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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 30.09.2021

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W.P. (C) 3246/2020 and CM No. 11319/2020

THOMSON REUTERS INDIA PRIVATE LIMITED Petitioner

Through: Mr. Sandeep Prabhakar,
Mr. Shankh Sengupta, Ms. Varuna
Bhanrale & Mr. Sujoy Sur,
Advocates.

versus

**LD. PRESIDING OFFICER, LABOUR
COURT & ANR.**

..... Respondents

Through: Mr. Shlok Chandra, Ms. Mansie
Jain and Mr. Chandratany
Chaube, Advocates for R-1.
Mr. Naveen R. Nath, Mr. Rahul
Jain and Mr. Abhimanyu Verma,
Advocates for R-2.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Challenge in the present petition is laid by the Petitioner to an Award dated 20.02.2020 passed by the Learned Labour Court in LIR No. 2899/2016 (old ID No. 542/2009), whereby relief of reinstatement with full back wages has been granted to Respondent No.2/Workman w.e.f. 30.11.2006, as per the last drawn salary, including the relief of continuity of service and other consequential benefits.

2. Brief necessitous facts as set out in the petition and necessary for adjudication of the present petition are that Petitioner is a Private Limited Company incorporated and registered under the Companies Act, 1956, having its registered Office at Mumbai, Maharashtra. Formerly known as Reuters India Private Limited, Petitioner is a part of multi-national Thomson Reuters Group of Companies and has several business verticals, of which one such vertical is a news and media business, which also includes a photography division.

3. On 02.02.1990, Reuters Group's Branch Office in India issued a letter to Respondent No.2, confirming his employment as Photographer / Dark Room Assistant at its New Delhi office. Subsequently in 1995, Reuters Group incorporated the Petitioner Company and the business carried out by the Indian Branch Office of Reuters Group was transferred to the Petitioner. Though Respondent No.2 was initially appointed by Reuters Group's Branch Office in India, however, on account of the internal restructuring in the organization, he became an employee of the Petitioner Company.

4. Over the years, Respondent No.2 was promoted and the last designation held by him was that of Deputy Chief Photographer (referred to as 'Senior Photographer 4' as per Global Role Framework of the Thomson Reuters Group) and his annual income was enhanced to Rs. 9,52,466/- per annum, effective from 01.04.2005. As per the internal document of Thomson Reuters India, referred to as 'Role Beacon', which provides roles and responsibilities for different positions, Respondent No.2 was expected to perform supervisory functions in addition to certain technical functions. These functions included responsibilities and roles

such as: (a) ability to deputize for local chief photographer; (b) proactive coverage of stories and key roles in major assignments; (c) logistic planning such as commissioning and staffing; (d) leading a small team of staff photographers and stringers on a big story; (e) ability to manage stringer networks; (f) ability to play a role on pictures desk towards editing etc.; (g) being fully conversant with all aspects of digital photography, picture editing and processing systems and (h) taking on mentoring/tutoring roles, as needed.

5. In keeping with the reputation enjoyed by the Petitioner at international level, Respondent No.2 was expected to adhere to the quality standards of the Petitioner. However, his performance deteriorated considerably from April, 2006 onwards. Several emails were sent to him to improve his quality of work, including advisories and his work was reviewed on a weekly basis, by Officers at senior levels. In fact, by an email dated 13.06.2006, Respondent No.2 acknowledged and accepted the weak points in his work and also elaborated on the actions undertaken by him to supervise and manage photography assignments of various stringers across India.

6. By an email dated 23.06.2006, Mr. Paul Barker (Global Desk) flagged two issues with respect to the photographs sent by Respondent No.2 to the Singapore Desk viz: (a) photographs were sent with little or no photoshop and contained bad colour balance and dust; and (b) resizing was incorrectly done. This was followed by several emails pointing out the defects in the pictures sent by Respondent No.2 and suggesting measures to correct and improve them. However, the deficiencies and shortcomings in the quality and standard of the photographs taken by

Respondent No.2 showed no improvement, despite several notices pointing out deficiencies and/or regular counseling/advice by many senior personnel, over several months.

7. Constrained by the inability of Respondent No.2 to improve his performance, Petitioner had no option but to terminate his employment and accordingly two letters, both dated 28.11.2006 were issued, terminating the services of Respondent No.2 and simultaneously settling all his dues.

8. Respondent No.2 sent a legal notice to the Petitioner on 01.05.2007 alleging that termination of his services was malafide and punitive and a result of professional rivalry of Mr. Desmond Boylan, the then Chief Photographer. A demand for reinstatement was also made. Petitioner responded to the legal notice vide letter dated 22.06.2007, refuting the allegations and asserting that the termination was on account of poor quality of work of Respondent No.2.

9. In or around October, 2007, Respondent No.2 approached the Conciliation Officer, but the disputes could not be resolved amicably. Accordingly, the Deputy Labour Commissioner referred the disputes for adjudication to the Labour Court vide order dated 22.10.2009, with the following Terms of Reference:-

“Whether the services of the workman Sh. Kamal Kishore S/o Sh. Kishore Chand Kamboj has been terminated illegally and/or unjustifiably by the management; and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws and government notification issued from time to time is he entitled and what directions are necessary in this respect?”

10. By the impugned award dated 20.02.2020, the Learned Labour Court answered the Reference in favour of Respondent No.2 and awarded the relief of reinstatement with back wages and consequential benefits. The award was challenged by the Petitioner by way of the present petition and vide order dated 01.06.2020, operation of the impugned award was stayed by this Court to the extent it directed reinstatement and full back wages, subject to the Petitioner depositing a sum of Rs. 50 Lacs, which was directed to be invested in an interest bearing Fixed Deposit Receipt with a Nationalized bank.

11. The expose of facts of the case as set out in the Statement of Claim filed by Respondent No.2 before the Labour Court, succinctly put, are as follows:-

(i) Respondent No.2 was employed with the Petitioner / Management since June, 1987 as a Dark Room Assistant-cum-News Photographer, as a regular employee, duly appointed by South Asia Manager, Reuters. His last designation on promotion was Deputy Chief Photographer and last drawn wages were around Rs.1,08,000/- per month;

(ii) The nature of his duties were that of a Press Photographer and he had no managerial, administrative or supervisory powers. He rendered dedicated service to the Management for 19 and a half years, without any complaints and had unblemished service record, till he was illegally terminated on 28.11.2006;

(iii) The action of termination was malafide, actuated by professional rivalry of his immediate superior, Mr. Desmond Boylan, from April, 2006 when Mr. Boylan was appointed as Chief Photographer. On taking over, Mr. Boylan started accusing Respondent No.2 of under-performance,

contrary to the outstanding and excellent track record of Respondent No.2 as a professional Photographer and the fact that he was well acclaimed in the media circles in India and abroad, particularly within Reuters, worldwide. In fact, the Management, being satisfied with his excellent performance, had accorded a Certificate of Appreciation, on completion of 15 years of service, by Respondent No.2;

(iv) On 28.11.2006, a letter was issued by the Management alleging that the performance of Respondent No.2 had dropped to unacceptable levels and the photographs taken by him could not be used for commercial licensing, besides certain other alleged instances, pointing to non-discharge of his responsibilities in a better manner. On 28.11.2006, the Management served upon Respondent No.2, another letter terminating the services of Respondent No.2 w.e.f. 30.11.2006;

(v) Before the Labour Court, Respondent No.2 contended that: (a) his services were terminated with malafide intent and without any valid ground(s) or reason(s) and purely on account of professional rivalry of his immediate superior; (b) he was not given an opportunity to explain the baseless allegations made against him in the letter dated 28.11.2006; (c) he had rendered excellent and dedicated service for 19 and a half years and several photographs taken by him had been published in newspapers, magazines, etc. around the world on the front and prominent pages; (d) he was awarded second prize for Photography for coverage of the Kargil War and had been sent to various countries abroad like Pakistan, Bhutan, Singapore, etc. on professional duties in view of his professional competence; (e) Mr. Boylan had been vindictive towards him due to professional rivalry and there was no evidence to substantiate the

allegations made against him of non/under-performance; (f) Mr. Boylan issued the order of Termination without any jurisdiction to do so as he was not the Appointing Authority of Respondent No.2, since the appointment was made by South Asia Managing Director of the Company, which was self-evident from the appointment letter; (f) Respondent No.2 was appointed by Reuters International, whereas the Termination Order was signed by a much junior officer of Reuters India Private Limited, a separate legal entity; (g) termination was illegal and violative of provisions of the Working Journalist and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (hereinafter referred to as 'WJ Act'), which squarely applies to every News Agency and Newspaper Establishment in India; (h) Section 3 of the WJ Act makes the provisions of Industrial Disputes Act, 1947 (hereinafter referred to as 'ID Act') applicable to Working Journalists and the termination is thus also violative of Sections 25-F and 25-G of the ID Act.

(vi) Respondent No.2 issued a legal notice on 01.05.2007, contesting the termination on the ground that it was illegal retrenchment under Section 25-F of the ID Act and demanded reinstatement. Management replied to the legal notice vide communication dated 22.06.2007 and declined to reinstate Respondent No.2.

(vii) When the legal notice did not elicit a favourable response, Respondent No.2 approached the Conciliation Officer for initiation of conciliation proceedings under Section 10(2) of the ID Act. The matter was referred for Conciliation, which was, however, unsuccessful and

thereafter the disputes were referred to the Labour Court, by the Deputy Labour Commissioner (SD).

12. Before the Labour Court, Petitioner filed a written statement and contended as under :

- (i) The proceedings before the Labour Court were not maintainable as Respondent No.2, being employed in a supervisory capacity, drawing a monthly remuneration of more than Rs.1,600/- was not a 'workman' as defined under the ID Act;
- (ii) On merits, it was contended that Respondent No.2 was employed with Reuters India Private Limited and being a Company of an international repute, Photography skills were required to be of extremely high quality and standards and Respondent No.2 was required to perform diligently and efficiently. Work performance of Respondent No.2 in the last 8 months prior to termination was far below the required levels and the quality of his work was dropping to unacceptably deficient levels;
- (iii) Quality of the work of Respondent No.2 was so bad that most of his pictures had to be 'spiked', i.e. could not be placed into the Company's usable set of pictures for onward commercial licensing. Mr. Paul Barker and Mr. Petar Kujundzic, the two Editors, who monitored the incoming files from India, containing the pictures taken by Respondent No.2 and wrote weekly reports, communicated extensively with Respondent No.2, pointing out the errors committed and suggesting methods to rectify them and improve his performance;
- (iv) Despite the time to time counseling and advice, through several e-mails, performance of Respondent No.2 did not improve. Petitioner pointed out several alleged deficiencies in the work of Respondent No.2

before the Labour Court and also stated that Respondent No.2 lacked team work, which was very essential for a conducive work environment, in a Company for synergistic output. Respondent No.2 exhibited total disregard to the concept of team cohesiveness and overburdened his colleagues by not performing his assigned jobs;

(v) The under-performance and other deficiencies in the working of Respondent No.2 hindered the Company's operations in India, which had to compete effectively not only amongst the domestic players but also amongst international competitors;

(vi) It was categorically stated that Mr. Desmond Boylan had no personal animosity with Respondent No.2. In fact, he was under a duty to supervise the quality of the work of the employees including that of Respondent No.2, so that the Reuters Group could maintain the sterling quality of its information, pictures and news. Past performance of Respondent No.2 may have been excellent, but that could not be a justification for the under-performance in the last eight months. There was no improvement in the work, despite due notice, advice and counseling to Respondent No. 2;

(vii) It was denied that provisions of the WJ Act or ID Act were violated. It was submitted that Respondent No.2 was removed on account of unsatisfactory quality of work, despite repeated notices and warnings and the dismissal could not be termed as 'retrenchment';

(viii) It was stated that until 1995, Reuters Group carried out business in India through Branch Office of a foreign Company, namely, Reuters International. In 1995, Reuters Group incorporated Reuters India Private Limited, to which existing business carried out by the Branch Office was

transferred. Hence, although Respondent No.2 was appointed by Reuters International, on account of the internal re-structuring, he became an employee of Reuters India Private Limited and was on the pay roll of the said Company and drawing salary therefrom, on the date of the termination. Further, in terms of the internal authorization policy of the Company, Mr. Boylan was authorized to issue the termination letter.

13. After completion of pleadings, Labour Court framed the following issues on 16.07.2010:-

- (1) *Whether the claimant is not a workman as defined u/s. 2(s) of the I.D. Act being working in supervisory capacity?*
- (2) *As per terms of reference.*
- (3) *Relief*

14. Before the Labour Court, Respondent No.2 examined himself as WW-1 and filed his evidence by way of affidavit, Ex. WW1/A. Contents of the Statement of Claim were reiterated in the affidavit. In support of the claim, documents exhibited as Ex. WW1/1 to WW1/8 were relied upon. No other defence witness was produced.

15. In the affidavit-in-evidence, Respondent No.2, testified as WW1. He deposed that he was initially appointed as Dark Room Assistant-cum-News Photographer as a regular employee and was working as Deputy Chief Photographer at the time of his termination. The nature of duties was that of a Press Photographer with no element of managerial, administrative or supervisory powers. He deposed that there was no one working under him and he had no authority to sanction payment of even a

single rupee on behalf of the Company or authority to appoint or exercise disciplinary control over his juniors.

16. Respondent No.2 further deposed that he had rendered unblemished and dedicated service for 19 and a half years, till his termination and several appreciation letters were issued to him from time to time. He deposed that he was wrongly accused of under-performance when Mr. Boylan took over on account of professional rivalry between the two, which was contrary to the record of exemplary performance of Respondent No.2. He further deposed that the termination was malafide, without any justifiable ground and without any opportunity to explain the allegations levelled. There was no chargesheet and no inquiry before issuing the Termination Order. Termination was also in violation of Sections 25-F and 25-G of the ID Act, which is applicable to Respondent No.2, by virtue of Section 3 of the WJ Act.

17. In the affidavit, Respondent No.2 furnished details of his gainful employment between 06.12.2006 to 06.09.2007 with Press Trust of India, between 01.09.2008 to 31.03.2009 with Tribune and thereafter again from April 2009 till the date of filing the affidavit, as Chief Photographer with Press Trust of India at Rs. 50,000/- per month.

18. Respondent No.2 was cross-examined by the Petitioner. He reiterated his stand in the Statement of Claim and the affidavit-in-evidence. Respondent No.2 stated that it was wrong to suggest that being a Deputy Chief Photographer, he was not involved in logistic planning, leading a small team of photographers or deputizing for the Chief Photographer. He deposed that he was not responsible for giving assignments to photographers or handling India Desk, during the absence

of Chief Photographer. He denied the suggestion that he was assigning work and chasing the stringers or was required to guide the junior photographers in his team. Respondent No.2 admitted receipt of emails dated 12.06.2006, 13.06.2006 and 03.07.2006, alleging that his performance required improvement.

19. Petitioner / Management examined Sh. B. Rakesh Kumar as MW-1 who filed his evidence by way of affidavit, Ex. MW1/A, and reiterated the contents of written statement. The witness relied upon documents Ex. MW1/1 (confirmation letter dated 02.02.2019), objected to by the Authorised Representative of Respondent No.2, being a photocopy and Ex. MW1/2. MW-1 was cross-examined at length.

20. In his affidavit-in-evidence, MW-1 deposed that he was employed as Manager–Human Resources Operation with Thomson Reuters International, a Group Company of Thomson Reuters India Private Limited. He elaborated on his role and responsibility as Manager-HR. He deposed that Respondent No.2 as Deputy Chief Photographer was expected to perform several supervisory functions in addition to certain technical functions, as per the internal document of Thomson Reuters India referred to as ‘Role Beacon’. He detailed the functions and responsibilities that Respondent No.2 was required to perform as follows:-

- “a. Ability to deputize for local Chief Photographer as and when required.*
- b. Skill in pro-active coverage of stories and taking key or leading roles in major assignments.*
- c. Capability to carry out major assignment logistical planning, for instance commissioning and staffing.*

- d. Capability to lead a small team of staff photographers and stringers on a big story.*
- e. Ability to manage stringer networks.*
- f. Ability to play a role on a pictures desk towards editing pictures, as needed.*
- g. Being fully conversant with all aspects of digital photography, picture editing and processing systems.*
- h. Taking on mentoring / tutoring roles, as needed.”*

21. MW-1 further deposed that Respondent No.2 was expected to adhere to quality standards of the Petitioner, as the Petitioner is a wire service of international repute. However, his performance deteriorated considerably in and after April, 2006. To ensure improvement in the quality of his work, senior personnel of Thomson Reuters Group carried out an extensive exercise of providing weekly objectives to achieve and also reviewed his work against the objectives assigned. MW-1 referred to certain emails which were exchanged between Respondent No.2 and Senior Editors / photographers of Thomson Reuters Group in Singapore, including Mr. Russel Boyce, Chief Photographer, Asia with respect to the deficiency in his work as also measures to improve the same. The emails were exhibited as Ex.MW1/MA to MW1/11 and were generally aimed at pointing out to Respondent No.2 the lacunae in the photographs taken by him and their quality. He further deposed that despite receiving the notice pointing out the deficiencies as well as repeated counselling and advice, Respondent No.2 was unable to rectify them and improve his performance. Poor quality of work by Respondent No.2 became detrimental to the Photography Division and the Petitioner was left with no option but to terminate his services on account of poor quality of

composition of photographs, non-usage of photo editing software to get a better crop of photographs, filing unnecessary photographs, increasing the workload of the Editing Desk and lack of team work, which was essential for a conducive work environment.

22. Considering the pleadings and evidence on record, Labour Court decided both the issues in favour of Respondent No. 2/workman and against the Management/Petitioner herein, relying on the definition of 'working journalist' under Section 2(f) of the WJ Act, which specifically includes 'news photographer' in its ambit. Since the Labour Court was of the view that Respondent No.2 was amenable to its jurisdiction, it adjudicated on the legality of the impugned termination order and held the termination to be illegal and unfair. Having so held, Labour Court granted relief of reinstatement with full back wages to Respondent No.2, from the date of termination, as per the last drawn salary along with relief of continuity of service and other consequential benefits.

