

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8460 OF 2024

M/s. J.W. Marriott Juhu

}**Petitioner**

: *Versus* :

Nilesh Kanojia & Anr.

}....**Respondents**

Mr. R.V. Paranjape with Mr. T.R. Yadav, for the Petitioner.
Mr. Yatin R. Shah, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

DATED : 16 October 2024.

JUDGMENT:

1) **Rule.** Rule is made returnable forthwith. With the consent of the parties, the petition is taken up for hearing and final disposal.

2) Petitioner-employer has filed this petition challenging the judgment and order dated 13 September 2023 passed by the Third Labour Court, Mumbai partly allowing Complaint (ULP) No.168/2018 filed by the Respondent-employee and directing reinstatement of Respondent in service w.e.f. 10 July 2018 with continuity of service and other consequential benefits, but without backwages. The Revision Application (ULP) No.88/2023 preferred by the Petitioners has been rejected by the Industrial Court by judgment and order dated 14 March 2024, which is also the subject matter of challenge in the present petition.

3) The employee is impleaded as Respondent No.1 in the present petition and General Manager of the Hotel- Mr. Sharad Puri and Director of Human Resources-Ms. Priya Thakur Singh has been impleaded as proforma Respondent Nos.2 and 3 on account of their impleadment as Respondent in Complaint (ULP) No.168/2018. Therefore, the real contesting party in the present petition is Respondent No.1 who shall hereinafter be referred to as the '*Respondent*'.

4) Petitioner No. 1 is a star category hotel with its establishment at Juhu, Mumbai. Respondent No.1 was appointed in the year 2006 in the Security Department as Enigma Security Associate. It is alleged that on 3 May 2017, Director of Loss Prevention received information through internal sources that some suspicious activities were taking place near Bakery and Main Kitchen of the Hotel. Therefore, CCTV footage was randomly checked on 4 May 2017 and it was noticed that Petitioner had carried two cake boxes out of the Hotel with the help of LP Associate-Mr. Vinit Ghai on 27 April 2017. It was observed that while on duty LP Associate-Mr. Vinit Ghai had brought two cake boxes from Bakery/Main Kitchen to LP Control Room, at around 04.50 hrs, Vinit Ghai alongwith contractual Security Guard, Arun Singh removed cake boxes from LP Control Room and took it towards Associate Gate through Garbage Room. They kept the cake boxes in the Hotel's Innova Car of Hari Om Transport. After keeping the cake boxes in the car, Vinit moved towards Associate Gate and stationed themselves there. At 4.50 hrs, Respondent went to the Associate Gate for getting himself checked through security guard and the Innova Car followed him. The car was not checked properly by the Security Guard since

Respondent was standing at the checking point. Respondent thereafter boarded the Car with two cakes and left the hotel. One cake was found delivered at Dadar and the other was taken by the Respondent at his home in Parel. After conducting preliminary enquiry, LP Associate-Vinit Ghai stated that he was following the instructions of Respondent by picking up two cakes from Bakery/Main Kitchen. He had further stated that the Respondent had instructed that the vehicle was not checked. This is how Respondent was charged with misconduct under Clauses 24(d) and 24(l) of the Model Standing Orders alleging theft as well as commission of act subversive of discipline or good behaviour by issuance of chargesheet dated 30 May 2017. Respondent was placed under suspension on 5 May 2017. During the course of enquiry into the first chargesheet, second incident allegedly took place on 21 November 2017 when union leaders of Maharashtra Navnirman Kamagar Sena (**Union**) entered the lobby of the Hotel and handed over letter to Mr. Sunil, Director of Loss Prevention desiring a meeting of General Manager of Hotel with Vice President of the union. On 23 November 2017, Respondent entered lobby of the Hotel with office bearers and members of the Union and protested against Respondent's suspension. Again on 27 November 2017, Respondent entered the Hotel through lobby area alongwith union leaders for protesting against Respondent's suspension. Therefore, second chargesheet dated 2 December 2017 was issued to the Respondent for misconduct under Clauses 24(a), (k), (l) and (r) of the Model Standing Orders. After conduct of enquiry in both the chargesheets, the charges were held to be proved and Respondent was dismissed from service by order dated 10 June 2018. He was paid an amount of Rs.1,82,275/- towards legal dues.

