
(2015) 01 RAJ CK 0296

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) Nos. 1403 of 2013 and 414 of 2014

Executive Director, Hotel Clarks Amer and Others

APPELLANT

Vs

Labour Judge No. 1 and Others

RESPONDENT

Date of Decision : 13-01-2015

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1)(c), 11-A

Citation : (2015) 3 CDR 1389

Hon'ble Judges : Sunil Ambwani, A.C.J;J.K. Ranka, J

Bench : Division Bench

Advocate : Virendra Agarwal and Manoj Goyal, for the Appellant; Babu Lal Gupta, Advocate and Ankul Gupta, Amicus Curiae, Advocates for the Respondent

Judgement

Sunil Ambwani, Acting C.J—We have heard learned counsel appearing for the parties. The D.B. Civil Special Appeal (Writ) No. 1403/2013 Executive Director, Hotel Clarks Amer & Anr. vs. Labour Judge No. 1 & Anr., arises out of the judgment of learned Single Judge dt. 12.11.2013 by which he had partly allowed the writ petition against the Award of the Labour Court No. 1, Jaipur dt. 15.11.2010 in Case No. L.C.R. 56/2004, confirming the findings of the Labour Court that the termination of services of the workman was illegal and improper, and the plea of loss of confidence taken by the employer. Learned Single Judge however substituted the award of reinstatement with 20% back wages, to the award of compensation only from the date of termination till the date of judgment, to be calculated at the rate of salary which was drawn by the workman at the time of termination of his services at Rs. 8000/- p.m. or so.

2. In D.B. Civil Special Appeal (Writ) No. 414/2014 Mukut Behari vs. Executive Director. Hotel Clarks Amer & Ors., the same judgment of learned Single Judge has been challenged by the workman against the directions issued by learned Single Judge substituting the relief of reinstatement with 20% back wages, to the award of compensation.

3. Brief facts giving rise to these Special Appeals are that Shri Mukut Behari, the

workman was serving as Junior Captain in the Hotel on 2.3.1992, drawing a salary of Rs. 4200/- p.m. On 8.1.2003, he was given a charge-sheet alleging that on 29.12.2002, when he was on duty in the Jharokha Restaurant of the Hotel, he alongwith Abhay Kant Jha and Satyavan Singh were working as Junior Captain and Puran Singh was working as Steward. On that day, in the evening, a guest came for dinner on table No. 2-A. She was given the menu card by Shri Satyavan Singh, on which she preferred to take buffet, which was priced at Rs. 455/- with tax. She paid Rs. 500/- to Shri Satyavan Singh, which was distributed between the workman, Puran Singh, Satyavan Singh and Abhay Kant Jha, jointly in consultation with common intention, on which, Shri Satyavan Singh, in order to cause loss to the Hotel, informed the guest with malicious intention that if she (guest) will not insist upon the bill, he will return Rs. 50/- to her and accordingly, Shri Satyavan Singh returned Rs. 50/- to the guest and in this manner, without issuing KOT (Kitchen Order Transfer) or bill, Rs. 350/- were taken from the guest, out of which, Rs. 100/- was kept by Shri Satyavan Singh, Rs. 100/- by Shri Puran Singh, Rs. 00/- by the workman, and Rs. 80/- by Shri Abhay Kant Jha, and in this manner, they dishonestly misappropriated the money belonging to the Hotel.

4. In his defence to the charges, the workman stated that on 29.12.2002, he was on duty to set and clean the tables. After completion of his duty hours, Shri Satyavan Singh had given him Rs. 100/- from the tips received by him. The workman was not aware as to in what manner the money was taken. The workman neither misused the money nor misappropriated it. In the domestic enquiry, the Enquiry Officer, after recording evidence, submitted his report, on which the workman was dismissed from service on 8.5.2003, despite the fact that his duty was only to set and clean the tables and he had not realized any money from the guest. The workman made an application, on which a reference was made by the State Government to the Labour Court No. 1, Jaipur under Sec. 10(1)(c) of the Industrial Disputes Act, 1947 vide Notification dt. 8.12.2003, to adjudicate whether the termination of services of the workman on 8.5.2003 by the Executive Director, Hotel Clarks Amer, Jaipur was proper and legal and if not, the relief to which he is entitled?

