GUJARAT MINERAL DEVELOPMENT CORPORATION

v.

SHRI P. H. BRAHMBHATT

October 30, 1973

[P. JAGANMOHAN REDDY AND P. K. GOSWAMI, JJ.]

Industrial Disputes Act—Respondent a temporary employee terminated from service—Whether termination a discharge simpliciter and the action taken by the employer, bonafide.

The respondent was appointed by the appellant in 1967 as a temporary senior Assistant on conditions set out in the letter of appointment. His services were terminated in 1971 when he was still in temporary service. Due to ill health, the respondent applied for one month's medical leave accompanied by a doctor's certificate; but the leave was refused and he was asked to join duty at once because according to the appellant, there was nothing wrong with his health. Ultimately, when on January 6, 1971, the employee did not appear for medical checkup on the appointed day, the worker was discharged from service retrospectively from November 9, 1970, with one months' pay in lieu of notice.

The Labour Court came to the conclusion, that the discharge was not a discharge simpliciter but an action taken for misconduct and was punitive. The principles of natural justice were not complied with and the impugned action came under s. 11-A of the Industrial Disputes Act, and so, the appellant was directed to reinstate the respondent with half the wages from the date of discharge till the date of his reinstatement.

Before this Court, it was contended by the respondent that the order of discharge was defective because it purported to terminate the service of the respondent retrospectively from the day from which his services were not available to the Corporation as he was absent without leave from November 9, 1970. The appellants' counsel contended that where under a contract of service there is power to terminate the services, that power having been exercised bonafide, the termination cannot be held invalid. The question for decision before this Court was whether the Special Labour Court arrived at a perverse finding, or a finding not warranted by the evidence on record; or, were there any errors apparent on the face of the record which vitiated that finding. Allowing the appeal,

HELD (i) The order of termination cannot be held to be defective merely because the order was to take effect retrospectively from November 9, 1970. The intention of the Corporation was to terminate the services of the respondent from the date from which his services were not available to the Corporation. Even if the super-added part, namely, that the order should operate retrospectively as from an anterior date, is invalid, there is no reason why the first part of the order discharging the services of the respondent as from the date of the order, does not take effect. Therefore, the order discharging the services of the respondent cannot be held to be invalid. [134C]

Jeevaratnam v. *State of Madras,* [1967] 1 L.L.J. 391, referred to.

(ii) Normally, an employer may terminate the services under the terms of the contract or the standing orders as duly certified, but where an Industrial Dispute is raised, the form of the order is not conclusive and the tribunal to which the dispute is referred can examine the question whether the discharge is punitive, malafide or arbitrary. If it comes to any of these conclusion, it can direct the reinstatement of the employee; but should not do so if the employer has lost his confidence in the employee. If the Tribunal is satisfied that the order is punitive, or malafide, or is made to victimise the workmen or amounts to unfair labour practice, it is competent to set it aside. The test is whether the act of the employer is bonafide or not. If it is not, and is a colourable exercise of the power under the contract of service, or standing orders, the Tribunal can discard it in a proper case, and direct re-instatement. [134E]

Tata Engineering and Locomotive Co. Ltd. v. *Prasad,* [1969] 2 L.L.J. 779, referred to.

A (iii) This Court ordinarily does not entertain pleas on questions of fact, or interfere with the findings of fact so as to convert itself into a third court of fact. But the Court will not hesitate to interfere with the findings of fact, where there has been illegality or an irregularity of procedure, or a violation of the principles of natural justice resulting in the absence of fair trial, or where there has been a gross miscarriage of justice, or where the Tribunal has given inconsistant and conflicting findings, or where the findings are vitiated by error of law, or where the conclusion which reached by the courts below are so B patently opposed to the well-established principles as to amount to miscarriage of justice or where the finding is not supported by any legal evidence and is inconsistant with the material produced on record, or where the High Court or the Tribunal below committed a serious error in not examining evidence of a central issue with the case which it deserved, etc. [135E]

(iv) In the present case, from the evidence it seems that the respondent had made it a habit of remaining absent from duty without obtaining prior permission; that he had very little respect for his superiors; that he was haughty and C insolent and did not care for the rules of the Corporation and was a habitual absentee without getting his leave sanctioned previously. The Special Labour Court had no basis for coming to the conclusion that the respondent had apologised for his wrongs and that the matter was properly dealt with. The respondent never apologised, but he was prevaricating. The respondent was always adopting highly unreasonable attitude which was detrimental to the interests of the Corporation. In the above circumstances, it would be misnomer to say that the action of the Corporation was not bonafide, but was malafide. Therefore, the findings of the Special Labour Court is perverse and could not be arriv- D ed at on any reasonable view of the evidence. [140G; 141C]