5) Respondent approached the Labour Court, Mumbai by filing Complaint (ULP) No. 168/2018 challenging the dismissal order. The Labour Court delivered order on preliminary issues on 24 February 2021 and held that the enquiry was fair and proper and that the findings of the Enquiry Officer are not perverse. Respondent No.1 did not challenge the order on preliminary issues dated 24 February 2021 and led his evidence by filing Affidavit of Evidence. Petitioner-Management also led evidence.

6) The Labour Court thereafter passed final judgment and Award dated 13 September 2023 holding that Respondents have committed unfair labour practices under Items 1(a), (b), (d), (f) and (g) of Schedule-IV of the MRTU & PULP Act and directed Petitioner to reinstate the Respondent in service from 10 July 2018 with continuity of service and other consequential benefits but without backwages. Petitioner-Employer filed Revision Application (ULP) No.88/2023 challenging the judgment and order dated 13 September 2023 passed by the Labour Court. In the said Revision Application, interim order was passed on application at Exhibit-C-2 by which the execution and operation of the Labour Court's order was stayed during pendency of Revision Application subject to condition of deposit of monthly salary of Respondent during pendency of the Revision Application.

7) The Industrial Court has dismissed Revision Application (ULP) No.88/2023 by judgment and order dated 14 March 2024, which is subject matter of challenge in the present petition. By order dated 18 March 2024, the learned Member of the Industrial Court further stayed the execution of Labour Court's order for a period of 8 weeks to enable Petitioner to approach this Court, subject to the

condition of deposit of monthly salary of Respondent in the Industrial Court. Aggrieved by the order of the Industrial Court, the Petitioner-employer has filed the present petition.

8) I have heard Mr. Paranjape, the learned counsel appearing for Petitioner and Mr. Shah, the learned counsel appearing for Respondent-employee. I have also gone through the findings recorded by the Labour and the Industrial Court in their respective judgments and have also perused the records of the case produced alongwith the petition as well as with compilation of documents.

9) The Respondent faced two chargesheets dated 30 May 2017 and 2 December 2017. The first chargesheet dated 30 May 2017 alleged theft of two cakes from the Hotel, out of which one is alleged to have been delivered at Dadar and the other was taken by the Respondent at his home. The second chargesheet dated 2 December 2017 is in fact linked to the first chargesheet as the same is issued on account of protest/ruckus made by the Respondent along with union leaders by repeatedly entering the Hotel's lobby. The dismissal order dated 10 June 2018 is based on reports of the Enquiry officer in both the chargesheets. The charges levelled in both the chargesheets were held to be proved which has led to Respondent's dismissal on 10 June 2018.

10) The Labour Court framed preliminary issues relating to fairness in the enquiry and perversity in the findings of the Enquiry Officer and delivered order dated 24 February 2021 holding that the enquiry is fair and proper and that the findings of the Enquiry Officer are not perverse. As observed above, Respondent No.1 did not challenge order dated 24 February 2021 on preliminary issues and the same has attained finality.

11) In the light of the findings on preliminary issues going against the Respondent, the Labour Court then proceeded to decide Issue Nos. 3 and 4 relating to unfair labour practices under Item Nos.1 (a), (b), (d), (f) and (g) of Schedule-IV of MRTU & PULP Act and holding that Respondent was entitled for reinstatement without full backwages and continuity of service w.e.f. 10 June 2018. While Mr. Paranjape has contended that the charge of theft of cakes is held to be proved on account of finding on Issue No.2 of absence of perversity in the findings of the Enquiry Officer, Mr. Shah has contended that the findings recorded by the Labour Court in final judgment and order dated 13 September 2023 would indicate that the charge of theft is actually not proved. It would therefore be apposite to reproduce findings recorded by the Labour Court in paras-33 and 34 of its final judgment which reads thus:

33) After considering the incident for which the complainant is chargesheeted on 30/05/2017, it is clear that employee Vinit has brought two cake boxes from the bakery/main kitchen to LP Control room. Thereafter, Vinit has kept these two boxes into Innova Car No. MH-02/CR-2151. Thereafter, complainant has verified that two cake boxes are kept in the Innova car, and thereafter he proceeded in the Innova car and illegally taken two cake boxes. On perusal of the chargesheet, it is clear that, complainant Nilesh has not in fact removed two cake boxes from the possession of the Hotel management, but according to management Vinit Ghai as per instruction of complainant kept two boxes in the vehicle. According to respondents main culprit is complainant Nilesh.

