

The Management Of Vs. Mr S J Kumar

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Court : Karnataka

Decided On : Mar-23-2023

Judge : Suraj Govindaraj

Appeal No. : WP 3963/2021

Appellant : The Management Of

Respondent : Mr S J Kumar

Judgement :

- 1 - WP No.3963 of 2021 IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE23D DAY OF MARCH, 2023 R BEFORE THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ WRIT PETITION No.3963 OF2021(L-TER) BETWEEN: THE MANAGEMENT OF R.V. EDUCATIONAL INSTITUTIONS RASHTREEYA SIKSHANA SAMITHI TRUST R V TEACHERS COLLEGE BUILDING2D BLOCK, JAYANAGAR BENGALURU56001 REPRESENTED BY ITS HONORARY SECRETARY MR A.V.S. MURTHY ... PETITIONER (BY SRI. K.R. ANAND., ADVOCATE) AND: MR S.J.KUMAR NO.34 5TH CROSS PUTTENAHALLI J.P. NAGAR, 7TH PHASE BENGALURU56007 RESPONDENT (BY Ms. AVANI CHOKSHI, ADVOCATE OF MANTHAN LAW) THIS WRIT PETITION IS FILED UNDER ARTICLES226AND227OF THE CONSTITUTION OF INDIA PRAYING TO CALL FOR RECORDS FROM THE HONBLE THIRD ADDITIONAL LABOUR COURT, BENGALURU IN SERIAL APPLICATION No.1/2017 IN REFERENCE No.51/2015 AND ISSUE A WRIT IN

THE NATURE OF CERTIORARI AND/OR ANY OTHER WRIT OR

ORDER

AND QUASH AND SET ASIDE - 2 - WP No.3963 of 2021 THE IMPUGNED

ORDER

ANNEXURE-Q DATED 30/08/2018 PASSED BY 3D ADDITIONAL LABOUR COURT, BENGALURU IN SERIAL APPLICATION NO.1/2017 IN REFERENCE NO.51/2015; AND ETC. THIS WRIT PETITION COMING ON FOR

ORDER

S AND HAVING BEEN RESERVED FOR

ORDER

S ON 16.01.2023, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

1 The petitioner-employer is before this Court seeking for the following reliefs: a) Call for records from the Honble Third Additional Labour Court, Bengaluru in Serial Application No.1/2017 in Reference No.51/2015 and b) Issue a writ in the nature of certiorari and/or any other writ or Order and quash and set aside the impugned order Annexure-Q dated 30/08/2018 passed by 3rd Additional Labour Court, Bengaluru in Serial Application No.1/2017 in Reference No.51/2015. c) Consequently, hold that the domestic enquiry ordered against the Respondent workman to be fair and proper and further be pleased to allow the Approval Application in Serial Application No.1/2017 in Reference No.51/2015 preferred by the Petitioner filed u/s 33(2)(b) of The ID Act, 1947; and/or d) Issue a writ in the nature of certiorari and/or any other Writ or Order and quash and set aside the impugned Order Annexure-X dated 06/11/2019 passed by 3rd Additional Labour Court, Bengaluru in Serial Application No.1/2017 in Reference No.51/2015; and e) Be pleased to Order grant of approval of Serial Application No.1/2017 on the basis of the evidence recorded on merits, in the interest of justice & equity - 3 - WP No.3963 of 2021 and uphold the order of Dismissal dated 26/04/2017 passed by the Petitioner against the Respondent to be just, proper and legal, in the interest of justice and equity. f) Pass such other Order/s as deem fit to grant in the facts and

circumstances of the case, in the interest of justice and equity.

2. The petitioner is a Trust managing several professional educational institutions. One such institution is the Dental College known as D.A.Pandu Memorial R.V.Dental College, which was established in the year 1992 having about 52 Teaching Staff and 62 Non-Teaching Staff, 285 Undergraduate students and 87 Post Graduate students at the relevant point of time. The Dental College also provided hostel facilities to the students in campus. The same having 47 rooms with a capacity of 105 for girl students and 19 rooms with a capacity of 42 for boy students.

3. The respondent-workman joined the services of the employer with effect from 01.03.2004 as a Group-D - 4 - WP No.3963 of 2021 attender. A written joint complaint was received on 03.09.2015 from the girl students residing in the hostel against the workman. The employer issued a charge sheet cum show cause notice on 16.02.2016, towards which a reply was submitted by the workman on 24.02.2016. The employer, not satisfied with the reply, ordered a domestic enquiry and a third-party advocate was appointed as an Enquiry Officer. The enquiry was commenced on 15.03.2016 and concluded on 15.12.2016, spread over 18 sittings. After considering the complaint, defence statement and evidence on record, the Enquiry Officer submitted his report and findings on 20.02.2017, holding the charges against the workman having been proved in terms of the charge sheet dated 16.02.2016.

4. The Disciplinary Authority issued a second show cause notice on 31.03.2017 which was replied to by the workman on 11.04.2017. The employer, not - 5 - WP No.3963 of 2021 satisfied with the said reply, dismissed the workman by order dated 26.04.2017. An application under Section 33 (2) (b) of the Industrial Disputes Act, 1947 (for short, I.D.Act) was also filed. Since there was an earlier dispute referred to the Industrial Tribunal, the said application came to be numbered as application No.1/2017 in Reference No.51/2015 as regards which the workman filed his objections.

5. The Labour Court tried the preliminary issue as regards the fairness of the domestic enquiry and, vide its order dated 30.08.2018 came to a conclusion that

the enquiry was not fair and proper and dismissed the application of the employer filed under Section 33 (2) (b) of I.D.Act.

6. The employer preferred an application to the Labour Court on 11.09.2018 for recalling the order dated 30.08.2018 and for the grant of an opportunity to lead fresh and additional evidence on merits. The - 6 - WP No.3963 of 2021 said application came to be dismissed by order dated 06.11.2019 by holding that if the employer is aggrieved by the orders of the Court, they can approach the Appellate Court, but no recall of the order can be sought.

7. The employer challenged the said order by filing a Writ Petition in W.P.No.26798/2019 when a joint memo dated 26.07.2019 was filed in terms whereof the employer and the workman agreed that the Labour Court be given a direction to give an opportunity to the employer to prove the charges by leading additional evidence since the employer had reserved its right to lead additional evidence in the event of the Labour Court coming to a conclusion that the enquiry was not fair or proper.

8. In terms whereof, the matter was remitted to the Labour Court by setting aside the order dated 30.08.2018 dismissing the application and directing - 7 - WP No.3963 of 2021 the Labour Court to permit the parties to lead evidence on merits. Thereafter, evidence was led by the employer of 7 witnesses who were cross-examined. The workman also examined himself and was cross-examined. The Labour Court, vide its order dated 06.11.2019, dismissed the application under Section 33 (2) (b) of I.D.Act. In pursuance thereof, the workman wrote to the employer seeking reinstatement, full back wages, balance payment of subsisting allowance and all other consequential reliefs. It is in those circumstances that the employer is before this Court challenging the orders dated 30.08.2018 and 06.11.2019 passed by the Labour Court.

9. Sri.K.R.Anand, learned counsel for the petitioner- employer would submit that:

9. 1. The Labour Court has not considered the evidence on record in a proper perspective.-. 8 - WP No.3963 of 2021 9.2. He relies upon the judgment of the Honble Apex Court in the case of MANAGEMENT OF TAMILNADU STATE

TRANSPORT CORPORATION [COIMBATORE]. LTD., VS. M.CHANDRSEKARAN¹, Jurisdiction of Commissioner [Conciliation]. u/s 33(2)(b) while considering Application for approval of Order of punishment is limited and cannot be equated with jurisdiction u/s 10. Scrutiny of Commissioner limited to ascertain whether prima facie case is made out for grant/ non-grant of approval of Order of punishment and while doing so the Commissioner cannot substitute his own judgment but must only consider whether view taken by disciplinary authority is a possible view.