(v) The respondent cannot be considered as a permanent employee of the Corporation, because under rule 15 of the rules, an employee is required to subscribe to a declaration before joining duty in the form prescribed in Appendix-I. That form declares that he has understood the Gujarat Minerals Corporation Ltd. (Staff) Service Rules, and he subscribes and agrees to be bound by the said rules. Such a declaration has not been signed by the respondent and therefore those rules are not applicable to the respondent. [141D] E

(vi) Under Rule 7, the General Manager may temporarily employ suitable candidates to vacant posts in Class III and IV only and the Chairman of the Sub-Committee may authorise appointment of suitable candidates to a vacant post in Class I and II. It is admitted that the post held by the respondent falls in one of the categories mentioned in the above rule. Under these circumstances, the employment of the respondent was temporary and was not subject to the rules. [141F]

F (vii) Further, even if the said employee contributed to the Provident Fund, the Provident Fund Act did not apply to the Respondent, because till 1972, the Provident Fund Act did not apply to this Corporation. If the Provident Fund Rules of the Corporation permitted a temporary employee also to contribute to it, the contribution by the respondent does not indicate that he was a permanent employee. [141G]

(viii) As regards the question as to whether s. 11(A) of the Act is applicable G to the present case, it can be said that s. 11-A will not apply to an Industrial Dispute referred prior to December 15, 1971, when the said section was brought into operation. Therefore, the said section is not applicable in the present case. Further, this section has no retrospective effect on the pending reference. [141H]

Workmen of M/s. Firestone Tyre and Rubber Co. of India Private Ltd. v. *The Management and Ors.*, [1973] 1 L.L.J. 278, referred to.

Under the circumstances, the termination of the services of the respondent is not malafide or punitive and the appointment of the respondent being tem- H porary, the termination was a discharge simpliciter and the action taken by the Corporation was bonafide. [142D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 803 of 1973.

Appeal by special leave from the award dated January 24, 1973 of the Special Labour Court, Ahmedabad in Reference (IC-IDA) No. 4 of 1972 published in the Gujarat Government Gazette Part 1-L dated March 1,1973. A

M. C. Chagla, G. P. Vyas and *R. P. Kapur,* for the appellant.

Respondent appeared *in person.* B

The Judgment of the Court was delivered by

JAGANMOHAN REDDY, J.—This appeal by special leave challenges the award of the Special Labour Court, Ahmedabad, by which the respondent an employee of the appellant Corporation was directed to be reinstated and paid as compensation half the wages including dearness allowance from the date of his discharge till the date of his reinstatement in service. The respondent was appointed by the appellant on June 13, 1967 as a temporary Senior Assistant on conditions set out in the letter dated June 13, 1967. The respondent's services continued to be temporary as no order of appointing him on probation was passed, and on the date when his services were terminated by an order dated January 6, 1971, he was in temporary service. C D

According to the respondent's statement of claim in September-October 1970 he was not keeping good health, none-the-less he used to attend to his duties. However, in October 1970 his health deteriorated further and he went on sick leave for five days from October 14 to October 18, 1970. Thereafter though he joined and worked he was under treatment. Then all of a sudden his health took a turn for the worse and after the medical examination by his physician he was advised rest and medical treatment for one month. In view of this advice he made an application on November 7, 1970 for one month leave on the ground of illness accompanied by a medical certificate of K. J. Vaidya who was a registered medical practitioner, but the appellant did not give any reply immediately. Later the appellant wrote a letter to the respondent asking him to "join duties at once" because there was nothing wrong with his health and his leave was not sanctioned. E F

We shall advert to the correspondence in greater detail later, but for the present it is sufficient to set out what has been narrated by the Special Labour Court, according to which the concerned workman (the respondent) after receiving the reply on November 14, 1970 wrote to the Corporation that the said superior officer was not qualified to opine about his health and it was necessary for him to take rest as medically advised. He also stated that he wanted to consult a physician in Bombay and if he decided to go there he would intimate his Bombay address to the Corporation. He alleged that this letter was not immediately replied. Thereafter, the concerned workman proceeded to Bombay and started receiving treatment from one Dr. K. C. Mehta, M.D. (Bom.), F.C.P.S. He then received a letter from the Corporation requiring him to report immediately to the Corporation for being sent for a medical examination by the Civil Surgeon, Ahmedabad. The concerned workman contended that if he was required to G H

A be examined by the Civil Surgeon, Ahmedabad, he should have been informed about it before he left for Bombay and according to him, this was not a *bona fide* direction. The concerned workman then sent a medical certificate obtained from his doctor with his letter dated December 9, 1970, asking for further leave. The concerned workman then received a letter dated December 24, 1970 requiring him to report to the Corporation within two days and informing him that if B he failed to do that, he would be dismissed from service. He then returned to Ahmedabad and wrote a letter dated January 4, 1971 to the Corporation that he was prepared to submit for the examination by the Civil Surgeon, Ahmedabad, and he should be sent an authority for the purpose. According to the concerned workman, instead of granting this request, the Corporation sent a letter dated C January 6, 1971 together with a discharge order, informing him that he was discharged with effect from November 9, 1970. The concerned workman contended that the action taken against him was illegal and improper; that the Corporation had no authority to require him to submit for examination by the Civil Surgeon; that it could not have rejected a certificate from a registered medical practitioner and, therefore, he was entitled to be reinstated with full back wages.