34) **It is pertinent to note that enquiry officer in his findings has concluded that charge of theft is not proved. However in legal sense, dishonestly removing any property from the possession of another without his consent is nothing but theft (Section 378 of I.P.C.)**

(emphasis added)

12) The findings recorded by the Labour Court in para-34 of its judgment appear to be not only self-contradictory but also contrary to the findings recorded by the Enquiry Officer which is upheld by the

Labour Court in preliminary Award. In para-34, the learned Judge has held that the charge of theft is not proved. However, the Enquiry Officer has held in his report as under:

In view of the above facts and observations, it is proved that the CSE who was working in the Loss Prevention Department (Security Department) of the Hotel, was involved into the acts of dishonesty, for carrying two cakes (i.e. the property of the hotel) and outside the Hotels (Employers) premises without any billing, unauthorizedly alongwith the help and in collusion with his co-employee Mr. Vinit Ghai and against the disciplinary norms. It is also further proved that the CSE has used the hotels Innova Car to carry the said cakes, which was neither booked nor purchased by CSE or his colleague Mr. Vinit Ghai, from their Employer Hotel and has delivered the said unauthorized cakes i.e. property of the hotel, to the friend of his co-employee, Mr. Vinit Ghai and the other one he carried to his residence. Further, it is admitted proven fact that two pieces of cake without any compliance of the billing procedure, as required to be done by the employees of the Hotel, have been taken from Hotel (Employers) premises, and delivered outside the hotel by an responsible employee working in the loss prevention department (Security Department) of the hotel, whose duty was to protect and prevent the losses to the Hotel which came to his knowledge. That the CSE being a Loss Prevention Associate, has used and travelled in the Hotels Innova Car for himself, which he was fully aware that he has no right to travel in the said car, nor carry and deliver the said unauthorised cakes (articles of the Hotel) and if he had any bonafide intentions, he being and LP Associate, would have brought the said facts to his superiors, but he has avoided to do so. Hence an adverse inference has to be drawn against the CSE, for the reasons stated hereinabove.

13) Thus, the Enquiry Officer has held Respondent carried two cakes outside the premises of the Hotel without any billing in collusion with his co-employee-Vinit Ghai. That he unauthorisedly used Hotel's Innova Car to carry the said cakes outside the Hotel. It is also proved that one cake was delivered to the friend of Vinit Ghai, whereas one cake was carried by the Respondent to his residence. With these findings, it is difficult to hold that the charge of theft of cakes is not proved in the enquiry. The findings of the Labour Court about charge of theft not being proved by the Enquiry Officer appears

to be perverse. In any case, the learned Judge of the Labour Court himself has held that the act of dishonestly removing the property from the possession of the Hotel without its consent amounts to theft.

14) The learned Judge of the Labour Court was persuaded to direct reinstatement of the Respondent by holding that Respondent did not misappropriate the valuable property of the Hotel and by invoking provisions of Prohibition of Offenders Act by holding that he is not a habitual thief. The curious finding recorded by the Learned Judge in paras-39, 40 and 41 reads as under:

39) Turning toward the first incident of theft of two cake boxes. Price of two cakes was at the most Rs. 1000 or 2000/-. One cannot neglect the fact that property stolen by complainant is edible item. It is true that in the case of misappropriation the value of the misappropriated property is not important. In case of misappropriation, matter must be dealt with iron hands. But here in the matter, complainant has not committed any economic offence, he has not misappropriated money. He has not misappropriated valuable property of respondent No. 1 Hotel. Complainant has not stolen property of guest of the hotel.