5. The Labour Court by an order dt. 14.7.2010 in the proceedings, held that the domestic enquiry was conducted fairly and properly and thereafter, proceeded to consider the question as to whether on the evidence adduced during the enquiry, the charge was established against the workman and whether the punishment is commensurate with the allegations made against him.

6. The Labour Court considered the entire evidence including the statement of the witnesses, which included the admission in the letters given by all the four employees, who were serving the Guests in the Jharokha Restaurant on 29.12.2002 and found on the appreciation of evidence led in the domestic enquiry that only Shri Satyavan Singh was guilty of the allegations of misappropriation. The workman had not admitted his fault in the letter written by

him. All that he had stated was that he was given Rs. 100/- by Shri Satyavan Singh. The Labour Court found that Shri Satyavan Singh has tried to implicate Shri Mukut Behari (the workman) and Shri Puran Singh. He had not given any such statement from which it may be established that they conspired to misappropriate the amount. Shri S.N. Sharma, who had conducted the preliminary enquiry, had found Shri Mukut Behari (the workman) and Puran Singh to be guilty on the basis of the letter of Shri Satyavan Singh, whereas in the domestic enquiry it was found that all the four had joined together to misappropriate the amount. The findings are based on the letters written by all the four employees including the workman, whereas Shri Mukut Behari (the workman) had only stated in his letter that he was doing the job of cleaning the tables, and that when the work was over he was given Rs. 100/- by Shri Satyavan Singh. Shri Puran Singh stated that his duty was in billing and that he was also given Rs. 100/- at the end of the day. On the next day, he was informed by Shri Satyavan Singh that he had not issued KOT of the guest, on which he offered to return the amount. Similar statement was given by Shri Abhay Kant Jha. From these letters, it appears that Shri Satyavan Singh had distributed the amount as a tip, which was not a new thing, inasmuch as, on every day if the amount of tip was less than Rs. 500/-, it was distributed as an accepted practice amongst the waiters.

7. The Labour Court, from the assessment of the evidence in the domestic enquiry, found that only Shri Satyavan Singh was guilty of the allegations. Shri Mukut Behari (the workman) neither realized nor misappropriated any amount belonging to the Hotel and thus, the charges in the charge sheet dated 8.1.2003 were not proved against the workman. The charge No. 5 against Shri Mukut Behari (the workman) was neither proved nor pressed and thus, it was held by the Labour Court that termination of services of Shri Mukut Behari (the workman) was improper and illegal and that he was entitled to be reinstated with continuity in service.

8. With regard to the back wages, the Labour Court observed that the workman had stated in his statement that he was not gainfully employed, but he had not pleaded nor led any evidence to prove that he was not working anywhere else, and thus, since in this age. It cannot be said that he had not worked for his livelihood at any place, he was only entitled to 20% of the back wages at the rate on which the employees, who were serving on similar jobs, were drawing their salary. The reference was decided accordingly with directions for reinstatement of the workman with continuity in service, but with entitlement to only 20% of the back wages.

9. Learned Single Judge upheld the findings of the Labour Court on the ground that as a Writ Court he had limited jurisdiction and further, there was no perversity in the findings recorded by it. The Labour Court had not ignored any material or relied on any material not produced before it. The conclusions drawn on the evidence could not be reviewed or re-assessed by the Court. It was

permissible for the Labour Court under Sec. 11-A of the Industrial Disputes Act to find out as to whether the charge was made out or not. The High Court cannot interfere on the ground that the Labour Court formulated issue in a different manner. In the circumstances, learned Single Judge did not discuss the facts elaborately.