9.3. By relying on the above he submits that the jurisdiction of the Labour Court under Section 33 (2) (b) of I.D.Act is limited. The Labour Court ought not to have substituted its own judgment but was only required to consider whether the view taken by the Disciplinary Authority is a possible view. 1 [2016]. 16 SCC16- 9 - WP No.3963 of 2021 9.4. The judgment in the case of STATE OF MAHARASHTRA & ANR VS. MADHUKA NARAYAN MARDIKAR² more particularly para 7 thereof, which is reproduced hereunder for easy reference:

7. The High Court, while conceding that it has no jurisdiction to sit in appeal over the decision of a domestic tribunal and is not entitled to reappraise the evidence, fell into an error in doing just that under the guise of examining the evidence to ascertain if the respondent was prejudiced on account of the failure of the department to provide him with the notebooks of Desale, Wadekar, Kadam and Sakpal dated 13th November, 1965 and the logbook of the jeep of even date. It is indeed true that the respondent had asked for the aforesaid documents since the commencement of the Departmental Enquiry and also in the course thereof. He was, however, informed that the original notebooks of the said four policemen as well as the logbook of the jeep were not traced. However, copies of the extracts from the notebooks of the said four policemen taken out earlier and sent to the Anti-Corruption Bureau during the preliminary enquiry were supplied to him, As far as the logbook is concerned evidence of the jeep driver was tendered to show that no entry about the visit from the Police Station to Kuwari's Bungalow was actually made on account of the distance being short. Be that as it may, the fact remains that the respondent was furnished with copies of extracts from the notebooks of the said policemen and 2 1991 Vol.I LLJ269- 10 - WP No.3963 of 2021 they were

also offered for further cross- examination. In the course of cross-examination of Police Constable Desale, the witness evaded a certain question by stating that "without seeing my original notebook I cannot say if I have made the entries regarding the duties performed on 13.11.65 and 14.11.65 in the notebook". He, however, admitted that the transcript from his notebook was correct but he could not say if the respondent had countersigned the entry of 13.11.65. The High Court has attached too much importance to this evasive reply given by Police Constable Desale and has come to the conclusion that non-supply of the original notebooks had prejudiced the defence. If the original notebooks are missing and if the transcripts prepared by the witnesses earlier are supplied, the department cannot be accused of deliberately suppressing evidence. In such a situation the evidence has to be evaluated bearing in mind the fact that the original notebooks and the logbook of the jeep are missing. The non-supply of the original notebooks and the logbook cannot, in the circumstance, efface the overwhelming evidence, both direct and circumstantial, tendered during the Departmental Enquiry. We are of the view that there is sufficient evidence on record to return a finding of guilt against the respondent. 9.5. Relying on the above, he submits that during the enquiry, all the copies of the extracts have been furnished, even by way of photocopying or in terms of the extracts thereof, without - 11 - WP No.3963 of 2021 producing or furnishing the original documents. The same would not result in a defective enquiry. The furnishing of all the documents even as photocopies would be sufficient compliance with the requirement of a fair enquiry. 9.6. He relies on the judgment of the Honble Apex Court in the case of STATE BANK OF PATIALA & ORS VS. S.K.SHARMA³ contending that unless there is any prejudice which has been caused to the employee, the enquiry cannot be held to be not fair or proper. In this case, he submits that there is no such prejudice which has been caused. Therefore, the Labour Court ought not to have held that the enquiry is not fair and proper. 3 (1996) 2 LLJ296- 12 - WP No.3963 of 2021 9.7. The judgment of the Apex Court in the case of LALLA RAM VS. MANAGEMENT OF DCM CHEMICAL WORKS LTD., & ANR⁴, more particularly paras 9, 11 and 12 thereof, which are reproduced hereunder for easy reference:

9. xxxxxxxx It cannot also be disputed that the extent of jurisdiction exercisable by an approving authority under Section 33(2)(b) of the Act is very limited as has

been clearly and succinctly pointed out by this Court in a number of decisions. In *Lord Krishna Textile Mills v. Its Workmen* [AIR 1961 SC860: (1961) 3 SCR204: (1961) 1 LLJ211: (1960-61) 19 FJR504 this Court after referring to its earlier decisions and explaining the distinction between permission and approval observed as follows: Therefore, putting it negatively the jurisdiction of the appropriate industrial authority in holding an enquiry under Section 33(2)(b) cannot be wider and is, if at all, more limited, than that permitted under Section 33(1) and in exercising its powers under Section 33(2) the appropriate authority must bear in mind the departure deliberately made by the Legislature in separating the two classes of cases falling under the two sub-sections, and in providing for express permission in one case and only approval in the other. It is true that it would be competent to the authority in a proper case to 4 [1978]. 1 LLJ507- 13 - WP No.3963 of 2021 refuse to give approval, for Section 33(5) expressly empowers the authority to pass such order in relation to the application made before it under the proviso to Section 33(2)(b) as it may deem fit; it may either approve or refuse to approve; it can, however, impose no conditions and pass no conditional order. In view of the limited nature and extent of the enquiry permissible under Section 33(2)(b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by Section 33(2)(b) and the proviso are satisfied or not. Do the Standing Orders justify the order of dismissal?. Has an enquiry been held as provided by the Standing Orders?. Have the wages for the month been paid as required by the proviso?. and, has an application been made as prescribed by the proviso?.

11. These decisions of this Court make it clear that when an Industrial Tribunal is asked to give its approval to an order of dismissal under Section 33(2)(b) of the Act, it can disregard the findings given by the Enquiry Officer only if the findings are perverse. The test of perversity that is indicated in these cases is that the findings may not be supported by any legal evidence at all..... A finding by a domestic tribunal like an Enquiry Officer can be held to be perverse in those cases

also where the finding arrived at by the domestic tribunal is one at which no - 14 - WP No.3963 of 2021 reasonable person could have arrived on the material before it.

12. The position that emerges from the above quoted decisions of this Court may be stated thus: In proceedings under Section 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the position settled by the decisions of this Court in *Bengal Bhatdee Coal Co. v. Ram Prabesh Singh* (1963) 1 LLJ - Page 291.

9.8. Relying on the above, he submits that the jurisdiction of the Court under Section 33 (2) (b) of I.D.Act is very limited, and all that the Labour Court has to do is to consider whether a prima facie case of according approval is made out or not before dismissing an employee. He submits that the Labour Court has not at all considered this aspect but has gone into the - 15 - WP No.3963 of 2021 merits of the matter and substituted its view to that of the Enquiry Officer and the Disciplinary Authority. 9.9. Strict rules of evidence would not apply to the enquiry proceedings. Marking of the photocopies during the course of evidence when the originals were available for inspection and were inspected by the Court would not be in violation of any particular rule. The workman not having objected to the marking of the photocopy of the documents through various witnesses does not open for the workman to raise this issue before the Labour Court. The workman has furnished photocopies of the documents which have been produced and marked. If at all there was any objection by the workman, the said objection ought to have been placed on record at that point of time and not raised while challenging the order passed by the Disciplinary Authority.-. 16 - WP No.3963 of 2021 9.10. The workman not having cross-examined the complainants, the complainants evidence having gone on record unchallenged, the same would by

itself establish the culpability of the workman. The Labour Court has misconstrued the evidence of the Enquiry Officer, when he denied that he had marked the photo copy without seeing the original, the Labour Court has come to a wrong conclusion that there is an admission on his part that the documents are marked without going through the originals. 9.11. He relies upon the judgment of the Honble Apex Court in the case of JOHN DSOUZA VS. KARNATAKA STATE ROAD TRANSPORT CORPORATION⁵ more particularly paras 8, 32, 34 and 38 which are reproduced hereunder for easy reference:

