
(2014) 04 BOM CK 0123
In the Bombay High Court
Case No : Writ Petition No. 14 of 2011

Syndicate Bank	Vs	APPELLANT
Mr. Vinod Kumar Amin		RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Constitution of India, 1950 — Article 136, 226
Industrial Disputes Act, 1947 — Section 11-A, 25F

Citation : (2014) 3 ABR 635 : (2015) 3 ALLMR 682 : (2014) 2 LLJ 548

Hon'ble Judges : G.S. Kulkarni, J

Bench : Single Bench

Advocate : Atul G. Damle, i/b. Mr. Piyush Shah, Advocate for the Appellant; R.D. Bhatt, Advocate for the Respondent

Final Decision : Dismissed

Judgement

G.S. Kulkarni, J.—By this petition under Article 226 of the Constitution of India, the Petitioner a nationalised bank challenges the Part-I Award dated 28.5.2003 and the Part-II Award dated 7.9.2010 passed by the Presiding Officer, Central Government Industrial Tribunal no. 2 in Reference No. CGIT-2/31 of 2001. By the impugned Award the Central Government Industrial Tribunal (for short "Industrial Tribunal") has directed reinstatement of the Respondent-workman on the post on which he was last working viz. of a clerk and has awarded continuity of service with full back wages.

The facts in nutshell are as under:-

The Respondent-workman had joined services of the Petitioner in the year 1977 as a clerk and worked on the said post discharging duties as a clerk-cum-typist for 22 years. In the course of his employment in Mumbai, he was posted at several branches of the Petitioner. He was an active member of the Union and also a Committee member. There was some incident which had taken place between the employee's Union and the Officer's Association when the Respondent was posted at Khar branch. As the Respondent was a committee

member, several office bearers of the Officers' Association had held a grudge against the Respondent which included Shri. B.S. Acharya-one of the employees of the Petitioner.

2. The Petitioner issued a charge-sheet to the Respondent on 23.7.1998, inter alia charging the Petitioner of an act of misconduct within the meaning of clause 19.5 of Bipartite Settlement. The allegation in the charge-sheet was that the Respondent while functioning as a clerk at Nana Chowk Branch, Mumbai, since 2.2.1994 was carrying business in the name of "M/s. Amigo Industries" a constituent of the Jogeshwari Branch, Mumbai of the Petitioner. It was alleged that M/s. Amigo Industries was a partnership firm constituted in the year 1991 with Mr. Premnath Kalmady and Mr. Rajendra S. Singh as partners. That on 3.5.1993 M/s. Amigo Industries had opened a current account with Jogeshwari branch, Mumbai and had availed certain credit facilities since 1994 and that the liabilities of the said firm had aggregated to an amount of Rs. 58 lakhs. It was alleged that the said liability as reflected in the books of the petitioner, was without adequate security to fall back upon. It was alleged that it was revealed that Mr. Premnath Kalmady-one of the partners of the said firm was the brother of the respondent and that Mr. Rajendra Singh was reportedly known to the respondent since the days of respondent working at Khar Branch, Mumbai of the petitioner. It was stated that the address furnished by the firm was the residential address of the respondent. It was further alleged that the respondent has invested in the business of the said firm and was involved in the maintenance of the books and involved in procuring orders, purchase of raw material, purchase of machineries and also involved in the efforts to sell/dispose of the business the firm. The charge-sheet stated that all the said circumstances indicated and suggested that the respondent floated the said firm with his brother and had indulged himself in conducting the business of the firm but however, did not come forward to clear the liabilities of the firm. The following charge was therefore, framed:-

We, therefore, charge you for "engaging in trade or business which is beyond the scope of duties under clause 19.5 (a) of Bipartite settlement.

The respondent was called upon to submit a written statement to the charge-sheet.

3. The respondent submitted a reply to the charge-sheet dated 8.9.1998 inter alia stating that he did not dispute that M/s. Amigo Industries was a partnership firm where Mr. Premnath Kalmady and Rajendra S. Singh were the partners and that Mr. Premnath Kalmady was brother of the respondent. It was stated that Respondent's brother Mr. Premnath Kalmady was staying with the respondent at his residence as he did not have any house/flat at Mumbai and had given the residential address of the respondent as the address of his firm. The respondent denied the allegations that the respondent had invested in the business of the said firm and that he was involved in maintenance of the books, procuring orders and in purchase of raw materials, machineries or in the efforts of selling and

disposing off the said firm. The respondent denied that he had approached the branch for getting credit facility sanctioned in favour of the said firm. He stated that except for the fact that the partner was his blood relation, he was in no way connected with his business activities. He stated that he was in no manner connected with the floating/running the firm. He denied that he had indulged in running the business of the firm. It was denied that he had committed any act of misconduct which attracted disciplinary action within the meaning of the bipartite settlement. He further stated that he being a staff member of the Petitioner bank and being a part of the bank and that as he knew the partners he would impress the partners to clear the liabilities towards the bank at the earliest.

4. The petitioner being not satisfied with the reply of the respondent to the charge-sheet, appointed an Inquiry officer viz. Mr. B.S. Acharya. The Inquiry officer conducted inquiry on various dates in which the management was represented by M.J. Prasad, Assistant Personnel Manager, Zonal Office, Mumbai, as a management representative and the respondent was represented by Mr. G.K. Kini, Special Assistant, Worli (South) branch as the delinquent's representative. The management examined three witnesses viz. Mr. Satish Kamat working as a Manager of Khaire-Patalganga Branch who at the relevant time was working in the Vigilance Unit, Mumbai and had undertaken investigation in the involvement of respondent in the credit facilities extended to M/s. Amigo Industries by Jogeshwari-Mumbai Branch of the petitioner. Mr. Satish Kamat was stated to have collected documents marked as "MEX-1 to MEX 22". Mr. Rajendra S. Singh, the partner of M/s. Amigo Industries was examined and deposed as a second witness of the petitioner. The third witness examined on behalf of the petitioner was Mr. Diwakar B. Karkera who had invested an amount of Rs. 19.29 lakhs in the business of M/s. Amigo Industries. The said witnesses were cross examined on behalf of the respondent.