CONTENTIONS OF THE PETITIONER

23. The impugned award is illegal and has been passed in total ignorance of the provisions of the ID Act and the WJ Act and without looking into the relevant material placed on record by the Petitioner. Since the issue of the status of Respondent No.2 being a workman / working journalist goes to the root of the jurisdiction of the Labour Court, this Court can interfere, within the scope of its jurisdiction under Articles 226 and 227 of the Constitution of India and set aside the impugned Award. On the scope of interference in a judicial review, reliance was placed on the following judgments:-

- (i) **Syed Yakoob v. K.S. Radhakrishnan & Ors., AIR 1964 SC 477**
- (ii) **Municipal Council, Sujanpur v. Surinder Kumar, (2006) 5 SCC 173**
- (iii) **Atlas Cycle (Haryana) Ltd. v. Kitab Singh, (2013) 12 SCC 573**
- (iv) **General Manager, Electrical Rengali Hydro Electric Project, Orissa & Ors. v. Girdhari Sahu and Ors., (2019) 10 SCC 695**

24. Respondent No.2 does not fall within the definition of 'workman' under Section 2(s) of the ID Act or definition of 'working journalist' under Section 2(f) of the WJ Act. Labour Court erred in holding that Respondent No.2 did not perform supervisory functions as Deputy Chief Photographer and consequently erred in holding that Respondent No.2 was a 'workman' under the ID Act. Petitioner falls under the definition of a 'newspaper establishment' under Section 2(d) of the WJ Act and thus, ID Act is not applicable to the present case. The correct issue that was required to be framed and determined by the Labour Court was whether Respondent No.2 was a 'working journalist' under the WJ Act and not if he was a 'workman' under the ID Act, which was never framed. Therefore if this Court comes to a conclusion that the issue required to be framed was whether Respondent No.2 is a 'working journalist', then the appropriate course of action would be to remand the matter to the Labour Court and permit the parties to lead additional evidence on the said issue. Reliance was placed on the following judgments in support of the plea to remand the matter:-

- (i) **Shanti Devi v. Daropti Devi, (2006) 13 SCC 775**
- (ii) **Daljit Singh Gujral & Ors v. Jagjit Singh Arora & Ors, (2014) 12 SCC 198**
- (iii) **M/s Standard Essential Oil Industries & Anr. v. The Forest Range Officer Kasargod, (2018) 16 SCC 180**

25. Assuming for the sake of argument that the ID Act is applicable, Labour Court, while considering the issue whether Respondent No.2 is a 'workman' under Section 2(s) of the said Act, failed to appreciate that the burden of proof was on Respondent No.2 to establish that he was a 'workman'. Contrary thereto, in the impugned Award, it is observed that the 'workman' has asserted that he was not having any managerial or administrative power and merely on this basis, the issue has been decided in favour of Respondent No.2. Labour Court failed to examine that Respondent No.2 had not placed any cogent evidence to prove that he was a 'workman' under Section 2(s) and unjustifiably put the burden of proof on the Petitioner to establish that Respondent No.2 was not a 'workman' and consequently erroneously held that the Management failed to establish that the workman was performing supervisory functions. This militates against the fundamental principle of law that a party which asserts a positive fact has to prove by leading evidence and the opposite party cannot be called upon to prove a negative fact. Reliance was placed on the following judgments on the issue of burden of proof:-

- (i) **Northcote Nursing Home Private Limited and Others v. Zarine H. Rahina and Others, 2001 (3) BomLR 714**
- (ii) **M/s D.C.M. Shri Ram Consolidate Ltd. v. B.K. Gupta, 2015 SCC OnLine Del 8210**

26. Respondent No.2 is neither a workman under Section 2(s) of the ID Act nor a working journalist under Section 2(f) of the WJ Act and thus the Labour Court had no jurisdiction to entertain the claim of Respondent No. 2 and adjudicate the alleged disputes. Persons working in 'supervisory capacity', receiving more than Rs. 1,600/- per month as salary, are categorically excluded from the definition of 'workman' under the ID Act and WJ Act specifically excludes persons employed in supervisory capacity performing managerial functions. Therefore, Respondent No.2, who was primarily performing supervisory functions as Deputy Chief Photographer and drawing a monthly salary of Rs. 1,08,000/-, falls outside the ambit of the ID Act and was not amenable to the jurisdiction of the Labour Court.

27. Insofar as 'working journalist' is concerned, without prejudice to the foregoing, even if this Court was to reframe the issue to assess whether Respondent No.2 was a 'Working Journalist' under Section 2(f) of the WJ Act, Respondent No.2 would still not fall under the said definition as he is covered under the exceptions to the definition, being employed in a supervisory capacity and performing functions mainly of a managerial nature. Respondent No.2 failed to adduce any evidence to discharge the burden that he was covered under the definition of Section 2(f) of the WJ Act, while the Petitioner placed contemporaneous documentary evidence to demonstrate that Respondent No.2, as a Deputy Chief Photographer, held a supervisory post, in as much as he supervised the work of all stringers and photographers by assigning, allocating and distributing the work to them and issuing necessary instructions. Respondent No.2 guided, advised and mentored the stringers and juniors,

on how to create and use photography skills to get the best results. He managed the desk and took independent decisions from the stage of generating ideas, exploring stories, finding correct events/locations, where stringers and photographers were required to be deputed and also sent pictures selected by him directly to the Senior Editors at the Global Desk. Evidence was adduced to show that Respondent No.2 edited, reviewed and checked the work and selected the photographs shot by stringers and photographers for sending to the Global Desk. He had the authority to reject or spike the photographs that were not up to the mark and acted on all these matters for and on behalf of the Petitioner for the India Desk. Merely because Respondent No.2's work was subject to review by his seniors, or he may not have had the power to hire or terminate the employees or sanction their leaves or take disciplinary action, did not dilute the supervisory and managerial nature of his functions. He was clearly thus neither a 'workman' under Section 2(s) of the ID Act nor a 'Working Journalist' under Section 2(f) of the WJ Act, by virtue of the exceptions provided under the said provisions.

28. The work profile of Respondent No.2 as Deputy Chief Photographer has been admitted by Respondent No.2 in his cross-examination, where he deposed that he took decisions on when and how to take photographs and was skilled in pro-active coverage of stories and played key or leading roles in major assignments, took decisions on which images were to be gathered, to meet coverage demands, managed stringer networks, communicated with external agencies to facilitate picture opportunities and chase stories. Emails were placed on record before the Labour Court, which were correspondences between

Respondent No.2 and the Global Desk / Chief Photographer, highlighting his functions, which were clear pointers to the supervisory and managerial nature of his job. Reliance was placed on the following judgments wherein principles / parameters / tests have been laid down to determine if an employee performs 'supervisory' functions:-

- (i) **Mcleod and Co. v. Sixth Industrial Tribunal West Bengal and Others**, 1958 SCC OnLine Cal 17
- (ii) **Mukesh K. Tripathi v. Sr. Divn. Manager, L.I.C. & Ors.**, (2004) 8 SCC 387
- (iii) **Standing Conference of Public Enterprises v. Government of NCT of Delhi and Ors.**, 2006 SCC OnLine Del 1378
- (iv) **R. Dial Dced. Thr. Rajan Kumar v. DCM Shriram Consolidated Ltd.**, (2008) 147 DLT 288
- (v) **S.N. Goswami v. Presiding Officer, Labour Court-II and Ors.**, 2009 SCC OnLine 6664
- (vi) **Hardwari Lal Sharma v. Pustak Mahal Publishers**, 2016 SCC OnLine Del 5595

29. Labour Court has erroneously come to a conclusion that Respondent No.2 was not discharging managerial or supervisory functions, overlooking the fact that in law, it is the predominant duty / function performed by a workman, which is determinative of his status and in the present case, Labour Court has itself come to a finding that the job profile of a Deputy Chief Photographer was to manage a group of Stringers and Photographers. Reliance was placed on the following judgments wherein it has been held that it is the pre-dominant or the primary duty which has to be looked into to determine if the employee is a workman or not:-

- (i) **Lloyds Bank Ltd., New Delhi v. Panna Lal Gupta And Ors, AIR 1967 SC 428**
- (ii) **Burmah Shell Oil Storage & Distribution Co. of India Ltd. v. Burmah Shell Management Staff Association & Ors., (1970) 3 SCC 378**
- (iii) **S.K. Maini v. Carona Sahu Company Ltd. & Ors., (1994) 3 SCC 510**
- (iv) **R. Varadachari v. Management of Press Trust of India, 2003 SCC OnLine Mad 102**
- (v) **Aeroflot Russian Airlines v. Mohan Kumar Sharma And Anr., 2014 SCC OnLine Del 3580**
- (vi) **M/s D.C.M. Shri Ram Consolidate (supra)**
- (vii) **M/s Ircon International Ltd. v. Union of India & Ors., 2015 SCC Online Del 10227**

30. It is settled law that if an employee is not a workman, then the relationship is governed by the contract of employment under the Indian Contract Act, 1872, enabling either party to terminate the contract, in accordance with the contractual provisions. In any case, in the present case, termination is a termination simpliciter, in terms of the appointment letter, with no stigma attached and the termination was effected, after clearing the dues including the notice pay. Thus, the only remedy available to Respondent No.2 was to file a suit for damages.

31. Labour Court has erred in holding that Mr. Desmond Boylan had no authority to terminate the services of Respondent No.2, on the ground that Manager South Asia, Reuters Group had issued the appointment letter. Labour Court failed to appreciate that Respondent No.2 was appointed way back in the year 1990 and subsequently, as brought out in the pleadings by the Petitioner, employment of Respondent No.2 was

shifted under the Petitioner, i.e. Reuters India Private Limited (later renamed Thomson Reuters India Private Limited), due to internal changes in the Organisational structure. Thus, the Petitioner became the employer and it was an admitted fact that Respondent No.2 was working with the Petitioner Company and drawing salary and emoluments therefrom. Mr. Boylan had the authorization of the Company to terminate the services of Respondent No.2, which was also ratified by the Board of Directors of the Petitioner Company.

32. Labour Court has erroneously held that termination of Respondent No.2 was an unfair practice, on the ground that no show-cause notice/charge-sheet was issued to Respondent No.2 and no inquiry was held prior thereto. Petitioner placed on record ample evidence to show that there was deficiency in the work of Respondent No.2 and his work was not in accordance with the required quality and standards, and that the termination was an outcome of his repeated and continuous unsatisfactory and deficient performance and not punitive in nature. Since this was a case of simpliciter and non-stigmatic termination, no chargesheet or show cause notice was required to be issued much less a formal domestic inquiry. It is a settled position of law that when an employee is forewarned repeatedly to improve his/her work, there is no requirement of further opportunity of hearing. Such a termination cannot be termed as 'retrenchment' warranting compliance with provisions of Sections 25-F and 25-G of the ID Act, contrary to the observations of the Labour Court. For the said proposition, reliance was placed on the following judgments:-

- (i) **Maria Thomas Gonsalves v. Concept Pharmaceuticals (P) Ltd., 2001 SCC OnLine Bom 1193**
- (ii) **Chaitanya Prakash v. H. Omkarappa, (2010) 2 SCC 623**

33. Relief of reinstatement granted by the Labour Court is wholly illegal and unwarranted and without taking into consideration critical factors, crucial for determining the feasibility of granting reinstatement, such as existence and availability of the vacancy of a Deputy Chief Photographer at this stage, in the Petitioner Company, as also the alternative employment of Respondent No.2. Admittedly, Respondent No.2 has been gainfully employed since December, 2006. Moreover, 14 years have elapsed since the termination of Respondent No.2 and Petitioner has undergone several structural/reorganisational changes and there is no vacancy to reinstate Respondent No.2 at the same or comparable designation. It is a settled law that discretionary relief must be granted by taking into consideration all attendant circumstances, such as length of service, nature of employment, availability of vacancy, financial capacity of the employer, delay in raising industrial dispute, closure of an Establishment, etc. For the said proposition, reliance was placed on the following judgments:-

- (i) **U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey, (2006) 1 SCC 479**
- (ii) **U.P. State Road Transport Corporation v. Man Singh, (2006) 7 SCC 752**
- (iii) **Sita Ram v. Moti Lal Nehru Farmers Training Institute, (2008) 5 SCC 75**
- (iv) **Uttar Pradesh State Electricity Board v. Laxmi Kant Gupta, (2009) 16 SCC 562**

- (v) **PVK Distillery Ltd. v. Mahendra Ram**, AIR 2009 SC 2205
- (vi) **Jagbir Singh v. Haryana State Agriculture Mktg. Board**, (2009) 15 SCC 327
- (vii) **Rajasthan State Road Transport Corporation, Jaipur v. Phool Chand**, (2018) 18 SCC 299
- (viii) **Gopinath & Anr. v. Harischandra & Ors.**, (2019) 16 SCC 245

34. Labour Court has failed to apply its mind while granting the relief of full back wages since 30.11.2006, despite the fact that Respondent No.2 had consistently admitted that he was gainfully employed. Assuming for the sake of argument that the Labour Court was of the view that Respondent No.2 was entitled to the relief of back wages, the Labour Court ought to have granted the back wages after deducting the earnings of Respondent No.2 in his alternative employments and only the differential amount should have been awarded.

CONTENTIONS OF RESPONDENT NO.2

35. Petitioner herein has laid a challenge to the Award on the ground that Respondent No.2 is not a 'workman' under Section 2(s) of the ID Act and that the termination is a termination simpliciter on account of unsatisfactory work. Challenge is also laid to the relief of reinstatement with full back wages. However, none of the challenges raised can be examined by this Court within the scope of judicial review under Article 226 of the Constitution of India, 1950, as these are questions of fact and evidence, on which the learned Labour Court is the final arbiter.

36. Insofar as the status of Respondent No.2 as 'workman' is concerned, Labour Court has elaborately examined the issue, based on pleadings and evidence as well as the documents on record, including reference to several judgments of the Hon'ble Supreme Court and different High Courts. Findings rendered by the Labour Court ought not to be interfered in a writ jurisdiction, more particularly, when the Petitioner has led no evidence to establish that Respondent No.2 was discharging managerial functions or had supervisory responsibilities. A finding that Respondent No.2 is a 'workman' under Section 2(s) of the ID Act, is a finding of fact, based on the nature of duties, which Respondent No.2 was able to establish through evidence and it is a settled law that findings of fact rendered by the Industrial Forums are beyond the scope of interference in a judicial review.

37. Learned Labour Court has rightly relied on the provisions of the WJ Act and the definition of 'working journalist' under Section 2(f) of the said Act and has come to a conclusion that Respondent No.2 was a 'working journalist'. A close scrutiny of the said provision shows that a 'news photographer' employed in a supervisory capacity is a 'working journalist'. Sub-clause (ii) of Section 2(f) makes a clear distinction between a person undertaking supervisory responsibilities, in contrast to a person having supervisory functions mainly of a 'managerial nature'. This distinction is also found in the definition of 'workman' under the ID Act. However, this provision of Special Law, i.e. WJ Act makes it clear beyond a doubt that a 'news-photographer' is a 'working journalist' by law, unless it is proved that he discharges managerial functions while holding a supervisory post. Unlike the definition of 'workman' under

Section 2(s) of the ID Act, the WJ Act does not prescribe a wage limit for restricting the definition of a 'working journalist' even if exercising supervisory or managerial functions.

38. Additionally, Section 3 of WJ Act makes it clear that for a 'working journalist', the provisions of the ID Act will govern the employment terms and the procedures, except for a slight modification relating to the period of notice for the purpose of Retrenchment, under Section 25-F of the ID Act. From the scheme of the Special Law, it is evident that the provisions of ID Act were sought to be incorporated in the WJ Act to provide an inbuilt adjudicatory and safeguarding mechanism in respect of 'working journalist', including the manner in which their services have to be terminated etc. It is also a settled law that a working journalist under Section 2(f) of the WJ Act is also a workman under Section 2(s) of the ID Act as propounded by this Court in **Statesman Ltd. v. Lt. Governor & Ors.**, 1974 SCC OnLine Del 127; Bombay High Court in **Indian Express News Papers (Bombay) Ltd. v. K. Kurunakaran**, 1980 Mah LJ 308 and Patna High Court in **Behar Journals Ltd. Patna v. Ali Hasan and Another**, (1959) SCC OnLine Pat 122.

39. Petitioner did not plead before the Labour Court that Respondent No.2 was discharging managerial functions. In fact, the pleadings in the writ petition before this Court also indicate that the case of the Petitioner was restricted to claiming that Respondent No.2 was discharging supervisory functions. Respondent No.2 in his cross-examination categorically denied the suggestion that he was undertaking managerial functions and responsibilities. Assuming without admitting that

Respondent No.2 exercised supervisory functions, yet by virtue of Section 2(f), he would be deemed to be a 'working journalist' in the absence of evidence that he worked in a managerial capacity. The best evidence put forth by the Petitioner was the exchange of emails, with a view to establish the alleged under-performance of Respondent No.2 as well as his status as a supervisor. A close perusal of the documents would show that from time to time the officials of the Petitioner were pointing out the alleged deficiencies and shortcomings in the photographs taken by Respondent No.2 and the lack of team spirit. However, in none of the emails was there even a whisper that Respondent No.2 was performing any job other than as a news photographer and rather the emails are a pointer to the fact that the primary and substantive role of Respondent No.2 was that of a photographer. The post in question on which Respondent No.2 was working at the relevant time essentially entailed knowledge and experience as a news photographer working in the field and involved no supervisory or managerial responsibilities. Therefore the Labour Court has rightly concluded that Respondent No.2 was a 'working journalist' under Section 2(f) of the WJ Act and consequentially a 'workman' under Section 2(s) of the ID Act and the award calls for no interference.

