

(2015) 07 BOM CK 0231

In the Bombay High Court

Case No : Writ Petition No. 6570 of 2015

Rohidas Premchand Bhagat

APPELLANT

Vs

Divisional Controller, Maharashtra State Road Transport
Corporation

RESPONDENT

Date of Decision : 08-07-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(2), 21, 226
Industrial Disputes Act, 1947 — Section 10, 11A, 2A, 33
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 30(2)

Citation : (2015) 5 ABR 322 : (2015) 5 ALLMR 546 : (2015) LabIC 3640 :
(2015) 3 LLJ 596 : (2015) 3 LLN 352 : (2015) 6 MhLj 660

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : Nangare Prashant R., for the Appellant; Bagul D.S., Advocates for
the Respondent

Final Decision : Dismissed

Judgement

R.V. Ghuge, J—Shri Bagul, learned Advocate waives for the sole respondent.

2. Rule.

3. By consent, Rule is made returnable forthwith and heard finally by the consent of the parties.

4. The petitioner assails the judgment and award of the Labour Court, dated 24.11.2014 in Reference (IDA) No. 22 of 2011. The strenuous contentions of Shri Nangare for the petitioner are as follows:--

"(a) The petitioner jointed as a Bus-conductor on 1.11.1989 with the respondent.

(b) On 22.10.2008, while the petitioner was on duty, the flying squad of the respondent caused a surprise check of the Bus at Patoda.

(c) It was noticed that the petitioner had collected fare of Rs. 14/- from one Sr. Citizen lady passenger, but had issued a ticket of Rs. 5/- only.

(d) Cash amount of Rs. 11/- was found in excess.

(e) The petitioner was charge sheeted on 22.10.2008 under clauses 7(a) and (j), 11, 12(b) and 22 of the Discipline and Appeal Rules.

(f) The petitioner submitted his explanation to the charge sheet on 8.11.2008. Thereafter, a departmental enquiry was commenced.

(g) Upon conclusion of the enquiry, the petitioner received a show cause notice dated 7.1.2010 along with the report of the enquiry officer calling upon him to explain as to why the punishment of termination from service should not be imposed upon him.

(h) The petitioner before tendering his reply, preferred Complaint (ULP) No. 3 of 2010, before the Labour Court.

(i) By an ex-parte ad-interim order, the show cause notice was stayed.

(j) By order dated 10.10.2010, the Labour Court allowed the interim relief application, filed under Section 30(2) of the MRTU & PULP Act, 1971, thereby staying the show cause notice.

(k) The respondent, preferred Revision (ULP) No. 17 of 2010.

(l) By judgment and order dated 24.1.2011, the Industrial Court allowed the Revision filed by the respondent, quashed and set aside, the interim order dated 10.10.2010 and rejected the application Exhibit U/2.

(m) On 31.1.2011, the respondent awarded the punishment of dismissal from service to the petitioner w.e.f. 3.2.2011.

(n) The petitioner raised an industrial dispute under Section 2A of the ID Act before the appropriate Government.

(o) By order dated 9.11.2011, the appropriate Government referred the dispute to the Labour Court, which was registered as Reference (IDA) No. 22 of 2011.

(p) By Part I award dated 3.1.2014 below Exhibit 46, the Labour Court concluded that the enquiry has been conducted in a fair and proper manner and the findings of the enquiry officer are not perverse.

(q) By judgment and order dated 24.11.2014, the Labour Court concluded that the punishment awarded to the petitioner was not shockingly disproportionate to the gravity and seriousness of the charges proved against him, in the light of his blemished past service record."

5. Shri Nangare has strenuously contended that the misconduct at issue involves only an amount of Rs. 11/-. It is a paltry amount and he does not deserve the punishment of dismissal from service. He further submits that though the default

card may indicate 25 punishments, the same are of minor nature and for various reasons, which do not deserve any consideration while arriving at the quantum of punishment.