D As against these averments, the case of the Corporation was that the concerned workmen was only a temporary employee and under the contract of his employment he was to be taken up as a probationer, and after completion of the probationary period he was to be confirmed. However, during his service, as he was found to be arrogant, careless, negligent and having scant respect for his superiors, no order E making him a probationer was passed and he was continued only as a temporary employee in an expectation that he would improve and give satisfaction to his superiors. According to the Corporation, assuming that he had become a probationer, he was not confirmed; and so in any event he was not a permanent workman. The Corporation then alleged that during the tenure of his service, apart from other defects in him, it was also found that in about October 1970, he was evading F to undertake about ten days' tour to Bombay. So, he was given a memo requiring tim to submit his explanation, which he did, but in a very disrespectful language. Thereafter, he had gone on leave on grounds of illness. It was then alleged that on November 7, 1970, though he was present in office, looking quite healthy and fit, and had worked for the whole day, yet he gave an application for leave for 30 days. He gave this application to the inward clerk and not to his G superior officer as it was the usual practice, which he could have followed very easily. He had attached a certificate to the leave application; but the certificate was from a Vaidya who was only a P.M.P. The certificate did not disclose any serious disease, and hence on considering these facts, the leave application was refused and he was asked to report for duty. A letter to that effect was sent to him under certificate of posting, but that letter was returned to the Corporation H with an unusual postal endorsement viz. "Left—particulars not known". A copy of this letter was then sent to him by registered post at the very address and the same was received by him on November 14, 1970. The concerned workman then wrote a letter refusing to report for

duty and stating that he would go to Bombay for consultation with an eminent physician. Thereupon, the Corporation wrote another letter dated 27/30 November, 1970 calling upon him to present himself at the head office so that he can be sent to the Civil Surgeon for a medical check-up because it wanted to verify as to whether his illness was genuine or not. According to the Corporation, this letter was sent to him with a special messenger at his residential address on November 30, 1970 at 11.30 A.M. but a member of his family reported that he had left for Bombay. In the meanwhile, the Corporation received a letter on December 2, 1970 purporting to have been sent from Bombay. However, this letter did not bear any postal mark from any Bombay post office. The Corporation then wrote a letter to him at his Bombay address on the same day asking him to comply with the instructions contained in the letter dated 27/30 November, 1970. According to the Corporation, this letter seems to have been received by him on December 4, 1970, and thereafter he sent a letter, dated December 9, 1970 together with an application for leave along with a medical certificate. But in this letter, the respondent did not give any specific reply to the directions to attend to the head office for his medical check-up. The medical certificate also did not show that he was seriously ill. Hence, the Corporation, by its letter dated December 24, 1970, sent to his Bombay address, calling upon him to present himself at the head office for a medical check-up. According to the Corporation, a letter dated January 4, 1971 was received from him asking for a letter of authority to be presented before the Civil Surgeon, but the Corporation had reasons to suspect that the concerned workman was in fact evading being medically examined. Further, looking to his previous record, it was found that it would not be proper to confirm such an employee, or to continue him in service. So, it was decided to discharge him. An order terminating his services with one month's pay in lieu of notice with effect from November 9, 1970 was passed and was sent to him with a letter dated January 6, 1971. The Corporation alleged that in the past also he was found to be remaining absent and irregular in work and leaving his work without any leave or authority, as such, the action taken against him was quite legal and proper and he was not entitled to any relief. The Corporation had raised contentions that the concerned workman was not a 'workman' within the meaning of the term under the Industrial Disputes Act, and the said Act did not apply to the Corporation because it was a Government concern. The contention that on this account, this reference was invalid was not pressed before the Special Labour Court and accordingly no question of lack of jurisdiction was urged before us.