40. It is a fundamental and settled law that a permanent and regular employee cannot be terminated by an order simpliciter, if it is a punitive order. Labour Court has come to a clear finding that the termination was punitive and there is no evidence to prove to the contrary. The justification sought to be rendered by the Petitioner that Respondent No.2 was terminated for incompetence and deteriorating performance is

misconceived. A 'workman' can only be terminated in accordance with the procedure established by law and not at the whims of the Management. Respondent No.2 had worked for more than 19 years and had unblemished and exemplary service record as a news photographer. There was no past instance of misconduct, incompetence or misdemeanor. The allegations of under-performance were made for the first time by Mr. Desmond Boylan in 2006 and the termination followed soon thereafter, in a most abrupt manner, without any show cause notice/ imputation of charges and / or a Domestic Inquiry. A complete go-by was given to the procedures under the industrial adjudication mechanism as well as the Principles of Natural Justice. The following judgments were relied upon by learned counsel for Respondent No.2:-

- (i) **D.K. Yadav v. J.M.A. Industries Ltd.**, (1993) 3 SCC 259
- (ii) **Uptron India Limited v. Shammi Bhan**, (1998) 6 SCC 538
- (iii) **Scooter India Limited v. M. Mohd. Yaqub**, (2001) 1 SCC 61

41. Respondent No.2 has been rightly awarded the relief of reinstatement as his termination was found to be illegal and unfair by the Labour Court. The purpose of so holding would be defeated if Respondent No.2 is not restored to his original position and allowed to reap the fruits of successful litigation. The terms of employment of Respondent No.2 with the Petitioner entitled him to pension, apart from terms and conditions which are far superior to those under the Wage Board Settlements, applicable to journalists in India. If the relief of reinstatement had not been granted, with continuity of back wages, Respondent No.2 would have been deprived of the difference in the

wages as well as pensionary benefits. In so far as the relief of back wages is concerned, it is a consequential benefit arising out of reinstatement looking into the fact that the termination was unfair, illegal and unjustified. Labour Court has observed that termination was motive driven to victimize the workman and an unfair practice on the part of the Management. In any event, gainful employment by itself is not a ground to deny complete back-wages to a workman as held by the Hon'ble Supreme Court in **S.S. Shetty v. Bharat Nidhi Ltd.**, AIR 1958 SC 12 and by this Court in **G.E. Capital Transportation Financial Services Ltd. v. Tarun Bhargava**, (2012) 190 DLT 185. Respondent No.2 had truthfully disclosed before the Labour Court that he had remained employed in the interregnum period along with the details of the period of employment and the salaries drawn under different employers. Therefore, this Court may modify the relief to the extent of awarding the differential amounts towards back wages by deducting the amounts received during the gainful employment and the wages payable by the Petitioner. Reliance was placed on the following judgments:-

- (i) **Hindustan Tin Works Pvt. Ltd. v. The Employees of Hindustan Tin Works Pvt. Ltd. and Ors.**, (1979) 2 SCC 80
- (ii) **Surendra Kumar Verma v. Central Industrial Tribunal-cum-Labour Court**, (1980) 4 SCC 443
- (iii) **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya**, (2013) 10 SCC 324
- (iv) **Principal, Delhi College for Arts and Commerce v. Sunita Sharma & Anr.**, 2013 SCC OnLine Del 391
- (v) **Hindustan Times Ltd. v. Arun Kumar**, 2016 SCC OnLine Del 2608

42. The argument of the Petitioner that the burden to prove that Respondent No.2 was a 'workman' was on Respondent No.2, which he failed to discharge and the Labour Court has wrongly placed the burden on the Petitioner, is misplaced. Petitioner had admitted in the pleadings and has also averred in the writ petition herein that Respondent No.2 is governed by the WJ Act. Respondent No.2 had proved that he was a 'working journalist' under the WJ Act, being a news photographer and thus covered under the substantive definition of 'workman' under Section 2(s) of the ID Act by elaborating on the nature of his duties. Therefore, the onus shifted on the Petitioner to prove that Respondent No.2 was covered under the 'exceptions' to the definition of 'workman' and 'working journalist', which as rightly held by the Labour Court, Petitioner failed to discharge.

43. Petitioner failed to produce any documentary evidence to prove that Respondent No.2 performed supervisory functions. Reliance on the Global Role Framework, on a closer scrutiny, proved to the contrary. The document defines the work profile of a Senior Photographer and is a standard document applicable to the Petitioner-Management and its principal Company, globally. The scope of the job profile indicates that while a Senior Photographer has an established network of contacts within the location of immediate area and is able to manage stringer networks, but he has no control over the staff in any manner, whatsoever.

44. I have heard the learned counsels for the parties and given careful cogitation to their rival contentions.

ANALYSIS AND FINDINGS

SCOPE OF INTERFERENCE

45. Scope of judicial review by this Court in the Awards of the Labour Court, under Article 226 of the Constitution of India, is the first issue that pronouncedly emanates for consideration. The argument of Respondent No.2 is that this Court does not sit as a Court of Appeal and even if the decision of an Industrial Forum is erroneous, it is impervious to jural interference, unless there is a jurisdictional error committed by the Labour Court, while the Petitioner argues that the Labour Court has come to an erroneous finding that Respondent No.2 is amenable to the jurisdiction of the Labour Court and this calls for an interference in the impugned Award.

46. The aforesaid issue flagged by the parties, can be examined from two different angles. The first part of the objection would in effect relate to the areas in which a writ of certiorari can be issued and the second part would be the limitations in interfering with the findings of a Labour Court, both on facts and law. In so far as the first part is concerned, it is settled law that writs of certiorari are intended to enable the High Courts to quash the decisions of Subordinate Courts or Tribunals, where they act wholly without jurisdiction or in excess of it or refuse to exercise the jurisdiction vested in them. Writ can also be issued if the Subordinate Court commits an error apparent on the face of the record, resulting in manifest injustice. However, as held by the Hon'ble Supreme Court in a number of judgments that howsoever wide the jurisdiction may be, it does not entitle the High Court to sit as a Court of Appeal and examine the

correctness of the decision to come to an alternate view, which according to the High Court, is a better view.

47. In the case of **Hari Vishnu Kamath v. Syed Ahmad Ishaque**, AIR 1955 SC 233, the Hon'ble Supreme Court held that a patent error such as a decision in ignorance or disregard of a provision of law can be corrected by writ of certiorari, but not a mere wrong decision. It was also held that the Court issuing a writ of certiorari acts in exercise of supervisory jurisdiction and will not interfere with findings of fact reached by the Subordinate Court, even if erroneous.

48. In **Syed Yakoob (supra)**, the Supreme Court delineated the contours of a writ of certiorari as follows:-

“7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or properly, as for instance, it decides a question without giving an opportunity, be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to

be. In regard to 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. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath v. Syed Ahmad Ishaque [(1955) 1 SCR 1104] NagandraNath Bora v. Commissioner of Hills Division and Appeals Assam [(1958) SCR 1240] and Kaushalya Devi v. Bachittar Singh [AIR 1960 SC 1168])

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

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

49. From a reading of the above judgments, what is discernible is that amongst others, two pre-requisites must be kept in the backdrop before an interference is made in an order impugned and a writ of certiorari is issued quashing the order viz. (a) Certiorari is not an Appellate jurisdiction; and (b) there must exist an apparent error of law in the judgment impugned.

50. Insofar as the second part of the preliminary objection is concerned, the law with respect to scope of interference in the awards of the Labour Courts under Articles 226 and 227 of the Constitution of India is no longer *res integra*. The Hon'ble Supreme Court has elaborately and perspicuously explained the scope and ambit of judicial interference in several judgements and held and reaffirmed that the Labour Court is the

final adjudicator on facts and evidence. In this context, I may refer to the judgment of the Hon'ble Supreme Court in **P.G.I. of Medical Education & Research v. Raj Kumar**, (2001) 2 SCC 54, relevant para of which is as under:-

“9. The Labour Court being the final court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect. In the event, however the finding of fact is based on any misappreciation of evidence, that would be deemed to be an error of law which can be corrected by a writ of certiorari. The law is well settled to the effect that finding of the Labour Court cannot be challenged in a proceeding in a writ of certiorari on the ground that the relevant and material evidence adduced before the Labour Court was insufficient or inadequate though, however, perversity of the order would warrant intervention of the High Court. The observation, as above, stands well settled since the decision of this Court in Syed Yakoob v. K.S. Radhakrishnan [AIR 1964 SC 477 : (1964) 5 SCR 64] .”

51. It is a settled law that evidence led before the Trial Courts or the Labour Courts and the findings thereon must be outrageously defying logic so as to call for interference by a higher Court. In this context, I may refer to the judgments in **Rajinder Kumar Kindra v. Delhi Administration**, (1984) 4 SCC 635; **Kuldeep Singh v. Commissioner of Police**, (1999) 2 SCC 10; **Gamini Bala Koteswara Rao v. State of AP**, (2009) 10 SCC 636; **Babu v. State of Kerala**, (2010) 9 SCC 189; **Dr. Sunil Kumar Sambhudayal Gupta v. State of Maharashtra**,

(2010) 13 SCC 657, SR Tiwari v. Union of India, (2013) 6 SCC 602. In Management of Madurantakam Cooperative Sugar Mills Ltd. v. S. Viswanathan, (2005) 3 SCC 193 and M.P. State Electricity Board v. Jarina Bee, (2003) 6 SCC 141, the Hon'ble Supreme Court expounded the law on the extent to which a writ court can interfere in the awards of the Labour Courts or Industrial Tribunals. The binding principles that can be culled out are that the Labour Court / Industrial Tribunal is the final fact-finding authority and unless the findings are perverse or based on no evidence, Writ Court should not interfere. Perversity would pervade the decision of the Labour Court if relevant material is ignored or irrelevant material is considered. Sufficiency or inadequacy of evidence cannot be a ground for interference and nor would a Writ Court be justified in interfering only on the ground that a different view was possible on the facts of the case.

52. Recently, a Co-ordinate Bench of this Court in **DDA v. Mool Chand**, (2017) SCC OnLine Del 9249 reiterated the principle that the Labour Court is the final fact finding Authority and I quote:-

“28.Relying on the principles enunciated in the above decision, a catena of pronouncements of the Supreme Court, including Management of Madurantakam Cooperative Sugar Mills Ltd. v. S. Viswanathan: (2005) 3 SCC 193, P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar (2001) 2 SCC 54 and M.P. State Electricity Board v. Jarina Bee: (2003), 6 SCC 141, followed, which may be regarded as having laid down, authoritatively, the following principles:

(i) The Labour Court/Industrial Tribunal is the final fact finding authority.

(ii) The High Court, in exercise of its powers under Article 226/227, would not interfere with the findings of fact recorded by the Labour Court, unless the said findings are perverse, based on no evidence or based on illegal/unacceptable evidence.

(iii) In the event that, for any of these reasons, the High Court feels that a case for interference is made out, it is mandatory for the High Court to record reasons for interfering with the findings of fact of the Labour Courts/Industrial Tribunal, before proceeding to do so.

(iv) Adequacy of evidence cannot be looked into, while examining, in writ jurisdiction, the evidence of the Labour Court.

(v) Neither would interference, by the writ court, with the findings of fact of the Labour Court, be justified on the ground that a different view might possibly be taken on the said facts.”

53. I may usefully refer to the judgment of this Court in **DTC v. Bijender Singh**, 2018 SCC Online Del 8852, wherein the Court has also elaborately explained on what constitutes ‘perversity’ in a decision and the relevant paras are as under:-

“29. Thereafter, relying on the well-known decisions in Management of Madurantakam Cooperative Sugar Mills Ltd. v. S. Viswanathan, (2005) 3 SCC 193, P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar, (2001) 2 SCC 54 and M.P. State Electricity Board v. Jarina Bee, (2003) 6 SSC 141, I had culled out the following principles, regarding the role of this Court while reviewing, judicially, the award or order of the Labour Court or Industrial Tribunal.

(i) The Labour Court/Industrial Tribunal is the final fact finding authority.

(ii) *The High Court, in exercise of its powers under Article 226/227, would not interfere with the findings of fact recorded by the Labour Court, unless the said findings are perverse, based on no evidence or based on illegal/unacceptable evidence.*

(iii) *In the event that, for any of these reasons, the High Court feels that a case for interference is made out, it is mandatory for the High Court to record reasons for interfering with the findings of fact of the Labour Courts/Industrial Tribunal, before proceeding to do so.*

(iv) *Adequacy of evidence cannot be looked into, while examining, in writ jurisdiction, the evidence of the Labour Court.*

(v) *Neither would interference, by the writ court, with the findings of fact of the Labour Court, be justified on the ground that a different view might possibly be taken on the said facts.*

(vi) ***“Perversity”, for its part, is attributed to a judicial/quasi judicial decision if the decision ignores/excludes relevant material, considers irrelevant/inadmissible material, is against the weight of evidence, or so outrageously defies logic as to suffer from irrationality.***

(vii) *In examining whether a decision is, or is not, perverse, the classic test, of the reasonable man's conclusion on the facts before the authority concerned would apply.*

(viii) *Inadequacy of evidence, or the possibility of reading the evidence in a different manner, would not amount to perversity.*

30. *Mool Chand (supra) was followed by me, later, in D.T.C. v. Chander Singh. The said decision was carried, in appeal, by the DTC, to the Supreme Court, by way of SLP No. 5306/2018, which was dismissed, by the Supreme*

Court, vide order dated 9th March, 2018, clearly holding that no case for interference, with the judgment of this Court, existed.”

(Emphasis supplied)

54. It would also be relevant to refer to the judgment of the Hon’ble Supreme Court in **Bhuvnesh Kumar Dwivedi v. Hindalco Industries Ltd.**, (2014) 11 SCC 85, relevant para of which is as under:-

“22. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer Point (i) in favour of the appellant.”

55. Reiterating the limitations on scope of interference, the Hon’ble Supreme Court in the case of **Deepali Gundu (supra)**, in the context of reinstatement and back wages awarded by the Labour Court held as under:-

“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 wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.”

56. Examined on the touchstone and anvil of the aforementioned judgments and the settled law, the preliminary point that arises is whether the issues raised by the Petitioner can at all be considered and determined by this Court in the present writ petition. The primordial contention of the Petitioner is that Respondent No.2 is not a ‘workman’ under the ID Act and was thus not entitled to approach the Labour Court for redressal of his grievances under the industrial disputes resolution mechanism. In my view, determination of the said question is the very foundation of the jurisdiction of the Labour Court as only a ‘workman’ as defined under Section 2(s) of the ID Act can seek a reference to a Labour Court and raise the disputes regarding his service conditions. The issue goes to the root of the jurisdiction of the Industrial Forum and therefore it is open to this Court in a writ jurisdiction to determine whether or not Respondent No.2 is a ‘workman’ under the ID Act, keeping in view the settled jurisprudence on the writs of certiorari, concerning the nebulous doctrine of error apparent on the face of the Award or the other parameters laid down by the Hon’ble Supreme Court, subscribing the factors on which a writ Court can interfere. This issue is thus answered in favour of the Petitioner.

‘WORKMAN’ UNDER SECTION 2(S) OF THE ID ACT

57. Before examining who is a ‘workman’ under Section 2(s) of the ID Act, it would be relevant to refer to the provisions of Section 2(s) of the ID Act, which read as under:

“2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

xxx

xxx

xxx

2 [(s) “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person— (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or (ii) who is employed in the police service or as an officer or other employee of a prison; or (iii) who is employed mainly in a managerial or administrative capacity; or (iv) who, being employed in a supervisory capacity, draws wages exceeding 3 [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.]”

58. By virtue of an Amendment w.e.f. 29.08.1956, brought about by the Amending Act 36 of 1956, the definition of ‘workman’ under Section 2(s) of the ID Act underwent a significant change, inasmuch as ‘workman’ now included categories of persons who were employed to do ‘supervisory’ and ‘technical’ work, in addition to the earlier categories of

skilled and unskilled manual or clerical work. Definition of 'workman' was further amended by Amending Act 46 of 1982, which was brought into force with effect from 21.08.1984 and by virtue of this amendment, categories of workmen employed to do 'operational' work came to be included in the definition along with those doing non-manual unskilled and skilled work.

59. In the case of **Burmah Shell (supra)**, the Hon'ble Supreme Court was concerned with a question as to whether categories of employees including a Transport Engineer could fall under Section 2(s) under the definition, as it stood prior to the 1984 Amendment. The primordial issue that the Hon'ble Supreme Court was required to consider was whether an employee was required to necessarily fall in one or the other of the four classes mentioned in the substantive part of the definition in order to be a workman or whether it was enough to show that he was excluded by way of the exceptions. The Hon'ble Supreme Court held that an employee can be said to be a workman, if he is employed to do manual, unskilled, skilled, technical, operational, clerical or supervisory work, for hire or reward. Employees who did not perform any of these jobs were outside the scope of the word 'workman' under Section 2(s) of the ID Act. The Hon'ble Supreme Court further observed that if every employee of an Industry was to be a workman except those mentioned in the four exceptions, these four classifications need not have been mentioned in the definition and a 'workman' could have been defined as a person employed in an industry except in cases where he was covered by one of the exceptions. Relevant para of the judgment is as follows:-

“5. For an employee in an industry to be a workman under this definition, it is manifest that he must be employed to do skilled or unskilled manual work, supervisory work, technical work or clerical work. If the work done by an employee is not of such a nature, he would not be a workman. Mr Chari on behalf of the Association, however, put forward the argument that this definition is all comprehensive and contemplates that all persons employed in an industry must necessarily fall in one or the other of the four classes mentioned above and, consequently, the Court should proceed on the assumption that every person is a workman; but he may be taken out of the definition of “workmen” under the four exceptions contained in the definition. The two exceptions with which we are primarily concerned are Exceptions (iii) and (iv). Under Exception (iii), even a workman, who is employed mainly in a managerial or administrative capacity, goes out of the definition of “workmen”, while under Exception (iv), persons, who are employed in a supervisory capacity, go out of the definition, provided they either draw wages exceeding Rs 500 per mensem or exercise, by the nature of the duties attached to the office or by reason of the powers vested in them, functions mainly of a managerial nature.

6. We are unable to accept this submission. In the case of May and Baker (India) Ltd. v. Workmen [(1961) II LLJ 94] this Court had to consider the correctness of a decision of a Tribunal which had held that one Mukerjee, an employee in an industry, was a workman under the Act, because he was not employed in a supervisory capacity. The Court held:

“The Tribunal seems to have been led away by the fact that Mukerjee had no supervisory duties and had to work under the directions of his superior officers. That, however, would not necessarily mean that Mukerjee's duties were mainly manual or clerical. From what the Tribunal itself has found it is clear that Mukerjee's duties were mainly neither clerical nor manual. Therefore, as Mukerjee was not a workman, his case would not be

covered by the Industrial Disputes Act and the Tribunal would have no jurisdiction to order his reinstatement.”

In that case, the Court thus held Mukerjee not to be a workman on the ground that his work was neither clerical nor manual which was the nature of the work envisaged in the definition to make an employee a workman. It is true that that decision was given on the definition of “workman” as it stood before the amendment of 1956 when the words “supervisory” and “technical” did not occur in the definition. Mr Chari's submission is that the amendment in 1956 introduced the words “supervisory” and “technical” with the object of making the definition all-comprehensive; but, on the face of it, it cannot be so. If every employee of an industry was to be a workman except those mentioned in the four exceptions, these four classifications need not have been mentioned in the definition and a workman could have been defined as a person employed in an industry except in cases where he was covered by one of the exceptions. The specification of the four types of work obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the word “workman” without having to resort to the exceptions. An example, which appears to be very clear, will be that of a person employed in canvassing sales for an industry. He may not be required to do any paper work, nor may he be required to have any technical knowledge. He may not be supervising the work of any other employees, nor would he be doing any skilled or unskilled manual work. He would still be an employee of the industry and, obviously, such an employee would not be a workman, because the work, for which he is employed, is not covered by the four types mentioned in the definition and not because he would be taken out of the definition under one of the exceptions.”