38. Consequently, the Labour Court shall in the instant case re-visit the matter afresh within the limit and scope of Section 33(2)(b), as explained 5 [2019]. 18 SCC47- 17 - WP No.3963 of 2021 above and keeping in mind that the exercise in hand is not adjudication of an industrial dispute under Section 10(1)(c) or (d) read with Section 11-A of the Act. However, if the Labour Court finds that the domestic inquiry held against the appellant is suffering from one of the incurable defects as illustrated by this Court in Mysore Steel Works (P) Ltd. [Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar, (1971) 1 LLJ543SC]. or Lalla Ram [Lalla Ram v. DCM Chemical Works Ltd., (1978) 3 SCC1:

1978. SCC (L&S) 396]. cases, then it may look into the evidence adduced by the parties for the purpose of formation of its prima facie opinion. 9.12. By relying on the above judgment, he submits that the Labour Court or Tribunal, while holding the enquiry under Section 33 (2) (b) of I.D.Act cannot invoke adjudicative powers vested under Section 10 (1) (c) and (d) of the Act nor can it deal with the proportionality of the punishments. 9.13. He submits that what the Labour Court ought to have examined is whether the test of preponderance of probability was satisfied since, in domestic enquiry, the principle of - 18 - WP No.3963 of 2021 beyond reasonable doubt would not be applicable. 9.14. He submits that none of the decisions relied upon by the petitioner has been referred to and dealt with by the Labour Court. The Labour Court has come to a one-line conclusion that the judgments relied upon are not applicable to the case. He, therefore, submits that the said observations and conclusions, without appreciating the contents of the judgments, the purport of the judgments is completely untenable and therefore, the order passed by the Labour Court is bad in law and is required to be set aside.

10. Ms.Avani Chokshi, learned counsel for the respondent-workman, submits that 10.1. this Court cannot reappraise the evidence in a proceeding for certiorari, the exercise of jurisdiction is restricted to whether the order - 19 - WP No.3963 of 2021 passed was without jurisdiction or suffers from a manifest error apparent on the face of record. In the present case, two views being possible and one view having been taken, this Court ought not to interfere in the matter since there is no patent gross error. 10.2. In this regard, she relies on the judgment of the Apex Court in the case of HARBANS LAL VS. JAGMOHAN SARAN⁶ more particularly para 5 thereof, which is reproduced hereunder for easy reference:

5. We are satisfied that the High Court travelled outside its jurisdiction in embarking upon a reappraisal of the evidence. The Prescribed Authority as well as the learned Second Additional District Judge concurrently found that Madan Lal was sitting in the shop on behalf of the appellant and deputising for him in carrying on the vegetable selling business. The finding by both authorities rested on evidence, and there was no warrant for disturbing that finding of fact in a writ petition. The limitations on the jurisdiction of the High Court under Article 226 of the Constitution are well settled. The writ petition before the High Court prayed for a writ in the nature of certiorari, and it is well known that a writ in the nature of certiorari may be 6 [1985]. 4 SCC333- 20 - WP No.3963 of 2021 issued only if the order of the inferior tribunal or subordinate court suffers from an error of jurisdiction, or from a breach of the principles of natural justice or is vitiated by a manifest or apparent error of law. There is no sanction enabling the High Court to reappraise the evidence without sufficient reason in law and reach findings of fact contrary to those rendered by an inferior court or subordinate court. When a High Court proceeds to do so, it acts plainly in excess of its powers. We are informed that a report of the Commissioner in another suit was not considered by the Prescribed Authority and by the learned Second Additional District Judge, and therefore, it is urged, the High Court was justified in taking that report into consideration and entering into an examination of the material on the record. We have examined the report of the Commissioner and we find that an objection had been filed to that report and the trial court had failed to dispose it of. In other words, the report of the Commissioner is not a final document and cannot be taken into consideration as it stands. It must, therefore, be ignored. That being so, the

finding of fact rendered by the Prescribed Authority and affirmed by the learned Second Additional District Judge remains undisturbed. The finding is that Madan Lal sat in the shop conducting the vegetable selling business on behalf of the appellant. 10.3. She relies on the judgment in the case of SURYA DEV RAI VS. RAM CHANDER RAI⁷ more particularly paras 38(3), (5), (7) and (8) 7 [2003]. 6 SCC675- 21 - WP No.3963 of 2021 thereof, which are reproduced hereunder for easy reference:

38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder: (3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice. (5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. (7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be - 22 - WP No.3963 of 2021 invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would

result in travesty of justice or where such refusal itself would result in prolonging of the lis. (8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character. 10.4. She relies upon the judgment of the Apex Court in the case of BOARD OF DIRECTORS, HPTC VS. K.C.RAHI⁸ more particularly para 6 thereof, which is reproduced hereunder for easy reference:

6. That the respondent was served with a notice recorded by the Tribunal is finding of fact. In our 8 (2008) 11 SCC502- 23 - WP No.3963 of 2021 view, therefore, the High Court has exceeded its jurisdiction by reversing the fact recorded by the Tribunal in exercise of its power under Article 226. Power under Article 226 is to interfere only when there is miscarriage of justice or an error of law on the face of the record but not to reappreciate the evidence recorded by the court of first instance. 10.5. She relies upon the judgment in the case of KVS RAM VS. BMTCC⁹ more particularly paras 10 and 14 which are reproduced hereunder for easy reference:

10. In the writ petition, while setting aside the award of the Labour Court, the learned Single Judge placed reliance upon the judgment of this Court passed in Punjab Water Supply Sewerage Board v. Ram Sajivan [Punjab Water Supply Sewerage Board v. Ram Sajivan, (2007) 9 SCC86: (2007) 2 SCC (L&S) 668]. and also another judgment of the High Court and observed that a person who practices fraud for securing employment cannot perpetuate on the ground of delay and the learned Single Judge faulted the Labour Court for exercising discretion under Section 11-A of the Industrial Disputes Act and interfering with the punishment of dismissal from service. In our considered view, in exercise of its power of superintendence under Article 227 of the Constitution of India, the High Court can interfere with the order of the tribunal, only, when there has been a patent perversity in the 9 (2015) 12 SCC39- 24 - WP No.3963 of 2021 orders of tribunal and courts subordinate to it or where there has been gross and manifest failure of justice or the basic principles of natural justice have been flouted. In our view, when the Labour Court has exercised its discretion keeping in view the facts of the case and the cases of similarly situated workmen, the High Court ought not to

have interfered with the exercise of discretion by the Labour Court.

