The Management Of L And T Komatsu Limited ... vs Larsen And Toubro Employees ... on 29 October, 2007

Equivalent citations: ILR2008KAR326, 2008 LAB. I. C. (NOC) 233 (KAR.) = 2008 (1) AIR KAR R 247, 2008 (2) AJHAR (NOC) 378 (KAR.) = 2008 (1) AIR KAR R 247 2008 (1) AIR KAR R 247, 2008 (1) AIR KAR R 247, 2008 (1) AIR KAR R 247 2008 (2) AJHAR (NOC) 378 (KAR.) = 2008 (1) AIR KAR R 247, 2008 (2) AJHAR (NOC) 378 (KAR.) = 2008 (1) AIR KAR R 247

Author: N. Kumar

Bench: N. Kumar

ORDER

N. Kumar, J.

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1. W.P.No. 38974/99 is preferred by the Management of Larsen & Toubro Komatsu Limited challenging the award of the Labour Court dated 13.8.99 passed by the Industrial Tribunal, Bangalore, in I.D.No. 12/97, in so far as it pertains to reinstatement of four employees. W.P.No. 29500/2000 is preferred by the Larsen & Toubro Employees Association and its four workmen who were dismissed from the service challenging the very same award in so far as it denied hack wages and wages for the strike period and for other reliefs. As in these writ petitions what is impugned is the common award passed by the Industrial, Tribunal these writ petitions are taken up for consideration together, heard and disposed of by this common order.

2. The facts in brief leading to the impugned award are as under:

> Larson and Toubro Komatsu Limited is a leading engineering industry in India with an annual turn over of more than Rs. 4,300/- crores, on the date of the writ petition. It is having a factory in Bangalore called as L&T Bangalore Works. It employed about 1200 employees including 795 workmen. (The said company for short hereinafter referred to as "the Management") Larsen & Toubro Employees' Association is a recognised Union (for short hereinafter referred to as "the Union"). The last settlement before the dispute, was entered into between the Management and the union, came to an end on 31.12.1993. The Union by a notice dated 31.10.93 terminated the settlement and placed a charter of demands for revision of pay scales, DA and other service conditions. The management also submitted its requirements

by its letter dated 20.3.94. When negotiations were initiated on the charter of demands, the Management impressed on the Union that it is imperative that the productivity of the workmen should be considerably increased and a substantial increase in wages could be considered only by augmenting the gains of improved productivity. The Union agreed in principle that there was scope for improving the productivity and therefore the Management's requirements which primarily sought for improvement in productivity and work practices were discussed simultaneously along with the charter of demands. The Management demanded that the workman should maintain not less than 90% efficiency in computer controlled machine and 80% in conventional machines. The Management also required that the operators in gas cutting operation should perform a minimum of 5 hours of gas cutting operation in a shift of 8 hours. After protracted discussions and negotiations consensus was reached as to the revision of the work norms viz. 90% efficiency in CNC machines, 80% efficiency in non CNC machines and gas cutting of 5 hours per shift and CO2 Arc welding of 1.5 hours by 0.5 hours, more than the average of the arcing hours done during the period October to December 94 and various other work practices. In Page 2519 fact, the negotiations on the charter of demands were held over a period of 18 months spread over 71 meetings and 250 hours of discussion. The Union published bulletin dated 10.3.95 and on 13.08.1995 informing the workers of agreed terms. Thereafter the parties felt that the proposed settlement should be made at tripartite level so that it will be binding and the fairness of the settlement would not be open to any criticism at a later stage. The understanding reached regarding productivity, measurement and improvements can be spelt out in a broader sense in the settlement and the details of productivity measurements and improvements could be incorporated in a memorandum of understanding.

3. On 16.8.95 the representatives of the Management, office bearers and executive committee members of the Union went to the office of the Commissioner of Labour and in the presence of the Commissioner of Labour and the Joint Labour Commissioner participated in the meeting and signed the settlement which was also signed by the Conciliation Officer. Similarly, all the persons who have signed the settlement, except the Conciliation Officer have also affixed their signature to the minutes of understanding. Within a fortnight of signing the settlement and the minutes of understanding, copies of the same were furnished to each and every workman of the company. It is the contention of the Management that a perusal of the Article-II of the settlement dated 16.8.95 and the terms of the Memorandum of Understanding would show that they are integral and formed part of the same transaction. They are interlinked and contain mutual and reciprocal rights and obligations. In other words, the Management agreed to various increases in emoluments and improvements in the service conditions, in consideration of the various commitments and obligations undertaken by the workmen to improve the productivity. It would appear that after signing of the settlement and Memorandum of Understanding, intra-union rivalry in the union developed and as a result one faction of workmen wanted to make the settlement unworkable and they carried on a virulent propaganda, that under the settlement the increase in wages given to the workman was not commensurate with the increase in the workload. It is in this context some of the welders in the fabrication department not only did not improve their arcing hours but some of them

did not reach even the minimum level of 1.5 arcing hours. All Counselling and persuasions on the part of the Management to make the welders improve their working hours were of no avail. Though many welders did not perform the arcing hours as per the minutes of understanding, Management decided to take disciplinary action against those welders who not only gave poor performance but were persistent in such poor performance and loading others to poor performance. The rival faction of the Union resorted to various disruptive activities and succeeded in mobilizing a large number of workmen to develop a hostile attitude towards the Management. This rival group also created a perception among a large majority of the workmen that under the settlement dated 16.8.95 they did not get a fair deal from the Management. Serious allegations were made against the office bearers of the Union accusing them of colluding with Page 2520 the Management and acting against the interest of the workmen. Faced with this situation, the then existing office-bearers resigned from the Union and a fresh election was held. On 19.5.96 the new set of office bearers were elected to the Union.

4. The Management initiated disciplinary action against five workmen including Sriyuths Prabhakara, Ebinezer, Ranganath and Subash (hereinafter referred to as the concerned four workmen). Charge sheets were issued to all the five workmen for their failure to achieve the performance of arcing hours as per the Minutes of Understanding dated 16.8.95. As explanation offered by them were not satisfactory they were asked to appear for an enquiry into the charges levelled against them. Separate domestic enquiries were held against all the five of them. After enquiry the Enquiry Officer found all the five of them guilty of the charges levelled against them. On 8.5.96 a copy of the findings was forwarded to the five workmen proposing punishment of dismissal and calling upon them to show cause why the said punishment should not be imposed. At that time on 19.5.96 the new office-bearers of the Union represented to the Management that the five workmen be given an opportunity to mend their ways and the Management agreed for the same, provided they make individual representations to that effect. All the five workmen gave letters of undertaking on 13/14.8.96 that they would achieve the arcing hours as per the settlement dated 16.8.95 and the disciplinary action may be dropped. In deference to their undertaking the consideration of the proposed punishment was kept to abeyance. However, out of the five workmen Sri. Shanker alone kept up his promise and improved his performance while the other four concerned workman did not make any effort to improve their performance. Accordingly on 14/15.11.96 orders were passed dismissing the concerned four workmen.

5. Challenging the aforesaid order of dismissal all the four workmen raised industrial dispute under Section 2A of the Industrial Disputes Act. Apprehending that similar disciplinary action may be taken against the other workmen the new office bearers of the Union accusing that the settlement and Memorandum of Understanding entered into by the previous office bearers was against the interest of workmen called a General Body Meeting on 23.12.96 and they passed resolution to go on strike from 21.1.97. The Union wanted to review all the terms of settlement and the Memorandum of Understanding for which the Management did not agree. An industrial dispute was raised before the Conciliation Officer and after conciliation having failed the Government of Karnataka referred the following points of dispute for adjudication.

(a) Whether the Minutes of the Management of M/s. L&T Ltd., Bangalore Works, Bellary Road, Bangalore-97 and Larsen and Toubro Employees Association held on 12.8.95, 30.6.95, 1.3.95, 17.1.95 and earlier which is purported to have been signed on 16.8.95 is in contradiction with the terms of the settlement under Section 12(3) dt. 16.8.95?

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(b) Are the Clauses 3(1)(a)(b)(c)(d) and 2 are mandatory in nature and if not whether the said Management are justified in asking the workmen to give production as enunciated in the settlement dt. 16.8.95?

(c) If not, whether the said Management are justified in dismissing the following employees on the ground of not giving production based on the said Minutes dt. 16.8.95?

(a) Prabhakara 15.11.96

(b) Ebenezer 15.11.96

(c) Ranganath 15.11.96

(d) Subash 15.11.96

(d) If not, to what relief(s) the workman are entitled?

II(a) Whether the workmen represented by Larsen and Toubro Employees Association, Bangalore, are justified in demanding the wages for the period off strike started from 21.1.1997?

(b) If not, to what relief(s) the said workmen are entitled to?

