HIGH COURT OF GUJARAT *(D.B.)*

NAVINCHANDRA SHAKERCHAND SHAH
V/S
MANAGER, AHMEDABAD CO-OPERATIVE DEPARTMENT STORES LIMITED

Date of Decision: 17 March 1977

Citation: 1977 LawSuit(Guj) 21

Hon'ble Judges: J B Mehta, D A Desai

Eq. Citations: 1978 GLR 108, 1979 (1) LLJ 60

Case Type: Special Civil Application

Case No: 783 of 1976

Subject: Constitution, Labour and Industrial

Head Note:

Service Law - Constitution of India - Art 226, 227 - Industrial Employment (Standing Orders) Act, 1946 - Industrial Disputes Act, 1947 - Sec 11a - Model Standing Orders - Or 22(m), 23, 24 - dismissal of service - order, converted into one of discharge by Labour Court - validity - mere negligence - held, act was not amounting to gross negligence - employer actuated by unfair motive in introducing facts subsequently so as to convert accidental lapse or slip of bona fide character into one of misconduct - Labour Court could have interfered and should have permitted workman to defend himself, but it failed to look either into standing order no. 22 and 23 or order 25 where for minor negligence warning or censure could have been given - impugned order of Labour Court suffers from non-application of mind, is quashed and set aside - order of termination is bad - High Court has jurisdiction to grant appropriate relief under Art 226 - employee is entitled to reinstatement with full back wages - petition allowed.

Imp Para: 6,15,27,33,37,38,50

Acts Referred:

Constitution Of India Art 227, Art 226

Industrial Disputes Act, 1947 Sec 11(a)

Industrial Employment (Standing Orders) Act, 1946 Sec 15

Final Decision: Petition allowed

Advocates: N R Tandel,K S Nanavati, I M Nanavati

Reference Cases:

Cases Cited in (+): **20**

Cases Referred in (+): **34**

Judgement Text:-

D A Desai, J

[1] This petition by a helper employed by the Ahmedabad Cooperative Department Stores Limited ('employer' for short) questioned the correctness and validity of an order made by the Manager of the employer on December 19, 1973 dismissing the petitioner from the service of the employer and the order made by the Labour Court, Ahmedabad, in Reference 1. C.No. 217 of 1974 converting the order of dismissal into one of discharge.

[2] The backdrop of the case which will illuminate the issues that have been canvassed at the hearing of this petition may be briefly stated. By November 17, 1973 the petitioner was serving as a helper employed by the employer for two and half years and was assigned the work of preparing bills and weighing commodities sold to the customers in the premises of the employer. On the relevant date, that is, on November, 17, 1973 he was in receipt of a consolidated monthly wages of Rs. 145/-. On November 17, 1973 somewhere in the evening one customer came to purchase wheat. It is alleged that he purchased 10 Kg. of wheat and a bill to that effect was prepared by the petitioner and when he started weighing the quantity of wheat in the scales, one Mr. Thakarda who was in charge of the foodgrains section and one Antiben which appears to be the name by which witness Bhanuben Vakil was addressed found that the quantity of wheat, in the

scale appeared to be more than what the customer had purchased and they stopped the petitioner from putting the wheat in the cotton cloth handbag which the customer had brought and 5 Kg. of wheat were taken out and put back in the jute bag from which the wheat was taken. Mr. Thakarda in charge of the foodgrains section immediately submitted a report dated November 17, 1973 soon after the occurrence addressed to the Assistant Manager in which after getting out the aforementioned facts it was stated that the petitioner by mistake was likely to give 5 Kg. wheat more than the quantity purchased to the customer and that such act of neglect was likely to cause loss to the employer and, therefore, the petitioner is required to be seriously reprimanded. He also requested for transfer of the petitioner from his section to some other section. Acting on this complaint of Mr. Thakarda, the Deputy Manager issued a show cause notice accompanied by the preliminary suspension order dated November 18, 1973 calling upon the petitioner to attend an inquiry which was intended to be held on November 23, 1973 at 1.00 P. M. before the Deputy Manager. It may be mentioned that the show cause notice is in the nature of a charge-sheet and the allegation in it relevant to the alleged misconduct is worth noticing in entirety. It reads as under :-

> "You are working as a helper in the foodgrains section and you remained very negligent in your work. On November 17, 1973 you prepared Bill No. 47536 showing sale of 10 Kg. of wheat but you weighed 15 Kg. of wheat. However, in view of the strict observation made by Shri Thakarda and Shri Antiben, you were stopped at the time before putting the wheat from the scale into the cotton cloth handbag of the customer and after reweighing, 5 Kg. of wheat were returned to the jute bag."

> Then proceeds the allegation that this constitutes serious negligence which was likely to cause financial loss to the employer and, therefore, it was not possible to continue the petitioner any more in service and the petitioner is suspended from November 20, 1973 and the inquiry would be held on November 23, 1973. On November 23, 1973 the inquiry was held by the Deputy Manager. Statements of one Udesing Javerbhai, Sabdaji Rathuji Thakarda, man in charge of the foodgrains section and one who filed the initial complaint, Bhanuben Vakil (referred to as Antiben in the charge) and petitioner were recorded. The Deputy Manager submitted his report dated December 18, 1973. He summed up by saying that if witness Udesing had not kept a watch, petitioner was likely to pass 5 kg. of wheat more than the

quantity purchased and that this constitutes serious misconduct which cannot be tolerated and, therefore, the petitioner deserves to be dismissed. Presumably accepting this report of the Deputy Manager, the Manager dismissed the petitioner from service.

[3] When the order dismissing the petitioner from service was taken before the Labour Court in a Reference made under the Industrial Disputes Act, the petitioner examined himself before the Labour Court. Papers of inquiry were produced on behalf of the employer but no evidence was led on behalf of the employer before the Labour Court. The presiding Officer of the Labour Court after a narration of facts held that no inducement appears to have been given by the employer to the petitioner at the time of making the inquiry to make the statement in the manner and in the way in which he had made it. It was further observed that even if the statement of the petitioner is excluded, there was unchallenged evidence of three witnesses. He then observed that there is no contention that the order of the inquiry officer is perverse or mala fide. Then comes the pertinent observation which may be re-produced to show how perfunctorily the whole case has been disposed of by the Labour Court. Observed the Labour Court :-

> "On misconduct being proved, it was in interest of company not to continue the workman in service. It is also held that there was a full-fledged inquiry in consonance with principles of natural justice."

