

Dda vs.mool Chand

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Court : Delhi

Decided On : Jul-21-2017

Appellant : Dda

Respondent : Mool Chand

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

21. t July, 2017 + W.P (C) No.9468/2004 & CM No.6772/2004 1. DDA Through: Mr.Arun Birbal and Mr.Sanjay

... Petitioner

Singh, Advs. versus MOOL CHAND Through: None Respondent CORAM: HON'BLE MR. JUSTICE C.HARI SHANKAR JUDGMENT This writ petition, filed by the DDA under Article 226 of the Constitution of India, assails (i) order, dated 3rd January, 2003 whereby the Labour Court had exonerated the respondent of the charges leveled against him by the management of the petitioner (hereinafter referred to as the management) and (ii) consequential award, dated 5th March, 2003, passed by the Presiding Officer, Labour Court-I (hereinafter referred to as a Labour Court) in Industrial Dispute No.154/84, which held the respondent to be entitled to W.P.(C) No.9468/2004 Page 1 of 40 reinstatement in service with 50% back wages and continuity of service.

2. 3. A brief recital of the facts would be necessary at the outset. In June, 1980, the respondent was posted as Chowkidar with the petitioner. During the period he served as such, it is alleged that, on 14th June, 1980, 1221 G.I. Pipes of 15mm diameter, 54 G.I. pipes of 20mm diameter and 18 G.I. pipe of 32mm diameter, totally worth Rs.73,600/- were stolen from the store of the petitioner. An FIR was also registered. This resulted in the issuance, to the respondent, of a Statement of Imputation dated 23rd June, 1980, by the petitioner, alleging that the theft, which had occurred between 8.30 pm and 9pm on 14th June, 1980, had taken place by the breaking open the lock of the main gate and that, as the respondent was one of the security guards deputed for watch and ward of the godown during the said shift, he was guilty of general laxity and sheer negligence. The respondent was, therefore, directed to show cause why disciplinary action be not initiated against him.

4. Inquiry took place, resulting in the Inquiry Officer submitting a report dated July 1981, containing the following findings:-

"W.P.(C) No.9468/2004 Page 2 of 40 (i) The conspiracy for the abovementioned theft was arranged by Maman Chand, security guard, with some outsiders. The stolen goods were removed in a truck. (ii) The thieves broke open the lock on the main gate, loaded the pipes on the truck and fled. (iii) Maman Chand was aided, in his nefarious act, by Rajender Singh, Mehar Chand and the respondent, who enabled Maman Chand to carry out his mission by purposely abstaining from the site. (iv) After the theft had taken place, Rajinder Singh and the respondent returned to the store at 10 pm. The security guard, who officiated during the next shift, P.T. Ram was also callous as he did not check the lock on the gate, in order to visualize the missing material, which was quite voluminous and lying in front of the gate. (v) The loss was only noticed by the security staff on the next date. In the circumstances, it was opined that Maman Chand, Rajinder Singh, Mehar Chand and the respondent were a danger W.P.(C) No.9468/2004 Page 3 of 40 to the security and property of the petitioner, and it was recommended that their services be immediately dispensed with. Other security staff were also advised to be strongly reprimanded.

5. As a sequel to the submission of the aforementioned inquiry report, the services of the respondent were terminated, under Rule 5(i) of the Central Civil Services (Temporary Services) Rules, 1965 as extended to employees of the petitioner vide Regulation 6 of the Delhi Development Authority (Salaries & Allowance and Conditions of Services), Regulation 1961, by way of establishment order No.174, dated 01st June, 1980.

6. The respondent raised an industrial dispute, resulting in reference, by the Delhi Government, of the following dispute, to the Labour Court, for adjudication: Whether the services of Mool Chand were terminated illegally and/or unjustifiably and if so, what relief is he entitled?. The reference was registered as ID15484. W.P.(C) No.9468/2004 Page 4 of 40 7. In his statement of claim, dated 10th December, 1984, filed before the Labour Court, the respondent contended thus:-

