Swaranakar etc., AIR 2003 SC 858, Paragraph 50 at P. 874. Hence, an agreement enforceable by law does not come into existence by mere performance of the condition by the appellant, *i.e.*, the appellant's act of encashment of cheques. In the absence of a reciprocal promise from the respondent, the appellant's promise becomes a void agreement; in other words, the appellant is not bound by the "condition", which he performed.

5. Moreover, Section 8 of the Contract Act cannot be made applicable to the facts of this case for the following reasons—

(i) Section 8 deals with the formation of a new contract; *i.e.*, reciprocal promise/s that is/are yet to be performed.

(ii) whereas the liability, which the respondent admitted, is a consequence of non-performance of respondent's original obligation of delivering the consigned goods to the appellant;

(iii) the consequences arising out of non-performance of an existing contract can be settled only pursuant to Section 62 of the Contract Act, *i.e.* by way of compromise/ settlement contract or by substituting the original contract with a new contract, or by "accord and satisfaction" (Section 63 of the Contract Act is not applicable as the appellant's claim is not a debt due under the contract).

6. The facts in the case of *Day and another v. Maclea*, (1889) 22 Q.B.D. 610, referred to in the judgment, are analogous to the facts in the case on hand. The plaintiffs, therein, brought an action to recover damages for breach of contract, and, before action was brought, the defendants sent them a cheque for 10*l.* 18*s.* 6*d.*, being less than the amount claimed, with a form of receipt to be signed by the plaintiffs, that the sum was accepted in full satisfaction of the claim. The plaintiffs kept the cheque but refused to accept it in satisfaction, and sent a receipt on account. There it was held that there was no 'accord and satisfaction'. In the case on hand also, there was no 'accord and satisfaction' in view of the appellant accepting the cheque under protest. The facts of the case, therefore, do not come within the purview of Section 8 or Section 62 of the Contract Act. The appellant's encashment of cheques, even if there were to be no protest, does not also constitute, for the reasons explained hereinabove, an "estoppel" so as to preclude the appellant from claiming the balance amount of compensation.

MISCONDUCT - PUNISHMENT - JUDICIAL REVIEW

By

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Many authors and writers expressed their views in the past many a time on the topic. But in view of the latest Judicial Pronouncements of the Apex Court this Article will be of interest to the Lawyers, to concerned Teachers and Students.

Misconduct:

What is Misconduct? It will be of interest to note that there is no definition of Misconduct any where. The Rules and Regulations in the absence of Standing Orders

and the Standing Orders applicable to the concerned establishments enumerate various omissions and commissions, which constitute Misconducts. The Apex Court in *State of Punjab v. Ram Singh,* 1992 Lab. IC 2391 (SC), held that there is no precise meaning for the word misconduct. The Karnataka High Court in *Jyothi Home Industries v. P.O.,* 1995 LLR 940, held that there is no definition of misconduct either in the Industrial Disputes Act or in the Standing Orders. Misconduct literally means wrong or improper conduct. If by the commission of the Acts by the employee, the employer suffers loss or it generates an atmosphere destructive of discipline of the establishment, the same is misconduct. There will be several acts of the employee which will expose him to penal consequences. Such acts would no doubt be misconducts within Industrial parlance.

It has been held by the Allahabad High Court in *Infant Milk Food Factory v. Labour Court,* 1994 (69) FLR 1132, that the enumeration of misconducts is not exhaustive and that they are only descriptive. The Kerala High Court in *T.K. Veghee v. T.U. Vcc Co.,* 1994 (2) LLN 178, held that Misconduct cannot be defined in Universally applicable terms and depends upon the circumstances of each case. Even if an act of omission or commission is committed outside the premises and if the said act has a bearing on the discipline of the establishment it will be misconduct even if the same has not been enumerated in the Certified Standing Orders. The Apex Court in *Glaxo Laboratories India Ltd v. Presiding Officer,* 1984 (1) SCC 1, held that the employer cannot prescribe any rule of conduct outside the premises and that Standing Orders being penal in nature no action can be taken in the absence of any enumeration or omission in the Standing Orders. But the later thinking of Apex Court in *Palghat BPL & PSC Tohozhildi Union v. BPL India Ltd.,* 1996 (72) FLR 433, is that notwithstanding the commission of any act outside the premises, in the Standing Orders, it constitute misconduct, as the object appears to be that workmen need to maintain discipline *vis-a-vis* Management. What amounts to misconduct is a question of fact which should be decided with reference to the facts, the situation in which the act was alleged to have been committed and the attending circumstances leading thereto and any act subversive of the discipline committed outside which has nexus with the discipline of the establishment is misconduct. In other words, there must be a nexus between the incidents of the alleged misconduct and the discipline of the establishment even if such an act is committed outside to constitute misconduct. The decision of Apex Court in *Palghat BPL & PSC Tohozhildi Union v. BPL India Ltd.,* (supra) upheld the decision of Division Bench of Kerala High Court in *Narayanan v. BPL Systems (P) Ltd.,* 1994 (1) LLN 749 (Ker), and also referred to *Glaxo Laboratories* case (supra) and all earlier decisions explaining the rationale in *Glaxo Laboratories* case (supra).