6. Before the order of dismissals were passed against the four workmen, Industrial Dispute No. 119/91 was referred to labour court by the Government where question involved was regarding non-payment of wages to three workmen i.e., Ebenezer, Ranganath and Prabhakar who did not work on 3.10.90, 4.10.90 and 5.10.90. Therefore the management as required under Section 33(2)(b) of the Industrial Disputes Act paid one month's wages by way of cheque to the aforesaid three workmen and made application for approval of the action taken against them. Those applications were numbered as M.A.No. 28, 29 and 30/96. In all the said applications the said workmen were served. They entered appearance through counsel. It is thereafter they revised industrial dispute under Section 10(4A) of the Act before the labour court challenging the order of their dismissal.

7. Against the order of reference dated 21.4.97 the Management preferred Writ Petition No. 13898/97 before this Court. On 17.4.98 the said writ petitions were disposed of holding that the challenge to the order of reference depends on facts and that all the points raised by the

Management could be urged during trial of the dispute before the Tribunal. However as the order of reference dated 21.4.97 did not correctly reflect the points of dispute this Court re-framed the points of dispute, as under:

> (1) Whether the Management and the Employees Association of L&T, Bangalore Works, Bangalore, entered into a Memorandum of Understanding dt 16.8.1995?
>
> (2) Whether the said Memorandum of Understanding was part and parcel of the Memorandum of Settlement dated 16.8.95 and as such, binding on the parties under Section 18(3) of the Industrial Disputes Act, 1947?
>
> (3) Even otherwise, whether the Memorandum of Understanding dated 16.8.95 is an agreement independently binding on the parties?

Page 2522 4(A) Whether the Management is justified in dismissing the following workmen on the ground that they did not reach the work norms as stipulated in M.O.U?

(a) Prabhakar

(b) Ebenezer

(c) Ranganatha

(d) Subash (B) If not, to what relief/s are the said workman entitled.?

5) Whether the workmen of the L&T of Bangalore Works are justified in demanding wages for the period of strike from 21.1.1997?

8. The Industrial Tribunal numbered the dispute as I.D.No. 12/97. Both parties filed their pleading. Thereafter the Tribunal proceeded to frame the following additional issues:

> (1) Whether the reference is not maintainable in view of the settlement and dispute is not existing to refer for adjudication?
>
> (2) Whether the I party proves that their workmen have only authorized the office-bearers of the Union to sign the settlement and not the Memorandum of Understanding?
>
> (3) Whether the I party is justified in going on strike with effect from 21.1.97 for 99 days protesting against the Memorandum of Understanding and dismissal of 4 workmen and are entitled for strike period wages?
>
> (4) Whether the Domestic Enquiry held by the II party against the workmen, viz., Prabhakar and three others is fair and proper?

(5) Whether the dismissal order of the four workmen have been passed by the competent authority?

(6) Whether the dismissal of four workmen is due to unfair labour practice and victimisation?

(7) What order?

9. Thereafter evidence was adduced before the Tribunal on the question of validity of domestic enquiry. The Tribunal by order dated 2.2.99 held that the enquiry into the charges against Prabhakar, Ebenezer, Ranganatha were fair and proper and they were not vitiated. But in so far as enquiry held in respect of charges against Subash was concerned it held that it is not fair and proper. In so far as Subash was concerned the Management led independent evidence before the Tribunal to substantiate the charges levelled against him. The Union also led evidence. On consideration of the material placed before it the Industrial Tribunal proceeded to pass the impugned award dt. 13.8.99, and has held as under:

(a) The Tribunal held that the Minutes of Understanding in Ext.M-40 is part and parcel of Memorandum of Settlement Ext.M-50 and without Memorandum of Understanding Ext.M-40. Memorandum of Settlement Ext.M-50 cannot be acted upon and cannot fee given affect to and therefore Ext.M.-40 it binding on the workmen.

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(b) The workmen were not entitled to wages for the period of strike.

(c) The misconduct alleged against the four workmen is proved and they have performed less arcing hours when compared to that of others.

(d) When consideration of punishment was kept in abeyance giving an opportunity to the workmen to correct themselves and thereafter without giving any further opportunity to the concerned four workmen, the order of dismissal issued is one which offends the principles of natural justice as there is nothing to show that they have not improved their performance during the period from 16.8.96 to 15.11.96

(e) Therefore, the punishment of dismissal is grossly disproportionate to the charges levelled and proved against the concerned workmen.

(f) The Tribunal directed reinstatement of the four workmen with continuity of service, but without backwages.

Both parties, being aggrieved by that portion of the award which is against them have preferred three writ petitions.

10. During the pendency of these writ petition on 19.12.2002 a memo was filed to the effect that the Management has made it a condition that unless workmen with-drew Writ Petition No. 29500/2000 regarding subject matter of earlier settlement Ex.M-50 and the Memorandum of Understanding Ex.M-40 no fresh settlement can be signed. The Association accepted the said condition subject to the right of the association to continue the case in respect of four workman. Therefore without prejudice to the aforesaid right, the Union did not press their prayer in W.P.No. 29500/2000 pertaining to Memorandum of Understanding dated 16.8.95. Accordingly, the memo was recorded. Acting on the said order the Union entered into fresh settlement in respect of demands pertaining to pay scales, work load and other condition.

11. Learned Senior Counsel Sri K. Subba Rao contended on behalf of the Union and the Workmen as follows:

> 1) The allegations made in the charge sheet to the effect that the workmen did not give 1.5 arcing hours would not constitute a misconduct in the eye of law or under the Standing Orders. Therefore, the entire disciplinary proceedings initiated against the workmen are one without jurisdiction and liable to be quashed.
>
> 2) The said misconduct is based on the clause in the Memorandum of Understanding Ex.M-40 where the target of 1.5 arcing hours has been fixed and the said Memorandum of Understanding is not binding on the workmen as it does not satisfy the requirements as contained under Section 2(p), 12 and 18 of the Act and Rule 59 (Rule 58 of the Central Rules).
>
> 3) The domestic enquiry conducted against these workmen is not valid and legal and therefore the finding recorded by the labour court to that effect is erroneous. Even the finding of misconduct recorded by the labour court after appreciating the independent evidence adduced in respect of Subash is contrary to law. As such these findings are liable to be quashed.

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4) After the management served a notice an these workmen along with a copy of enquiry report and in reply to the same when these workmen gave an undertaking to give them an opportunity to improve their performance, thereafter, without holding any fresh enquiry, without there being any material to show that they did not reach the stipulated target, the imposition of punishment of dismissal is illegal as it offends the principles of natural justice and fair play.

5) Though a memo is filed on behalf of the Union withdrawing the writ petition challenging the finding of the labour court regarding Ext.M-40 i.e., the Memorandum of Understanding, Union has reserved its right to prosecute the writ petitions in so far as dispute regarding dismissal of four employees. While doing so, it is open to them, to contend that EX.M-40 is not binding on those four workmen as it does not satisfy the requirement of law as prescribed in the statute.

6) When once the labour court held that the dismissal was bad it committed an error in not granting full back wages and consequential benefits to the four workmen.

7) The order of dismissal is bad as it is contrary to the law declared by the Supreme Court in the case of JAIPUR ZILLA SAHAKARI BHOOMI VIKAS BANK LTD.

12. Per contra, Sri Vijayashankar, learned Senior Counsel appearing for the management contended as under:

> (1) when the Union filed a memo with-drawing the Ex.M-40 it not open to them or to the four workmen to contend that Ex.M-40 is not legal and binding and therefore the finding recorded by the labour court in this regard requires to be affirmed.
>
> (2) When once labour court held that Ex.M-40 is part of Ex.M-50 and is binding on all the parties, it ought to have answered all the issues in favour of the management and it was in total error in holding that the order of dismissal is bad and in ordering reinstatement, as the said findings are outside the scope of reference.
>
> (3) Section 11A has no application to the facts of this case, because the only question which was for consideration before the Tribunal was Whether Ex.M-40 is binding on the parties or not and whether the order of dismissal passed is justified or not and in that view of the matter the Tribunal exceeded its jurisdiction in interfering with the order of dismissal and ordering reinstatement.

13. In view of the aforesaid facts and rival contentions, the points that arise for consideration are as under:

> 1) Whether the non-performance of the stipulated arcing hours by the four workmen amounts to misconduct?
>
> 2) Whether Ext.M-40 is binding on all the workmen?
>
> 3) In view of the memo filed by the Union withdrawing the challenge to the award holding that Ext.M-40 is binding on all the workmen is it open to the Union or for the workmen to challenge the validity of Page 2525 Ext.M-40 while questioning the order of dismissal passed against the four workmen?
>
> 4) Whether the order of dismissal is void for non-compliance of Section 33(2)(b) of the Industrial Disputes Act?
>
> 5) Whether the finding of the Industrial Tribunal on the question of domestic enquiry in respect of three workmen and the finding of misconduct recorded by the Tribunal in respect of Sri. Subash calls for any interference?

