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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 10.05.2018*

+ **WP (C) 601/2014**

BHOLANATH LAL Petitioner
Through: Mr.Prabhakar, Advocate

versus

M/S. SHREE OM ENTERPRISES (P) LTD.Respondent
Through: Ms.Ritu Jain, Advocate.

+ **WP (C) 605/2014**

RAM SAGAR Petitioner
Through: Mr.Prabhakar, Advocate

versus

M/S. SHREE OM ENTERPRISES (P) LTD.Respondent
Through: Ms.Ritu Jain, Advocate.

+ **WP (C) 606/2014**

JEET NATH Petitioner
Through: Mr.Prabhakar, Advocate

versus

M/S. SHREE OM ENTERPRISES (P) LTD.Respondent
Through: Ms.Ritu Jain, Advocate.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (ORAL)

1. All these three writ petitions involve identical issues of facts and law and are being decided by this common judgment.
2. By a common award dated 03.10.2012, the learned Presiding Officer, Labour Court, Karkardooma, Delhi (in short 'Industrial Adjudicator') has answered the reference made by Government of NCT of Delhi bearing No.F.24(89)/SD/2010/11441 dated 18.08.2010 in ID No.106/11 (Jeet Nath), F.24(88)/Lab/SD/2010/11198 dated 12.08.2010 in ID No.107/11 (Ram Sagar) and F.24(62)/Lab/SD/2010/ 6152 dated 21.06.2010 in ID No.108/11 (Bholanath Lal). The terms of Reference in each case are as under:-

In ID No.106/11

"Whether the services of Sh. Jeetnath S/o Late Shri Tanda Das have been terminated illegally and/or unjustifiably by the management; if yes, to what relief is he entitled and what directions are necessary in this respect?"

In ID No.107/11

"Whether the services of Sh. Ram Sagar S/o Late Sh. Palturam have been terminated illegally and/or unjustifiably by the management; if yes, to what relief is he entitled and what directions are necessary in this respect?"

In ID No.108/11

"Whether the services of Sh. Bholanath Lal S/o Shri Gokarn Lal have been terminated illegally

and/or unjustifiably by the management; if yes, to what relief is he entitled and what directions are necessary in this respect?”

3. The petitioner Jeet Nath claimed that he has been working as a helper with the respondent/Management since 1989 at a salary of Rs.2,900/- per month. The petitioner Ram Sagar claimed that he has been working as a helper since 1999 with the respondent at a salary of Rs.2,600/- per month. However, the petitioner Bhola Nath Lal has claimed to have been working as a Peon since 1984 with the respondent at a salary of Rs.2,600/- per month. It is alleged by them that they had demanded certain legal facilities and for that reason the respondent/Management terminated their services on 23.02.2010.
4. The respondent/Management had taken the defence that they never terminated the services of these workmen who had voluntarily abandoned their job on their being transferred to its Chandni Chowk Unit by order dated 01.01.2010 and stopped coming for duties w.e.f. 31.01.2010. It is admitted that the salaries of these workmen for the period from November 2009 to January 2010 is due to them which they never refused to pay and due to transfer, the workmen did not report for their duties and to collect salaries.
5. The Industrial Adjudicator framed the following issues on 16.01.2012: -
 - “1. Whether the workman himself voluntarily abandoned the services of the management?

2. In terms of reference.”

6. The findings on above issues are recorded by the Industrial Adjudicator in paragraphs 13 and 14 of the common impugned Award, which read as under:-

“13. In view of the aforesaid discussion and the authorities cited, it is a matter of record that the management has not been able to prove the abandonment through any oral or documentary evidence. No evidence in the eyes of law the factum of alleged communications of the absentism has proved by the management through ocular and trustworthy evidence.

14. The management has been closed its evidence by not leading any evidence. There is no document whatsoever placed on record regarding the absentism/abandonment of the workmen. Even the management has failed to adduce any evidence regarding the contentions raised in the written statement that the workman has abandoned on their own as they have been transferred to other place. Even being call back to rejoin their respective duties. As such the contention raised by the management is not plausible by any ocular and trustworthy evidence nor its substantiated with any material evidence. Accordingly, in view of the foregoing discussion both the issues are decided in favour of the workmen and against the management.”