Having held that the misconduct is proved, the presiding officer of the Labour Court proceeded presumably to decide whether the penalty was out of all proportion to the gravity of the charge. In this connection he observed that there was no evidence to establish that the customer concerned was known to the workman and he tendered apology and that workman has a clean record and the value of 5 kg. of wheat would be Rs. 8. 50 and the punishment of dismissal to a workman with clean record was too severe. He then observed that having considered the evidence led at the inquiry and other circumstances, the order of dismissal should be converted into one of discharge and proceeded to pass the final order.

[4] It is an admitted position that the institution of the employer is governed by the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946. Model Standing Order 22 provides that any of the acts or omissions therein

mentioned on the part of workman amount to misconduct. Reliance is placed on 22(m) which provides "habitual neglect of work, or gross or habitual negligence". The Explanation to Standing Order 22 provides that no act of misconduct which is committed on less than three occasions within a space of one year shall be treated as 'habitual'. Standing Order No. 23 provides for punishment which could be imposed on a workman who may be found guilty of misconduct as prescribed in Standing Order 22. It provides amongst others punishment of dismissal from service. Sub-clause (3) of Standing Order 23 provides that no order of dismissal shall be made except after holding an inquiry against the workman concerned in respect of the alleged misconduct in the manner set forth in clause (4). Clause (4) provides that a workman against whom an inquiry has to be held shall be given a charge-sheet clearly setting forth the circumstances appearing against him and requiring explanation. The workman shall be given an opportunity to answer the charge and permitted to be defended by a workman working in the same department as himself. It further provides that the workman shall be permitted to cross examine any witnesses on whose evidence the charge rests. Clause (5) (a) permits the employer to suspend a workman pending the inquiry and clause (5) (b) prescribes an obligation to pay subsistence allowance at the rate mentioned therein during the period of suspension and till the final order is made. Clause (c) provides something akin to the provision that were in Article 311 of the Constitution before its amendment, namely, a second opportunity to be given to the employee before any punishment is imposed upon him. It provides that if on the conclusion of the inquiry or as the case may be, of the proceedings on a criminal charge, the workman has been found guilty of the charges framed against him and it is considered, after giving the workman concerned a reasonable opportunity of making representation on the penalty proposed, that an order of dismissal or discharge or suspension or fine or stoppage of annual increment or reduction in rank would meet the ends of justice, the employer shall pass an order accordingly. Sub-clause (6) casts an obligation upon the Manager to take into account the gravity of the misconduct, the previous record, if any, of the workman and any other extenuating or aggravating circumstances that may exist while awarding punishment. Standing Order 24 provides that a workman may be warned, censured or fined for any of the acts therein mentioned. We must take note of Clauses (c) and (d) which provide for negligence in performing duties and neglect of work.

[5] The first contention is that on facts alleged there is no misconduct in respect of which an inquiry could have been held or punishment could have been imposed. On behalf of the petitioner it was said that an error and that too a bona fide one cannot by styled as neglect of work or negligence in performing duties. On behalf of the employer

it was said that the line which demarcates error from negligence is a thin one and it will have to be decided on the facts and in the circumstances of each case whether what has been alleged is a mere error or a mistake or negligence in performance of duty. Negligence has always been said to be a negative concept. Where there is a duty to take care or to exercise certain skill, failure to take care or exercise skill may indicate negligence but it is equally true that in the day to day work an honest mistake may be committed. The mistake may be of such a nature as by its own gravity it may be indicative of negligence. But every mistake or every error in performing duties could hardly be styled as negligence. Standing Order 22 does not constitute negligence whenever alleged as misconduct. It refers to habitual neglect of work, or gross or habitual negligence. Being aware of how the word "habitual" has to be construed in relation to Standing Order 22(m), Mr. Nanavati said that the case of the respondents is that the petitioner was guilty of gross negligence. We must, therefore, bear in mind that the misconduct alleged against the petitioner in terms is of gross negligence. It is not mere negligence. Mere negligence is not misconduct. That becomes crystal clear if Standing Order 22(m) is read with Standing Order 24(c) and (d). If negligence is gross, it would constitute misconduct in respect of which penalty as provided in Standing Order 23 can be imposed. But a slight negligence or neglect of work may be visited with a warning, censure or fine and that becomes clear by the language employed in Standing Order 24.

[6] If on facts on a rational view of the matter anyone can say that what was attributed to the petitioner was mere negligence, Standing Order 22 would not be attracted and no punishment under Standing Order 22 could be inflicted because for such a negligence Standing Order 24 makes a clear arid specific provision. In order to attract Standing Order 22, the negligence alleged must be gross negligence.

[7] Could the facts as alleged by the employer without any controversy about anything in it except the embellishments and embroideries made after some days be styled as gross negligence ? Before we travel into this, which according to Mr. Nanavati is a forbidden field, let us clear the ground as to under what circumstances the High Court exercising extra-ordinary jurisdiction under Art. 226 can interfere with the finding recorded in the disciplinary inquiry or by the Labour Court. As a serious controversy about our jurisdiction in a petition for issuance of a writ of certiorari under Art. 226 is raised, it is necessary to clear the ground. The law in relation to the limits of the jurisdiction of the High Courts in entertaining a plea for a writ of certiorari under Art. 226 of the Constitution is well-settled. In order to justify the issue of a writ of certiorari it must

be shown that the impugned order suffers from an error apparent on the face of the record. It is clear that the error must be an error of law and not an error of fact because an error of fact though serious and though it may be apparent on the face of the record cannot sustain a claim for a writ of certiorari. It is only errors of law that justify the issuance of said writs provided, of course, they are of such a character as would reasonably be treated as error apparent on the face of the record. If a finding of fact is made by the impugned order and it is shown that it is based on no evidence, that would no doubt be a point of law open to be urged under Art. 226. Vide Agnani v. Badri Das & Ors., 1963 (1) L.L.J 684. This very view was also affirmed in 1963 (2) L.L.J. 78, (Tata Oil Mills Co. Ltd. v. Its Workmen & Another.)