6) Whether the Tribunal was justified in going to the legality of the order of dismissal, and was it outside the scope of reference?

7) Whether the Industrial Tribunal was justified in exercising its power under Section 11A and interfering with the order of dismissal and ordering reinstatement of the four workmen?

14. Now let me consider these points in seriatim wise.

POINT NO. 1 - MISCONDUCT:

15. The question for consideration is whether non-performing the stipulated arcing hours would constitute a misconduct when the same is not stipulated so in the certified standing orders of the company. The Supreme Court in the case of State of Punjab and Ors. v. Ram Singh Ex.Constable reported in 1992 LAB.I.C. 2391, had an occasion to consider what a misconduct means. It has been held that 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 behavior, willful in character, forbidden 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.

16. The Supreme Court in the case of Rasiklal Vaghajibahi Patel v. Ahmedabad Municipal Corporation and Anr. , has held that unless either in the Certified Standing order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and punish the workman even though the alleged misconduct would not be comprehended in any of the enumerated misconduct.

17. The Supreme Court in the case of Mahendra Singh Dhantwal v. Hindustan Motors Ltd. reported in 1976 (II) LLJ 259, has observed that Standing Page 2526 Orders of a company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct which a workman may commit. What is misconduct will naturally depend upon the circumstances of each case. When there are standing orders, there would be no difficulty because they define misconduct. In the absence of the Standing Orders, however, the question will have to be dealt with reasonably and in accordance with commonsense. As to what acts can be treated as acts of misconduct, therefore, would depend on the facts and circumstances of each case. The expression 'misconduct' covers a large area of human conduct. 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. To some extent, misconduct is a civil crime which is visited with civil and pecuniary consequences.

18. In Bank of India v. T.S. Kelawala and Ors. reported in 1990(2) LLJ 39, the Supreme Court has held that whenever a worker indulges in a misconduct such as a deliberate refusal to work, the employer can take a disciplinary action against him and impose on him the penalty prescribed for it which may include some deduction from his wages. It is not a mare presence of the workmen at the place of work but the work that they do according to the terms of the contract which constitutes this fulfillment of the contract of employment and for which they are entitled to be paid. There cannot be two opinions that 'go-slow' is a serious misconduct being a covert and a more damaging breach of the contract of employment. It has been roundly condemned as an industrial action and has not been recognised as a legitimate weapon of the workmen to redress their grievances. In fact the model standing orders as well as the certified standing orders of most of the industrial establishments define it as a misconduct and provide for a disciplinary action for it. Hence once it is proved, those guilty of it have to face the consequences which may include deduction of wages and even dismissal from service.

19. The Supreme Court in the case of Bharat Sugar Mills Ltd v. Jai Singh and Ors. reported in 1961-62 FJR (Vol.21) 118, has held that Go-slow is, therefore, a serious type of misconduct and no employer can be accused reasonably of male fides or of revengefulness if he propose punishment of dismissal for such conduct.

20. The expression 'misconduct' has not been defined either in the Industrial Disputes Act, 1947 or in the Industrial Employment (Standing Orders) Act, 1946. The dictionary meaning of the word misconduct are 'improper behaviour'; intentional wrong doing or deliberate violation of a rule of standard of behaviour. In so far as the relationship of industrial employment is concerned, a workman has certain express or implied obligations towards his employer. Any conduct on the part of an employee Page 2527 inconsistent with the faithful discharge of his duties towards his employer would be a misconduct. Any breach of the express or implied duties of an employee towards his employer, therefore, unless it be of trifling natures would constitute an act of misconduct. In industrial law, the word 'misconduct' has acquired a specific connotation. It cannot mean inefficiency or slackness. It is something far more positive and certainly deliberate. The charge of 'misconduct' therefore is a charge of some positive act or of conduct which would be quite incompatible with the express and implied terms of relationship of the employee with the employer. What is misconduct will naturally depend the circumstances of each case. In any case the act of misconduct must have some relation with the employee's duties to the employer. In other words, there must be some rational correction of the employment of the employee with the employer. If the act complained of is found to have some relationship to the affairs of the establishment, having a tendency to affect or disturb the peace and good order of the establishment or be subversive of discipline in any direct or proximate sense, such act would amount to misconduct. Conversely, if the act complained of has no relation to his duties towards his employer, it would not be an act of misconduct towards his employer. The Model Standing Orders lists the acts and omissions which shall be treated as misconduct. It is not exhaustive. It is only illustrative. There may be many more acts which may constitute misconduct. It is not possible to provide for every type of misconduct in the Standing Orders for justifying disciplinary action against the workman.

21. It is not enough that the employees attend the place of work. They must put in the work allotted to them. It is for the work and not for their more attendance that the wages/salaries are paid. Deliberate delaying of production by workmen pretending to be engaged in the factory, is one of the most pernicious practices that discontented or disgruntled workmen sometimes resort to. It is almost dishonest in that the workmen claim full wages for the reduced output and it is more harmful to the industry than total cessation of work by strike.

22. Go-Slow - Slow-down or go-slow, whether as a concerted action by the workmen or by an individual workman, in reducing production is a breach of duty and has been condemned as misconduct in industrial adjudication. An employee who deliberately works slowly and thereby curtails production or does not complete a job in proper time, is guilty of intentional omission of duty, which would constitute misconduct. It is a serious misconduct as it is an insidious method of undermining the stability of a concern. For while delaying production and thereby reducing output, workmen claim to have remained employed and thus to be entitled to full wages. Go-slow may be indulged in by an individual workman either in one section or different sections or in one shift or both shifts effecting the output in varying degrees and to different extent depending upon the nature of the product and the productive process. Misconduct of go-slow may entail two-fold consequences viz., discharge or dismissal from service and deduction of wages. In either case, it is necessary that the factum of go-slow and/or extent of the loss of Page 2528 production on account of it, is disputed, there should be a proper enquiry on the charges which furnish particulars of go-slow and loss of production on that account.

23. Therefore, reduced production, refusal to give the agreed out put, deliberately working slow, not completing the job in a proper time, is a breach of duty. It is a crude device to defy the norms of work. It is dishonesty, in as much as, the workman claim wages for the work which he has not done, and claims full wages for the reduced out put. The workmen is guilty of intentional omission of duty. It has been condemned as misconduct in Industrial adjudication. It is not a case of inefficiency or slackness. It is a positive act. It is quite incompatible with the express and implied terms of relationship of master and servant. That is the edifice of contract of employment. It need not be specifically mentioned in the contract of employment or in the standing orders. Standing orders lists the acts and omissions which shall be treated as a misconduct and it is not exhaustive. It is not possible to provide every type of misconduct in the standing orders. At the same time, an employer cannot fish-out some conduct as misconduct and punish the workman even though the alleged misconduct could not be comprehended in any of the enumerated misconduct. Therefore, not performing the stipulated work deliberately and not giving the agreed out put for which wages are paid and received constitute a grave misconduct and is one of the most pernicious practices that harm the industry than the total cessation of work.

24. Therefore, workmen not giving 1.5 arcing hours in the instant case would constitute misconduct notwithstanding the fact that the same is not one of enumerated misconduct under the standing orders.

POINT No. 2 & 3 - SETTLEMENTS:

25. Section-18 divides settlements and awards into two categories. The first category consists settlements which are arrived at by agreements between the employer and workmen otherwise than in the course of any conciliation proceedings. This category is envisaged by Sub-sections (1) and (2). The second category consists of settlement which are arrived at in the Conciliation proceedings before a Conciliation Officer or the Board and the awards of the adjudicatory authorities viz., the Labour Courts, Tribunals or National Tribunal. The binding effect of settlements and awards falling under the two categories is also different. The employer, of course, is a common party in both types of settlements and awards, but workmen who get bound by settlements and awards falling under the first category are only those workmen who were parties to the agreement in the case of settlement or were parties to the reference made to a private arbitrator. However, the case is different in respect of settlements and awards falling under the second category.

26. Normally, it is the union or representatives of the employees who enter into agreements with the employer. All the employees do not as a matter of fact become parties to the agreement. But the settlement signed by such representatives binds on those whom they represent. Therefore, the terms Page 2529 of the settlement become a part of the contract of employment of each individual workman represented by such representatives. If such a settlement is arrived at between the employer and the union representing majority of workmen, it shall not be binding on the union which represents the minority of the workmen which was not a party to that settlement.