5. In the inquiry proceedings on behalf of the respondent-workman one Umesh Kamath, Chartered Accountant who was looking after the accounts of M/s. Amigo Industries was examined and was cross examined on behalf of the petitioner. The second witness examined on behalf of the respondent before the Inquiry officer was Mr. Premnath Kalmady (respondent's brother) who was a partner in M/s. Amigo Industries. The third witness examined on behalf of the respondent was one Mr. Premnath Shetty who was owner of a hotel and who had stated that as one of the partners of M/s. Amigo Industries viz. Mr. R.S. Singh wanted to invest in chemical industries, he had suggested name of Mr. Premnath Kalmady. The fourth witness on behalf of the respondent was one Mr. Ganesh Kalmady, (another brother of the Respondent) and power of attorney holder of Premnath Kalmadi who was stated to have attended/involved in the working of M/s. Amigo Industries right from supervising the construction of the factory premises of the firm and who had stated that he has noticed pilferage of finished goods by Mr. Rajendra S. Singh.

6. After considering the oral and documentary evidence on record, the inquiry

officer prepared an inquiry report dated 8.7.1999 holding that the charge against the respondent was proved. A copy of the inquiry report dated 8.7.1999 was furnished to the respondent alongwith the inquiry proceedings calling upon his comments. The respondent by his letter dated 27.7.1999 submitted his explanation inter alia stating that the Inquiry officer was biased and prejudiced against the respondent and he stated that the enquiry officer did not consider the evidence on record as put forth on his behalf. The Respondent submitted that there was a dispute between the partners of M/s. Amigo Industries and that one of the partners Mr. Singh was facing charges by the police in the alleged misconduct as complained by Premnath Kalmady (respondent's brother). He further submitted that the documents pertaining to M/s. Parag Textiles as produced on behalf of the petitioner bank were bogus inasmuch as M/s. Parag Textiles was not in existence and hence could not have been taken into consideration by the enquiry officer without the said documents being proved.

7. The disciplinary Authority taking into consideration the Inquiry proceedings, the report of the inquiry officer and the explanation as submitted by the respondent-workman passed an order dated 25.9.1999 holding the respondent guilty of the charges. It was recorded that the respondent had floated the said firm with his brother and another person as partners and has indulged himself in the business of the firm and had not come forward to close and clear the liabilities of the firm as a result of which liability to the tune of Rs. 58 lakhs were struck in the books of accounts without additional security to fall back upon. It was recorded that the bank being a financial institution dealing with the public money and that the respondent being an employee of the bank had failed to discharge his duties honestly and diligently and on account of various lapses on his part, liabilities aggregating to Rs. 58 lakhs were stuck to the books of the bank without adequate security to fall back upon. It was observed that the petitioner-bank was exposed to risk financial losses. It was recorded that the punishment proposed was commensurate to the gravity of the charge. It was, therefore, held that the respondent was guilty of gross misconduct of engaging in trade and business outside the scope of duties under clause 19.5 of bipartite settlement and it was ordered that the respondent be dismissed from the services of the petitioner with immediate effect.

8. The respondent being aggrieved by the order passed by the Disciplinary Authority of imposing punishment of dismissal from service preferred an appeal before the Appellate Authority namely the General Manager (HO) Manipal. The Appellate Authority vide order dated 6.10.1999 after a hearing to the representative of the respondent, confirmed the punishment of dismissal as ordered by the Disciplinary Authority by its order dated 25.9.1999.

9. The respondent being aggrieved by the dismissal order and as confirmed by the Appellate Authority, through the Syndicate Bank Employees Union raised a dispute before the Assistant Labour Commissioner and Conciliation Officer vide its letter dated 24.3.2000 alleging that the dismissal of the respondent was

illegal and malafide and that the respondent deserved to be reinstated in services. The petitioner submitted its reply to the said demand as raised by the Syndicate Bank Employees Union in its letter dated 25.7.2000. The Conciliation officer submitted a failure Report dated 11.10.2000 to the appropriate Government. The appropriate Government referred the dispute for adjudication by the Central Government Industrial Tribunal being Reference No. CGIT-2/31 of 2001. The reference as made by the appropriate Government was as under:

Whether the action of Syndicate Bank by dismissing Shri. Vinod Kumar from the services of the bank is justified and proper ? if not then what relief the workman is entitled to ?

10. Before the Industrial Court the respondent filed a statement of claim inter alia setting out that till the issuance of charge-sheet, the respondent had discharged 22 years of service with the petitioner-bank and was posted at several branches. He alleged that he was an active worker of the workmen's union for several years and has never availed of the promotion because of the Union's activities and continued to work as clerk-cum-typist. He alleged that during the course of his working at Khar branch some incident had taken place because of which there was tension between the employee's union and the officer's association. At that time the respondent being a committee member, the office bearers of the Officers' Association had held a grudge against the respondent which included Mr. B.S. Acharya, the Inquiry officer. It was his case that although he was an active worker of the Union, he never neglected the work in the branch and continued to carry on his duties and responsibilities to the satisfaction of the superiors. He contended that he was residing at Goregaon (East) in Mumbai with two younger brothers viz. Premnath Kalmady and Ganesh Kalmady. Both these brothers had opened their savings bank account at Jogeshwari branch of the petitioner. He stated that their account opening form was introduced by the respondent and that it was permissible. The Respondent set out in detail as to how he was in no manner connected with the business of M/s. Amigo Industries and that only because his brothers were part of the firm it could not be said in the absence of any cogent proof that he was conducting the business of Amigo Industries. He stated that the complaint against him was a consequence of disputes his brother had against the other partner Mr. Singh. He stated that it was also on false complaints of Mr. Singh that a false charge was levelled against him. The Respondent averred that his brother Mr. Premnath had reported the matter to Jogeshwari Branch of the petitioner-bank and indicated handing over of keys to the Branch Manager with a request to take over the factory premises in order to secure the bank's interest and also to prevent Mr. R.S. Singh from removing plant and machinery reducing the assets of the firm. However, Mr. R.S. Singh continued to pilferage raw material and finished goods because of which a police complaint was filed by Premanath Kalmady. Mr. R.S. Singh started a hate campaign against Mr. Premnath Kalmady and Mr. R.S. Singh also threatened the Respondent's brother that the Respondent would be involved in litigation. The respondent averred that the respondent at the relevant time

was working at Nana Chowk Branch he had not taken any unusual leave, not availed of any concession legitimate or otherwise. That he had not taken any particular interest in the business of the firm.