14. Once the Labour Court has exercised the discretion judicially, the High Court can interfere with the award, only if it is satisfied that the award of the Labour Court is vitiated by any fundamental flaws. We do not find that the award passed by the Labour Court suffers from any such flaws. While interfering with the award of the Labour Court, the High Court did not keep in view the parameters laid down by this Court for exercise of jurisdiction by the High Court under Articles 226 and/or 227 of the Constitution of India and the impugned judgment [K.V.S. Ram v. Bangalore Metropolitan Transport Corpn., Writ Appeal No.390 of 2008, decided on 3-9- 2012 (KAR)]. cannot be sustained. 10.6. She submits that this is not only a prima facie case that the Industrial Adjudicator under Section 33 (2) (b) of ID Act is concerned with. If there are violations of principles of natural justice and if the enquiry is not proper, then the Adjudicator will be entitled to arrive at its own conclusion and in such a situation, will not be - 25 - WP No.3963 of 2021 confined to the aspect of prima facie case. In this regard, she relies upon the decision in the case of BHARAT IRON WORKS VS. BHAGUBHAI BALUBHAI PATEL, 10 more particularly, paras 1 and 2 thereof, which are reproduced hereunder for easy reference:

1. In a long line of decisions of this Court the ambit of Section 33, Industrial Disputes Act, 1947, is now well established. There is also no difference in principle of the law applicable to a case under Section 10, Industrial Disputes Act and that under Section 33. To put it clearly, it is this: When an application under Section 33 whether for approval or for permission is made to a tribunal it has initially a limited jurisdiction only to see whether a prima facie case is made out in respect of the misconduct charged. This is, however, the position only when the domestic enquiry preceding the order of dismissal is free from any defect, that is to say, free from the vice of violation of the principles of natural justice. If on the other hand, there is violation of the principles of natural justice, the Tribunal will then give opportunity to the employer to produce evidence, if any, and also to the workman to rebut it if he so chooses. In the latter event the Tribunal will be entitled to arrive at its own conclusion on merits on the evidence produced before it with regard to the proof of the 10 AIR 1976 SC98- 26 - WP No.3963 of 2021 misconduct

charged, and the tribunal, then, will not be confined merely to consider whether a prima facie case is established against the employee. In other words, in such an event, the employer's findings in the domestic enquiry will lapse and these will be substituted by the independent conclusions of the Tribunal on merits.

2. There is a two-fold approach to the problem and if lost sight of, it may result in some confusion. Firstly, in a case where there is no defect in procedure in the course of a domestic enquiry into the charges for misconduct against an employee, the Tribunal can interfere with an order of dismissal on one or other of the following conditions: (1) If there is no legal evidence at all recorded in the domestic enquiry against the concerned employee with reference to the charge or if no reasonable person can arrive at a conclusion of guilt on the charge levelled against the employee on the evidence recorded against him in the domestic enquiry. This is what is known as a perverse finding. (2) Even if there is some legal evidence in the domestic enquiry but there is no prima facie case of guilt made out against the person charged for the offence even on the basis that the evidence so recorded is reliable. Such a case may overlap to some extent with the second part of the Condition 1 above. A prima facie case is not, as in a criminal case, a case proved to the hilt.-. 27 - WP No.3963 of 2021 10.7. She also places reliance on the judgment in the case of JOHN DSOUZA VS. KARNATAKA STATE ROAD TRANSPORT CORPORATION¹¹ more particularly para 33, which is reproduced hereunder for easy reference:

33. The three-Judge Bench decisions of this Court in Punjab National Bank [Punjab National Bank Ltd. v. Workmen, (1960) 1 SCR806: AIR 1960 SC160 and Mysore Steel Works (P) Ltd. [Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar, (1971) 1 LLJ543SC]. , as well as the Division Bench judgment in Lalla Ram [Lalla Ram v. DCM Chemical Works Ltd., (1978) 3 SCC1:

1978. SCC (L&S) 396]. were unfortunately not cited before this Court in Cholan Roadways Ltd. [Cholan Roadways Ltd. v. G. Thirugnanasambandam, (2005) 3 SCC241:

2005. SCC (L&S) 395]. There is yet no conflict of opinion as in Cholan Roadways Ltd. [Cholan Roadways Ltd. v. G. Thirugnanasambandam, (2005) 3 SCC241:

2005. SCC (L&S) 395]. also this Court reiterated the past consistent view that while exercising jurisdiction under Section 33(2)(b) of the Act, the Industrial Tribunal is required to see only whether a prima facie case has been made out as regard to the requirement of domestic enquiry. Cholan Roadways [Cholan Roadways Ltd. v. G. Thirugnanasambandam, (2005) 3 SCC241:

2005. SCC (L&S) 395]. nonetheless deals with only first phase of the jurisdiction exercisable under Section 33(2)(b) and it falls short to elucidate as to whether, in 11 (2019) 18 SCC47- 28 - WP No.3963 of 2021 the event of a defective domestic enquiry, the Labour Court/Tribunal can also the parties to adduce evidence. The second phase of jurisdiction exercisable under Section 33(2)(b) was not debated in Cholan Roadways [Cholan Roadways Ltd. v. G. Thirugnanasambandam, (2005) 3 SCC241:

2005. SCC (L&S) 395]. apparently for the reason that on facts this Court was satisfied that the delinquent workman was guilty of the misconduct attributed and proved against him in the domestic enquiry. On the other hand, Mysore Steel Works (P) Ltd. [Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar, (1971) 1 LLJ543SC]. and Lalla Ram [Lalla Ram v. DCM Chemical Works Ltd., (1978) 3 SCC1:

1978. SCC (L&S) 396]. have gone a step ahead to hold that the Tribunal can permit the parties to adduce evidence if it finds that the domestic enquiry suffers from any defect or was violative of the principles of natural justice or was marred by unfair labour practice, it may then independently examine the evidence led before it to embark upon the question whether or not the punitive action deserves to be accorded approval. 10.8. By relying on the above, she submits that whenever a domestic enquiry is held to be not fair, then the Industrial Adjudicator would have the jurisdiction to examine all the evidence on record and not be limited to prima facie case. She submits that there are material - 29 - WP No.3963 of 2021 inconsistencies in the present case and best evidence has not been placed on record by the employer. The security guard who was posted at the entrance of the girls hostel, who is stated to have seen the workman entering the girls hostel has not been examined. MW-5 warden, having stated that the security

guard had informed her that the workman had entered the hostel, it was but required for the employer to examine the said security guard. In the absence whereof, the very entry of the workman and the time of such entry is not established more so when anyone were to enter the hostel, they have to sign the register kept in the security guards enclosure with their name and time of entry.

10.9. She submits that AW-4 Sree Priya who is the only person who has deposed about the presence of the workman in the girls hostel has contradicted herself in the cross-examination.-. 30 - WP No.3963 of 2021 She has stated that when she informed the warden about the presence of the workman upon the wardens searching, he was not found whereas AW-2 warden has stated that she received the complaint from Ms Minu and asked her to search for the mobile and there is no mention of her searching for the workman.

10.10. In the cross-examination, AW-4 has stated that she saw the workman at around 10.15 am whereas Ms.Minu has stated that she realized that the mobile was missing at 11.15 am. She stated that the mobile was found after two hours i.e., that could be around between 12.15 to 1.15 when infact as per evidence of MW-4, it was found at 3.30 to 4.00 p.m. Apart from the above, she submits that though two girls students AW-4 - Sree Priya and Gadha are stated to have seen the workman, only Sree Priya has been examined and Gadha has not been examined.-. 31 - WP No.3963 of 2021

10.11. She further submits that the workman did not own a scooter. No document has been produced to establish that the workman owned a scooter. On the date of the incident, there was a bandh in the city. Hence, the question of a workman bringing a scooter would not arise. The security guard at the security gate is required to enter the particulars of the vehicles entering the college. The said register making such entries has not been produced. The licence plate number or colour of the scooter has not been stated by any witness. No photograph of the scooter has also been produced. In the charge sheet, the colour of the scooter is mentioned as ash grey whereas MW-4 states that it is silver bike.