27. Rule 58 of the Industrial Disputes (Central) Rules 1957, provides that a settlement arrived at in the course of the conciliation proceedings or otherwise shall be in Form-H and prescribes the persons by whom the Memorandum of Settlement can be signed on behalf of the employer and the union respectively. A settlement becomes binding at once as soon as the Memorandum of Settlement has been signed by the parties in the prescribed manner and a copy of it is sent to the Government and the Conciliation Officer and it comes into operation on the date it is signed or on the date which might he mentioned in it for its coming into operation. The requirements of a settlement being in prescribed form and jointly sending copy of the Memorandum of Settlement of the Central Government is merely directory and it cannot be mandatory on the proper construction and understanding of this Rule.

28. The Supreme Court in the case of State of Madras v. C.P. Sarathy reported in AIR 1953 SC 53 observed that, in view of the increasing complexity of modern life and the interdependence of the various sectors of a planned national economy, it is obviously in the interest of the public that labour disputes should be peacefully and quickly settled within the frame work of the Act rather than by resort to methods of direct action which are only too well calculated to disturb the public peace and order and diminish production in the country and courts should not be astute to discover formal defects and technical flaws to overthrow such settlements.

29. The Supreme Court in the case of The Bata Shoe Co. (P) Ltd v. D.N. Ganguly and Ors. reported in AIR 1958 SC1158, dealing with the meaning of the words, "in the course of conciliation proceedings" appearing in Section 18 of the Act, held that one thing is clear that these words referred to the duration when the conciliation proceedings are pending. Referring to Section 18 of the Act it is clear beyond doubt that a settlement which is made binding under Section 18 on the

ground that it is arrived at in the course of conciliation proceedings is a settlement arrived at with the assistance and concurrence of the conciliation officer, for it is the duty of the conciliation officer to promote a right settlement and to do everything he can to induce the parties to come to a fair and amicable settlement of the dispute. It is only such a settlement which is arrived at white conciliation proceedings are pending that can be binding under Section 18. Therefore, it was held that the actual agreement could not be called a settlement arrived at in the course of conciliation proceedings even though it may be accepted that it was arrived at, at the time when conciliation proceedings were pending. A settlement which can be said to be arrived at in the course of conciliation proceedings Page 2530 is not only to be arrived at during the time the conciliation proceedings are pending but also to be arrived at with the assistance of the conciliation officer and his concurrence, such a settlement would be reported to the appropriate Government under Section 12(3).

30. The Supreme Court in the case of Workmen of Delhi Cloth and General Mills Ltd v. Delhi Cloth and General Mills Ltd. reported in 1972(1)LLJ 99, after referring to Rule 58 of the Industrial Dispute (Central Rules 1957 made under Section 38 of the Industrial Disputes Act, 1947, held that the plain reading of the Rule and the Form, clearly suggests its mandatory character. The question of a valid and binding settlement is governed by statute and the rules made thereunder. In the light of these provisions and in particular Section 18(1) vests with the management and the Union unfettered freedom to settle the dispute as they please and clothes it with a binding effect on workmen or even on all member workmen of the union. The settlement has to be to compliance with the statutory provisions.

31. The Supreme Court in The case of Tata Chemical v. The Workmen Employed Under Tata Chemicals Ltd , held that the analysis of Section 2(p) of the Act would show that it envisages two categories of settlement (i) a settlement which is arrived at in the course of conciliation proceeding, i.e., which is arrived at with the assistance and concurrence of the Conciliation Officer who is duty bound to promote a right settlement and to do everything he can to induce the parties to come to a fair and amicable settlement of the dispute and (ii) a written agreement between employer and workmen arrived at otherwise than in the course of conciliation proceeding.

32. For the validity of the second category of settlement, it is essential that the parties thereto should have subscribed to it in the prescribed manner and a copy thereof should have been sent to an officer authorised in this behalf by the appropriate Government and the Conciliation Officer. Further it was stated that a bare perusal of Section 18 would show that whereas a settlement arrived at by an agreement between the employer and the workmen otherwise than in the course of conciliation proceeding is binding only on the parties to the agreement, a settlement arrived at in the course of the conciliation proceedings under the Act is binding not only on the parties to the industrial dispute but also on the other persons specified in Clauses (b), (c) and (d) of Sub-section (3) of Section 18 of the Act.

33. In the case of Brooke Bond India Ltd v. The Workmen , the Supreme Court held that normally in order that a settlement between the employer and the workmen may be binding on them, it has to be arrived at by agreement between the employer and the workmen. Page 2531 Where the workmen are represented by a recognised Union, the settlement may be arrived at between the employer and

the Union. If there is a recognised Union of the workmen and the Constitution of the Union provides that any of its office bearers can enter into a settlement with the management on behalf of the Union and its members, a settlement may be arrived at between the employer and such office-bearer or bearers. A reading of Section 65(2)(b) of the Rules clearly shows that it presupposes the existence of a settlement already arrived at between the employer and the workmen and it only prescribes the form in which the Memorandum of settlement should be and by whom it should be signed. It does not deal with the entering into or arriving at a settlement. Therefore, where a settlement is alleged to have been arrived at between an employer and one or more office-bearers of the Union and the authority of the office-bearers who signed the memorandum of settlement to enter into settlement is challenged or disputed the said authority or authorisation of the office bearers who signed the memorandum of settlement has to be established as a fact, and it is not enough if the employer merely points out and relies upon the fact that the Memorandum of settlement was signed by one or more of the office-bearers of the Union.

34. The Supreme Court in the case of the Workmen, Hindustan Lever Ltd v. The Management of Hindustan Lever Ltd. reported in 1984 Lab.I.C. 388, has held that the employer which swore by the agreement and repeatedly succeeded in getting thrown out certain reference at the threshold on account of the agreement, now wants to contend that there was no concluded agreement and ignoring the whole history, the Tribunal falls into an error in accepting this contention. The weight of evidence not only not at all referred to by the Tribunal but frankly wholly ignored clearly and unmistakably lead to one and one conclusion alone that according to the employer there was the concluded agreement between the parties. It is a solemn agreement, the agreement of which effective and wholesome advantage has been taken by the employer and when it now does not suit it, it in breach of the solemn agreement wants to turn round and not only repudiate it but disown it as having never been entered into. No court of justice can ever permit such a thing to be done. It was held that the employer was estopped from challenging the agreement in view of his conduct throughout.

35. In the light of the aforesaid clear enunciation of law by the Supreme Court, the question for consideration is whether the four workmen involved in these proceeding are bound by Ex.M.40, the Memorandum of understanding entered to into between the Management and the Union. EX.M.50 is the Memorandum of settlement entered into between the Management and the Union, which is not in dispute, Conciliation Officer also is a party to the said settlement and he also has affixed his signature. The only difference between Ex.M.50 and M.40 is that to Ex.M.40 Conciliation Officer is not a party and he has not affixed his signature. Therefore, the said settlement falls under Section 18(1) and (2) of the Act and not under Section 18(3) of the Act. Then to make it binding and effective, Page 2532 Rule 58 has to be complied with. In the instant case admittedly Rule 58 is not complied with. Therefore, it was contended that Ex.M.40 is not binding on the four workmen, as the said Rule has been held to be mandatory. There is a divergent opinion on this aspect. In all the aforesaid cases the question was whether the settlement was binding on the Management and Union, in the absence of compliance of Ex.M.40. But, that is not the case here. In the instant case, the question is when the union accept the settlement, whether the workmen who are its member; can contend that the settlement is not binding on them.

36. It is not in dispute that the Union contested the Memorandum of Understanding Ex.M-40 as not binding on them as Rule 58 of the Rules has not been complied with. The Labour Court on consideration of the said objection held that Ex.M-50 is part and parcel of Memorandum of settlement and without Ex.M-40, Ex.M-50 cannot be acted upon and given effect to. Therefore, Ex.M-40 is binding on the workmen and thereafter, proceeded to pass the impugned award.

37. The Union and the aforesaid workmen preferred these writ petitions challenging the award of the Labour Court including the aforesaid finding regarding the binding nature of Ex.M-40. However, during the pendency of these writ petitions the Union negotiated with the management in respect of various matters pertaining to pay scales and other conditions of service including work load. In the said negotiations, the management made it clear that unless the Union withdrew the writ petition in W.P.No. 29500/2000 regarding subject of the earlier settlement Ex.M-50 and the Memorandum of Understanding Ex.M-40, no fresh settlement will be signed. The Union accepted the aforesaid condition, subject to the right of the Union to continue the case in respect of four workmen. The management accepted this condition. Therefore, without prejudice to the contentions of the Union to continue the case pertaining to four workmen and without prejudice to all the contentions which they have urged in Writ Petition No. 29500/00, the Union agreed not to press their prayer pertaining to Memorandum of Understanding dated 16.08.1995 in these writ petitions. In this regard they filed a memo and requested that the same may be recorded with a view to facilitate the Union and the management to sign a fresh settlement in respect of demand pertaining to pay scales, work load and other conditions of service. The aforesaid dated 19.12.2002 is duly signed by the representatives of the Union and their Advocate. Accordingly, this Court has recorded the said memo. It is not in dispute that thereafter negotiations took place between the Union and the management and they have entered into fresh settlement which is also given effect to.

