis of that enquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations

[526] V.P. Ahuja, vs. State of Punjab and others, AIR 2000 SC 1080
[527] AIR 2000 SC 1706

of misconduct and an enquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that enquiry, the order would be punitive in nature as the enquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive". "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary enquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary enquiry.

Dipti Prakash Banerjee vs. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta and others[528], the Supreme Court has observed as under: -

[528] AIR 1999 SC 983

Termination of probationer - Allegations whether punitive or simpliciter - Depends on whether allegations form foundation for motive of order. As to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to inquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid. Use of words his conduct, performance, ability and capacity during whole period was not satisfactory in termination order - Whether amount to stigma or not - Depends upon facts and circumstances of each case.

Stigmatic words - Need not be contained in order of termination itself - Documents referred to in order may also contain material which may amounts to stigma and would vitiate order.

Order stating that conduct, performance, during whole period not satisfactory - Letter issued earlier to probationer from management stated that he had prepared "false bills" and "misbehaved with women academic staff members" - Contents of letter form foundation of termination order and not a case of mere motive - Other three letters referred to in termination order contained not only certain allegations but clear adverse findings by Director as well as by informal Inquiry Committee - Said findings arrived at in non-departmental inquiry are 'foundation' for termination - Order vitiated on ground of stigma - Probationer not gainfully employed elsewhere - Entitled to reinstatement and back wages.

U.P. Co-operative Societies Act (11 of 1966), S.122 - U.P. Co-operative Societies Employees' Service Regulations (1975), Regn.19, Regn.84 - Termination of services - Disciplinary proceedings - Regulations prescribed detailed procedure for conduct of - No charge-sheet served - No enquiry officer appointed - No enquiry conducted against delinquent officer on alleged ground of abandoning his services - There is violation of Regulations to the prejudice of delinquent officer - Termination order set aside - Delinquent officer reinstated - Co-operative Society not precluded from holding proper enquiry - Delinquent officer, however, admitted his remaining absent for

particular period - He is not entitled to pay and allowances for that particular period[529].

Temporary Servant - Termination of service without holding inquiry - Valid -when it is for unfitness and unsatisfactory work. It is settled law that the court can lift the veil of the innocuous order to find whether it is the foundation or motive to pass the offending order. If misconduct is the foundation to pass the order then an enquiry into misconduct should be conducted and an action according to law should follow. But if it is not the motive it is not incumbent upon the competent officer to have the enquiry conducted and the service of a temporary employee could be terminated, in terms of the order of appointment or rules giving one month's notice or pay salary in lieu thereof. Even if an enquiry was initiated, it could be dropped midway and action could be taken in terms of the rules or order of appointment. Where a person was appointed to a post temporarily by direct recruitment by selection committee constituted by the Government in this behalf; the appointment order mentioned that the appointee could be terminated from service on one month's notice or one month's pay; the appointee's work was supervised by the higher officers and two officers had submitted their reports concerning the performance of the duties by the appointee; she was regularly irregular in her duties, insubordination and left the office during office hours

[529] U.P. Co-operative Federation Ltd., Vs. R S Yadav and others, AIR 1998 SC 413

without permission etc. and on consideration thereof, the competent authority found that she was not fit to be continued in service as her work and conduct were unsatisfactory, and therefore terminated her service in exercise of powers under U.P. Termination of Services of U. P. Govt. Temporary Govt. Services of Rules (1975), the termination was for her unsuitability or unfitness but not by way of punishment as a punitive measure and was one in terms of the order of appointment and also the Rules. Consequently, the order terminating her service could not be set aside on ground that departmental enquiry was not held[530].

If an employee who is on probation or holding an appointment on temporary basis is removed from the service with stigma because of some specific charge, then a plea cannot be taken that as his service was temporary or his appointment was on probation, there was no requirement of holding any enquiry, affording such an employee an opportunity to show that the charge levelled against him is either not true or it is without any basis. But whenever the service of an employee is terminated during the period of probation or while his appointment is on temporary basis, by an order of termination simpliciter after some preliminary enquiry it cannot be held that as some enquiry had been made against him before issuance of order of

[530] State of U.P. and another, vs. Km. Prem Lata Misra and others, AIR 1994 SC 2411

termination it really amounted to his removal from service on a charge, as such penal in nature.

The principle of tearing of veil for finding out real nature of the order shall be applicable only in a case where the Court is satisfied that there is a direct nexus between the charge so levelled and action taken. If decision is taken, to terminate the service of an employee during period of probation, after taking into consideration overall performance and some action or inaction on the part of such employee then it cannot be said that it amounts to his removal from service as punishment. It need not be said that the appointing authority at stage of confirmation or while examining the question as to whether the service of such employee be terminated during the continuance of the period of probation, is entitled to look into any complaint made in respect of such employee while discharging his duties for purpose of making assessment of the performance of such employee.

Thus in the present case the Governing Council examined different reports in respect of the probationer during period of probation and considered the question as to whether he should be allowed to continue in the service of the Institute. The decision was taken by the Governing Council on the total and overall assessment of the performance of the probationer in terms of the condition of the appointment. It cannot therefore be

said that the order of termination amounts to removal from service as punishment[531].

**Plea for loss of confidence for termination**: - This is too well settled that the belief or suspension of the employer upon an employee should not be a mere whim or fancy[532]. It should be bonafide reasonable and it must rest on some tangible basis and the power has to be exercised by an employer. Objectively, in good faith, which means honestly and with due care and prudence. If the exercise of such power is challenged on the ground of being colourable or malafide or an act of victimisation of unfair labour practice, the employer must disclose to the court the grounds of his impugned action so that the same may be tested judiciously[533]

The Supreme Court in L. Michael vs. M/s. Johnson Pumps India Ltd[534], observed that discharge simpliciter on the ground of loss of confidence when questioned before a court of law on the ground that it was a colourable exercise of power or it is a malafide action, the employer must disclose that he has acted in good faith and for good and objective reasons. Mere *ipse dixit* of the employer in such a situation is of no significance. Where a disciplinary enquiry is dispensed with on the specious plea that it was not reasonably practicable to hold one and a

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[531] Governing Council of Kidwai Memorial Institute of Oncology, Bangalore, vs. Dr. Pandurang Godwalkar and another, AIR 1993 SC 392
[532] AIR 1972 (SC) 661
[533] 1990 LLR 598 (SC)
[534] AIR 1975 SC 661

penalty of dismissal or removal from service is 'imposed, if the same is challenged on the ground that it was a colourable exercise of power or malafide action, the same situation would emerge and, the employer must satisfy the court the good and objective reasons showing both proof of misconduct and valid and objective reasons for dispensing with the enquiry.

Sudhir Vishnu Panvalkar vs. Bank of India[535], in this case the Supreme Court observed with regard to plea of loss of confidence as “only ground that survives for our consideration is as to whether the Bank was justified in terminating the services of the appellant on the ground of loss of confidence and in the facts and circumstances of the case, whether any such inquiry was necessitated. From the material placed on record before us, it is quite clear that the appellant was involved in misappropriation of Society's funds. The proceedings initiated under Section 88 of the Act went up to the Maharashtra Co-operative Tribunal and after contest by the parties, the Tribunal held the appellant guilty of certain charges involving moral turpitude relating to misappropriation of Society's funds. Mr. Singhvi, however, urged that some of these documents were not the subject-matter of proceedings before the High Court and, therefore, they cannot be relied upon by the Bank in this appeal. He also urged that these documents/papers are from the proceedings before the registrar and that they have no bearing upon the issue involved in this case. He also urged that

[535] AIR 1997 SC 2247

the Bank had not produced the entire correspondence before this Court for its appreciation and proper decision. Ordinarily, this plea could have been sustained but no statable reasons could be given on behalf of the appellant nor the correctness thereof could be challenged. All these documents were filed by the Bank along with its counter-affidavit of which the copy and the documents were furnished to the appellant long time back. Although, the rejoinder was filed by the appellant but he could not dispute the correctness of all these documents. It is in these circumstances, we are of the view that these documents could be relied upon by the Bank to justify the order of termination on the ground of loss of confidence. On perusal of the material produced before us, we are of the opinion that the order of termination passed by the Bank does not suffer from any vice and the Division Bench of the High Court was right in upholding the termination order".

The Plea of loss of confidence was discussed at length by the Supreme Court in the case of Chandu Lal, vs. The Management of M/s. Pan American World Airways Inc[536]. Termination of services on ground of loss of confidence - Does not amount to retrenchment - Holding of domestic enquiry is a condition precedent. Where the services of a workman were terminated on grounds that the workman was being involved in an act of smuggling, on basis of loss of confidence, without holding any domestic enquiry, the order of termination was

[536] AIR 1985 1128

vitiated as it did amount to be one with stigma and warranted a proceeding contemplated by law preceding termination. Want of confidence in an employee does point out to an adverse facet in his character as true meaning of allegation is that the employee has failed to behave up to expected standard of conduct which has given rise to a situation involving loss of confidence. In such circumstances termination would not amount to retrenchment and disciplinary proceedings were necessary as condition precedent to infliction of termination as measure of punishment. In this respect termination of workman held illegal. However, it being on ground of loss of confidence, workman held, not entitled to reinstatement but to compensation - Tenability of stand of loss of confidence as a defence to reinstatement not decided.

Compensation in lieu of reinstatement - Periods of past unemployment and future term taken into consideration - A workman working in Airlines was removed from service on ground of loss of confidence and was out of employment for a little more than eleven years, keeping in view the fact that workman if restored to service would have been assured of employment for further term of years and the fact that he would have been entitled to back wages for period of unemployment, he was directed to be paid Rs. 2 lacs by way of compensation.

**Plea of - Loss of confidence - Amounts to stigma**: Loss of confidence by the employer in the employee is a feature which

certainly affects the character or reputation of the employee and, therefore, the plea of loss of confidence in the employee indeed casts a stigma. Whether termination is grounded upon stigma would not vary from case to case depending upon whether it involves a government servant or a workman. But the procedural safeguards are different when termination is sought to be founded upon stigma. If disciplinary inquiry has not preceded the prejudicial order in the case of a Government servant the action would be bad while in the case of a workman the order could be justified even in the course of adjudication before the appropriate Tribunal under the Industrial Disputes Act even though no inquiry had been undertaken earlier[537].

**Permanent employee** - Termination of service without holding enquiry - validity. This issue was deliberated at length by the Supreme Court in the following manner in the case of Delhi Transport Corporation vs. DT.C Mazdoor Sangh Congress & ors[538].

Regulation 9(b) which confers powers on the authority to terminate the services of a permanent and confirmed employee by issuing a notice without assigning any reasons in the order and without giving any opportunity of hearing to the employee before passing the impugned order is wholly arbitrary, uncanalised and unrestricted violating principles of

[537] Kamal Kishore Lakshman, vs. Management of M/s. Pan American World Airways Inc., and others, AIR 1987 SC 229
[538] AIR 1991 SC101

natural justice as well as Art. 14 of the Constitution. Government Company or Public Corporation being State instrumentalities are State within the meaning of Art. 12 of the Constitution and as such they are subject to the observance of fundamental right embodied in Part III as well as to conform to the directive principles in Part IV of the Constitution. The Service Regulations or Rules framed by them are to be tested by the touchstone of Art. 14. Furthermore, the procedure prescribed by their Rules or Regulations must be reasonable, fair and just and not arbitrary, fanciful and unjust. Regulation 9(b), therefore, confers unbridled, uncanalised and arbitrary power on the authority to terminate the services of a permanent employee without recording any reasons and without conforming to the principles of natural justice. There is no guideline in the Regulations or in the Act, as to when or in which cases and circumstances this power of termination by giving notice or pay in lieu of notice can be exercised. It is now well settled that the 'audi alteram partem' rule which in essence, enforces the equality clause in Art. 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule. Rules. of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the Rule of Law which permeates our Constitution demands that it has to be observed both substantially and procedurally. Considering

from all aspects Regulation 9(b) is illegal and void as it is arbitrary, discriminatory and without any guidelines for exercise of the power. Rule of law posits that the power to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. Regulation 9(b) does not expressly exclude the application of the 'audi alteram partem' rule and as such the order of termination of service of a permanent employee cannot by passed by simply issuing a month's notice under Regulation 9(b) or pay in lieu thereof without recording any reason in the order and without giving any hearing to the employee to controvert the allegation on the basis of which the purported order is made. Regulation 9(b) is also void under S. 23 of the Contract Act as being opposed to public policy.

Per Sharma, J.

The rights of the Government Companies and Public Corporations, which are State instrumentalities, be within meaning of Art. 14 and their employees cannot be governed by the general principle of master and servant, and the management cannot have unrestricted and unqualified power of terminating the services of the employees. In the interest of efficiency of the public bodies, however, they should have the authority to terminate the employment of undesirable, inefficient, corrupt, indolent and disobedient employees, but it must be exercised fairly, objectively and independently; and the

occasion for the exercise must be delimited with precision and clarity. Further, there should be adequate reason for the use of such a power, and a decision in this regard has to be taken in a manner, which should show fairness, avoid arbitrariness and evoke credibility. And this is possible only when the law lays down detailed guidelines in unambiguous and precise terms so as to avoid the danger of misinterpretation of the situation. An element of uncertainty is likely to lead to grave and undesirable consequences. Clarity and precision are, therefore, essential for the guidelines. Examining in this background Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulation 1952 cannot be upheld for lack of adequate and appropriate guidelines.

Per Sawant J

Clause (b) of Regulation 9 contains the much hated and abused rule of hire and fire reminiscent of the days of laissez faire and unrestrained freedom of contract. (Para 219)

There is need to minimize the scope of the arbitrary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals, however, high-placed they may be, it is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection

and fairness does not go with the posts, however, high they may be. There is only a complaisant presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law.

The employment under the public undertakings is a public employment and a public property. It is not only the undertakings but also the society, which has a stake in their proper and efficient working. Both discipline and devotion are necessary for efficiency. To ensure both, the service conditions of those who work for them must be encouraging, certain and secured, and not vague and whimsical. With capricious service conditions, both discipline and devotion are endangered, and efficiency is impaired.

The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined

premises and uncertain applications. That will be a mockery of them.

Both the society and the individual employees, therefore, have an anxious interest in service conditions being well defined and explicit to the extent possible. The arbitrary rules which are also sometimes described as Henry VIII Rules, can have no place in any service conditions.

Beyond the self-deluding and self-asserting righteous presumption, there is nothing to support the so called "high authority" theory. This theory undoubtedly weighed with some authorities for some time in the past. But its unrealistic pretensions were soon noticed and it was buried without even so much as an ode to it.

Per K. Ramaswamy, J

Law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under rule of law. The prevailing social conditions and actualities of life are to be taken into account to adjudging whether the impugned legislation would subserve the purpose of the society. The arbitrary, unbridled and naked power of wide discretion to dismiss a permanent employee without any guidelines or procedure would tend to defeat the constitutional purpose of equality and allied purposes. Courts would take note of actualities of life that persons actuated to

corrupt practices are capable to manoeuvre with higher echelons in diverse ways and also camouflage their activities by becoming sycophants or cronies to the superior officers. Sincere, honest and devoted subordinate officers are unlikely to lick the boots of the corrupt superior officer. They develop a sense of self-pride for their honesty, integrity and apathy and inertia towards the corrupt and tend to undermine or show signs of disrespect or disregard towards them. Thereby, they not only become inconvenient to the corrupt officer but also stand an impediment to the ongoing smooth symphony of corruption at a grave risk to their prospects, in career or even to their tenure of office. The term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. If a superior officer develops likes towards sycophant, though corrupt, he would tolerate him and found him to be efficient and pay encomiums and corruption such cases stand on impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him / her off by writing confidential with delightfully vague language imputing to be 'not up to the mark', 'wanting public relations' etc. Yet times they may be termed to be "security risk" (to their activities). Thus they spoil the career of the honest, sincere and devoted officers. Instances either way are galore in this regard. Therefore, one would be circumspect, pragmatic and realistic of these actualities of life while ambulating constitutional validity of wide arbitrary uncannalised and unbridled discretionary power

of dismissal vested in an appropriate authority either by a statute or a statutory rule. Vesting arbitrary power would be a feeding ground for nepotism and insolence; instead of sub serving the constitutional purpose, it would defeat the very object, in particular, when the tribe of officers of honesty, integrity and devotion are struggling under despondence to continue to maintain honesty, integrity and devotion to the duty, in particular, when moral values and ethical standards are fast corroding in all walks of life including public services as well. It is but the need and imperative of the society to pat on the back of those band of honest, hardworking officers of integrity and devotion to duty, It is the society's interest to accord such officers security of service and avenues of promotion.

That apart, the haunting fear of dismissal from service at the vagary of the concerned officer would dry up all springs of idealism of the employee and in the process coarsens the conscience and degrades his spirit. The nobler impulses of mind and the higher values of life would not co-exist with fear. When fear haunts a man, happiness vanishes. Where fear is, justice cannot be, where fear is, freedom cannot be. There is always a carving in the human heart for satisfaction of the needs of the spirit, by arming by certain freedom for some basic values without which life is not worth living. It is only when the satisfaction of the physical needs and the demands of the spirit co-exist, there will be true efflorescence of the human personality and the free exercise of individual faculties.

Therefore, when the Constitution assures dignity of the individual and the right to livelihood the exercise of the power by the executive should be cushioned with adequate safeguards for the rights of the employees against any arbitrary and capricious use of those powers.

As a court of constitutional functionary exercising equity jurisdiction, Supreme Court would relieve the weaker parties from unconstitutional contractual obligations, unjust unfair, oppressive and unconscionable rules or conditions when the citizen really unable to meet on equal terms with the State. It is to find whether the citizen, when entered into contracts or service, was in distress need or compelling circumstances to enter into contract on dotted lines or whether the citizen was in a position of either to "take it or leave it" and if it finds to be so, Supreme Court would not shirk to avoid the contract by appropriate declaration. Therefore, though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject to change in the changing social conditions.

In the absence of specific head of public policy which covers a case, the court must in consonance with public conscience and in keeping public good and public interest invent new public policy and declare such practice or rules that are derogatory to the constitution to be opposed to public policy. The rules which stem from the public policy must of necessity be laid to further

the progress of the society in particular when social change is to bring about an egalitarian social order through rule of law. In deciding a case which may not be covered by authority courts have before them the beacon light of the trinity of the Constitution and the play of legal light and shade must lead on the path of justice social, economical and political. Lacking precedent, the court can always be guided by that light and the guidance thus shed by the trinity of our Constitution.

Before depriving an employee of the means of livelihood to himself and his dependents, i. e. job, the procedure prescribed for such deprivation must, therefore, be just, fair and reasonable under Arts. 21 and 14 and when infringes Art. 19(1)(g) must be subject of imposing reasonable restrictions under Art. 19(5). Conferment of power on a high rank officer is not always an assurance, in particular when the moral standards are generally degenerated that the power would be exercised objectively, reasonably, conscientiously, fairly and justly without inbuilt protection to an employee. Even officers who do their duty honestly and conscientiously are subject to great pressures and pulls. Therefore, the competing claims of the "public interest" as against "individual interest" of the employees are to be harmoniously blended so as to serve the societal need consistent with the constitutional scheme.

Regulation 9(b) is arbitrary, unjust, unfair and unreasonable offending Arts. 14, 16(1), 19(1)(g) and 21 of the Constitution. It

is also opposite to the public policy and thereby is void under Section 23 of the Indian Contract Act.