60. This Court in **Kirloskar Brothers Ltd. v. Presiding Officer, Labour Court**, 1975 SCC OnLine Del 187 held that the Trial Court should adopt a positive approach and see whether the particular employee is a workman and not that whether negatively seen, the employee falls within the exceptions under Section 2(s). If he does not fall within the exceptions, then by process of elimination, he is to be held to be a workman. It was further held that Courts are required to see that a person is a workman as opposed to what may be called a ‘non-workman’ and not whether he is a workman because he is not a Manager or one employed in an administrative capacity. Following the principles laid down by the Hon’ble Supreme Court in **Burmah Shell (supra)**, this Court held as under:-

“10. In order to make a reference to a Labour Court or a Tribunal of an industrial dispute the first point that must engage the attention of the appropriate Government is to decide whether the complaining employee is a “workman”. Even if reference is made of a dispute then the Labour Court or the Tribunal must first apply its mind to this problem for unless the employee concerned is a workman the question of adjudication of an industrial disputes does not arise. In my opinion the approach has to be a positive approach and not a negative approach. In other words, what has to be seen is whether the particular employee is a workman and not whether the employee concerned falls within the exceptions mentioned in Section 2(s) and if he does not fall in one of the exceptions then by process of elimination he is held to be a “workman”. A social legislation like the Industrial Disputes Act confers certain rights and obligations upon certain categories of persons. Those rights and obligations must be limited to be attracted only in the case of such persons as are covered by the statute. Certain rights are conferred upon a “workman” as

defined by Section 2(s) of the Act. Therefore, those rights are available only to persons who can be called workman and not to all those who are not covered by the exceptions given in Section 2(s). To put in another way what has to be seen is whether a person is a workman as opposed to what may be called “non-workman” and not whether he is a workman because he is not a Manager or one employed in an administrative capacity. It is possible that an employee in a given case may not be employed in managerial and administrative capacity or in supervisory capacity and yet he may not be a workman. If the approach is that every employee is a “workman” but the benefits of raising an industrial dispute is not available to those who are subject to the Army Act, or the Air Force Act or the Navy (Discipline) Act or who is employed in the police service or as an officer or other employee of a prison or who is employed mainly in a managerial or administrative capacity; or who being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature, then, in my opinion, the approach would be incorrect. The proper approach in law would be to first see whether an employee is a workman and then see whether any of the exceptions are attracted. Reading the definition of the word “workman” I find that it is necessary that a person must be employed in an industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward. Thus the first thing to find out is whether the employee concerned is employed to do manual or clerical work, be it skilled or unskilled, technical or non-technical. If that be so, then he would be workman even if he is employed in a supervisory capacity unless by virtue of being employed, in supervisory capacity his wages exceed Rs. 500/- or his duties or powers convert his employment into one mainly of managerial nature. On the other hand if manual or clerical work is only a small part of the duties of the person concerned and incidental to his main work, which is not manual or

clerical then such a person would not be a workman. In Management of May and Baker (India) Ltd. v. Their workmen and Appellants, A.I.R. 1967 S.C. 678 (3), that court was concerned with construing Section 2(s) of the Industrial Disputes Act as it stood before the amendment of 1956. The rule laid down was similar to the one which I have propounded above and I think the rule still holds good despite the substitution of clause (s) of Section 2 by the amendment Act, 36 of 1956. In the case of May and Baker, referred to above the Supreme Court came to the conclusion that inasmuch as the main work of the employee in that case was that of canvassing and any clerical or manual work that he had to do was incidental to his main work of canvassing the employee could not be regarded as a person falling within the ambit of the term "workman". On good authority, therefore, I hold that the approach has to be positive, as said by me earlier and not negative to find out whether an employee would fall within the ambit of the term workman."

61. Constitutional Bench of the Hon'ble Supreme Court in the case of **H.R. Adyanthaya v. Sandoz (India) Ltd.** (1994) 5 SCC 737, after considering the judgments in **Burma Shell (supra)**; **Western India Match Company Co. Ltd. v. Workmen** (1964) 3 SCR 560; **A. Sundarambal v. Govt. of Goa, Daman and Diu** (1988) 4 SCC 42 and several other judgments, held as under:-

"18. The legal position that arises from the statutory provisions and from the aforesaid survey of the decisions may now be summarised as follows.

19. Till 29-8-1956 the definition of workman under the ID Act was confined to skilled and unskilled manual or clerical work and did not include the categories of persons who were employed to do 'supervisory' and 'technical' work. The said categories came to be included in the definition w.e.f. 29-8-

1956 by virtue of the Amending Act 36 of 1956. It is, further, for the first time that by virtue of the Amending Act 46 of 1982, the categories of workmen employed to do 'operational' work came to be included in the definition. What is more, it is by virtue of this amendment that for the first time those doing non-manual unskilled and skilled work also came to be included in the definition with the result that the persons doing skilled and unskilled work whether manual or otherwise, qualified to become workmen under the ID Act.

20. The decision in *May & Baker case* [(1961) 2 LLJ 94 : AIR 1967 SC 678 : (1961) 2 FLR 594] was delivered when the definition did not include either 'technical' or 'supervisory' or 'operational' categories of workmen. That is why the contention on behalf of the workmen had to be based on the manual and clerical nature of the work done by the sales representatives in that case. The Court had also, therefore, to decide the category of the sales representative with reference to whether the work done by him was of a clerical or manual nature. The Court's finding was that the canvassing for sale was neither clerical nor manual, and the clerical work done by him formed a small fraction of his work. Hence, the sales representative was not a workman.

21. In *WIMCO case* [(1964) 3 SCR 560 : AIR 1964 SC 472 : (1963) 2 LLJ 459], the dispute had arisen on 18-8-1961 under the U.P. Industrial Disputes Act and at the relevant time the definition of the workman in that Act was the same as under the Central Act, i.e., the ID Act which had by virtue of the Amending Act 36 of 1956 added to the categories of workmen, those doing supervisory and technical work. However, the argument advanced before the Court was not on the basis of the supervisory or technical nature of the work done by the employees concerned, viz., inspectors, salesmen and retail salesmen. The argument instead, both before the Industrial Tribunal and this Court was based on the clerical work put in by them, which was found to be 75 per cent of their work. This Court confirmed the finding of the Tribunal that the employees

concerned were workmen because 75 per cent of their time was devoted to the writing work. The incidental question was whether the sales-office and the factory and the factory-office formed part of one and the same industrial establishment or were independent of each other. The Court observed that it would be unreasonable to say that those who were producing matches were workmen and those who sold them were not. In other words, the Court did hold that the work of selling matches was as much an operational part of the industrial establishment as was that of manufacturing.

22. *In Burmah Shell case [(1970) 3 SCC 378 : (1971) 2 SCR 758 : AIR 1971 SC 922 : (1970) 2 LLJ 590] the workmen involved were Sales Engineering Representatives and District Sales Representatives. The dispute had arisen on 28-10-1967 when the categories of workmen doing supervisory and technical work stood included in the definition of workman. The Court found that the work done by the Sales Engineering Representatives as well as District Sales Representatives was neither clerical nor supervisory nor technical. An effort was made on behalf of the workmen to contend that the work of Sales Engineering Representatives was technical. The Court repelled that contention by pointing out that the amount of technical work that they did was ancillary to the chief work of promoting sales and the mere fact that they possessed technical knowledge for such purpose, did not make their work technical. The Court also found that advising and removing complaints so as to promote sales remained outside the scope of the technical work. As regards the District Sales Representatives, the argument was that their work was mainly of clerical nature which was negated by the Court by pointing out that the clerical work involved was incidental to their main work of promoting sales. What is necessary further to remember in this case is that the Court relied upon its earlier decision in May & Baker case [(1961) 2 LLJ 94 : AIR 1967 SC 678 : (1961) 2 FLR 594] and pointed out that in order to qualify to be a workman under the ID Act, a person concerned had to satisfy that he fell*

in any of the four categories of manual, clerical, supervisory or technical workman.

23. *However, the decisions in the later cases, viz., S.K. Verma [(1983) 4 SCC 214 : 1983 SCC (L&S) 510 : (1983) 3 SCR 799] , Delton Cable [(1984) 2 SCC 569 : 1984 SCC (L&S) 281 : (1984) 3 SCR 169] , and Ciba Geigy [(1985) 3 SCC 371 : 1985 SCC (L&S) 808 : 1985 Supp (1) SCR 282] cases did not notice the earlier decisions in May & Baker [(1961) 2 LLJ 94 : AIR 1967 SC 678 : (1961) 2 FLR 594] , WIMCO [(1964) 3 SCR 560 : AIR 1964 SC 472 : (1963) 2 LLJ 459] and Burmah Shell [(1970) 3 SCC 378 : (1971) 2 SCR 758 : AIR 1971 SC 922 : (1970) 2 LLJ 590] cases and the very same contention, viz., if a person did not fall within any of the categories of manual, clerical, supervisory or technical, he would qualify to be workman merely because he is not covered by either of the four exceptions to the definition, was canvassed and though negatived in earlier decisions, was accepted. Further, in those cases the Development Officer of the LIC, the Security Inspector at the gate of the factory and Stenographer-cum-Accountant respectively, were held to be workmen on the facts of those cases. It is the decision of this Court in A. Sundarambal case [(1988) 4 SCC 42 : 1988 SCC (L&S) 892] which pointed out that the law laid down in May and Baker case [(1961) 2 LLJ 94 : AIR 1967 SC 678 : (1961) 2 FLR 594] was still good and was not in terms disowned.*

24. *We thus have three three-Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz., manual, clerical, supervisory or technical and two two-Judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-Judge Bench decisions which have without referring to the decisions in May & Baker [(1961) 2 LLJ 94 : AIR 1967 SC 678 : (1961) 2 FLR 594] , WIMCO [(1964) 3 SCR 560 : AIR 1964 SC 472 : (1963) 2 LLJ 459] and Burmah Shell [(1970) 3 SCC 378 : (1971) 2 SCR 758*

: AIR 1971 SC 922 : (1970) 2 LLJ 590] cases have taken the other view which was expressly negatived, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.

25. *What is further necessary to remember is that in none of the aforesaid decisions which we have discussed above, the word 'operational' or the words 'skilled' and 'unskilled' independently of 'manual' fell for consideration as the amendment under which they were introduced came into operation for the first time w.e.f. 21-8-1984 and the dispute involved in the aforesaid decisions were of the prior dates."*

62. A bare perusal of the aforesaid judgments and the definition of 'workman' under Section 2(s) leads to an inevitable conclusion that an employee would come within the purview of the definition if he: (i) is employed in any industry; and (ii) performs any manual, unskilled, skilled, technical, operational, clerical or supervisory work.

PREDOMINANT/PRIMARY DUTY IS THE DECIDING FACTOR

63. It is equally well settled that designation or nomenclature/name of a post is not material while dealing with the question of an employee being a workman. There is no scintilla of doubt on the proposition of law argued by learned counsel for the Petitioner that it is the principal / primary / pre-dominant duties that the employee performs, which form

the criteria to determine his status as a workman as held in a number of judgements. However, in order to avoid prolixity, I may only refer to a few in the present judgment. In **S.K. Maini (supra)**, the Hon'ble Supreme Court held as under:-

*“9. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that whether or not an employee is a workman under Section 2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any strait-jacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases. When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organisations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it. In this connection, reference may be made to the decision of this Court in *Burmah Shell Oil Storage and Distribution Co. of India Ltd. v. Burmah Shell Management Staff Assn.* [(1970) 3 SCC 378 : (1971) 2 SCR 758 : (1970) 2 LLJ 590] In *All India Reserve Bank Employees' Assn. v. Reserve Bank of India* [(1965) 2 LLJ 175 : AIR 1966 SC 305 : (1966) 1 SCR 25] it has been held by this Court that the word ‘supervise’ and its derivatives are not words of precise import and must often be construed in the light of context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with the power of inspection and superintendence of*

the manual work of others. It has been rightly contended by both the learned counsel that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the employee concerned and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also does some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of 'workman' as defined in Section 2(s) of the Industrial Disputes Act."

64. In **Hussan Mithu Mhasvadkar v. Bombay Iron & Steel Labour Board and Anr.**, (2001) 7 SCC 394, the Supreme Court held as follows:-

"10. No doubt, in deciding about the status of an employee, his designation alone cannot be said to be decisive and what really should go into consideration is the nature of his duties and the powers conferred upon as well as the functions assigned to him. Even if the whole undertaking be an industry, those who are not workmen by definition may not be benefited by the said status. It is the predominant nature of the services that will be the true and proper test. Operations of the Government which are pure and simpliciter administrative and of a governmental character or incidental thereto cannot be characterized to be "industrial" in nature, be they performed by a department of the Government or by a specially constituted statutory body to whom anyone or more of such functions are delegated or entrusted with. When, as in this case, as disclosed

from Section 15 of the Act as also the provisions of the Scheme, the primary duties of an employee and the dominant purpose, aim and object of employment was to carry out only certain specific statutory duties in the matter of effective enforcement and implementation of the Welfare Scheme in order to ameliorate and rehabilitate a particular cross section of labour, and, if need be, on the basis of his own decision which calls for a high degree of discretion and exercise of power to prosecute the violator of the provisions of the Act, Rules and the provisions of the Scheme, we are unable to accord our approval to the claim made on behalf of the appellant that he can yet be assigned the status of a “workman”, without doing violence to the language of Section 2(s) and the very purpose and object of the ID Act, 1947. That apart, even judging from the nature of powers and the manner of its exercise by an Inspector, appointed under the Act, in our view, the appellant cannot be considered to be engaged in doing any manual, unskilled, technical, operational, clerical or supervisory work and the mere fact that in the course of performing his duties he had to also maintain, incidentally, records to evidence the duties performed by him, day to day, cannot result in the conversion of the post of “Inspector” into any one of those nature noticed above, without which, as held by a Constitution Bench of this Court in the decision in H.R. Adyanthaya case [(1994) 5 SCC 737 : 1994 SCC (L&S) 1283] the appellant cannot fall within the definition of “workman”. The powers of an Inspector and duties and obligations cast upon him as such are identical and akin to law enforcing agency or authority and also on a par with a prosecuting agency in the public law field.”

65. It is, therefore, clearly a question of fact as to whether an employee is a workman and can be determined only on the basis of the evidence on record, which would clearly reflect the principal or predominant nature of the actual duties or work performed by the employee.

BURDEN OF PROOF FOR PROVING 'WORKMAN' UNDER SECTION 2(s), IDA

66. The burden to prove that an employee is a workman, is undoubtedly on the employee, in as much as it is a well settled principle of law that the primary burden of proof to establish a fact, rests on the person who asserts it. In this regard, I may refer to the authoritative pronouncement of the Hon'ble Supreme Court in **State of Gujarat v. Pratamsingh Narsinh Parmar** (2001) 9 SCC 713 and **Workmen of Nilgiri Cooperative Marketing Society Ltd. v. State of Tamil Nadu** (2004) 3 SCC 514. Again in **Reserve Bank of India v. S. Mani** (2005) 5 SCC 100, the Hon'ble Supreme Court held that it is only if the initial burden of proof, which was on the workman, was discharged to some extent that a finding can be returned in respect of the defence of the Management. A plea having been set up by the workman, the initial burden is on him to show that he was employed in the capacity that he claims and only once the onus and burden cast on him is discharged by placing some material on record, the Management is required to displace the case set up by the workman by leading positive evidence. In **UCO Bank v. Presiding Officer**, 1999 SCC OnLine Del 657, this Court held as under:-

“12. Now I shall deal with the second issue relating, to burden of proof: Principles regarding burden of proof are stipulated in Chapter-VII of Indian Evidence Act, 1872 (Sections 101 to 114A). General Principle, which is laid down in these Sections, particularly Sections 101 and 102 is that he who asserts must i.e. burden of proof is the obligation to adduce evidence to the satisfaction of the Tribunal or Court in order to establish the existence or non-existence of a fact contended to by a party.

Burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for a negative is usually incapable of proof. Dealing with aforesaid Principles contained in Indian Evidence Act. Mr. O.P. Malhotra in his book entitled “The Law of Industrial Disputes”, Fifth Edition (Volume-I) Page-842 states as under:

“The expression ‘burden of proof’ has two distinct and often blurred meanings viz. (i) the burden of proof as a matter of law and pleadings. This, burden, as it has been called, for establishing a case, whether by preponderance of evidence or beyond a reasonable doubt, and (ii) the burden of proof in the sense of introducing evidence. In the Indian Evidence Act. S. 101 uses the expression in the former sense while S. 102 uses it in the latter sense. The former type of onus viz. the burden of proof of the facts in issue is usually known as the general burden of proof or the burden of proof on pleadings. This type of burden of proof has been called by jurists, the ‘legal burden’. The legal or persuasive burden is the burden borne by the party who will lose the issue unless he satisfies the Tribunal of the facts to the appropriate degree of conviction and it is aptly termed the “Risk of Non Persuasion” by Wigmore. The phrase “legal burden” was coined by Lord Denning while the phrase ‘persuasive burden’ was used by Dr. Glanville Williams Other jurists have referred to it as the “burden of proof on the pleadings”. This burden is entitled to be called the ‘legal burden’ because its incident is determined by the substantive law, and the adjective persuasive gives some indication of its real nature. The pleadings do not always indicate which party bears the burden, and the answer to a somewhat controversial question is assumed if it is said to be “fixed”, for the epithet is designed to emphasise the fact that this burden does not shift in the course of a trial a matter of words about which there is room for two views in the case of issues to which certain rebuttable

presumptions of law are applicable. The latter type of onus is called the professional or the tactical burden. The burden of proof in the first sense is fixed at the beginning of the trial by the state of pleadings and it is settled as a question of law, remaining unchanged, throughout the trial exactly where the pleadings place it and never shifts in any circumstances whatsoever. The burden of proof in the second sense, however, constantly shifts, as one scale of evidence or the other preponderates”.