[8] Our attention was drawn to a number of decisions but it would be profitable to refer to the latest in State of A. P. v. G. Venkata Rao, A.I.R. 1975 S.C. 2151 wherein it was observed that the High Court is not a court of Appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. 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. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. 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. The test applied is whether there was evidence which would reasonably support the conclusion.

[9] In the context of the labour law, the earliest decision on the question is one in Messrs Indian Iron and Steel Co. v. Their Workmen, A.I.R. 1958 S.C. 120. It was observed that in the case of dismissal for misconduct the Tribunal does not act as a Court of Appeal and substitute its own judgment for that of the management and it will interfere only when there is a want of good faith; when there is victimisation or unfair labour practice on the part of the management. Various decisions of the Supreme Court crystallize into the following broad propositions as to when the Tribunal can interfere

while deciding a dispute arising out of dismissal or discharge of a workman They are (i) there is want of bona fides (ii) it is a case of victimisation or unfair labour practice or violation of the principles of natural justice; (iii) there is a basic error of facts; or (iv) the finding is perverse in the sense that no sensible man acting fairly could ever come to the conclusion to which the Tribunal reached. The principles herein crystallized are supported by a number of decisions and it is not necessary to refer to each one of them in detail. To this one can add one more limb that where the inquiry which is either required to be held according to procedure prescribed in the Standing Order or according to the principles of natural justice and it has not been so held, the order recorded in such an inquiry would be a nullity.

[10] Reverting to the facts of this case two things appear on the face of the record. They do not call for an inquiry or examination of disputed questions of facts which we would treat for the time being as forbidden field in which we would not enter. But the two salient features of the domestic inquiry held in this case are so staggering and they appear apparent on the record that one just wonders whether this whole exercise was undertaken for some ulterior purpose which of course, it is difficult to dissect and ascertain.

[11] The first aspect that disturbs, when one looks at the record is whether what was alleged was at all a misconduct much less a gross misconduct. This is very important because in the name of discipline the employer is not there to clutch at a straw to style anything as misconduct so as to throw out the employee. If anything can be alleged to be a misconduct, the protection afforded to the employees by various labour laws will not only be illusory but would be deceptive. The allegation against the petitioner was that he was a helper in charge of two duties, namely, to prepare a bill for one who comes to purchase foodgrains and after preparing the bill to weigh the foodgrains purchased by the customer in the scales. It is an admitted position that the incident on which the allegation of misconduct is founded occurred in the evening. The petitioner prepared a bill showing sale of 10 Kg. of wheat. It is admitted that this customer who had come to purchase wheat was not known to the petitioner or was not related to the petitioner or the petitioner was not in any way interested in him. In fact curiously in the inquiry the name of this customer is not disclosed or divulged. He is not called as a witness. No attempt is made to establish any relationship between him and the petitioner. There is not the slightest suggestion that the petitioner wanted to oblige the customer or that he was inclined to obtain any wrongful advantage for himself by giving 5 Kg. of wheat more to the customer. There is not the slightest suggestion. In fact once

the customer's name is not disclosed and he is not called and no attempt is made to establish any relationship between him and the petitioner, such an allegation could never have been made. Therefore, on the record as it is, petitioner is shown to have sold 10 Kg. of wheat by preparing a bill to a stranger. After preparing the bill when the petitioner proceeded to weigh the wheat, it appears that he had put weights for 15 Kg. Therefore, if the error was not found, petitioner would have handed over 15 Kg. wheat to that customer. The question is at what stage the whole thing was nipped in the bud and in this connection the first complaint made soon after by Mr. Tharkarda in charge of the foodgrains section possibly reveals the whole truth. Mr. Thakarda says in Exhibit 10 prepared immediately after the occurrence that after writing the bill for 10 Kg. of wheat sold to the customer, when he was weighing the wheat, Mr. Thakarda and Antiben in time looked at the quantity of wheat and the petitioner was stopped before the wheat passed from the scale to the handbag of the customer. Therefore, the wheat was never handed over to the customer. The wheat still remained the property of the employer. It was still in the scale. Before that Antiben and Thakarda both pointed out that the wheat was more than what was purchased and from the scale itself 5 kg. were returned to the jute bag from which wheat was taken. This is the initial allegation. Two things are worth noting. There is not the slightest reference to Udesing who appears to be the villain of the piece who has subsequently interposed himself and given a different colour to this modest possible error to be, as the most heinous cirme. There is not the slightest reference to Udesing being present at the time. There is not the slightest reference In Exhibit 10 that Udesing ever drew attention of anyone to what was happening. In Exhibit 10 it is not suggested that the wheat ever want into the cloth hand - bag of the customer. The wheat was in the scale and 5 Kg were taken out before the quantity was put in the handbag of the corner. Two persons, Thakarda and Antiben, who saw the incident interposed and drew the attention of the petitioner that the quantity of wheat was more than what is sold and assert in Exhibit 10 that by mistake petitioner was likely to give 5 Kg. more wheat to the customer and would have thereby caused loss to the employer. Those who witnessed the occurrence and had the entire picture before them styled or described the incident as mistake. Mistake is also an error. There is no negligence in it. No Mala fides are attributed. A pure accidental error is described in Exhibit 10 which is the complaint. Should anyone take note of this incident unless it is said that human being serving with the present employer must be wholly infallible enough not to commit the slightest mistake and the efficiency of the employee must be 100 per cent. Apart from that it being absurd, humanly it is not conceivable. It is not for a moment suggested that all an errors must be overlooked as an error simpliciter. An error which has the consequence of leading to serious or attrocious consequences may be