A B C D E F G

On the aforesaid averments, the Special Labour Court posed the question whether the termination of the services of the respondent was a discharge simpliciter as alleged by the Corporation or was it a discharge for misconduct which was of a punitive nature? On a perusal of the correspondence the Labour Court came to the conlusion that as the concerned workman did not report for medical check-up, but wrote a letter asking for an authority to be presented before the Civil Surgeon, his services were terminated which clearly amounted to an

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A action taken for non-compliance with the requirements contained in the letters as well as for remaining absent without leave. In the circumstances it held that the discharge was in pursuance of the threatened disciplinary action and did not amount to a discharge simpliciter, in that the real nature of the action taken against him was for the misconduct and was punitive. On this conclusion it further held that the principles of natural justice were not complied with by calling upon B the workman to show cause against the proposed action nor was the workman given an opportunity to explain the allegations which formed the basis of the impugned action. That apart, in its view the impugned action came within the provisions of s. 11A of the Industrial Disputes Act—hereinafter called 'the Act'— according to which it would be the duty of the Court to satisfy itself whether the order or dismissal C or discharge was justified or not and in discharging that duty the Court would be entitled to rely on the materials on record without taking any fresh evidence in relation thereto. Though the Special Labour Court came to the conclusion that the previous behaviour of the workman showed that he was haughty and insolent and he had used improper language to his superiors he was properly dealt with by being made to apologise for his wrongs and therefore he cannot be tried and punish- D ed twice for the same wrong inasmuch as the action for the termination of his services was based on the ground that the reasons urged for leave were found to be not genuine and he had not submitted himself to a medical check-up as required by the Corporation. It was further found that merely because his leave application was presented in a particular manner, and because it was accompanied by a certificate from a registered medical practitioner a Vaidya, no inference would E arise that the grounds urged were absolutely false. In the view of the Special Labour Court the management of the Corporation in this case had approached the matter with a closed, and not an open, mind, nor did it consider that the circumstances on which it relied were explainable on the assumption that the concerned workman was innocent.

F Adverting to the letter written by the respondent on November 21, 1970 in reply to the Corporation's letter of November 4, 1970, informing him that his leave was refused and that he should immediately report for duty, the Special Labour Court observed that this letter seems to have been written in a rather harsh language, but explains away the conduct as probably being due to leave being refused by the superior officers of the Corporation. In the view it took, it held that G the discharge of the respondent cannot be justified.

It is obvious from the order terminating the services of the respondent that it is an order of discharge. But that order though dated January 6, 1971, purports to terminate the services of the respondent as from November 9, 1970 on the ground that his services were no longer required. In the covering letter of the same date, a month's H salary was sent in lieu of one month's notice as provided in the Service Rules of the Corporation. The respondent contends that this order is defective because it purports to terminate his services retrospectively from November 9, 1970. Though the order is one purporting to

terminate his services from a date anterior to the date of the order of termination, that order *ex facie* is severable. In fact it is an order discharging the services of the respondent as from the date of the order with the super-added direction that the order should operate retrospectively as from an anterior date. Even if the super-added part is invalid, there is no reason why the first part of the order does not take effect. It was so held by this Court in *Jeevaratnam* v. *State of Madras*(1). The intention of the Corporation was no doubt to terminate the services of the respondent from the date from which his services were not available to the Corporation as he was absent without leave. For that reason the Corporation stated in the covering letter that the rest of his dues will be sent to him hereafter, which probably were intended to cover the period for which the leave was not granted or this may be in respect of the provident fund etc. In any case, as we have said earlier, the order of termination cannot be held defective merely because the order was to take effect from November 9, 1970. We will, therefore, treat the order as an order of termination as from the date of the order with one month's salary in lieu of one month's notice which would more than meet the requirements, because there is a dispute as to whether even under the Service Rules the respondent was entitled to seven days pay only in lieu of notice. In our view, the order cannot be held to be invalid.

The appellant's counsel contends that where under a contract of service there is power to terminate the services, that power having been exercised *bona fide,* the termination cannot be held to be invalid, and consequently it is open to an employer, where there is such a power, to terminate the services of an employee or to discharge him without giving any reasons. It is true, normally an employer may terminate the services under the terms of the contract or the standing orders as duly certified, but where an industrial dispute is raised the form of the order is not conclusive, and the Tribunal to which the dispute is referred can examine the question whether the discharge was punitive, *mala fide,* vindictive or arbitrary. If it comes to any of these conclusions, it could direct reinstatement of the employee. But even in such cases the Tribunal should not direct reinstatement if it comes to the conclusion that the employer has lost his confidence in the employee, where the reposing of such confidence is a necessary concomitant of his services. In other words, the order of discharge simpliciter is not conclusive and when an industrial dispute is raised, the Tribunal adjudicating such dispute can examine the substance of the matter and determine whether the termination is in fact discharge simpliciter or dismissal, though the order is one of simple termination of service. If it is satisfied that the order is punitive or *mala fide* or is made to victimize the workman or amounts to unfair labour practice, it is competent to set it aside. The test is whether the act of the employer is *bona fide* or not. If it is not and is a colourable exercise of the power under the contract of service or standing orders, the Tribunal can discard it and in a proper case direct reinstatement. See also *Tata Engineering and Locomotive Company Ltd.* v. *Prasad*(2)

(1) [1967] 1 L.L.J. 391. (2) [1969] 2 L.L.J. 799.