6. Shri Nangare has relied upon the judgment of the Apex Court in the case of Palghat BPL and PSP Thozhilali Union Vs. BPL India Ltd. and Another, (1995) 9 JT 587 : (1996) 2 LLJ 335 : (1995) 5 SCALE 452 : (1995) 6 SCC 237 : (1995) 3 SCR 406 Supp , to support his contention that an unintended misconduct or a misconduct of a minor and technical character should be treated leniently. He, therefore, prays that since the petitioner has ten years of service left, leniency be shown and the punishment be suitably modified by allowing this petition.

7. Shri Bagul, learned Advocate has opposed the petition on the ground that the default card indicates 25 mis-conducts for which the petitioner has been punished. These 25 punishments and the present misconducts have occurred in a span of about 19 years of employment which indicates the attitude and conduct of the petitioner.

8. He further submits that the ratio laid down by the Apex Court in the Palghat case (supra) would not apply to the petitioner's case because in the said case, the concerned employee had an unblemished past service record and in an act of frustration, he had pelted a stone at the employer's vehicle which was passing by the BPL bus stop. The stone accidentally broke the window and hit an officer. It was in this backdrop, that the Apex Court had shown leniency as it was an act of frustration and provocation in the light of the settlement discussions having failed between the workers and the management.

9. He further submits that the petitioner was a bus-conductor who was involved in 25 misconducts earlier. It is crystallized law that leniency cannot be shown in the cases of misappropriation. Any order of reinstatement would send a wrong signal and the bus-conductors working with the respondent would be encouraged to commit such acts and would lose the fear of law.

10. Having considered the above aspects as contended by the learned Advocates, I am unable to accept the submissions of the petitioner.

11. In cases involving mis-appropriation the Apex Court has concluded in Janatha Bazar (South Kanara Central Co-operative Whole Sale Stores Limited) Etc. Vs. The Secretary, Sahakari Nourarara Sangha Etc., AIR 2000 SC 3129 : (2000) 87 FLR 483 : (2000) 10 JT 589 : (2000) 2 LLJ 1395 : (2000) 6 SCALE 446 : (2000) 7 SCC 517 : (2000) SCC(L&S) 958 : (2000) 3 SCR 367 Supp : (2000) AIRSCW 3439 : (2000) 6 Supreme 339 , that an amount, whether paltry or large, is not important. Cases of misappropriation are required to be dealt with, with an iron hand. The observations of the Apex Court in paragraph Nos. 3, 6 and 8 read as under:--

"3. The question involved in these appeals is--Whether High Court was justified in confirming the order passed by the Labour Court reinstating the respondents-

workmen with 25% back wages inspite of specific finding of fact that the charges of breach of trust and misappropriation of goods for the value given in the said charges had been clearly established. Apparently, it would be an unjustified direction to reinstate an employee against whom charge of misappropriation is established. A proved act of misappropriation cannot be taken lightly even though number of such misappropriation cases remain undisclosed and such employees or others amass wealth by such means. In any case, misappropriation cannot be rewarded or legalized by reinstatement in service with full or part of back wages.