40) There are different theories of punishment in criminal jurisprudence. We believe in theory of reformation. Being followers of Mahatma Gandhi we believe in his thought **"Hate the sin and not the sinner"**. Probation of the Offenders Act also provides release of the offender on probation who has committed offence for which imprisonment upto 7 years is provided. Herein the matter, it is not case that complainant is habitual thief. It is not case that prior to this incident also, complainant was also found while stealing or misappropriating property of the hotel. So it is the first offence of theft of two cake boxes. There cannot be same punishment to the person who has committed theft of edible items and the theft of ornaments. Respondents ought to have given a chance to complainant to improve his behaviour. Awarding capital punishment of termination to the employee who is found while committing theft of edible items is shocking to my conscience. Ordinary prudent man/ employer in case of theft of edible item, would not have imposed capital punishment of termination. Ordinary prudent man would have given chance to complainant so that in future he will not repeat his misconduct. Respondents have not acted like ordinary prudent employer.

41) It is true that respondent No. 1 is five star hotel and it is expected from every employee that he must be honest and loyal towards his employer, but merely because respondent No. 1 is five star hotel, gravity of the theft of edible item worth Rs. 1000/- or 2000/- is not increased. So looking from any angle, punishment of termination for theft of edible items and unauthorised entry of complainant in the lobby of respondent No. 1 hotel with some persons of the union is not grave misconduct which invites order of termination from service. **So, punishment of termination is shockingly disproportionate.** As per the observations in the case of Colour Chem Ltd. V/s. A. L. Alaspurkar, respondents have victimized complainant. Respondents have imposed harsh and shockingly disproportionate punishment. They have terminated the complainant not in good faith but in the colourable exercise of employer's right. Therefore, I conclude that respondents are indulged in unfair labour practices under item 1(a), (b) & (g) of Sch. IV of the MRTU & PULP Act. Accordingly, I answer issue No. 3 as "respondents are indulged in unfair labour practices under item (a) (b) & (g) of Sch. IV of the MRTU & PULP Act".

(emphasis added)

15) Thus, merely because the stolen property is an edible item of value of Rs.1000-2000/-, the Labour Court held that the punishment was harsh and shockingly disproportionate. Invocation of provisions of Probation of Offenders Act by the labour Court is clearly unwarranted. The learned judge was dealing with a case of maintenance of discipline in an organization and not reformation of a convicted person.

16) So far as the charges in the second chargesheet is concerned, the Labour Court has recorded following findings:

35) It is pertinent to note that chargesheet of the incident of theft etc. dtd. 27/04/2017 was issued to applicant in the month of May 2017. Then till December 2017 no enquiry was commenced. Actually enquiry ought to have commenced immediately. As per the Maharashtra Industrial Employment Rules 1959, enquiry shall have to be completed within 3 months. Here in the matter, till December 2017 neither enquiry was commenced nor suspension of the complainant was withdrawn. So, there must be restless situation for complainant. One has to understand the feeling, restlessness, fear, tension which complainant was suffering due to non-

commencement of enquiry on the basis of chargesheet of the incident dtd. 27/04/2017. So, one must have to accept the case that due to restlessness, fear and constant pressure of the enquiry like hanging sword, complainant approached to the union representative of Maharashtra Navnirman Kamgar Sena. **In my view, there is no wrong on the part of the complainant, if he approached to union representative for redressal of his grievances. In my candid opinion, if union representatives approached to the management of the respondent No. 1 hotel for enquiry regarding the chargesheet/notice of the incident dtd. 27/04/2017, they have not committed any wrong.** One has to understand that as management has not initiated the enquiry immediately after issuing the chargesheet, second incident of entering in the lobby with the members of MNKS occurred. If management would have immediately initiated enquiry, and it would have completed within time, second incident would not have occurred. So, management of the respondent No. 1 hotel is responsible for the incident for which second chargesheet was issued.

(emphasis added)

17) This is how the Labour Court has virtually absolved Respondent in respect of the charge in the second chargesheet. The learned Judge has totally ignored the manner in which Respondent and union leaders were demanding the discussions. They repeatedly entered lobby of the hotel in presence of hotel guests and demanded meeting with Hotel's General Manager. Thus an employee who was facing the charge of stealing hotel's property was found to be virtually threatening the management by bringing in outside elements in the lobby of the hotel. The Labour Court has thus grossly erred in totally ignoring the misconduct in the second chargesheet.