Permanent employee cannot be thrown out by simple notice. The Supreme Court has observed that “conferment of 'permanent' status on an employee guarantees security of tenure. It is now well settled that the services of a permanent employee, whether employed by the Government, or Government company or Government instrumentality or Statutory Corporation or any other "Authority" within the meaning of Article 12, cannot be terminated abruptly and arbitrarily, either by giving him a month's or three months' notice or pay in lieu thereof or even without notice, notwithstanding that there may be a stipulation to that effect either in the contract of service or in the Certified Standing Orders[539]”.

Central Inland Water Transport Corporation Ltd and another vs. Brojo Nath Ganguly and another[540]. This is a landmark case relating to service contracts. On interpretation of the relevant Service Rule the Supreme Court held that the Rule empowering the Government Corporation to terminate services of its permanent employees by giving notice or pay in lieu of notice period is opposed to public policy and violative of Art. 14 and directive principles contained in Arts. 39(a) and 41.

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[539] Uptron India Ltd., vs. Shammi Bhan and another, AIR 1998 SC 1681

[540] AIR 1986 SC 1571

Syndicate Bank, vs. General Secretary, Syndicate Bank Staff Association and another[541], in this case delinquent bank employee absented himself from work for a period of 90 or more consecutive days. The Bank sent show cause notice to delinquent for his continued absence and to report back for work before mentioned date failing which he would be deemed to have been voluntarily retired from the services of the Bank for his continued absence. The said notice was sent by registered post but it was returned with the report of the postal authority that he refused to receive the same. The Bank by virtue of Clause 16 of the Bipartite Settlement treated the delinquent as having voluntarily abandoned his services. This order of the Bank was similarly sent to delinquent under registered cover but was returned with the endorsement of the postal authority "not found during delivery time". Industrial dispute was raised by the union which led the reference by Government to the Tribunal for adjudication. The Tribunal was of the view that since the Bank did not examine the postman that delinquent in fact refused to receive the notice, it could not be said that there was service of notice to him. Therefore, the Bank could not in the circumstances invoke the provisions of Clause 16 of the Bipartite Settlement and on that score alone reinstatement of delinquent was ordered. The High Court upheld the order of Tribunal.

[541] AIR 2000 SC 2198

Held, the notice was sent on the correct address of delinquent and it was received back with the postal endorsement "refused". A clear presumption arose in favour of the Bank and against delinquent. Yet the Tribunal held that no notice was given to him as postman was not produced by the Bank. This would be rather an incongruous finding by the Tribunal. Bank has followed the requirements of Clause 16 of the Bipartite Settlement. It rightly held that delinquent has voluntarily retired from the service of the Bank. Under these circumstances it was not necessary for the Bank to hold any inquiry before passing the order. An inquiry would have been necessary if delinquent had submitted his explanation which was not acceptable to the Bank or contended that he did report for duty but was not allowed to join by the Bank. Nothing of the like has happened in this case. Assuming that inquiry was necessitated, evidence led before the Tribunal clearly showed that notice was given to delinquent and it is he who defaulted and offered no explanation of his absence from duty and did not report for duty within 30 days of the notice as required in Clause 16 of the Bipartite Settlement. Thus, undue reliance on the principles of natural justice by the Tribunal and even by the High Court has certainly led to miscarriage of justice as far as Bank was concerned. There was no occasion for the Tribunal to direct that delinquent be reinstated in service or for the High Court not to have exercised its jurisdiction under Article 226 of the Constitution to set aside the Award.

The requirements of principles of natural justice, which are required to be observed, are: (1) workman should know the nature of the complaint or accusation; (2) an opportunity to state his case; and (3) the management should act in good faith which means that the action of the management should be fair, reasonable and just. It is no point laying stress on the principles of natural justice without understanding their scope or real meaning. There are two essential elements of natural justice which are: (a) no man shall be judge in his own cause; and (b) no man shall be condemned, either civilly or criminally, without being afforded an opportunity of being heard in answer to the charge made against him. In course of time by various judicial pronouncements these two principles of natural justice have been expanded, e.g., a party must have due notice when the Tribunal will proceed; Tribunal should not act on irrelevant evidence or shut out relevant evidence; if the Tribunal consists of several members they all must sit together at all times; Tribunal should act independently and should not be biased against any party; its action should be based on good faith and order and should act in just, fair and reasonable manner. These in fact are the extensions or refinements of the main principles of natural justice stated above.

The Supreme Court in D. K. Yadav vs. J.M.A. Industries Ltd[542]., has laid down that where the Rule provided that the services of an employee who overstays the leave would be treated to have

[542] Supra

been automatically terminated, would be bad as violative of Articles 14, 16 and 21 of the Constitution. It was further held that if any action was taken on the basis of such a rule without giving any opportunity of hearing to the employee, it would be wholly unjust, arbitrary and unfair. The Court reiterated and emphasized in no uncertain terms that principles of natural justice would have to be read into the provision relating to automatic termination of services.

**Stay of Enquiry proceedings by civil court:**

Stay of Enquiry Proceeding by Civil Court - not permissible. The jurisdiction of the Civil Courts to stay the Enquiry Proceedings against an employee is barred by the provisions of Industrial Disputes Act, 1947. Also the Civil Court cannot interfere at the stage of show-cause notice after the conclusion of domestic enquiry against the employee as any relief prayed for by the employee at the stage would fall within the domain of the forums as created under the ID Act only. The same issue was discussed by the Madras High Court in the case of Indian Oxygen Ltd., Madras vs. Ganga Prasad[543].

Whether Civil Court has jurisdiction to grant stay? Held No. It is settled law that the civil court has no jurisdiction to enforce a personal contract. The right to continue in service is a right conferred on the Industrial worker by the ID Act. De hors, the

[543] 1990 LLR 115

statute a termination of the service may give rise to a cause of action to claim damages and not reinstatement. Granting of the letter relief will amount to enforcement of personal contract, which is not the province of civil court[544].

[544] 1985 LLR 636 (Kar. HC).

# Chapter 06: DISCIPLINARY ENQUIRY- PRACTICE & PROCEDURE IN VOGUE / ADOPTED BY THE EMPLOYERS

6.1 Procedure provided under various statutes:

6.1.1 Industrial Employment Standing Orders Act, 1946; & Rules;

6.1.2 Shops and Commercial Establishments Act (s);

6.1.3 Provisions under the Indian Constitution;

6.2 Procedure adopted by employers – Public and Private;

6.2.1 Central Civil Service Conduct and Appeal Rules;

6.2.2 Procedure adopted by semi Govt., bodies;

6.2.3 Procedure adopted by private bodies;

6.3 Presentation of Data procured through Questionnaire;

## 6.1 Procedure provided under various Statutes:

### 6.1.1: Industrial Employment (Standing Orders) Act, 1946 & Rules framed there under:

The legislative intent of the Act is that to require employers in industrial establishments formally to define conditions of employment under them. And the Act further facilities

employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them.

This Act applies / extends to the whole of India. And it applies to every industrial establishment wherein one hundred or more workmen are employed, or were employed on any day of the preceding twelve months;

PROVIDED that the appropriate government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any industrial establishment employing such number of persons less than one hundred as may be specified in the notification.

According to Sec.2 (e) "industrial establishment" means-

(i) an industrial establishment as defined in clause (ii) of section 2 of the Payment of Wages Act, 1936 (4 of 1936); or

(ii) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948); or

(iii) a railway as defined in clause (4) of section 2 of the Indian Railways Act, 1890 (9 of 1890), or

(iv) the establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employees workmen:

(g) "standing orders" means rules relating to matters set out in the Schedule;

**Sec. 3 of the Act denotes about submission of draft standing orders:**

(1) Within six months from the date on which this Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in his industrial establishment.

(2) Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model standing orders have been prescribed, shall be, so far as is practicable, in conformity with such model.

(3) The draft standing orders submitted under this section shall be accompanied by a statement giving prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong.

(4) Subject to such conditions as may be prescribed, a group of employers in similar industrial establishments may submit a joint draft of standing orders under this section.

**Sec. 4 of the Act denotes about conditions for certification of standing orders**

Standing orders shall be certifiable under this Act if-

(a) provision is made therein for every matter set out in the Schedule which is applicable to the industrial establishment, and

(b) the standing orders are otherwise in conformity with the provisions of this Act, and it shall be the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing orders.

**Sec. 10A of the Act denotes about payment of subsistence allowance:**

(1) Where any workmen is suspended by the employer pending investigation or inquiry into complaints or charge of misconduct against him, the employer shall pay to such workman subsistence allowance

(a) at the rate of fifty per cent of the wages which the workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension; and

(b) at the rate of seventy-five per cent of the such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

(2) If any dispute arises regarding the subsistence allowance payable to a workman under sub-section (1) the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 1947 (14 of 1947), within the local limits of whose jurisdiction the industrial establishment wherein such workman is employed is situate and the Labour Court to which the dispute is so referred shall, after giving the parties an opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties.

(3) Notwithstanding anything contained in the foregoing provisions of this section where provisions relating to the payment of subsistence allowance under any other law for the time being in force in any state are more beneficial than the provisions of this sections, the provisions of such other law shall be applicable to the payment of subsistence allowance in the state.

**Sec. 13B of the Act denotes about Act not to apply to certain industrial establishments**

Nothing in this Act shall apply to an industrial establishment insofar as the workmen employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Services) Rules, Revised Leave Rules, Civil

Service Regulations, Civilians in Defence Service (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate government in the official Gazette, apply.

**Industrial Employment (Standing Orders) Central Rules 1946**:

The Industrial Employment (Standing Orders) Central Rules, 1946, extend to all Union territories, and shall also apply in any State (other than a Union territory) to industrial establishments under the control of the Central Government or a Railway administration or in a major port, oilfield or mine. Apart from the said Central Rules, every State has its own Rules to regulate the terms and conditions of employment.

## SCHEDULE I

### MODEL STANDING ORDERS IN RESPECT OF INDUSTRIAL ESTABLISHMENTS NOT BEING INDUSTRIAL ESTABLISHMENTS IN COAL MINES

**2. Classification of workmen--** (a) Workmen shall be classified as --

(1) permanent,

(2) Probationers,

(3) *badlis,*

(4) temporary,

(5) casual,

(6) apprentices.

**Rule 13. Termination of employment**

(1) For terminating employment of a permanent workmen, notice in writing shall be given either by the employer or the workmen - one month's notice in the case of monthly-rated workmen and two weeks' notice in the case of other workmen: one month's or two week's pay, as the case may be, may be paid in lieu of notice.

(2) No temporary workman whether monthly-rated, weekly-rated or piece-rated and no probationer or *badli* shall be entitled to any notice or pay in lieu thereof if his services are terminated, but the services of a temporary workman shall not be terminated as a punishment unless he has been given an opportunity of explaining the charges of misconduct alleged against him in the manner prescribed in Paragraph 14.

(3) Where the employment of any workmen is terminated, the wages earned by him and other dues, if any, shall be paid before the expiry of the second working day from the day on which his employment is terminated.

**Rule 14. Disciplinary action for misconduct**

(1) A workman may be fined up to two per cent of his wages in a month for the following acts and omissions, namely:

..... ..... .....

**Note.--**Specify the acts and omissions which the employer may notify with the previous approval of the appropriate Government or of the prescribed authority in pursuance of section 8 of the Payment of Wages Act, 1936.

(2)A workman may be suspended for a period not exceeding four days at a time, or dismissed without notice or any compensation in lieu of notice, if he is found to be guilty of misconduct.

(3) The following acts and omissions shall be treated as misconduct.

(a) wilful in subordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior,

(b) theft, fraud or dishonesty in connection with the employer's business or property,

(c) willful damage to or loss of employer's goods or property,

(d) taking or giving bribes or any illegal gratification,

(e) habitual absence without leave or absence without leave for more than 10 days,

(f) habitual late attendance,

(g) habitual breach of any law applicable to the establishment,

(h) riotous or disorderly behaviors during working hours at the establishment or any act subversive of discipline,

(i) habitual negligence or neglect of work,

(j) frequent repetition of any act or omission for which a fine may be imposed to a maximum of 2 per cent of the wages in a month.

(k) striking work or inciting others to strike work in contravention of the provision of any law, or rule having the force of law.

(4)(a) Where a disciplinary proceeding against a workman is contemplated or is pending or where criminal proceedings against him in respect of any offence are under investigation or trial and the employer is satisfied that it is necessary or desirable to place the workman under suspension, he may, by order in writing suspend him with effect from such date as may be specified in the order. A statement setting out in detail the reasons for such suspension shall be supplied to the workman within a week from the date of suspension.

(b) A workman who is placed under suspension under Cl. (a) shall, during the period of such suspension, be paid a subsistence allowance at the following rates, namely:

(i) Where the enquiry contemplated or pending is departmental, the subsistence allowance shall, for the first ninety days from the date of suspension, be equal to one-half of the basic wages, dearness allowance and other compensatory allowances to which the workmen would have been entitled if he were on leave with wages. It the departmental enquiry gets prolonged and the workman continues to be under suspension for a period exceeding ninety days, the subsistence allowance shall for such period be equal to three-fourths of such basic wages dearness allowance and other compensatory allowances:

Provided that where such enquiry is prolonged beyond a period of ninety days for reasons directly attributable to the workman, the subsistence allowance shall, for the period exceeding ninety days, be reduced to one-fourth of such basic wages, dearness allowance and other compensatory allowances.

(ii) Where the enquiry is by an outside agency or, as the case may be, where criminal proceedings against workman are under investigation or trial, the subsistence allowance shall, for the first one hundred and eighty days from the date of

suspension, be equal to one half of his basic wages, dearness allowance and other compensatory allowances to which the workman would have been entitled to if he was on leave. If such enquiry or criminal proceedings gets prolonged and the workman continues to be under suspension for a period exceeding one hundred and eighty days, the subsistence allowance shall for such period be equal to three-fourths of such wages:

Provided that where such enquiry or criminal proceeding is prolonged beyond a period of one hundred and eighty days for reasons directly attributable to the workman, the subsistence allowance shall, for the period exceeding one hundred and eighty days, be reduced to one-fourth of such wages.

(b-a) In the enquiry, the workman shall be entitled to appear in person or to be represented by an office-bearer of a trade union of which he is a member.

(b-b) The proceedings of the enquiry shall be recorded in Hindi or in English, the language of the State where the industrial establishment is located, whichever is preferred by the workman.

(b-c) The proceedings of the inquiry shall be completed within a period of three months:

Provided that the period of three months may, for reasons to be recorded in writing, be extended by such further period as may be deemed necessary by the enquiry officer.

(c) If on the conclusion of the enquiry or, as the case may be, of the criminal proceedings, the workman has been found guilty of the charges framed against him and it is considered, after giving the workman concerned a reasonable opportunity of making representation on the penalty proposed, that an order of dismissal or suspension or fine or stoppage of annual increment or reduction in rank would meet the ends of justice, the employer shall pass an order accordingly:

Provided that when an order of dismissal is passed under this clause, the workman shall be deemed to have been absent from duty during the period of suspension and shall not be entitled to any remuneration for such period, and the subsistence allowance already paid to him shall not be recovered:

Provided further that where the period between the date on which the workman was suspended from duty pending the inquiry or investigation or trial and the date on which an order or suspension was passed under this clause exceeds four days, the workman shall be deemed to have been suspended only for four days or for such shorter period as is specified in the said

order of suspension and for the remaining period he shall be entitled to the same wages as he would have received if he had not been placed under suspension, after deducting the subsistence allowance paid to him for such period :

Provided also that where an order imposing fine or stoppage of annual increment or reduction in rank is passed under this clause, the workman shall be deemed to have been on duty during the period of suspension and shall be entitled to the same wages as he would have received if he had not been placed under suspension, after deducting the subsistence allowance paid to him for such period:

Provided also that in the case of a workman to whom the provisions of clause (2) of Article 311 of the Constitution apply, the provisions of that article shall be complied with.

(d)If on the conclusion of the inquiry, or as the case may be, or the criminal proceedings, the workman has been found to be not guilty of any of the charges framed against him, he shall be deemed to have been on duty during the period of suspension and shall be entitled to the same wages as he would have received if he had not been placed under suspension after deducting the subsistence allowance paid to him for such period.

(e) The payment of subsistence allowance under this standing order shall be subject to the workman concerned not taking up any employment during the period of suspension.

(5) In awarding punishment under this standing order, the authority imposing the punishment shall take into account any gravity of the misconduct, the previous record, if any, of the workman and any other extenuating or aggravating circumstances, which may exist. A copy of the order passed by the authority imposing the punishment shall be supplied to the workman concerned.

(6)(a) A workman aggrieved by an order imposing punishment may within twenty-one days from the date of receipt of the order, appeal to the appellate authority.

(b) The employer shall, for the purposes of Cl. (a) specify the appellate authority.

(c ) The appellate authority, after giving an opportunity to the workman of being heard shall pass order as he thinks proper on the appeal within fifteen days of its receipt and communicate the same to the workman in writing.

**6.1.2: Shops and Commercial Establishments Act(s):** Every state has its own Act to regulate the terms and conditions of employment. Let us pick up one State Act and analyze its terms with specific reference to research under context.

BOMBAY SHOPS AND ESTABLISHMENTS ACT, 1948: Section 38B - Application of Industrial Employment (Standing Orders) Act to establishments 38B. Application of Industrial Employment (Standing Orders) Act to establishments

The provisions of the Industrial Employment (Standing Orders) Act, 1946 (XX of 1946), in its application to the State of Maharashtra (hereinafter in this section referred to as "the said Act"), and the rules and standing orders (including model standing orders) made thereunder, from time to time, shall, mutatis mutandis, apply to all establishments wherein fifty or more employees are employed and to which this Act applies as if they were industrial establishments within the meaning of the said Act.

Section 66 - Notice of termination of service: No employer shall dispense with the services of an employee who has been in his continuous employment-

(a) for not less than a year, without giving such person at least thirty days notice in writing, or wages in lieu of such notice;

(b) for less than a year but more than three months, without giving such person at least fourteen days' notice in writing, or wages in lieu of such notice:

Provided that such notice shall not be necessary where the services of such employees are dispensed with for misconduct.

Explanation - For the purposes of this section, "**misconduct"** shall include-

(a) absence from service without notice in writing or without sufficient reasons for seven days or more;

(b) going on or abetting a strike in contravention of any law for the time being in force; and

(c) causing damage to the property of his employer.]

**6.1.3: Provisions under the Indian Constitution**:

**"310. *Tenure of office of persons serving the Union or a State*.**

(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

The Constitution (Forty-second Amendment) Act, 1976, made certain amendments in the substituted clause (2) of Article 311 with effect from January 3, 1977. Article 311 as so amended reads as follows:

"**311**. **Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State**. - (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges :

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply –

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as. the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

**6.2: Procedure adopted by employers – Public and Private**;

**6.2.1 CENTRAL CIVIL SERVICES (CLASSIFICATION, CONTROL & APPEAL) RULES, 1965:** In exercise of the powers conferred by proviso to Article 309 and Clause (5) of Article 148 of the Constitution and after consultation with the Comptroller and Auditor-General in relation to persons serving in the Indian Audit and Accounts Department, the President here by makes the following rules Central Civil Service Conduct and Appeal Rules……

**Classification of Services:**

(1) The Civil Services of the Union shall be classified as follows:

(i) Central Civil Services, Group 'A';

(ii) Central Civil Services, Group 'B';

(iii) Central Civil Services, Group 'C';

(iv) Central Civil Services, Group 'D';

(2) If a Service consists of more than one grade, different grades of such Service may be included in different groups.

**Constitution of Central Civil Services**

The Central Civil Services, Group 'A', Group 'B', Group 'C' and Group 'D', shall consist of the Services and grades of Services specified in the Schedule.