13. *The point for consideration is as to whether these rules of evidence would be applicable even in adjudication proceedings under the Industrial Law. This question was decided by Supreme Court in the case of Shankar Chakravarti v. Britannia Biscuit Co. Ltd., (1979) II LLJ 194 wherein Supreme Court observed that though the Adjudicator/Authorities under the Act have all the trappings of a court, they are not hide-bound by the statutory provisions of the Evidence Act. Section-11(3) of the Industrial Disputes Act confers on them powers of a Civil Court under the Code of Civil Procedure only in respect of matters specified therein. Such Authorities are created for adjudication of Industrial disputes between the parties arrayed before them. Their function being of a quasi-judicial nature, they have to adjudicate such disputes on the basis of pleadings of the parties and the evidence adduced before them in accordance with Rules of natural Justice. Therefore, any party appearing before anyone of such Authorities must make a claim or demur the claim of the other side. When there is a burden upon the party to establish a fact so as to invite a decision in its favour, it has to lead the evidence. The obligation to lead evidence to establish an averment made by a party is on the party making the averment. The test would be who would fail if no evidence is led. Such party, therefore, must seek opportunity to lead evidence.”*

67. In this context, I may also allude to another judgment of this Court in **Standing Conference (supra)**, relevant paras of which read as under:-

“8. While answering issue No. 2, i.e. whether the claimant was a workman or not, the Tribunal observed that the claimant, in this statement, has stated that he was a foreman but still a workman. The management had taken the stand that the respondent, being a foreman, was working as a supervisor and he was required to supervise the work of other workmen, working under him. The Tribunal refuted the argument and observed that it was for the management to prove on record that the claimant was falling in one of the exceptions as mentioned in Section 2(s) and he was doing the work either of managerial category or of supervisory category and he was having powers to sanction or recommend leaves. Since there was no evidence led by the management, the claimant, has to be held as a workman. I consider that the Tribunal misdirected itself by putting the onus of proving that the respondent was a workman on the management. The respondent was appointed as a Foreman. A foreman, as per dictionary meaning, has supervisory duties. If the respondent claimed that he was a workman, the onus to prove that he was a workman, was on the Respondent No.2 himself. In AIR 2004 SC 4179 Mukesh K. Tripathi v. Sr. Divisional Manager, LIC and others, Supreme Court, considering its earlier judgments in AIR 1967 SC 678 Management of May and Baker (India) Ltd. v. Their Workmen, 1964 (3) SCR 560 Western India Match Co. Ltd. v. Workmen, 1973 SCC 378 and 1994 (5) SCC 737 H.R. Adyanthaya v. Sandoz(India) Ltd., and observed as under:

“The Constitution Bench summarized the legal position that arose from the statutory provisions and from the decisions rendered by this Court, stating:

“Till 29.8.1956 the definition of workman under the ID Act was confined to skilled and unskilled manual or clerical

work and did not include the categories of persons who were employed to do 'supervisory' and 'technical work'. The said categories came to be included in the definition w.e.f. 29.8.1956 by virtue of the Amending Act 36 of 1956. It is, further, for the first time that by virtue of the Amending Act 46 of 1982, the categories of workmen employed to do 'operational' work came to be included in the definition. What is more, it is by virtue of this amendment that for the first time those doing non-manual unskilled and skilled work also came to be included in the definition with the result that the persons doing skilled and unskilled work whether manual or otherwise, qualified to become workmen under the ID Act. "(para 16)

"From the perusal of the award dated 28.5.1996 of the Tribunal, it does not appear that the Appellant herein had adduced any evidence whatsoever as regard the nature of his duties so as to establish that he had performed any skilled, unskilled, manual, technical or operational duties. The offer of appointment dated 16/7/1987 read with the Scheme clearly proved that he was appointed as an apprentice and not to do any skilled, unskilled, manual, technical or operational job. The onus was on the Appellant to prove that he is a workman. He failed to prove the same. Furthermore, the duties and obligations of a Development Officer or the Corporation by no stretch of imagination can be held to be performed by an apprentice." (Para 23)

9. The view taken by the Tribunal that the respondent was not shown to be doing any managerial or supervisory duties by the management, is contrary to the settled law. In fact, it is now settled law that in order to be covered under Section 2(s), a workman has to prove that he was doing one of the categories of work as enumerated in Section 2(s) i.e. manual, skilled, semi skilled, clerical, operational, technical or supervisory. In case of a supervisor, the salary must be below Rs. 1600/-. A Foreman, in a construction of a building, does not do any manual, clerical, skilled or semi skilled work. He essentially

has to supervise the work of construction at various stages. A construction of building has several steps. The first step is digging of trenches for laying foundation. The second step is laying foundation and raising superstructure comprising of walls, concrete slabs, pillars, laying of RCC roof etc. While the workforce involved in this entire work are labour, meson, bar benders etc., their work is supervised by the supervisors, foremen, architects. Supervisor and foreman have not to do work manually, but they have simply to give instructions to the labours and supervise their work so that work is done properly and efficiently. Despite being a foreman, the respondent claimed to be a workman, so it was obligatory on the respondent to prove that work, as specified under Section 2(s) of the Industrial Disputes Act, was being done by him. The respondent failed to show that he was doing any manual, skilled, semi skilled, clerical, technical job. He did not specify the nature of his work. It has also come in evidence that he was the only foreman, employed by the management. I, therefore, consider that the order of the Tribunal, putting onus on the management to prove that the respondent was a workman, is a perverse order.”

68. It is thus manifestly clear that in order to be covered under the definition of ‘workman’ under Section 2(s) of the ID Act, the employee is required to show that the job of the employee falls within one or the other categories enumerated in the definition and merely showing that the employee has not performed supervisory or managerial duties does not *ipso facto* make him a workman, and the burden of proof clearly lies on the employee claiming the said status. Once the employee has discharged the onus by placing some material on record, Management has to displace the case by positive evidence. To this extent this Court accepts the contention of the learned counsel for the Petitioner.

APPLICABILITY OF IDA / WJA

69. Petitioner concedes that provisions of WJ Act are applicable to the Petitioner organization as it is a 'Newspaper Establishment' under Section 2(d) of the said Act *albeit* disputes that Respondent No. 2 is a 'working journalist' under the WJ Act and thus contests the jurisdiction of the Labour Court to entertain the claim of Respondent No. 2. In this regard, I may allude to para 26 of the writ petition as follows:-

“26. THAT the Ld. Presiding Officer failed to appreciate that since the Petitioner company falls under the definition of a “newspaper establishment” under section 2(d) of the Working Journalists Act, the Working Journalists Act and not the ID Act is applicable to the present case. Thus, Respondent No. 2 was wrongly considered as “workman” under the ID Act, when the true issue to be determined was whether Respondent No. 2 was a “working journalist” under the Working Journalists Act. The Impugned Award is, therefore, erroneous in so far as the Ld. Presiding Officer has failed to apply the correct law.”

70. *Per contra*, it is the case of Respondent No. 2 that his claim was tenable before the Labour Court as he is a 'working journalist' and thereby covered by the provisions of the ID Act. To give perspective to the contentions of the parties, it becomes important and relevant to examine the provisions of WJ Act in so far as they are applicable to the present controversy, which are extracted hereunder for ready reference:-

2. *Definitions:- In this Act, Unless the context otherwise requires:-*

xxx

xxx

xxx

“(f) “working journalist” means a person whose principal avocation is that of a journalist and [who is employed as such, either whole-time or part-time, in, or in relation to, one or more

newspaper establishments], and includes an editor, a leader-writer, news-editor, sub-editor, feature-writer, copy-tester, reporter, correspondent, cartoonist, news-photographer and proof-reader, but does not include any such person who-

(i) is employed mainly in a managerial or administrative capacity; or

(ii) being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature;”

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3. Act 14 of 1947 to apply to working journalists .-(1) The provisions of the Industrial Disputes Act, 1947 (14 of 1947), as in force for the time being, shall, subject to the modification specified in sub-section (2), apply to, or in relation to, working journalists as they apply to, or in relation to, workmen within the meaning of that Act.

(2) Section 25-F of the aforesaid Act, in its application to working journalist, shall be construed as if in clause (a) thereof, for the period of notice referred to therein in relation to the retrenchment of a workman, the following periods of notice in relation to the retrenchment of a working journalist had been substituted, namely:-

(a) six months, in the case of an editor, and

(b) three months, in the case of any other working journalist.”

71. WJ Act, 1955 was enacted to regulate certain conditions of service of working journalists and other persons employed in Newspaper Establishments. Section 2(f) defines ‘working journalist’ as a person whose principal avocation is that of a journalist and is employed in or in relation to any Newspaper Establishment and includes certain categories

such as Editor, etc. mentioned therein, which are merely inclusive and illustrative. Section 3 thereof, provides that provisions of Industrial Disputes Act, 1947 shall apply to the working journalists, subject to modifications mentioned in Sub-Section (2) of Section 3. WJ Act of 1955 is a complete Code, in so far as disputes between the employer and working journalists are concerned and by virtue of Section 3, the disputes have to be settled according to the provisions of the ID Act.

72. In **Express Newspapers v. Labour Court**, 1963 SCC OnLine AP 254, Respondent was working as a journalist and was dismissed by the Express Newspapers Pvt. Ltd. and reference was made by the Government under the ID Act. This was challenged by the Petitioner / Management on the ground that the Labour Court had no jurisdiction to entertain the matter. The contention was rejected by the Hon'ble Supreme Court and it was held that all provisions of the ID Act, as if the matter so referred was specified in Schedule II of the ID Act, would apply and the Labour Court would have the jurisdiction to deal with the matter. To the same effect are the observations of a Division Bench of the Patna High Court in **Samachar Bharti v. Kedar Nath**, AIR 1972 Pat 397.

73. It was vehemently canvassed on behalf of Respondent No.2 that he is a working journalist under the WJ Act and therefore a 'workman'. The said plea of Respondent No.2 finds support from the observations of the Patna High Court in **Behar Journals (supra)** and is accepted by this Court. Relevant passage from the judgment is as follows:-

“6. In support of the application the first point urged on behalf of the petitioner is that respondents No. 2, being a sub-editor, was not a workman within the meaning of the Industrial

Disputes Act and as such, there was no dispute between the management and the workman with regard to the point in question, and the reference was void. The argument, in my opinion, is based on misconception of law. An Act called the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (Act XLV of 1955), was enacted by the Parliament to regulate certain conditions of service of working journalists and other persons employed in newspaper establishments.

“Working journalist” has been defined in S. 2(f) of that Act to mean a person whose principal avocation is that of a journalist and who is employed as such in, or in relation to, any newspaper establishment, and includes an editor, a leader-writer, news editor, sub-editor, feature-writer, copy-taster, reporter, correspondent, cartoonist, news-photographer and proof-reader, but does not include any such person who (i) is employed mainly in a managerial or administrative capacity, or (ii) being employed in a supervisory capacity, performs either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature.

Thus, according to this definition, respondent No. 2, a sub-editor, was a working journalist. Section 3(1) of that Act lays down that the provisions' of the Industrial Disputes Act, 1947 (XIV of 1947), as in force for the time being, shall, subject to the modifications specified in sub-s. (2) (with which we are not concerned in the present case) apply to, or in relation to, working journalists as they apply to, or in relation to, workmen within the meaning of that Act. It is, therefore, manifest that respondent No. 2 was a workman within the meaning of the Industrial Disputes Act and the reference, therefore, was perfectly valid. The argument raised on behalf of the petitioner on this point, therefore, fails.”

74. In **Bennett Coleman Co. Ltd. v. Mumbai Mazdoor Sabha**, (1996) 2 Mah LJ 823, the Bombay High Court referred to the judgment in **Statesman (supra)** and held as under:

*“21. The learned counsel for the petitioners relied upon the judgment of High Court of Delhi in the case of **The Management of Statesman Ltd. v. Lt. Governor, Delhi** reported in 1975 Lab. I.C. 543. In this case, B.C. Misra, J. speaking for the Court observed that the modification of the Industrial Disputes Act in its application to Working Journalists was indicated by sub-section (2) of section 3 and other provisions of Act (45 of 1955) but subject to these modifications the Industrial Disputes Act, 1947 applied mutatis mutandis to the working journalists. In this case, the High Court of Delhi observed that the working journalists were entitled to all the benefits flowing from Industrial Disputes Act subject to modification indicated by sub-section (2) of section 3 and other provisions of Act (45 of 1955) and it was therefore not necessary to decide whether they were really workmen as such. The said judgment thus contains some observations to the effect that the question as to whether the working journalists were workmen or not was kept open. If any observations are to be spelt out from the said judgment to the effect that the working journalists were not workmen within the meaning of section 2(s) of the Industrial Disputes Act, 1947, I respectfully disagree with such observations.”*

‘WORKING JOURNALIST’ UNDER WJ ACT

75. The next question that needs examination is as to who is a ‘working journalist’ under Section 2(f) of WJ Act. In **Management of Rashtradoot, Jaipur v. Rajasthan Working Journalist Union and Ors.** (1971) 3 SCC 96, the Hon’ble Supreme Court upheld the findings of the Labour Court that the Respondent who was an Editor was a working journalist under Section 2(f), even when his duties extended to

appointment of Sub-Editors, giving directions for payment of salaries and dealing with the leave applications of the employees. It was held that since it was not denied by the Management that Respondent was working as an Editor, the other functions imputed to him were in addition to his functions as an Editor. Relevant paras of the judgment are as under:-

“6. The Labour Court after an exhaustive discussion of the evidence, both oral and documentary, produced before it, came to the conclusion that Shri Dinesh Khare was a ‘working journalist’ within the definition contained in Section 2(f) of the Act and that he was, therefore, entitled to all the benefits accruing thereunder.

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13. It was not denied that Shri Khare had been working as an Editor. The other functions imputed to him were in addition to his functions as an Editor. The question arises, if on this state of the pleadings and evidence as discussed earlier, it can be said that the conclusions of the Labour Court are either perverse or based on no evidence or are otherwise tainted with such a serious legal infirmity that they should be reopened by us under Article 136 of the Constitution. We are unable to hold that they are. There is legal evidence on the record both oral and documentary, on which the Labour Court could lawfully base its conclusion. We find no justification for interfering with it.

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15. In the final result the conclusions of Labour Court must be held to be unassailable.”

76. In **R. Varadachari (supra)**, the Madras High Court held that the claimant was not a workman / working journalist as he was employed as a Regional Manager exercising full managerial and supervisory control. It was found as a matter of fact that the claimant was not entrusted with

supervisory duty incidentally or that his mere designation was a Regional Manager but as a matter of fact he was controlling the entire Region and exercising all functions of a Manager. The Petitioner had himself admitted that he was in-charge of the entire Southern Region News Division and the entire administration of Madras Regional Office, its operations and all persons employed in the Southern Region were found to be under his supervision and control, employed in whatever capacity.

77. In a recent judgment in the case of **Jagran Prakashan Limited and Ors. vs. Presiding Officer, Labour Court and Ors.**, 2020 (9) ADJ 44 the Allahabad High Court while dealing with the issue of who a 'working journalist' is, held as under:-

“25. A conjoint reading of the aforesaid provisions together with the preamble of the Act shows that it is statute brought 'to regulate certain conditions of service of working journalists and other persons employed in newspaper establishments', to borrow the precise phraseology of the preamble. The Working Journalists Act is, thus, by no means a wholesome or a complete legislation, governing or regulating the entire gamut of service conditions of working journalists and other newspaper employees. Section 3 of the Act, under reference, clearly shows that to working journalists, who are otherwise not workmen within the meaning of the Central Act, the provisions of the Central Act have been extended by virtue of sub-Section (1) of Section 3 in the same manner as they apply to workman, subject to modifications, detailed in sub-Section (2) of Section 3. The effect of Section 3 is that working journalists, as defined under the Working Journalists Act, who are not otherwise workmen, would be treated to be so and extended all benefits available to workmen under the Central Act, subject to modifications provided under sub-Section (2) of Section 3.

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28. *The question, however, remains whether a junior plate maker employed with a newspaper establishment is a workman by virtue of Section 3 of the Working Journalists Act, alone. To the understanding of this Court, the more pertinent issue would be whether a junior plate maker is at all a working journalist, and if not, is he still a workman, either under the Central Act or the State Act?*

29. *A working journalist has been defined under Section 2(f) of the Working Journalists Act, the terms of which have been extracted above. A reading of the definition of the working journalist shows that it defines in substance and in general terms who a working journalist is, and then in the later part, furnishes illustrative categories of newspaper employees who would qualify for working journalists. The categories indicated are inclusive and illustrative; not exhaustive. There is, in the last part of the definition, a clause, that would exclude anyone, who qualifies under the first part as a working journalist from that category.*

30. *Now, what is to be seen is, whether a plate maker qualifies as a working journalist, under Section 2(f) of the Working Journalists Act? A working journalist is primarily defined as a person whose principal avocation is that of a journalist, but the word journalist is nowhere defined in the statute. Therefore, the import and meaning of the word 'journalist' has to be understood according to its ordinary meaning, falling back for its definition on extrinsic sources. The Cambridge International Dictionary of English (published by the Press Syndicate of the University of Cambridge) defines the word 'journalist' as, "a person who writes news stories or articles for a newspaper or magazine, or broadcasts them on radio or television." The essence of the avocation of journalism is literary or intellectual contribution made to print or electronic media in the form of news, stories, articles or photographs and the like, in some form or the other. The specific illustrations in the inclusive list of who a journalist is, under Section 2(f) of the Working Journalists Act, answer the*

above description of a journalist as understood in ordinary parlance. It is, thus, a journalist, employed, as such, with a newspaper establishment, who alone can qualify as a working journalist under the Act, last mentioned. The illustrative categories of employees are all functionaries, who are bound by a common thread about their different functions in a newspaper establishment - the common thread being their literary or intellectual contribution to newspaper publication, in one way or the other. Clearly, therefore, other functionaries or employees working in the newspaper establishment, who do not qualify for a journalist, judged on the essence of their function, would not be working journalist under the Working Journalists Act.”

78. In **Marshal Braganza v. First Labour Court (by S.R. Samant, Presiding Officer) and Another**, (1975) SCC OnLine Bom 2, Bombay High Court held as under:-

“11. It may be that in the narrow sense photography is an art but it is a highly developed science.

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*In my judgment, the execution of the work of a cameraman involves special technical knowledge. The nature of the work of the cameraman indicates that for the successful creation of reality in a motion picture he depends upon the display of his imagination and the exercise of artistic faculty and the application of technical knowledge as distinguished from manual dexterity. In reaching this conclusion, I am guided by the observations made by ther Lordships of the Supreme Court in the case of *Burmah Shell* quoted above. I therefore, hold that the petitioner would fall within the meaning of the definition of the word “workman” as defined in S.2(s) of the Act.”*

79. Therefore, whether a person is a working journalist or not has to be ascertained by posing a question as to whether the principal avocation of

a person is that of a journalist. The word 'journalist' is not defined under the WJ Act and therefore its meaning would have to be understood according to its ordinary meaning as a person who authors News stories/Newspaper Articles/Magazine Articles or broadcast them on Radio or Television as defined in 'The Cambridge International Dictionary of English'. As held by the Allahabad High Court, the essence of the avocation is a literary or intellectual contribution made to print or electronic media in the form of stories or articles and the illustrations in Section 2(f) of the WJ Act answer the said description of a journalist as understood in ordinary parlance. Therefore, to be a working journalist, one must be employed as a journalist with a Newspaper Establishment and included in the illustrative categories mentioned in Section 2(f) of the WJ Act. It is not enough that he is not covered under the exceptions to the definition, which are found in sub-clauses (i) and (ii) of Section 2(f) of WJ Act. Careful reading of sub-clause (ii) indicates that a person is excluded from the definition of working journalist, if he or she is working in a supervisory capacity and performing functions mainly of a managerial nature. The sequitur is that if a person has supervisory duties with no or insignificant managerial responsibilities, he or she would still be a working journalist.