11. The petitioner filed his written statement denying the contentions of the respondent made in the statement of claim. The petitioner, inter alia contended that the departmental action was taken against the respondent was fair and reasonable. That an adequate opportunity was granted to the respondent who participated in the departmental proceedings. It was stated that the order of dismissal from the services of the respondent was awarded after going through the record, the submissions of the respondent and taking into account the gravity of misconduct. It was stated that the punishment was based on appropriate findings in the inquiry proceedings as conducted by the Inquiry officer. It was stated that it was established in the enquiry that the respondent was actually looking after the affairs of M/s. Amigo Industries and that his family members had contributed financially to the firm. It was contended that as gross misconduct of respondent was proved in the inquiry proceedings, the punishment of dismissal levelled against the respondent and confirmed by the Appellate Authority were legal, valid and justified.

12. The Industrial Tribunal framed a preliminary issue regarding fairness and propriety of the inquiry. The parties lead evidence on the preliminary issue. The Respondent submitted that the proceedings before the Inquiry officer were vitiated on various factors, which included the Inquiry officer disallowing questions and denying proper opportunity to defend the respondent. It was contended that the inquiry officer also did not allow the respondent to examine two more witnesses who were not available on the day of the proceedings and a request for adjournment on that count was disallowed and the Inquiry Officer concluded the inquiry on the same day by denying the opportunity to examine the said witnesses. He contended that the inquiry was rushed through without proper opportunity being made available to him to put his defence. On the said preliminary issue, the respondent was cross examined on behalf of the petitioner as also an affidavit in lieu of examination in chief on preliminary issue came to be filed by Mr. B.S. Acharya-the Inquiry officer. The said witness of the management was also cross-examined on behalf of the respondent.

13. The Industrial Tribunal decided the preliminary issue in regard to the fairness of the enquiry proceedings before the Enquiry officer by delivering a Part I Award dated 20.5.2003. The Industrial Tribunal held that the domestic inquiry conducted against the respondent violated the principles of natural justice and it was observed that the findings of the Inquiry Officer were perverse. The Industrial Tribunal therefore, directed that the Management be allowed to lead evidence to justify its action.

14. As the Industrial Tribunal held the enquiry proceedings to be defective and illegal by the Part I Award, the Petitioner was required to prove the charge against the Respondent by leading evidence before the Industrial Tribunal. In

pursuance thereto the petitioner examined Mr. Satish Kamat who was at the relevant time worked at Vigilance Cell of the petitioner bank. Further Mr. Rajendra. S. Singh, the partner of M/s. Amigo Industries was also examined on behalf of the management. One Mr. Divakar B. Karkera who had extended financial help to M/s. Amigo was also examined on behalf of the petitioner. All these three witnesses of the petitioners were cross examined on behalf of the respondent. The respondent led his evidence by filing an affidavit in lieu of examination in chief and was cross examined on behalf of the petitioner management.

15. The Industrial Tribunal by a Part II-Award dated 30.9.2009 allowed the reference whereby the termination of the respondent dated 25.9.1999 was quashed and set aside with a direction that the petitioner shall reinstate the respondent forthwith by giving him benefit of back wages and continuity of service from 25.9.1999.

16. The Petitioner approached this Court by filing Writ Petition No. 1271 of 2010 to challenge Part II Award dated 30.9.2009. A learned Single Judge of this Court disposed of the said writ petition in terms of the consent order passed dated 23.8.2010, by which the Part II Award dated 30.9.2009 impugned therein was quashed and set aside and the matter was remanded back to the Industrial Tribunal for fresh hearing and orders.

17. On remand the parties submitted their written submissions. The Industrial Tribunal thereafter heard the parties and by its impugned judgment being the Part II Award dated 7.9.2010 allowed the reference, whereby the Industrial Court set aside the petitioner's order dated 25.9.1999 terminating the respondent services and directed the Petitioner to reinstate the respondent on the post as held by him with the benefits of back wages and continuity of service from 25.9.1999.

18. The petitioner has filed this petition challenging Part I Award dated 20.5.2003 and also Part II Award dated 7.9.2010. It is submitted on behalf of the parties that during the pendency of the present petition, the respondent has attained the age of superannuation on 30.10.2011.

19. I have heard Mr. Atul G. Damle, learned Counsel for the petitioner and Mr. R.D. Bhatt, learned Counsel for the respondent. With the able assistance of the learned Counsel, I have gone through the record of the present proceedings.

20. The record of the present proceedings indicates that this Court had passed an order dated 9.2.2011 at the stage of admission of the present writ petition inter alia recording that when it was noticed that the respondent had completed 59 years of age and was due to retire shortly and that the reference being allowed by the tribunal and the termination which was effective from 25.9.1999 being quashed and set aside with a direction of reinstatement with full back wages, that it would be appropriate that the parties work out an amicable settlement in view of this chequered history and background of the case. It was

observed that the Petitioner could consider the proposal of reinstatement of the respondent in the service with a view to enable him thereafter, to accept such terms as may be agreed including tendering of resignation/voluntary retirement, but protecting his dues. With this suggestion, both the sides agreed to consider and arrive at a mutually acceptable solution. The order of this court recorded that the respondent would be required to forward a proposal in writing to the petitioner which would be placed before the Head office for appropriate decision. It was recorded that the respondent would forward the proposal and on such proposal being received, it was expected that the senior officials, including the Board of the petitioner would take an appropriate decision on the said proposal within two weeks from the date of receipt of the proposal. In this background, the matter was adjourned to 7.3.2011. When the petition came up for further hearing on 11.3.2011, in an order passed by this Court, it was recorded that the parties are exploring the possibility of a settlement and hence, the writ petition was adjourned for further hearing on 25.3.2011. It appears that no decision was taken by the bank on the proposal of the Respondent submitted in pursuance of the directions of this Court in its order dated 9.2.2011. It appears that the order of this Court was simply ignored by the Petitioners. On this background, by order dated 20.6.2011, the writ petition was admitted and hearing of the petition was expedited however, no interim stay to the impugned order dated 30.9.2009 was granted. Thereafter the Writ Petition remained pending and was taken up for final hearing on 24.1.2014.

21. Learned Counsel on behalf of the respondent as a preliminary submission contended that the prayers made in the writ petition to the extent Part I Award is challenged cannot be agitated by the petitioner for two fold reasons. Firstly that in pursuance of the finding in Part I Award, the Petitioner and the Respondent had led evidence before the Industrial Tribunal and it is only on the basis of the evidence which has come before the Tribunal the impugned Part II Award dated 7.9.2010 has been made. Secondly, that the order dated 23.8.2010 passed by this Court categorically records that only Part II Award dated 30.9.2009 was set aside indicting that Part I Award remains undisturbed and accepted by the petitioner.