**Classification of Posts**

Civil Posts under the Union other than those ordinarily held by persons to whom these rules do not apply, shall, by a general or special order of the President, be Classified as follows :-

(i) Central Civil Posts, Group 'A';

(ii) Central Civil Posts, Group 'B';

(iii) Central Civil Posts, Group 'C';

(iv) Central Civil Posts, Group 'D';

**PART IV: SUSPENSION**

(1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the President, by general or special order, may place a Government servant under suspension-

(a) where a disciplinary proceeding against him is contemplated or is pending; or

(aa) where, in the opinion of the authority aforesaid, he has engaged himself in activities prejudicial to the interest of the security of the State; or

(b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial:

Provided that, except in case of an order of suspension made by the Comptroller and Auditor - General in regard to a member of the Indian Audit and Accounts Service and in regard to an Assistant Accountant General or equivalent (other than a regular member of the Indian Audit and Accounts Service), where the order of suspension is made by an authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made.

(2) A Government servant shall be deemed to have been placed under suspension by an order of appointing authority -

(a) with effect from the date of his detention, if he is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours;

(b) with effect from the date of his conviction, if, in the event of a conviction for an offence, he is sentenced to a term of

imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed or compulsorily retired consequent to such conviction.

EXPLANATION - The period of forty-eight hours referred to in clause (b) of this sub-rule shall be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment, if any, shall be taken into account.

(3) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant under suspension is set aside in appeal or on review under these rules and the case is remitted for further inquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force on and from the date of the original order of dismissal, removal or compulsory retirement and shall remain in force until further orders.

(4) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of Law and the disciplinary authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement

was originally imposed, the Government servant shall be deemed to have been placed under suspension by the Appointing Authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders :

Provided that no such further inquiry shall be ordered unless it is intended to meet a situation where the Court has passed an order purely on technical grounds without going into the merits of the case.

(5)(a) An order of suspension made or deemed to have been made under this rule shall continue to remain in force until it is modified or revoked by the authority competent to do so.

(b) Where a Government servant is suspended or is deemed to have been suspended (whether in connection with any disciplinary proceeding or otherwise), and any other disciplinary proceeding is commenced against him during the continuance of that suspension, the authority competent to place him under suspension may, for reasons to be recorded by him in writing, direct that the Government servant shall continue to be under suspension until the termination of all or any of such proceedings.

(c) An order of suspension made or deemed to have been made under this rule may at any time be modified or revoked by the authority which made or is deemed to have made the order or by any authority to which that authority is subordinate.

(6) An order of suspension made or deemed to have been made under this rule shall be reviewed by the authority competent to modify or revoke the suspension, before expiry of ninety days from the date of order of suspension, on the recommendation of the Review Committee constituted for the purpose and pass orders either extending or revoking the suspension. Subsequent reviews shall be made before expiry of the extended period of suspension. Extension of suspension shall not be for a period exceeding one hundred and eighty days at a time.

(7) Notwithstanding anything contained in sub-rule (5), an order of suspension made or deemed to have been made under sub-rules (1) or (2) of this rule shall not be valid after a period ninety days unless it is extended after review, for a further period before the expiry of ninety days".

**Timely payment of subsistence allowance**: - (1) In the case of Ghanshyam Das Srivastava Vs. State of Madhya Pradesh[545], the Supreme Court had observed that where a Government servant under suspension pleaded his inability to attend the inquiry on account of financial stringency caused by the non-payment of subsistence allowance to him the proceedings conducted against him exparte would be in violation of the provisions of Article 311 (2) of the Constitution as the person concerned did not receive a reasonable opportunity of defending himself in the disciplinary proceedings.

2. In the light of the judgment mentioned above, it may be impressed on all authorities concerned that they should make timely payment of subsistence allowance to Government servants who are placed under suspension so that they may not be put to financial difficulties. It may be noted that, by its very nature, subsistence allowance is meant for the subsistence of a suspended Government servant and his family during the period he is not allowed to perform any duty and thereby earn a salary. Keeping this in view, all concerned authorities should take prompt steps to ensure that after a Government servant is placed under suspension, he received subsistence allowance without delay.

3. The judgment of the Supreme Court referred to in para 1 above indicates that in that case, the disciplinary authority

[545] AIR 1973 SC 1183

proceeded with the enquiry ex-parte notwithstanding the fact that the Government servant concerned had specifically pleaded his inability to attend the enquiry on account of financial difficulties caused by non-payment of subsistence allowance. The Court had held that holding the enquiry ex-parte under such circumstances would be violative of Article 311 (2) of the Constitution on account of denial of reasonable opportunity of defence.

## PART V: PENALTIES AND DISCIPLINARY AUHTORITIES

**Penalties**:

The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Government servant, namely:-

*Minor Penalties* -

(i) censure;

(ii) withholding of his promotion;

(iii) recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government by negligence or breach of orders;

(iii a) reduction to a lower stage in the time-scale of pay by one stage for a period not exceeding three years, without cumulative effect and not adversely affecting his pension.

(iv) withholding of increments of pay;

*Major Penalties* -

(i) save as provided for in clause (iii) (a), reduction to a lower stage in the time-scale of pay for a specified period, with further directions as to whether or not the Government servant will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay:

(ii) reduction to lower time-scale of pay, grade, post or Service which shall ordinarily be a bar to the promotion of the Government servant to the time-scale of pay, grade, post or Service from which he was reduced, with or without further directions regarding conditions of restoration to the grade, or post or Service from which the Government servant was reduced and his seniority and pay on such restoration to that grade, post or Service;

(iii) Compulsory retirement;

(iv) Removal from service which shall not be a disqualification for future employment under the Government;

(v) Dismissal from service which shall ordinarily be a disqualification for future employment under the Government.

Provided that, in every case in which the charge of possession of assets disproportionate to known-source of income or the charge of acceptance from any person of any gratification, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act is established, the penalty mentioned in clause (viii) or clause (ix) shall be imposed:

Provided further that in any exceptional case and for special reasons recorded in writing any other penalty may be imposed.

EXPLANATION - The following shall not amount to a penalty within the meaning of this rule, namely:-

(i) withholding of increments of a Government servant for his failure to pass any departmental examination in accordance with the rules or orders governing the Service to which he belongs or post which he holds or the terms of his appointment;

(ii) stoppage of a Government servant at the efficiency bar in the time-scale of pay on the ground of his unfitness to cross the bar;

(iii) non-promotion of a Government servant, whether in a substantive or officiating capacity, after consideration of his

case, to a Service, grade or post for promotion to which he is eligible;

(iv) reversion of a Government servant officiating in a higher Service, grade or post to a lower service, grade or post, on the ground that he is considered to be unsuitable for such higher service, grade or post or on any administrative ground unconnected with his conduct;

(v) reversion of a Government servant, appointed on probation to any other service, grade or post, to his permanent service, grade or post during or at the end of the period of probation in accordance with the terms of his appointment or the rules and orders governing such probation;

(vi) replacement of the services of a Government servant, whose services had been borrowed from a State Government or any authority under the control of a State Government, at the disposal of the State Government or the authority from which the services of such Government servant had been borrowed;

(vii) compulsory retirement of a Government servant in accordance with the provisions relating to his superannuation or retirement;

(viii) termination of the services -

(a) of a Government servant appointed on probation, during or at the end of the period of his probation, in accordance with the terms of his appointment or the rules and orders governing such probation, or

(b) of a temporary Government servant in accordance with the provisions of sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965, or

(c) of a Government servant, employed under an agreement, in accordance with the terms of such agreement.

## PART VI: PROCEDURE FOR IMPOSING PENALTIES

### 14. Procedure for imposing major penalties

(1) No order imposing any of the penalties specified in clauses (v) to (ix) of Rule 11 shall be made except after an inquiry held, as far as may be, in the manner provided in this rule and rule 15, or in the manner provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850), where such inquiry is held under that Act.

(2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a Government servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, an authority to inquire into the truth thereof.

Provided that where there is a complaint of sexual harassment within the meaning of rule 3 C of the Central Civil Services (Conduct) Rules, 1964, the complaints Committee established in each ministry or Department or Office for inquiring into such complaints, shall be deemed to be the inquiring authority appointed by the disciplinary authority for the purpose of these rules and the Complaints Committee shall hold, if separate procedure has not been prescribed for the complaints committee for holding the inquiry into the complaints of sexual harassments, the inquiry as far as practicable in accordance with the procedure laid down in these rules.

EXPLANATION - Where the disciplinary authority itself holds the inquiry, any reference in sub-rule (7) to sub-rule (20) and in sub-rule (22) to the inquiring authority shall be construed as a reference to the disciplinary authority.

(3) Where it is proposed to hold an inquiry against a Government servant under this rule and rule 15, the disciplinary authority shall draw up or cause to be drawn up-

(i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge;

(ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge, which shall contain-

(a) a statement of all relevant facts including any admission or confession made by the Government servant;

(b) a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained.

(4) The disciplinary authority shall deliver or cause to be delivered to the Government servant a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charges is proposed to be sustained and shall require the Government servant to submit, within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person.

(5)(a) On receipt of the written statement of defence, the disciplinary authority may itself inquire into such of the articles of charge as are not admitted, or, if it considers it necessary so to do, appoint, under sub-rule (2), an inquiring authority for the purpose, and where all the articles of charge have been admitted by the Government servant in his written statement of defence, the disciplinary authority shall record its findings on each charge after taking such evidence as it may think fit and shall act in the manner laid down in rule 15.

(b) If no written statement of defence is submitted by the Government servant, the disciplinary authority may itself inquire into the articles of charge, or may, if it considers it necessary to

do so, appoint, under sub-rule (2), an inquiring authority for the purpose.

(c) Where the disciplinary authority itself inquires into any article of charge or appoints an inquiring authority for holding an inquiry into such charge, it may, by an order, appoint a Government servant or a legal practitioner, to be known as the "Presenting Officer" to present on its behalf the case in support of the articles of charge.

(6) The disciplinary authority shall, where it is not the inquiring authority, forward to the inquiring authority-

(i) a copy of the articles of charge and the statement of the imputations of misconduct or misbehaviour;

(ii) a copy of the written statement of the defence, if any, submitted by the Government servant;

(iii) a copy of the statements of witnesses, if any, referred to in sub-rule (3);

(iv) evidence proving the delivery of the documents referred to in sub-rule (3) to the Government servant; and

(v) a copy of the order appointing the "Presenting Officer".

(7) The Government servant shall appear in person before the inquiring authority on such day and at such time within ten working days from the date of receipt by the inquiring authority

of the articles of charge and the statement of the imputations of misconduct or misbehaviour, as the inquiring authority may, by notice in writing, specify, in this behalf, or within such further time, not exceeding ten days, as the inquiring authority may allow.

(8)(a) The Government servant may take the assistance of any other Government servant posted in any office either at his headquarters or at the place where the inquiry is held, to present the case on his behalf, but may not engage a legal practitioner for the purpose, unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner, or, the disciplinary authority, having regard to the circumstances of the case, so permits;

Provided that the Government servant may take the assistance of any other Government servant posted at any other station, if the inquiring authority having regard to the circumstances of the case, and for reasons to be recorded in writing, so permits.

Note: The Government servant shall not take the assistance of any other Government servant who has three pending disciplinary cases on hand in which he has to give assistance.

(b) The Government servant may also take the assistance of a retired Government servant to present the case on his behalf, subject to such conditions as may be specified by the President from time to time by general or special order in this behalf.

(9) If the Government servant who has not admitted any of the articles of charge in his written statement of defence or has not submitted any written statement of defence, appears before the inquiring authority, such authority shall ask him whether he is guilty or has any defence to make and it he pleads guilty to any of the articles of charge, the inquiring authority shall record the plea, sign the record and obtain the signature of the Government servant thereon.

(10) The inquiring authority shall return a finding of guilt in respect of those articles of charge to which the government servant pleads guilty.

(11) The inquiring authority shall, if the Government servant fails to appear within the specified time or refuses or omits to plead, require the Presenting Officer to produce the evidence by which he proposes to prove the articles of charge, and shall adjourn the case to a later date not exceeding thirty days, after recording an order that the Government servant may, for the purpose of preparing his defence:

(i) inspect within five days of the order or within such further time not exceeding five days as the inquiring authority may allow, the documents specified in the list referred to in sub-rule (3);

(ii) submit a list of witnesses to be examined on his behalf;

NOTE: If the Government servant applies orally or in writing for the supply of copies of the statements of witnesses mentioned in the list referred to in sub-rule (3), the inquiring authority shall furnish him with such copies as early as possible and in any case not later than three days before the commencement of the examination of the witnesses on behalf of the disciplinary authority.

(iii) give a notice within ten days of the order or within such further time not exceeding ten days as the inquiring authority may allow, for the discovery or production of any documents which are in the possession of Government but not mentioned in the list referred to in sub-rule (3).

NOTE: The Government servant shall indicate the relevance of the documents required by him to be discovered or produced by the Government.

(12) The inquiring authority shall, on receipt of the notice for the discovery or production of documents, forward the same or copies thereof to the authority in whose custody or possession the documents are kept, with a requisition for the production of the documents by such date as may be specified in such requisition:

Provided that the inquiring authority may, for reasons to be recorded by it in writing, refuse to requisition such of the documents as are, in its opinion, not relevant to the case.

(13) On receipt of the requisition referred to in sub-rule (12), every authority having the custody or possession of the requisitioned documents shall produce the same before the inquiring authority:

Provided that if the authority having the custody or possession of the requisitioned documents is satisfied for reasons to be recorded by it in writing that the production of all or any of such documents would be against the public interest or security of the State, it shall inform the inquiring authority accordingly and the inquiring authority shall, on being so informed, communicate the information to the Government servant and withdraw the requisition made by it for the production or discovery of such documents.

(14) On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the disciplinary authority. The witnesses shall be examined by or on behalf of the Presenting Officer and may be cross-examined by or on behalf of the Government servant. The Presenting Officer shall be entitled to re-examine the witnesses on any points on which they have been cross-examined, but not on any new matter, without the leave of the inquiring authority. The inquiring authority may also put such questions to the witnesses as it thinks fit.

(15) If it shall appear necessary before the close of the case on behalf of the disciplinary authority, the inquiring authority may, in its discretion, allow the Presenting Officer to produce evidence not included in the list given to the Government servant or may itself call for new evidence or recall and re-examine any witness and in such case the Government servant shall be entitled to have, if he demands it, a copy of the list of further evidence proposed to be produced and an adjournment of the inquiry for three clear days before the production of such new evidence, exclusive of the day of adjournment and the day to which the inquiry is adjourned. The inquiring authority shall give the Government servant an opportunity of inspecting such documents before they are taken on the record. The inquiring authority may also allow the Government servant to produce new evidence, if it is of the opinion that the production of such evidence is necessary, in the interests of justice.

NOTE: New evidence shall not be permitted or called for or any witness shall not be recalled to fill up any gap in the evidence. Such evidence may be called for only when there is an inherent lacuna or defect in the evidence which has been produced originally.

(16) When the case for the disciplinary authority is closed, the Government servant shall be required to state his defence, orally or in writing, as he may prefer. If the defence is made orally, it shall be recorded and the Government servant shall be

required to sign the record. In either case, a copy of the statement of defence shall be given to the Presenting Officer, if any, appointed.

(17) The evidence on behalf of the Government servant shall then be produced. The Government servant may examine himself in his own behalf if he so prefers. The witnesses produced by the Government servant shall then be examined and shall be liable to cross-examination, re-examination and examination by the inquiring authority according to the provisions applicable to the witnesses for the disciplinary authority.

(18) The inquiring authority may, after the Government servant closes his case, and shall, if the Government servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Government servant to explain any circumstances appearing in the evidence against him.

(19) The inquiring authority may, after the completion of the production of evidence, hear the Presenting Officer, if any, appointed, and the Government servant, or permit them to file written briefs of their respective case, if they so desire.

(20) If the Government servant to whom a copy of the articles of charge has been delivered, does not submit the written statement of defence on or before the date specified for the

purpose or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of this rule, the inquiring authority may hold the inquiry *ex parte.*

(21)(a) Where a disciplinary authority competent to impose any of the penalties specified in clause (i) to (iv) of rule 11 (but not competent to impose any of the penalties specified in clauses (v) to (ix) of rule 11), has itself inquired into or caused to be inquired into the articles of any charge and that authority, having regard to its own findings or having regard to its decision on any of the findings of any inquiring authority appointed by it, is of the opinion that the penalties specified in clauses (v) to (ix) of rule 11 should be imposed on the Government servant, that authority shall forward the records of the inquiry to such disciplinary authority as is competent to impose the last mentioned penalties.

(b) The disciplinary authority to which the records are so forwarded may act on the evidence on the record or may, if it is of the opinion that further examination of any of the witnesses is necessary in the interests of justice, recall the witness and examine, cross-examine and re-examine the witness and may impose on the Government servant such penalty as it may deem fit in accordance with these rules.

(22) Whenever any inquiring authority, after having heard and recorded the whole or any part of the evidence in an inquiry

ceases to exercise jurisdiction therein, and is succeeded by another inquiring authority which has, and which exercises, such jurisdiction, the inquiring authority so succeeding may act on the evidence so recorded by its predecessor, or partly recorded by its predecessor and partly recorded by itself:

Provided that if the succeeding inquiring authority is of the opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, it may recall, examine, cross-examine and re-examine any such witnesses as hereinbefore provided.

(23)(i) After the conclusion of the inquiry, a report shall be prepared and it shall contain-

(a) the articles of charge and the statement of the imputations of misconduct or misbehaviour;

(b) the defence of the Government servant in respect of each article of charge;

(c) an assessment of the evidence in respect of each article of charge;

(d) the findings on each article of charge and the reasons therefor.

EXPLANATION- If in the opinion of the inquiring authority the proceedings of the inquiry establish any article of charge

different from the original articles of the charge, it may record its findings on such article of charge:

Provided that the findings on such article of charge shall not be recorded unless the Government servant has either admitted the facts on which such article of charge is based or has had a reasonable opportunity of defending himself against such article of charge.

(ii) The inquiring authority, where it is not itself the disciplinary authority, shall forward to the disciplinary authority the records of inquiry which shall include:-

(a) the report prepared by it under clause (i).

(b) the written statement of defence, if any, submitted by the Government servant;

(c) the oral and documentary evidence produced in the course of the inquiry;

(d) written briefs, if any, filed by the Presenting Officer or the Government servant or both during the course of the inquiry; and

(e) the orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry.

**Inquiry by the disciplinary authority**: -

The Department of Personnel & Administrative Reforms OM No. 39/40/70-Estt. (A) dated the 9th November, 1972, *inter-alia*, provides that only those Inquiry Officers who are free from bias should be appointed by the disciplinary authority to conduct departmental inquiries. It is, further been provided that wherever an application is moved by a Government servant, against whom disciplinary proceedings are initiated, against the Inquiry Officer on grounds of bias, the proceedings should be stayed and the application referred to the appropriate reviewing authority for considering the matter and passing appropriate orders thereon. In this connection, the Staff Side raised the following points, at the National Council (JCM) meeting held in November, 1975 :

(a) The orders contained in the Department of Personnel & AR OM dated 9th November, 1972 are not being implemented in some Departments; and

(b) The OM dated 9.11.1972 did not contain instructions regarding disciplinary authority inquiring into the cases itself.

2. Regarding (a) above, Ministry of Finance etc. are requested to observe and implement scrupulously the aforesaid

instructions contained in this Department's OM of 9th November, 1972.