6. As stated above, the learned Single Judge and the Division Bench in writ appeals confirmed the findings given by the Labour Court that charges against the workmen for breach of trust and misappropriation of funds entrusted to them for the value mentioned in the charge-sheet had been established. After giving the said findings, in our view, the Labour Court materially erred in setting aside the order passed by the Management removing the workmen from the service and reinstating them with 25% back wages. Once act of misappropriation is proved, may be for a small or large amount, there is no question of showing uncalled for sympathy and reinstating the employees in service. Law on this point is well settled. [Re.: Municipal Committee, Bahadurgarh Vs. Krishan Behari and others, (1996) 3 AD 34 : AIR 1996 SC 1249 : (1996) 73 FLR 1429 : (1996) 3 JT 96 : (1996) LabIC 1056 : (1996) 2 SCALE 698 : (1996) 2 SCC 714 : (1996) 2 SCR 827 : (1996) 1 UJ 799 . In U.P. State Road Transport Corporation v. Basudeo Chaudhary and Anr. : (1997) 11 SCC 370 this Court set aside the judgment passed by the High Court in a case where a conductor serving with the U.P. State Road Transport Corporation was removed from service on the ground that alleged misconduct of the conductor was attempt to cause loss of Rs. 65/- to the Corporation by issuing tickets to 23 passengers for a sum of Rs. 2.35 but recovering @ Rs. 5.35 per head and also by making entry in the way bill as having received the amount of Rs. 2.35, which figure was subsequently altered to Rs. 2.85. The Court held that it was not possible to say that Corporation removing the conductor from service has imposed a punishment which is disproportionate to his misconduct. Similarly in Punjab Dairy Development Corporation Limited and another, etc. Vs. Kala Singh, etc., AIR 1997 SC 2661 : (1997) 5 JT 604 : (1997) 2 LLJ 1041 : (1997) 4 SCALE 324 : (1997) 6 SCC 159 : (1997) SCC(L&S) 1434 : (1997) 1 SCR 235 Supp : (1997) 2 UJ 125 : (1997) AIRSCW 2625 : (1997) 6 Supreme 126 , this Court considered the case of a workman who was working as a Dairy Helper-cum-Cleaner for collecting the milk from various centers and was charged for the misconduct that he inflated the quantum of milk supplies in milk centers and also inflated the quality of fat contents where there were less fat contents. The Court held that "in view of proof of misconduct a necessary consequence will be that Management has lost confidence that the workman would truthfully and faithfully carry on his duties and consequently the Labour Court rightly declined to exercise the power under Section 11A of the I.D. Act to grant relief with minor penalty".

8. In case of proved misappropriation, in our view, there is no question of considering past record. It is the discretion of the employer to consider the same in appropriate cases, but the Labour Court cannot substitute the penalty imposed by the employer in such cases."

(Emphasis supplied)

12. The learned Division Bench of this Court in the case of P.R. Shele Vs. Union of India (UOI) and Others, (2008) 3 ALLMR 83 : (2008) 2 BomCR 213 : (2008) 2 MhLj 33 of the said judgment read as under:--

"9. We may also refer to yet another judgment of the Supreme Court in Union of India (UOI) and Others Vs. Upendra Singh, (1994) 68 FLR 762 : (1994) 207 ITR 782 : (1994) 1 JT 658 : (1994) 1 LLJ 808 : (1994) 1 SCALE 637 : (1994) 3 SCC 357 : (1994) 1 SCR 1070 : (1994) 2 SLJ 77 : (1994) 1 UJ 434 . The relevant observations of the Supreme Court may be quoted:

In the case of charges framed in a disciplinary inquiry the tribunal or Court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The truth or otherwise of the charges is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of the disciplinary proceedings, if the matter comes to Court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be. The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Article 226 of the Constitution. Therefore, the principles, norms and the constraints which apply to the said jurisdiction apply equally to the Tribunal. If the original application of the respondent were to be filed in the High Court it would have been termed, properly speaking, as a writ of prohibition. A writ of prohibition is issued only when patent lack of jurisdiction is made out. It is true that a High Court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like certiorari, prohibition and mandamus in United Kingdom, yet the basic principles and norms applying to the said writs must be kept in view.

"10. We may also refer to the judgment of this Court in Ramchandra Govindrao Gaidhani v. Union of India and Anr. delivered on 18-9-2006 in Writ Petition No. 6211 of 1999, to which one of us (Smt. Ranjana Desai, J.) is a party. Similar view has been taken by this Court in that case. Examined in the light of the above judgments, we cannot fault the Tribunal for having refused to examine the correctness, the truth or otherwise of the charges. We cannot lose sight of the fact that the petitioner did not challenge the Disciplinary Authority's order or the Appellate Authority's order. The first submission of learned Counsel for the

petitioner must, therefore, fail.