10. Learned Single Judge, thereafter, briefly discussed the facts in which he observed as follows:--

"The fact, however, remains that Mr. Satyavan Singh collected Rs. 500/- from guest, which was required to be accounted in the hotel but he kept the money. He refunded Rs. 150/- to guest, thus Rs. 350/- was kept by him. He distributed the said amount amongst 4 persons including respondent-workman. It is stated that respondent-workman had no knowledge of pocketing money by Satyavan Singh as it was given in distribution of tip. To that extent, respondent-workman can be said to be innocent but fact remains that when respondent workman could know that it is not an amount of tip, he should have refunded the amount to be establishment, however, other than showing willingness to do, the amount was not given back to the petitioner-establishment. It is a case of hotel establishment, which is run on trust, thus plea of loss of confidence of petitioner cannot be ignored in the facts and circumstances of the case. Thus, even if misconduct is not found proved as has been committed by Satyavan Singh, the question is as to whether petitioner-establishment can have confidence on the respondent-workman. In my opinion, it is definitely a case of loss of confidence, thus an order of reinstatement is not proper. The workman can be compensated in lieu of reinstatement and even learned counsel for the petitioner has prayed to compensate the workman in lieu of reinstatement though if finding of fact recorded by the Labour Court is not interfered."

11. On the aforesaid discussion, learned Single Judge found that to balance the equities, the award of adequate compensation would be appropriate for the ends of justice. Since the workman was receiving Rs. 4200/- p.m. at the time of termination of his services in the year 2003, and that a period of almost 10 years had already passed, after which the salary is now Rs. 8000/- p.m. or so, the workman engaged in the year 1980, having rendered the service of almost 23 years before termination, is entitled to the wages from the date of termination till the date of the judgment, to be calculated at the rate he was getting salary at the time of termination of his services.

12. The workman did not challenge the award. The Special Appeals have been filed by both the employer and the workman, aggrieved with the judgment of learned Single Judge. Whereas the employer has challenged the judgment of learned Single Judge as well as the Award of the Labour Court in which the findings were returned that the termination of services of workman, on the evidence led in the domestic enquiry, was improper and illegal, the workman has challenged the findings on the plea of loss of confidence recorded by learned Single Judge and partly allowing the writ petition by substituting the award of

reinstatement with 20% back wages, to the award of compensation from the date of termination till the date of judgment to be calculated at the rate, the workman was receiving salary at the time of termination of his services.

13. It is submitted by learned counsel appearing for the employer that once a finding has been recorded that the domestic enquiry was held fairly and properly, the Labour Court has limited jurisdiction to interfere. Relying on the decisions of the Supreme Court in *Usha Breco Mazdoor Sangh Vs. Management of Usha Breco Ltd. and Another*, (2008) 3 CLT 130 : (2008) 118 FLR 400 : (2008) 6 JT 427 : (2008) 2 LLJ 945 : (2008) 7 SCALE 447 : (2008) 5 SCC 554 : (2009) 1 SLJ 322 and *Mavji C. Lakum Vs. Central Bank of India*, (2008) 119 FLR 96 : (2008) 5 JT 546 : (2008) 3 LLJ 1 : (2008) 7 SCALE 32 : (2008) 12 SCC 726 : (2009) 1 SCC(L&S) 254 : (2008) AIRSCW 3460 , it is submitted that the Labour Court or Tribunal cannot sit in appeal over the findings recorded by the Enquiry Officer and accepted by the Management. It is the decision making process and not the finding which can be called in question by the Labour Court. When two views are possible and the view taken by the enquiry officer is plausible, the Labour Court or the Tribunal should not interfere. It is submitted that in the present case, the findings of the Labour Court are based on presumptions and assumptions without any material on record. It was a case of fraud and misappropriation by a person holding the post of trust and, as such, on the loss of confidence, the dismissal from service was the proper punishment.

14. In *Cholan Roadways Limited Vs. G. Thirugnanasambandam*, (2005) 1 ACC 143 : AIR 2005 SC 570 : (2005) 104 FLR 440 : (2005) 1 JT 116 : (2005) 1 LLJ 569 : (2005) 3 SCC 241 : (2005) SCC(L&S) 395 , it 50, was held by the Supreme Court that where the Industrial Tribunal has ignored the relevant considerations and considered irrelevant ones, the Court may interfere with the findings of fact. The adjudicating authority, however, must pose unto itself the correct questions so as to arrive at the correct findings of fact. A wrong question posed leads to a wrong answer.