3. The second point raised by the Staff Side has been further examined in this Department. According to Rule 14 (5) of the CCS (CCA) Rules, 1965, the disciplinary authority may itself inquire into the charges against the accused Government servant or appoint an Inquiry Officer for the purpose. However, it should be possible in a majority of cases, and the more serious ones at any rate, to ensure that the disciplinary authority himself does not conduct the inquiry. It may still be not practicable to ensure in all cases that the disciplinary authority himself would not be the Inquiry Officer. Such a course may be necessary under certain circumstances particularly in small field formations where the disciplinary authority as well as the Inquiry Officer may have to be one and the same person. It has accordingly been decided that unless it is unavoidable in certain cases as mentioned above, the disciplinary authority should refrain from being the Inquiry Officer and appoint another officer for the purpose[546].

**Permission to engage a Legal Practitioner**[547]:-

Rules 14 (8) (a) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 provides, inter-alia that a

[546] [Deptt. of Personnel & AR OM No. 35014/1/76-Ests. (A) dated the 29th July, 1976]

[547] [Deptt. of Personnel & AR OM No. 11012/7/83-Estt.(A) dated the 23rd July, 1984]

delinquent Government servant against whom disciplinary proceedings have been instituted as for imposition of a major penalty may not engage a legal practitioner to present the case on his behalf before the Inquiring Authority, unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner, or the disciplinary authority, having regard to the circumstances of the case, so permits. It is clarified, that, when on behalf of the disciplinary authority, the case is being presented by a Prosecuting Officer of the Central Bureau of Investigation or a Government Law Officer (such as Legal Adviser, Junior Legal Adviser), there are evidently good and sufficient circumstances for the disciplinary authority to exercise his discretion in favour of the delinquent officer and allow him to be represented by a legal practitioner. Any exercise of discretion to the contrary in such cases is likely to be held by the court as arbitrary and prejudicial to the defence of the delinquent Government servant.

**Action on inquiry report**

(1) The disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of Rule 14, as far as may be.

(2) The disciplinary authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the disciplinary authority or where the disciplinary authority is not the inquiring authority, a copy of the report of the inquiring authority together with its own tentative reasons for disagreement, if any, with the findings of inquiring authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the disciplinary authority within fifteen days, irrespective of whether the report is favourable or not to the Government servant.

(2A) The disciplinary authority shall consider the representation, if any, submitted by the Government servant and record its findings before proceeding further in the matter as specified in sub-rules (3) and (4).

(3) If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in clauses (i) to (iv) of rule 11 should be imposed on the Government servant, it shall, notwithstanding anything contained in rule 16, make an order imposing such penalty:

Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant.

(4) If the disciplinary authority having regard to its findings on all or any of the articles of charge and on the basis of the evidence adduced during the inquiry is of the opinion that any of the penalties specified in clauses (v) to (ix) of rule 11 should be imposed on the Government servant, it shall make an order imposing such penalty and it shall not be necessary to give the Government servant any opportunity of making representation on the penalty proposed to be imposed:

Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making an order imposing any such penalty on the Government servant.

Reasons for disagreement, if any should be communicated –

(1) The Supreme Court has decided the matter finally in its judgment dated 01.10.1993 in the case of Managing Director (ECIL), Hyderabad vs. B. Karunakar (JT 1993 (6) SC.I). It has been held by the Supreme Court that wherever the Service Rules contemplate an inquiry before a punishment is awarded and when the inquiry officer is not the disciplinary authority; the delinquent employee will have the right to receive the inquiry officer's report notwithstanding the nature of the punishment. Necessary amendment providing for supply of copy of the inquiry officer's report to the delinquent employee has been

made in Rule 15 of the CCS (CCA) Rules, 1965 vide Notification No. 11012/4/94-Estt. (A) dated 03.05.1995. All disciplinary authorities are, therefore, required to comply with the above mentioned requirement without failure in all cases.

2. A question has been raised in this connection whether the disciplinary authority, when he decides to disagree with the inquiry report, should also communicate the reasons for such disagreement to the charged officer. The issue has been considered in consultation with the Ministry of Law and it has been decided that where the Inquiring Authority holds a charge as not proved and the disciplinary authority takes a contrary view, the reasons for such disagreement in brief must be communicated to the charged officer along with the Report of Inquiry so that the charged officer can make an effective representation. This procedure would require the Disciplinary Authority to first examine the report as per the laid down procedure and formulate its tentative views before forwarding the Report of Inquiry to the charged officer[548].

**Procedure for imposing minor penalties**

(1) Subject to the provisions of sub-rule (3) of rule 15, no order imposing on a Government servant any of the penalties specified in clause (i) to (iv) of rule 11 shall be made except after-

[548] [Department of Personnel & Training OM No. 11012/22/94-Estt. (A) dated 27.11.1995]

(a) informing the Government servant in writing of the proposal to take action against him and of the imputations of misconduct or misbehaviour on which it is proposed to be taken, and giving him reasonable opportunity of making such representation as he may wish to make against the proposal;

(b) holding an inquiry in the manner laid down in sub-rules (3) to (23) of rule 14, in every case in which the disciplinary authority is of the opinion that such inquiry is necessary;

(c) taking the representation, if any, submitted by the Government servant under clause (a) and the record of inquiry, if any, held under clause (b) into consideration;

(d) recording a finding on each imputation or misconduct or misbehaviour; and

(e) consulting the Commission where such consultation is necessary.

(1-A) Notwithstanding anything contained in clause (b) of sub-rule (1), if in a case it is proposed after considering the representation, if any, made by the Government servant under clause (a) of that sub-rule, to withhold increments of pay and such withholding of increments is likely to affect adversely the amount of pension payable to the Government servant or to

withhold increments of pay for a period exceeding three years or to withhold increments of pay with cumulative effect for any period, an inquiry shall be held in the manner laid down in sub-rules (3) to (23) of Rule 14, before making any order imposing on the Government servant any such penalty.

(2) The record of the proceedings in such cases shall include-

(i) a copy of the intimation to the Government servant of the proposal to take action against him;

(ii) a copy of the statement of imputations of misconduct or misbehaviour delivered to him;

(iii) his representation, if any;

(iv) the evidence produced during the inquiry;

(v) the advice of the Commission, if any;

(vi) the findings on each imputation of misconduct or misbehaviour; and

(vii) the orders on the case together with the reasons therefor.

**Communication of Orders**

Orders made by the disciplinary authority shall be communicated to the Government servant who shall also be supplied with a copy of its finding on each article of charge, or where the disciplinary authority is not the inquiring authority, a

statement of the findings of the disciplinary authority together with brief reasons for its disagreement, if any, with the findings of the inquiring authority and also a copy of the advice, if any, given by the Commission, and where the disciplinary authority has not accepted the advice of the Commission, a brief statement of the reasons for such non-acceptance.

### 6.2.2: Procedure adopted by semi Govt., bodies;

National Dairy Development Board (NDDB): The NDDB is an autonomous body of Government of India constituted under the Act of Parliament called the National Dairy Development Act, 1987 (no.37 of 87). The Act has given a mandate to NDDB to implement and support cooperative strategy in the Country and replicate the 'anand pattern' (popularly known as amul) the three tier co-operative strategy, across the country and make the country self sufficiency in milk and milk products. Section 48 of the Act inter-alia provides for power to make regulations specifying the conditions of service of officers and other employees. In exercise of powers conferred by section 48 of the Act, the NDDB has framed regulations to regulate the conditions of services of officers and workmen. To be precise for the purpose of research under context; the following regulations are of relevance:

(1) National Dairy Development Board Officers (Conduct, Discipline and Appeal) Regulations, 1988

(2) National Dairy Development Board Workmen (Conduct, Discipline and Appeal) Regulations, 1988

On perusal and study of the aforesaid regulations, it has been observed that there is no difference between the procedure provided for to deal with disciplinary enquiry matters. Therefore, in order to avoid repetition, we have concentrated on regulations applicable for workmen.

Regulation 4 : **Liability to abide by regulations**

Regulation 5: **Obligation to maintain secrecy**

Regulation 6 : **Confidentiality agreements for certain jobs**

Regulation 8: **Performance of duties**

Regulation 9: **Absence without justification and consequences thereof** : Taking casual leave in conjunction with any other workmen or remaining absent from office in that manner shall deemed to be a misconduct and be punishable as such.

Regulation 13: **Prohibition against participation in election.**

Regulation19: **Private trade or employment prohibited**
Regulation 23: **Gifts**

Regulation29: **Prohibition of giving or taking dowry**
Regulation 31: **Misconducts**: there are 57 misconducts listed

out most of them are based on the premises of misconducts listed out in the Industrial Employment (Standing Orders) Act, 1946.

Regulation 32: **Suspension**: Right of Suspension has been vested with the Employer under the circumstances that (a) where disciplinary proceedings against him / her contemplated or pending or (b) where a case against him / her in respect of any criminal offence is under investigation or trial or (c) in the opinion of employer, the employer is engaged in any criminal activity which is prejudicial to the public order.

Regulation 33: **Subsistence Allowance**: This is again has been termed on the lines of the similar provision denoted in the Industrial Employment (Standing Orders) Act, 1946.

Regulation 35: **Penalties**: The following penalties have been provided with:

Minor penalties:

(a) censure

(b) fine

(c) withholding of increments of pay with or without cumulative effect

(d) withholding of promotion

(e) recovery from the pay or from any other amount due

Major Penalties*:*

(a) reduction to lower service or post or to a lower pay scale
(b) compulsory retirement
(c) removal from service
(d) dismissal

However the following shall not amount to penalty within the meaning of this regulation:

(i) stoppage of workman at the efficiency bar in a time scale, or on the ground of his/her unfitness to cross the bar;
(ii) non-promotion
(iii) reversion to a lower grade or post during probation when an employee holding post on promotion;
(iv) compulsory retirement, withholding of LTC;
(v) termination of services:-
    (a) during probation
    (b) appointed on temporary capacity
    (c) appointed under contract or agreement in accordance with the terms of such contract / agreement
    (d) of any workman on reduction of establishment or consequent on redundancy
    (e) on loss of lien
    *(f)* on continued ill health or where found medically incapacitated or otherwise medically unfit in accordance *with these regulations.*

Regulation 36 : **Disciplinary Authority** : The Disciplinary Authority, which shall be the Appointing Authority or any Authority higher than it, may impose any of the penalties on the workman as specified in regulation 35.

Regulation : 37 : **procedure for minor penalties** :

(1) Where it is proposed to impose any of the minor penalties specified in clause (1) of regulation 35, the workman concerned shall be informed in writing of the allegations and the charges of misconduct or misbehaviour against him and where his past service is also relied upon a copy of his past service record as well be given an opportunity to submit his written statement of defence within the specified period not exceeding fifteen *days and the defence* statement, if any, submitted by the workman, shall be taken into consideration by the Disciplinary Authority before passing orders.

*(2)* The record of proceedings sh*all include :-*

(a) a copy of the statement of imputations of misconduct or misbehaviour delivered to the workman;

(b) his defence statement, if any; and

(c) the orders of the Disciplinary Authority together with reasons thereof;

(d) past service record wherever the same is relied upon.

Regulation 38 : **Procedure for imposing major penalties**:

(1) No order imposing any of the major penalties specified in the clause (2) of the regulation 35 shall be made except after an enquiry is held in accordance with this regulation.

(2) Wherever the Disciplinary Authority is of the opinion that there are grounds for enquiring into the truth of any allegations and charges of misconduct or misbehaviour against a workman, it may itself enquire into or appoint any other person as it deems fit (hereinafter called the Enquiring Authority) to enquire into the truth thereof.

(3) A charge sheet stating the allegations and charges shall be given to the workman concerned and shall be given an opportunity to explain in writing within the period specified. If no explanation or reply is received from the workman concerned within the specified period, it shall be presumed that employee has accepted the charges.

(4) If the allegations of the charges are denied by the workman the enquiry may be held by the Disciplinary Authority itself, or by nay other person appointed as the Enquiring Authority.

(5) On receipt of the written explanation of the workman, or if no such written statement is received within the time specified, an enquiry may be held by the Disciplinary Authority itself, or by any other person appointed as an Enquiring Authority under sub-regulation (2);

Provided that it may not be necessary to hold an enquiry in respect of the charges admitted by the workman in his written explanation the Disciplinary Authority shall, however, record its findings on each charge

(6) Where the Disciplinary Authority itself enquires or appoints an Enquiring Authority for holding an enquiry it may, by an order, appoint a person to be known as the "presenting Officer" to present the case in support of the charges.

(7) The workman may take assistance of any other employee (who is not a co-worker or who has not on hand any other disciplinary proceeding or against whom there is not other disciplinary proceedings or criminal proceedings) working in the same department or the regional office in the same town as the case may be. He will have no right to engage a legal practitioner in such enquiry except where the presiding officer is a legally trained person.

(8) On the date fixed by the Enquiring Authority, the workman shall appear before that Authority at the time, place and date specified in the notice, when the Enquiring Authority shall ask the workman whether he pleads guilty or has nay defence to make and if he pleads guilty to any of the charges, the Enquiring Authority shall record the plea, sign the record and obtain the signature of the workman concerned thereon and return a finding of guilt in respect

of those charges to which the workman concerned pleads guilty.

(9) If not …adjourn the proceedings not later than 15 days.

(10) Allowing and dis-allowing of documents submitted by workman

(11) Brief procedure of examination and cross examination of witnesses.

(12) The Enquiring Authority may, at its discretion, allow the Presenting Officer to produce not included in the charge-sheet or may itself call for new evidence or recall or re-examine any witness and en every such case the workman shall be given an opportunity to inspect the documentary evidence, if any, before it is taken on record, or as the case may be, to cross-examine the witness, who has been so summoned.

(13) The Enquiring Authority may, after completion of the evidence, hear the Presenting Officer, if any, appointed, and the employee, or permit them to file written briefs of their respective cases, if they so desire.

(14) Incase workman does not appear in person or otherwise fails or refuses to comply with any of the provisions of the regulations, the Enquiring Authority may hold the enquiry exparte.

(15) Whenever any Enquiring Authority, after having heard and recorded the whole or nay part of the evidence in an

enquiry ceases to exercise jurisdiction therein, and is succeeded by another Enquiring Authority which has, and which exercises, such jurisdiction, the Enquiring Authority so succeeding may act on the evidence so recorded by its predecessor, or party recorded by his predecessor and partly by itself.

(16) After conclusion of the enquiry, a report shall be prepared and submitted to the Disciplinary Authority.

(17) The Disciplinary Authority or the Enquiring Authority as the case may be shall complete the proceedings, as far as may be, within three months from the date of issue of the chargesheet.

Regulation 39: **Action on the enquiry report**

(1) The Disciplinary Authority having regard to the findings on all or any of the charges and the past service record, after giving the concerned employee a reasonable opportunity of making representation on the penalty proposed, make an order imposing penalty. The Disciplinary Authority, having regard to its findings on all or any of the charges, is of the opinion that the same has not been made out, it may pass an order exonerating the workman concerned.

(2) The Disciplinary Authority, shall if it disagrees with the findings of the Enquiring Authority on any of the charges, record its reasons for such disagreement and record its

own findings on such charge, to effect that evidence on record is sufficient for the purpose, and make an order imposing any minor penalty and of the same is not felt adequate under the circumstances, proceed under sub-regulation (4).

(3) The Disciplinary Authority, if it is not itself the enquiring Authority may, for reason to recorded in writing, remit the case to the Enquiring Authority for fresh or further enquiry and report thereon, and the Enquiring Authority shall thereupon proceed to hold further enquiry, as for as may be, according to regulation 38.

(4) Regulation 40 : **Communication of orders** : Every order made by the Disciplinary Authority after enquiring under regulation 37 or regulations 38 shall be communicated to the workman concerned, who shall also be supplied with a copy of the report of the enquiry, if any.

(5) **Appeal**: Appeal against any decision of the Disciplinary Authority, imposing penalty under regulation 37 or 38 may be made to Chairman and the decision is that of the Chairman, to the Board.

(6) **Review**: Notwithstanding anything contained in these regulations, the Board may, on its own motion or otherwise, call for the records of nay case relating to disciplinary proceedings within 180 days of the date on which final order is made.

### 6.2.3 : Procedure adopted by private bodies

The Madras Aluminium Company Limited., a company incorporated under the companies Act, 1956 and having its registered and plant at Mettur Dam R.S (Salem District), Tamil Nadu (hereinafter referred to as malco for short). Malco owns aluminium queries in Salem District and Ooty District of Tamil Nadu and has two aluminium smelters in Mettur, employs more than one thousand workmen and officer staff. As the Malco is required to follow the Standing Orders to regulate the terms and conditions of employment of workmen. Accordingly, Malco is following the standing orders certified by the certifying Officer, Coimbatore dated 28th January 1967. The text of the said standing orders which are important to our research under context are discussed hereunder:

Order no. 52: The maintenance of discipline among workmen by laying down rules and instructions and enforcing the same by appropriate action is the legitimate right and responsibility of the employer.

Order no. 53 enlists 47 types of the misconduct – all of them are in sync with Industrial Employment (Standing Orders) Act, 1946.

Order no. 54 (a) denotes about punishment for Misconduct – a workman found guilty of misconduct may be:

(ii) Suspended for a period not exceeding even (7) days.
(iii) Fined in accordance with payment of wages Act, 1936, or
(iv) Degraded or demoted, or
(v) His increment may be fully or partly withheld, or
(vi) His promotion may be stopped for such period and to such extent as may be considered fit, or
(vii) Dismissed without notice or any compensation in lieu of notice.

(b) Procedure for suspension: The order of suspension under the above clause shall be in writing and may take effect immediately on communication thereof to the workmen. Such order shall set out the alleged misconduct and the workman shall be given opportunity of explaining the circumstances

alleged against him. If on enquiry the order is confirmed or modified the workman shall be deemed to be absent from duty for the periods of suspension and shall not be entitled to any remuneration for such periods. If, however, the order is restricted, the workman shall be entitled t the same wages as he would have received if he had not been suspended.

Order no. 55: Procedure for dismissal:

(a) No order of dismissal shall be made unless the workman concerned is informed in writing of the alleged misconduct and is given time of not less than 72 hours to explain the circumstances alleged against him.

(b) Pending enquiry in the misconduct, the workman may be suspended from work.

(c) The manager may himself or through other officer make such enquiry and the workman shall present himself at the time and date fixed for such enquiry.

(d) At the enquiry, the manger or enquiring officer may, at his discretion, either require the workman or his witnesses to file their written and signed statement or proceed to record their statements which they shall sign after it is read out to them and

found correct. The workmen and the witness shall be bound to answer truthfully all such questions as are put to them by the manager or the enquiring officer.

(e) If on an enquiry, the workman is found guilty of misconduct, he may be dismissed and such dismissal shall take place from the date of suspension and shall not be entitled to any remuneration for the period of suspension.

(f) If on enquiry, the workman is found not guilty of misconduct, he would be permitted to resume work and shall be entitled to the same wages as he would receive if he had not been suspended.

*(g)* Where under the provisions of any law, it is necessary to obtain the permission of any court, tribunal or authority for the dismissal the workman or workmen concerned may be kept under suspension pending disposal of such court, tribunal or authority of the application for grant of such permission. The payment of wages for the period of such suspension will either be made or not made as provided in such clause (e) or (f) above depending upon whether permission to dismiss the worker is not or is granted by the tribunal, court or other authority.

Order no. 56 - - In awarding the punishment under the above Standing Order, the manager shall take into account the gravity of the misconduct, the previous record of the workman if any, and any other extenuating or aggravating circumstances that may exist. And order no. 57 denotes that a copy of the order by the manager shall be supplied to the workman concerned.