7. After deciding the issues, while granting relief, the Industrial Adjudicator vide impugned award directed the respondent/Management to reinstate the petitioners/workmen with back wages @10% from the date of filing of the claim till the publication of the award.

8. Feeling aggrieved by the impugned award, the petitioners/workmen have challenged the impugned award under Article 226 and 227 of the Constitution of India for issuance of an appropriate writ for quashing the award to the extent by which they were granted 10% back wages instead of full back wages.
9. Admittedly, the findings of the Industrial Adjudicator by impugned common award dated 03.10.2012 holding the termination of the petitioners to be illegal & unjustified and the relief of reinstatement with 10% back wages had not been assailed by the respondent/Management.
10. The learned counsel for the petitioner submits that the petitioners should have been awarded full back wages once the termination has been held to be illegal and unjustified and findings awarding the petitioners only 10% of back wages has resulted in miscarriage of justice. He urged that in their respective statement of claims, the petitioners have claimed that they could not obtain any employment after their termination despite their best efforts. He emphasizes that all the petitioners in their respective evidences have testified before the Industrial Adjudicator that despite their best efforts they could not obtain any employment after their termination on 23.02.2010 and they remained unemployed and their testimonies were not challenged in their respective cross-examination by the respondent. He draws the attention of the court to the fact that despite

opportunities, the respondent/Management did not adduce any evidence. He submits that the petitioners may be awarded full back wages from the date of their termination. He relies upon a judgment of **Hon'ble Supreme Court in Hindustan Tin Works (P) Ltd. vs. Employees of Hindustan Tin Works Ltd. 1979 (2) SCC 80**, wherein in Para Nos.9 and 11 it was held as under:-

“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.

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 above noted 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.”

11. Per contra it is submitted by the learned counsel for the respondent that the petitioners are not entitled to full back wages. She submits that in a Metropolitan city like Delhi, jobs of helper/peon are easily available and these petitioners could not have survived had they not been gainfully employed after their termination. She submits that the Industrial Adjudicator has awarded 10% back wages on appreciation of evidence which does not require any modification.
12. She relies upon a judgment of this Court in **LRS Institute of Tuberculosis & Allied Diseases vs. Shri Babu Lal 2015 IX AD (Delhi) 203** wherein the learned Single Judge of this court has held that the High Court can interfere in the order of the Labour Court or Tribunal only when it is convinced that the Labour Court had made a patent mistake in admitting evidence illegally or made grave errors in law in coming to the conclusion on facts. She also cites another judgment of a Single Judge of this Court in **Ms. Pratima Seth vs. Management of M/s. Ansal Properties & Industries Ltd. & Ors. 140 (2007) DLT 45** wherein the workman did not state in affidavit that she remained unemployed after her dismissal from the service by the respondent/Management and instead, the respondent in its affidavit testified that the petitioner/workman was gainfully employed, on which point, the workman failed to cross examine

the Management witness. In these circumstances, the Court held that the findings of Labour Court disentitling the workman any back wages cannot be assailed. She also relies upon one more judgment of a Single Bench of this Court in **Ceeke Transformers vs. P.O. Labour Court No.1 & Ors. 2011 (124) DRJ 416** wherein the workman was granted 75% of the back wages by the Labour Court. The learned Single Judge by observing the last drawn wages of the workman to be Rs.650/- per month, awarded a lump sum back wages of Rs.40,000/- in the peculiar facts and circumstances of the case.

13. I have heard the learned counsel for the parties.
14. The findings of the Industrial Adjudicator have attained finality to the extent of holding the termination of the petitioners/workmen by the respondent/Management to be illegal and unjustified and their entitlement to reinstatement. The only common point involved in these writ petitions is as to whether on appreciation of evidence, the findings of the Industrial Adjudicator while awarding only 10% of the back wages instead of full back wages requires any interference by this Court? Relevant Para 15 of the relief of impugned award reads as under:-

“15. Both the parties during the course of arguments as well as in their pleadings are interested to join the services of the workmen and the management also require the man-power at its establishment. Therefore, it will be justified to direct the workmen to join the services of the management.