15. In *Usha Berco Mazdoor Sangh vs. Management of Usha Berco Limited and Anr.*, (supra), referring to *Mohan Lal Vs. Anandibai and Others*, AIR 1971 SC 2177 : (1971) 1 SCC 813 : (1971) 3 SCR 929 , it was held that when the validity or legality of the domestic enquiry is determined to be in favour of the Management, no fresh evidence is required to be adduced by it. The Labour Court should not interfere with the findings of Enquiry Officer, just because it is lawful to do so. Even assuming that for all intents and purposes, the Labour Court acts as an Appellate Authority over the judgment of Enquiry Officer, it would exercise appropriate restraint. While determining the issue as to whether the workman is guilty of misconduct, the workman should be entitled to raise all contentions including the contention of lack of bona fides or unfair labour practice, as also the acts of victimization on the part of the Management. Even evidence in that behalf can be laid. Save and except, however, for sufficient and cogent reasons, neither the Enquiry Officer would arrive at a finding in regard to

lack of bona fides or victimization or unfair labour practice on the part of the Management, nor the Labour Court while considering the said findings would ordinarily not do so. Materials must be brought on record to establish the said allegations. It is one thing to say that the finding of the Enquiry Officer is perverse or betrays the well known doctrine of proportionality but it is another thing to say that only because two views are possible, the Labour Court shall interfere therewith. When the Labour Court comes to a conclusion that a verdict of guilt has been arrived at by the Enquiry Officer, where the materials suggested otherwise but it is another thing to say that such a verdict was also a possible view. The decision of the Labour Court should not be based on mere hypothesis. It cannot overturn a management decision on ipse dixit. Its jurisdiction under Sec. 11-A although is wide one, must be exercised judiciously. Judicial discretion cannot be exercised either whimsically or capriciously. It may scrutinize and analyze evidence but what it is important how it does so.

16. In *Ashok Kumar Sharma Vs. Oberoi Flight Services*, AIR 2010 SC 502 : (2009) 14 JT 3 : (2009) 4 LLJ 732 : (2009) 13 SCALE 602 : (2010) 1 SCC 142 : (2010) 1 SCC(L&S) 20 : (2009) 15 SCR 602 : (2009) 6 SLR 448 : (2009) 10 UJ 4745 , the Labour Court, after hearing the parties, held that the order of dismissal passed by the Management was contrary to law, but at the same time it also held that the dismissal of the workman from service of the management was not justified and awarded full back wages to the workman from the date of his dismissal until the date of award and learned Single Judge dismissed the writ petition against which the Division Bench of the High Court did not deem it proper to order reinstatement of the workman, and instead directed the Management to pay him Rs. 60,000/- in full and final settlement of the claim, the Supreme Court relying on *U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey*, AIR 2006 SC 586 : (2006) 108 FLR 201 : (2005) 10 JT 344 : (2006) 1 LLJ 496 : (2006) 1 SCC 479 : (2006) SCC(L&S) 250 : (2006) 2 SLJ 327 : (2005) AIRSCW 6314 : (2005) 8 Supreme 815 and *Sita Ram and Others Vs. Moti Lal Nehru Farmers Training Institute*, AIR 2008 SC 1955 : (2008) 1 CLT 318 : (2008) 117 FLR 1191 : (2008) 3 JT 622 : (2008) 2 LLJ 688 : (2008) 4 SCALE 77 : (2008) 5 SCC 75 : (2008) 2 SCC(L&S) 71 : (2008) AIRSCW 2256 : (2008) 2 Supreme 375 held that the view of the High Court that monetary compensation in lieu of reinstatement of the workman would be proper cannot be said to be unjustified. The Supreme Court, however, found that the compensation in the sum of Rs. 60,000/- was grossly inadequate and regard being had to all the relevant facts and circumstances, the compensation of Rs. 2 lacs was awarded with interest at the rate of 9% p.a., if the amount was not paid within the time.