80. Applying the above principles, this Court finds merit in the contention of Respondent No.2 that for excluding an employee from the definition of working journalist, twin conditions need to be established viz.: (i) the employee was working in the supervisory position; and (ii) while holding the supervisory position, he or she was discharging managerial functions. There is also merit in the contention that the

provisions of the ID Act would be applicable to the present case if it is established that Respondent No.2 is a working journalist under Section 2(f) of the WJ Act.

ISSUE FRAMED BY THE LABOUR COURT

81. Learned counsel for the Petitioner had emphasized that the Labour Court had wrongly framed the issue and in case it wanted to render findings under the WJ Act, the correct or the additional issue framed should have been whether Respondent No.2 was a 'working journalist' under the WJ Act. It was prayed that the matter should therefore be remanded for framing of correct/additional issue. The contention of the Petitioner deserves to be rejected for many-fold reasons. Firstly, perusal of the Labour Court Award clearly reflects that parties had argued with respect to the applicability of WJ Act at length and even in the present writ petition, there is a clear admission that the said Act is applicable. Labour Court has recorded in the Award that the Management had argued that the workman is not a working journalist as per Section 2(f) of the WJ Act. Relevant part is as under:-

“The Management has also argued that the workman-herein is not a “working journalist” as per S. 2(f) of the Working Journalist Act, 1955 which is worded thus: ...”

82. During the course of arguments, it was not the case of the Petitioner that the observations of the Labour Court are incorrect or contrary to the arguments addressed and this Court finds no reason to disbelieve the observations made by the Labour Court in this regard. It is not the case of the Petitioner even today that any objection was taken by the Petitioner before the Labour Court that no arguments could be

addressed with respect to the provisions of WJ Act in the absence of any issue being framed in that regard. More importantly, Petitioner did not challenge the order when the issue was initially framed by the Labour Court.

83. Secondly, even before this Court, substantial arguments have been addressed on the issue, as to whether Respondent No. 2 is a working journalist or not, by both sides and detailed pleadings as well as written submissions have been filed, both on facts as well as on law. I may note that a similar issue had come up before a Coordinate bench of this Court in **A. Spiegel Verlag Rudolf Augustein Gmbh & Co. KG v. Govt. of NCT of Delhi & Anr.**, 2019 SCC OnLine Del 8624 and the Court, having heard the arguments on the issue at length, adjudicated the matter instead of remanding it back to the Labour Court.

84. Thirdly, it is significant to note that the case of the Petitioner before the Labour Court was that Respondent No.2 worked in a supervisory capacity. It was not the case of the Petitioner that Respondent No. 2 performed managerial or administrative functions, which is a *sine qua non* for excluding a person from the definition of ‘working journalist’. The documents relied upon by the Petitioner before the Labour Court were the e-mails exchanged between the senior officials of the Petitioner and Respondent No. 2 as well as a compendium named ‘Role Beacon’, which according to the Petitioner enumerated the role and responsibility of a senior Photographer 4. A perusal of the documents, heavily relied upon by the Petitioner, both before the Labour Court and before this Court, does not even remotely suggest that Respondent No. 2 was performing functions in a managerial capacity and therefore for

obvious reasons the case set up by the Petitioner was that Respondent No. 2 performed supervisory roles.

85. The argument of learned counsel for the Petitioner can be looked at from another prism. Status of an employee is determined by the pre-dominant duties performed by him during the course of his employment. The fundamental and inherent nature of the work performed by an employee cannot undergo a change, post termination of his services and/or during litigation. In the present case, Respondent No. 2 was employed with the Petitioner till 2006, when his services were terminated. When Respondent No. 2 filed a claim before the Labour Court, his exact nature of employment was known to the Petitioner and in the written statement, it was open to the Petitioner to plead the nature of job that Respondent No.2 was deployed to carry out. It was also open to lead evidence to support the pleadings. Categorical stand, however, was taken in the written statement that Respondent No. 2 was employed in a 'supervisory capacity' *albeit* in the context of ID Act. While it may be true that no issue was framed on the status of Respondent No. 2 under the WJ Act, but what this Court fails to understand is how the alleged supervisory nature of job, purportedly supported by e-mails and 'Role Beacon', could change post-2006 and pertinently could the Petitioner improve upon the emails and 'Role Beacon', assuming the issue was framed with respect to the WJ Act, as contended by the Petitioner. Answer to the said question can only be in the negative. As per the stated case of the Petitioner, the nature of job of Respondent No. 2 was that of a Supervisor and a Supervisor cannot become a Manager during the course of litigation. The words 'Supervisor' and 'Manager' though may not be

strictly defined and may appear to be loose expressions, with no rigid frontiers and it may not be possible to precisely define where supervision ends and management begins, however, the two are not interchangeable. Thus, even if the issue was framed by the Labour Court, Petitioner could not have improved upon the e-mails or the Role Beacon which was the only evidence available with the management in the context of the functioning of Respondent No. 2. In this view also, this Court finds no reason to remand the matter back to the Labour Court.

NATURE OF EMPLOYMENT OF RESPONDENT NO. 2

86. The seminal and somewhat vexed issue that arises for consideration and which goes to the root of the jurisdiction of the Labour Court is the nature of employment of Respondent No.2. The entire pleadings of the writ petition are focused on showing that Respondent No.2 was performing supervisory functions and in order to substantiate the plea, Petitioner has placed reliance on the Global Role Framework, Role Beacon for Senior Photographer-4 and several emails exchanged between Respondent No.2 and his seniors, allegedly reflecting that he led small groups of photographers, assigned tasks to photographers / stringers, reviewed their work and mentored his subordinates. It is more than evident that it is not the pleaded case of the Petitioner that Respondent No.2, being employed in a supervisory capacity, performed either by nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature. In this view of the matter, in my view, taking the best case of the Petitioner that Respondent No.2 worked in a supervisory capacity, even if true, would

not exclude Respondent No.2 from the definition of ‘working journalist’ under Section 2(f) of the WJ Act. Quite apart, it is required to be noted that despite the stand of the Petitioner, the Labour Court did not view the case of the Petitioner in a narrow or a restricted compass of ‘supervisory functions’, but also examined if Respondent No. 2 performed managerial functions. It was extensively argued on behalf of the Petitioner that Respondent No. 2 was not a working journalist and therefore the Labour Court, after noting the meaning and connotation of the nomenclature ‘Manager’, analyzed the nature of duties from that perspective as well and came to a finding in favour of Respondent No.2. Be it noted that while canvassing the aforesaid argument before the Labour Court, Petitioner never raised any objection that an issue was not framed in that regard and it bears repetition to state that Petitioner never assailed the order of the Labour Court, wherein issue was framed under the ID Act.

87. While the Petitioner has neither pleaded nor established that Respondent No.2 was performing managerial functions, yet, in light of the judgements mentioned above, it would be necessary to examine if Respondent No.2 was able to discharge the burden of establishing that he was a ‘working journalist’ under Section 2(f) of the WJ Act. A plain and bare reading of Section 2(f) of the WJ Act clearly shows that a ‘working journalist’ is a person whose: (i) principal avocation is of a journalist; (ii) who is employed either whole time or part time in or in relation to newspaper establishment; and (iii) falls in one or more of the categories mentioned therein, which are merely illustrative and includes ‘news-photographer’. That Respondent No.2 was employed in a ‘newspaper establishment’ is undisputed. As far as ‘news-photographer’ is concerned,

the evidence on record is a pointer to the fact that the predominant duties of Respondent No.2 were that of a photographer. Even assuming for the sake of argument in favour of the Petitioner that Respondent No.2 in addition to his principal duties of a photographer coordinated and mentored the work of some juniors/stringers, it is not enough to take away the fact that his principal avocation was of a photographer. It has been clearly held by the Hon'ble Supreme Court in **Burmah Shell (supra)** and **Ananda Bazar Patrika (P) Ltd. v. Workmen** (1970) 3 SCC 248 as well as in **John Joseph Khokar vs. B.S. Bhadange**, 1997 SCC OnLine Bom 366 by the Bombay High Court that it is the primary duty and the predominant nature of employment, which is a decisive factor, and not any ancillary or additional duties, to determine if an employee is a 'workman' or not. Labour Court has rightly relied on the cross-examination of MW-1, wherein a specific question was put to the witness on the predominant duty of Respondent No.2 and the question and the answer is extracted hereunder for ready reference:-

“Q. Is it true that the predominant duty of the claimant was that of a photographer?”

Ans. It is partly true. (Vol. Apart from the role of photographer, claimant was also responsible as a Deputy Chief Photographer.)”

88. Respondent No.2 has clearly deposed in his affidavit that he was employed with the Management since June, 1987 as a Dark Room Assistant-cum-News Photographer as a regular employee. His last Designation was Deputy Chief Photographer and the nature of his duties

was that of Press Photographer. Relevant part of the affidavit is extracted hereunder:-

“That I was employed with the management since June 1987 as a Dark Room Assistant cum News Photographer as a regular employee. I was appointed by Mr. Michael Neale, South Asia Manager, Reuters. My last designation was Dy. Chief Photographer and my last drawn wages was Rs. 1,08,000/- per month cost to the company. The nature of my duties were that of a Press Photographer.”

89. Thus, Respondent No. 2 discharged the initial burden of proving that he was deployed as a photographer and the onus shifted on the Petitioner to prove to the contrary. In the cross-examination by the Management, there is not even a suggestion to Respondent No.2 that his principal nature of duties did not involve photography. It would be useful to allude to the document, heavily relied upon by the Petitioner, i.e. ‘Role Beacon’, which according to the Petitioner describes and prescribes the roles and responsibilities/accountabilities as well as technical/professional skills and competencies of a Senior Photographer-4. A reading of the document leaves no doubt that the primary/principal and predominant duties of Respondent No.2 were that of a ‘news-photographer’. Relevant portion is as under:-

“Role Purpose

What is the primary purpose of this role? How does it contribute to the achievement of overall business objectives?

Takes decisions on when and how to photograph and produce top level news, sports, entertainment and feature pictures in line with the principles of accuracy, independence and freedom from bias. Skilled in pro-active coverage of stories and taking key or leading roles in major assignments.

Major Responsibilities/Accountabilities

Decides which images to gather to meet coverage demands. Capable of major assignment logistical planning e.g. comms, staffing etc. May lead a small team of other staff photographers and stringers on a big story. In large centres, may play a role on a pictures desk, editing pictures copy as needed. Fully conversant with all aspects of digital photography, picture editing and processing systems including Panikon and Photoshop. Capable of being sent on assignment anywhere in the world and have the ability to transmit pictures. Able to deputise for local Chief Photographer as and when required. Embraces the principle of telling stories using the most suitable multimedia opportunities. May take on tutoring or mentoring duties.

Scope and Impact

- *Financial responsibilities (eg budget, revenue, gross sales etc)*
- *Business impact and geographic scope of role?*
- *People management responsibilities? (include typical team size)*

Typically operates within a location or across a small group of locations. Has an established network of contacts within location or immediate area. No staff responsibilities but able to manage stringer networks. Will possess direct injection rights.

Technical/Professional Skills & Competencies

What are the critical skills that a successful incumbent would possess; eg. fluent in German, expert at unbiased writing, expert decision maker, working knowledge of risk management, basic awareness of investment banking, expert at mitigating conflict.

Possesses an excellent eye for a picture. Has a proven ability to shoot pictures which show originality, flair and imagination

and demonstrates an ability to use pictures technology to capture and file images. He/she may have a specialism in one area and is able to writ basic captions as required.”

90. It is significant to note that the Petitioner had in evidence relied on several e-mails which were correspondences exchanged between Respondent No.2 and the Senior Officers in the hierarchy of the Petitioner. No doubt the purpose and intent of relying on this documentary evidence was primarily to show that Respondent No.2 was allegedly not working up to the expected standards and his performance was deteriorating, but close reading of the e-mails, as rightly pointed out by counsel for Respondent No.2, itself shows that the primary and substantive role was clearly that of a news-photographer. The e-mails disclose that the Senior Officers of the Petitioner were pointing out the deficiencies in his work, i.e. photographs and were critical of his role as a photographer and no part of the emails even remotely suggests or supports the case of the Petitioner that Respondent No.2 was performing managerial functions. This is clear from the e-mails dated 12.04.2006, 12.06.2006, 15.06.2006 etc. wherein the Management is critical about the quality, size and the number of photographs taken by Respondent No.2. Useful it would be in this regard to refer to observation in the judgment in **Marshal Braganza (supra)**, which has been heavily relied upon by the Labour Court. Para 11 has been quoted in the earlier part of the judgment.

91. In my view, therefore, Respondent No.2 had discharged the burden of proving that he was working in the capacity of a news-photographer and was therefore a ‘working journalist’ under Section 2(f) of the WJ Act. It was certainly open to the Management to plead that Respondent

No.2 fell in the exception to Section 2(f) and prove that he was working as a supervisor and performing functions of a managerial nature. However, Petitioner never pleaded that Respondent No.2 was performing managerial functions, for the obvious reason that they were conscious of the fact that Respondent No. 2 was never deployed in a managerial capacity.

92. Labour Court has delved into the definition of 'working journalist' which includes a 'news-photographer' within its ambit. Court has taken pains to distinguish and differentiate between supervisory, managerial and administrative functions, apart from delving at length on the definitions of 'manager' under various Dictionaries and has rightly observed that it is the primary duty and not the designation which is the determining factor. Labour Court has also carved out the distinction between an employee discharging a supervisory function and the one discharging supervisory function in conjunction with managerial/administrative functions. Carefully assessing the evidence led by the Petitioner, the Labour Court, after relying on the definition of the term 'Manager' and 'managerial functions' from various Dictionaries as also relied upon in various judgements, has undertaken the exercise of determining if Respondent No. 2 performed managerial functions and only thereafter has come to a conclusion that he neither performed supervisory nor managerial functions. In my view, the Labour Court has arrived at a correct finding, after posing the right question and analyzing the evidence. Labour Court, after examining the definition of 'working journalist' and 'workman' under the respective Statutes has, in my view, rightly concluded that being a workman, Respondent No. 2 was amenable

to its jurisdiction and the claim of Respondent No. 2 challenging the termination order and seeking reinstatement with full backwages was open to adjudication under the Industrial Disputes Resolution Mechanism Regime. This Court thus finds no infirmity with this part of the impugned Award. Needless to state that since Respondent No. 2 is a working journalist under Section 2(f) of the WJ Act, provisions of the ID Act were applicable to the present case, by virtue of Section 3 of the WJ Act. Therefore, the provisions of the ID Act would be applicable to the present case by virtue of Section 3 of the WJ Act.

LEGALITY OF RESPONDENT NO.2'S TERMINATION

93. The next issue that arises for consideration is whether the services of Respondent No.2 have been unfairly, unjustifiably and illegally terminated. There is no dispute that Respondent No.2 joined the services of the Petitioner in the year 1987 and was a regular employee. There is also no dispute that the services of Respondent No.2 were abruptly terminated *vide* letter dated 28.11.2006. The letter Ex. WW-1/5 reads as follows:-

*“Mr. Kamal Kishore
Delhi
28 November 2006
Dear Kamal*

- 1. You are employed with Reuters India Private Limited (Company) as a photographer in our Delhi establishment.*
- 2. In accordance with your contract of employment with the Company, you are required to perform your duties diligently, efficiently and to the satisfaction of your superiors. The nature of activities carried out by our Company enjoins upon all its employees (including you) to*

perform their duties efficiently and produce work of a very high standard.

3. *It has been observed that in the last 6 to 8 months, your work performance has been far below the required levels with the quality of your work dropping to unacceptably deficient levels.*

The quality of your work dropped so badly that most of your pictures had to be "spiked", meaning they could not be put into the Company's usable set of pictures for onward commercial licensing by the Reuters Group.

We from time to time counselled you and advised you to improve your performance including by way of several e-mails, These e-mails pointed to you specifically the deficiencies in your performance, with a view to giving you specific feedback and adequate opportunities to improve your performance (refer our e-mails to you including those dated 12 April 2006, 26 June 2006, 3 July 2006, 17 July 2006, 16 August 2006, and 25 August 2006). The following are the key deficiencies we brought to your attention in our various communications to you:

- a. *The quality of composition of your pictures has been very poor - to cite some of the many examples: (i) the pictures you provided of the Delhi Municipality's action against the outbreak of dengue looked amateurish (and had to be spiked), while our competitor's pictures of the same event were so good that one of them made it to the front page of a newspaper; (ii) the picture you sent about security arrangements at a shopping mall was badly composed and looked like men waiting at a bus stop; (iii) your 3 pictures of the Delhi monsoon were badly shot and mostly from a high position which never brings out the impact of the water in the picture, while our competitors sent one good picture each – both shot from ground level and their pictures “told” the story they were meant to tell.*

- b. You either did not use photo editing software or did not effectively use photo editing software to get a better "crop" of the pictures or enhance their quality. For example a picture you filed about a man selling balloons would have looked much better if you had a closer crop of it.*
 - c. You filed several unnecessary pictures which put avoidable workload on the editing desk-by way of examples, you sent 5 pictures of the Indian Prime Minister from the G7 Summit all of which were quite similar and uninteresting for commercial use; and you sent the 3 pictures of the Delhi monsoon referred to above.*
 - d. You lacked team work which is very essential for a conducive work environment in the Company and for synergistic output. For example, when you allocated work to a relatively new work colleague, you allocated two events which given the distance and the expected traffic conditions were impractical for the work colleague to cover.*
- 4. You are aware that our Company has to compete effectively not only among domestic players but also international players. The Reuters Group has stood for sterling quality of its information, pictures and news, and in order to maintain and better that quality each of its employees must work with a passion for producing quality output.*
- 5. As you will see we repeatedly brought to your notice the deficiencies in your performance as stated above (which are illustrative and not exhaustive). Further, we gave you constructive and specific feedback and suggestions as to how to improve the quality of your work; however you have not improved your performance and continue to produce work of unsatisfactory quality.*
- 6. You must know that the lacklustre quality of your work means the Company is unable to utilise your services to cover important events. In the circumstances, the Company*

has ended up paying you for services that are practically useless to it .- as the Company finds itself unable to risk its reputation for the highest standards by commercially offering for license your pictures which fall way below those standards. In addition such a situation has foisted on your colleagues undue burden to cover up for your deficiencies.