18) I am not in agreement with the findings recorded by the Labour Court that the punishment of dismissal is shockingly disproportionate to the charges proved against the Respondent so as to direct reinstatement with continuity and other consequential benefits. Serious charge of misappropriation of Hotel's property is held to be proved. The staff of the hotel is not supposed to carry

goods kept for sale at their homes without paying for the same. Respondent was working in the security department and was entrusted with duty of protecting hotel's property and his indulgence in the act of stealing employer's property is clearly subversive of discipline, warranting imposition of major penalty. The objective behind punishing the employee is mainly to maintain discipline in the establishment and the expectation of the learned Judge of labour Court that the Petitioner-Hotel ought to have simply ignored the act of stealing by security staff is clearly unacceptable.

19) The activities of Respondent were detected when surveillance was done through CCTV footage after receipt of information by Loss Prevention Department through internal sources about suspicious activities taking place near Bakery and Main Kitchen. The other employee who actually took out the cakes from Bakery and Main Kitchen, Mr. Vinit Ghai has resigned from service. Respondent however faced departmental enquiry. The Petitioner-Hotel could have possibly taken a lenient view by imposing punishment other than dismissal for his act of stealing two cakes. However, it was Respondent who escalated the matter further by bringing in politically associated union for pressurizing the hotel management to revoke his suspension. Bringing in union leaders inside hotel lobby of a five-star hotel and demanding revocation of suspension by creating ruckus in hotel lobby, put a further premium on Respondent's acts of indiscipline. Apart from serious misconduct of stealing hotel's property, creation of ruckus in the lobby of a five-star hotel in front of hotel's guests by an employee undergoing suspension and disciplinary inquiry is again a serious misconduct.

20) Considering the conspectus of the case I am of the view that the findings recorded by the Labour Court that the punishment is shocking disproportionate are unsustainable. Considering the acts of stealing hotel's property and creating ruckus in hotel's lobby through union leaders, Respondent cannot be reinstated in service. This is not a case where loss of confidence by the employer towards him can be directed to be restored. The Industrial Court ought to have corrected the perverse findings recorded by the Labour Court in exercise of its revisionary jurisdiction under Section 44 of the MRTU & PULP Act.

21) Though this Court would have been justified in setting aside the orders passed by the Labour and the Industrial Court and dismissing Complaint (ULP) No.168/2018. As observed earlier, Respondent cannot be reinstated in service considering the misconduct committed by him. If at all any leniency is to be shown towards him, on account of nature of items (cakes) taken away by him, which were possibly not being capable of being sold outside (and there is no charge of sale of cakes outside), award of some lumpsum compensation to him would meet ends of justice. It appears that Petitioners have deposited Respondent's monthly wages during pendency of the Revision Application. Mr. Paranjape has submitted that the total amount deposited in the Industrial Court towards wages of Respondent would be in the range of Rs. 4,00,000/-. He has already been paid an amount of Rs. 1,82,275/- on 9 July 2018 at the time of his dismissal. Considering the facts and circumstances of the case, further lumpsum compensation of Rs. 5,00,000/- would meet the ends of justice as the total amount receivable by the Respondent would be about Rs.6,82,275/-.

22) I accordingly proceed to pass the following order:

ORDER

- (i) Judgment and Order dated 13 September 2023 passed by the Third Labour Court in Complaint (ULP) No.168/2018, as well as Judgment and Order dated 14 March 2024 passed by the Member, Industrial Court, Mumbai in Revision Application (ULP) No.88/2023 are set aside.
- (ii) Respondent shall be paid lumpsum compensation of Rs. 5,00,000/- in lieu of reinstatement and backwages over and above amount of Rs. 1,82,275/- already paid to him at the time of his dismissal.
- (iii) Respondent shall withdraw the entire amount deposited in the Industrial Court alongwith accrued interest. If there is any shortfall, the amount of shortfall shall be indicated by the Respondent to the Petitioners and within one month of communication of such shortfall, the amount/ difference between lumpsum compensation of Rs.5,00,000/- and the amount withdrawn from the Industrial Court shall be paid to the Respondent by the Petitioners.

23) With the above directions, the Writ Petition is **partly allowed**. Rule is made partly absolute.

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[SANDEEP V. MARNE, J.]