A The principles being clear, the only question is whether the Special Labour Court arrived at a perverse finding or a finding not warranted by the evidence on record or are there any errors apparent on the face of the record which vitiate that finding?

The respondent who personally argued his case contended that in *Bengal Chemical & Pharmaceutical Works Ltd.* v. *The Employees*(1), it was held by this Court that though Art. 136 is couched in widest terms, it is necessary for this Court to exercise its discretionary jurisdiction only in cases where awards are made in violation of the principles of natural justice, causing substantial and grave injustice or raises an important principle of industrial law requiring elucidation and final decision by this Court or discloses such other exceptional and special circumstances which merit the consideration of this Court. It is true that the decisions of this Court warrant the submission that before redress is claimed under Art. 136 the party claiming it should show that the impugned order or award is defective by reason of excess of jurisdiction or of a substantial error in apply the law or of settled principle or suffers from gross and palpable error occasioning manifest and substantial injustice: per Hidayatullah, J., in *Kamani Metals & Alloys Ltd.* v. *Their Workmen*(2).

It may, however, be stated that this Court does not generally entertain pleas on questions of fact or interfere with findings of fact so as to convert itself into a third court of fact. The reason is obvious, because different persons may come to different conclusions on an appreciation of evidence depending upon the way in which the credibility of the evidence given by the witnesses is judged. In so judging the evidence, various contributory factors may play a vital part, such as the knowledge and experience of men and affairs. However an appellate court or a court having jurisdiction to entertain petitions challenging the verdict will not hesitate to interfere with findings of fact where there has been an illegality or an irregularity of procedure, or a violation of the principles of natural justice, resulting in the absence of fair trial or where there has been a gross miscarriage of justice, or where the tribunal has spoken in two voices and has given inconsistent and conflicting findings, or where the findings are vitiated by error of law or where the conclusions reached by the courts below are so patently opposed to the well-established principles as to amount to miscarriage of justice or where the finding is not supported by any legal evidence and is wholly inconsistent with the material produced on the record, or where the High Court or the tribunal below, committed a serious error in not examining evidence on a central issue with the care which it deserved. These principles have been affirmed in the various decisions of this Court and are so well-established that it is unnecessary to refer to those decisions.

Applying these principles what we have to see in this case is, is any interference in the award called for. No doubt the Special Labour Court gave a clear finding that the behaviour of the workman showed

(1) [1959] 1 L.L.J. 413. (2) [1967] 2 L.L.J. 56, 60 (S.C.).

that he was haughty and insolvent and that he had used improper language to his superiors. Having given that finding it thought that he was properly dealt with by being made to apologise for his wrongs and therefore he cannot be tried and punished twice for the same wrong. While we consider that the finding arrived at is amply justified by the record, the subsequent glossing over of the serious charge against the respondent is unwarranted on the evidence on record. Several letters were addressed to the respondent by the Corporation and he was given several memos in respect of his work, attitude and conduct while in service. He seems to have made it a habit of remaining absent from duty without obtaining prior permission as is evident from the various letters. By its letter dated October 23, 1967, the Corporation informed the respondent that he remained absent from 3rd to 6th and 11th of that month without prior approval of any of his superiors and he was told that availing of such leave by the Senior Assistant cannot be tolerated by the management. He was asked to explain within two days from the date of the receipt of that letter, why disciplinary action should not be taken against him for remaining absent from the office. By his letter dated October 26, 1967, the respondent explained that he was suffering from acute dysentery from 3rd to 6th October and therefore he was compelled to remain on leave during that period. This letter shows that he was aware that remaining absent without prior sanction of leave was improper but it was explained that he could not get prior approval for leave. Again by its letter dated January 19, 1968, the Corporation informed the respondent that he remained absent from his duties on January 15, 1968 without prior approval of any of his superiors and he was asked to explain why disciplinary action should not be taken against him for availing of leave in this manner which previously also he had availed of two days' leave in similar manner. On October 9, 1969 a memo was issued to the respondent that in contravention of the instruction issued under Office Circular dated July 5, 1969, he had remained absent on October 4, 1969 without prior approval of leave in writing from any of his superiors, and he was asked to explain immediately why his absence should not be treated as leave without pay. Again on May 13, 1970, another memo was issued to the respondent saying that he was in the habit of proceeding on cosual leave without getting the same sanctioned before hand. In that memo it was stated that whenever he was asked by his departmental head to give reason for his remaining on casual leave he was trying to evade giving specific reasons for absenting himself from duties. The memo further stated that :"... ..you are in the habit of deliberately ignoring day to day instructions issued to you by your departmental head, *e.g.*, you have been often told to be punctual in attending office, not to leave your seat during office hours without any reasonable cause, or office work, not to while away your time by going on 5th Floor and chitchating with the members of the staff etc. Even then it is found that you have persisted in ignoring all these instructions. That you are showing scant respect for your superiors". He gave an explanation which was argumentative and vague. On June 26, 1970 he was again served with another memo stating that it was found that on 25th morning at about 11.30 he had