### 6.3 Presentation of Data procured through Questionnaire-

In order to understand the practical implementation part and the ground realities in the matters of misconduct, disciplinary enquiries and imposition of punishment thereof by the employers, a surveillance been maintained through observations and enquiries through circulation of structured questionnaire and over an interview / interaction with professionals (Enquiry Officers) involved in the Industry and Legal Profession. The questionnaire has been mailed to more than 25 Industries and other professionals such as Enquiry Officers, Trade Union Leaders and Legal (Labour Law) Practitioners. The data collected and procured through questionnaire and personal interviews and interaction with enquiry officers, legal practitioners and Trade Union Leaders is enormous. The questionnaire contains 181 questions *inter-alia* covering all aspects of Disciplinary Enquiry and Industrial Relations and for ease of reference to the respondent the same has been divided in to following categories with 05 point scale objective type answer scheme:

1) Organization culture
2) Industrial Relations
3) Conflict Resolution Style
4) Grievance Handling Machinery
5) Disciplinary Action Against Misconduct
6) Suspension
7) Disciplinary Proceedings vis-à-vis Criminal Proceedings
8) Imposition of Punishment
9) Statements with regard to existing procedure and procedure required n the matters of Disciplinary Enquiry.

Out of 181 questions, and the responses thereto, the following questions and responses of respondents are marked out while the most relevant to the research under context and the same is depicted herein below:-

**(1) Organization culture:**

*Scale points*: (1) NOT AT ALL (2) TO A SLIGHT EXTENT (3) TO A MODERATE EXTENT (4) TO A GREAT EXTENT (5) TO A VERY GREAT EXTENT

| Question | **scale point -5** | **scale point -4** | **scale point -3** | **scale point -2** | **scale point -1** |
|---|---|---|---|---|---|
| manpower is its greatest asset | | 4 | | | |
| to maintain discipline, disciplinary action is imperative | 5 | | | | |

| | | | | | |
|---|---|---|---|---|---|
| Discretion in disciplinary power is often exercised | | 4 | | | |
| Suspicion and caution is practiced in every dealing | | | 3 | | |
| no difference between hard working and insincere employees | | | 3 | | |
| Employees maintain status quo out of fear | | 4 | | | |
| Employees agree with superiors to avoid their wrath | | 4 | | | |
| Employees believe in worshipping boss | | 4 | | | |
| Promotions are linked to employees' affinity to boss | | | 3 | | |
| Employees compelled to play a role of conspirator against their subordinates | | | 3 | | |
| Mistakes in work are not tolerated | | 4 | | | |
| Shrewd and cunning employees command respect | | | 3 | | |
| Employees do things that earn superiors' goodwill | 5 | | | | |
| Trusted allies are nurtured and protected | | 4 | | | |
| One is expected to win irrespective of the means | | 4 | | | |
| Employees pretend good interpersonal relationship | | 4 | | | |
| Employees participation | | | 3 | | |
| Openness in dealings | | | 3 | | |

## (2) Industrial Relations

*Scale points*: (1) NOT AT ALL (2) TO A SLIGHT EXTENT (3) TO A MODERATE EXTENT (4) TO A GREAT EXTENT (5) TO A VERY GREAT EXTENT

| Question | **scale point -5** | **scale point -4** | **scale point -3** | **scale point -2** | **scale point -1** |
|---|---|---|---|---|---|
| Management believes in collective bargaining | | | | 2 | |

| | | | | | |
|---|---|---|---|---|---|
| existence of Trade Union is a barrier to the industrial growth, peace & harmony | | 4 | | | |
| Fact finding enquiries play an important role in improving I.R. | 5 | | | | |
| intervention of third party conflict resolution | | 4 | | | |
| Workers and union avoid hostile reactions | | | 3 | | |
| Union is open and willing to negotiate on various issues | | | 3 | | |
| Management does not believe that “Discipline can be enforced by penalizing employees" | | | | 2 | |
| Employees are not castigated and reprimanded unnecessarily | | | | 2 | |
| Management disapproves of terminating people on unjustified grounds | | | | 2 | |
| Management is not over-strict in enforcing discipline | | | | | 1 |
| will resort to lay off or lock out, as a last alternative | | | 3 | | |
| Workers don't indulge in causing intentional waste and inefficiency | | 4 | | | |
| I.R in organization is untouched by changes in political scene in the country | | | | 2 | |
| Labour relations remain healthy even if the company's supply and demand in market is hard hit | | | | 2 | |
| Workers and union disapprove steps like strike as a tool to resolve conflicts /issues / demands | 5 | | | | |
| Workers are aware of complete situation of organization | | | | 2 | |
| Grievances of the employees are handled rationally through a well defined grievance handling procedure | | | | | 1 |
| fair amount of mutual trust between management and the union. | | | | 2 | |

## (3) Grievance Handling Machinery:

*Scale points*: (1) NOT AT ALL (2) TO A SLIGHT EXTENT (3) TO A MODERATE EXTENT (4)TO A GREAT EXTENT (5) TO A VERY GREAT EXTENT

| Question | **scale point -5** | **scale point -4** | **scale point -3** | **scale point -2** | **scale point -1** |
|---|---|---|---|---|---|
| We have effective grievance handling committee | | | | 2 | |
| We involve third party member | | | | | 1 |
| All the Complaints/Grievances are referred to the committee | | | | 2 | |
| exists established procedure to be followed by Committee | | | | 2 | 1 |
| Time limit has been set to dispose of the complaint / grievance | | | | | 1 |
| Committee enjoys the confidence and trust of the employees | | | | | 1 |
| Rotation of committee members | | | | | 1 |
| every employee knows about the existence of Grievance handling Committee | | | | | 1 |
| Members of the Committee are well acquainted with all the aspects of Grievance | | | | 2 | |
| The procedure for grievance handling committee has been formulated in consultation of employees/union | | | | | 1 |
| Are you satisfied with the existing grievance handling committee & procedure | | | | | 1 |

## (4) Disciplinary Action against misconduct:

*Scale points*: (1) NOT AT ALL (2) TO A SLIGHT EXTENT (3) TO A MODERATE EXTENT (4) TO A GREAT EXTENT (5) TO A VERY GREAT EXTENT

| Question | **scale point -5** | **scale point -4** | **scale point -3** | **scale point -2** | **scale point -1** |
|---|---|---|---|---|---|
| Service Rules/Standing Orders are formulated with due consultation of employees/unions | | | | 2 | |
| We do not go for preliminary enquiry prior to regular enquiry | | 4 | | | |
| We generally initiate disciplinary action both on complaint as well as suo-moto | 5 | | | | |
| Disciplinary procedure in full and at length has been laid down in our Service Rules/Standing orders | | | | 2 | |
| List of misconducts have been enlisted in the Service Rules / Standing Orders | | | | 2 | |
| acts of misconducts have been divided and denoted to impose minor and major penalties | | | | | 1 |
| Types of punishment to be inflicted has been denoted in the Service Rules/Standing Orders | | | | 2 | |
| exists a separate procedure to impose minor and major penalty | | | | | 1 |
| We have in-house expertise to draft charge-sheet | | | | 2 | |
| While issuing charge-sheet we generally decide to go for a major or minor penalty | | | 3 | | |
| Sometimes we appoint enquiry officer in the charge-sheet itself | | | 3 | | |
| We also initiate disciplinary action against the misconduct committed at employee's club, Establishment Residential Colony and in public premises | | 4 | | | |
| We invariably place employees on suspension on the issuance of charge-sheet | | | 3 | | |
| We evaluate the nature of | | | 3 | | |

| | | | | | |
|---|---|---|---|---|---|
| charges and other exigencies and then place a charge-sheeted employee on suspension | | | | | |
| Once the charge sheet is issued, we see that the charges are proved by all means | | | 3 | | |
| Our Service Rules/ Standing Orders contain the procedure to impose penalty | | | | 2 | |
| Standing Orders / Service Rules contain full fledged procedure to conduct disciplinary enquiry | | | | | 1 |
| Generally legal retainers/Advocates of the company will be appointed as the Enquiry Officer | | 4 | | | |
| Management will appoint E.O and pay remuneration | 5 | | | | |
| Workmen will have a say in the appointment of E.O | | | | | 1 |
| Presenting Officer (PO) is guided by the Co's legal team | | | 3 | | |
| E.O. is instructed by the management from time to time | | | 3 | | |
| Always charge-sheet is accompanied with the documents relied thereof | | | | 2 | |
| The delinquent employee is enquired to bear the cost of producing witnesses for his defence | | | 3 | | |
| Only on the specific request from the delinquent employee we supply the documents | | 4 | | | |
| Enquiry report will be submitted to the Disciplinary Authority | 5 | | | | |

## (5) Suspension:

*Scale points*: (1) NOT AT ALL (2) TO A SLIGHT EXTENT (3) TO A MODERATE EXTENT (4) TO A GREAT EXTENT (5) TO A VERY GREAT EXTENT

| Question | **scale point - 5** | **scale point -4** | **scale point -3** | **scale point -2** | **scale point -1** |
|---|---|---|---|---|---|
| We follow laid down procedure while suspension | | | | 2 | |
| It is pure discretion of the management to place employee under suspension | 5 | | | | |
| No time limit for suspension period | 5 | | | | |
| Consideration of suspension as punishment | | 4 | | | |
| Revocation of suspension only after the disposal of the disciplinary enquiry | | 4 | | | |
| Payment of subsistence allowance during suspension is the discretion of the employer | | 4 | | | |
| Suspension is the right vested in the employer | 5 | | | | |

## (6) Disciplinary Proceedings vis-à-vis Criminal proceedings

*Scale points*: (1) NOT AT ALL (2) TO A SLIGHT EXTENT (3) TO A MODERATE EXTENT (4) TO A GREAT EXTENT (5) TO A VERY GREAT EXTENT

| Question | **scale point -5** | **scale point -4** | **scale point -3** | **scale point -2** | **scale point -1** |
|---|---|---|---|---|---|
| Our Rules contain the guidelines about the Disciplinary proceedings vis-a-vis criminal proceedings | | | | | 1 |
| There should be such codified guiding principles / norms in the matters of parallel proceedings of disciplinary | 5 | | | | |

| | | | | | |
|---|---|---|---|---|---|
| and criminal | | | | | |
| Criminal court order is not binding on domestic enquiry | | | | 2 | |
| Enquiry is not essential/importance on conviction in criminal case | 5 | | | | |
| Standard of proof in disciplinary enquiry & in criminal proceedings is common | | | 3 | | |

## (7) Imposition of Punishment:

*Scale points*: (1) NOT AT ALL (2) TO A SLIGHT EXTENT (3) TO A MODERATE EXTENT (4) TO A GREAT EXTENT (5) TO A VERY GREAT EXTENT

| Question | **scale point -5** | **scale point -4** | **scale point -3** | **scale point -2** | **scale point -1** |
|---|---|---|---|---|---|
| Our rules contain elaborate procedure to be followed on receipt of enquiry report | | | | | 1 |
| There should be such codified guiding procedure to be followed by the employer on and after receipt of enquiry report | 5 | | | | |
| We supply the Enquiry Report only on the request of the delinquent employee irrespective of the existing procedure | | 4 | | | |
| Our Service Rules specify that enquiry report along with documents relied are to be supplied to delinquent employee. | | | | 2 | |
| Non-furnishing of enquiry report will quash the proceedings of the enquiry held | | | | 2 | |

| | | | | | |
|---|---|---|---|---|---|
| Essential ingredients of valid enquiry constitutes : definite charges, evidence, reasonable opportunity, findings of EO based on material placed, adhere to principles of natural justice | 5 | | | | |
| Personnel Officer/Labour Welfare Officer/ I.R. Cell of the establishment is not fully acquainted with the basic features/essentials of the valid disciplinary enquiry as they are not codified | | 4 | | | |
| Issuing of second show-cause notice is not a Rule of thumb | 5 | | | | |
| As soon as we receive the report of the EO, punishment will be imposed | | | | | |
| Selecting the punishment is the discretion of the employer | 5 | | | | |
| We follow laid down criteria for inflicting punishment | | | | 2 | |
| We do not have codified guidelines for inflicting appropriate/ proportionate punishment | 5 | | | | |
| In case the findings are not favourable we do not agree with the findings of the EO | | 4 | | | |
| If the findings are not as per our expectations, we go for de - novo enquiry | | 4 | | | |
| We offer personal hearing before inflicting punishment | | | | | 1 |
| The disciplinary authority and appellate authority can be one and the same | | 4 | | | |
| Generally the appellate authority will not interfere in the order of punishment irrespective of existence of any alleged anomaly in the punishment | | | | | 1 |

| | | | | | |
|---|---|---|---|---|---|
| Sec. 11A of the ID Act, 1947 interferes in the jurisdiction and powers of the employer in the disciplinary matters | 5 | | | | |
| One who has power to appoint has inherent right to terminate the same | 5 | | | | |
| Social justice is the basis of judicial interference in the matters of employee discipline | | 4 | | | |
| We have laid down procedure for review of the punishment | | | | | 1 |
| Generally we do not pardon the proved charges | 5 | | | | |
| We challenge the orders of reinstatement by Labour Court by way of filing appeals in the Higher Courts | 5 | | | | |

## HOW DO YOU AGREE WITH FOLLOWING STATEMENTS?

*Scale points:* (1) STRONGLY AGREE (2) AGREE (3) UNDECIDED (4) DISAGREE (5) STRONGLY DISAGREE

| Statement | **scale point -5** | **scale point - -4** | **scale point -- -3** | **scale point -2** | **scale point -1** |
|---|---|---|---|---|---|
| Whatever procedure available on this day on the Disciplinary Proceedings is based on the court rulings & precedents from time to time | | | | 2 | |
| The industry badly requires codified procedures containing all nitty-gritty on the procedure of disciplinary proceedings beginning from initiation of disciplinary enquiry to inflicting punishment | | | | | 1 |
| The codified procedure may clear existing doubts and pave foundation for restoring confidence and transparency in the matters of disciplinary proceedings | | | | | 1 |

| | | | | | |
|---|---|---|---|---|---|
| between employer and employee | | | | | |
| Not satisfied with the patch work quasi legislation being done by the judiciary in the matters of disciplinary proceedings by way of giving rulings from time to time | | | | | 1 |
| Industrial Employment (Standing Order) Act, 1946, respective State Shops & Establishment Acts and Conduct, Rules and Regulations of the PSU's, autonomous bodies, Public Cos., must possess the codified Rules regarding procedure to be followed while initiation and conducting disciplinary proceedings. | | | | | 1 |

A pro-forma used is annexed hereto and marked as ‘appendix-1’ and the critical analysis of the material referred hereinabove in this chapter is narrated in the forthcoming chapter i.e.Chapter –7.

# Chapter 07: CRITICAL ANALYSIS OF THE EXISTING SYSTME OF DISCIPLINARY ENQUIRY

7.1 Critical analysis of the procedure provided under various statutes:

7.1.1 Industrial Employment Standing Orders Act, 1946; & Rules

7.1.2 Shops and Commercial Establishments Act (s);

7.1.2 Provision of the Constitution of India

7.2 Critical analysis of the procedure adopted by employers – Public and Private;

7.2.1 Central Civil Service Conduct and Appeal Rules;

7.2.2 Procedure adopted by semi Govt., bodies;

7.2.3 Procedure adopted by private bodies;

7.3 Critical analysis of Data procured through questionnaire and depicted in chapter - 6

## 7.1 Critical analysis of the procedure provided under various statutes:

### 7.1.1 Industrial Employment Standing Orders Act, 1946; & Rules:

All the relevant existing sections and rules have been denoted and captured in Chapter – 6 above; However the Act of 1946 and the Rules framed there under is not complete and self sufficient and proved to be grossly inadequate in the matters / issues of Disciplinary Enquiry in view of the mass of case law developed in the area of this research. The Following are the main areas among the other areas of Disciplinary Enquiry, where the Act and Rules fall short / being felt grossly inadequate:

**(1) Misconduct**: The Act has been passed in the year 1946, most of the misconducts have conceived and denoted based on the Industrial environment and situation existed in that particular point of time. The same needs to be changed and new set of misconducts needs to be updated, introduced for better Industrial Relations and Industrial peace. The Act is not self content with regard to classification of misconducts as per their degree, nature and seriousness via-a-vis the quantum of punishment to imposed on their establishment.

**(2) Initiation of Disciplinary Enquiry**: This is least to say that such provision is in existence. As the Act is not containing full fledged enquiry procedure, obviously, provisions relating to guide, to initiate inquiry and to conduct enquiry are not existing; that is to say initiation of enquiry (a) suo-moto, (b) on complaint (c) on secondment, (d) transfer and (e) after retirement (including VRS) (f) after resignation (g) after death of an employee and who can initiate.

**(3) Charge-sheet:** Act does not contain any of the following information relating to the charge-sheet: (a) standard pro-forma of the Charge-sheet, (b) essential elements to be followed in the charge-sheet (c) language to be deployed while framing of the charges, etc.

**(4) Procedure to be followed in the Disciplinary Enquiry**: The Act does not contain the detail procedure to be followed while conducting disciplinary enquiry. That is to say, service of charge-sheet, providing with documents to delinquent, etc,.

**(5) Appointment of Enquiry Officer / Bias**: There is no hard and fast rule to appoint Enquiry Officer (E.O). The Act is not provided with procedure to appoint Enquiry Officer. Any body

can be appointed as E.O, payment to E.O is being made by the Employer, no transparency in appointment of E.O and he can be easily subjected to all kind of bias.

**(6) Applicability of Principles of Natural Justice**: Act is very silent on applicability of principles of natural justice. The Act is not explicit under what circumstances and under what stage full and fair opportunity to be given to other side by following the principles of natural justice.

**(7) Representation through lawyer by delinquent employee**: No such provision is present in the Act or under the Standing Orders framed there under.

**(8) Record keeping of enquiry proceedings**: The existing practice of record keeping of the enquiry procedure does not inspire the confidence of the delinquent employee. There is no standardized procedure. It is left wide open to the vagaries and discretion of the Enquiry Officer. When the delinquent questions the validity and legality of such erratic procedure, courts are not keen to interfere on the ground / issue of extent of prejudice caused to delinquent employee.

**(9) Examination and cross examination**: The existing practice and the Acts and Rules discussed herein does not contain about the modus operandi of examination / cross examination and re-examination of each of the parties witnesses and documents.

**(10) Admission of charges**: There exist no guidelines in the matters of administration of admission / confession of charges by the delinquent employee.

**(11) Form and content of Enquiry Report**: No such guidelines have been laid down about the form and content of the enquiry report. In the interest of delinquent employee and in the interest of the justice equity and fairness it is advisable to have guidelines about the form and content of the Enquiry Report.

**(12) Imposition of Punishment**: This is very important aspect in the entire process of the disciplinary proceedings. Act should contain all the minute aspects over imposition of punishment i.e. study of enquiry report, supply of enquiry report, second show cause notice, personal hearing to the delinquent etc.

**(13) Remedies and Penal provisions**: The Act should specifically contain inter-alias that the remedies i.e. review, revision and appeal against the order passed by the disciplinary Authority.

### 7.1.2 Shops and Commercial Establishments Act (s):

The Shops and commercial establishment Act promulgamated by the center and the respective States not at all contain any kind of provisions / procedure with regard to disciplinary enquiry, least to state about the exit / termination of an employee. It is intoto left to the discretion of the employer. Therefore, it is advisable that all the provisions discussed herein above under the Standing Orders Act / Rules, should find place in the respective State Shops and Commercial Establishment Acts enacted by center and States.

**7.1.3 Provisions of the Indian constitution**: Analysis discussed here under the provisions of Central Civil Service Conduct and Appeal Rules is the reflection of Article 311 of the Indian Constitution.