"(i) He had been appointed as Chowkidar but was actually assigned the work of electrician. (ii) For a while before the fatal night, Maman Chand was bringing considerable pressure, on the respondent, to go to his relatives house to carry out some electrical repairs. The respondent had, ultimately, to succumb to the said pressure, as a result whereof, on 14th June, 1980, the respondent went, with Rajinder Singh, to Dadri. (iii) Having completed the electrical repairing work, Rajinder Singh and the respondent returned to the site office. The respondent did not notice anything amiss and found everything to be as usual and normal. (iv) Nothing out of the way was seen even by the staff which took charge for the next shift, which was from 10 pm on 14th June, 1980 to 6 am on 15th June, 1980. W.P.(C) No.9468/2004 Page 5 of 40 (v) The fact that the lock of the main gate was broken was noticed only by the staff who worked between 6 am and 2 pm on 15th June, 1980. (vi) A statement recorded by the police team, which was called, revealed that the chief perpetrator of the theft was Maman Chand and that he was supported, in the said act, by Rajinder Singh. Maman Chand and Rejinder Singh on being interrogated, confessed to their involvement in the above crime. (vii) Office Memo dated 23rd June, 1980, was thereafter, issued to the respondent, seeking his explanation in the matter. In reply thereto, the respondent submitted that he was unaware of the commission of the offence, and was entirely innocent of any involvement therein. (viii) Though the respondent was intimated that

departmental proceedings might be initiated against him, no such proceedings were, in fact, initiated. Neither was the respondent given any opportunity to defend himself. W.P.(C) No.9468/2004 Page 6 of 40 (ix) In stark violation of the fundamental principles of natural justice as well as Article 311 of the Constitution of India, the services of the respondent were terminated vide letter No.174 dated 01st June, 1980. (x) The name of the respondent did not figure in the FIR lodged with the police authorities either. (xi) In the circumstances, the respondent prayed that he be reinstated, with full back wages and continuity of service.

8. In its reply to the above mentioned statement of claim of the respondent, the petitioner averred thus:-

"(i) The contention, of the respondent, that he had been asked to do electrical works, was denied. It was asserted that the respondent had been appointed as a Chowkidar and was asked only to discharge the duties of a Chowkidar. (ii) The averment, of the respondent, that he had been coerced into visiting the house of Maman Chand, was also denied. It was asserted that, in fact, the respondent had left his place of duty without permission, and without any prior information being given to the Competent Authority in this regard. The absence of the respondent had resulted in theft of the property of the petitioner, which could have been avoided, had he not absented himself from duty. (iii) Though it was accepted that Maman Chand was the main culprit and Rajinder Singh was the supporter, the fact remained that the respondent had abstained from duty without authority, leaving the property of the petitioner unguarded and allowing the culprits to flee with the stolen goods. (iv) In view of the issuance, to the respondent, of letter dated 23rd June, 1980 (supra), the contention, of the respondent, that no departmental proceedings had been instituted and that, he had not been given any opportunity to defend himself, were denied. (v) The services of the respondent were terminated in view of the finding, of the Inquiry Officer, that the officials on duty, including the respondent, were a danger to the security and property of the petitioner. W.P.(C) No.9468/2004 Page 8 of 40 9. On the basis of the pleadings of the petitioner and the respondent, the following preliminary issue was framed by the Labour Court:-

"Whether the domestic enquiry held by the management is improper and invalid as alleged by the workman?. 10. On the ground that there had been complete violation of the principles of natural justice, it was held, by the Labour Court, vide award dated 24th March, 1998, that the services of the respondent had been terminated illegally and unjustifiably, and that he was entitled to be reinstated in service.

11. The said award, of the Labour Court, was carried, by the petitioner, to this Court, by way of CWP44561998. Vide judgment dated 25th April, 2001, a learned Single Judge of this Court set aside the said award, dated 24th March, 1998, of the Labour Court, on the ground that, having decided the issue of whether the enquiry held by the management was improper and invalid, against the management, the Labour Court erred in proceeding, without any pause, to decide the subsequent issue of whether the services of the respondent had been terminated illegally/unjustifiably, and of the relief to which he would W.P.(C) No.9468/2004 Page 9 of 40 be entitled as a consequence thereof, without affording the management opportunity to lead evidence in this regard. In the circumstances, the award dated 24th March, 1998, of the Labour Court was set aside and the petitioner and respondent were directed to appear before the Labour Court on 30th May, 2001 on which date, the Labour Court was directed to fix a date for consideration of the second issue i.e. whether the services of the respondent had been terminated illegally and/or unjustifiably, and the relief, if any, to which he would be entitled as a consequence thereof.

12. In the said remand proceedings, S.S. Saraswat, Assistant Engineer, DDA, and R.L. Jain, Superintending Engineer (Planning), DDA and the respondent himself, led their evidence as MW-1, MW-2 and WW-1 respectively. They were also cross-examined. Affidavit-in- evidence was also filed by the management.