17. In *Atlas Cycle (Haryana) Ltd. Vs. Kitab Singh*, (2013) 4 AD 46 : AIR 2013 SC 1172 : (2013) 136 FLR 893 : (2013) 2 JT 253 : (2013) LabIC 1337 : (2013) 2 LLJ 289 : (2013) 1 LLN 561 : (2013) LLR 231 : (2013) 2 SCALE 49 : (2013) 12 SCC 573 : (2013) 2 SCT 160 : (2013) 2 SLJ 452 : (2013) AIRSCW 2341 : (2013) AIRSCW 1016 : (2013) AIRSCW 4535 : (2013) 1 Supreme 786 , it was held that

where the finding of fact is based on no evidence, such error of law can be corrected by a writ of certiorari. The issue as to whether workman had voluntarily submitted his resignation or was forced to resign was not adverted to by the Labour Court. The finding of fact that the workman was never tortured and that the story of forcible resignation was not reliable, recorded by the Labour Court contrary to the material evidence on record, was rightly interfered with by learned Single Judge, directing the respondent's reinstatement with 25% back wages. The Supreme Court reiterated the principles of appreciation of evidence by the High Court as follows:--

"15. We are satisfied that the learned Single Judge thoroughly analyzed all the aspects and arrived at a correct conclusion. It is settled law that when the Labour Court arrived at a finding overlooking the materials on record, it would amount to perversity and the writ Court would be fully justified in interfering with the said conclusion. We are conscious of the fact that the High Court exercising writ of certiorari jurisdiction would not permit to assume the role of the appellate Court, however, the Court is well within its power to interfere if it is shown that in recording the said finding, the Tribunal/Labour Court had erroneously refused to admit the admissible and material evidence, or had erroneously admitted any inadmissible evidence which has influenced the impugned finding, the writ Court would be justified in exercising its remedy. In other words, 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."

18. Learned counsel appearing for the workman has supported the findings of the Labour Court. He submits that when learned Single Judge decided not to interfere with the findings of fact, and on which he expressed a view that it was not open to him, to re-assess the evidence, he could not have relied on the same evidence, which was assessed by the Labour Court, to arrive at a finding that when the workman could know that it was not amount of tip, he should have returned the amount to the establishment. His unwillingness, to return the amount, to the hotel establishment, which is run on trust, was sufficient to accept the plea of loss of confidence.

19. It is submitted that learned Single Judge has adopted an incorrect approach to the issue raised before him. Whereas on one hand he has recorded his opinion, not to interfere with the findings of fact, he had, on the same findings, recorded an opinion, which virtually amounts to recording proof of the guilt of the workman and thereby accepting the plea of loss of confidence and thereafter, setting aside the award of reinstatement on such findings. It is submitted that it was an accepted practice in the hotel amongst the employees to share the tips, if they were less than Rs. 500/-. Once it was proved that the workman had no knowledge that the amount was not realized as a tip, and Shri Satyavan Singh has realised the amount, on his own, the workman engaged in the restaurant only for laying and cleaning the tables and cleaning the crockery, could not have been held guilty of misappropriating the amount. There was nothing in the letter

written by the workman, which may have suggested or attributed the guilt on him in proof of charges to deny the award of reinstatement. It is submitted that under Sec. 11-A of the Industrial Disputes Act, the Labour Court had jurisdiction to reassess the evidence, even if the domestic enquiry was held following the principles of natural justice. The question as to whether the principles of natural justice were followed is different from the question as to whether on the evidence led in the domestic enquiry, the conclusion was correctly drawn. Even if the principles of natural justice are followed, the employer can arrive at a totally incorrect and absurd conclusion from the evidence before him. In the present case, there was absolutely no evidence, that the workman had knowledge of the illegal extraction of the amount from the lady guest. Further, there was no evidence as to whether the amount was asked to be returned and was actually returned by the employees, who had realized Rs. 350/- from the lady guest. The findings recorded by learned Single Judge are contradictory to the findings recorded by the Labour Court.

20. It is submitted that learned Single Judge could have reversed the findings of the Labour Court, but having accepted the legal proposition that it was not open to him to do so, he could not have thereafter, recorded his own opinion in upholding the plea of loss of confidence, which was never taken before the Labour Court.