A some visitors with whom he left the office without intimating his immediate superior and later he had left a leave application for half day casual leave and left the office without intimating his superior. He was asked to note that this was highly indisciplined and to show cause why action may not be taken against him. In his reply dated June 29, 1970 he said that it was not 11.30 a.m. but 1.30 p.m. that he had left the office and said that he had conveyed the message through some B one but evidently he did not convey the message. He was given a warning on June 30, 1970 that he had violated the instructions by not submitting the explanation in time before 5.30 p.m. on June 16, 1970 and also that the explanation given by him was most unsatisfactory, and the facts stated therein were incorrect. On December 24, 1969 he was given a warning for returning late from recess on that date at 2.50 p.m. instead of at 2.30 p.m. and he was informed that C the authorities viewed it as gross irregularity and indiscipline on his part in not observing office timings and was strictly warned that in future if he was found irregular in observing office timings, he will be liable for strict disciplinary action.

After this, on another occasion the respondent by letter dated D October 20, 1970 was asked to undertake tour to Bombay for a week to ten days before Diwali, but he refused to comply. Thereafter a memo dated October 23/26, 1970 was issued to the respondent that he was told by the Assistant Sales Organiser on October 20, 1970 to proceed on tour to Bombay for sale of Silica Sand and that he was specifically instructed to undertake the tour before Diwali, but he had arrogantly refused to accept the original letter and returned the same E with the remark that he cannot undertake the tour on ground of his bad health. Even prior instructions to proceed on tour were not complied with. Instead of carrying out these instructions he proceeded on leave immediately on the ground of ill health and did not carry out the instructions. When he was once again instructed in writing as stated above, he had shown gross disobedience, insubordination and disrespect to his superiors and gross negligence in his work. It was F further stated in that memo that besides the above incident, it had been found on several occasions in the past that he was in the habit of deliberately violating the instructions issued to him by his superiors from time to time in respect of his duties and showing scant respect to his superiors and that the Management had taken a serious view of this and he was asked to submit his written explanation on or before October 27, 1970 why his services should not be terminated forth- G with. To this memo the respondent replied on October 28, 1970, in which he described the allegations contained in the memo dated October 23/26, 1970 as "absolutely false, frivolous and concocted". He also said "a tour before a week ahead of Diwali should not be fruitful" and that it would be wastage of money "which any layman can appreciate". He also stated therein that he personally felt that the Corporation was resorting to a sort of stunt to send him on tour before H Diwali maliciously to put him in hot water since management did not arrange so far for his visiting cards with designation to represent the Corporation while promoting the sale of Silica Sand. The Corporation legitimately took exception to this letter and by memo dated November

3, 1970, informed the respondent that his explanation was couched in impolite, insulting, unparliamentary and disrespectful language, and he had cast unwarranted and baseless aspersions against his superiors and the mangement in respect of which the management took a very serious view to this sort of behaviour amounting to insubordination on the part of a Senior Assistant. In view of this he was asked to withdraw all those allegations and aspersions and to tender an unconditional written apology before 5.30 p.m. on November 4, 1970, expressing sorrow for the same, failing which the management will have to take serious disciplinary action against him. The respondent thereafter began to hedge and did not offer an unconditional written apology. By his letter dated November 4, 1970, he said "While referring yours above, I do not infer what is inferred by Management, but however if so is inferred by the Management, I feel sorry". He was then informed by a memo dated November 6, 1970 that there was nothing to be inferred when everything was abundantly clear, and that instead of straightaway withdrawing all the allegations and aspersions against the management contained in his explanation dated October 28, 1970, he had raised the question of inference by the management. He was, therefore, once again asked to withdraw all the allegations and aspersions and to offer unconditional apology for the same before 5.30 p.m. on November 6, 1970. Again by letter dated November 7, 1970 the respondent did not offer an unconditional apology but write as follows:

> "While referring yours above I again feel sorry that the Management still feels my reply dated 28th of October 1970 offending though not, which is a matter of great regret".

It will thus be observed that by neither of these two letters did he either withdraw the allegations made against the Corporation or its officers, nor offer an unconditional apology. His only regret was that the management felt his reply offending though it was not.