13. S.S. Sarswat (MW-1) deposed, on 14th August, 2001 that (i) on 15th June, 1980, at 7.20 am, he was informed, by two employees of the petitioner, that the lock of the main gate of the store was broken and some theft had taken place, W.P.(C) No.9468/2004 Page 10 of 40 (ii) he reached the store and found that the lock was broken but was intact with wire, (iii) he found the impression of truck tyres

on the ground, (iv) though he could not make any immediate estimate of the theft, he was informed, by the contract labour present at the godown, that bundles of pipes had been taken away, (v) on enquiry, he found that on 14th June, 1980, Maman Chand, Mehar Chand, Rajinder Singh and the respondent were on duty, and (vi) he thereafter, informed his senior officer, namely, R.L Jain, Executive Engineer as well as the police authorities, consequent whereof FIR No.384/1980, under Sections 457/300/4

IPC, was registered at PS Janak Puri.

14. In his cross-examination, which took place on 06th November, 2001, MW-1 deposed that (i) he was aware that the respondent knew the work of electrician. W.P.(C) No.9468/2004 Page 11 of 40 (ii) it was correct that the respondent used to perform electric work for the petitioner, to ensure smooth supply of electricity, (iii) he did not know whether the respondent had been sent by the mate to do electric work at the village where Maman Chand resided, (iv) he came to know of the time of the breaking of lock from the statement of some of the contract labourers present in the premises, as also from a tea stall owner, (v) no statement was taken, either from the said labourers or from the tea stall owner, (vi) it was possible that the time of breaking of the lock as stated by the labour or the tea stall owners might not be exactly correct and could vary. (vii) he could not say, with certainty, that, the incident occurred during the shift of the respondent i.e. between 2 pm and 10 pm.

15. MW-2 R.L. Jain, initially filed his evidence by way of affidavit, dated 31st January, 2002. In the said affidavit, it was averred that the theft had taken place during the shift of the respondent, when he was W.P.(C) No.9468/2004 Page 12 of 40 absent without approval of any senior officer. The assertion, of the respondent, that he had been assigned electrical work by the petitioner, was also denied.

16. As a sequel to the above affidavit, examination-in-chief of MW-2 R.L.Jain, took place on 08th September, 2002, wherein he deposed that (i) the duty of security guards was to look after the material lying inside the store, (ii) the security guards also used to look after the gate, (iii) the time of theft was revealed by MW-1 S.S. Sarswat, (iv) he (R.L.Jain) could neither admit nor deny the fact that the theft might

have taken place during the subsequent shift, i.e. between 10 pm and 6 am, or even during the shift from 6 am to 2 pm on 15th June, 1980.

17. On 24th September, 2002, the respondent was recalled for cross-examination. The following part of his deposition in cross-examination is relevant: W.P.(C) No.9468/2004 Page 13 of 40 Question of taking prior approval from the JE does not arise as he was not there at that time. There was no AE in the store department. I had taken permission from the Mate Sh. Mehar Chand who was my immediate boss. It is wrong to suggest that Mate is not the immediate boss of coidars and other labourers. It is not in my knowledge whether the said Mate had taken permission from concerned JE and AR. When I returned back I found everything normal and charge was given peacefully to the shift employee.

18. After hearing the parties, the Labour Court vide order dated 3rd January, 2003 (impugned herein), found thus:-

"(i) MW-1 S.S. Saraswat, was unable to state whether everything was in order to at the time of handing over of charge by the respondent, on completion of his shift. In fact, he admitted the suggestion that no complaint was made by the mate of the shift from 10 pm to 6 am. (ii) The mate who was on duty from 6 am to 2 pm was vague, and testified that he was not exactly aware of any complaint having been made by the mate of the shift from 10 pm to 6 am, and that he had lodged FIR on having been informed by the Chowkidar, on 15th June, 1980, about the breaking of the lock. W.P.(C) No.9468/2004 Page 14 of 40 (iii) Neither was any FIR proved on record nor was any witness able to state whether the name of the respondent figured therein or not. (iv) The deposition of MW-1, to the effect that he had come to know of the timing of breaking of the lock from certain contract labourers and from a tea stall owner, and that no statement, either of the said labourers or of the tea stall owners was ever taken, effectively exonerated the respondent. This was underscored by the further admission, on the part of MW-1, that it was possible that the timing of breaking of the lock, as stated by the said labourers or tea stall owners, might not have been exactly correct, and that, in fact, he could not even state categorically that the incident took place during the shift of the respondent from 2 pm to 10 pm. (v) Equally, damaging to the case of the management, was

the deposition of MW-2, who also testified that he could neither admit nor deny the possibility that the theft might have taken place between 10 pm on 14th June, 1980 and 6 pm on 15th June, 1980, or even between 6 am and 2 pm on 15th June, 1980. W.P.(C) No.9468/2004 Page 15 of 40 (vi) The complaint, dated 04th May, 1981, of the Assistant Engineer, Sita Ram, merely contained vague allegations that the respondent, alongwith Rajinder Singh and Mehar Chand, enabled Maman Chand to carry out the theft by purposely abstaining from the site and returning at 10 pm. There was no cogent or corroborating evidence on record, to the effect that the respondent was found absent from duty.