10.12. There are also inconsistencies as regards the retrieval of the sim card. AW-7 has stated that he and another student brought him back to the parking area and asked the workman to - 32 - WP No.3963 of 2021 hand over the mobile. When the workman handed over the sim, the other students were away from them. AW-3 - Minu has stated that she saw the workman taking out the sim card from his pocket and giving it to AW-7 - Sharat in

her presence. 10.13. The location of the scooter and location of the workman, scooter and mobile are also not clearly established inasmuch as by using the mobile app to trace the mobile, it was stated that the mobile was near the auditorium. But Ms.Minu states that it was near the parking area and as per AW-7, it was near the main gate and parking area. 10.14. She further submits that there are serious defects in the enquiry inasmuch as only photocopies of the documents have been furnished. The originals were neither made available for inspection nor produced before the Enquiry Officer. No documents have been - 33 - WP No.3963 of 2021 provided along with the charge sheet. The proceedings were conducted in English when the workman only understands Kannada. The Enquiry Officer relied on a photocopy of a so called apology letter on part of the workman. The original of apology letter was never produced before the Enquiry Officer. It is only photocopies of the documents which were confronted to the workman and marked. No originals were ever shown to the workman. 10.15. The Disciplinary Authority being the Principal, the dismissal order has been passed by the Superintendent who is not the competent authority. Despite the serious allegation of theft being made, there was no police complaint lodged by the employer or the students. 10.16. It is on the basis of the above, she submits that firstly this Court would not have jurisdiction to set aside the rejection of the application under Section 33 (2) (b) of ID Act. Secondly, on - 34 - WP No.3963 of 2021 account of the enquiry having been held not to be fair and proper, the entire gamut of the matter was available before the Labour Court for adjudication and at that stage not only the prima facie case but the fact of whether the delinquency has been proved was required to be considered by the Industrial Adjudicator. There are material discrepancies in the evidence of various witnesses. The best evidence has not been placed on record by the employer. The enquiry has not been conducted in a proper manner. All the documents have not been furnished to the workman. The originals were never produced. 10.17. Lastly, she submits that though the workman had been reinstated into service, the employer having filed the above petition, reinstatement was not made. Despite an application having been made by the workman under Section 17B of the I.D.Act, since no order had been passed, - 35 - WP No.3963 of 2021 no payment of 17B wages has been made by the employer, during the pendency of the above matter. She submits that necessary

orders on the same could also be passed along with the main since the above petition has been taken up for final disposal. 10.18. It is on the basis of the above, she submits that the finding of the Labour Court is proper and correct and as such, does not require any interference.

11. Sri.K.R.Anand, learned counsel for the employer in rejoinder would submit that insofar as Section 17B wages are concerned that there could be no direction now passed for making payment of the said wages since the matter is taken up for final hearing. If the employer were to succeed, then there would be no question of reinstatement. The order passed by the Labour Court if set aside, the question of payment of any wages would also not arise. On this ground, he - 36 - WP No.3963 of 2021 submits that the application under Section 17B would also be required to be dismissed.

12. Heard Sri.K.R.Anand, learned counsel for the petitioner and Ms.Avani Chokshi, learned counsel for the respondent and perused the records.

13. The points that would arise for determination are:

1. Whether an order refusing permission under Section 33(2)(b) of I.D.Act can be challenged by way of a Writ Petition?.

2. Whether the exercise of powers under Section 33 (2)(b) of I.D.Act by the Labour Court while granting or refusing permission is to be based on prima facie consideration or does it require detailed examination:

3. Whether the enquiry which has been conducted is fair and proper?.

4. Whether the evidence available on record can be said to have material inconsistencies?.

5. Whether the finding of the Labour Court suffers from any legal infirmity?. - 37 - WP No.3963 of 2021 6. Whether this Court would have jurisdiction to interfere with the order passed rejecting an application under Section 33 (2) (b) of I.D.Act?.

7. Whether an application under Section 17B of the I.D.Act has to be considered prior to consideration of the matter on merits or could the said application be

considered along with the merits at the time of final hearing and final order being passed?.

8. What order?.

14. Answer to Point No.1: Whether an order refusing permission under Section 33(2)(b) of I.D.Act can be challenged by way of a Writ Petition?. 14.1. The contention of Ms.Avni Chokshi, learned counsel for the petitioner is that in exercise of jurisdiction of certiorari, this Court cannot reappraise evidence and interference is only possible in case of jurisdiction excess. In support of which, she relies upon the decision in the cases of Harbans Lal, Surya Dev Rai - 38 - WP No.3963 of 2021 and K.C.Rahi which have been extracted hereinabove. 14.2. Reading Para 5 of the decision in Harbans Lals case supra does not indicate any specific bar. What the Honble Apex Court has held is that the evidence cannot be reappraised without sufficient reason in law and fact. Thus, whenever there is sufficient reason available for this Court that is to say that if exfacie the finding of the Labour Court is bad in law and/or there is serious error committed by the Labour Court, the same would be required to be corrected by this Court or else litigant would be left with no remedy. 14.3. The Honble Apex Court in Surya Dev Rais case also caveated the powers of this Court in reappraising the evidence by stating that whenever an error which is manifest and - 39 - WP No.3963 of 2021 apparent on the face of the proceedings or grave injustice of loss, failure of justice is occasioned, the power to issue a certiorari by exercising supervisory powers can be made. 14.4. Similar was the situation in K.C.Rais case where the Honble Apex Court held that when there is a miscarriage of justice or error of law on the face of record, this Court could interfere. Thus, the submission of Ms.Avni Chokshi, learned counsel for the workman is required to be rejected. 14.5. Hence, I answer Point No.1 by holding that in appropriate cases, this Court can issue a certiorari quashing the order passed by the Labour Court if there is a breach of principles of natural justice, the order is vitiated by a manifest or apparent error of law, the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or at a disregard of a provision of - 40 - WP No.3963 of 2021 law, grave injustice or gross failure of justice is occasioned thereby, the Labour Court has acted in excess of its jurisdiction by over stepping or crossing the limits

of jurisdiction, has acted in flagrant disregard of law or the rules or procedure.

15. Answer to Point No.2: Whether the exercise of powers under Section 33 (2)(b) of I.D.Act by the Labour Court while granting or refusing permission is to be based on prima facie consideration or does it require detailed examination?. 15.1. By relying on M.Chandrashekarans case, the contention of Sri.K.R.Anand, learned counsel for the employer is that the grant of approval or not cannot be equated with jurisdiction under Section 10 and no detailed scrutiny is required to be made and only prima facie case is to be seen. For the same proposition, he relies upon the decision in Lalla Rams case and submitted that where the employer has bonafide come to the conclusion that the employee was guilty - 41 - WP No.3963 of 2021 and there was no unfair labour practice or victimization, the Labour Court ought to have granted permission and ordered for dismissal. He therefore submits that what is required is only for the employer to have come to a bonafide conclusion that the employee was guilty requiring his dismissal. He also relies on the decision of John D'souzas case for the very same purpose. 15.2. Per contra, Ms.Avni Chokshi, learned counsel for the workman on the other hand has relied on Balubhai Patels case and submitted that when an application under Section 33 of I.D.Act is made, the Tribunal initially has limited jurisdiction only to see whether a prima facie case is made out, which is the situation only when the domestic enquiry, preceding the order of dismissal is free from any defect. On the other hand, if there is any defect in the enquiry, the Labour Court or the Tribunal will give an - 42 - WP No.3963 of 2021 opportunity to the employer to produce the evidence as also an opportunity to the workman to rebut and in such a situation, the Tribunal will be entitled to arrive at its own conclusion on merits of the evidence produced before it with regard to proof of misconduct charged. Thus, she submits that the prima facie view would only be relevant if the enquiry was proper, where enquiry was not proper, the Tribunal could come to its own conclusion. She also places her reliance on the decision of John Dsouzas case to contend that whenever there is a violation of natural justice or unfair labour practice, the Labour Court ought to independently examine the matter. 15.3. There cannot be any dispute about the proposition as contended by both the counsel. 15.4. Hence, I answer Point No.2 by holding that whenever an enquiry is found to be proper and correct by the Labour Court, then the Labour - 43 - WP No.3963 of 2021 Court