- 7. You have been given more than ample feedback, time and opportunity to improve your performance; however, your performance has shown no signs of improvement.*
- 8. In the circumstances, the Company is left with no choice but to terminate your employment. We shall be writing to you separately in this regard.*

Yours Truly

Desmond Boylan

Chief Photographer, India”

94. The reasons for termination were that the performance of Respondent No.2 had been far below the required levels in the last 6-8 months with the quality of the work dropping to unacceptably deficient levels. Most of the pictures taken by Respondent No.2 had to be ‘spiked’ and there was lack of team work, which was essential for a conducive work environment in the company and that despite time-to-time counseling and advises, Respondent No.2 failed to improve his performance. Respondent No.2 disputed the drop in performance and had placed on record documentary evidence to show that his work and performance had been commended and appreciated until in 2006, when Mr. Desmond was appointed as Chief Photographer and had nurtured ill-will towards Respondent No.2. Allegations of racial and discriminative behavior towards Respondent No.2 were also made. Assuming that the Management had issues with the performance of Respondent No.2, his

services could not be terminated on the ground of unsatisfactory work as Respondent No.2 was a regular employee and not a probationer. Even otherwise, the termination order itself indicates that there were allegations of poor performance etc. made against Respondent No.2 and therefore the order is not an order of termination simpliciter. Furthermore, it is a settled law that in the industrial regime, termination on ground of unsatisfactory service falls within the ambit of retrenchment. I may, in this regard, refer to the judgment in the case of **Karnataka State Road Transport Corporation v. M. Boraiah**, (1984) 1 SCC 244 relevant para of which is as under:-

“13. Once the conclusion is reached that retrenchment as defined in Section 2(oo) of the Disputes Act covers every case of termination of service except those which have been embodied in the definition, discharge from employment or termination of service of a probationer would also amount to retrenchment. Admittedly the requirements of Section 25-F of the Disputes Act had not been complied with in these cases. Counsel for the appellant did not very appropriately dispute before us that the necessary consequence of non-compliance of Section 25-F of the Disputes Act in a case where it applied made the order of termination void. The High Court, in our opinion, has, therefore, rightly come to the conclusion that in these cases the order of retrenchment was bad and consequently it upheld the Award of the Labour Court which set aside those orders and gave appropriate relief. These appeals are dismissed. There would be one set of costs. Consolidated hearing fee is assessed at Rs 5000. This amount shall be over and above the deposit made by the appellants to meet the costs of the respondents.”

95. In **Chartered Bank v. Chartered Bank Employees Union**, (1960) 3 SCR 441 it was held as under:-

“8. There is no doubt that an employer cannot dispense with the services of a permanent employee by mere notice and claim that the Industrial Tribunal has no jurisdiction to inquire into the circumstances in which such termination of service simpliciter took place. Many standing orders have provisions similar to para 522(1) of the Bank Award, and the scope of the power of the employer to act under such provisions has come up for consideration before Labour Tribunals many a time. In Buckingham and Company Ltd., Etc. v. Workers of the Company, Etc. [1952 LAC 490] the Labour Appellate Tribunal had occasion to consider this matter relating to discharge by notice or in lieu thereof by payment of wages for a certain period without assigning any reason. It was of opinion that even in a case of this kind the requirement of bona fides is essential and if the termination of service is a colourable exercise of the power or as a result of victimisation or unfair labour practice the Industrial Tribunal would have the jurisdiction to intervene and set aside such termination. Further it held that where the termination of service is capricious, arbitrary or unnecessarily harsh on the part of the employer judged by normal standards of a reasonable man that may be cogent evidence of victimisation or unfair labour practice. We are of opinion that this correctly lays down the scope of the power of the Tribunal to interfere where service is terminated simpliciter under the provisions of a contract or of standing orders or of some award like the Bank Award. In order to judge this, the Tribunal will have to go into all the circumstances which led to the termination simpliciter and an employer cannot say that it is not bound to disclose the circumstances before the Tribunal. The form of the order of termination is not conclusive of the true nature of the order, for it is possible that the form may be merely a camouflage for an order of dismissal for misconduct. It is therefore always open to the Tribunal to go behind the form and look at the substance; and if it comes to the conclusion, for example, that though in form the order amounts to termination simpliciter it in reality cloaks a dismissal for misconduct it will be open to it to set it aside as a colourable exercise of the power.”

96. The form of the termination order, on a plain reading, indicates that it is a punitive order whereby the services of a regular employee, who has rendered uninterrupted, continuous and unblemished service for over nineteen years, have been abruptly terminated. Termination order was not preceded by any charge sheet, followed by a domestic enquiry, affording a fair chance to Respondent No.2 to explain the allegations made, thereby obliterating the difference between a probationer and a regular employee and this is clearly brought out in the cross-examination of MW-1 as under:-

“Q. Is it true that neither any charge sheet was issued nor any domestic enquiry was held against the claimant?”

Ans. It is correct.

Q. I put it to you that at the time of termination of service of workman Sh. Desmond Boylan had no power to appoint or terminate the services of any employee in the company. What have you to say?

Ans. I am not aware whether Mr. Desmond Boylan at the particular point of time had the aforesaid power or not.”

97. In **Anoop Sharma v. Public Health Division, Haryana** (2010) 5 SCC 497 it was held by the Hon'ble Supreme Court that even a 'workman' employed in an industry who has been in a continuous service for not less than one year cannot be retrenched by the employer until conditions enumerated in Clauses (a) and (b) of Section 25-F of ID Act are satisfied. Provisions of Section 25-F are mandatory and non-

compliance renders the retrenchment a nullity. Relevant para is as follows:-

“16. An analysis of the above reproduced provisions shows that no workman employed in any industry who has been in continuous service for not less than one year under an employer can be retrenched by that employer until the conditions enumerated in clauses (a) and (b) of Section 25-F of the Act are satisfied. In terms of clause (a), the employer is required to give to the workman one month's notice in writing indicating the reasons for retrenchment or pay him wages in lieu of the notice. Clause (b) casts a duty upon the employer to pay to the workman at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.

17. This Court has repeatedly held that Sections 25-F(a) and (b) of the Act are mandatory and non-compliance therewith renders the retrenchment of an employee nullity—State of Bombay v. Hospital Mazdoor Sabha [AIR 1960 SC 610] , Bombay Union of Journalists v. State of Bombay [AIR 1964 SC 1617 : (1964) 6 SCR 22] , SBI v. N. Sundara Money [(1976) 1 SCC 822 : 1976 SCC (L&S) 132] , Santosh Gupta v. State Bank of Patiala [(1980) 3 SCC 340 : 1980 SCC (L&S) 409], Mohan Lal v. Bharat Electronics Ltd. [(1981) 3 SCC 225 : 1981 SCC (L&S) 478] , L. Robert D'Souza v. Southern Railway [(1982) 1 SCC 645 : 1982 SCC (L&S) 124] , Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court [(1980) 4 SCC 443 : 1981 SCC (L&S) 16] , Gammon India Ltd. v. Niranjana Dass [(1984) 1 SCC 509 : 1984 SCC (L&S) 144] , Gurmail Singh v. State of Punjab [(1991) 1 SCC 189 : 1991 SCC (L&S) 147] and Pramod Jha v. State of Bihar [(2003) 4 SCC 619 : 2003 SCC (L&S) 545].

18. This Court has used different expressions for describing the consequence of terminating a workman's service/employment/engagement by way of retrenchment without

complying with the mandate of Section 25-F of the Act. Sometimes it has been termed as ab initio void, sometimes as illegal per se, sometimes as nullity and sometimes as non est. Leaving aside the legal semantics, we have no hesitation to hold that termination of service of an employee by way of retrenchment without complying with the requirement of giving one month's notice or pay in lieu thereof and compensation in terms of Sections 25-F(a) and (b) has the effect of rendering the action of the employer as nullity and the employee is entitled to continue in employment as if his service was not terminated."

98. In **Management of Horticulture Department of Delhi Administration v. Trilok Chand & Anr.**, (1999) 82 DLT 747, this Court held that if an employee has rendered continuous service of more than 240 days in the twelve calendar months preceding the date of termination, he would be considered as a workman under Section 2(s) and cannot be terminated without complying with the provisions of the Act. In fact in **L. Robert D'Souza v. Executive Engineer, Southern Railway and Another**, (1982) 1 SCC 645 which was relied upon by the Labour Court, the Hon'ble Supreme Court held that even a casual or a seasonal workman cannot be retrenched without complying with the requirements of Section 25F of the Act if he has rendered continuous uninterrupted service of one year or more. Relevant para of the judgment in **Management of Horticulture Department (supra)** is as follows:-

"19. First, there is no material placed by the petitioner before the Labour Court in support of its contention that the workmen were appointed as seasonal workers for some specified period. On the other hand, workmen have given the evidence to the effect that they were appointed for indefinite period and were performing regular nature of job. It is also stated that they worked for more than 240 days in a calendar year and the total

period of service was two years or more. In the case of the workman in C.W. No. 2691 of 1999 the averment of the workman Sri Trilok Chand was that he was taken into employment as mali/beldar with effect from 1 November 1986 and he worked continuously when his services were terminated with effect from 29 March 1989 without assigning any valid reason. Similar statements are made by other workmen in other writ petitions. This version of workmen remained unrebutted. They having worked for more than 240 days continuously, their termination, would clearly be violative of S. 25F of the Act. Further such person would clearly come within the definition of workman under S. 2(s) of the Act. Similar view has been taken before this Court in the case of Municipal Corporation of Delhi v. Sukhvir Singh reported in 1994 (2) L.L.N. 720, on similar facts.”

99. I may also refer to a passage from the judgment of the Coordinate Bench in **A. Spiegel (supra)** which is as follows:-

“70. In view of the above discussion, it cannot be said that the findings of the learned Labour Court below, or the order passed by it as a consequence thereof, suffers from any such inherent illegality, jurisdictional error, or perversity, as would justify interference, therewith, by this Court, in exercise of the limited jurisdiction conferred, on it, in such cases, by Article 226 of the Constitution of India. I find no reason to differ with the finding, of the Labour Court, to the effect that Respondent No.2 was, in essence, a permanent employee of the petitioner and not a ‘freelancer’ and that, having uninterruptedly served the petitioner, solely and to the exclusion of all others, for 14 years, even without any artificial break, the decision of the petitioner to summarily terminate its relationship with Respondent No.2, by refusing to review the agreement between them beyond 30th April, 2012, amounts to “retrenchment”, within the meaning of Section 25-F of the ID Act, read with Section 3 of the Working Journalists Act. The said termination of employment has, therefore, to be characterised as illegal,

and the learned Labour Court cannot be said to have fallen into error in so holding.”

100. Having carefully perused the above judgements, it is palpably clear that law does not envisage termination of service of even a casual employee, who has rendered continuous service of more than 240 days in 12 calendar months, preceding the date of termination, without following the procedure of retrenchment under the ID Act, much less dispensing with the services of a regular employee with 19 years of dedicated service, without a prior blemish, without issuing a show cause notice/charge-sheet and/or holding a domestic inquiry. It also intrigues this Court, how the performance of an employee, with 19 years of service, suddenly drops to unacceptable levels and I may in this context refer to a line from a judgment of a Division Bench of this Court in **Narender Prakash Kohli v. UOI**, (2015) SCC OnLine Del 9299: “*a leopard does not lose his spots overnight, much less turns into a jackal*”. In view of this, I concur with the finding of the Labour Court that termination of Respondent No.2 was arbitrary, illegal and unjustified. Thus, the Labour Court has rightly decided both the issues in favour of Respondent No.2 and against the Petitioner.

RELIEF OF REINSTATEMENT

101. Learned counsel for the Petitioner had ubiquitously articulated that the Labour Court has erred in granting the relief of reinstatement to Respondent No.2 with full back wages and continuity of service. Having perused the Award, this Court finds that in so far as the relief of reinstatement is concerned, the learned Labour Court has placed heavy

reliance on the judgment of the Hon'ble Supreme Court in **Deepali Gundu (supra)**, wherein the concept of reinstatement was elaborately discussed and deliberated upon. Relevant paras of the said judgment are as follows:-

“21. The word “reinstatement” has not been defined in the Act and the Rules. As per Shorter Oxford English Dictionary, Vol. 2, 3rd Edn., the word “reinstatement” means to reinstall or re-establish (a person or thing in a place, station, condition, etc.); to restore to its proper or original state; to reinstate afresh and the word “reinstatement” means the action of reinstating; re-establishment. As per Law Lexicon, 2nd Edn., the word “reinstatement” means to reinstall; to re-establish; to place again in a former state, condition or office; to restore to a state or position from which the object or person had been removed and the word “reinstatement” means establishing in former condition, position or authority (as) reinstatement of a deposed prince. As per Merriam-Webster Dictionary, the word “reinstatement” means to place again (as in possession or in a former position), to restore to a previous effective state. As per Black's Law Dictionary, 6th Edn., “reinstatement” means:

“To reinstall, to re-establish, to place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed.”

22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of

sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

23. A somewhat similar issue was considered by a three-Judge Bench in *Hindustan Tin Works (P) Ltd. v. Employees* [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53] in the context of termination of services of 56 employees by way of retrenchment due to alleged non-availability of the raw material necessary for utilisation of full installed capacity by the petitioner. The dispute raised by the employees resulted in award of reinstatement with full back wages. This Court examined the issue at length and held: (SCC pp. 85-86, paras 9 and 11)

“9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of

damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation,

to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the Apex Court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them.

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11. In the very nature of things there cannot be a straitjacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not

humour. It is not to be arbitrary, vague and fanciful but legal and regular.”

(emphasis supplied)

After enunciating the abovenoted principles, this Court took cognizance of the appellant's plea that the company is suffering loss and, therefore, the workmen should make some sacrifice and modified the award of full back wages by directing that the workmen shall be entitled to 75% of the back wages.

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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.”

102. In view of the conspectus of the aforesaid judgments, be it ingeminated that whenever an employee is dismissed, removed or terminated and the action of the employer is found to be illegal, the normal rule, *albeit* subject to exceptions, is that the employee should be restored to the position which he or she held before the umbilical cord broke between the employer and the employee. As noticed by the Hon’ble Supreme Court, the word ‘reinstatement’ means to reinstall/re-establish/restore to the earlier position or former state, condition or office.

103. A three-Judge Bench of the Hon’ble Supreme Court in **Hindustan Tin Works (supra)** while dealing with termination of 56 employees by way of retrenchment observed that in the field of industrial jurisprudence, a declaration can be given that termination of service is bad and workman continues to be in service. The spectre of common law doctrine that

contract of personal service cannot be specifically enforced does not haunt this branch of law. Relief of reinstatement with continuity of service can be granted where termination is found to be invalid, which would mean that the employer has taken away illegally the right to work of the workman contrary to law and deprived him of his earnings. If the employer is found to be in the wrong, reinstatement is inevitable. It was not the case of the Petitioner that the said judgement no longer holds the field.

104. Having so noted, I would be failing in my duty if reference is not made to a subsequent judgment in **Madhya Pradesh Administration v. Tribhuban**, (2007) 9 SCC 748, wherein the Hon'ble Supreme Court held that reinstatement may not always be an automatic consequence of the Courts holding that the termination is illegal. However, this was clearly in the context of a daily wager as compared and contrasted to a regular employee, with a long length of service. Relevant paras are as under:-

“6. The question, however, which arises for consideration is as to whether in a situation of this nature, the learned Single Judge and consequently the Division Bench of the Delhi High Court should have directed reinstatement of the respondent with full back wages. Whereas at one point of time, such a relief used to be automatically granted, but keeping in view several other factors and in particular the doctrine of public employment and involvement of the public money, a change in the said trend is now found in the recent decisions of this Court. This Court in a large number of decisions in the matter of grant of relief of the kind distinguished between a daily wager who does not hold a post and a permanent employee. It may be that the definition of “workman” as contained in Section 2(s) of the Act is wide and takes within its embrace all categories of workmen specified therein, but the same would not mean that even for the purpose of grant of relief in an industrial dispute

referred for adjudication, application of constitutional scheme of equality adumbrated under Articles 14 and 16 of the Constitution of India, in the light of a decision of a Constitution Bench of this Court in Secy., State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] and other relevant factors pointed out by the Court in a catena of decisions shall not be taken into consideration.

7. *The nature of appointment, whether there existed any sanctioned post or whether the officer concerned had any authority to make appointment are relevant factors. (See M.P. Housing Board v. Manoj Shrivastava [(2006) 2 SCC 702 : 2006 SCC (L&S) 422] , State of M.P. v. Arjunlal Rajak [(2006) 2 SCC 711 : 2006 SCC (L&S) 429] and M.P. State Agro Industries Development Corpn. Ltd. v. S.C. Pandey [(2006) 2 SCC 716 : 2006 SCC (L&S) 434] .)”*

105. A year later in **Mahboob Deepak v. Nagar Panchayat, Gajraula**, (2008) 1 SCC 575 the Hon’ble Supreme Court reiterated the principal that reinstatement cannot be an automatic consequence of holding the termination to be unfair and also carved out factors which are relevant for determining the relief which are as follows:-

“7. The factors which are relevant for determining the same, inter alia, are:

- (i) whether in making the appointment, the statutory rules, if any, had been complied with;*
- (ii) the period he had worked;*
- (iii) whether there existed any vacancy; and*
- (iv) whether he obtained some other employment on the date of termination or passing of the award.”*

106. Recent trend of judgments shows that Courts have been holding that reinstatement may not be a natural or automatic consequence of setting aside of dismissal order. However, reading of the two aforesaid

judgments and other recent judgments, in my considered view, leads to an inevitable conclusion that for the purpose of grant of relief of reinstatement, Courts have always understood and appreciated the difference in the nature of employment of the employee as well as the length of service. In the present case, Respondent No.2 was a regular employee, with over nineteen years of continuous and unblemished service and clearly falls within the axiomatic jurisprudence and legal regime laid down by the Hon'ble Supreme Court in **Hindustan Tin Works (supra)** and not in the exceptions in the later judgments.

107. Learned counsel for the Petitioner had opposed the relief of reinstatement, additionally, on the ground that the Labour Court has not taken into consideration the crucial factor that Respondent No.2 was terminated more than 13 years ago, during which period the Petitioner Company had undergone structural / reorganisational changes and there are no vacancies to reinstate Respondent No.2 at the same or comparable designation. It was urged that the Petitioner Company no longer has a designation such as 'Deputy Chief Photographer' or a commensurate position. Learned Counsel for Respondent No.2 has denied the said position and categorically stated in the Statement of Objections that the post exists and no material has been produced by the Petitioner to support its assertion.

108. This Court cannot accept the aforesaid contention on behalf of the Petitioner for two-fold reasons. Firstly, a perusal of the written statement as well as the affidavit-in-evidence filed by the Petitioner before the Labour Court clearly reflects that no such stand was taken before the Labour Court and therefore it does not lie in the mouth of the Petitioner to

even argue that the Labour Court failed to appreciate this crucial aspect. The averment in the writ petition and the argument on this aspect before this Court is an after-thought. Secondly, no material has been placed before the Labour Court or even before this Court to substantiate the assertion that there is a change in the structural or organisational hierarchy in the Petitioner Company and / or the post of 'Deputy Chief Photographer' was abolished, and if so, the details thereof. It was certainly open to the Petitioner to have pleaded this before the Labour Court and led evidence, but its failure to do so cannot enure to the disadvantage of Respondent No.2. Even assuming for the sake of argument that the Petitioner company does not have a post with the nomenclature 'Deputy Chief Photographer', nonetheless, Respondent No.2 can always be reinstated to an equivalent or comparable post involving the skills of photography, as it cannot be and has not been denied by the Petitioner that it continues to be in the business of news and media, involving the requirement of Photographers.