"15. We may also refer to another judgment of the Supreme Court in Managing Director, North-East Karnataka Road Transport Corporation v. K. Murti. The relevant paragraph of the judgment may be quoted:

The learned Counsel for the appellant, at the time of hearing, placed strong reliance on the two decisions of this Court, one in Regional Manager, Rajasthan SRTC v. Ghanshyam Sharma which was also a case of bus conductor carrying passengers without issuing tickets. This Court, in the above case, held that carrying the passengers without tickets amounts to dishonesty or grave negligence and for such misconduct punishment of removal from service is justified. This Court also further observed that the Labour Court was not justified in directing the reinstatement with continuity of service but without backwages. This Court has also relied upon a judgment in Karnataka SRTC v. B.S. Hullikatti. In the said judgment, this Court has held that in such cases where the bus conductors carry passengers without ticket or issue tickets at a rate less than the proper rate, the said acts would inter alia amount to either being a case of dishonesty or of gross negligence and such conductors were not fit to be retained in service because such inaction or action on the part of the conductors results in financial loss to the Road Transport Corporation. This Court has also observed that in cases like the present, orders of dismissal should not be set aside. The learned Counsel for the appellant also cited Divisional Controller, N.E.K.R.T.C. v. H. Amaresh. In this case, this Court was considering the case of misappropriation of a small amount of State Road Transport Corporation's fund by a conductor and held it a grave act of misconduct, which resulted in financial loss to the Corporation. This Court also held that punishment of dismissal from service awarded by the disciplinary authority did not call for any interference by the Labour Court or the High Court and hence the order of reinstatement passed by the High Court was set aside. This Court also in a catena of decisions held that the Tribunal should not sit in appeal over the decision of any employer unless there exists a statutory provision in this behalf. This Court also observed that the High Court gets jurisdiction to interfere with the punishment in the exercise of its jurisdiction under Article 226 of the Constitution only when it finds that the punishment imposed is shockingly disproportionate to the charges proved."

13. It is not in dispute that the enquiry has been upheld and the findings of the enquiry officer are held to be fair and proper by the part I award dated 3.1.2014. The said award has not been challenged in this petition. The relevant prayer clause (B) set out in this petition reads as under:--

"(B). By issuing appropriate writ, order, direction or any other appropriate order in nature of writ, Hon"ble High Court may be pleased to quash and set aside the Award dated 24.11.2014 passed by learned Labour Court, Ahmednagar in Reference (IDA) No. 22/2011 and direct the respondent to reinstate the petitioner on the post of Conductor with continuity in service and back wages."

14. In the above backdrop, the issue for my consideration is as to whether the punishment awarded to the petitioner could be said to be proportionate and commensurate to the gravity and seriousness of the misconduct proved by considering the past service record. It is not in dispute that a clean past service record will act as a mitigating factor. Naturally, a blemished past service record would operate as an aggravating factor.

15. The Labour Court while delivering the impugned award has referred to the default card and has concluded that the evidence with reference to the blemished past service record of the petitioner based on the entries made in the default card establishes 25 punishments having been imposed on the petitioner. In fact, the petitioner was terminated earlier on 18.11.2006 for having committed a serious mis-conduct. In the department appeal, leniency was shown to the petitioner and he was reinstated by awarding an alternate punishment.

16. It is trite law that once the findings of the enquiry officer and the enquiry have been upheld, the scope of interference by the Labour Court or by this Court within the ambit of Section 11A is limited. The Apex Court in the case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, AIR 1973 SC 1227 : (1973) 26 FLR 359 : (1973) 1 LLJ 278 : (1973) 1 SCC 813 : (1973) 3 SCR 587 , has observed in paragraph Nos. 22, 24, 28, 31 and 32 as under:--

"22. It was further laid down that an employer ought to have the right to decide what the appropriate punishment for a misconduct should be and its exercise of the discretion in this regard should not be interfered with by a Tribunal unless the punishment is unjust. In *Shri Ram Swarath Sinha, Righa, Muzafferpur v. The Management of the Belsund Sugar Company Limited, Righa Muzaffarpur*, the Labour Appellate Tribunal has recognised the right of a management to ask for permission to adduce evidence for the first time before the Tribunal to justify its action though no domestic enquiry had been held by it. It has been emphasized that the permission asked for cannot be thrown out in limine on the ground that the management had not made any previous enquiry into the charge. We may say that this decision was in respect of a proceeding under Section 33 of the Act, but, as held by this Court, there is no difference in such matters whether the Tribunal was deciding a dispute referred to it Under Section 10 or an application filed before it Under Section 33 of the Act.