styled as negligence and it can only be gross provided the degree of culpability is very high. If every error is to be negligence, one would never have the word "error" but would always be substituting the word "negligence". And look at this error. It is alleged as a mistake. It is styled as a mistake. It is considered bona fide. It is not suggested that the petitioner had any pie in the game for sharing the ill-gotten gain that would have ensued had the error not been disclosed. If the petitioner is a weighman in charge of weighing foodgrains and gives more than what is purchased and it is not detected and if it is repeated, one can say that it is habitual negligence. But one incident, first of its kind, because the Labour Court says that the petitioner's record is clean, and Mr. Nanavati did not attempt to suggest that in the past for two and half years that this petitioner served, he committed the slightest error in discharge of his duties, cannot constitute negligence, much less gross negligence. An inference must be drawn of the fact that the Manager who held the inquiry must be conscious of the requirements of Clause (6) of Standing Order 23 which requires that before awarding punishment of dismissal, the entire record of the workman has to be examined and though the record reveals that he is oblivious of the requirements and provisions of the Standing Orders, normal presumption is that he knows the relevant provisions and would ordinarily comply with them. He must examine the same and yet he does not say that this petitioner was in the past guilty of slightest negligence in the discharge of his duties. The immediate superiors or coworkers whichever way we look at, Thakarda and Antiben described the incident soon after the occurrence as a mistake committed by the petitioner. Now look at the degree of the consequences because Mr. Nanavati has relied on one or two authorities to show how frightful are the consequences. Loss to the employer would be of Rs. 8. 50 ps. If the lapse was not detected in time and the goods had gone out of the employer's institution. Could it be said to be serious or irreparable or even atrocious or very harmful consequences. However, what is worth noting is that loss of not even a pie has been suffered. In support of the submission that error may have serious consequences reliance was placed on Kalyani v. Air France, Calcutta, (1963) I L.L.J. 679. Two mistakes were committed by the employee while checking the load-sheets and balance charts and in defence it was said that some others were also checking load-sheets and balance charts. It was found that the mistakes committed by the workman in that case were serious involving possible accident to the aircraft and possible loss of human life. Now unless we equate 5 kg. of wheat with the value of an aircraft running into crores of rupees or the human life which is invaluable, it is not possible to go by the ratio of this decision.

[12] It is not for a moment suggested that the employer should tolerate or be indulgent

to the employee who would be negligent in work or discharge of duties which causes loss to the employer. But if a possible lapse is to be styled as gross negligence so as to result in dismissal, the word "gross" would be without meaning. Negligence is qualified by the use of adjective gross. When negligence is inferred from possible consequences of the act or omission, the consequence should be such as to be irreparable or the resultant damage must be so heavy that the degree of culpability would be very high. Mr. Nanavati intelligently, therefore, avoided the charge "habitual negligence" because unless thrice repeated, it cannot be the subject matter of charge. By taking recourse to gross negligence he avoided mere negligence as this was the first instance. If be were to urge that it was habitual negligence, he was out of Court because he could not show that it has been thrice repeated and that is what the Standing Order itself requires. Therefore, taking recourse to gross negligence, he wants us to hold that this possible loss not suffered was such as to condemn this petitioner as being guilty of gross negligence. He is tight when he said that all instances of negligence cannot be dismissed as mere errors. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a compositor who carelessly places a plus sign instead of a minus sign in a question paper may cause numerous examinees to fail; a compounder in a hospital or chemists' shop who makes up the mixtures or other medicines carelessly may cause quite a few deaths; the man at an airport who does not carefully filter the petrol poured into a plane may cause it to crash; the railway employee who does not set the point carefully may cause a head-on collision. Misplaced sympathy can be a great evil. Vide Royal Printing Works v. Industrial Tribunal, Madras, (1959) 2 L.L.J. 619.

[13] Taking all these illustrations together is it possible with an extreme bias in favour of the employer, an employee who is so very touchy about his financial affairs, that one possible mistake detected in time before loss occurred, styled in the inquiry report as a mistake, can constitute gross misconduct, apprehended loss being of Rs. 8.50 only, so that an employee whose record is spotless can be straight-way dismissed ?

[14] We may take a leaf from the decided case. In Andhra Scientific Co. v. Seshagiri Rao, A.I.R. 1967 S.C. 408, the misconduct alleged was habitual negligence as work of arranging the items in order and fixing up labels was not completed during the prescribed time. The Supreme Court posed to itself a question whether on the facts

alleged the employee could be said to be guilty of habitual negligence and held that the acts of which the workman has been found guilty do not amount to habitual negligence of work. The relevant clause in the conditions of service requires that before a person can be said to be guilty of habitual negligence it has to be shown that he has been guilty of negligence on several occasions so as to show that this is his habit. It was found as a fact that the negligence was over a period but it was treated as one incident of negligence and it was observed that the fact that the negligence continued over several months does not make it a habitual negligence.

[15] Taking every illustration which Mr. Nanavati could intelligently and adroitly put forth before us and comparing it with the present one so as to butress his submission that this is a case of gross negligence, if we ever agree with it, it would be doing violence to language. Remove the word "gross" and read a possible loss of Rs. 8.50 which had not occurred and the trifling character of the charge would be exposed. We cannot merely subscribe to language devoid of facts. It is the facts which must inform the language. The facts have to be described by proper language not that once we have the language, facts can be moulded to suit the language. That cannot be tolerated. We presume while discussing this aspect that the employer's approach was fair. He possibly believed that there was likely to be a loss which had not occurred because of the careful intervention of two other very careful employees Thakarda and Bhanuben and yet as far as the present petitioner was concerned, he must be visited with the extreme penalty because every employee can be held in terror in that a slight error not causing any loss but was likely to cause loss will end in being thrown out of employment where the salaries are to say the least meagre if not paltry.

[16] Keeping in view our jurisdiction, namely, that we can interfere with the order when the finding is completely baseless or perverse, could it not be said that before we say a finding is baseless or perverse that there was no misconduct at all on facts alleged and taken as admitted ? Let the facts alleged be taken as wholly admitted. Could a man acting fairly in possession of full faculties of his mind having a sensible approach to the problem posed before him write an epitaph that this is a case of gross negligence. No one can say that. There was no misconduct. We are not looking into adequacy or sufficiency of evidence. We are always conscious of the forbidden field. It is the function of the Tribunal to find whether the evidence was adequate or sufficient. We are taking the evidence as produced to be wholly correct at the initial stage and feel that there is no misconduct. Can we not say that under Art. 226 ? If writ can be issued to advance the cause of justice, then it is justice if we say that what is suggested as misconduct by

any standard does not appear to be a misconduct. It has to be a misconduct in law. In other words, it has to be a misconduct as understood in the Standing Orders and that Standing Order refers to gross misconduct. If there was no misconduct, the adjective "gross" is futile. If there was no negligence, it could never be said to be gross negligence. It is purely bona fide and accidental error. Therefore, to start with there was no case or justification not even a remote one for starting an inquiry.