RELIEF OF BACK WAGES

109. Insofar as the relief of back wages is concerned, learned counsel for the Petitioner opposed the same *inter alia* on the grounds that even assuming that the termination of Respondent No.2 was unlawful, full back wages cannot be granted as a mechanical exercise, since it is no longer the law that reinstatement and back wages are a natural and automatic consequence of setting aside of termination. It was also opposed on the ground that Respondent No.2 has been gainfully

employed during the period of termination, a fact which is admitted by Respondent No.2.

110. Perusal of the Award shows that the Labour Court has heavily relied on the judgment of the Hon'ble Supreme Court in **Deepali Gundu (supra)**, in awarding full back wages to Respondent No.2. In **Deepali Gundu (supra)**, the question before the Hon'ble Supreme Court was whether the Appellant therein was entitled to wages for the period during which she was forcibly kept out of service by the Management of the School. The Hon'ble Supreme Court referred to and relied upon several earlier judgments on the law of back wages and it would be useful to allude to some of them hereinafter.

111. In **Hindustan Tin Works (supra)**, a three-Judge Bench of the Hon'ble Supreme Court held that if the action of the employer, terminating the employee, is found to be a wrongful exercise, as a result of which the workman is directed to be reinstated, the employer cannot shirk his responsibility of paying the wages, which the workman has been deprived of by the illegal and invalid action of the employer. Ordinarily, a workman whose services have been illegally terminated would be entitled to full back wages, except to the extent that he was gainfully employed and any other view would be a premium on the unwarranted litigative activity of the employer.

112. The Hon'ble Supreme Court also referred to another judgment of the three-Judge Bench in **Surendra Kumar Verma (supra)**, para 6 whereof is relevant and is as follows:-

“6. ...Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead

to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted.”

113. The principle laid down in **Hindustan Tin Works (supra)**, was reiterated in **P.G.I. of Medical Education (supra)** and the relevant paras are as under:-

“8. While it is true that in the event of failure in compliance with Section 25-F read with Section 25(b) of the Industrial Disputes Act, 1947 in the normal course of events the Tribunal is supposed to award the back wages in its entirety but the discretion is left with the Tribunal in the matter of grant of back wages and it is this discretion, which in Hindustan Tin Works (P) Ltd. case [(1979) 2 SCC 80 : 1979 SCC (L&S) 53 : (1979) 1 SCR 563] this Court has stated must be exercised in a judicial and judicious manner depending upon the facts and circumstances of each case. While, however, recording the guiding principle for the grant of relief of back wages this

Court in Hindustan case [(1979) 2 SCC 80 : 1979 SCC (L&S) 53 : (1979) 1 SCR 563] , itself reduced the back wages to 75%, the reason being the contextual facts and circumstances of the case under consideration.

9. *The Labour Court being the final court of facts came to a conclusion that payment of 60% wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect. In the event, however the finding of fact is based on any misappreciation of evidence, that would be deemed to be an error of law which can be corrected by a writ of certiorari. The law is well settled to the effect that finding of the Labour Court cannot be challenged in a proceeding in a writ of certiorari on the ground that the relevant and material evidence adduced before the Labour Court was insufficient or inadequate though, however, perversity of the order would warrant intervention of the High Court. The observation, as above, stands well settled since the decision of this Court in Syed Yakoob v. K.S. Radhakrishnan [AIR 1964 SC 477 : (1964) 5 SCR 64] .*

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12. *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 straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. As regards the decision of this Court in Hindustan Tin Works (P) Ltd. [(1979) 2 SCC 80 : 1979 SCC (L&S) 53 : (1979) 1 SCR 563] be it noted that though broad guidelines, as regards payment of back wages, have been laid down by this Court but having regard to the peculiar facts of the matter, this Court directed payment of 75% back wages only.*

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14. *The issue as raised in the matter of back wages has been dealt with by the Labour Court in the manner as above having regard to the facts and circumstances of the matter in the issue, upon exercise of its discretion and obviously in a manner which cannot but be judicious in nature. In the event, however, the High Court's interference is sought for, there exists an obligation on the part of the High Court to record in the judgment, the reasoning before however denouncing a judgment of an inferior Tribunal, in the absence of which, the judgment in our view cannot stand the scrutiny of otherwise being reasonable. There ought to be available in the judgment itself a finding about the perversity or the erroneous approach of the Labour Court and it is only upon recording therewith the High Court has the authority to interfere. Unfortunately, the High Court did not feel it expedient to record any reason far less any appreciable reason before denouncing the judgment."*

114. The Hon'ble Supreme Court thereafter noted the judgment in **Haryana Roadways v. Rudhan Singh**, (2005) 5 SCC 591, by a three-Judge Bench, wherein the Hon'ble Supreme Court had observed that there is no rule of thumb that in every case where the Tribunal gives its finding that the termination was in violation of Section 25-F of the ID Act, entire back wages should be awarded. A host of factors have to be kept in mind, one of them being the length of service of the workman. Relevant para is as follows:-

"8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the

like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.”

115. A year later in **U.P. State Brassware (supra)**, the said principle was reiterated as under:-

“22. No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act.”

116. In **J.K. Synthetics Ltd. v. K.P. Agrawal**, (2007) 2 SCC 433, Respondent was dismissed on the basis of an enquiry and the Labour Court, after holding that the enquiry was not fair and proper, set aside the punishment of dismissal and awarded reinstatement with full back wages. The High Court upheld the Award of the Labour Court. However, on an

appeal, the Hon'ble Supreme Court did not approve the award of full back wages. The observations of the Hon'ble Supreme Court with regard to back wages, as noticed in **Deepali Gundu (supra)**, are as follows:-

“17. There is also a misconception that whenever reinstatement is directed, “continuity of service” and “consequential benefits” should follow, as a matter of course. The disastrous effect of granting several promotions as a “consequential benefit” to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether “continuity of service” and/or “consequential benefits” should also be directed. ...

18. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in Rudhan Singh [(2005) 5 SCC 591 : 2005 SCC (L&S) 716] and Uday Narain Pandey [(2006) 1 SCC 479 : 2006 SCC (L&S) 250] . Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may.”

117. Finally, relying on several judgments, the Hon'ble Supreme Court in **Deepali Gundu (supra)** culled out certain propositions and the same being relevant to the present case, are extracted hereunder for ready reference :

“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 the length of service of the employee/workman, the nature of misconduct, 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 under Section 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, if 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 wrongdoings 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 suggested in *Hindustan Tin Works (P) Ltd. v. Employees* [(1979) 2 SCC 80 : 1979 SCC (L&S) 53] .

38.7. The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal* [(2007) 2 SCC 433 : (2007) 1 SCC (L&S) 651] 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 [*Hindustan Tin Works (P) Ltd. v. Employees*, (1979) 2 SCC 80 : 1979 SCC (L&S) 53] , [*Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court*, (1980) 4 SCC 443 : 1981 SCC (L&S) 16] referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”

118. The issue of grant of full back wages again came up for consideration before the Hon’ble Supreme Court in **Raj Kumar v. Director of Education**, (2016) 6 SCC 541, wherein the Court relied on the observations and principles propounded by its previous judgment on the grant of back wages in **Deepali Gundu (supra)**, more particularly, paragraph 22 of the judgment in **Deepali Gundu (supra)**, and directed the Managing Committee to reinstatement the Appellant thereon on his

post along with back wages and other consequential benefits. Relevant paras are as follows:-

“56. The termination of the appellant is bad in law for non-compliance with the mandatory provisions of Section 25-F of the ID Act and also Section 8(2) of the DSE Act. Further, the respondent School has not produced any evidence on record to show that the retrenchment of the appellant was necessary as he had become “surplus”. The termination of the appellant was ordered in the year 2003 and he is unemployed till date. The respondents have been unable to produce any evidence to show that he was gainfully employed during that period and therefore he is entitled to back wages and other consequential benefits in view of the law laid down by this Court in Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya [Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324 : (2014) 2 SCC (L&S) 184] wherein it was held as under: (SCC p. 344, para 22)

“22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action

taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.”

57. *For the reasons stated supra, we are of the view that the impugned judgment and order dated 28-7-2008 [Raj Kumar v. Govt. (NCT of Delhi), 2008 SCC OnLine Del 1572] passed by the Delhi High Court is liable to be set aside and accordingly set aside, by allowing this appeal. The retrenchment of the appellant from his service is bad in law. The respondent Managing Committee is directed to reinstate the appellant at his post. Consequently, the relief of back wages till the date of this order is awarded to the appellant, along with all consequential benefits from the date of termination of his services. The back wages shall be computed on the basis of periodical revision of wages/salary. We further make it clear that the entire amount due to the appellant must be spread over the period between the period of retrenchment and the date of this decision, which amounts to 13 years, for the reason that the appellant is entitled to the benefit under Section 89 of the Income Tax Act. The same must be complied with within six weeks from the date of receipt of the copy of this judgment.”*

119. On a reading of the above conspectus of judgments and the principles propounded in **Deepali Gundu (supra)**, it is clear that the law on back wages is no longer *res integra*. In cases of wrongful termination, reinstatement with back wages is the normal rule, subject of course to a caveat that while deciding the issue of back wages, Courts may take into consideration a host of factors, such as length of service of the employee, financial condition of the employer, etc. The employee is required to plead that he or she was not gainfully employed or was employed on lesser wages. As observed in **Deepali Gundu (supra)**, in cases where the Competent Court or Tribunal finds that employer has acted in gross violation of statutory provisions and/or Principles of Natural Justice, etc. then it shall be fully justified in directing payment of full back wages and in such cases, Superior Courts should not exercise powers under Article 226 or Article 136 of the Constitution of India and interfere with the Award, only because there is a possibility of forming a different opinion. Hon'ble Supreme Court has also struck a note of caution that Courts must always keep in view that in cases of wrongful termination, wrongdoer is the employer and sufferer is the employee / workman and there is thus no justification to give a premium to the employer for their wrongdoing by relieving them of the burden to pay back wages.

120. It would be useful to allude to another significant observation in **Deepali Gundu (supra)**, at the cost of repetition, that in a number of cases, superior Courts have interfered with the award of the Primary Adjudicatory Authority on the premise that finalization of litigation has taken a long time. Hon'ble Supreme Court observed that lack of infrastructure and manpower is the principle cause for delay in disposal

of cases and for this the litigants cannot be blamed or penalized. It would amount to grave injustice to a workman / employee if he is denied back wages simply because there is a long lapse of time between termination and finality to the litigation. Courts should bear in mind that in most of these cases, employer is in an advantageous position. Hon'ble Supreme Court held that the High Court had committed grave error by interfering with the order passed by the Tribunal for back wages, ignoring that the charges leveled against the Appellant therein were frivolous and the enquiry was held in gross violation of Principles of Natural Justice.

121. Principles culled out in **Deepali Gundu (supra)** have been reiterated and reaffirmed in recent judgments of the Hon'ble Supreme Court in **Raj Kumar (supra)** and **Rajasthan SRTC (supra)** amongst other judgements. No doubt, it cannot be said that in every case, back wages are to be granted as a matter of course. Courts have been denying back wages in cases where the facts of a particular case may so require, such as where the employee has been employed as a casual employee or a daily wager, or the Establishment has closed, or the award of back wages would cast an impossible / unbearable financial burden on the employer, or it is shown that the employee has been employed for a short span of time and that too after weighing the pros and cons and balancing the equities. Petitioner has not been able to bring forth any judgment where a regular employee, having worked for nearly two decades, has been denied back wages, after it was found that the termination was unfair and wrongful.

122. In view of the aforesaid, this Court finds no infirmity with the Award of the Labour Court to the extent it has awarded full back wages

to Respondent No.2. However, it cannot be ignored that Respondent No.2 has conceded that he was gainfully employed during the period of termination and had also brought forth the said position in the affidavit of evidence filed before the Labour Court. Labour Court has certainly erred in overlooking this crucial fact of gainful employment and has not factored the wages earned by Respondent No.2 during the period of termination by the Petitioner. Relevant part of the affidavit is as under:-

“9. That after the termination of my services, I have been employed as under:-

(a) 6.12.06 to 6.9.07 as Dy. Photo Editor at Rs. 65,000/- cost to the company with P.T.I.

(b) Unemployed w.e.f. 7.9.2007 to August, 2008.

(c) 1.9.2008 to 31.3.2009 @ Rs. 45,000/- (cost to company) with Tribune Newspaper as Chief Photographer.

(d) April, 2009 till now as chief photographer with PTI at Rs. 50,000/- (cost to the company). I am not gainfully employed after the termination of my services by the management. I could not get any alternative employment with the same salary and perks at par with the Respondent management. I am, therefore, entitled to be reinstated in service, with continuity of service, full back wages and all other consequential benefits.”

123. While the Petitioner argued that the gainful employment of Respondent No.2 was a sufficient factor to deny him back wages, counsel for Respondent No.2 had urged that the salary received by him from the other sources of employment was far less as compared to the salary that he had been receiving or would have received from the Petitioner, if he had not been terminated and therefore the differential amount be awarded towards back wages. The contention of the Petitioner to this extent, in my view, only deserves to be rejected. No doubt, gainful employment of an

employee / workman during the period of termination is a relevant factor to be taken into consideration while granting the relief of back wages but as held in **Deepali Gundu (supra)**, it is open to the employee to show that he was paid wages lesser than the wages he is entitled from the employer who has terminated his services. Petitioner has not pleaded any of the grounds or factors as brought out in various judgments referred to above which disentitled Respondent No.2 from back wages. In **Hindustan Times (supra)**, this Court held as under:-

“24. There is no doubt that the question of whether to grant backwages and if so, to what extent, is a matter of discretion - that has to be judiciously exercised, taking into account all the established facts and circumstances of the case. Here, the management to an extent called upon itself in firstly insisting that the order of termination was justified and then contradicting itself in saying that the workman had voluntarily, by conduct abandoned employment. The falsity of its plea regarding not having received a leave application or not having sanctioned it, was exposed before the Labour Court and the Single Judge. The workman had to fight to vindicate himself, for more than ten years. A small amount of Rs. 2000/- per month was directed to be paid for a period of time. Ultimately, he succeeded and obtained a reinstatement order. The management chose not to utilize his services; instead it approached this court in writ proceedings. The pendency of its writ petition culminated in the inability to grant reinstatement because the workman attained the age of superannuation; he even died without securing the relief he sought for. The Single Judge has actually modified the award and granted HT Ltd. some relief, by directing it to pay a limited amount towards dues for the period the writ petition was pending. In the circumstances, the question is whether the direction to pay balance back-wages is warranted.

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26. On the question of withholding part of backwages because the employee did not work, the management's arguments ring hollow. The appellant obstinately refused reinstatement even when it was ordered and obtained an interim order, suspending operation of award. Secondly, the instances cited where the workman did not obtain employment relating to the earlier period; there is something relevant in the arguments on his behalf that having been stigmatized, in a way, through the appellant's public advertisement, he felt that securing meaningful employment would have been a difficult task if not an impossible one. The court cannot overlook that the respondent was a journalist with some experience; he was diagnosed with acute diabetes and abscess of liver and at the time of his termination, had two small children. The subjective compulsions, which drove him not to seek employment, however cannot become the main focus of this proceeding, which will substantially, in such case, obscure the impact of the appellant's illegal action. As regards the "new rule" this court would recollect a previous ruling on the "no back-wage without work" "rule" in the following observations from *The Principal Delhi College of Arts & Commerce v. Sunita Sharma*:

"9. Counsel for the college had argued that the respondent would gain undue benefit by the dismissal of this appeal, since she would be entitled to full arrears of salary without working on the post. This Court is of opinion that the College invited such a result, if it can be characterized as such, upon itself by preferring this appeal. To compound this, it sought a stay of the impugned judgment, which resulted in the respondent being denied work and the entitlement to earn salary. Furthermore, this Court is of opinion that in such cases, there cannot be a blanket "no backwage" rule as is sought to be urged. An employee denied benefit of work and pay, is as much entitled to restitution in law, as a businessman whose contract is terminated capriciously. In the latter case, the courts award damages, a head which often include damages for loss of profit, and

further direct payment of interest. Similarly, a tax payer who is made to pay amounts which cannot be legitimately recovered, is entitled to interest for the duration the amounts are retained by the tax authorities. A plaintiff who sues for illegal termination of contract of service (i.e. a managerial cadre official in a private enterprise) on proof of illegal termination can succeed in getting damages. In the case of public employment, where the employee is terminated for no justifiable cause, surely restitution has to be likewise complete. Therefore, the Court upholds the impugned judgment and order of the learned single judge as regards full consequential benefits to the respondent.”

124. The judgments relied upon by the learned counsel for the Petitioner with respect to the relief of reinstatement and back wages, as referred to in para 33 above, would not enure to the advantage of the Petitioner as clearly the judgments are related to employees who were employed as daily wagers/on temporary basis and for short spells. The cases are therefore clearly distinguishable from the instant case where Respondent No. 2 was admittedly a regular employee of the Petitioner and had served the Petitioner for over 19 years, with an unblemished past record. It bears repetition to state that learned counsel for the Petitioner has been unable to point out any judgment where the relief of reinstatement and/or back wages has been denied to an employee similarly placed as Respondent No. 2 herein. The nature of employment as well as the length of service have always been considered as crucial factors by the Courts, for deciding the relief of reinstatement and back wages.

125. In view of the aforesaid, the Award of the Labour Court is modified to the limited extent that Respondent No.2 shall be entitled to

back wages after deducting the salary/emoluments drawn from alternative employments for the period subsequent to termination. It is open to the Petitioner to work out the necessary calculations after working out the differential amounts and seek necessary assistance for the same from Respondent No.2.

126. Writ petition is partially allowed in the aforesaid terms. Pending application is disposed of accordingly.

127. Vide interim order dated 01.06.2020, this Court had stayed the operation of the impugned Award, subject to deposit of a sum of Rs.50 Lakhs by the Petitioner, which has been invested in an FDR, in a Nationalised Bank. Interim order stands vacated. The amount of Rs.50 Lakhs along with interest accrued thereon shall be released to Respondent No.2. In case the amounts outstanding to Respondent No.2 are less than Rs.50 Lakhs, then the proportionate amount shall be refunded to the Petitioner by Respondent No.2. Needless to state, in case Respondent No.2 is entitled to an amount excess of the amounts so released, the balance shall be paid by the Petitioner to Respondent No.2.

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JYOTI SINGH, J

SEPTEMBER 30, 2021

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