ought to only consider the prima facie nature and if the decision of the employer in imposing the relevant punishment is plausible. 15.5. In the event of enquiry not being proper, only in that event after the employer were to lead evidence to prove the delinquency and the employee were to lead evidence to rebut the delinquency, the Labour Court is vested with the duty to examine the matter afresh and come to its own conclusion. In such a situation, it is not the prima facie view. All aspects would be left open for the Labour Court/Tribunal to consider.-. 44 - WP No.3963 of 2021 16. Answer to Point No.3: Whether the enquiry which has been conducted is fair and proper?. 16.1. Though several arguments have been advanced by both the sides as regards whether the enquiry was fair and proper, in the present case, I am of the considered opinion that the said question need not be gone into for the simple reason that the Industrial Tribunal has already come to a conclusion that the enquiry was not fair and proper and it is in furtherance of the same that the employer has led evidence before the Labour Court in Reference No.51/2015 which has been considered by the Labour Court in the impugned judgment. The award having been passed on the basis of the evidence having been led, it is those aspects which would be required to be considered by this Court.-. 45 - WP No.3963 of 2021 17. Answer to Point No.4: Whether the evidence available on record can be said to have material inconsistencies?. 17.1. The submission of Ms.Avani Chokshi, learned counsel for the workman is that there are several inconsistencies in the evidence on record whereas the contention of Sri.K.R.Anand, learned counsel for employer is that the evidence on record is proper and correct which indicates the culpability of the workman. Some of the aspects relating to the evidence has been reproduced hereunder. 17.2. The contention of Ms.Avani Chokshi, learned counsel for the workman is that the workman is supposed to have passed through security chamber before going to the girls hostel and therefore, there is a requirement of entry to be made in the register at the security chamber as also for the security guard to have been examined to establish that the workman went - 46 - WP No.3963 of 2021 into the girls hostel. There is considerable force in the said submission made, in the sense that, one of the evidence which could have been led by the employer is of the security guard being both the oral testimony and document maintained by the security guard. 17.3. The other inconsistency sought to be made out by the

counsel for the workman is that there are two girls who have claimed to have seen the workman in the hostel viz., Ms.Sree Priya and Ms.Gadha. However, evidence of Ms.Sree Priya was led and evidence of Ms.Gadha was not led. Hence, it is contended that the sole testimony of Ms.Sree Priya cannot be relied upon. In my considered opinion merely because there are numerous witnesses to a particular incident, it is not required that all the witnesses to be examined thereby bulking the records. One eyewitness is sufficient for proving the - 47 - WP No.3963 of 2021 case of the employer unless the veracity of the said witness is impeached by the workman. 17.4. The said evidence of Ms.Sree Priya being on record, it cannot be said that there is material inconsistency solely on account of not leading the evidence of other witness Ms.Gadha. This submission of Ms.Avni Chokshi is required to be rejected. 17.5. There is inconsistency sought to be brought about between the evidence of Ms.Sree Priya and that of the warden inasmuch as Ms.Sree Priya has stated that she has informed the warden that she has searched for the workman but did not find him. However, the warden has stated that she only received a complaint from Ms.Minu and asked Ms.Minu to search for the mobile without reference to the respondent. I am of the considered opinion that the same is not an inconsistency inasmuch as the question which was posed for the warden was with - 48 - WP No.3963 of 2021 reference to Ms.Minu and not with reference to workman. The statement of Ms.Sree Priya as regards the presence of the respondent does not in any manner contradict with the answer given by the warden and as such this contention of Ms.Avani Chokshi is required to be rejected. 17.6. It has been contended that Ms.Sree Priya saw the workman around 10.15 am and informed the same to Ms.Minu who was looking for her phone then. However, Ms.Minu has stated that she kept her phone for charging at 10.15 am and realized that it was missing only at 11.15 am. Though there may appear to be some inconsistency in the statement made as regards the time, taking into consideration the entire conceptus of the matter, this minor inconsistency cannot be termed to be a material inconsistency so as to effect the case of the employer. Ms.Sree Priya, who was - 49 - WP No.3963 of 2021 examined as MW-3, was not cross-examined by the workman. The inconsistency which has been sought to be made out is only on the basis of examination-in-chief. A perusal of examination-in-chief of Ms.Sree Priya would indicate that on 2.9.2015 between 10.15 am and 11

am she and Ms.Gadha were coming down from the third floor to the stairs when they saw the workman climbing up the stairs. Therefore, there is no categorical statement made that she saw the workman at 10.15 am. The reference to Ms.Sree Priya noticing Ms.Minu searching for her mobile phone and she asking everyone in the hostel about the mobile phone is also in the time frame of 10.15 am and 11.15 am. The information given by Ms.Sree Priya to Ms.Minu about the workman had been seen in the hostel and climbing up the stairs is also with reference to that time frame.-. 50 - WP No.3963 of 2021 17.7. The inconsistencies sought to be made out as regards the period of two hours stated by Ms.Sree Priya as regards Ms.Minu having found her mobile in the two wheeler of Mr.Kumar is neither here nor there since she has stated that she had seen Ms.Minu and other students searching for mobile in front of college car parking area at the main gate when she and her friends were going out. It is obviously thereafter that the mobile was found. Thus, in my considered opinion, there is no inconsistency let alone material inconsistency. 17.8. The evidence of MW-4 - Sharath as regards the time for recovery of the phone is believable more so when the said statement made by him is with reference to a particular time and not the time frame as stated by Ms.Sree Priya. 17.9. Another inconsistency sought to be made out is that the workman did not own a scooter. The issue in the present matter is not whether the - 51 - WP No.3963 of 2021 workman owned a scooter or not but whether the mobile phone was found in a scooter of which the workman had the keys to and was using. 17.10. In the background of enquiry report being submitted, the employer made an application under Section 33(2)(b) of the Industrial Disputes Act, 1947 read with Rule 61(2) of the Industrial Disputes (Karnataka) Rules, 1957 (for short, ID Rules) seeking approval for dismissal of the workman. Objections having been filed thereto, the first issue which was framed was as regards the fairness and properness of the enquiry, which was answered in the negative by the Labour Court. It is in that background that the employer examined 7 witnesses as AW-1 to AW-7 and marked 25 documents. The workman examined himself as RW-1 and marked one document.-. 52 - WP No.3963 of 2021 17.11. Initially the employer led the evidence of 2 witnesses viz., AW-1 and AW-2 and marked 23 documents. The workman examined himself as RW-1. Considering the evidence on record, the Labour Court came to a conclusion that the enquiry conducted by the employer

against the workman is not fair and proper and consequently, an application under Section 33 (2)(b) of I.D.Act filed did not deserve any approval and dismissed the proceedings. The recall application having been filed, which came to be rejected. Thereafter, it is in WP No.26798/2019 filed by the employer contending that it was aggrieved on account of such denial that on a joint memo being filed the matter was remitted for evidence to be recorded to prove the allegations against the workman. For that purpose, the employer led the evidence of Dr.Deepak Shivanagappa who has stated that he had represented the - 53 - WP No.3963 of 2021 management before the Enquiry Officer and certain of documents had been filed wherein it was verified by the Enquiry Officer from the originals. He reiterated the case of the management. In the cross-examination, he has denied any knowledge of the matter. He has stated that he has no knowledge of any of the facts which were put across to him by various suggestions. 17.12. The warden of the girls hostel was examined as AW-4. She has stated about the procedure to be followed for any person to visit the girls hostel. She has further stated about the workman having trespassed into the girls hostel without her notice and information about her having received a complaint from Ms.Minu on 2.9.2015 about her lost mobile and she has informed at about 4.30 pm about finding her mobile in a two wheeler of the workman.-. 54 - WP No.3963 of 2021 17.13. She had received a complaint lodged by Ms.Minu, in furtherance of which, she had given a representation to the Principal of the College. The originals of the registers were also produced in the evidence. She has also produced Ex.A-11 being the visitor register extract and Ex.A-12 being the complaint book, both of them had been marked as Ex.M14 and Ex.M15 respectively before the Enquiry Officer. She has put forward the case of the management/employer against the workman. In the cross-examination by the workman, she has denied that she did not know about the theft. She has categorically stated that Ms.Minu had informed about the same as also regarding the tracing of the mobile at 4.30 pm. She admitted that there is no entry made in Ex.A11 about the workman having entered the girls hostel. Nothing much has been elicited from her during cross-examination.-. 55 - WP No.3963 of 2021 17.14. Ms.Minu Maria Jose, owner of the mobile phone, was examined as AW-3. She has stated about how on 2.9.2015 when the college was closed due to bundh, some of the hostel mates went to the college to find out