[17] But the more we go further, we feel that this employer was actuated by some ulterior purpose. This the petitioner who is ill-informed has not been able to reveal. But let us look at the facts as alleged by the employer. Initially the complaint has to be taken as constituting the charge sheet or the allegations on which the charge-sheet is founded. In this complaint Exhibit 10 there is not the slightest reference to the presence of Udesing Jhaverbhai. Apart from that there is not the slightest reference that Udesing Jhaverbhai took any part in this incident or he had anything to do with the incident or he was in any way connected with this incident. The bill was prepared by the petitioner. He started weighing the wheat and Mr. Thakarda says that he and Antiben found that quantity of wheat was more than what was sold and before the wheat could be put in the handbag of the customer, 5 Kg. of wheat after proper weighing were returned to the jute bag. If Udesing had taken any part up to this point, Thakarda would not have committed to refer to him because he refers to himself and Antiben. On the report made by Mr. Thakarda, the Deputy Manager prepared the chargesheet dated November 18. 1973. Here also he refers to Thakarda and Antiben only. He also staves that the allegation is that the wheat was in the scale and 5 Kg. of extra wheat were returned from the scale to the jute bag and they did not go into the handbag of the customer. This is the charge. There is no reference to Udesing being a witness to this incident. There is not the suggestion in the chargesheet that Udesing would be examined as a witness at the inquiry. However, on November 23, 1973 when an inquiry is held, Udesing appears to have been examined as the first witness. He says that since the month of November he was working as a weighman in the foodgrains section. He further stated that on November 17, 1973 a customer came who had also come on the previous day. A bill in respect of him was prepared by the petitioner and then the petitioner weighed the quantity of wheat sold. He said that the petitioner weighed 15 kg. of wheat and handed over the quantity to the witness. He says he saw the bill and found that it was for 10 Kg. while petitioner had handed over 15 Kg. of wheat and the entire quantity was in the handbag of the customer and, therefore, he developed a suspicion and, therefore, he took out the wheat from the cloth bag of the customer and weighed them again and he himself took out 5 Kg. of wheat in presence of Thakarda and returned 10 Kg. to the

customer. Then he informed Bhanuben about the occurrence. It is this Udesing's evidence which is relied upon by the Inquiry Officer. Udesing's name was never mentioned in the chargesheet, his presence was never referred to. What he says is not to be found in the chargesheet. Till the chargesheet was served it was nobody's case that 15 Kg. had gone into the customer's hand bag and Udesing took them out. If such a thing had occurred, Thakarda would not have missed mentioning about it in Exhibit 10, a report submitted by him soon after the occurrence. And look at Thakarda's performance. He falls in line with Udesing. Bhanuben says that her attention was drawn by Udesing. She also falls in line with Udesing. If the employer was acting fairly, how did it become necessary to introduce Udesing who was never shown as a witness in the preliminary complaint or in the charge-sheet? He has changed the entire version because till the time the chargesheet was drawn up, wheat had not gone into the handbag of the customer. But they were still in the scale from where 5 Kg. were returned to the stock of wheat and entirely different allegation has been made in the evidence of these witnesses and this appears to have done with a purpose. Anyone in his senses would have understood that what is stated in the charge sheet was a bona fide error. Therefore an ingenuity is employed and possibly someone seems to have stepped into the picture with a brush and paint to convert an incidental slip into a sort of a completed misconduct. But we were told that the petitioner himself had admitted that fact. Petitioner's statement recorded by the Inquiry Officer refers to weighing 15 Kg. and Udesing pointing out the same. The statement need not be doubted because it is signed by the petitioner. .Now the Deputy Manager who was the Inquiry Officer clearly refers to Udesing's statement. The initial complaint was by Thakarda supported by Bhanuben. Yet the Inquiry Officer started with Udesing's evidence. Then he refers to the admissions. The finding recorded is that if Udesing's attention had not been drawn to the incident, the employer would have lost 5 Kg. of wheat. Udesing appears to have been a subsequently got up witness. The story was subsequently cooked up. It was an attempt to constitute a misconduct which on the facts alleged till then did not disclose misconduct. It was said that this Court cannot examine this aspect because the only thing that the Court can look at is whether the inquiry was according to the provisions contained in the Standing Order or in accordance with the principles of natural justice. Principles of natural justice would imply that v, hat was no evidence could ever be acted upon. Vide B. E. Supply Co. v. The Workmen, A.I.R. 1972 S.C. 330 at 339. This subsequent performance, therefore, dearly implies that the employer was actuated by an unfair motive in introducing facts subsequently so as to convert an accidental lapse or a slip of a bona fide character into one of misconduct or where an element of mala fide has been introduced. Under these circumstances the Labour Court could have

interfered and should have interfered.