38. Therefore, it is clear that the Union accepted Ex.M-40 the Memorandum of Settlement as binding on them and they gave up their challenge to the award of the Labour Court holding that the said Ex.M-40 is binding on the Union. The aforesaid four workmen are the members of the Union which is not disputed. In fact, one of the workmen namely Ebenezer has signed Ex.M-40 and M-50 as an office bearer of the said Page 2533 Union. Once, the Onion accepts the settlement and acts on the same and gives up its right to challenge the binding nature of such settlement, it is not open to a workman belonging to the said Union to challenge the binding nature of the said settlement. Ex.M-40 equally binds the aforesaid four workmen and they have no right to contend that it is not binding on them.

39. The learned Counsel for the workman contended that as it is clear from the aforesaid memo, the Union has reserved its right to challenge Ex.M-40 while putting forth the case of aforesaid workmen and therefore, the aforesaid memo will in no way take away the right of the Union or the workmen to challenge the binding nature of Ex.M-40. Therefore, it is necessary to carefully consider the tenor of the said memo. It reads as under:

> 1. Larsen & Toubro Employees' Association' Association (hereinafter referred to as the 'Association' for short) is a registered Association registered under the Trade Unions Act. The Association represents the Workmen employed in the L & T

Komatsu Limited.

2. Writ Petition No. 29500/2000 (L) connected with Writ Petition No. 29945 to 299457/2000 (L) were filed by the workmen challenging the award dated 13-8-1999 made in ID No. 12/1997 on the file of the Industrial Tribunal, Bangalore. That Award has also been challenged by the Management of L&T Komatsu Limited in writ petition NO. 38974/1999 and all these writ petitions are pending.

3. During the pendency of the writ petitions, the Association which is the recognised association under the Code of Discipline negotiated with the Management of L&T Komatsu Limited in respect of various matters pertaining to wage scales and other conditions of service including work load. One of the subject matters of the negotiations pertains to the work load. The Management of L&T Komatsu Limited have made it a condition that unless the workmen withdraw the writ petition in WP No. 29500/2000 regarding subject matter of the earlier settlement (Exhibit M-50) and the Memorandum of Understanding (Exhibit M-40), no fresh settlement can be signed.

4. The Association has accepted the condition, subject to the right of the Association to continue the case in respect of four workmen, namely Shriyuths:

(1) Prabhakar;

(2) Ebenezer;

(3) Ranganath, and (4) Subash The Management has also accepted this condition.

5. Hence, without prejudice to the contention of the Association to continue the case pertaining to four workmen referred to above and without prejudice to all the contentions which they urged in writ petition No. 29500/2000 c/w writ petition No. 29945 to 29947/2000, the petitioner Association hereby submits that they do not press their prayer in writ petition No. 29500/2000 (L) c/w writ petition No. 29945 Page 2534 to 29947/3000 (L) pertaining to Memorandum of Understanding dated 16-8-1995 (Exhibit M/40).

6. The terms of this memo may kindly be recorded with a view to facilitate the Association and the Management of L&T Komatsu Limited to sign a fresh settlement in respect of demands pertaining to pay scales, work load and other conditions of service.

On the reading of the aforesaid memo makes it clear that the petitioner-Association did not press their prayer in W.P.No. 29945 to 29947/2000 pertaining to Memorandum of Understanding dated 16.08.1995. In the aforesaid writ petition, the Association contended that the finding recorded by the Tribunal holding that Ex.M-40 was part of Ex.M-50, because it was admitted by the workmen, that it was signed by representatives of the Union and consequently it must be treated as part of Ex.M-50, is on the very face of it untenable. It is no doubt true that the Union did not dispute the

signature of the office bearers who signed EX.M-40. But the contention is, assuming that the signatures were that of the office bearers Ex.M-40, it did not partake the character of settlement, as mandatory requirement of treating it as a part of binding settlement between the parties were not complied with and in the circumstances, it was also not intended to be so because Ex.M-50 itself is a self contained document and it would survive on its own without there being any support either from Ex.M-40 or from any other instrument. It was further contended that the learned Presiding Officer of the Tribunal failed to notice that Ex.M-40 did not fulfill the conditions required to be treated as part of the settlement as defined under Section 2(p) read with Section 12(3) of the I.D. Act and rules framed thereunder and the form thereto, it could never bind the workmen under Section 18(3) of the Act. The Tribunal ought to have held that the workmen are not bound by Ex.M-40 and consequently, the production which was required to be given by them as per Ex.M-40 was not required to be given by them. By filing the aforesaid memo, the Union withdrew their challenge to Ex.M-40 which was held to fee binding by the Tribunal on the Union and its members. However, the Union reserved the right to continue the case in respect of four workmen who had been denied the backwages and wages for the strike period, on the ground of proved misconduct. The Union having withdrawn the challenges to Ex.M-40 cannot challenge the finding on Ex.M-40 under the guise of continuing the case in respect of four workmen. If such an interpretation is placed on the terms of the said memo, it leads to absurdity and that was not the intention of the parties. No Court of Justice can ever permit such a thing to be done. The Union is estopped from challenging the agreement in view of the memo filed by them and acted upon. When once the Union withdraws its challenge to the binding nature of Ex.M-40, as the four workmen involved in this proceedings are members of the said Union who are bound by the act of the Union, it is not open for the Union or the said four workmen to challenge the legality of Ex.M-40 while challenging the order of the Tribunal. In that view of the matter, the finding recorded by Page 2535 the Tribunal that Ex.M-40 is part of Ex.M-50 and is binding on the Union and its four workmen is valid and legal.

POINT No. 4 - SECTION 33 VIOLATION:

> 40. The dispute between the parties was referred to adjudication before the Labour Court in I.D.No. 119/91. The question involved was regarding non-payment of wages to three workmen namely Ebenezer, Rangananth and Prabhakar, who did not work on 03.10.1990, 04.10.1990 and 05.10.1990. It is during the pendency of the said reference the order of dismissal came to be passed on 15.11.1996. Therefore, as required under Section 33(2)(b) of the I.D. Act they were paid one month's wages by way of cheque and simultaneously, an application for approval of the action taken against them was filed before the Labour Court. Those applications were numbered as M.A.28/96, 29/96 and 30/96. In all the said applications, the workers were served with the notice. They entered appearance through Counsel. After filling of the said application and entering appearance, those workman raised an industrial dispute under Section 10(4-A) of the Act before the Labour Court in I.D. No. 29/97, 32/97 and 25/97. After raising the said dispute, they filed a memo before the Labour Court contending that the said applications filed by the management under Section 33(2)(b) have become infructuous. On the said memo, management endorsed no objection. In view of the said memo, the Labour Court dismissed those applications

as having become infructuous.

41, Sri K. Subba Rao, the learned senior counsel appearing for the workmen contended that no orders were passed granting approval of this order of dismissal. Once application filed for approval is rejected the effect would be that the order of dismissal becomes void ab initio. In support of the said contention, he relied on the judgment of the Supreme Court in the case of Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd. v. Shri Ram Gopal, Sharma and Ors. , and also the judgment of this Court in the case of L.G. Dalal v. The West Coast Paper Mills Limited in W.P.No: 20388/98.

42. Per contra, the learned Senior Counsel Sri. Vijaya Shankar contended that a reading of the aforesaid judgment makes it very clear that it apples to a case where an application is made by the management for approval or after making an application it is withdrawn without any orders being passed thereon, then the order of dismissal becomes void and inoperative. In the instant case, those conditions are not satisfied and when at the request of the workmen the said application came to be disposed of as infructuous, it cannot be said that the management can be penalized for the same.

43. In Jaipur Zilla Sahakari Boomi Vikas Bank Ltd. case, the Supreme Court has held as under:

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15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, not making an application under Section 22(2)(b) seeking approval or withdrawing an application once made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdrawn the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.

In L.G. Dalal's case this Court held that, when for the reasons best known to the employer, he has withdrawn the said application with the permission of the Tribunal, thereafter, the employer had not done anything in the matter, the order of discharge passed by the employer would be inoperative and ineffective.

44. In view of the aforesaid Constitution Bench, judgment of the Supreme Court, it can be said that it is a settled legal position that, if an employer who dismisses an employee under Section 33(2)(b) during pendency of any proceedings in respect of an industrial dispute, if any misconduct not connected with the dispute, he has to comply with the mandatory requirement of proviso to Section 33(2)(b), i.e., the discharge or dismissed employee should be paid wages for one month and an application has to be made by the employer to the authorities before which proceedings is pending for approval of the action. Once he complies with the said requirement of law, the statutory obligation cast upon him under the proviso is fulfilled. Then, he would not be found fault with. After consideration of the application filed for approval, the authorities grants the approval sought for. The order of dismissal passed would become effective from the date of the order of dismissal. If the approval sought is not granted, the order of dismissal Page 2537 becomes void, non est in the eye of law, i.e., the dismissed employee is treated as in employment and would be entitled to full wages for the period between the date of dismissal and the date of the order refusing to grant approval. The employer by design who do not make an application after dismissing thus employee from service or files and withdraws the same before any order is passed on its merits, is said to have contravened this mandatory requirement of law and thus the order of dismissal passed would become inoperative and void.