So, when the misconduct is established, what is the punishment to be awarded by the Disciplinary Authority? And, whether Courts can interfere with the quantum of punishment imposed by the Disciplinary Authority? It is needless to state that any punishment to be imposed by the Disciplinary Authority should be preceded by a domestic enquiry, which should follow the Principles of Natural Justice?

Natural Justice is founded on the Principle of "*Audi Alteram Partem*" *i.e.*, no one shall be condemned without hearing him. Hearing means affording a reasonable opportunity to defend oneself. The decision of Apex Court in *Sur Enamel and Stamping Works v. Workmen,* 1963 (7) FLR 237 (SC), enumerates the meaning of affording opportunity. The Apex Court in *Sohanlal Gupta v. Asha Devi Gupta,*

2003 (7) SCC 4925, however stated that "Principles of Natural Justice cannot be fitted into any straight jacket". This decision was again referred to by the Apex Court in *N.K. Prasada v. Government of India*, 2004 (3) LLN 65 (SC); at page 66, and held that Natural Justice Principles depends upon the facts and circumstances of the case and that no straight jacket formula can be laid. So much about the Principles of Natural Justice.

Violation of Natural Justice Principles:

Earlier view of Apex Court was that if the Enquiry is held in violation of the Principles of Natural Justice the enquiry will be void and also the punishment in pursuance thereof has to be set aside, resulting in automatic reinstatement. But this view has been completely eroded beginning with the pronouncement in *Electronic Corporation of India v. B. Karunakaran*, 1994 LLR 391 (SC). In the following decisions in *Divisional Manager Plantation Division v. Munna Barick*, 2005 (104) 375 (SC); *T. Zakariah v. APSC Co.op. Finance Corpn.,* 2002 (1) CLR 292 (AP); *S.R. Ahmed v. CGM cum Disciplinary Authority, S.B.I.,* 2001 (89) FLR 490 (AP), it was held that Natural Justice Principles doctrine has given way to Prejudice doctrine. The mere violation of Natural Justice Principles by itself does not render the action invalid. It has to be pleaded and demonstrated, how the violation caused prejudice to the employee. This is the view of A.P. High Court in the latest decision between Smt. *Swarna Kumari v. Government of A.P.,* 2006 (2) ALD 585 (Larger Bench). *Swarna Kumari* was a Senior Civil Judge at Rajam. It will be of interest to the readers that the High Court of A.P. took the same view in Dr. *K. John v. Andhra University,* 2004 (5) ALD 454. Dr. *John* was an Asst. Professor (HRM) of A.U. So much has been stated about violation of the Principles of Natural Justice.

Punishment - Interference:

When misconduct has been proved in the Domestic Enquiry, whether the misconduct committed can be vested with the punishment of dismissal as per the certified Standing Orders, by the Disciplinary Authority, can the Labour Court/Industrial Tribunal interfere with the quantum of punishment.

Section 11-A, which has been introduced in the Industrial Disputes Act by Section 3 of the Industrial Disputes (Amending) Act, 1971, confers a right on the Court to interfere with the quantum of punishment if the same is shockingly disproportionate to the nature of misconduct. In other words the punishment must be proportionate with the nature of misconduct. However, the Court must give reasons for holding that the punishment shocks the conscience of any person. The Andhra Pradesh High Court rightly held in the decision between *State Bank of India v. V.R. Gadgil*, 1994 Lab. IC 2657, that what is shockingly disproportionate is difficult to say. The Apex Court in the decision between *Commissioner of Police v. Syed Hussain*, 2006 (108) FLR 1155, held that the doctrine of proportionality of punishment has to be applied in appropriate cases, as judicial review will depend on the facts and circumstances of each case. Section 11-A does not confer untrammelled power on Courts *CMC Hospital Employees Union v. CMC Hospital, Vellore*, 1987 (4) SCC 691. Also see another decision of Apex Court, *Dinesh Paenna Sagarkunal Regional Bank v. M.L. Jain,* 2005 (104) FLR 291 (SC) = 2005 (1) LLN 662.