19. In the circumstances, the Labour Court held that the management had failed to prove the charges against the respondent and, consequently, exonerated the respondent of the said charges. The file was directed to be put up for evidence and arguments on the issue referred to the Labour Court, on 16th January, 2003.

20. After hearing the parties, on the issue of whether the services of the respondent had been terminated illegally/unjustifiably and, if so, the relief to which the respondent was entitled, the Labour Court, vide the impugned award dated 05th March, 2003, held, at the outset, that, in view of the failure, on the part of the management, to prove the charges against the respondent, on the basis whereof the respondent W.P.(C) No.9468/2004 Page 16 of 40 was dismissed from service, the dismissal would not survive and the respondent would, ipso facto, be entitled to reinstatement.

21. On the issue of back wages, the Labour Court while accepting the submission of the respondent that he had remained unemployed after his termination, and that the work of conducting Poojas and advising on horoscopes and marriages, practised by him, could not be regarded as gainful employment, held, nevertheless, that, as the respondent had also contributed to the delay in the proceedings, he could not be awarded full back wages. Accordingly, the impugned award dated 05th March, 2003 directed that the respondent be reinstated in service with 50% back wages and continuity of service.

22. The present writ petition assails the impugned order dated 03rd March, 2003 and award dated 05th March, 2003. The following grounds, inter alia, have been

advanced in the writ petition: (i) In view of the fact that it was admitted, by the respondent, that he had left, during his shift on 14th June, 1980, without the permission either of the Assistant Engineer or the Joint Engineer, there was no justification for the Labour Court to hold the charges not to have been proved. W.P.(C) No.9468/2004 Page 17 of 40 (ii) The Labour Court had erred in proceeding as though it was conducting a criminal trial in accordance with Code of Criminal Procedure, 1973, subject to all the technicalities of evidence. (iii) The petitioner could not be expected to repose any more confidence in the respondent as a Chowkidar. He could not, therefore, have been directed to be reinstated in service. (iv) The Labour Court had erred in failing to appreciate the fact that the theft had taken place during the shift of the respondent, and that the culprits, after committing the theft, replaced the lock with the help of wire so as to give an impression that the lock was intact. (v) There was, in any event, no justification for awarding back wages, or continuity of service, to the respondent.

23. Notice, on the present writ petition, was issued by this Court on 25th August, 2004. Though the petition was adjourned several times thereafter, the respondent has never entered appearance.

24. I have heard Mr.Arun Birbal, appearing on behalf of the petitioner. He contended that the deposition, of MW-1 S.S. Sarswat, to W.P.(C) No.9468/2004 Page 18 of 40 the effect that he was not aware whether the respondent had been sent by the mate to do electrical work at his village, where Maman Chand lived, read in conjunction with the evidence in cross-examination of the respondent, extracted in para 24 *ibid*, established the fact that the respondent had remained absent from duty at the time when the theft took place, without due permission. Mr.Birbal was critical of the observations of the Labour Court, in the impugned order dated 03rd January, 2003, to the effect that the onus to prove the charge was on the management, and that there was no cogent or corroborative evidence available to establish that the respondent was absent from duty, stating that there could not be any evidence better than the respondents own admission. Mr.Birbal also drew my attention to the appointment letter, dated 15th January 1977, whereby the respondent was appointed as Chowkidar, emphasizing that the said appointment was purely on a work charged basis. As such, Mr.Birbal, would

contend, the petitioner could very well have terminated the respondents service even without notice and, in fact, showed greater fairness to the respondent than was merited in the circumstances. In W.P.(C) No.9468/2004 Page 19 of 40 his submission, the Labour Court ought to have taken this fact, too, into consideration.

25. Reiterating his contention that the Labour Court seriously erred in ignoring the admission of the respondent, Mr.Birbal characterized the findings of the Labour Court as perverse, justifying interference by this Court in exercise of its powers under Article 226 of the Constitution of India. He also submitted that, as the respondent was a casual and work charged employee, who had worked only for 3 years, no case for reinstatement had been made out.

26. I have bestowed my careful consideration to the submissions advanced by Mr.Birbal, as well as the material available on record.

27. The law, with respect to the scope of inquiry and interference, under Article 226 and 227 of the Constitution of India, with respect to awards/orders of labour courts and industrial tribunals is well settled, and invariably takes a leaf from the principles, relating to the scope of certiorari and the circumstances in which it can be issued, as enunciated by the following words of the Constitution Bench of the Supreme Court, speaking through P.B. Gajendragadkar, J.