[18] There is another aspect of the matter which must be examined here. Assuming that the charge was of gross negligence as envisaged in Standing Order 24(m), the inquiry has to be held according to the provisions of Standing Order 25. One of the requirements in Clause (4) was that the workman shall be permitted to be defended by a workman working in the same Department as himself. The clause appears to be mandatory in character in that if the permission was asked for, it has got to be granted. The only distinction made by Mr. Nanavati was that the permission has to be asked for and no such permission was asked for. This aspect more often assumes importance in number of matters. If a workman is a member of some organized Union, the Union may step in having its own source of knowledge of law and the rights. But a man like the petitioner, possibly not member of any Union or any Union appearing to take any interest in him and who was getting a consolidated wage of Rs. 145 per month, was he expected to know the provisions of Clause (4) of Standing Order 25 We positively pointed out that the Manager who claims the power of dismissal does not know it. We will be pointing out at two or three places that he was completely oblivious of the requirement of Standing Order 25. In such a situation we would expect, to avoid any charge of unfairness, that the employee must be informed about his rights under the Standing Order. A time may come when this will have to be treated as a duty, a breach of which may entail serious consequences. How do we expect a petitioner like the present one working as a weighman, more of a mechanical type of work, not calling for any educational attainment and ready to struggle for the whole of his life getting a meagre wage of Rs. 150/- per month to understand the provisions of Standing Order? The inquiry has to be in accordance with the principles of 'natural justice. In such a situation apart from technicality whether permission is asked for or having not been asked for, a time has come to expect the employer or his nominee to inform the employee of his rights. If thereafter the employee does not avail of the opportunity, no grievance could be made. And here the petitioner as required by clause (4) had a right to cross-examine witnesses. Sitting in law Courts day in and day out we know what the art of cross-examination is and few have mastery over it. Do we expect this petitioner to cross-examine witnesses on his own, unaided and unhelped by any one? We are aware of the fact that another workman of his department would have hardly improved the matter, but two together could have put up some show of cross-examination and Udesing could have been cross-examined. If a party is required to show cause and has a right to cross-examine witnesses, such a right would be illusory if it is required to be exercised by lay persons. Vide B. E. Supply Co. v. The Workmen, (supra). We would

not say that the inquiry is vitiated on account of this lapse because of the technical approach that permission was not asked for, otherwise it would have been rightly granted. We must confess that there was no cross-examination. There could be none in the circumstances and the provision merely remains for the glorification of the statute book rather than of any practical utility. In drawing up the chargesheet it is obligatory under clause (4) to set forth the circumstances appearing against the employee and requiring his explanation. That is the statutory legal requirement. If that was to be so, it should have been stated that wheat had gone into the cloth handbag of the customer and Udesing was the first man to catch hold of the same and they were taken out of the bag and reweighed and thereafter 5 Kg. wheat were taken out. That is wholly absent in the charge-sheet yet the final order is based on that allegation.

> Therefore, while the charge was one way, the inquiry has proceeded in a different way. The subject matter of the charge having been held proved, the punishment has been imposed. But there is a still greater defect in the inquiry. Clause (5) (c) requires that if on the conclusion of the inquiry or as the case may be, of the proceedings on a criminal charge, the workman has been found guilty of the charges framed against him and it is considered, after giving the workman concerned, a reasonable opportunity of making representation on the penalty proposed, that an order of dismissal or discharge if it would meet the ends of justice, it can be passed. This is something akin to the second notice as contemplated by Article 311 of the Constitution before its present amendment and it is a well-settled principle that failure to give a second opportunity would vitiate the order. Not even Mr. Nanavati could at least tell us how the record shows that the employer had satisfied or met with the requirements of clause (c). The entire inquiry record was produced before the Labour Court. It does not contain the second show cause notice. The punishment in this case was the punishment of dismissal. The petitioner even if his admission is to be taken as a confession, has simultaneously said that he was sorry for the lapse and that being his first lapse, it may be condoned. The second notice is not at all given therefore clause (c) is violated. It is a statutory requirement because the Standing Orders are statutory in character. Clause (6) requires that before passing the order of punishment, the Manager shall take into consideration the gravity of the misconduct, and the previous record if any of the workman and any other extenuating or aggravating circumstance that may exist. All these requirements are conspicuous by their very silence. This led us to make an

observation, may be we are wrong, that at least apart from the petitioner, this Manager of the institution was completely oblivious of the requirements of the Standing Orders. Possibly he did not know that there is something like Standing Orders and he was required to comply with it. His ignorance is so patent on the record, that one can only infer that he carried on the inquiry as he thought it proper and that would be completely contrary to the statutory requirements of the Standing Order. This will lead to an obvious and indisputable conclusion that the inquiry has been held in contravention or violation of the principles of natural justice as incorporated in the Standing Orders and his conclusion will be wholly vitiated.

[19] We then turn to the order of the Labour Court before we take up some of the serious legal submissions made by Mr. Nanavati. We have already pointed out above the conclusions recorded by the Labour Court. We honestly feel that the Labour Court has completely missed the point and the order more or less reproduces the ipse dixit of the Labour Court. The Court took the misconduct as proved without ever first examining, as was contended, whether the facts alleged constitute misconduct. It observed that on misconduct being proved, the other thing namely punishment must follow as a matter of course. It was open to the Labour Court to look at the inquiry and come to the conclusion whether it is vitiated or not. Not one word is to be found in the whole order of the Labour Court to repeat is merely the ipse dixit of the Court having no relevance to record. Accordingly very little attempt was made by Mr. Nanavati to support the order. But a mere reading of it is sufficient to discard it as lacking in direction, methodology, requirements and dealing with the problem posed before it. Therefore, it is proper that this Court must interfere.

[20] It is at this stage that Mr. Nanavati formulated three propositions for our consideration. They may be reproduced in his own words :-

(1) The High Court would have no jurisdiction to interfere with the order of the Labour Court particularly when the Labour Court has found on facts that a misconduct is committed and in exercise of discretion has converted the order of dismissal into discharge ;

(2) Misconduct alleged and proved against the employee consists of gross negligence in discharge of his duty which would attract the penalty of

dismissal; and

(3) Assuming that the order of the Labour Court is required to be set aside, the matter will have to be remanded to the Labour Court so far as the claim to reinstatement and back wages is concerned.

[21] Taking the first proposition it is answered by the discussion in the foregoing paragraphs. The domestic inquiry was bad as it was contrary to the principles of natural justice and in complete violation of the provisions of the relevant Standing Orders The order of the Labour Court suffers completely from non-application of mind on the relevant facts. The finding that the facts alleged do constitute gross negligence so as to amount to misconduct would be perverse. It is of no consequence in the facts of this case. It appears that mechanically without understanding its implication, order of dismissal was converted into one of discharge. The first ground must, therefore, be negatived.

[22] The second contention must equally be negatived in view of the discussion in the foregoing paragraphs that the facts alleged did not constitute any gross negligence. In fact there is no negligence but it is a minor, trivial error of no consequence which no sensible man would even take notice of.