45. Therefore, the rationale behind holding the management responsible is, an employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such application. If it is so done, he will be happier or more comfortable than the employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it in set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceedings as contemplated in law.

46. However, in the instant case, the aforesaid judgment would have no application. The order of dismissal was passed in respect of three employees in the instant case on 15.11.1996. Therefore, as required under Section 33(2)(b) of the Act, they paid one month's wages by way of cheque to these three dismissed employees and simultaneously filed separates applications for approval of the action taken against them. The said applications were numbered as M.A.28/96, 29/96 and 30/1996 in the pending dispute No. 119/91 before the Industrial Tribunal at Bangalore. In all the said three applications, the workers were served with notice. They entered appearance through Counsel. Thereafter, they raised an industrial dispute under Section 10(4-A) of the Act before the Labour court in I.D.No. 29/97, 32/97 and 25/97. After raising the said dispute they filed a memo before the Labour Court contending that the said applications filed by the management under Section 33(2)(b)

have become infructuous. On the said memo, the management endorsed no objection. In view of the said memo, the Labour Court dismissed those applications as having become infructuous. It is under those circumstances, no orders were passed granting approval of the order of dismissal. Therefore, it is not a case of management avoiding to file application under Section 33(2)(b) of the Act, seeking approval of the action taken. It is also not the case where applications filed is being withdrawn to avoid any order being passed by the Industrial Tribunal on merits. There is no overtact on the part of the management in withdrawing the applications filed. On the contrary, it is the workmen after raising the dispute under Section 10(4-A) of the Act filed memos before the Industrial Tribunal contending that these applications have become infructuous. Of course the Page 2538 management has endorsed on the said memo by 'no objection'. The management cannot be blamed for this act.

47. This Court in the case of Sri Parushuram Nemani Kuduchakar, Shahapur, Belgaum and Ors. v. Smt. Shantabai Ramachandra Kuduchkar, Shahapur, Belgaum and Ors. , had an occasion to consider the law of estoppel and on reviewing the catena of decisions on the point, held as under:

> 37. Estoppel is a rule of evidence. It finds statutory recognition in Sections 115 to 117 of the Evidence Act. However, it is not an exhaustive statement of the law of estoppels. Estoppels are of infinite variety of intricate matters. The rule of estoppel is based on equity and good conscience. In plain words estoppel means, a person shall not be allowed to say one thing at one time and the opposite of it at another time. A person is estopped from denying or withdrawing his previous assertion, or from going back upon his own act, or asserting state of things opposite to what he has formerly asserted by word or conduct. The principle is that it would promote fraud and litigation, if a person is allowed to speak against his own act or representation on the faith of which another person was induced to alter his position. The object of estoppel is to prevent fraud and secure justice between parties by promotion of honesty and good faith.
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> 38. One of the spectes of estoppel is contained in the doctrine of approbation and reprobation. It means, a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. If parties in Court are permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralysed, the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the right of all men, honest and dishonest, are in the keeping of the courts and consistency of the proceedings is therefore required of all those who come or are brought before them. In fact this maxim is only one application of the doctrine of election and its operation must be confined to reliefs claimed in respect of the same transaction and to the person who are parties thereto. This doctrine, however does not apply against the provisions of statute. It applies to the conduct of the parties.

48. In the judgment relied on L.G. Dala's case the management filed application withdrawing the application filed under Section 33(2)(b) application filed and it is in that context, it was held that the order of dismissal is void. It is not the position here. In fact prior to the aforesaid judgment of the Constitution Bench, as the law stood then, and understood by both the parties, without waiting for the approval of the Industrial Tribunal, in an application under Section 33(2)(b) after a dispute was raised Page 2539 under Section 10, the entire matter came to be adjudicated under the said forum. It is to that context, the workmen did not wanted a parallel proceedings, parallel trial and recording of evidence. Therefore, they chose to raise the industrial dispute immediately, filed a memo in the serial application stating that it has become infructuous because of their act of raising a dispute and contesting the matter under Section 10. Under these circumstances, the Doctrine of Estoppel clearly applies to the facts of this case and the workmen are precluded from contending now because the application under Section 33(2)(b) was dismissed as infructuous, and no express order of approval was granted, the order of dismissal is void and non-est. Therefore, I do not find any merit in the said contention.

POINT NO. 5 -VALIDITY OF DOMESTIC ENQUIRY

49. The petitioners contend that the finding on the domestic enquiry by the Tribunal is erroneous material on record do not prove the misconduct alleged against the petitioners. The misconduct alleged against the petitioners is that they did not perform 1.5 arcing hours during the relevant period, is not in dispute. The case of the petitioners is that they were not obliged to perform 1.5 arcing hours. The evidence produced on record, in particular Exs.M-141 and W-7 would clearly go to show that the petitioners have not given 1.5 arcing hours. Not only that, after they were found guilty of the misconduct alleged and they were issued with a show cause notice calling upon them to show cause why the punishment proposed in the said notice should not be imposed, along with a copy of the enquiry report, all the petitioners gave a letter of undertaking on 13/14.8.96 undertaking to achieve arcing hours as per the settlement dated 16.08.1995 and the disciplinary action may be dropped. In deference to their request, the consideration of the proposed punishment was kept in abeyance. However, out of 5 workmen, Shankar alone kept up his promise and improved his performance. While the other four workmen who are the petitioners herein, did not improve their performance. Therefore, this material on record clearly establishes that the misconduct alleged against them it virtually admitted. However, it is also supported by documentary evidence as well as oral evidence in the enquiry. Petitioners had full opportunity to cross examine the management witness as well to adduce evidence. Therefore, the principles of natural justice have been complied with in the domestic enquiry. It is only on consideration of the aforesaid material, the Tribunal has recorded a finding that the domestic enquiry conducted is proper and do not call for any interference.

50. In so far as the workmen Subash is concerned, it found that the domestic enquiry is defective. Therefore, the management adduced evidence before the Labour Court. Workmen also adduced evidence before the Labour Court. In view of the aforesaid admitted position, on appreciation of the said material on record, the Tribunal has recorded a finding that the misconduct alleged against the said Subash is proved. As the domestic enquiry in respect of the three petitioners and the enquiry conducted by the Tribunal in respect of Subash is in conformity with the principles of natural justice

Page 2540 and the parties had full opportunity to put forth their case and in the light of their admissions, the finding recorded by the Tribunal is based on legal evidence and do not call for interference. Therefore, there is no merit in the contention that the domestic enquiry was vitiated on any ground.

POINT No. 6 - SCOPE OF REFERENCE:

51. Sri. Vijaya Shanker learned Senior Counsel submitted that the only question which requires to be adjudicated is whether the memorandum of understanding was part and parcel of the memorandum of settlement dated 16.08.1995. If the answer is yes, then, there is nothing more to be adjudicated upon. In substance, the question of the Labour Court or this Court going into the validity of the order of dismissal passed the four employees would not arise. Therefore, he submits that the Labour Court committed serious error in setting aside the order of dismissal and directing reinstatement after holding the M.O.U. was part of Memorandum of settlement. The scope of reference was the subject matter of various decisions on which both the parties relied. They are as under:

52. The Supreme Court in the case of J.K. Iron and Steel Co. Limited v. Iron and Steel Mazdoor Union and Ors. reported in 1956 (1) LLJ 227 has held as under:

> Industrial adjudication does not mean adjudication according to the strict law of master and servant. An adjudicator's award might contain provisions for settlement of a dispute which no court could order if it is bound by ordi any law. Industrial tribunals are not fettered by these limitations. The scope of an adjudication under the Industrial Disputes Act is much wider than that of an arbitrator making an award.
>
> All the same, wide as these powers are, there are limitations to the ambit of the industrial tribunal's authority. Though these tribunals are not courts in the strict sense of the term they have to discharge quasi-judicial functions. Their powers are derived from the statute that created them and they have to function within the limits imposed there and to act according to its provisions. Those provisions invest them with many of the "trappings" of a court and deprive them of arbitrary or absolute discretion and power. They cannot act as benevolent despots and base their conclusions on irrelevant considerations and ignore the real questions that arise out of the pleadings of the parties.
>
> The provisions of the Industrial Disputes Act (read with Uttar Pradesh State Industrial Tribunal Standing Orders, 1951) make it evident that though these tribunals are not bound by all the technicalities of civil courts, they must nevertheless follow the same general pattern. The only point in pleadings and framing issues is to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. It is not open to the tribunals to fly off Page 2541 at a tangent disregarding the pleadings and reach any conclusions that they think are just and proper.