22. As regards the second submission there is much substance in the contention as raised on behalf of the respondent. It is undisputed that the petitioner in pursuance of Part I Award dated 28.5.2003 availed of an opportunity to lead evidence before the Tribunal and on the basis of such evidence which came on record of the Industrial Tribunal initially delivered Part II Award dated 30.9.2009, whereby the petitioner's order dated 25.9.1999 terminating the respondent was quashed and set aside with direction to reinstate the respondent with the benefit of back wages and continuity in service from 25.9.1999. In a consolidated challenge raised by the petitioner to the Part I and the Part II Award dated 30.9.2009 in Writ Petition no. 1271 of 2010 this Court passed a consent order dated 23.08.2010 recording that the parties agreed that Part II Award dated 30.9.2009 passed by the Industrial Tribunal be quashed and set aside and the

matter be remanded back to the Industrial Tribunal for fresh hearing. The Petitioners accepting this position participated in the fresh hearing before the Industrial Tribunal under which the impugned Part II award was made by the Industrial Tribunal. The Industrial Court in the impugned award has taken note of this. In view of this undisputed position, I am of the opinion that though a challenge has been raised by the petitioner to the Part I Award the same is not maintainable in view of the order dated 23.8.2010 of this Court which shows the Petitioners gave up its challenge to the Part I award as is clear from the order dated passed by this Court. Learned Counsel appearing on behalf of the petitioner has fairly accepted that the arguments in the present petition would be confined only on the evidence which has been led before the Industrial Tribunal. Despite this clear position only to justify the prayers in the writ petition qua Part I award the learned Counsel for the Petitioner relied on the judgment of the Supreme Court in the case of The Cooper Engineering Limited Vs. Shri P.P. Mundhe, to contend that the challenge to Part I Award can be raised subsequently along with Part II award. The reliance on this judgment of the Supreme Court may not be of any assistance to the Petitioners in the facts of the present case inasmuch as it is clear from the order dated 23.8.2010 passed by this Court in writ petition No. 1271 of 2010 that the petitioner had given up the challenge to Part I award. It also cannot be overlooked that the Petitioner in consequence of the findings of the Part I award led fresh evidence before the Industrial Tribunal so as to justify the punishment conferred on the Respondent hence in any event in the facts of the present case the challenge to the Part I award is rendered academic. It is therefore futile for the Petitioners to justify the challenge to Part I award. The prayer of the Petitioner so far as it concerns the challenge to Part I award hence is not maintainable. I, therefore, proceed to examine the challenge in regard to Part II Award dated 7.9.2010.

23. On this background the challenge which falls for consideration in the present writ petition is whether there is any illegality or perversity in the directions of the Industrial Tribunal in the part II award by which the termination of the respondent dated 25.9.1999 has been quashed and set aside with a direction of reinstatement with full back wages and continuity of service so as to call for interference of this Court in its jurisdiction under article 226 of the Constitution of India.

24. It is well settled that the jurisdiction of this Court under Article 226 of the Constitution in issuing a writ certiorari to determine the correctness and validity of the finding of the Industrial Tribunal would not encompass re-appreciation of evidence and substituting the findings of fact as recorded by the Industrial Tribunal. The findings can be interfered only when such findings are perverse and/or made in the absence of any evidence or the findings are so unreasonable and arbitrary as would shock the conscience of the Court. By adverting to the said settled position in law, the controversy in the present petition is required to be examined.

25. Learned Counsel on behalf of the petitioner contends that the conclusions arrived at by the tribunal are perverse inasmuch as the tribunal has ignored the fresh evidence which had come on record which completely proved the charge against the respondent. He submits that in the evidence of Shri Satish Kamat it has come on record that the respondent was actively participating in the business of Amigo. It is contended that the charge against the respondent being proved the petitioner has lost confidence against the respondent and therefore the services of the respondent was rightly terminated. In support of his submissions he relies on the judgment of the learned single judge of this court in the case of Tata Infomedia Limited Vs. Tata Press Employees' Union and Another, and the judgment of the Supreme Court in the case of Delhi Cloth and General Mills Co., Ltd. Vs. Workmen and Others etc., . Learned counsel for the petitioner further submits that the tribunal has erred in granting full back wages. He submits that the tribunal ought not to have awarded full back wages in as much as that it is settled principle of law that even if it is found that the termination is bad in law award of full backwages is not automatic. He relies on the judgment of the Supreme Court in the case of U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, . He submits that the respondent ought to have proved that he was not gainfully employed and that the initial burden was on the respondent. It is context the relies of the judgment of the Supreme Court in the case of Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, .

26. On the other hand learned counsel for the respondent submits that the tribunal has rightly appreciated the evidence which was led before the tribunal which clearly demonstrated that the Respondent was not carrying on any business when in the employment of the Petitioner. He submits that the Tribunal has rightly considered the evidence as recorded before it as the proceedings before the Enquiry officer were declared to be vitiated by virtue of the Part I award, which was accepted by the Petitioner. In support of this submission he relies on the judgment of the Supreme Court in the case of Neeta Kaplish Vs. Presiding Officer, Labour Court and Another, . In the context of the Petitioner's charge against the Respondent that he was doing business when in the employment of the Petitioner, the learned Counsel for the respondent relies on the judgment of the Division Bench of this Court in the case of Shiv Bhagwan Moti Ram Saraoji Vs. Onkarmal Ishar Dass and Others, to submit as what would be really meant by the term "carrying on business." He submits that the tribunal has appreciated the evidence in the proper perspective and there is no perversity or any error on the face the order of the tribunal in reaching to a conclusion to order reinstatement of the respondent. He submits that this is a clear case where one of the partners of M/s. Amigo namely Mr. Singh on account of his dispute with the other partner who was the brother of the respondent had made false complaints against the respondent and also submitted false documents He submits that the respondent however miserably failed to bring any evidence to prove the charge as made against the respondent. He submits that from the perusal of evidence it was clear that the petitioner was relying on false

documents. He submits that considering the evidence the charge against the respondent could not be proved and hence no other conclusion could have been reached by Tribunal. He submits that that once this is the factual finding of the tribunal then the jurisdiction of this court would be only to correct any error of law which is apparent on the face of the order and not to correct an error of fact howsoever grave it may be. In support of this submission he relies on the judgment of the Supreme Court in the case of Anoop Sharma Vs. Executive Engineer, Public Health Division No. 1 Panipat (Haryana), , and in the case of Devinder Singh Vs. Municipal Council, Sanaur, . He submits that the respondent has discharged the burden of proving that he was not gainfully employed after his termination. He submits that the respondent having discharged his burden to show that he was not gainfully employed the burden shifted on the petitioner to prove otherwise. He submits that the petitioner has failed to prove that the respondent was in any manner gainfully employed so as to disentitle him of the benefit of back wages. In support of his submission he relies on the Judgment of the Supreme Court in the case of Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, , U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, , J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, , Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others, .