[23] That brings us to the third contention which took considerable time. Though the contention is formulated to raise a dispute about the final order that can be made, it had three distinct limbs and each limb will have to be separately examined. The first limb was that as the Labour Court had no opportunity to ascertain whether reinstatement should or should not be ordered, the matter should go back to the Labour Court. The second limb was that even if this Court were to direct reinstatement, yet the matter will have to be remanded to the Labour Court because the question of back wages will have to be examined on evidence as to whether the petitioner bad obtained any gainful employment during the period between the date of dismissal and his reinstatement. And the third limb was that in a petition under Article 226 for a writ of certiorari, this Court has a limited jurisdiction to quash the order. But it cannot make any final order of reinstatement or give direction for payment of back wages and after quashing the order, the matter must go back to the Labour Court. We will deal with these three submissions in the order in which they are put.

[24] The first contention of Mr. Nanavati hardly presents any difficulty. If the order of

dismissal is bad, it is no more in dispute that reinstatement must follow as a matter of course. This appears to be quite well settled since a long time. Instead of examining this contention on merits, we will content ourselves by referring to some celebrated cases on this point. The employee was in service and he would have continued in service but for the order terminating his services by dismissing him from service. If that order is bad unless otherwise provided the employee would continue to serve. All this gloss, whether reinstatement should be given or compensation should be given, developed after a question was raised about loss of confidence. Even if the dismissal is not justified, it was contended that the employer having lost confidence in the employee, reinstatement should not be ordered, compensation should be paid for wrongful termination. In days gone by it was said that if a cook or a driver or a wallet is reinstated against the employer's wish, he would remain in perpetual fear from his cook or driver. Every time he sits for his meal, the unwanted cook can generate mental agony. While using his car he has continuous apprehension that the driver would jeopardise his life. For persons holding such posts it was considered that ordinarily reinstatement should not be ordered because the employer's peace of mind will be disturbed. This was further expanded to domestic peace and harmony. But today in large concerns, between employer and ultimate employee, there is hierarchy of officers. The director or Managing Director could even hardly claim to personally know persons serving in the lower echelons of service. If they even do not know each other, there is no question of reposing faith or confidence in each other and in such a situation plea of loss of confidence sounds hollow. But that question does not arise and we need not further go into it. For loss of confidence, there is no pleading. Now in such a situation where the order of termination is bad, reinstatement cannot ordinarily be refused and it would be all the more so even if there is long lapse of time between reinstatement and dismissal. Vide Swadeshi Industries Lid. v. Its Workmen, A.I.R. 1960 S.C. 1258.

[25] In a more recent decision the Supreme Court in Workmen of Assam Match Co. Ltd. v. Labour Court, 1973 (2) L.L.J. 279 in terms observed that security of tenure for industrial employment tends to create harmonious relations between the employer and the employee, and to that Court has consistently held that in cases of wrongful or illegal dismissal the normal rule is that the employee who has been illegally or wrongfully dismissed should be reinstated. Therefore, the normal rule in case of illegal termination of service is reinstatement. Reliance was, however, placed on a Division Bench decision of the Bombay High Court in Sadanand Patamkar v. New Prabhat Silk Mills, (1974) 2 L.L.J. 52 wherein also this principle that when the order of dismissal from service is bad, re instatement must normally follow has not been departed from. That decision is more

useful while considering the question about the back wages. But the decision just affirmed the principle that when termination of service is illegal, reinstatement must follow as a matter of course. Now here we have held the termination to be quite illegal. So reinstatement must follow as a matterof course. In fact we would be justified in pointing out that the employer in his written statement before the Labour Court merely made a bald statement that reinstatement should not be granted. The test is whether the employer was making out some special circumstances on account of which even though the order of termination of services is considered bad in law, in view of those special circumstances reinstatement should not be ordered That is not the case nor is such circumstance ever pointed out to us also here. Therefore once the order of dismissal is found to be bad, reinstatement in this case must necessarily and inevitably follow.

[26] The next question is about back wages. Mr. Nanavati contended that there is no evidence to show as to what the petitioner was doing during the period he was dismissed from service and by the time he is asked to go back to service under the orders of this Court and, therefore, the matter must go back to the Labour Court for an inquiry into this aspect. We would like to take three steps while negativing this contention. Standing Order 25(5)(b) casts an obligation that if an employee is suspended pending the inquiry he should be paid subsistence allowance. Admittedly nothing was paid in this case. There is a further provision that the inquiry must be finished in four days The inquiry was over, of course, by November 23, 1973 and we would say it was over in four days. But the Deputy Manager submitted his report on December 15, 1973. The Manager took action on December 19, 1973 four days after the report and the petitioner was not reinstated. He was neither paid any subsistence allowance nor was he taken back in service. Of course after the dismissal there was no question of paying anything but this would reinforce our conclusion that any reference to Standing Order was conspicuous by its silence and the Manager considered himself as gentleman at large subject to his own rules as he understood them. That apart when 'the matter came before the Labour Court the petitioner went into the box. He said he has not got any employment meaning thereby that he was unemployed. This part of his statement at the beginning of his examination-in-chief has not been challenged in cross-examination. In the written statement not a word is said that the petitioner was employed somewhere else. If the petitioner says he was not employed and if that averment is not questioned in cross-examination and if the employer does not lead evidence and does not say anything, it would indicate that the petitioner was not employed anywhere and the averment of the petitioner on oath must be accepted as

trustworthy and reliable. If that be so, there is material to show that the petitioner was not gainfully employed anywhere.

[27] The question then is should he not get his back wages ? What should be the approach in such matter ? Even though the employee was serving and for the service he was getting some paltry wages, quietly he was thrown out in a manner to say the least in the present day notions almost following the old rule of hire and fire. He is thrown out of employment. That dismissal is found to be wholly bad. The law of the land as pronounced by the Supreme Court is that in such cases reinstatement must follow as a necessary corollary. Should he be denied wages? For what offence should the man be denied wages ? Should he be visited with the further penalty by denying him wages ? The only answer is that he has lived. We cannot subscribe to such a thing. Yes it is true that if the petitioner was gainfully employed somewhere else, he should not get the double advantage and to that extent one can always deduct the amount earned somewhere else and if it was more than what he was earning with the employer, probably he would be hardly keen to get reinstatement but even if he was earning something, allowance will have to be made for that. But if he was not earning anything, there is no reason why on the ground of justice and fairplay he should be denied back wages.