53. Again the Supreme Court in the case of Delhi Cloth and General Mills Co. Limited v. Their Workmen and Ors. reported in 1967 (I) LLJ 423 held as under:

> While it is open to the appropriate Government to refer the dispute or any matter connected therewith for adjudication, the tribunal must confine its adjudication to the points of dispute referred to and matters incidental thereto. In other words the tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto.

54. The Supreme Court in Pottery Mazdoor Panchayat v. The Perfect Pottery Co. Limited and Anr. reported in 1979 LAB I.C. 827 has held as under:

> 11. ...The very terms of the references show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. The references being limited to the narrow question as to whether the closure was proper and justified, the Tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management.

55. The Supreme Court in the case of Municipal Committee Tauru v. Harpal Singh and Anr. reported in 1998(80) FLR 681 has held as under:

> Even in labour matters a claimant goes before the court or tribunal with a case and it is upon the merits of that case that relief is to be granted or refused to him. To look to his case is not to look at technicalities. There is no substantial justice when the court or tribunal gives relief to a workman which is on a basis that is totally contrary to the basis upon which he approached it; which, indeed is the employer's case. Substantial justice must be done both to the employer and the employees.

56. Under Section 10(4-A) of the industrial Disputes Act when an order referring the industrial dispute is made specifying the points for dispute for adjudication, the Labour Court shall confine its adjudication to those points and matters incidental thereto. Interpreting this provision, a Division Bench of this Court in the case of Workmen of Mysore Paper Mills Limited v. Mysore Paper Mills Limited and Ors. reported in 1970 (Vol. 37) FJR 131 has held as under:

> Under Section 10(4) of the Industrial Disputes Act, 1947, an Industrial Tribunal has no option but to confine itself to the order of reference and adjudicate upon the same. Where, in the order of reference the appropriate Government has specified the points of dispute for adjudication, the Tribunal must confine its adjudication to the points Page 2542 of dispute referred and matters incidental thereto. The tribunal is not free to enlarge the scope of the dispute referred to it.

57. The Calcutta High Court in the case of Bengal River Transport Association v. Calcutta Port Shramik Union and Ors. reported in 1978 LAB I.C.1416 dealing with the jurisdiction of the Tribunal under Section 10(4-A) has held as under:

> 12. The Tribunal in exercising its jurisdiction is only bound by the terms of reference. The jurisdiction is confined to the actual points of disputes referred to.
>
> 13. A thing is said to be incidental to another when it appertains to the principal thing. According to the dictionary meaning, it signifies a subordinate action.

58. From the aforesaid decisions, it is clear that once the dispute is referred to the Labour Court or the Tribunal, they must confine their adjudication to the points of dispute referred to and the matters incidental thereto. The Tribunal is not free to enlarge the scope of dispute. The Tribunal in exercising its jurisdiction is only bound by the terms of reference. A thing is said to be incidental to another when it pertains to the principal thing. Therefore, the jurisdiction is confined to the actual points and disputes referred to. However, the ultimate object of such adjudication should be to do substantial justice both to the employer and the employee.

59. Keeping this in mind, if we look into the order of reference, no doubt the Government referred the dispute regarding the validity of the memorandum of understanding as being part of the memorandum of settlement dated 16.08.1995. Regarding the validity of the disputed terms in the said agreement, it also referred the dispute whether the management was justified in dismissing the four employees for not giving production based on the said memorandum of understanding. In the writ petition, the High Court reframed those points of dispute and specifically framed a point to the effect that whether the management was justified in dismissing four workmen on the ground that they did not reach the working norms stipulated in the memorandum of understanding. After remand, the Tribunal framed additional issues which included validity of the domestic enquiry and regarding the dismissal order passed. From these undisputed material on record, it cannot be said that the validity of the order of dismissal was not the subject matter of references at all, as contended by the management.

60. It was next contended that when once the Tribunal holds that the memorandum of understanding is valid and binding of the workmen and that there is a specific clause therein which made it obligatory for welders to give 1.5 arcing hours, and when once it is proved that the aforesaid workmen did not give the said arcing hours, the misconduct is proved and therefore, the question of the Tribunal or this Court interfering with the said order of dismissal would not arise.

61. This argument ignores the power of the Tribunal and in particular, Section 11-A of the Act. Even if the misconduct is held to be proved, it does not necessarily follow that such misconduct should be meted out the Page 2543 punishment of order of dismissal. The Tribunal has been vested with the power under Section 11-A of the Act to find out having regard to the gravity of the misconduct alleged and proved, whether the punishment of dismissal is proportionate or not. If the Tribunal feels that the punishment is excessive having regard to the gravity of the charges proved, it has the jurisdiction to substitute a lesser punishment to the one imposed by the management. Therefore,

the contention that the Tribunal has no jurisdiction to interfere with the order of punishment imposed by the management when once the misconduct is held proved, is without any substance.

POINT NO. 7 - SECTION 11-A OF THE ACT:

62. Sri Vijaya Shankar, learned Senior Counsel in support of his contention that even though 11(A) is attracted, in the facts of this case the Labour Court was not justified in exercising its discretion in interfering with the order of dismissal. The learned Counsel relied on several judgments of the Supreme Court which according to him is the law which governs the Courts today.

63. Mahendra Nissan Allwyns Ltd v. M.P. Siddappa and Anr. reported in 2000 (1) LLJ 424.

4. We do not agree with the High Court. The charges are of a serious nature. The first respondent was found to have led out workmen from the factory premises regardless of the challenge by the Security Guard. Along with these workmen the first respondent entered the administrative building of the appellant and the room of the Deputy General Manager and Manager (Personnel) were abused in filthy language and threatened, examples of which have been given. Misbehaviour was also proved against the first in his conduct with five executives of the appellants. If these are not serious charges against a workman worthy of his dismissal from service, we do not know what can be. The High Court was quite wrong in the conclusion that it reached and in the order that is passed. The Punishment imposed against the respondent must remain unaltered.

64. Regional Manager, Rajasthan State Road Transport Corporation v. Ghanshaym Sharma reported 2002(2) LLN 1118.

5. Though under Section 11A, the Labour Court has jurisdiction and powers to interfere with the quantum of punishment however, the discretion has to be used judiciously. When the main duty or function of the conductor is to issue tickets and collect fare and then deposit the same with Road Transport Corporation and when a conductor fails to do so, then it will be misplaced sympathy to order his reinstatement instead of dismissal.

65. Union of India and Ors. v. Narain Singh reported in 2002(3) LLN 22 Held: Once the Court comes to the conclusion that the charges were proved and that the charges were of the serious natures, it is not the Page 2544 function of the Court to interfere with the quantum of punishment. It is wrong for the Court to say that factors, viz.:

(a) the person is coming from which place;

(b) his family background; and

(c) His service record etc., have to be kept in mind before imposing punishment.

It is also wrong for the Court to say that if a poor person pleads guilty to the misconduct, then extreme penalty of dismissal is uncalled for. The Court must not lightly interfere with sentences

passed after a property conducted enquiry where the guilt is proved. Reduction of sentence, particularly in military, paramilitary or police services can have a demoralizing effect and would be a retrograde step so far as discipline of these services is concerned.

66. State Bank of India v. Tarun Kumar Banerjee and Ors. reported in 2000(2) LLJ 1373:

> (9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed, cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimization.
>
> (10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, within the judicial discretion of a Labour Court or Tribunal.

67. Janatha Bazar South Kanara Central Co-Operative Wholesale Stores Ltd. and Ors. v. Secretary, Sahakari Noukarara Sangha and Ors. reported in 2000(II) LLJ 1395.

6. Once act of misappropriation is proved, may be for a small or large amount, there is not question of showing uncalled for sympathy and reinstating the employees in service. Law on this point is well settled....

68. The Supreme Court in the case of Indian Iron and Steel Co. Ltd. v. Their Workmen (1958)I LLJ 260 while considering the Tribunal's power to interfere with the management's decision to dismiss, discharge or terminate the services of a workman, has observed that the Tribunal does not act as a Court of appeal and substitute its own judgment for that of the management and that the Tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice etc. on the part of the management.

69. It is a fundamental principle of justice that the punishment should be commensurate with the guilt. Judex acquitatem semper spectare debot. Page 2545 A Judge ought always to have equity before his eyes. It is a well recognized principle of jurisprudence which permits penalty to be imposed for misconduct, that the penalty must be commensurate with the gravity of the offence charged. Before promulgation of Section 11A it was considered the prerogative of the employer to inflict the punishment on the delinquent workman which was beyond the jurisdiction of the industrial adjudication to interfere. However, the Supreme Court made inroads into this prerogative of the employer to inflict where punishment was shockingly disproportionate to the proved act of misconduct.