"24. This is the decision which has been referred to in the Statement of objects and reasons already adverted to. It may be noted that the four circumstances pointed out by this Court justifying interference at the hands of the Tribunal are substantially the same as laid down by the Labour Appellate Tribunal in *Buckingham and Carnatic Company*.

"28. In the above decision, this Court quoted with approval the decision of the Labour Appellate Tribunal in *Buckingham and Carnatic Company Ltd.* (supra) holding that the materials on which a Tribunal acts may consist of:--

- (1) entirely the evidence taken by the management at the enquiry and the proceedings of the enquiry, or
- (2) that evidence and in addition thereto further evidence led before the Tribunal, or
- (3) evidence placed before the Tribunal for the first time in support of the charges.

"31. The powers of a Tribunal when a proper enquiry has been held by an employer as well as the procedure to be adopted when no enquiry at all has been held or an enquiry held was found to be defective, again came up for consideration in *Management of Ritz Theatre (P) Ltd. Vs. Its Workmen*, AIR 1963 SC 295 : (1962) 5 FLR 216 : (1962) 2 LLJ 498(2) : (1963) 3 SCR 461 . Regarding the powers of a Tribunal when there has been a proper and fair enquiry, it was held :

It is well-settled that if an employer serve the relevant charge or charges on his employee and holds a proper and fair enquiry, it would be open to him to act upon the report submitted to him by the Enquiry Officer and to dismiss the employee concerned. If the enquiry has been properly held, the order of dismissal passed against the employee as a result of such an enquiry can be challenged if it is shown that the conclusions reached at the departmental enquiry were perverse or the impugned dismissal is vindictive or mala fide, and amounts to an unfair labour practice. In such an enquiry before the Tribunal, it is not open to the Tribunal to sit in appeal over the findings recorded at the domestic enquiry. This Court has held that when an proper enquiry has been held, it would be open to the Enquiry Officer holding the domestic enquiry to deal with the matter on the merits bona fide and come to his own conclusion.

"32. Again regarding the procedure to be adopted when there has been no enquiry or when there has been a defective enquiry, it was stated :

It has also been held that if it appears that the departmental enquiry held by the employer is not fair in the sense that proper charge had not been served on the employee or proper or full opportunity had not been given to the employee to meet the charge, or the enquiry has been affected by other grave irregularities vitiating it, then the position would be that the Tribunal would be entitled to deal with the merits of the dispute as to the dismissal of the employee for itself. The same result follows if no enquiry has been held at all. In other words, where the Tribunal is dealing with a dispute relating to the dismissal of an industrial employee, if it is satisfied that no enquiry has been held or the enquiry which has been held is not proper or fair or that the findings recorded by the Enquiry Officer are perverse, the whole issue is at large before the Tribunal. This position also is well-settled."

17. The scope of judicial review by the courts has been considered in 1947 in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*, (1948)

1 K.B. 223 . The said judgment delivered by a Three Judges Bench (Lord Greene, M.R., Somervell, L.J., and Singleton, J.) lays down the parameters of judicial review of the courts and the conditions to be satisfied for causing judicial review. It would be apposite to reproduce two paragraphs from the said judgment which read as under:--

"The contention of the authority, in my opinion, is based on a misconception of the effect of the Act in granting this discretionary power to local authorities. The courts must always remember, first, that the Act deals, not with a judicial act, but with an executive act; secondly, that the conditions which, under the exercise of that executive act, may be imposed are in terms put within the discretion of the local authority without limitation; and thirdly, that the statute provides no appeal from the decision of the local authority. What, then, is the power of the courts? The courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition. On the face of it, a condition of this kind is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like local authorities will exceed their powers, and the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.