whether classes are being conducted and she around 10.15 am put her mobile phone for charging in her room and went to her friends room to third floor. When she came back to her room around 11.15 am, she was shocked to see that her mobile phone was missing and she searched in her room but could not trace it. During that time, she was informed by two of her other hostelmates Ms.Gadha and Ms.Sree Priya that the workman had come to the girls hostel and was going upstairs. Hence, she went in search of the workman but he was not found in hostel premises. 17.15. She and her friends started searching for the mobile phone. With the help of her friends - 56 - WP No.3963 of 2021 mobile phone software, they spotted the mobile phone in the parking area. Hence all of them went there. When some of the senior students joined them in the search. They also went in search of the workman who was seen in the auditorium, when he was questioned if he had come to the girls hostel, he denied initially but subsequently accepted but stated that he had gone to meet the warden of the hostel. When he was asked to open the boot space of the two wheeler, he asked the person to wait there by stating that he would get his two wheeler but abruptly he went into the wash room and did not return even after 5 minutes. It is thereafter that the male students brought the workman out from the washroom and led him to the main gate of the college and brought him back inside the college. When the workman took out sim card from his pocket and gave it to Mr.Sharath. He also gave key of the two wheeler to - 57 - WP No.3963 of 2021 Mr.Sharath and when the boot was opened, the mobile phone was inside. 17.16. Thereafter, she gave a complaint, which was signed by 27 others. Though she had not been cross examined before the Enquiry Officer, she was cross-examined before the Labour Court. She admitted that there was no entry in the visitor register at Ex.A-11 about the workman having entered the hostel building. She also admitted that she has not personally seen the workman entering the girls hostel. She denied that the workman had not given the key of the two wheeler and/or the sim card. It is also denied that the two wheeler did not belong to the workman. She has answered that she did not know registration number of the vehicle. 17.17. In the cross-examination of Ms.Sree Priya, she has stated that about 10.15 am., herself and another roommate were coming down from - 58 - WP No.3963 of 2021 third floor when they saw the workman climbing up to the first floor. However, during the recordal of the cross-examination

subsequently, the time 10.15 am is mentioned. I am of the considered opinion that the same has to be read in conjunction with the earlier statements made by Ms.Sree Priya and as such, this reference to 10.15 am is required to be considered as an approximate time frame. Therefore, there is no contradiction in the evidence of Ms.Sree Priya. 17.18. One Mohamed Althaf, a student of the college was examined as AW-5. He has also reiterated the statement made by Ms.Minu Maria Jose. In the cross-examination, when suggested, he has agreed that till about 1.30 pm., he did not know about the mobile phone being missing. There is no contradiction or otherwise in his evidence, he has only stated about when he came to know of the phone being missing, that - 59 - WP No.3963 of 2021 does not in any manner indicate the time of theft. Similarly, Anas Ahammed who was examined has also reiterated the complaint made by Ms.Minu Maria Jose. 17.19. Dr.Sharath K.S., was examined as AW-7. He has stated that at the relevant point of time, he was a student and staying at R.V.Dental College Boys Hostel. Subsequently, he has been recruited by the Indian Armed Forces and currently, posted in New Delhi with the rank of Captain. He has categorically stated that he has personally enquired about the lost mobile phone of Ms.Minu with the workman, who was shaky and not very clear. Hence, he had asked the workman to lead them to the scooter. However, on the way, the workman tried to move away but he was not allowed to move away. On the way to the parking area, the workman handed over a sim card stating that - 60 - WP No.3963 of 2021 sim card belongs to the mobile of Ms.Minu. Later on, he handed over a key of a two wheeler when the boot was opened, the mobile was found. At that point of time, all the students got angry with the workman but he had pacified them. He has stated that the mobile phone was found between 3.30 pm. to 4.00 pm. in the cross examination, though several questions have been posed, no particular answer favouring the workman has been elicited. He has denied all the suggestions which have been put across. 17.20. The workman examined himself as RW-1 by filing a detailed affidavit in lieu of evidence claiming that there are certain disputes pending between Union and the respondent in ID No.51/2015. The workman belonging to the said Union. The management was waiting for an opportunity to victimise him on one ground - 61 - WP No.3963 of 2021 or the other. The entire proceedings initiated against the workman was for that purpose. 17.21. In his

cross examination, he has stated that he does not own a two wheeler. He sought to contend that if at all the workman had owned a scooter, necessary entry would have been made at the gate in the register maintained which has not been produced. This in my considered opinion is again a statement made for the sake of making. The key to the scooter having been given by the workman as deposed by several other students, it cannot be said that he did not have a scooter or that mobile was not found in the scooter. Merely because the licence plate number of the scooter has not been stated in the complaint, the same would not amount to the scooter not being in existence since all the students have deposed about how the key to the scooter was given by the workman and the mobile was found therein.-. 62 - WP No.3963 of 2021 17.22. The complaint which has been made is by the students who have stated the basic requirement to their Principal to take action. Non-mentioning of licence plate number would not enure to the benefit of the workman. There is much sought to be made out as regards the colour of the vehicle by stating that it is ash grey bike or silver bike. This need not hold me much longer since ash grey or silver are more or less similar and each person describing a colour in a particular manner. This I am of the considered opinion that there is no inconsistency in the evidence let alone material in the evidence which has been placed on record. The burden of proof in a disciplinary enquiry is to be assessed on the basis of preponderance of probability and not on the basis of beyond reasonable doubt, the evidence led by preponderance of probability would to - 63 - WP No.3963 of 2021 my mind indicate the culpability of the workman. 17.23. I answer Point No.4 by holding that in the evidence on record there are no material inconsistencies to take away the culpability of the workman established by applying the rule of preponderance of probability.

18. Answer to Point No.5: Whether the finding of the Labour Court suffers from any legal infirmity?. 18.1. The Labour Court has come to a conclusion that the charges levelled against the workman have not been proved by the employer. To arrive at this conclusion, the Labour Court is of the opinion that the charges levelled against the workman was theft of a mobile phone and that it should be proved beyond all reasonable doubts. Since no police complaint had been filed, no mahazar was drawn while recovering - 64 - WP No.3963 of 2021 the mobile phone, no eyewitness was examined by the employer, the Labour Court came to a