70. It is in this background and in the light of the recommendation of the International Labour Organization, it was considered that the Tribunal's power in an adjudication proceeding relating to discharge or dismissal of a workman should not be limited and the Tribunal should have the power in cases wherever necessary to setaside the order of discharge or dismissal and direct reinstatement of the workmen on such terms and conditions if any as it thinks fit or give such other relief to the

workmen including the award of any lesser punishment in lieu of discharge or dismissal as of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Therefore Section-11A was inserted into the Act to confer power on the adjudicators to re-appraise the evidence adduced in the domestic enquiry and to grant proper relief to workmen, powers which the Tribunal did not possess earlier. Therefore, by introduction of this provision for the first time power is conferred on the Tribunal to differ both on finding of misconduct arrived at by an employer as well as the punishment imposed by it.

71. After promulgation of this Section an industrial adjudicator has the power to substitute its own measure of punishment for the managerial prerogative not only where the punishment is shockingly disproportionate to the act of misconduct but when where it is satisfied that the punishment of discharge or dismissal is not commensurate with the act of misconduct committed by the workman on the facts and in the circumstances of the case. Even where the Tribunal is satisfied that the act of misconduct alleged against the workman is proved and a penalty has to be imposed, it has to examine as to whether the extreme penalty of dismissal or discharge is justified or not in the facts and circumstances of the case. If it comes to the conclusion that the punishment is disproportionate or excessive to the act of misconduct committed by the workman, it has the power to vary the punishment and impose lesser punishment which it may deem just and fair in the circumstances of the case.

72. The power under Section 11A are alternative. First is to direct reinstatement of the workman on such terms and conditions as it thinks fit and the second is to give some other relief to the workman including award of any lesser punishment in lieu of reinstatement as in the circumstances of the case may require. Under second alternative the Tribunal instead of directing reinstatement may give the relief of compensation to the workman. Lesser punishment contemplated under Page 2546 Section 11A is not confined to the Standing Orders or any of the Regulations of the Employer. It takes in its sweep all punishment lesser than discharge or dismissal whether provided in the Standing Orders or regulations of punishment or not. The Tribunals have very wide discretion in awarding punishment to the delinquent workman while dealing with a dispute relating to discharge or dismissal.

73. The discretionary power of the Tribunal in upholding the punishment inflicted by the employer interfering with it by awarding lesser punishment is amenable to judicial review by the High Courts in exercise of jurisdiction under Articles 226 and 227 or by the Supreme Court under Article 136 of the Constitution. Under Article 227 a High Court is vested with the right of superintendence and it is undisputably entitled to scrutinize the order of a subordinate Tribunal within well-accepted limitations. The renewing courts can examine whether the Tribunal has properly approached the matter for exercising or refusing to exercise its power under Section 11A. But when the award is well-reasoned and the Tribunal has stated the various considerations for inflicting lesser punishment the award cannot be said to be illegal and void.

74. In exercising discretion to award the lesser punishment, the Tribunal has to consider the seriousness and gravity of the charge committed by the delinquent workman. The seriousness of the charge will not be mitigated with reference to the motive with which the workman behaved. Nor is

the length of service of the workman relevant in imposition of punishment to prove misconduct because length of service cannot give licence to a workman to commit misconduct. In exercising the discretionary power to interfere with the punishment the discretion should not be exercised in an arbitrary manner but it should be exercised in a judicious manner. The Tribunal, therefore, before interfering with the punishment imposed by the management must take into consideration all the relevant facts and factors and should interfere with the punishment imposed by the Management only when it comes to the conclusion that the punishment imposed is extremely harsh and unjust and wholly disproportionate to the misconduct proved.

75. In the facts of this case, the four workmen who were dismissed from service were accused of not giving 1.5 arcing hours per day, which is a misconduct alleged and proved against them. The Tribunal while interfering with the punishment of dismissal took note of the fact that after the four employees were found guilty of the misconduct alleged against them, they were served with a letter enclosing a copy of the domestic enquiry and they were called upon to show cause why the punishment of dismissal should not be imposed. However, on a representation made by the Union and the employees, the proposed action was kept in abeyance to give one more opportunity to the said four workman to improve their performance. Out of 5 employees to whom such opportunity was given, one employee showed improvement and therefore no action of dismissal was taken against him. However, as the aforesaid four employees in spite of such opportunity did not improve their performance, they were dismissed from service. According Page 2547 to the Tribunal, one more show cause notice should have been given about the proposed action and they should have been given an opportunity to show whether they have improved their performance or not and in the absence of any material placed to show that during that period the four workmen have performed less arcing hours compared to others, the management was not justified in passing the order of dismissal. Further, it held that not performing the arcing hours as per the memorandum of understanding and the dismissal on that ground alone is itself disproportionate to the charges levelled and proved against the workmen. Therefore, it invoked its jurisdiction under Section 11-A of the Act and set aside the order of dismissal and directed reinstatement into service with continuity of service to give one more opportunity to the concerned workmen to reform themselves by taking judicial note of the circumstances of the case. However, it declined to award the backwages. It also took note of the fact that in view of the order passed by the Government so also the order of the Tribunal, nearly 50% of the wages has been paid to them though they are not performing any function.

76. The finding of the Tribunal that one more show cause notice, one more opportunity to the workmen for production of evidence to show whether there was any improvement in the performance, should have been given and as the some was not done, vitiated the order of dismissal, is without any substance. In the domestic enquiry when these workmen were held to have committed misconduct, before imposing the punishment, the law requires they should be heard. In reply to the same, they did not challenge the finding of misconduct, but they admitted the misconduct. On the contrary, they wanted one more opportunity to improve the performance. When such an opportunity was given one workman showed improvement and no punishment was imposed. However, the other four did not improve. Punishment was not imposed on that ground. Punishment was imposed on the ground of misconduct proved in the domestic enquiry. Giving them

a chance was only a concession. It did not have the effect of wiping out the proved misconduct.

77. However the question for consideration would be whether the management was justified in proceeding to pass the order of dismissal. In other words, the question is whether the order of dismissal is proportionate to the gravity of the charges proved against these workmen; Whether the Tribunal committed any error in exercising its power under Section 11-A of the Act to interfere with the order of dismissal.

78. In this regard it is to be noticed that the dispute between the parties was whether the memorandum of understanding is enforceable or not, as it is not a settlement contemplated under Section 18(3) of the Act. But the term regarding 1.5 arcing hours per day is found in the said memorandum of understanding. The material on record shows that there was an agitation regarding this enhanced target and the whole dispute between the parties revolves round the validity of the said memorandum of understanding. If the memorandum of understanding is held to be not binding at all, then, Page 2548 these employees could not have been held to have committed any misconduct at all, as admittedly, prior to that memorandum of understanding, they were not obliged to give the aforesaid target of 1.5 arcing hours. Because of the settlement entered into on the very same day as that of Memorandum of Understanding, where considerable increase in the emoluments were given to the workmen, the said enchancement was proportionate to the enchancement of the work agreed to between the parties. It is only before this Court the Union gave up its challenge to the said Memorandum of Understanding.

79. Under these circumstances, it cannot be said that these four workmen committed grave misconduct such as to warrant an order of dismissal. Though GO SLOW or deliberate act of not giving the agreed out may justify such extreme punishment, in the instant case the agreement prescribing the stipulation was in dispute. Therefore, I am of the view that the Tribunal was justified in interfering with the order of dismissal which was grossly disproportionate to the proved misconduct in the prevailing circumstances which gave rise to the dispute between the parties. It cannot be said that the Tribunal exceeded in its jurisdiction under Section 11-A of the Act, in setting aside the order of dismissal. Therefore, the said finding of the Tribunal also do not call for interference.

80. It was contended on behalf of the workmen that when once the order of dismissal was set aside and reinstatement was ordered, the Tribunal committed an error in not awarding full backwages and wages during the period of strike. I do not find any substance in the said contention. When once the misconduct is held to be proved, the punishment should follow. However, the punishment of dismissal imposed by the disciplinary authority was found to be disproportionate to the gravity of misconduct proved. Therefore, the Tribunal interfered with the punishment and instead of imposing any lesser punishment in its place, it has denied 50% backwages as punishment to the workmen, as well wages during the period of strike. In this regard, the Tribunal has been very considerate. In fact, from the date of dismissal, till date, these workmen have been paid 50% of the wages without they performing any work. They have enjoyed this benefit from the date of dismissal, i.e., 14/15.11.1996. Therefore, even this portion of the order of the Tribunal cannot be found fault with. For the aforesaid reasons, I do not find any merit in any of those contentions. Accordingly, I pass the

following order:

Both the Writ Petitions are dismissed. Parties to bear their own costs.