21. In the present case, the Labour Court discussed the entire evidence and found from the statements of the witnesses that the entire money was received by Shri Satyavan Singh and that there was no evidence to establish that the other three employees including Shri Mukut Behari (the workman) were involved with him. The workman was serving as a Junior Captain. He was given the duties of setting and cleaning the tables, and cleaning the plates, quarter plates, crockery etc. The Management had permitted the distribution of tips, if they were less than Rs. 500/-. In case it was more than Rs. 500/-, the tip was deposited in the hotel, which was distributed on Dipawali by the Management to the staff. There was no evidence to suggest that Shri Mukut Behari (the workman) had the knowledge of offer given by Shri Satyavan Singh to the guest. The money was accepted by Shri Satyavan Singh without the knowledge and consent of other employees and that he had given Rs. 100/- to the workman as a contribution of the tip, which was a practice in the Hotel. The Labour Court did not accept the finding that all the four employees had conspired to misappropriate the amount, which was recorded in the domestic enquiry on the basis of the letters written by the charged employees. The Labour Court found that though the proceedings of domestic enquiry were just and proper, the letter written by Shri Mukut Behari (the workman) that he admitted his guilt was not a correct fact. He had clearly stated that he had no knowledge of the manner in which the money was received. He pleaded in the letter that his duty was to clean and lay the tables. The guest was attended by Shri Satyavan Singh, who used to issue KOT and to get the bill prepared. The lady guest had complained to the Management. The Executive Director called Shri Mukut Behari (the workman) and asked for

explanation, on which the workman stated that he will make enquiries and inform him as to what happened and thereafter, came back to him stating that the work was done by Shri Satyavan Singh. On the next day, Shri Satyavan Singh had gone to the Executive Director and informed him that all the four employees were included in the misappropriation of the money. The letters written by Shri Satyavan Singh and other employees including the workman could not be used against Shri Mukut Behari (the workman), who had not admitted the knowledge of the manner in which the money was received. Shri S.N. Sharma had held preliminary enquiry in which he had found Shri Mukut Behari (the workman) and Shri Puran Singh guilty of charges, on the basis of the letter of Shri Satyavan Singh, which did not prove the connivance of Shri Mukut Behari (the workman) in realizing or appropriating the money from the guest.

22. The findings of the Labour Court have been approved by learned Single Judge. We do not find any error in the assessment of the evidence, after which the Labour Court found that Shri Mukut Behari (the workman) was not involved in illegally receiving money with the knowledge as to how it was realized. He did not have any knowledge of illegal realization of Rs. 350/-, the non-issuance of KOT and the bill, and taking of Rs. 350/- from the guest instead of Rs. 450A, which was appropriated by Shri Satyavan Singh, from which he had given Rs. 100/- to Shri Mukut Behari (the workman), as distribution of tips received by him. The findings, therefore, do not require any interference in the Special Appeal.

23. The Labour Court directed reinstatement on the finding that the termination of services of the workman was illegal and unjustified. It cannot be denied that the Labour Court has such power under Sec. 11-A of the Industrial Disputes Act, if it finds that the termination was illegal and improper, and further, the Labour Court also had powers to direct reinstatement of the workman with 20% back wages in the absence of evidence led by the workman that he was not gainfully employed anywhere else. Learned Single Judge could have interfered with the findings and conclusions of the Labour Court if the same are arrived at overlooking and ignoring the evidence and material on record. No good ground has been made out by the employer, on which learned Single Judge could have interfered with the Award of the Labour Court.

24. Learned Single Judge caused interference with the relief granted by the Labour Court on the ground of plea of lack of confidence raised by the employer on the evidence that the workman should have returned the amount to the establishment after he came to know that the amount was illegally realized from the customer in the hotel establishment, which is run on trust. He held that the plea of lack of confidence cannot be ignored and thus, even if the misconduct was not found proved as it was committed by Shri Satyavan Singh, the question is as to whether the employer can have confidence in the workman. Learned Single Judge opined that it was definitely a case of lack of confidence and thus, the order of reinstatement was not proper.