## 7.2 Critical analysis of the procedure adopted by employers – Public and Private;

### 7.2.1 Central Civil Service Conduct and Appeal Rules;

### 7.2.2 Procedure adopted by semi Govt., bodies;

### 7.2.3 Procedure adopted by private bodies;

The following are the common lacunae's found in the procedure adopted under the said Central Civil Service Conduct and Appeal Rules, Semi Govt., bodies and Private bodies: (below points provided for in order to avoid repetition of text and to avoid overlapping)

- ?? Inadequate guidelines about initiation of disciplinary enquiry
- ?? Improper procedure of drawing up of charge-sheet
- ?? Articles of Charges / statement of imputation
- ?? Service of Charge-sheet –not guided
- ?? Qualifications of Enquiry Officer – not guided
- ?? Appointment of Enquiry Officer – not guided
- ?? Fee to the Enquiry Officer - not guided
- ?? Appointment of Presenting Officer – not guided

- Improper maintenance of daily order sheet to be maintained by the Enquiry Officer
- Recording of statement of witnesses – not guided
- Cognizance of Documents – not guided
- Examination in chief of witnesses – not guided
- Cross examination / re-examination of witnesses – not guided
- Ill-equipped to deal with the situation when delinquent confesses / pleads guilty
- Privileged documents – not guided
- Functions of Enquiry Officer – not guided
- Representation by legal practitioner – not guided
- Exparte Enquiry – not guided
- Time limit – not properly guided
- Principles of natural justice – not being fully applied
- Standard of proof – not applied
- Adjournment – not guided
- Stay by court – no specific provision to guide
- Form and content of Enquiry report – not guided

- ?? Action on the Enquiry report – not guided
- ?? Denovo / further Enquiry – not guided
- ?? Imposition of penalty – not guided
- ?? Major and minor punishment – not guided
- ?? Show cause notice / second show cause notice – not guided
- ?? Personal hearing - not guided
- ?? Remedies – not provided for properly

## 7.3 Critical analysis of Data procured through questionnaire and depicted in chapter - 6

As depicted in the Chapter – 6 *supra*, the data procured on plight of existing Disciplinary Enquiry procedure and the method and process of imposition of punishment is critically examined and evaluated herein below:

1) **Organization culture**: All most all the respondent from whom the opinion has been sought through Questionnaire and interviews have candidly expressed that Organisation Culture with regard to maintain discipline at the work place, to upkeep

time, output, avoid gossips, etc., often resorted to a strict disciplinary action. It has been revealed from the responses that out of five point scale, an healthy higher percentage of respondents responded with point scale at 4 points denotes that the human resource is treated as chattels and having poor work culture. Transparency in the relation between the employer and employer is abysmally low, therefore, among the other factors, employees inculcating a culture of Boss worshiping is common feature and as a result an unhealthy organizational culture is being developed.

2) **Industrial Relations**: Again, it has been revealed in the responses to questionnaire both oral and written that in order to have orderly and healthy industrial relations often resorted to disciplinary action by the employers. Lack of faith in Collective Bargaining, existence of Trade Union in the setup has been perceived as detrimental to good Industrial Relations. Principle of workers participation in the management has been remained as paper tiger. Management often approves termination of employees on unjustified grounds. Lay of and Lockouts has

been presumed and practiced as rights of employer. Inadequate system of conflict resolution in an organization has been noticed. All the above factors, among the other factors drives towards unhealthy Industrial Relations.

3) **Grievance Handling Machinery**: Most of the organizations, which have responded to the questionnaire have openly come out that they do not have adequate / full fledged / foolproof Grievance Handling Machinery. It is pertinent to mention that having a Grievance Handling Machinery is the first step towards having better / codified Disciplinary Enquiry Procedure. It has been further revealed the following:

    a) No effective grievance handling committee
    b) No involvement of third partying the process – to inspire confidence of workmen and transparency.
    c) No procedure laid down to be followed by the Committee
    d) Committee does not enjoy the confidence and trust of employees

e) Members of the Committee are not acquainted / updated aspects of grievance handling.

Apropos, the existing grievance handling machinery is not effective and it needs to be given appropriate shape and teeth and having grievance handling machinery, in every industry, factory should be made compulsory by statute.

4) **Disciplinary action against Misconduct**: The responses to the questionnaire reveal that there exists no uniform procedure for conducting Disciplinary Enquiry. The employers believe that, the existing procedure though it is inadequate, it places them in the comfort zone as they can take decisions to suite their convenience. With the exiting scheme of things, employer may easily discharge / remove and dismiss the targeted workmen / employees. The responses to questionnaire reveals the following:

(1) Power of *suo moto* initiation of enquiry

(2) Faulty Disciplinary Enquiry Procedure

(3) No differentiation between acts of misconduct vis-à-vis imposition of punishment

(4) Faulty charge-sheet

(5) Appointment of Enquiry Officer & fee is being paid by management

(6) Enquiry Officers are just rubber stamps in the hands of employers

(7) No laid down procedure to be followed by Enquiry Officer

(8) Workman will not have any say in the appointment of Enquiry Officer

(9) Enquiry report in not binding the Management

(10) Employer may always institute a *de nova* enquiry.

In view of the above, one can easily conclude that the system *perse* is not at all inspired the confidence and trust of employees.

5) **Suspension**: Even this is not an exception from the defects. The privilege of employer to place an employee under suspension is exercised sans responsibility. We have seen in the earlier chapters that, very often, courts have interfered in

settling the matters related suspension, subsistence allowances and other benefits. It is imperative have a clear laid down policy in the matters of suspension.

**6) Disciplinary Proceedings vis-à-vis Criminal Proceedings**: This is another area of disciplinary enquiry, wherein, as of date, only court rulings are filling the gaps. It is imperative that a clear procedure to be in built in the Disciplinary Procedure that to avoid discomfort and growing litigation.

**7) Imposition of Punishment:** The imposition of punishment is again very, very subjective and based on surmises, conjunction and bias, as there exist no laid down procedure. There is lot of inconsistency and discrimination while inflicting proportionate penalty. In order to meet the ends of justice and to control the unbridled power of the employers in imposition of penalty, section 11A was introduced in the Industrial Disputes Act, 1947. It has been revealed to a great extent in responses to the questionnaire that there exists no

elaborate procedure to be followed while imposition of penalty. It is relevant to state that we have examined catena of judgments in this regard in the earlier chapters. Time and again the law courts are guiding about the proportionate punishment to be inflicted on the delinquent employees.

It is pertinent to mention here that all most all the respondents to the questionnaire referred *supra* have vehemently responded affirmative with regard to adequacy of the existing scheme of things and requirement of full-fledged disciplinary enquiry procedure inter-alia agreeing to the following questions / statements specifically posed them:

(a) Whatever procedure available on this day on the Disciplinary Proceedings is based on the court rulings & precedents from time to time

(b) The industry badly requires codified procedures containing all nitty-gritty on the procedure of disciplinary proceedings beginning from initiation of disciplinary enquiry to inflicting punishment

(c) The codified procedure may clear existing doubts and pave foundation for restoring confidence and transparency in the matters of disciplinary proceedings between employer and employee

(d) Not satisfied with the patch work quasi legislation being done by the judiciary in the matters of disciplinary proceedings by way of giving rulings from time to time

(e) Industrial Employment (Standing Order) Act, 1946, respective State Shops & Establishment Acts and Conduct, Rules and Regulations of the PSU's, autonomous bodies, Public Cos., must possess the codified Rules regarding procedure to be followed while initiation and conducting disciplinary proceedings.

**7.4 Graphic analysis of responses to the Questionnaire:** Analysis of the responses to the said questionnaire has been processed in the form of graphical charts, the said charts are provided in below for ready reference.

# Chapter 08: CONCLUSIONS AND SUGESSIONS



## 8.1 CONCLUSION:

Everyone is talking change in labour laws and even the recommendations of the Second Labour Commission have not touched the vital issues for holding of enquiries when an employee is charge-sheeted and his explanation has not been found satisfactory. In India there are more than 175 labour legislations but none of these deals at length with the procedure of holding enquiries. That apart the main drawback in labour administration pertains to appointment of enquiry officers.

Invariably, in every disciplinary proceeding, the enquiry officer has been appointed by the employer which does not inspire the confidence of the delinquent employee. There is thus great need to change procedure of the disciplinary / domestic enquiries. It is pertinent to mention here that in the development of legal system, the decisions of the Court play a very important role, particularly the verdicts in the nature of ratio decidendi and obiter dicta. That is how, in effect, virtually every stage / aspect of disciplinary proceeding is being guided by court rulings. This aspect has been clearly dealt at length by us in chapter 1 to 5 above. As discussed in the above chapters with specific reference to the principles of natural justice viz; *adi alterm partem and nemo judex causa sua* are the two important principles of principles of natural justice. In view of this, the need of effective system and procedure while holding disciplinary enquiries is imperative. As discussed supra in disciplinary enquiries opportunity is given to the person against whom certain imputations of charges have been leveled and to contend himself and tell the Enquiry Officer records the

evidence of the parties and gives its findings to the effect whether the charges as levied have been proved or not.

It is revealed by the above study and through observations that more than 90 percent cases pending for adjudication pertain to termination, discharge and or dismissal of workmen / employee. Gone are the days when employer could dispense with services of an employee at his whims and fancies. With the withering away of the principles of lassie faire which were governing the relationship between an employer and employee, an employer cannot summarily terminate, discharge or dismiss simplicitor an employee howsoever undisciplined, undesirable or unwanted he maybe. The current labour legislations, judicial pronouncements which have for their objective the amelioration of the lot and betterment of the service conditions of the working class, have to a great extent restricted rights of an employer and secured the corresponding extent the job security of a workmen. For better appreciation of this position it is reiterated that the organs of the State i.e. Legislature, Executive and Judiciary through their respective functionaries have tighten their lose ends to place job security of an employee on

higher platform and to see that the employers are not exploited the workfolk to sub-serve their vested interest. Accordingly, we have perused catena of provisions which deals about the said situation. The following are the main Acts / provisions / case laws among the other which *inter-alia* deals about employees job / social security and social welfare which we have dealt at length in the chapters discussed hereinabove: -

(a) Article 311 of the Indian Constitution, 1950

(b) Industrial Employment (Standing Order) Act, 1946

(c) Industrial Disputes Act, 1947

(d) Shops and Establishment Acts

(e) Union of India v/s Tulsiram Patel, AIR 1985 SC 1416

(f) Kulwant Singh v/s state of Punjab, 1990 (61) FLR 635

(g) M/s Scooters India Ltd., v/s Moh. Yaqub & anr, 1999 SC

(h) Uptron India Ltd., v/s Shammi Bhan & anr (1998 (6) SCC 538

(i) D.K Yadav v/s JMA Industries 1993 LLR 584 (SC)

(j) Central Inland water transport corporation v/s Brojonath ganguly, 1986 (3) SCC 156

(k) Delhi Transport Corporation v/s DTC Mazdoor congress, 1991 (sppl) 1 SCC 600

It is relevant and worth while to mention here the observations of the Supreme Court in the Delhi Transportation case[549] that **"…**There is need to minimize the scope of the arbitrary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals, however, high-placed they may be, it is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness does not go with the posts, however, high they may be. There is only a complaisant presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be

[549] 1991 (sppl) 1 SCC 600

governed by discretion when it can conveniently and easily be covered by the rule of law……...

…… The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them. Both the society and the individual employees, therefore, have an anxious interest in service conditions being well defined and explicit to the extent possible. The arbitrary rules which are also sometimes described as Henry VIII Rules, can have no place in any service conditions…

…. Law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under rule of law. The prevailing social conditions and actualities of life are to be taken into

account to adjudging whether the impugned legislation would sub serve the purpose of the society. The arbitrary, unbridled and naked power of wide discretion to dismiss a permanent employee without any guidelines or procedure would tend to defeat the constitutional purpose of equality and allied purposes. Courts would take note of actualities of life that persons actuated to corrupt practices are capable to manoeuvre with higher echelons in diverse ways and also camouflage their activities by becoming sycophants or cronies to the superior officers…. Vesting arbitrary power would be a feeding ground for nepotism and insolence; instead of sub serving the constitutional purpose, it would defeat the very object, in particular, when the tribe of officers of honesty, integrity and devotion are struggling under despondence to continue to maintain honesty, integrity and devotion to the duty, in particular, when moral values and ethical standards are fast corroding in all walks of life including public services as well… As a court of constitutional functionary exercising equity jurisdiction, Supreme Court would relieve the weaker parties from unconstitutional contractual obligations, unjust unfair,

oppressive and unconscionable rules or conditions when the citizen really unable to meet on equal terms with the State. It is to find whether the citizen, when entered into contracts or service, was in distress need or compelling circumstances to enter into contract on dotted lines or whether the citizen was in a position of either to "take it or leave it"…

… Before depriving an employee of the means of livelihood to himself and his dependents, i. e. job, the procedure prescribed for such deprivation must, therefore, be just, fair and reasonable under Arts. 21 and 14 and when infringes Art. 19(1)(g) must be subject of imposing reasonable restrictions under Art. 19(5). Conferment of power on a high rank officer is not always an assurance, in particular when the moral standards are generally degenerated that the power would be exercised objectively, reasonably, conscientiously, fairly and justly without inbuilt protection to an employee**…"**

Upon perusal of the above and with reference to the said observations of the apex court, one would easily reach an understanding that there exists system of strong legislations

and aggressive judicial mechanism to protect the interest of the workfolk. This being the state of things; there is one loose end with the employer i.e. unbridled power / authority of dispense with services of the employees by way of bleak mechanism called disciplinary action.

Accordingly, the entire study and research is dedicated on the very issue of how vulnerable the workfolk is against the disciplinary authority vested with the employer. We have witnessed through chapter – **1** to chapter **7** that:-

(a) what is misconduct how it has been read and presumed under Industrial Jurisprudence, Constitutional perspective, master – servant relationship

(b) Scope and purpose of Disciplinary Enquiry and applicability of principles of natural justice

(c) Initiation of Disciplinary proceedings, charge-sheet, Enquiry officer, Presenting officer, stay of Enquiry by law courts

(d) Delinquent employee represented by legal practitioner, disciplinary proceedings vis-à-vis criminal proceedings, witness, bias in the enquiry

(e) Form and content of enquiry report by the enquiry officer, supply of enquiry report, imposition of penalty and remedies available

(f) Practice and procedure adopted by the employers – collection of data through structured questionnaire as well as oral interface / interview with professionals and people associated with the subject under context.

(g) Critical analysis of the existing practice and procedure of the Disciplinary Enquiry.

On perusal and examination of the above material which *inter-alia* includes text, law, rules, regulations, standing orders, procedure, case law etc., goes to suggest and establish that there is no systematic laid down / codified or otherwise – enforceable procedure which contains all steps, procedure which secure the equity, justice and fair play of the interested parties, especially to delinquent employees in the matters of

disciplinary enquiries or departmental enquiries. Lot of areas in the enquiry process are still left wide open and are in the grey and waiting to be filled by assumption / presumptions and court rulings. Therefore, in view of the above narrated procedure as studied and depicted in chapter 1 to 5 and critical research and analysis narrated in chapter – 6 and chapter – 7, based on which I have no hesitation to reach conclusion and accordingly the present research and study concludes and declares the finding as affirmative to the hypothesis. That is to say - **YES DISCIPPLINARY ENQUIRY IS A WEAPON IN THE HANDS OF THE EMPLOYER. And such weapon can be used and being used to sub-serve their comfort and convenience at the cost of workfolk,** *inter-alia* **taking full advantage of the existing confused state of things (**with specific reference to existing Indian Judicial superstructure and Constitutional perspective**) in the matters of disciplinary enquiry process.**

## 8.2 SUGGESTIONS:

**8.2.1 Urgent need for a panel of independent Enquiry Officers:** Under the present system and enquiry officer does not inspire the confidence of the delinquent employee. In the backdrop of the facts herein before, when we talk of disciplinary proceedings, a domestic / disciplinary enquiry is that of mistrust which arises essentially because the charge sheet is given by the employer and enquiry is also held by an officer or an outsider appointed by the employer. The employer, as such, represents the both prosecutor and the judge. A suspicion of bias is inevitable in such a situation. This is one of the main reason among others the delinquent employee do not have the faith in the Enquiry Officers. They participate reluctantly and take every possible to frustrate the enquiries. They raise number of objections including that of validity of the appointment of Enquiry Officer.

Since the workmen have a perceived feeling that the management has already taken a decision to get rid of them

and the enquiry is only a postmortem to comply with legal formalities, the Enquiry Officer, howsoever impartial he may be, does not inspire the confidence of the delinquent workmen. This feeling will frustrate the very essence of natural justice. Therefore, it necessary that the law should provide, a "**Panel of Enquiry Officers**" who may be, amongst retire judges including the retired judges of labour court, Industrial Tribunals, Labour Law Practitioners, Labour Inspectors / Officers. They should be empowered with semi / quasi-judicial powers while holding enquiries. As a result of such enquiries, the due weightage will be given to the findings of such Enquiry Officer and the number of Industrial disputes will be considerably reduced since the parties will know their fate on the conclusion of the enquiries. When such panel is constituted the enquiries will generate a sense of trust and confidence among the workers and employers alike.

### 8.2.2 Guidelines for full-fledged enquiry procedure:

Let the following frugal procedure among the other nitty-gritty find place in the Industrial Employment (Standing Orders) Act,

1946 and the Rules / Standing Orders framed / provided there under, CCA Rules, and the Regulations:-

(a) Preliminary (if necessary to be held) after the report of the complaint.

(b) Issue and service of show-cause notice / charge-sheet

(c) Explanation of workman complained against the issue of charge-sheet

(d) In case explanation is not satisfactory. Management may appoint an enquiry officer (guide lines).

(e) Appointment of Presenting Officer

(f) Enquiry Notice

(g) Admission of guilt

(h) Legal assistance to delinquent employee

(i) Oral enquiry if required.

(j) Reports of the findings and conclusions.

(k) Disciplinary authority to issue second show cause notice with a copy of the Enquiry Report as to why proposed penalty should not be imposed and accept the findings of the Enquiry Officer.

(l) Personal hearing

(m) Communication of disciplinary orders to employee concerned.

(n) Appeal Review and Revision;

**ESSENTIAL REQUIREMENTS IN EACH STEP:**

**Report or complaint against the delinquent**:

(vii) The report must contain specifically:

- Date
- Time
- Specific acts or omission of the employee against whom complaint has been reported.
- Effect of such act or omission on the organization

- Names of the persons who were eye-witnesses.

(viii) The report must be made immediately after the occurrence of the act or omission.

(ix) The report must be made by the supervisor/reporting officer concerned or affected with the matter of complaint.

(x) It should be addressed to the head of the Department.

(xi) It must be noted through proper channel.

(xii) It must be forwarded in original with his remark to the appointing authority / Disciplinary Authority.

**Action on the report / complaint by the management:**

(c) The officer concerned should give his opinion in brief about the reported acts or omission. And record if disciplinary action is necessary with reasons.

(d) The forwarding officer / complainant should send all the papers and documents connected with or throwing light on the acts or omissions and the behaviour in the department / section / plant of the employee concerned.

**Preliminary Enquiry**:

When necessary:-

(iv) If the employee is to be corrected in the department itself, it may serve the purpose; the workman may apologize.

(v) It can be useful where the facts are complicated or the employer for his satisfaction want to ascertain the truth of the complaint or take action if desired.