27. The charge against the respondent was that the respondent was engaged in trade or business outside the scope of his duties and hence it amounted to act of misconduct within the meaning of clause 19 (5) of the bipartite settlement. To prove this charge before the tribunal the petitioner examined three witnesses namely Shri Satish Kamath who at the relevant time was working as Officer Vigilance Unit, Mumbai and who is supposed to have conducted the investigation in the involvement of the respondent in the preliminary inquiry. In the affidavit in lieu of examination-in-chief of Shri Satish Kamath certain documents are brought on record of the tribunal to support the charge that the respondent is conducting business of M/s. Amigo Industries. The documents are: (i) the account opening forms of the brother of the respondent Shri. Premnath Kalmady and Shri Ganesh Kalmadi brothers of the Respondent which were bearing the introduction signature of the respondent. By these forms their respective bank accounts were opened at the Jogeshwari branch of the petitioner-bank. (ii) documents pertaining to transactions of Shri Ganesh Kalmadi and Shri Premnath Kalmady showing transfer of money to the account of M/s. Amigo Industries. (iii) Letter of one of the partners of M/s. Amigo Industries Shri Rajendra S. Singh to the Manager of Jogeshwari Branch in the nature of a complaint against the respondent (Exhibit MEX 9 and 10) (iv) letter dated 24.5.1996, Exhibit MEX 11 of the respondent to Shri Rajendra S. Singh,(v) letter dated 6.11.1996 of M/s. Parag Textiles addressed to the respondent, (vi) financial statement of M/s. Amigo Industries as on 30.9.1995 and 31.3.1996 which shows name of the respondent as an unsecured creditor of M/s. Amigo Industries,(vii) letter dated 3.2.1997 (MEX 15) of Shri. Rajendra S. Singh to the Manager Jogeshwari Branch

of the petitioner alleging that the respondent is responsible for functioning of the factory, (viii) statement of Shri Rajendra S. Singh and the respondent taken during the course of investigation, by this witness as Vigilance Officer. On the basis of the aforesaid documents, Shri Satish Kamath the management witness deposed that there was involvement of the respondent in the affairs of M/s. Amigo Industries during the course of employment of the respondent with the petitioner-bank. He states that there was also circumstantial evidence about his involvement in the affairs of the firm. This management witness was cross-examined on behalf of the respondent in which he has categorically stated that he had examined the leave record of the respondent and that there was no record with the respondent that he had taken frequent leaves. He also admits that the place of business of M/s. Amigo Industries was Tarapur and the suppliers of that industry namely M/s. Parag Industry was at Badlapur and whereas to visit the said places from Nana Chowk branch Mumbai, would take a full day. From these statements in the cross examination Respondent contended before the Tribunal that it was false that the Respondent was conducting day to day affairs of the business of M/s. Amigo by any physical participation. However, that was not only the test but the tribunal further examined the documentary evidence so as to see how it establishes the charge that the Respondent was conducting business when in employment of the Petitioner. The documents were examined by the Tribunal to reach a finding of fact on each of the issues as raised by the petitioner bank. It has come on record in the evidence that as regards introducing the account opening of his brother Shri Premnath Kalamdy and Shri. Ganesh Kalmadi by the respondent to open savings bank account in a different branch of the petitioner-bank the banks, witness stated in his evidence that that there is nothing wrong in introducing account opening forms of his brothers by the respondent and that there is no such restriction to be introduced by any relatives to open savings bank account. The witness further stated that there is no evidence to show that the respondent was in fact operating these two accounts of the partners who were supposed to manage M/s. Amigo Industries. He also stated that the said brothers of respondent namely Shri Premnath Kalmadi and Shri. Ganesh Kalmadi were staying with the respondent at the same residence. As regards the letter addressed by M/s. Parag Industry it was seen that it did not indicate any address of M/s. Parag Industry. The witness however says that address of M/s. Parag Industry was given by Shri. R.S. Singh who met the said witness in October, 1997. He has also admitted that there were some disputes between the two partners namely Shri Premnath Kalmadi (respondent's brother) and Shri R.S. Singh. The witness admits that letter addressed by M/s. Parag Industry was given to him by the partner Shri R.S. Singh. When asked as to whether original of the letter of M/s. Parag Industry was available with the said witness, the witness has answered that he does not remember. This witness after categorically admitting that the letters addressed by M/s. Parag Industry were handed over to him by Shri R.S. Singh was unable to also comment on the signatures on the said letters. He has categorically deposed in his cross-examination that on the basis of these letters he prepared his report against the

respondent that he was involved in the affairs of M/s. Amigo Industries. He has further admitted that no letter was written by him to M/s. Parag Textiles and that he does not remember the telephone number of M/s. Parag Textiles. He also admits that he has not recorded any statement of the signatory to the letter addressed by M/s. Parag Textiles but, had only discussions with the signatories. The foundation of the charge-sheet against the respondent was on the basis of the so called vigilance report of this witness. It is surprising that this report was prepared by him on the version as stated to him by the partner of Amigo Shri R.S. Singh. This officer did not even bother to verify the authenticity of the letters of Parag Textiles as given to him by Mr. R.S. Singh. The letters addressed by Parag Textiles which indicate involvement of the respondent could not have been taken into consideration as the originals were not produced nor an attempt was made on behalf of the petitioner to prove those documents by examining the author of the said documents. Furthermore, no person from Parag Textiles was examined to show any involvement of the respondent in any of the dealings with Parag Textiles. Other documents also in no manner indicate any involvement of the respondent in the business of M/s. Amigo Industries. As regards the allegation that the respondent had invested an amount in M/s. Amigo Industries it has come on record in the evidence that the same meager amount was borrowed by the respondent's brother. It has come on record that there was no bar for an employee of the bank to lend some amount. The petitioner's allegation against the respondent on this count was baseless. All these facts which have come on record have been appreciated by the Tribunal to reach a finding that the same in no manner indicate any involvement of the respondent in the business of M/s. Amigo Industries.