25. We find that the process of reasoning adopted by learned Single Judge, cannot be sustained. Learned Single Judge observed that once the workman came to know that the amount was not of tips, he should have returned it to the establishment. However, there is no such evidence nor any suggestion was put to the workman in the domestic enquiry. There was no evidence to show that the amount was not returned. A casual argument led to recording the findings of loss of confidence. Learned Single Judge further erred in law in recording the finding, that the hotel establishment is run on trust and thus, plea of loss of confidence cannot be ignored, without any evidence or material on record.

26. The plea of loss of confidence, depends upon the nature of the duties performed by a workman. The workman entrusted with the job of handling the cash, security or any other work, which requires the confidence of the employer, may not be reinstated once the allegations are proved against him. In the present case, it was admitted that Shri Mukut Behari (the workman) was employed for cleaning and setting the tables, and cleaning the crockery. He was not holding any position of trust or confidence. Having accepted the finding that the workman had no knowledge that the money was illegally taken from the customer and acceptance of the amount from Shri Satyavan Singh was by way of sharing of tips, which was a practice in the hotel and was accepted by the Management, it cannot be said without any evidence of positive knowledge that the workman had conducted himself in such a manner that the employer may have lost the confidence in him. There was no suggestion nor any evidence as to whether the amount accepted by the workman was not returned and thus, it cannot be said on assumption that the employer had lost the confidence in the workman.

27. In *Kanhaiyalal Agrawal and Others Vs. The Factory Manager and others*, (2001) 8 AD 77 : AIR 2001 SC 3645 : (2001) 91 FLR 380 : (2001) 7 JT 571 : (2001) 2 LLJ 1239 : (2001) 6 SCALE 300 : (2001) 9 SCC 609 : (2001) 4 SCT 428 : (2001) AIRSCW 3656 : (2001) 7 Supreme 97 , the Supreme Court discussed the plea of loss of confidence. It was held that what must be pleaded and proved to invoke the principle of loss of confidence is that (i) the workman is holding a position of trust and confidence; (ii) by abusing such position, he commits acts which resulted in forfeiting the same; and (iii) to continue him in service would be embarrassing and inconvenient to the employer or would be detrimental to the discipline or security of the establishment. All these three aspects must be present to refuse reinstatement on ground of loss of confidence. Loss of confidence cannot be subjective based upon the mind of the management. Objective facts which would lead to a definite inference of apprehension in the mind of the Management regarding trustworthiness or reliability of the employee must be alleged and proved. Else, the right of reinstatement ordinarily available to the employee will be lost.

28. In the present case, there was no direct evidence with regard to the knowledge of the workman in accepting Rs. 100/- from Shri Satyavan Singh, who

was guilty of not issuing KOT and misleading the customer and receiving a money without issuing the bill. There was no evidence to show that the charged workman had knowledge of taking money from the customer without issuing the bill by Shri Satyavan Singh. The workman had accepted the money as a part of accepted practice of sharing the tips. He had admitted before the Executive Director as well as given in writing that he had no knowledge of the taking of money by Shri Satyavan Singh from the customer without issuing the bill. Thereafter, there was no evidence on record as to whether he had not returned the money or that having come to know that the money was illegally taken, he had not offered to return the money. This plea was raised only by way of an argument by the counsel appearing for the employer and was accepted by learned Single Judge in denying reinstatement, accepting the plea of loss of confidence and interfering with the order of reinstatement, without discussing the evidence, thereby depriving him a legitimate relief of reinstatement with 20% back wages.

29. On the question of back wages, learned counsel appearing for the workman has relied on the recent judgments of the Supreme Court in Tapash Kumar Paul Vs. BSNL and Another, AIR 2015 SC 357 : (2014) AIRSCW 5816 : (2014) 7 JT 589 : (2014) 3 SCT 106 and Bhuvnesh Kumar Dwivedi Vs. Hindalco Industries Ltd., AIR 2014 SC 2258 : (2014) AIRSCW 3157 : (2014) 6 JT 190 : (2014) 3 LLJ 478 : (2014) 6 SCALE 119 .