(vi) Nature of preliminary enquiry:-

A preliminary enquiry is of very informal character and the methods are likely to vary in accordance with the requirements of each case. The delinquent employees have no vested right in any form or procedure of holding preliminary enquiry. The procedure is wholly at the discretion of the officer holding the enquiry. After the preliminary enquiry, the disciplinary authority need not record its satisfaction in writing nor is it required to give reasons for initiating the regular departmental enquiry. *Ex - parte* subjective satisfaction can be reached regarding *prima facie* case. The authority need not give any opportunity to the

delinquent to have his say in the preliminary enquiry. Principles of rationality and fairness in action cannot be read into such enquiry. The doctrine of principles of natural justice is not applicable to preliminary enquiries.

Preliminary inquiry is only for the purpose of satisfaction of the disciplinary authority as to the existence of a prima facie case against the concerned employee for instituting a regular departmental inquiry. The disciplinary authority can get a fresh preliminary inquiry conducted by another officer and institute a regular departmental inquiry on its basis if it was not satisfied with the investigation and report of an earlier preliminary inquiry.

Wherein and whenever conducted it must be -

c) under oral instructions or written orders.

d) Conducted on the same day or as early as possible

e) Statements need not be recorded.

f) Only some explanatory questions to the employee complained against and one or two or three eye witnesses if any may be asked.

**Who should conduct the preliminary enquiry**:-

There cannot be a broad and unqualified proposition that an officer who conducted a preliminary enquiry is disqualified from acting as a disciplinary authority on the ground of bias. Also, there is no proposition that official bias can never be attributed to the authority who conducted a preliminary enquiry and later on held the disciplinary enquiry as well. It depends on the facts and circumstances of each case. In a given case there may be circumstances to show that a disciplinary authority who was a party to the preliminary enquiry report was so overwhelmed by his findings in the preliminary report that had approached the entire issue with a closed mind. The manner of conducting the disciplinary enquiry and process of decision making may be suggestive of an inference that the disciplinary authority considered the domestic enquiry as a mere formality to fortify his own view point. In such cases, bias can be a ground for

invalidating the decision of the disciplinary authority. But where the order passed by the disciplinary authority indicates that he scanned and made an independent appraisal of the entire evidence and gave additional reasons in support of its conclusions and was not mechanically led away by what was said in the preliminary enquiry report, an inference of strong likelihood of bias may not be drawn. However, it would be prudent for the disciplinary enquiry not to conduct the preliminary enquiry himself. The same view was held in the case of Rajendra Prasad Singh vs. Union of India[550].

Generally, either the head of the department or under his instructions someone else of the department who is possibly should not be junior to the complainant.

g) Someone other than the complaining officer.

h) Not by one who is to be appointed as Enquiry Officer in the matter.

Submission of report of the Preliminary enquiry:-

[550] 1996 I LLJ 1003 (Cal. H.C )

d) The officer conducting preliminary enquiry should as far as possible submit a written report to the Head of the Department who had ordered the Preliminary enquiry.

e) The Head of the Department should forward preliminary report along with the report of the complainant to the disciplinary authority.

f) Even if the employee has apologized, the head of the department should always send his report to the disciplinary authority.

**Issue of show-cause notice or charge-sheet to the delinquent**

1) If any action whether it is punishing or pardoning, the employee complained against, is contemplated by the management, show cause notice or charge-sheet should be issued. It may however be issued in those cases also if the objective is to drop the enquiry or if the delinquent realises his lapses or defaults and tenders apology.

2) The show cause notice or charge-sheet is the very basis of any disciplinary action. The scope of charges mentioned in the show cause notice or charge-sheet will never be widened at any time after issuance of show cause notice or charge-sheet.

3) If the disciplinary enquiry has to be carried to its conclusions a charge-sheet should be issued and not a show-cause notice. If the object is merely reprimand the delinquent or enquiry is not intended in any reason, a show-cause notice may be issued.

2**. Drafting of charge-sheet or show cause notice**:

As per the Standing Orders / Staff Rules / Conduct Rules of the organization where it is proposed to hold an enquiry, the disciplinary authority shall frame the definite charges on the basis of the allegations against an employee. The charges together with a statement of the allegations, on which they are based, a list of documents by which and a list of witnesses by whom the articles of charges are proposed to be sustained, shall be communicated in writing to the employee who shall be required to submit within such time as may be specified by the

disciplinary authority (not exceeding 15 days), a written statement whether he admits or denies of or all the articles of charges.

**Explanation** It is advisable to show the documents listed with the charge-sheet or any other document to the employee at this stage itself.

There is no standard or prescribed form, for drafting charge-sheet or show cause notice, it may be in a form of a letter or a notice. However the following essentials ought to mention:

It should be signed by the Disciplinary authority / appointing authority.

3. **Show-cause Notice/Charge-sheet must be served on the Delinquent**:

(a) If not served on the delinquent no enquiry could be proceeded with.

(b)The service must be on the delinquent employee himself unless otherwise provided by the service rules or standing orders.

(c)The service may be -

i) By hand delivery

ii) By displaying on the Notice Board ; If the Service Rules provide and authorise the same.

iii) By Registered AD Post Acknowledgement Due.

iv) Through substituted services / thru newspaper as a last resort.

Refusal to accept the notice or charge-sheet by the workman when delivered in persons or by Registered post with acknowledgement due: If the workman refuses to take delivery of the letter, there should be record of this fact with signatures of the persons effecting the delivery and the witnesses to the (minimum 2). Whereas service under Postal Certificate is not a conclusive proof of service.

4. **Workman's explanation and how to deal with it**:

The workman complained against may or may not submit his explanation.

The explanation when received -

a. Must be received by putting thereof the date and time of its receipt.

b. Must be immediately forwarded to appointing authority/disciplinary authority through Administration Division.

c. Must be minutely examined vis-à-vis the show cause notice or the charge sheet.

d. Should be from and be signed by the workman concerned and not by any person or representative on his behalf unless it is accompanied by written authority or unless the representative is a legal practitioner.

e. Its contents should be brought to the notice of the complaining Head of the Department.

5. **Admission of charges and action thereof**:

(a) If the workman complained against accepts the charges levelled in the Show Cause Notice or Charge-sheet the management may take the matter in view of the gravity of the offences from the nature of an apology tendered by him in explanation. If in any case of absolute apologies, a warning for the sake of record must be issued to the workmen concerned though this time he is being excused or let off with minor punishments, he would be dealt with seriously if he indulges often again in similar or other misconduct.

(b) Admission should be unconditional.

(c) If the explanation is not satisfactory, the case should be fixed for enquiry and the delinquent should be informed accordingly.

6. **Enquiry Notice**:

A. (i) Drafting of notice

The Enquiry Officer should clearly inform the delinquent about -

(a) Place, date and time of the enquiry;

(b) Name or names of officer(s) who would conduct the enquiry;

(ii) The enquiry notice should mention -

(a) The delinquent would be allowed to be assisted by another workman of the same department. As per the Staff Rules of the organization the employee may take the assistance of any other employee of the organization but may not engage a legal practitioner for the purpose.

(b) That in case the delinquent workman fails to attend the enquiry; the same would be held *ex-parte* and that whatever the decision would be binding on him.

(c) It should be signed by the management in case of first notice and later on by the Enquiry Officer.

B. Copy of notice to Enquiry Officer :

Copy of enquiry notice or separate letter must also be addressed to the Enquiry Officer authorizing him to hold the enquiry at the stipulated time and submit his report of finding after satisfactory completion of the enquiry.

C. Nomination of Presenting Officer :

The management should nominate any of its officer to present its side in the enquiry proceedings.

**7. Commencement of oral enquiry**:

Oral enquiry : Name of :

(a) Object :The very purpose of holding the enquiry is to give a chance of hearing to the workman so that he is not punished without getting a reasonable and proper opportunity to explain the charges made against him.

(b) Distinguished with the court trials:

The domestic or departmental enquiry differs from the ordinary court trial in as much as the court trials are held and according to well laid and codified laws of the land, the domestic enquiries are guided and regulated by principles of natural justice.

(c) A domestic enquiry should be started as soon as possible, should not be un-necessarily prolonged.

**8. WHO SHOULD BE THE ENQUIRY OFFICER**?

Appointment of Enquiry Officer – as stated *supra,* appointed amongst the 'panel of enquiry officers'

(I) The Enquiry Officer could be an outsider and also an advocate but as far as possible the EO should be from the 'panel of enquiry officers'.

(II) He should act independently of his other duties towards the parties.

(III) The EO should not have before hand personal knowledge of misconduct or its facts - he should not be witness.

(IV) He should be impartial man with an open mind and not biased against the delinquent.

(V) As per the existing Staff Rules of the organization, where the disciplinary authority itself enquiries or appointing an enquiry officer for holding an enquiry, it may by an order appoint a person to known as the presenting officer on its behalf the case in support of the articles of charge.

9. **INQUIRY PROCEEDINGS**:

(I) It is mandatory that the EO maintains written records of the inquiry proceedings.

(II) Enquiry Officer should -

a) Record the adjournment of the proceeding.

b) Sign the proceedings himself, besides taking signatures of management representative as well as the delinquent workman in duplicate.

c) Every page of the proceedings should also be marginally signed or initiated by both the parties as well as the EO.

d) On the first date, the EO read over the charges to the delinquent workman and ask him whether he wants to add in his explanation and this should be recorded.

(I) As per the Staff Rules of the organization on the date fixed by the EO, the employee shall appear before the EO at the time, place and date specified in the notice. The Enquiry Officer shall ask the employee whether he pleads guilty or has any defence to make and if he pleads guilty to anyone of the charges levelled against him, the Enquiry Officer shall record

the plea, sign the record and obtain the signatures of the charge-sheeted employee thereon. The EO shall return a finding of guilt in respect of those charges to which the employee concerned pleads guilty.

If the employee does not plead guilty, the inquiry officer shall adjourn the case to a later date not exceeding 05 days, after recording an order that the employee may, for the purpose of preparing his defence:

(i) Inspect the document listed with the charge-sheet;

(ii) Submit a list of additional documents and witness that he wants to examine, and

(iii) Be supplied with the copies of the statements of witnesses if any, listed in the charge-sheet.

**10. CONDUCTING ENQUIRY *EX-PARTE***:

(f) If the delinquent workman does not appear at the scheduled enquiry and has not applied for adjournment or if applied it has been refused, the EO may proceed to complete the inquiry *ex-parte*.

(a)If the inquiry is conducted *ex-parte* the EO should mention in the proceedings before recording the statements whether or not the inquiry notice has been served on the workman complained against.

(b) The EO should allow some grace time for the delinquent workman and should record the same mentioning the specific time allowed by him. This is, however, essential every time and is under the discretion of the EO.

(c) If the workman comes to participate thereafter, he may be read over the proceedings so far recorded and be allowed to join thereafter.

(d) Even in case of *ex-parte* enquiry, the EO has to be satisfied that the mis-conducts are proved by the reliable evidence.

**11. DELINQUENT WORKMAN'S REPRESENTAION AT THE ENQUIRY**:

(a) As an offshoot of one, principles of natural justice it is now well established that the workman should be allowed to be assisted or represented by another workman from the same

department and if not available from the same department, the same establishment.

(b) The workman's representative is only to watch the proceedings and assist the workman but not to interfere in the conduct of inquiry.

(c) The EO has discretion to permit representation of delinquent workman by an outsider like a lawyer or trade union representative. If the facts of the enquiry or the charges are completed or the management is represented by a lawyer through in employment of the employer or in the interest of justice he thinks if necessary.

**12. RULES OF EVIDENCE**:

Although the Indian Evidence Act is not applicable to the departmental proceedings yet, the fundamental principles of evidence and their appreciation are no doubt applicable. Before a worker is held guilty there must be reliable and legal evidence from which an inference of guilt can be drawn.

**13. HOW TO RECORD STATEMENT / ORAL EVIDENCE IN AN INQUIRY**:

(a) Statement is the oral evidence given by witness before the EO.

(b) Every statement comprises of three parts and should be recorded in the following order:

i) First: Chief of direct examination conducted, the party calling the witness.

ii) Second: Cross examination conducted by the opposite party.

iii) Third: Re-examination conducted by the party conducting the direct Examination.

(c)In the above the Enquiry Officer, may if he thinks fit essential and not otherwise put any questions to the witnesses.

**14. CLOSING PROCEEDINGS**:

As soon as the workman closes his evidence, the Enquiry Officer should write in the end that "workman concerned has no more witnesses to examine and the proceedings closed" and sign the statement himself and should also get the same signed

by the management representative or the complainant workman - complained against and his representative.

**Time frame to complete the enquiry**: The Enquiry Officer should complete the enquiry within 45 days of matter referred to him.

**15. REPORT OF FINDING AND CONCLUSIONS IS NECESSARY**:

After the completion of the enquiry the Enquiry Officer should immediately start preparing his report of the enquiry conducted, however, he should examine very minutely not orally the proceedings recorded by him, but also the show cause notice/charge-sheet and the reply received from the employee concerned.

As per the staff rules of the organization once the enquiry officer concludes enquiry, the report shall prepared, which shall contain:

(a) a gist of the articles of charge and the statement of the imputations of misconduct or misbehaviour;

(b) a gist of the defense of the employee in respect of each articles of charge.

(c) As assessment of the evidence in respect of each article of charge.

(d) The finding on each article of charge and the reasons thereof.

The report of the finding should be submitted by the Enquiry Officer to the appointing authority/disciplinary authority.

As per the staff rules, the disciplinary authority, if it is not itself the enquiry authority may, for reasons to be recorded by it in writing remit the case to the enquiry officer for fresh or further enquiry and report, and the enquiry officer shall thereupon proceed to hold the further enquiry according to the provisions of the Staff Rules.

**16. PASSING ORDERS OF PUNISHMENT ON REPORT** :

The Disciplinary authority while passing the order should mention that -

(i) He/she has gone through the report of the findings as well as,

(ii) The entire record of the enquiry and

(iii) Confirms of disagree with the views of the Inquiry Officer

(iv) Thereafter the Disciplinary authority should mention that he/she has considered the circumstances of the case, gravity of misconduct and past record of the workman and propose appropriate punishment in his/her opinion would meet the ends of justice.

As per Staff Rules of the organization orders made by the disciplinary authority shall be communicated to the employee concerned, who shall also be supplied with a copy of the report of the enquiry.

(v) The order must also reveal that decision taken by him/her is necessary for the sake of discipline in the Board.

(vi) Should be given minimum 15 days time to delinquent to explain himself against the proposed punishment.

**17. IMPOSING OF PUNISHMENT**:

On receiving the explanation from the delinquent, the appointing/disciplinary authority may pass order of the proposed punishment or may reduce depending on any extenuating circumstances which might have been brought out by the workman in his explanation and if disciplinary authority things it necessary to do so.

**18. APPEALS**:

As per the Staff Rules of the organization the appeal over the decision of the appointing authority will be with Chief Executive Officer /Board of Directors.

An appeal shall be preferred within the *stipulated period* from the date of the communication of the order appealed against. The appeal shall be addressed tot he appellate authority as aforesaid and submitted to the authority whose order is appealed against. The authority whose order is appealed against shall forward the appeal together with its comments and the records of the case to the appellate authority within

stipulated period. The appellate shall consider whether the findings are justified or whether the penalty is excessive or in adequate and pass appropriate order. The appellate authority may pass order confirming, enhancing, reducing or setting aside the penalty or remitting the case to the authority which impose the penalty or to any other authority within such direction as it may deem fit in the circumstances of the case.

The Supreme Court in the case of Sur Enamel and Stamping Works Ltd. vs. The Workmen[551], held that the mere form of an enquiry would not satisfy the requirements of complete adjudication to protect the disciplinary action against a workman. An enquiry cannot be said to have been properly held unless:

(i) the employee proceeded against has been informed clearly of the charges levelled against him

(ii) the witnesses are examined - ordinarily in the presence of the employee-in respect of the charges

[551] AIR 1963 SC 1914

(iii) the employee is given a fair opportunity to cross examine witnesses

(iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and

(v) the enquiry officer records his findings with reasons for the same in his report.

In the recent judgment the supreme court of India in the case of Union of India and others, Vs. Mohd. Ramzan Khan[552], once again reiterated that Disciplinary inquiry is quasi-judicial in nature. There is a charge and a denial followed by an inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principles of natural justice. With the Forty-Second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of

[552] AIR 1991 SC 471

evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his; conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected.

### 8.2.3 Grievance Handling Machinery is condition precedent for codified procedure of holding disciplinary enquiries:

It is strongly advised to have a better grievance handling machinery in place in the Industry, which will in turn prevent occurring of misconducts and disputes, differences,

commissions and omission on the part of the employees will be resolved at plant / shop-floor level which inter-alia lessens the burden of disciplinary authority and judiciary. Therefore, having good and employee friendly grievance handling mechanism is a *condition precedent* for full-fledged codified procedure in the matters of holding of Disciplinary Enquiry.

The present law is deficient in this respect but it deals mainly with the employees, misconduct and prescribes what disciplinary action to be taken against them. But law ignores entirely the causes which lead to indiscipline from among the working class. Absence of effective grievance procedure and proverbial delay in industrial courts induce tremendous feelings of frustration among workers and force them to take belligerent postures in dealing with day to day disagreements. Small issues like non-supply of uniforms, cafeteria issues, drinking water, electric fans, punching of attendance etc., become magnified out of proportion. In case grievance handling procedure is put in place, all these issues may be thrashed and solved at this level itself.

According to Mr. J.A Pankal who is long associated with Tata Iron and Steel Company Ltd., Jamshedpur is of the opinion that the grievance procedure should consist of :-

a. The attitude and support of the management;
b. Belief in the utility of the procedure by all concerned;
c. Introduction of procedure with concurrence of the employees' representatives and their union;
d. Simple and expeditious grievance handling;
e. Codification of Company's policies, rules and practices and availabilities of copies of different levels of handling grievances;
f. Personnel department functioning in a advisory capacity at all levels of management;
g. Fact oriented instead of employee oriented, discussion of grievances;
h. Respect for decisions taken at each level;
i. Publicity of the procedure and its achievement in the company; and

j. Periodic review of the working of the procure[553].

**Model grievance procedure**: The National Commission Labour, Ministry of Labour, Employment and Rehabilitation, Govt., of India, has formulated a scheme for grievance procedure. It has adopted the 'step-ladder' system. The scheme says the procedure to be custom made to industry specific and it envisage the following main points among other:

(1) presentment of the grievance within 48 hours

(2) further reference to Head of the Department and he shall dispose of the same within 3 days

(3) Grievance Committee – shall give its recommendation within 7 days

(4) Workers right to appeal to the management

(5) Grievance voluntary arbitration

(6) Workers representative on the Grievance Committee

(7) Time limit of appeal from step to another

[553] J.A Panakal Grievance Procedure, Indian Labour Journal, July 1968

**Guiding Principles for grievance procedure**: The existing labour legislations does not provide for well-defined and adequate procedure for redressal of day-to-day grievances in Industrial units. Clause 15 of the Model Standing Orders in Schedule 1 of the Industrial Employment (Standing Orders) Central Rules 1946 specifies that “all complaints arising out of employment including those relating to unfair treatment or wrongful exaction on the part of the employer or his agent, shall be submitted to the manager or the other person specified in this behalf with right to appeal to the employers”

A grievance procedure should take note of the following principles:

(i) Conformity with existing legislation:

(ii) Need to make the machinery simple and expeditious

(iii) Constitution of Grievance Committee

**Statutory provisions for setting up of Grievance Settlement Authorities and reference of certain individual disputes to such authorities**:

By the amending Act no. 46 of 1982 the provision for setting up of Grievance Settlement Authorities was introduced as Sec. 9 C

under new Chapter II-B of the Industrial Disputes Act, 1947. This Section imposes an obligation on the employer of every industrial establishment employing fifty or more workmen or such number of workmen on any day in the preceding 12 months to set up a Grievance Settlement Authority in accordance with the rules made in this behalf under this Act. The object is to settle promptly any industrial dispute connected with individual workman employed in the establishment.