conclusion that offence of theft has not been proven. The said conclusion of the Labour Court is also supported by the fact that the security book not being produced, the security guard not being examined and the timing given as regards the loss of phone and the recovery of the phone being divergent between two witnesses. 18.2. The Labour Court further came to a conclusion that the scooter belonging to the workman has not been established and in that circumstances held that the offence of theft has not been proved beyond reasonable doubt. 18.3. I am of the considered opinion that the entire approach of the Labour Court in this regard is misplaced. The Labour Court has proceeded with the matter as if the same were a criminal prosecution requiring the allegations to be - 65 - WP No.3963 of 2021 proved beyond reasonable doubt. It is trite law that any aspects relating to departmental enquiry, burden of proof is to be discharged on the basis of preponderances of probabilities and not on the basis of beyond reasonable doubt. The Labour Court ought not to have applied the principles applicable to a criminal prosecution to a disciplinary enquiry more so when the present proceedings are relating to students in a hostel one of whom had lost the mobile and others had searched and found the phone as also deposed that the workman was in the premises and handed over the phone. There is no evidence led to indicate that the students were inimically disposed to the workman or that the students had acted at the behest of the employer, even otherwise such a claim is hard to believe. 18.4. Whenever a student loses a phone, that person would only be interested in finding and - 66 - WP No.3963 of 2021 recovering the phone. The person who helps such a student also would only be interested in doing so. They are not at that point of time concerned with prosecution of the workman. Infact the evidence of AW-7 is clear that even though other students wanted to take action against the workman, he pacified them. The object of the students at that point of time was only to recover the phone and hand over it to the owner viz., Ms.Minu. It is also required to be noted that at that point of time, none from the management was available at the site and all the actions were taken by the students. The context of a situation while regarding discharge of burden of proof on the basis of preponderance of probability is very much essential. 18.5. The context being stated above, I am of the considered opinion that minor variations in the timings provided by AW-4 and AW-2 is not of - 67 - WP No.3963 of 2021 much relevance.

The deposition of AW-7 is very clear as regards the occurrence of events. He has clearly stated about the workman trying to escape and having been brought back, the sim card having been given by the workman, the key of the scooter being given by the workman and the phone being found in the said scooter. It is therefore not relevant as to whether the workman was owner of the scooter and whether proof regarding thereto had been produced. The evidence on record being that the key of/to the scooter had been given by the workman and as stated above, the mobile phone being found in the said scooter, would be sufficient to discharge the burden of proof on the basis of preponderance of probability. 18.6. The Labour Court has also observed that there are no eyewitnesses who have deposed to the incident. Of course there is no eyewitness to the theft of a phone but there are enough and - 68 - WP No.3963 of 2021 more witnesses who were present at the time of recovery of the phone. The recovery of phone in the possession of the workman without any explanation would lead to an unsurmountable conclusion that the theft had also been committed by him. The circumstances aforesaid in my considered opinion are sufficient to hold the workman guilty of having committed the theft of a phone and the concealment thereof in a departmental enquiry. 18.7. Hence, I am of the considered opinion that the finding of the Labour Court in this regard is not proper and is required to be set aside.

19. Answer to Point No.6: Whether this Court would have jurisdiction to interfere with the order passed rejecting an application under Section 33 (2) (b) of I.D.Act?. 19.1. The contention of Ms.Avni Chokshi, learned counsel for the workman is that once an order rejecting an application filed under Section 33 - 69 - WP No.3963 of 2021 (2) (b) of I.D.Act is passed by the Labour Court, this Court would have no jurisdiction. However, she submits that if an application under Section 33(2)(b) of I.D.Act had been allowed, then the workman could have approached this Court. I am of the considered opinion that such a dichotomy is not permissible. If any authority were to act in a manner contradictory to applicable law and if any person were to be aggrieved by such an action, there is a remedy which ought to be made available to such person. The principles of *ubi jus ibi remedium* would be applicable inasmuch as wherever there is a grievance there has to be remedy. 19.2. The Labour Court if were to commit any error, the filing of a present writ

petition would be the adequate remedy available to either the workman or the employer depending on whether the application under Section 33 (2)(b) - 70 - WP No.3963 of 2021 of I.D.Act is allowed or rejected. Thus, I answer Point No.6 by holding that this Court would have jurisdiction to interfere with an order rejecting an application under Section 33 (2)(b) of I.D.Act.

20. Answer to Point No.7: Whether an application under Section 17B of the I.D.Act has to be considered prior to consideration of the matter on merits or could the said application be considered along with the merits at the time of final hearing and final order being passed?. 20.1. Section 17 B of the I.D.Act reads as under:- 17B. Payment of full wages to workman pending proceedings in higher courts.- Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court: Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such - 71 - WP No.3963 of 2021 workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.]. 20.2. In terms of the above provision, whenever a Labour Court, Tribunal or the National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such an award to the High Court or the Supreme Court, the employer during the period of pendency of such proceedings is required to make payment of full wages last drawn by the workman. This being so, to protect the workman and the society inasmuch as a workman without work and without wages would cause not only harm to the workman himself but to his family and there upon the society as such. 20.3. It is in that circumstances that I am of the considered opinion that whenever an - 72 - WP No.3963 of 2021 application under Section 17B is made, the same is required to be considered immediately. 20.4. In the present matter, the petition being taken up

for final hearing, the said application under Section 17B was not considered. That does not however preclude or take away the right of the workman inasmuch as the entitlement of the workman is defined under Section 17B of the I.D.Act and the said right arises immediately upon a challenge made by the employer of an order of reinstatement. If the reinstatement had not been challenged, the workman would have been reinstated, would continue the work and be paid for the work done. It is only on account of the reinstatement order being challenged, the workman has no work and no wages. 20.5. The right of Section 17B wages being a statutorily recognized right, the said right can never be negated by delay in consideration of - 73 - WP No.3963 of 2021 application under Section 17B. The delay attributable to any reason cannot deprive the statutory right vested in the workman for 17B wages. 17B wages is required to be paid from the month after the award being published under Section 17 of I.D.Act in terms of the decision of the Honble Apex Court in the case of M/s.Haryana Suraj Malting Ltd., vs. Phool Chand¹². Thus, even though the application is now being considered along with the main, this statutory right which was vested with the workman is required to be fulfilled and the employer having challenged the reinstatement would be liable to make payment of 17B wages as observed above. 20.6. A right under Section 17B inheres in a workman as soon as a challenge is made to the reinstatement and is subject only to the proviso to Section 17B, that is, if the employer were to 12 Civil Appeal No.5650/2018 - 74 - WP No.3963 of 2021 prove that the workman had been employed and had received adequate remuneration during the said period, the Court could order that no wages shall be payable. The only exception being the employment of the workman. If the workman were not employed and/or if the employer were unable to establish such employment, the right under Section 17B is absolute and the said payment is required to be made by the employer on a challenge being made to reinstatement order. 20.7. Hence, I answer Point No.7 by holding that whenever an order of stay of reinstatement is passed, the courts would have to do so by directing the employer to make payment of Section 17B wages unless the employer were at that stage be able to show that the workman is gainfully employed, if such an order is not passed at such stage than on an application under Section 17B of the I.D.Act being filed the - 75 - WP No.3963 of 2021 same is required to be considered at the earliest preferably as soon as the

application is filed. If however the said application is not considered at that stage, but is considered when the final arguments are taken up, even then, the workman would be entitled to Section 17B wages merely on account of a challenge being made to a reinstatement order, unless the employer were to prove the exception in terms of the proviso to Section 17(B).

21. Answer to Point No.8: What order?. 21.1. In view of the finding given to each of the above points, I pass the following:

ORDER

i. The Writ Petition is allowed. ii. The order dated 30.08.2018 passed by the Labour Court in Reference No.51/2015 rejecting an - 76 - WP No.3963 of 2021 application under 33 (2)(b) of the I.D.Act is set aside. iii. Consequently, the application under Section 33 (2)(b) of the I.D.Act filed by the employer is allowed. iv. The order of dismissal passed by employer is confirmed. v. Though the above the Writ Petition is allowed, the employer shall make payment of 17B wages, being the last drawn wages of the workman calculated from a date one month after the award being passed by the Labour Court and published until the payment thereof by the employer to the workman. Sd/- JUDGE PRS List No.:

1. SI No.:

7.

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