16. So far as with regard to the back wages the workmen as alleged in their affidavits that they have been remained unemployed since illegal termination of their services. There is no evidence whatsoever for their non-employment or for the registration of them at any Employment Exchange. The workmen have not made any sincere efforts for their re-employment. In these circumstances, the management be directed to reinstate the workmen namely Jeetnath, Ram Sagar and Bholanath Lal along with back wages at rate of 10% each from the date of filing of the claim till the date of publication of the award. Award is answered accordingly. Copy of the award be kept in each separate file.”

15. It is noticed that all these petitioners/workmen in their respective affidavits tendered in evidence as WW-1 in each case have specifically testified that despite various efforts they could not obtain any employment either better or worse on or after 23.02.2010 and they remained unemployed since illegal termination of their services by the respondent/Management. In their respective cross-examination, the respondent/Management did not dare to challenge the testimonies of these workmen that they remained unemployed. It is a sacrosanct rule of evidence that if the deposition of a witness in his examination-in-chief on a particular fact has not been challenged in his cross-examination by the other party, the deposition in the examination-in-chief to that extent is deemed to have been admitted by the other party. Furthermore, the respondent/Management did not lead any evidence that these

petitioners were gainfully employed after termination of their services.

16. Recently in **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya and others (2013) 10 SCC 324**, the **Hon'ble Supreme Court** after discussing the various case laws on the point has culled out the following principles to be considered while granting the back wages and the relevant paragraphs of the judgment read as under:-

“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

avermment 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* [*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.”

17. The respondent/Management in its written statement before the Industrial Adjudicator has vaguely pleaded that the workmen are gainfully employed elsewhere. However, in support of its pleadings and to rebut the testimonies of all the Petitioners, the respondent/Management has failed to adduce any evidence.
18. The question with regard to the jurisdiction of the High Court in issuing a writ of certiorari under Article 226 had come up for consideration before the **Hon’ble Supreme Court in Syed Yakoob vs. K.S.Radhakrishnan AIR 1964 SC 477** and relevant paragraphs No.7 and 8 of the judgment read as under:-

“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 improperly, as for instance, it decides a question without giving an opportunity to 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 a 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. Ahmad Ishaque* [AIR 1955 SC 233], *Nagendra Nath Bora v. Commr. of Hills Division* [AIR 1958 SC 398] 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 misinterpretation 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.”

19. The petitioners have discharged their initial burden by stating in their pleadings and in evidence that they remained unemployed after termination of their services by the respondent. The respondent/Management did not challenge the testimonies of the workmen that after the termination of their respective services they remained unemployed. The onus thus stands shifted to the respondent/Management who did not adduce any evidence to show that after the termination, the

petitioners/workmen remained gainfully employed. The services of the petitioners/workmen were terminated on 23.02.2010. It is a case of gross victimization of workmen and the respondent/Management is involved in unfair labour practices. Management has admittedly not paid even the earned wages of all these workmen for period from November 2009 to January 2010 though the workmen claimed and proved that their wages were due from October 2009 to 22.02.2010 as there is no cross-examination on this point also. These workmen have suffered due to illegal acts and unfair labour practices on the part of the respondent/Management and in case the normal rule of granting full back wages is not followed it would amount to rewarding the respondent/Management for its illegal and unwarranted actions and unfair labour practices. The Industrial Adjudicator fell into grave error by not following the normal rule of granting full back wages to the petitioners/workmen. There is no justification given in the impugned award granting only 10% of the back wages to the workmen instead of full back wages and the findings of the Industrial Adjudicator to this extent are perverse. Therefore, in the facts and circumstances of the present case the impugned award dated 03.10.2012 granting back wages to the extent of 10% to the petitioners/workmen is set aside and the petitioners/workmen shall be entitled to full back wages from the date of their termination i.e. 23.02.2010. The respondent/Management shall

make the payment of the back wages to the petitioners/workmen within four months failing which it shall have to pay interest @9% per annum. The writ petitions are disposed of accordingly.

(VINOD GOEL)
JUDGE

MAY 10, 2018
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