What, then, are those principles? They are perfectly well understood. The exercise of such of a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty-those, of course, stand by themselves-unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word "unreasonable." It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a

general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could even dream that it lay within the powers of the authority. WARRINGTON, L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head....."

18. In a somewhat similar situation, the Honourable Supreme Court in the case of Om Kumar and Others Vs. Union of India, (2000) 3 JT 92 : (2000) 7 SCALE 524 : (2001) SCC(L&S) 1039 : (2000) 4 SCR 693 Supp , has held in paragraphs 27, 28, 37, 38, 39, 67, 69 and 71 as under:--

"27. The principle originated in Prussia in the nineteenth Century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court had applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.

28. By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality."

"37. The development of the principle of "strict Scrutiny" or "proportionality" in Administrative Law in England is, however, recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny". In the case of these freedoms, Wednesbury principles are no longer applied. The Courts in England could not expressly apply proportionality in the absence of the Convention but tried to safeguard the rights zealously by treating the said rights

as basic to the Common Law and the Courts then applied the strict scrutiny test. In the *Spycatcher Case Attorney General v. Guardian Newspapers Ltd.*, (No. 2) (1990) 1 AC 109 (at pp. 283-284) , Lord Goff stated that there was no inconsistency between the Convention and the Common Law. In *Derbyshire County Council v. Times Newspapers Ltd.*, (1993) AC 534 , Lord Keith treated freedom of expression as part of Common Law. Recently, in *R v. Secretary of State for Home Department, Ex P. Simms*, [1999] 3 All ER 400 (H.L.) , the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the Common Law. Lord Hobhouse held the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in *R v. Lord Saville Ex. pt.*, [1999] 4 All ER 860, 870, 872 (CA). In all these cases, the English Courts applied the "strict scrutiny" test rather than describe the test as one of "proportionality". But, in any event, in respect of these rights "Wednesbury" rule has ceased to apply."

"38. However, the principle of "Strict Scrutiny" or "proportionality" and primary review came to be explained in *R v. Secretary of State for the Home Department, ex. P. Brind*, (1991) 1 A.C. 696 . That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organisations which were prescribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of the organisations. It did not however, for example, preclude the broadcasting by such persons through the medium of a film, provided there was a "voice-over" account, paraphrasing that they said. The applicant's claim was based directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English Law but stated that freedom of expression was basic to the Common Law and that, even in the absence of the Convention, English Courts could go into the question (See p. 748-749).

".... Whether the Secretary of State, in the exercise of his discretion could reasonably impose the restriction he has imposed on the broadcasting organisations"

and that the Courts were "not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it."

Lord Templeman also said in the above case that the Courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that "in terms of the Convention" any such interference must be both necessary and proportionate (ibid pp. 750-751)."

"39. In a famous passage, the seeds of the principle of Primary and Secondary

review by Courts were planted in the Administrative law by Lord Bridge in the Brind case. Where convention rights were in question the courts could exercise a right of primary review. However, the Courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the Courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

"The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment".

"67. But where, an administrative action is challenged as "arbitrary" under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, AIR 1991 SC 1153 : (1991) 1 JT 605 : (1991) 1 SCALE 378 : (1991) 3 SCC 91 : (1990) 3 SCR 20 Supp , Venkatachaliah, J, (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In Tata Cellular Vs. Union of India, AIR 1996 SC 11 : AIR 1994 SC 11 : (1994) 4 JT 532 : (1994) 6 SCC 651 : (1994) 2 SCR 122 Supp ; Indian Express Newspapers (Bombay) Private Ltd. and Others Vs. Union of India and Others, AIR 1986 SC 515 : (1985) 1 SCC 641 , Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another, AIR 1990 SC 334 : (1989) 3 JT 188 : (1989) 2 LLJ 506 : (1989) 2 SCALE 107 : (1989) 4 SCC 187 : (1989) 3 SCR 488 : (1990) 1 UJ 40 , at. 241 and U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others, AIR 1993 SC 1435 : (1993) 2 JT 226 : (1993) 1 SCALE 747 : (1993) 2 SCC 299 : (1993) 2 SCR 149 , while Judging whether the administrative action is "arbitrary" under Article 14 (i.e. Otherwise than being discriminatory), this Court has confined itself to a Wednesbury review always."