(as His Lordship then was), in Syed Yakoob v. K.S. Radhakrishnan and W.P.(C) No.9468/2004 Page 20 of 40 Others, AIR 1964 SC477 which have, since, become locus classicus: 7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard, to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the

jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be W.P.(C) No.9468/2004 Page 21 of 40 challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis- interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on

the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or W.P.(C) No.9468/2004 Page 22 of 40 to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconducted or contravened.

28. Relying on the principles enunciated in the above decision, a catena of pronouncements of the Supreme Court, including *Management of Madurantakam Cooperative Sugar Mills Ltd. v. S. Viswanathan*: (2005), 3 SCC193 *P.G.I of Medical Education and Research, Chandigarh v. Raj Kumar* (2001) 2 SCC54 and *M.P State Electricity Board v. Jarina Bee*: (2003), 6 SSC141 followed, which may be regarded as having laid down, authoritatively, the following principles: (i) The Labour Court/ Industrial Tribunal is the final fact finding authority. (ii) The High Court, in exercise of its powers under Article 226/227, would not interfere with the findings of fact recorded by the Labour Court, unless the said findings are perverse, W.P.(C) No.9468/2004 Page 23 of 40 based on no evidence or based on illegal/ unacceptable evidence. (iii) In the event that, for any of these reasons, the High Court feels that a case for interference is made out, it is mandatory for the High Court to record reasons for interfering with the findings of fact of the Labour Courts/ Industrial Tribunal, before proceeding to do so. (iv) Adequacy of evidence cannot be looked into, while examining, in writ jurisdiction, the evidence of the Labour Court. (v) Neither would interference, by the writ court, with the findings of fact of the Labour Court, be justified on the ground that a different view might possibly be taken on the said facts.

29. Perversity, for its part, is attributed to a judicial/ quasi judicial decision if the decision ignores/excludes relevant material, considers irrelevant/inadmissible material, is against the weight of evidence, or so outrageously defies logic as to suffer from irrationality [Damodar Lal v. Sohan Devi, (2016) 3 SCC78 S R Tiwari v. Union of India, (2013) 6 SCC602 Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC635 Kuldeep Singh v. Commissioner of Police, (1999) W.P.(C) No.9468/2004 Page 24 of 40 2 SCC10 Gamini Bala Koteswara Rao v. State of AP, (2009) 10 SCC636 Babu v. State of Kerala, (2010) 9 SCC189 Dr. Sunil Kumar Sambhudayal Gupta v. State of Maharashtra, (2010) 13 SCC657.

30. Damodar Lal (Supra) further postulates that in examining whether a decision is, or is not, perverse, the classic test, of the reasonable mans conclusion on the facts before the authority concerned would apply. The same decision also reiterates the trite position that inadequacy of evidence, or the possibility of reading the evidence in a different manner, would not amount to perversity.

31. Without delving into the details of the evidence, to which sufficiently comprehensive allusion has already been made hereinabove, it is clear that the findings of the Labour Court, in the impugned order dated 3rd January, 2003 on the basis whereof the management has been held as having failed to prove the charges against the respondent, cannot be characterized as perverse. The Labour Court has taken into account the fact that there was considerable ambivalence, amongst the management witnesses even on the basic issue of when the theft took place. MW-1, S.S. Saraswat, W.P.(C) No.9468/2004 Page 25 of 40 clearly stated that he had come to know of the timing of the theft only from the oral statement of some contract labourers and a tea stall owner, who themselves never tendered any statement. As such, the deposition of MW-1 to the effect that the theft had taken place during the shift of the respondent, can, at best, be characterized as hearsay. This stood underscored by the further deposition, of MW-1, to the effect that the time of theft could vary and that he could not definitively state that the incident had, in fact, taken place during the shift of the respondent. MW-2 was no less prevaricating, in stating that he could neither admit, nor deny, the possibility of the theft having taken place during the shift from 10 p.m. to 6 a.m. on 15th June, 1980, or even from 6 a.m. to 2 p.m. on the next

day.