28. The second witness as examined on behalf of the petitioner was an outsider namely Shri Rajendra S. Singh partner of M/s. Amigo Industries. In the affidavit in lieu of examination-in-chief of this witness is somewhat similar to the affidavit of the first witness of the bank. He referred to the same documents as referred by the bank's witness. This witness has deposed about the alleged involvement of the respondent to say that the respondent was assisting in regard to the bank loan formalities to dispose of the finished raw materials, procuring orders and that the respondent was participating in the affairs of the firm. In his cross-examination he deposed that the factory was started in 1996 and it functioned for 8 months and thereafter became non-functional due to disputes between the partners. He has also deposed that he has no evidence to point out that the respondent had maintained accounts. He also deposed that respondent's brother Shri Ganesh Kalmadi was looking after the business of the firm and stated that the respondent was attending the factory on a number of occasions and was attending the factory in the morning and leaving on the very day in the evening. He however stated that there was nothing in writing to show the visits of the respondent to the factory. The witness at the same time states that the respondent was serving in the petitioner Bank and he was working at Nana chowk branch when the dispute arose. When asked whether respondent was

working at factory by taking leave, his answer to it was "God knows, I never inquired the same with him." He has deposed about the police complaint. He also deposed in the cross-examination that there was default on the part of M/s. Amigo Industries to repay the loan liability towards the petitioner bank. He also admitted that he had not discharged his liability to repay the said loan. He also denied the suggestion that he had not filed complaint against the respondent to escape Amigo's liability towards the bank and stated that the respondent's brother Shri Ganesh Kalmadi had complained against him at Tarapur police station. He also stated that he has lodged a complaint at Panvel police station against the respondent on 16.8.1999 and stated that the said complaint was registered with the police but did not have proof on that point. A perusal of the evidence of this witness also does not further the case of the petitioner-bank to prove the charge against the respondent, in as much the involvement of the respondent in regard to the business of M/s. Amigo Industries could not be established. Moreover not a single acceptable documentary evidence to even remotely connect the respondent to the charge was brought on the record of the tribunal. The tribunal hence has rightly come to a conclusion that Shri Rajendra S. Singh who was a partner of M/s. Amigo Industries along with brother of the respondent had a serious dispute with the brother of the respondent (who was one of the partner of Amigo) eventually leading to cross police complaints inter-se between these partners. In these circumstances, without any documentary proof, Shri. Rajendra Singh stepped in to depose against the respondent to say that the respondent was engaged in the business of M/s. Amigo Industries. It also could not have been overlooked that this witness was a partner of M/s. Amigo Industries and that relations between the partners were strained as also that M/s. Amigo Industries was a defaulter in payment of the loan and being a partner Shri Rajendra S. Singh had a joint and several liability to make repayment of the loan which was not discharged by him. Furthermore, admittedly there were recovery proceedings adopted against the partnership firm which included Shri. R.S. Singh. The deposition of this witness was considered by the tribunal to record a finding of fact that the charge in no manner stands proved looking at the evidence of Shri R.S. Singh.

29. The third witness examined on behalf of the petitioner-bank was also an outsider namely Mr. Divakar B. Karkeria who claimed investing an amount of Rs. 19.29 lacs in M/s. Amigo Industries. This witness has deposed that the respondent was conducting business of M/s. Amigo Industries and was looking after affairs of M/s. Amigo Industries and was also interacting with customers and clients. However, except for his bare statement in the affidavit in lieu of examination in chief, no document whatsoever was produced in support of his statement. In cross-examination the witness has admitted that he was not asked to produce any evidence to show that he was 20 % partner of M/s. Amigo Industries or that he had taken loan from the bank and invested with M/s. Amigo Industries. This witness has also not brought any documentary evidence to show that the respondent was engaged in the business of M/s. Amigo Industries.

30. The respondent filed his affidavit in lieu of examination-in-chief inter alia stating that he was committee member of the petitioner-bank employees Union as recognised by the management and was working at Khar branch at the relevant time. He stated that because of his trade union activities he had displeased the members of the officers' association. He stated that Shri R.S. Singh who was a partner of M/s. Amigo Industries along with respondent's brother had owed a liability towards the petitioner bank and had given a false complaint against him. He stated that M/s. Amigo Industries was set up by his younger brother Shri Premnath Kalmadi and that he was not associated with the said firm at any time. That Shri R.S. Singh was a partner and was made a partner for his technical experience. He stated that Shri R.S. Singh was indulging in pilfering raw material and also sell finished products clandestinely which was informed to him by his other brother Shri Ganesh Kalmadi who also got associated with the business of Amigo and hence Shri Ganesh Kalmadi had filed a police complaint against Shri. R.S. Singh at Boisar police station. A copy of the charge sheet No. 50 of 1997 dated 7.7.1997 was filed by him separately. He stated that because of this Shri R.S. Singh made a complaint to the bank against the respondent with a view to take revenge against the member of the family of Shri Ganesh Kalmady. He also stated that because Shri Premnath Kalmady who started the firm was preoccupied with his business at Udipi, hence his younger brother Shri Ganesh Kalmady was given Power of Attorney to take all necessary decisions and actions. He stated that Shri Ganesh Kalmady was a Post Graduate in commerce and looking after the day to day affairs and used to write accounts which were finalized subsequently by the Chartered Accountants. He stated that he had never taken any part at any point in connection with business of M/s. Amigo Industries. He also stated that both Shri Premnath Kalmady and Shri Ganesh Kalmady used to stay with him at the flat at Goregaon. He also stated that at the relevant time he was working at Santacruz Divisional office of the petitioner-bank and later on at Nana chowk branch and the factory was far away from these places which required full day to go and come back to Tarapur where the factory was located. He stated that he has not visited the factory except at the inauguration when a pooja was held. He also stated that after dismissal from service of the petitioner-bank, he was mentally perturbed and even thereafter he was continuously following up his case in the tribunal and hence could not look out for any alternate employment. He further stated that being a dismissed bank employee, no employer would have given him any employment and stated that he was not gainfully employed since his dismissal. He also stated that he and his family were pulling on loans given by his in-laws and the help given to him by his brothers and that he is required to repay the loans given to him by his brothers. He stated that he was therefore entitled for back wages. The respondent was cross-examined extensively on behalf of the petitioner-bank. In his cross-examination, the respondent has confirmed that he was not looking after the business of M/s. Amigo Industries. He has further deposed that he was not aware whether the partners of M/s. Amigo Industries were regularly visiting the said industry at Tarapur. He has further deposed that he was not aware as to whether

his brother Shri Premnath Kalmady and Shri Karkera took over the said firm by retiring Shri R.S. Singh. He further deposed that his brother Shri. Ganesh Kalmadi was working with M/s. Amigo Industries. He has also confirmed that he never visited Tarapur except at the inaugural function. He also confirmed that he did not work with any company after his termination and that he was still unemployed.