30. In Bhuvnesh Kumar Dwivedi's case (supra), the Supreme Court has held that where the Labour Court directed reinstatement with full back wages and there was no proof to show that the workman was employed in particular project and on completion of which his services were terminated, the claim of the employer that the workman was gainfully employed somewhere was vague and could not be considered and accepted. The workman was entitled to full back wages from the date of termination of his services till date of his reinstatement.

31. In Tapash Kumar Paul vs. BSNL & Anr. (supra), the opinions in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others, (2013) 6 ABR 304 : (2013) 10 AD 89 : (2013) 139 FLR 541 : (2013) LabIC 4249 : (2013) 4 LLN 417 : (2013) 11 SCALE 268 : (2013) 10 SCC 324 : (2013) 4 SCT 716 , Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, AIR 1979 SC 75 : (1978) 37 FLR 240 : (1978) 2 LLJ 474 : (1979) 2 SCC 80 : (1979) 1 SCR 563 : (1978) 10 UJ 712 and Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, AIR 1981 SC 422 : (1980) LabIC 1292 : (1981) 1 LLJ 386 : (1980) 4 SCC 443 : (1981) 1 SCR 789 : (1981) 1 SLJ 107 were considered. Reliance was placed upon the following observations made in Surendra Kumar Verma's case (supra):--

"...Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the instatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead

to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better of their employment elsewhere and so on. In such situations, there is a vestige of discretion left in the Court to make appropriate consequential orders. The Court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The Court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the Court may mould the relief but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."

32. In *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalya (D.Ed.) & Ors.* (supra), the judgments in *Surendra Kumar Verma & Ors. vs. Central Government Industrial Tribunal-cum-Labour Court New Delhi & Anr.* (supra) and *Hindustan Tin Works (P) Ltd. vs. Employees of M/s. Hindustan Tin Works Pvt. Ltd. & Ors.* (supra) were considered and in which it was held that the very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities as they are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These suffering continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and

rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

33. The view taken in *Deepali Gundu Surwase* (supra) has been reiterated in *Tapash Kumar Paul vs. BSNL & Anr.* (supra) decided on 28.1.2014. It appears to be the current view of the Supreme Court, which should have been taken note while deciding the writ petition.

34. We may observe here that the employer gets a chance at the time of conciliation proceedings before the reference is made to the Labour Court, to settle the dispute. He also gets a chance during the proceedings of the case before the Labour Court to avail the remedies of Lok Adalats, which are frequently organized. The employer also gets an opportunity before learned Single Judge to offer a reasonable settlement with the workman. With all these opportunities, he cannot, at the stage of intra-Court Special Appeal, urge that since the workman has survived for long, he must have been gainfully employed without leading evidence in the Labour Court or even before learned Single Judge and thus, he is not entitled to back wages. Once the findings have been returned that the termination was illegal and improper, the workman is ordinarily entitled to reinstatement.

35. In the present case, there is no evidence to suggest that either there is no employment available in the hotel run by the employer or the hotel industry including the hotel in which the workman was employed is closed down or is suffering the loss. On the contrary, it is admitted by learned counsel appearing for the employer that the hotel business in the State of Rajasthan including Jaipur is flourishing and that the profits are much larger than before. In the circumstances, denying the back wages to the workman will be causing severe injustice to him. He cannot be punished to suffer indignity and poverty for loss of employment indefinitely. If he has been able to make his family survive, his efforts for survival should not be taken against his right to receive relief from the Court.

36. On the discussion as above, the Special Appeal No. 1403/2013 Executive Director, Hotel Clarks Amer & Anr. vs. Labour Judge No. 1 & Anr. is dismissed. The Special Appeal No. 414/2014 Mukut Behari vs. Executive Director, Hotel Clarks Ajmer & Ors. is allowed and the Award of the Labour Court is upheld. The workman will be entitled to reinstatement within a month from today and the payment of 20% back wages will be given to him calculated with interest @ 9 % p.a. within the same period. A copy of this judgment will be placed in the file of special appeal No. 414/2014.