"69. The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of "arbitrariness" of the order

of punishment is questioned under Article 14."

"71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the Court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The Court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the Courts, and such extreme or rare cases can the Court substitute its own view as to the quantum of punishment."

(Emphasis supplied)

19. The Apex Court in the case of B.C. Chaturvedi Vs. Union of India and others, AIR 1996 SC 484 : (1995) 8 JT 65 : (1996) LabIC 462 : (1996) 1 LLJ 1231 : (1995) 6 SCALE 188 : (1995) 6 SCC 749 : (1995) 4 SCR 644 Supp : (1996) 1 UJ 80 , has observed in paragraph 18 as under:--

"18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

20. While considering the issue of proportionality of punishment inflicted on an employee, the Apex Court in the case of Union of India and another Vs. G. Ganayutham (Dead) by LRs., AIR 1997 SC 3387 : (1997) 7 JT 572 : (2000) 2 LLJ 648 : (1997) 5 SCALE 606 : (1997) 7 SCC 463 : (1997) SCC(L&S) 1806 : (1997) 3 SCR 549 Supp : (1997) AIRSCW 3464 : (1997) 8 Supreme 269 , has held in paragraphs 30, 31, and 33 as under:--

"30. We may also state that even if the Courts in England by virtue of incorporation of the Convention should become the primary Judges of the validity of administrative decisions, still they would exercise great judicial restraint in matters concerning governmental policies, national security, or taxation, finance and economy of the country and similar such matters of grave public policy. This restraint on the part of the judiciary is described in administrative law as giving a

greater margin of appreciation to the administrator in certain areas. See Brind, (Lord Templeman, (p. 751), Ackner (p. 762) and Lord Lowry (p. 766). Similar principles have been laid down by this court while testing the validity of legislative measures in the context of Article 19(2) to (6). The Courts would give a "reasonable margin" to the legislature Manohar Lal Vs. The State of Punjab, AIR 1961 SC 418 : (1961) CriLJ 570(1) : (1961) 2 FLR 107 : (1961) 2 LLJ 67 : (1961) 63 PLR 660 : (1961) 2 SCR 343 in several situations.

31. The current position of proportionality in administrative law in England and India can be summarised as follows:--

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bonafide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English Administrative Law in future is not ruled out. These are the CCSU principles.

(3)(a) As per Bugdaycay, Brind and Smith, as long as the Convention is not incorporated into English Law, the English Courts merely exercise a secondary judgment to find out if the decision maker could have, on the material before him, arrived at the primary judgment in the manner he had done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English Courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of "proportionality" and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Article 19, 21 etc. are involve and not for Article 14.

33. In *Ranjit Thakur*, this Court interfered with the punishment only after coming to the conclusion that the punishment was in outrageous defiance of logic and was shocking. It was also described as perverse and irrational. In other words, this Court felt that, on facts, *Wednesbury* and *CCSU* tests were satisfied. Similar view was taken in *Indian Oil Corporation Ltd. and another Vs. Ashok Kumar Arora*, AIR 1997 SC 1030 : (1997) 75 FLR 949 : (1997) 2 JT 367 : (1997) 1 SCALE 775 : (1997) 3 SCC 72 : (1997) SCC(L&S) 636 : (1997) AIRSCW 1022 : (1997) 2 Supreme 248 , that the Court will not intervene unless the punishment is wholly disproportionate."