Even so, on the same day, i.e. November 7, 1970, the respondent sent a letter enclosing therewith a leave application for 30 days earned leave from November 9, 1970 to December 8, 1970 (8th November 1970 being Sunday) accompanied by a medical certificate in original. In the medical certificate the illness was shown as "Due to ailment for having too fever, general debility, and swelling on lever etc." and the person certifying was a Vaidya. Thereafter at no time did the respondent care to have his leave mentioned before availing of leave, nor did he return to work till his services were terminated.

The Corporation asked the respondent to appear before it for being sent to the Civil Surgeon, Ahmedabad, but the respondent began to dodge. The Corporation sent a letter dated November 9, 1970 under certificate of posting informing the respondent that his leave application was violative of certain provisions of the Service Rules and that he was well aware that as provided in the Service Rules of the Corporation, application for earned leave is ordinarily required to be submitted 15 days before the date from which leave is required and that it was obligatory on the part of every employee

A to furnish his address during leave which he had failed to state in his leave application and he had absented himself from duty without getting his leave sanctioned even though he was present in the office on November 7, 1970 and there was nothing wrong with his health. It was also stated therein that instead of personally handing over his leave application to the Head of his Department, he had adopted an uncommon and out of the way practice of getting his application B inwarded through the Registry Branch with the result that his application did not reach the Assistant Sales Organiser before 4.50 on November 7, 1970, and thereafter without caring to inquire whether his leave had been sanctioned or not he had absented from duty from November 9, 1970 onwards, which action amounted to indisciplinary behaviour and misconduct and the management took a serious view of the same. He was instructed to report immediately C for duty as his leave had not been sanctioned, on failure of which the management will be constrained to take disciplinary action against him. It was also added that it was difficult to believe that there was anything wrong with his health which required rest for 30 days inasmuch as he had attended the office in good health from October 18, 1970 onwards upto November 7, 1970 after enjoying leave from October 14 to October 17, 1970. A copy of this letter was also D sent to the respondent by registered post acknowledgement due, on November 12, 1970. By his letter dated November 21, 1970, sent under registered post acknowledgement due the respondent admitted that according to Service Rules of the Corporation, application for earned leave is ordinarily required to be submitted within 15 days before the date of commencement of leave. But as the word 'ordinarily' implies there can be occasions for urgent leave when the 15 days E limit cannot be observed, and that as he urgently needed leave on medical advice, it was not possible for him to apply in advance. Regarding furnishing his address during leave, he thought that such address was to be furnished if there was to be any change in the normal address during the leave period and that was why he did not furnish the address in the leave application. He also stated that the officer who had F signed the letter dated November 9, 1970, had no medical qualification and that even if he had, he had never medically examined him. He, therefore, wondered how the officer was competent to certify that there was nothing wrong with his health. He further stated that he was still under the medical treatment and needed rest as advised by the physician, and that it was not proper that the management should force him to resume duty under the threat G of disciplinary actions. He stated that he proposed to consult a good physician about his health which was causing him a lot of worry and he may have to go to Bombay in next few days and that he shall communicate his Bombay address to the Corporation if he went to Bombay. The Corporation thereafter wrote a letter dated November 27/30, 1970 asking the respondent to present himself in the Head Office immediately on Monday, November 30. 1970. H so that he could be sent to the Civil Surgeon for medical check-up, with a view to verify whether the causes of his alleged illness were genuine or not. This letter could not be delivered to him and so a copy of it was sent to him at his Bombay address which he had in

the meanwhile furnished. On December 2, 1970 the Corporation asked the respondent that to comply with the instructions contained in the letter dated November 27, 30, 1970 enclosed therewith and to present himself at the Head Office for being sent to the Civil Surgeon for medical check-up. On December 9, 1970 the respondent again sent another application for leave for 39 days from December 9, 1970 to January 16, 1971 as earned leave whatever due and the balance sick leave as admissible. He said that he was under the treatment of a renowned and highly qualified physician Dr. K. C. Mehta, M.D., P.C.P.S., who had certified that the respondent was suffering from "chronic gastritis with hyperacidity and general debility" and was advised rest for five weeks. The Corporation by its letter dated December 24, 1970, told the respondent that the question of granting further leave for 39 days from December 9, 1970 to January 16, 1971 did not arise, as he had not proceeded on duly sanctioned leave and had unjustifiably absented himself from duty from November 9, 1970. The Corporation once again asked the respondent by this letter to present himself immediately in the Head Office within two days from the receipt of the letter for his medical check-up by the Civil Surgeon, Ahmedabad, so that the management could take a decision in respect of his request for leave. By his letter dated January 4, 1971 the respondent wrote that he was willing to appear before the Civil Surgeon, Ahmedabad, for medical examination and asked the Corporation to send him a letter of authority for appearance before the Civil Surgeon so that the can show it to him and get himself examined. This was the last straw, which ultimately induced the Corporation to terminate the respondent's services. It, however, did so without assigning any reasons.