It is necessary to state briefly the views of the Apex Court rendered over the years.

The Court in the following decisions observed that interference under Section 11-A at the hands of the Tribunal should be *inter alia* on arriving at a finding that no reasonable person could inflict such punishment. The Tribunal can also interfere when relevant facts on record are not taken into consideration, *Dinesh Paenna Sagarkunal Regional Bank v. M.L. Jain*, (supra). Also see *Muniadh Colliery v. Bihan Collieries Karmagar Union,* 2005 (3) SCC 331 and *V. Ramana v. APSRTC,* 2005 (7) SCC

338. Finally in the decision between *Hombe Gowda Educational Trust v. State of Karnataka,* 2006 LLR 141 (SC), the Apex Court reverse the earlier view held as follows:

> "The Court has come a long way from its earlier view points. The recent trend in the decisions of this Court seek to strike a balance between the earlier approach of the Industrial relation wherein only the interest of the workman was sought to be protected with the avowed object of fast Industrial growth of the Country. In several decisions of the Court it has been noticed that however discipline of the work place/Industrial undertaking received a set back in view of the change in economic policy of the country, it may not now be proper to allow the employees to break the discipline with impunity. Our country is governed by Rule of Law. All actions therefore must be taken in accordance with the rule of law declared by this Court in terms of Article 14 of the Constitution of India ….. . ……"

Incidentally, the employee in the above case is a Lecturer, who slapped the Principal of the College on provocation by the Principal who beat the Lecturer in the first instance. But that is a different stand and the punishment of dismissal was upheld. The Apex Court in the decision between *Mahindra and Mahindra Ltd. v. N.B. Nawate*, 2005 (104) FLR 1218 = 2005 (1) LLN 1074 = 2005 (3) SCC 134, held that dismissal for abusing the Supervisor is justified holding that such an attitude cannot be tolerated by any civilized society. Also see another decision of Apex Court between *South Indian Bank Ltd., and Krishna Kumar,* 2006 (108) FLR 1155 (SC).

It is interesting to note that Domestic Enquiry conducted observing Principles of Natural Justice holding that the charges of proved resulting in the dismissal of the employee by the Disciplinary Authority has a very important bearing while exercising the powers under Section 11-A of the Industrial Disputes Act by the Industrial Tribunal. The Apex Court in *Bharat Heavy Electricals Ltd. v. M.C. Reddy,* 2005 (1) LLN 1051 = 2005 (1) CLR 959 = 2005 (104) FLR 806 (SC), held that there is no power in the Tribunal to sit as an Appellate Court over the decision of the Disciplinary Authority/Domestic Enquiry finding while exercising power under Section 11-A in the absence of any Statutory Rule or Rules. Also see the decision in *M.P. Electricity Board v. J.C. Sharma,* 2005 (3) SCC 401, and also decision was in *V. Ramana v. Divisional Manager, APSRTC, 2005 (2) CLR 410.* It is well settled Law that the nature and extent of punishment to be imposed on the employee for proven misconduct are all matters for the Employer to decide *SPS Venkataraman v. CCI Ltd.,* 2005 (5) ALD 520 (Para 11). In *V. Ramana*'s case (supra) which is an appeal against the Full Bench decision of A.P. High Court reported in 2004 (1) LLN 152, it was held that where the Tribunal holds that the domestic enquiry held is valid it cannot interfere with the quantum of punishment by exercising powers under Section 11-A and that the employer is the best Judge.

Thus, there is a sea change in the thinking of Supreme Court on the quantum of punishment imposed by the Disciplinary Authority.

My grateful thanks to my guide Prof. *R. Satya Raju* of Andhra University, who is my guide in my P.hd., and to Sri *Y.V. Sanyasi Row*, Advocate, who is an Authority on Industrial Laws practicing at Visakhapatnam who kept his valuable Library at my disposal and also discussed with me the salient features.

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