32. No submission, on this aspect, of the matter, i.e. the time of occurrence of the theft were advanced by Mr. Birbal who essentially criticized the finding of the Labour Court towards the conclusion of paragraph 5 of the impugned order dated 3rd January, 2003, to the effect that there was no cogent and corroborative evidence, on record, to the effect that the respondent had absented himself from duty. The submission of Mr. Birbal was that the respondent had himself W.P.(C) No.9468/2004 Page 26 of 40 admitted the fact of such absence, and that there could be no better evidence than the admission of the respondent himself. For this, Mr. Birbal relies on the following extract, from the evidence in cross examination of the respondent, recorded on 24th September, 2002: Question of taking prior approval from the JE does not arise as he was not there at that time. There was no AE in the store department. I had taken permission from the Mate Sh. Mehar Chand who was my immediate boss. It is wrong to suggest that Mate is not the immediate boss of chokidaars and other labourers. It is not in my knowledge whether the said Mate had taken permission from concerned JE and AE. When I returned, I found everything normal and charge was given peacefully to the shift employee.

33. It is not possible for this Court to accept the submission of Mr. Birbal that the above extracted words of the respondent, as contained in the record of his cross examination on 24th September, 2002, amount to an unequivocal admission, on his part, to the effect that he had been unauthorisedly absent from duty at the time when the theft took place. No such clear-cut admission is to be found in the said words of the respondent and, as such, it cannot be said that the Labour Court acted perversely in entering a finding that there was no cogent or corroborative evidence on record, to the effect that the respondent was unauthorisedly absent from duty. W.P.(C) No.9468/2004 Page 27 of 40 34. In any event, the main allegation against the respondent was that, owing to his unauthorized absence from duty, theft of a large quantity of goods belonging to the petitioner had taken place. Had there been unimpeachable and unequivocal evidence, regarding the time of theft, it might, perhaps, been possible to take exception to the decision, of the Labour Court, that the time of theft had not been proved. However, as things

stand, there was no clear-cut evidence regarding the time when the theft took place, and the finding, of the Labour Court, to that effect, cannot be characterized as so perverse as to vitiate its order. This Court does not discountenance the possibility that the evidence could, holistically, be also read as indicating that the theft had taken place during the shift of the respondent. However, as the various authorities cited hereinabove have held, the possibility, of taking a different view, cannot be a ground for this Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, to set aside the decision of the Labour Court. Wide and expansive though the sweep and swing of certiorari may be, it stops short of metamorphosing into an appellate jurisdiction. The Labour Court has, in its wisdom, appreciated the evidence before it, and this Court is W.P.(C) No.9468/2004 Page 28 of 40 convinced that no case, for issuance of writ of certiorari for quashing or setting aside the said decision of the Labour Court can be said to exist.

35. Almost as a post script, it is relevant to note that there is no allegation that the respondent was actually complicit in the actual commission of theft.

36. The only other aspect surviving for consideration is that of back wages.

37. On the issue of back wages, too, there is wealth of authority, from the Supreme Court. The consensus of judicial opinion, over the last decade or two, on this issue, appears to be that, while, statutorily, a finding of illegal retrenchment from termination of the employee would entail, in its wake, reinstatement of continuity of service and full back wages, in a given fact situation, granting reinstatement with back wages, in full or in part, may be "wholly inappropriate", and that a lumpsum compensation should, instead, be awarded. In arriving at this decision, the factors which appear to have been held to be relevant are (i) the number of years the workman continued in service, (ii) the delay, if any, in the workman seeking relief, against her/his W.P.(C) No.9468/2004 Page 29 of 40 retrechment/dismissal/termination, under the Industrial Disputes Act, 1947 and (iii) the period that has lapsed since then, and the possibility of the workman having attained the age of superannuation in the interregnum.

38. The earlier trend of judicial thought may be said to be represented by the following words of D.A. Desai J, speaking for a 3 Judges Bench of the Supreme Court in *M/s. Hindustan Tin Works Pvt. Ltd v. The Employees of M/s. Hindustan Tin Works Pvt. Ltd. and Others* : (1979), 2 SCC80 9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the W.P.(C) No.9468/2004 Page 30 of 40 terminates the service workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution

would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the Apex Court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen illegally and W.P.(C) No.9468/2004 Page 31 of 40 Society Ltd. v. Labour Court Gram Panchayat v. Safai were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in Dhari Kamdar Mandal [(1971) 1 LLJ508(Guj)]. and a Division Bench of the Allahabad High Court in Postal Seals Industrial Cooperative II, Lucknow [(1971) 1 LLJ327(All)]. have taken this view and we are of the opinion that the view taken therein is correct.