We have given the contents of all these letters in a chronological order which to any reasonable mind would show that the respondent was houghty and insolent and did not care for the Rules of the Corporation and was a habitual absentee without getting his leave sanctioned previously. The Special Labour Court had no basis for coming to the conclusion that the respondent had apologised for his wrongs and that the matter was properly dealt with. The respondent never apologised, but as we have pointed out earlier, he was prevaricating. The respondent's attitude was that if it was inferred that he was insolent, then he was sorry but that he was not insolent. This is not an unconditional apology and the Corporation did not accept it and before any action could be taken against him he stayed away from work without obtaining prior leave and never returned. The respondent was always adopting highly unreasonable attitudes which were detrimental to the interest of the Corporation. In the above circumstances, it would be a misnomer to say that the action of the Corporation was not *bona fide* but was *mala fide*. This finding has not an iota of justification, for, the final actions of the Corporation leading to the termination of the services of the respondent as is evident from the correspondence, were due to the fact that the respondent, though asked to present himself at the Head Office so that he could be sent to the Civil Surgeon for medical check-up, defied and was not prepared to abide by those directions. On the other hand, he wanted to impose

A his own terms and required the Corporation to send him a letter of authority so that he could show it to the Civil Surgeon and get himself examined. The Corporation was perfectly justified in taking the stand that the respondent was malingering inasmuch as he was prepared to travel back from Bombay to Ahmedabad but he was not prepared to attend the Head Office so that he could be sent for medical check-up. If the Corporation had been merciful in terminating his B services by discharging him simpliciter, that is not a fault to be laid at their doors nor can it be a ground for imposing on them the services of the respondent who was indisciplined and arrogant, a conduct subversive of the smooth functioning of any commercial or industrial undertaking. We think the finding of the Special Labour Court is perverse and could not be arrived at on any reasonable view of the C evidence.

It has also been urged that the respondent should be considered as a permanent employee of the Corporation inasmuch as according to the Service Rules a probationer is automatically declared as permanent if he is not so confirmed within two years. This contention, in our view, is equally untenable because under Rule 15 of the Rules D which have been passed subsequent to the appointment of the respondent, an employee is required to subscribe to a declaration before joining duties in the form prescribed in Appendix I. That Form declares that he has read and understood the Gujarat Mineral Development Corporation Limited (Staff) Service Rules and that he subscribes and agrees to be bound by the said Rules. Such a declaration has not been signed by the respondent and, therefore, those Rules are not E applicable to him. It is also evident that rule 2(b) states that "these Rules are applicable to every wholetime employee of the Corporation, provided that employees under specific agreement or arrangement shall not be governed by these rules or shall be governed by them only subject to such special terms, conditions or stipulations as may be provided for by such agreement or arrangement". Under r. 17 the General Manager may temporarily employ suitable candidates to vacant F posts in Class III and IV only and the Chairman or the Sub-Committe may authorise appointment of suitable candidates to vacant posts in Class I & II. It is admitted that the post held by the respondent falls in one of the categories mentioned in the above rule. In these circumstances the employment of the respondent was temporary and was not subject to the Rules. The argument that he contributed to the Provident Fund and therefore must be considered to be a G permanent employee of the Corporation is equally untenable, because the Provident Fund Act did not apply to this Corporation till 1972 which is after the termination of the services of the respondent. If the Provident Fund Rules of the Corporation permitted a temporary employee also to contribute to it, the contribution by the respondent does not indicate that he was a permanent employee.

H The next question is whether s. 11A of the Act is applicable to this case. That section provides that where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court Tribunal or National Tribunal for adjudication and, in

the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. We are, however, not concerned with the several questions which may arise thereunder, because the section itself will not apply to an industrial dispute referred prior to December 15, 1971, when s. 11A was brought into operation. It was held by this Court in *The Workmen of M/s. Firestone Tyre & Rubber Co. of India (Pvt.) Ltd.* v. *The Management and others*(1), that this section has no retrospective operation on the pending references.

In our view the termination of the services of the respondent is not *mala fide* or punitive but the appointment of the respondent being temporary, the termination was a discharge simpliciter and the action taken by the Corporation was *bona fide*. In the circumstances we set aside the award of the Special Labour Court and maintain the order made by the appellant terminating the services of the respondent only as from 6th January 1971. In respect of the period 7th November 1970 to 6th January 1971 he will be entitled to payment of his salary, if any due to him, after leave to which he may be entitled is sanctioned.

The appeal is allowed, but in the circumstances without costs.

S.C. *Appeal allowed.*

(1) [1973] 1 L.L.J. 278.