31. A perusal of the evidence which has come on record before of the tribunal looked from any angle do not show that there is any perversity in the findings recorded by the Tribunal that the charge against the respondent is not proved. A careful analysis of the proceedings indicate that there is no cogent evidence which would show that the respondent was actually engaged in business of M/s. Amigo Industries during the course of his employment with the petitioner. It has come on record that brothers of the respondent were managing the business of M/s. Amigo Industries along with partners Shri R.S. Singh and later on by Mr. D.B. Karkeria. It has come on record that there were disputes between the partners the brothers of the respondent on one side and the Shri. R.S. Singh on the other. As also the business of M/s. Amigo Industries had become non-functional after 8 months of its commencement in the year 1996. It has also come on record that as regards the liability of Amigo towards the petitioner-bank had adopted independent proceedings against the firm and its partners. The Tribunal rightly appreciated that Shri R.S. Singh was one of the partner who not only had a dispute with the brothers of the respondents, but was also a person interested to avoid his liability towards the bank. It was Shri. R.S. Singh who being aware of this background took the lead to make a complaint against the Respondent and supplied copies of some documents (which could not be proved) to show that respondent was conducting business. No material whatsoever indicate that the circumstances as narrated by the petitioner in the charge sheet at all existed or that the respondent was a partner of Amigo or was engaged in the business of M/s. Amigo Industries by any direct or indirect participation. The Petitioner's allegation in the charge-sheet that it was because of the Respondent that the bank could not recover the loan availed by Amigo could not be proved. The tribunal has taken into consideration the entire evidence and has also discarded the documents as produced on behalf of the petitioner, the originals of which were not produced before the Court nor the author of the same were examined. In such a situation, by no stretch of imagination, it can be said that the tribunal is in error in recording a finding that the petitioner-bank has failed to establish that the respondent was involved in the activities of M/s. Amigo Industries and that the respondent had acted outside the scope of his duties. The tribunal has correctly weighed the evidence to reach to a conclusion that the charge against the respondent is not proved.

32. Learned counsel on behalf of the petitioner in support of his submissions has relied upon the judgment of the Learned Single Judge of this Court in the case of Tata Infomedia Limited Vs. Tata Press Employees' Union and Another, in which it is held that though strict rules of evidence and proof do not govern a disciplinary

proceeding the enquiry must nevertheless be consistent with the fundamental principles of fair play and natural justice and the charge in a disciplinary enquiry has to be established on preponderance of probabilities and not by proof beyond reasonable doubt that would govern a criminal trial. There can be no quarrel about this settled position in law that in the departmental proceedings the test is not that the charge is required to be proved beyond reasonable doubt but to the proof would be governed by preponderance of probabilities. In the facts of the present case applying the test of preponderance of probabilities the charge against the respondent cannot be said to be proved. I have observed hereinabove that taking into consideration and appreciating the entirety of the evidence the tribunal has rightly held that the charge against the respondent is not proved. The reference to this Judgment is therefore, of no avail to the petitioner.

33. The Supreme Court in its decision in the case of Anoop Sharma Vs. Executive Engineer, Public Health Division No. 1 Panipat (Haryana), following the observations of the Judgment of the Constitution Bench of the Supreme Court in the case of Syed Yakoob Vs. K.S. Radhakrishnan and Others, held that a Writ of Certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals where orders are passed without jurisdiction or in excess of jurisdiction. An error of law which is apparent on the face of the record can be corrected by a writ but not an error of fact however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal a writ of certiorari can be issued if it is shown that in recording the said finding the Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari. It was held that in dealing with these category of cases, it must always be borne in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of the evidence led on the point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Court under Article 226 to issue a writ of certiorari can be legitimately exercised. The scope of exercise of jurisdiction under Article 226 of the Constitution of India has again been reiterated by the Supreme Court in the case of Devinder Singh Vs. Municipal Council, Sanaur, . In this judgment, the Supreme Court has again affirmed the view of the Constitution Bench Judgment in the case of "Syed Yakoob vs. K.S. Radhakrishnan" (supra). Adverting to these principle of law in the facts of the present case the scope for interference in the finding of fact as recorded by the Tribunal on the basis of the evidence which has come before it would hardly warrant any interference. I do not find any

perversity in the findings as recorded by the Tribunal. I have already observed hereinabove that after appreciating the evidence in the proper perspective the findings of fact as recorded by the Tribunal cannot be said to be unacceptable, erroneous or perverse so as to call for any interference of this Court in exercise of jurisdiction under Article 226 of the Constitution.

34. The next issue which is required to be considered is as regards payment of back wages. The Tribunal has directed reinstatement of the respondent with the benefits of back wages and continuity of service with effect from 25.9.1999. From the aforesaid discussions, it is clear that the termination of the respondent was illegal. In his deposition before the Tribunal, the respondent has categorically submitted that after dismissal he has not taken employment anywhere and he is not gainfully employed since his dismissal and that he is sustaining himself and his family on the borrowings/loans given by his in-laws and help given by his brothers. He has submitted that he is required to repay loans given to him. He has also stated that being a dismissed employee, no employer would have given him any employment. In the cross-examination, the petitioner could not disprove the fact about the respondents unemployment as stated by the respondent or produce any material to show that the respondent was gainfully employed. It is a settled that once the employee has discharged his burden to show that he was not gainfully employed after termination, the burden shifts on the employer to prove otherwise. In the present case, the petitioner has not produced anything on record before the Tribunal to show that the respondent is gainfully employed after his termination by the Petitioner and has thus failed to discharge the burden as shifted on the petitioner. On the issue of back wages, the petitioner has placed reliance on the judgment of the Supreme Court in the case of U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, in which the Supreme Court has held that although a direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but with the passage of time, a pragmatic view of the matter is being taken by the Court realising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely when the workman was retrenched. It is further held that no precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. It is held that it depends upon the facts and circumstances of each case and that payment of back wages should not be granted mechanically or should not be automatic, and it should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of law. In this case the Supreme Court was dealing with an issue falling u/s 6-N of the U.P. Industrial Disputes Act which was a provision equivalent to Section 25F of the Industrial Disputes Act, 1947 in which retrenched employee was appointed on daily wages in a project work to look after the construction of a building. The construction of building had