21. The Apex Court has then summarized the law on the point of punishment appearing to be shockingly disproportionate in the matter of *Chairman and Managing Director, United Commercial Bank and Others Vs. P.C. Kakkar*, AIR 2003 SC 1571 : (2003) 96 FLR 1067 : (2003) 2 JT 78 : (2003) 2 LLJ 181 : (2003) 2 SCALE 42 : (2003) 4 SCC 364 : (2003) SCC(L&S) 468 : (2003) 1 SCR 1034 : (2003) 2 SLJ 65 : (2003) AIRSCW 944 : (2003) 2 Supreme 93 , and concluded that the Court should not interfere with the decision of the Employer unless the said decision appeared to be an act of procedural impropriety or was illogical or which shocked the judicial conscience in a sense that the decision could be said to be in defiance of logic or moral standards. It was thus, concluded in paragraph 15 of the said judgment as under:--

"15. It needs no emphasis that when a Court feels that the punishment is shockingly disproportionate, it must record reasons for coming to such a conclusion. Mere expression that the punishment is shockingly disproportionate would not meet the requirement of law. Even in respect of administrative orders Lord Denning M.R. in *Breen v. Amalgamated Engineering Union* (1971 (1) All E.R. 1148) observed "The giving of reasons is one of the fundamentals of good administration". In *Alexander Machinery (Dudley) Ltd. v. Crabtree* (1974 LCR 120) it was observed: "Failure to give reasons amounts to denial of justice". Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons

for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. But as noted above, the proceedings commenced in 1981. The employee was placed under suspension from 1983 to 1988 and has superannuated in 2002. Acquittal in the criminal case is not determinative of the commission of misconduct or otherwise, and it is open to the authorities to proceed with the disciplinary proceedings, notwithstanding acquittal in criminal case. It per se would not entitle the employee to claim immunity from the proceedings. At the most the factum of acquittal may be a circumstance to be considered while awarding punishment. It would depend upon facts of each case and even that cannot have universal application."

22. The view taken by the Apex Court in the Firestone judgment (*supra*) and the Wednesbury principles of judicial review have been consistently followed and hold the field for last many decades. As such, it needs to be scrutinized as to whether the punishment awarded could be interfered with, without showing misplaced sympathy towards the delinquent. It is crystallized that punishment can be interfered with, if it amounts to a shockingly disproportionate punishment or it shocks the judicial conscience of the Court and amounts to an outrageous defiance of logic and reasoning.

23. The Apex Court in the case of U.P. State Road Transport Corporation, Dehradun Vs. Suresh Pal, AIR 2006 SC 3227 : (2006) 111 FLR 851 : (2006) 12 JT 412 : (2006) 3 LLJ 967 : (2006) 9 SCALE 481 : (2006) 8 SCC 108 : (2006) SCC(L&S) 1905 : (2006) 7 SCR 534 Supp : (2007) 2 SLJ 32 : (2006) AIRSCW 4903 : (2006) 7 Supreme 408 , has concluded that unless a punishment amounts to being shockingly disproportionate to the mis-conduct, the Courts should refrain from interfering with the same. Merely because the punishment may appear to be disproportionate is not enough. What is required is that it should be shockingly disproportionate. Paragraph No. 8 of the UPSRTC judgment (*supra*), reads as under:--

"8. Normally, courts do not substitute the punishment unless they are shocking disproportionate & if the punishment is interfered or substituted lightly in the punishment in exercise of their extraordinary jurisdiction then it will amount to abuse of the process of court. If such kind of misconduct is dealt with lightly and courts start substituting the lighter punishment in exercising the jurisdiction under Article 226 of the Constitution then it will give a wrong signal in the Society. All the State Road Transport Corporations in the country have gone in red because of the misconduct of such kind of incumbents, therefore, it is the time that misconduct should be dealt with iron hands and not leniently."

24. Considering the factual matrix and the law as is laid down by the Apex Court and this Court, I am unable to accept the contention of the petitioner that a shockingly disproportionate punishment has been awarded. An act of misappropriation in itself is a grave and serious misconduct warranting punishment of dismissal from service. 25 punishments for various mis-conducts,

including the earlier punishment of termination from service would surely be termed as an aggravating factor. I therefore, do not find that the impugned judgment and order could be termed as perverse or erroneous.

25. The Writ Petition is therefore, dismissed. Rule is discharged with no order as to costs.