11. In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular 12. It was, however, very strenuously contended that as the appellant company is suffering loss and its carry-forward loss as on March 31, 1978 is Rs 8,12,416.90, in order to

see that the industry survives and the workmen continue to get employment, there must be some sacrifice the party objecting to it must establish W.P.(C) No.9468/2004 Page 32 of 40 this financial inability of on the part of workmen. If the normal rule in a case like this is to award full back wages, the burden will be on the appellant-employer to establish circumstances which would permit a departure from the normal rule. To substantiate the contention that this is an exceptional case for departing from the normal rule it was stated that loss is mounting up and if the appellant is called upon to pay full back wages in the aggregate amount of Rs 2,80,000, it would shake the financial viability of the company and the burden would be unbearable. More often when some monetary claim by the workmen is being examined, the company consequent upon the demand being granted is voiced. Now, undoubtedly an industry is a common venture, the participants being the capital and the labour. Gone are the days when labour was considered a factor of production. Article 43-A of the Constitution requires the State to take steps to secure the participation of workmen in the management of the undertaking, establishments or other organisations engaged in any industry. Thus, from being a factor of production the labour has become a partner in industry. It is a common venture in the pursuit of a desired goal.

13. Now, if a sacrifice is necessary in the overall interest of the industry or a particular undertaking, it would be both unfair and inequitable to expect only one partner of the industry to make the sacrifice. Pragmatism compels common sacrifice on the part of both. The sacrifice must come from both the partners and we need not state the obvious that the labour is a weaker partner who is more often called upon to make the sacrifice. Sacrifice for the survival of an industrial undertaking cannot be an unilateral action. It must be a two-way traffic. The management need not have merry time to itself making the workmen the sacrificial goat. If sacrifice is necessary, those who can afford and have the cushion and the capacity must bear the greater brunt making the shock of W.P.(C) No.9468/2004 Page 33 of 40 sacrifice as less poignant as possible for those who keep body and soul together with utmost difficulty.

17. Now, undoubtedly the appellant appears to have turned the corner. The industrial unit is looking up. It has started making profits. The workmen have

already been reinstated and, therefore, they have started earning their wages. It may, however, be recalled that the appellant has still not cleared its accumulated loss. Keeping in view all the facts and circumstances of this case it would be appropriate to award 75% of the back wages to the workmen to be paid in two equal instalments. (Emphasis supplied) 39. The above view was, however, diluted thereafter. The decisions in P.G.I. of Medical Education & Research, Chandigarh (Supra), M.P. State Electricity, Indian Railways Construction Co. Ltd. v. Ajay Kumar, (2003) 4 SCC579 and Hindustan Motors Limited v. Tapan Kumar Bhattacharya, (2002) 6 SSC41 M/s. Hindustan Tin Works (supra) reiterated the principle that no strait-jacket formula regarding quantum of back wages to be awarded, consequent to setting aside of an order of illegal retrenchment, could be laid down though statutory sanction, for grant of full back wages, in such a case, undoubtedly exists W.P.(C) No.9468/2004 Page 34 of 40 40. At the same time, P.G.I of Medical Education & Research, Chandigarh (Supra) and M.P. State Electricity (supra) also held that the Labour Court is the final fact finding authority even on the question of quantum of back wages to be awarded, and that the decision of the Labour Court, in that regard, would not justify interference by the High Court, in the absence of a finding that the said decision was perverse, erroneous or not in accordance with law. Significantly, in Management of Madurantakam Coop. Sugar Mills Ltd (supra), the Supreme Court, taking stock of the fact that the workman had attained the age of superannuation and that the management was in financial crisis, reduced the quantum of back wages payable to 50%, retaining the entitlement of the workman to full retiral benefits. In, M/s. Hindustan Tin Works Pvt. Ltd. (supra), it was held that though, at times, to keep the industry running, sacrifice was required both from the management and the employee, greater sacrifice had necessarily to be expected from the management. In that case, the Supreme Court reduced the back wages as directed to be paid by the High Court, from 100% to 75%. W.P.(C) No.9468/2004 Page 35 of 40 41. Subsequently, however, the trend of judicial thought appears to have sharply swung, from the theory of "reinstatement with back wages (in whole or in part)" to the theory of "lumpsum compensation". Noting this fact, Senior Superintendent Telegraph (Traffic) v Santosh Kumar Seal, (2010) 6 SCC773 held thus:

"9. In the last few years it has been consistently held by this Court that relief by way of reinstatement with back wages is not automatic even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure and that monetary compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate. (See U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey [(2006) 1 SCC479:

2006. SCC (L&S) 250]. , Uttaranchal Forest Development Corpn. v. M.C. Joshi [(2007) 9 SCC353: (2007) 2 SCC , State of M.P. v. Lalit Kumar Verma [(2007) 1 SCC575: (2007) 1 SCC (L&S) 405]. , M.P. Admn. v. Tribhuban [(2007) 9 SCC748: (2008) 1 SCC (L&S) 264]. , Sita Ram v. Moti Lal Nehru Farmers Training Institute [(2008) 5 SCC75: (2008) 2 SCC (L&S) 71]. , Jaipur Development Authority v. Ramsahai [(2006) 11 SCC684: (2007) 1 SCC (L&S) 518]. , GDA v. Ashok Kumar [(2008) 4 SCC261: (2008) 1 SCC (L&S) 1016]. and Mahboob Deepak v. Nagar Panchayat, Gajraula [(2008) 1 SCC575: (2008) 1 SCC (L&S) 239]. .) (L&S) 813].