Section 9 C provides as follows:

9C. (1) the employer in relation to every industrial establishment in which fifty or more workmen are employed or have been employed on nay day in the preceding 12 months, shall provide for, in accordance with the rules made in that behalf under this Act, a Grievance Settlement Authority for the settlement of industrial disputes connected with an individual workman employed in the establishment.

(2) Where an industrial dispute connected with an individual workman arises in an establishment referred to in sub-section

(1), a workman or any trade union of workmen of which such workman is a member, refer, in such manner as may be prescribed, such dispute to Grievance Settlement Authority provided for by the employer under that sub-section for settlement.

(3) The Grievance Settlement Authority referred to in sub-section (1) shall follow such procedure and complete its proceedings within such period as may be prescribed.

(4) No reference shall be made under Chapter III with respect to any dispute referred in this section unless such dispute has been referred to the Grievance Settlement Authority concerned and the decision of the Grievance Settlement Authority is not acceptable to any of the parties to the dispute.

It is clear from the provision that the emphasis is on the individual grievance, Sub section (2) also imposes an obligation on the aggrieved workman or the Union of which he is a member to refer such dispute to the Grievance Settlement

Authority in the manner prescribed thereof. However, no respite and benefit to the ultimate user / workman, because, the said provision was not made mandatory and compulsory on the part of the employers.

Therefore, it is advised that to have rather compel by way of statute the employers to have grievance settlement procedure on the above guidelines.

**Scope for further study**: The utility of this study and research has been high lighted in the *preface* portion of this thesis. The researcher has touched upon only the disciplinary enquiry part of topic. In this topic itself there are many areas, apparently they may appear as minute / small areas; they are subjects at length and further research may be carried out namely:

(1) Principles of natural justice

(2) Forms and precedents of suspension, show cause notice, charge-sheet, minor and major penalty, discharge, termination, dismissal

(3) Suspension

(4) Remedies available to workmen and non-workmen category

(5) Re-visiting of labour legislations with specific reference to disciplinary enquiries and suggestions / remedies thereof.

(6) Retrenchment, lay of and strikes and misconducts

(7) Standing orders and service Rules with specific reference to Disciplinary Enquiries and recommendations and suggestions.

(8) Comparison of disciplinary procedure in vogues vis-à-vis western countries – suggestions and recommendations.

**********

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# Table of case referred

## A

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# Appendix -1

## Schedule – A: Pro-forma of the Questionnaire

Faculty of Law
Saurashtra University, Rajkot
Researcher: Shivaji Rao
Guide : Dr. B.G. Maniar

### QUESTIONNAIRE

**PERSONAL DETAILS**

| | | | |
|---|---|---|---|
| 1. | Name of the Respondent & Org. | : | |
| 2. | Age & Education | : | |
| 3. | Designation | : | |
| 4. | Category | : | (i) Supervisor/Officer/Executive<br>(ii) Technical/non-technical |
| 5. | Number of years of service with the Organisation | : | |
| 6. | Total Experience | : | |
| 7. | Monthly Income | : | |

**ORGANISATION CULTURE:**

You are requested to read the following statements carefully and give your frank opinion as to whether the same are true for your organization on the below mention 5 point scale. This data is being collected purely for research purpose and your fair and frank opinion will be highly appreciated. Utmost confidentiality will be maintained and neither the identity nor the responses of the respondents will be disclosed to anyone.

**(1) NOT AT ALL (2) TO A SLIGHT EXTENT (3) TO A MODERATE EXTENT (4) TO A GREAT EXTENT (5) TO A VERY GREAT EXTENT**

---

01. Does your organisation believe that manpower is its greatest asset [_____]

02. We believe that to maintain discipline, disciplinary action is imperative [_____]

03. Discretion in disciplinary power is often exercised [_____]

04. Lot of time is wasted in gossiping [_____]

05. Everybody expects that the other will take the initiative to be on safer side [_____]

06. Members are usually late in starting work [_____]

07. Important decisions are kept in abeyance with a feeling that the time will solve it [_____]

08. Constant verbal acrimony and altercation is a regular feature between dept. heads [_____]

09. Suspicion and caution is practiced in every dealing [_____]

10. Agents are used to contain dedicated people [_____]

11. There is no difference between hard working and insincere employees [_____]

12. Employees maintain status quo out of fear that they might fail or their weaknesses might get exposed [_____]

13. Employees agree with superiors to avoid their wrath [_____]

14. Employees pretend as "Yes sir" or "I agree with you sir" to please boss [_____]

15. Everyone wants to be ahead of others [_____]

16. "You can never be wrong or I can never disagree with you Sir", are the criteria of success and failure [_____]

17. Employees believe in worshipping boss than doing their work [_____]

18. Promotions are linked to employees' affinity to boss and not their work [_____]

19. Employees are generally lethargic and uninterested in work [_____]

20. Secret information of subordinates are passed on to the boss to gain advantage [_____]

21. Winners are rewarded and lossers are doomed/neglected [_____]

22. Employees are compelled to play a role of conspirator against their subordinates [_____]

23. Mistakes in work are not tolerated [_____]

24. To clip the wings colleagues are pitted against each other in fight/competition [_____]

25. Bias, prejudice and suspicion is widespread amongst the employees [_____]

26. Is it a fact that, when one tries to go up and the other tries to pull him down [_____]

27. Shrewd and cunning employees command respect while the the sincere ones have to swallow non-recognition [_____]

28. Good policies are not pursued and fail after initial enthusiasm [_____]

29. Employees isolate themselves from taking more responsibilities and challenges [_____]

30. Competing rather than co-operating is more esteemed [_____]

31. Power concentration is centralized and restricted [_____]

32. Employees do things that earn superiors' goodwill [_____]

33. Trusted allies are nurtured and protected [_____]

34. Consensus and unanimity is established by suppressing every objection [_____]

35. Work is accomplished by hook or crook during exigencies [_____]

36. Employees go out of their way to seek opportunities where they can develop a liking and acceptance of others [_____]

37. One is expected to win irrespective of the means he uses [_____]

38. Employees pretend interpersonal relationship are excellent even when it is not so [_____]

39. Established systems are deemed indispensable [_____]

40. Employees approve of the superiors to get their appreciation [_____]

41. Employees are encouraged to be innovative [_____]

42. Challenges are accepted and worked upon [_____]

43. Openness in dealings is encouraged [_____]

44. Employees want to advance and grow in their career [_____]

45. Employees plan things in advance and act without waiting for others [_____]

46. Employees participation in deciding policies etc. is prevalent [_____]

47. Colleagues help and co-operate irrespective of personal guide and prejudices [_____]

48. There is more involvement in group projects and activities [_____]

**INDUSTRIAL RELATIONS:**

49. Management believes in collective bargaining [_____]

50. We believe that existence of Trade Union is a barrier to the industrial growth, peace & harmony [_____]

51. Trade Union Act should be repealed [_____]

52. We practice collective bargaining to settle disputes [_____]

53. By practicing collective bargaining the I.R. have been improved [_____]

54. There is no inter union & intra union rivalry in the organisation [_____]

55. Union refrains from direct attack on production for pressurising to settle their demands [_____]

56. Management and union leadership in the organization is open, trust worthy, matured and based on democratic principles [_____]

57. Fact finding enquiries play an important role in improving I.R. [_____]

58. I.R. has been affected by the existence of the Trade Unions [_____]

59. Personnel Officers/Labour Administrator's role help minimising disputes and maintaining harmonious I.R. [_____]

60. Union avoids taking agitational recourses like morchas and gheroes on unreasonable grounds [_____]

61. Management does not encourage autocratic supervision [_____]

62. Workers work with full vigour and don't withhold their efforts [_____]

63. Most of the issues/conflicts are settled without the intervention of third party [_____]

64. Workers stick to discipline and rules of the Company [_____]

65. Workers and union avoid hostile reactions [_____]

66. Union is open and willing to negotiate on various issues [_____]

67. Management does not believe that "Discipline can be enforced by penalizing employees" [_____]

68. Employees are not castigated and reprimanded unnecessarily [_____]

69. Workers' participation in management is encouraged in various ways [_____]

70. Communication between the management and the union is effective [_____]

71. Union is generally co-operative and does not indulge in unnecessary arguments [_____]

72. Management disapproves of terminating people on unjustified grounds [_____]

73. Union does not support indiscipline [_____]

74. Workers regularly attend duties [_____]

75. Management is not overstrict in enforcing discipline [_____]

76. There is good level of understanding, inter and intrapersonal relationship between and within the management and the union [_____]

77. Management will resort to lay off or lock out, as a last alternative [_____]

78. There have been no instance of strike or lock out in the organisation in recent past [_____]

79. Workers don't indulge in causing intentional waste and inefficiency [_____]

80. Industrial Relations in organisation is untouched by changes in political scene in the country. [_____]

81. Union discourages situation that leads to unnecessary stress and tension with management [_____]

82. Labour relations remain healthy even if the company's supply and demand in market is hard hit [_____]

83. Union is flexible and does not resort to practice of `work to rule` [_____]

84. Improvement and upgradation of production technology and methods done rationally does not face union's acrimony and rejection [_____]

85. Workers and union disapprove steps like strike as a tool to resolve conflicts /issues / demands [_____]

86. Management and union are transparent in their approach and dealings. [_____]

87. Workers are aware of complete situation of organization [_____]

88. Grievances of the employees are handled rationally through a well defined grievance handling procedure [_____]

89. There is a fair amount of mutual trust between management and the union. [_____]

## CONFLICT RESOLUTION STYLE:

90. Please indicate, which one of the statement is most relevant in your organisation.

- Managers in the organization are :

[_] Less co-operative and assertive

[_] More co-operative and assertive

[_] More co-operative but less assertive

[_] Less co-operative and assertive to some extent

[_] Highly co-operative and assertive

## GRIEVANCE HANDLING MACHINERY:

91. We have effective grievance handling committee [_____]

92. Our grievance handling committee is very active [_____]

93. We involve third party member in the committee to

demonstrate transparency & bonafidenes [_____]

94. All the Complaints/Grievances are referred to the committee [_____]

95. There exists established procedure to be followed by Committee while dealing with the complaints/grievances [_____]

96. Time limit has been set to dispose of the complaint / grievance by the Committee [_____]

97. Committee's observations are implemented in its letter and spirit [_____]

98. Committee enjoys the confidence and trust of the employees [_____]

99. Committee members are not static, once in a year or two new committee members will be inducted in the place of old[_____]

100. Each and every employee knows about the existence of Grievance handling Committee [_____]

101. Role of Personnel Officer/Labour Administrators in the contest of grievance handling procedure is significant in our organisation[_____]

102. Members of the Committee are well acquainted with all the aspects of Grievance handling including education, competence, tactfulness, attitude etc. [_____]

103. The procedure for grievance handling committee has been formulated in consultation of employees/union [_____]

104. Are you satisfied with the existing grievance handling committee & procedure [_____]

**DISCIPLINARY ACTION FOR MISCONDUCT:**

105. Service Rules/Standing Orders are formulated with due consultation of employees/unions [_____]

106. We do not go for preliminary enquiry prior to regular enquiry [_____]

107. We generally initiate disciplinary action both on complaint as well as suo-moto [_____]

108. Disciplinary procedure in full and at length has been laid down in our Service Rules/Standing orders [_____]

109. List of misconducts have been enlisted in the Service Rules / Standing Orders [_____]

110. Acts of misconducts have been divided and denoted to impose minor and major penalties [_____]

111. Types of punishment to be inflicted has been denoted in the Service Rules/Standing Orders [_____]

112. There exists a separate procedure to impose minor penalty [_____]

113. There exists separate procedure to impose major penalty [_____]

114. We have in-house expertise to draft charge-sheet [_____]

115. While issuing charge-sheet we generally decide to go for a major or minor penalty [_____]

116. Sometimes we appoint enquiry officer in the charge-sheet itself [_____]

117. We also initiate disciplinary action against the misconduct committed at employee's club, Establishment Residential Colony and in public premises [_____]

118. We invariably place employees on suspension on the issuance of charge-sheet [_____]

119. We evaluate the nature of charges and other exigencies and then place a charge-sheeted employee on suspension [_____]

120. We also place employees under suspension, pending or in contemplation of charge-sheet/disciplinary proceedings [_____]

121. Once the charge sheet is issued, we see that the charges are proved by all means [_____]

122. Our Service Rules/ Standing Orders contain the procedure to impose penalty [_____]

123. Standing Orders / Service Rules contain full fledged procedure to conduct disciplinary enquiry viz. [_____]

a) Notice of enquiry
b) Appointment of E.O
c) Recording of enquiry proceedings
d) Procedure to be followed regarding admission of guilt
e) Procedure of Exparte enquiry
f) Procedure regarding workman to be represented by lawyer/ co-workmen/union leader
g) procedure regarding recording of statement & Principles of Natural Justice
h) Particulars with regard to writing of the enquiry report

124. Generally legal retainers/Advocates of the company will be appointed as the Enquiry Officer (EO) [_____]

125. Management will appoint E.O and pay remuneration [_____]

126. Workmen will have a say in the appointment of E.O [_____]

127. Presenting Officer (PO) is guided by the Co's legal team [_____]

128. E.O. is instructed by the management from time to time [_____]

129. Always charge-sheet is accompanied with the documents relied thereof [_____]

130. The delinquent employee is required to bear the cost of producing witnesses for his defence [_____]

131. Only on the specific request from the delinquent employee we supply the documents [_____]

132. Enquiry report will be submitted to the Disciplinary Authority [_____]

## SUSPENSION

133. We follow laid down procedure while suspension [_____]

134. It is pure discretion of the management to place employee under suspension [_____]

135. Generally suspension is followed by charge-sheet & vice-versa [_____]

136. No time limit for suspension period [_____]

137. Consideration of suspension as punishment [_____]

138. Revocation of suspension only after the disposal of the disciplinary enquiry [_____]

139. We pay or not to pay subsistence allowance during suspension in the discretion of the employer [_____]

140. Suspension is the right vested in the employer [_____]

## DISCIPLINARY PROCEEDINGS VIS-A-VIS CRIMINAL PROCEEDINGS

141. Our Rules contain the guidelines about the Disciplinary proceedings vis-a-vis criminal proceedings [_____]

142. There should be such codified guiding principles / norms in the matters of parallel proceedings of disciplinary and criminal [_____]

143. Criminal court order is not binding on domestic enquiry [_____]

144. Enquiry is not essential/importance on conviction in criminal case [_____]

145. Standard of proof in disciplinary enquiry & in criminal proceedings is common [_____]

## IMPOSITION OF PUNISHMENT

146. Our rules contain elaborate procedure to be followed on receipt of enquiry report [_____]

147. There should be such codified guiding procedure to be followed by the employer on and after receipt of enquiry report [_____]

148. Our Service Rules specify that enquiry report along with documents relied are to be supplied to delinquent employee.[_____]

149. We supply the Enquiry Report only on the request of the delinquent employee irrespective of the existing procedure [_____]

150. Non-furnishing of enquiry report will quash the proceedings of the enquiry held [_____]

151. Essential ingredients of valid enquiry constitutes :

a) that there are definite charges [_____]
b) evidence is adduced during enquiry [_____]
c) reasonable opportunity is given to the delinquent employee [_____]
d) findings of the E.O. on the material/evidence adduced [_____]
e) application of mind by E.O. to the material produced while concluding the findings of the enquiry [_____]
f) enquiry has been conducted following the rules/ procedures and Principles of Natural Justice [_____]

152. Generally the Personnel Officer/Labour Welfare Officer/ I.R. Cell of the establishment is not fully acquainted with the basic features/essentials of the valid disciplinary enquiry as they are not codified [_____]

153. Issuing of second show-cause notice is not a Rule of thumb [_____]

154. As soon as we receive the report of the EO, punishment will be imposed [_____]

155. Selecting the punishment is the discretion of the employer [_____]

156. We follow laid down criteria for inflicting punishment [_____]

157. We do not have codified guidelines for inflicting appropriate/ proportionate punishment [_____]

158. In case the findings are not favourable we do not agree with the findings of the EO [_____]

159. If the findings are not as per our expectations, we go for de - novo enquiry [_____]

160. We offer personal hearing before inflicting punishment [_____]

161. The disciplinary authority and appellate authority can be one and the same [_____]

162. Generally the appellate authority will not interfere in the order of punishment irrespective of existence of any alleged

anomoly in the punishment [_____]

163. Sec. 11A of the ID Act, 1947 interferes in the jurisdiction and powers of the employer in the disciplinary matters [_____]

164. One who has power to appoint has inherent right to terminate the same [_____]

165. Social justice is the basis of judicial interference in the matters of employee discipline [_____]

166. We have laid down procedure for review of the punishment [_____]

167. Generally we do not pardon the proved charges [_____]

168. We challenge the orders of reinstatement by Labour Court by way of filing appeals in the Higher Courts [_____]

**How do you agree with the following Statements?**

---

**(1) STRONGLY AGREE (2) AGREE (3) UNDECIDED (4) DISAGREE (5) STRONGLY DISAGREE**

---

169. Whatever procedure available on this day on the Disciplinary Proceedings is based on the court rulings & precedents from time to time [_____]

170. The industry badly requires codified procedures containing all nitty-gritty on the procedure of disciplinary proceedings beginning from initiation of disciplinary enquiry to inflicting punishment [_____]

171. The codified procedure may clear existing doubts and pave foundation for restoring confidence and transparency in the matters of disciplinary proceedings between employer and employee[_____]

172. Not satisfied with the patch work quasi legislation being done by the judiciary in the matters of disciplinary proceedings by way of giving rulings from time to time [_____]

173. Industrial Employment (Standing Order) Act, 1946, respective State Shops & Establishment Acts and Conduct, Rules and Regulations of the PSU's, autonomous bodies, Public Cos., must possess the codified Rules
regarding procedure to be followed while initiation and conducting

disciplinary proceedings. [_____]

Please list down any other modes of responding which you think are not covered by the list above, and rate each using the same rating scale.

174. _____ _____

175. _____ _____

176. _____ _____

177. _____ _____

178. _____ _____

180. _____ _____

181. _____ _____

Any other comments, ideas or information you wish to share are welcome. Please mention them briefly in the space below.

***THANK YOU***

**Appendix – 2**

## List of articles published by researcher during the study for this PhD degree:

01. Assessment of sales tax vis-à-vis works contract tax – Indian context
02. Soliciting assistance of co-employee /lawyer in the disciplinary enquiry – judicial structure
03. Implications of employment of personnel on fixed term contract – views of the Supreme & below.
04. Whether P F is required to deducted / contributed foe personnel engaged as consultants / experts?
05. Proposition of law holding the field – on admission of guilt during / prior disciplinary enquiry
06. Whether perks made under productivity Bonus / Incentive schemes will attract the EPF Act?
07. Principles of retrospective operation of law and ultravires
08. The Report of the Second Indian National Labour Commission – 2002 an overview
09. Re-visiting chapter VB of the Industrial Disputes Act with special reference to the retrenchment and approach
10. Thesis by the Court of Highest wisdom on anti-thesis of acts committed out side the precincts of employment
11. Judicial activism by the court of Supreme wisdom in the matters of employees (statutory-non-statutory) vis-à-vis section 46 of the Factories Act, 1946.

12. General principles of law holding the field in the matters termination of contract of agency (agreements)

**<u>Books under advanced stage of publication</u>**:

13. A nutshell of Contract (R&A), 1970 r/w Rules 1971 with a capsule of ratio decidendi and full text judgements of the Supreme Court – up to 2005.
14. F A Q's under Labour Legislations.

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