come to an end in year 1988. A reference to the industrial dispute was made in the year 1990. In the same year, a decision was taken to close down the establishment which was an establishment under the Government of U.P. By virtue of the decision of closing down, it was the case of the employer that all the employees including regular employees, save and except some skeleton staff for winding up were retrenched. In that case, the employee had not pleaded that after his purported retrenchment he was wholly employed. In such a context, the Supreme Court has observed as aforesaid and awarded 25% of back wages, in the facts of that case. The facts in the present case are different. The respondent was dismissed after an enquiry and that reinstatement has been ordered by the Tribunal holding that the evidence as come on the record of the tribunal do not prove the charge against the respondent.

35. The other judgment which is relied on behalf of the petitioner is in the case of Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, in which the Supreme Court has followed its earlier decision in the case of P.G.I. of M.E. and Research, Chandigarh Vs. Raj Kumar, wherein the Supreme Court has observed that payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. The Supreme Court has also laid down that when the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed and that the initial burden is on the employee. It was held that after the employee has placed material in that regard, the employer can bring on record materials to rebut the claim.

36. In the Judgment of the Supreme Court in the case of "M/s. Hindusthan Tin Works Pvt. Ltd. v. Employees of M/s. Hindusthan Works Pvt. Ltd., (1978) LIC 1667)" in dealing with an issue on back wages which has been referred to as raising a very human problem in the field of industrial jurisprudence the Supreme Court has made the following observations:

9. Speaking realistically where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness.

(Emphasis supplied)

The Supreme Court in its decision in the case of Harjinder Singh Vs. State of Punjab, in dealing with the Judgment of back wages, it has been observed as under:

20. " In RAMON SERVICES (P) LTD. Vs. SUBHASH KAPOOR, R.P. Sethi, J observed "that after independence the concept of social justice has become a part of our legal system. This concept gives meaning and significance to the democratic ways of life and of making the life dynamic. The concept of welfare State would remain in oblivion unless social justice is dispensed. Dispensation of social justice and achieving the goals set forth in the Constitution are not possible without the active, concerted and dynamic efforts made by the persons concerned with the justice dispensation system. In LIC of India and Another Vs. Consumer Education and Research center and Others, ; K. Ramaswamy, J observed that social justice is a device to ensure life to be meaningful and livable with human dignity. The State is obliged to provide to workman facilities to reach minimum standard of health, economic security and civilized living. The principle laid down by this law requires Courts to ensure that a workman who has not been found guilty cannot be deprived of what he is entitled to get. Obviously, when a workman has been illegally deprived of his device then that is misconduct on the part of the employer and employer cannot possibly be permitted to deprive a person of what is due to him.

(emphasis supplied)

In a recent Judgment of the Supreme Court in the case of Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others, considering the law laid down in several earlier judgments in the context of back wages the Supreme Court in para 38 held as under:

38. " The propositions which can be culled out from the aforementioned judgments are:

38.1: In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of

proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power u/s 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved then it will have the discretion not to award full back wages. However, the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5 The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court etc merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrong doings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course of suggested in Hindustan Tin Works (P) Ltd. vs. Employees.

38.7. The observation made in J.K. Synthetics Ltd. vs. K.L.P. Agarwal that on

reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches referred to herein above and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

(emphasis supplied)

37. The position in law becomes clear from the aforesaid decisions of the Supreme Court that there cannot be a straight-jacket formula for award of backwages. The award of backwages is required to be considered and dealt with in the facts and circumstances of each case. The underlying principle being that the Court should come to a conclusion that the termination was illegal and that it is clearly demonstrated that the workman was not gainfully employed after his termination. In a given case the Tribunal would be justified in awarding full backwages if the facts so justify if tested applying the principles as laid down by the Supreme Court in Deepali Gundu Surwase's case (supra). In such a situation no interference will be called for in the decision of the Tribunal in exercise of the powers under Article 226 of the Constitution of India merely because there is possibility of forming a different opinion on the entitlement of the workman to get full backwages or employers obligation to pay the same. This is for the reason that the Court has to keep in mind that in the cases of illegal termination of services, the wrong doer is the employer and the employee is the sufferer and there is no justification to give premium to the employer for his wrong doing by relieving him of the burden to pay to the workman the dues in the form of backwages.

38. Applying the aforesaid salutary principles of law as laid down by the Supreme Court I do not find that there is any error or perversity on the part of the Tribunal in awarding full back wages to the respondent. The respondent had specifically pleaded before the tribunal that he was not gainfully employed. The burden therefore, shifted on the petitioner-employer to rebut the said position. No material whatsoever was brought on record to displace the case of the respondent. The respondent therefore has discharged the burden to show that he was not gainfully employed after termination. It cannot be disputed that the respondent was made to suffer since the year 1999. Taking into consideration the observations of the Supreme Court (supra) and with due regard to the basic human considerations in its applicability in labour jurisprudence it cannot be forgotten that the respondent has already suffered financially. To the extent the respondent and his family has otherwise suffered the mental trauma of dismissal, deprivation of the source of livelihood, the social set back, all these factors have no measure. A workmen cannot be left to suffer in every possible manner and more so financially. In these circumstances the orders of the tribunal of award of full back wages are justified and proper in the facts of the present case.

39. In view of the aforesaid discussion, the Petitioner has failed to make out any case for interference of this Court in its jurisdiction under Article 226 of the Constitution of India. Writ Petition therefore stands dismissed. Rule is accordingly

discharged. There shall be no order as to costs.

At this stage after the judgment was pronounced, Mr. Shah, learned Counsel for the petitioner prays for stay of this order. It is noted that during the pendency of the present writ petition there was no interim protection granted by this Court. In any event, the facts and circumstances of the case do not justify this prayer as the respondent has already attained the age of superannuation on 30.10.2011 and hence, what remains is only the monetary benefits payable to the respondent. The prayer for stay, therefore, is rejected.