10. In a recent judgment authored by one of us (R.M. Lodha, J.) in Jagbir Singh v. Haryana State Agriculture Mktg. Board [(2009) 15 SCC327: (2010) 1 SCC (L&S) 545]. , the aforesaid decisions were noticed and it was stated: (SCC pp. 330 & 335, paras 7 &

14) 7. It is true that the earlier view of this Court articulated in many decisions reflected the legal position W.P.(C) No.9468/2004 Page 36 of 40 that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice. *** in contravention of 14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case

where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee. 42. Perhaps the most recent pronouncement, on this issue, is to be found in the following unequivocal words of Ranjan Gogoi, J., in *Rashtrasant Tukdoji Maharaj Technical Education Sanstha v Prashant Manikarao Kubitkar*, MANU/SC/0745/2017, which holds thus: The Respondent workman had worked under the

"2. Appellant for a period of two years and three months W.P.(C) No.9468/2004 Page 37 of 40 whereafter he was terminated on 1st June, 1994. Judicial opinion has been consistent that if the termination is found to be contrary to Sections 25F and 25G of the Industrial Disputes Act, 1947 reinstatement in service is not the rule but an exception and ordinarily grant of compensation would meet the ends of justice. The Respondent workman in the present case had worked 3. for a period of two years and three months and that apart he had approached the labour Court after 13 years. Taking into account the totality of the facts and circumstances of the case we are of the view that the order of the labour Court and the High Court ought to be modified by granting compensation of Rs. 1,00,000/- (Rupees one lakh) in lieu of reinstatement without back wages as ordered. It is ordered accordingly."

(Emphasis supplied) 43. In deciding to reinstate the respondent with 50% backwages, the Labour Court noticed the fact that, except for some Pooja Work and advice on Horoscope and marriages, there was no evidence of the respondent having been engaged in any gainful employment, consequent to his termination by the petitioner. This finding, of the Labour Court, has not been traversed by the petitioner in the writ petition. It is also undisputed that the respondent has had to suffer litigation from 2004 till date, during which period no benefit, of the impugned award dated 5th March, 2003 has enured to him, owing to the interim stay granted by this Court. Having held that the W.P.(C) No.9468/2004 Page 38 of 40 respondent had been unjustifiably terminated by the petitioner, this Court cannot be unmindful of the fact that, had the respondent continued in

service, he would have earned full wages and would, monetarily, be substantially better off than he is today.

44. The rationale, behind the decision of the Labour Court, to award 50% back wages to the respondent is, therefore, understandable.

45. The operation of the impugned award, dated 5th March, 2003 was stayed by this Court vide order dated 25th August, 2004, subject to deposit of litigation expenses by the petitioner. As such, it is apparent that the respondent would neither have been reinstated in service nor paid any amount consequent upon the impugned award. The respondent was appointed as chowkidar more than 40 years ago in 1976; in all probability therefore, he would have crossed the age of superannuation. No useful purpose would, therefore, be served, by directing the petitioner to reinstate the respondent in service, at this distance of time. This Court is also guided, in this regard, by the pronouncements in Santosh Kumar Seal (supra) (as well as the authorities relied upon therein) and Rashtrasant Tukdoji Maharaj Technical Education Sanstha (supra). In view of the said decisions, W.P.(C) No.9468/2004 Page 39 of 40 it would be necessary to substitute the decision, of the Labour Court, to reinstate the respondent with 50% back wages, to an award of lumpsum compensation. While deciding on the compensation to be awarded, this Court cannot lose sight of the fact, that had the award been implemented, the respondent would have been in the employment of the petitioner till today, and would also be entitled to retiral benefits.

46. In view of the above discussion, I am of the view that the interests of justice would be met, if the petitioner is directed to pay, to the respondent, an amount of Rs. 2 lakhs, as lump sum compensation. The said payment shall be disbursed to the respondent within a period of four weeks and proof of compliance, thereof, filed by the petitioner before this Court on affidavit, which shall be taken on record in the present proceedings.

47. The writ petition is disposed of, in the above terms.

48. No costs. C. HARI SHANKAR (JUDGE) JULY21 2017 neelam/kb/nitin W.P.(C) No.9468/2004 Page 40 of 40