[28] In M. L. Bose & Co. v. Its Employees, A.I.R. 1961 S.C. 1198 it was found as a fact that the dismissal of the workman was illegal and even though someone else was employed in his place, relief of reinstatement was granted. Against the order of the Tribunal granting reinstatement, the matter was taken to the Supreme Court and a stay of operation of the order was obtained. It was unconditionally granted. When the appeal came up for final hearing and it was being dismissed it was observed by the Supreme Court that it saw no reason for depriving the workmen of their full wages from the date the award became operative to the date of their reinstatement. It may be mentioned that the Tribunal had awarded one third of the wages for the period between dismissal and the award granting reinstatement and the Supreme Court granted full backwages from the date of award till reinstatement after the dismissal of the appeal by the Supreme Court.

[29] The question really is as to from what date back wages should be paid It is the termination that brings about cessation in getting it. If at the date on which he has stopped rendering service by an order which is found to be illegal, that must be the relevant date from which the back wages must start subject to the general principle that

if the employee has thereafter served somewhere else, the amount so earned by him should be adjusted. If the termination is found to be illegal and reinstatement is ordered, ordinarily for the entire period back wages should be granted.

[30] In Workmen of \U. P. State Electricity Board v. U. G. V. El. Supply Co,, (1996) 1 L.L.J. 730, The Constitution Bench of the Supreme Court observed that the Tribunal was in error in reducing the wages awarded to Sharma for the period after his termination of service was found to be wrongful In that case employee Sharma's termination of service was found to be wrong from a certain date. Even for the period subsequent to that date, the Tribunal did not award full wages. The Court held that from the date termination of Sharma's services became illegal, he is entitled to receive his full emoluments subject of course to the deduction that may be made for the period he had served in some other department. The principle deducible from this judgment is that where a termination of service is found to be illegal, the date on which such illegal order was made which prevented the employee from returning to service should be the starting point for awarding him wages. It would not be proper then to say that it was found to be illegal on a certain date by a competent authority and, therefore, the later date should be the starting date for awarding back wages. The declaration of illegality relates back to the date on which the order was made. Therefore, in the facts and on principle petitioner would be entitled to full back wages once it is found on fact on record, not disputed and not controverted, that he was not employed any where else during this period.

[31] That brings us to the last limb of the contention that in a petition praying for a writ of certiorari the Court has jurisdiction to quash the order and there its jurisdiction comes to an end and it cannot make a substantive order of reinstatement and a direction for back wages and the matter should be remanded to the Labour Court for the same. Article 226 before its amendment by the 42nd Constitution Amendment Act conferred power upon the High Court to issue to any person or authority, including in appropriate cases any Government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto or certiorari, or any of them, for the enforcement of any of the rights conferred by Part III or for any other purpose. Article 227(1) before its amendment by the 42nd Constitution Amendment Act provided that every High Court shall have superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. By the 42nd Constitution Amendment Act Article 226(1) has been recast and it reads as under :-

"226. (1) Notwithstanding anything in Art. 32 but subject to the provision of Art. 131A and Art. 226A, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them-

(a) for, the enforcement of any of the rights conferred by the provisions of Part III; or

(b) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made there under; or

(c) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (b) where such illegality has resulted in substantial failure of Justice."

The word "tribunal" has been deleted from Article 227(1). A Labour Court would be a Tribunal and the High Court had superintendence over it under Article 227(1). The amended Article where the superintendence over the Tribunal under Article 227 (1) is taken away came into force on 1st February 1977. This petition was filed on April 20, 1976. That means it was filed at a time when this High Court had superintending jurisdiction under Article 227(1). This aspect has some importance because the submission is that before the amendment of Articles 226 and 227 by the 42nd Constitution Amendment Act the High Court entertained petitions against the Labour Court, Industrial Court and Industrial. Tribunal exercising jurisdiction both under Art 226 and Art. 227 in that under Art. 226 it would grant the proper writ more particularly writ of certiorari quashing the order by correcting the errors of jurisdiction and under Art. 227 grant proper relief by giving proper directions. The superintending jurisdiction under Art. 227(1) before the present amendment, according to Mr. Nanavati, was something akin to

revisional jurisdiction and therefore, this Court could correct not merely the errors but pass appropriate orders which the Tribunal could have passed. But while so doing, in order to quash the error for correcting the errors of jurisdiction, exercise or failure to exercise the same, the Court exercised power of issuance of a writ of certiorari under Art. 226. Approaching the matter from this angle he submitted that now that this High Court has no superintending jurisdiction over the Tribunal, it can continue to exercise jurisdiction under Art. 226 with the limitations therein imposed by issuing a writ of certiorari which would not only quash the order and to leave the matter at that.

[32] When the petition was filed and admitted and Rule Nisi was issued on July 5, 1976, this Court had superintending jurisdiction over the Labour Court. For the purpose of the present discussion accepting what Mr. Nanavati says that it is because of this superintending jurisdiction that this Court could pass orders which the Labour Court could have passed, it could not be said that in a pending matter this jurisdiction is lost. It was not submitted that this petition has abated. It was only said that we cannot exercise jurisdiction under Art. 227(1). It is not necessary to finally decide this question in this petition because we are in a position to deal with the submission of Mr. Nanavati even if we confine ourselves to the amended Article 226.

[33] Under Article 226 with its recent amendments, this Court can in appropriate cases grant writ in the nature of habeas corpus, or any other direction or order amongst other things under clause (b) for redress of any injury of a substantial nature by reason of the contravention of any other provision of the Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made there under. That is one power enjoyed by this High Court. The High Court can also grant a writ, direction or order under clause (c) for redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (b) where such illegality has resulted in substantial failure of justice. Now before we examine the ambit and scope of clauses (b) and (c) of Art. 226 (1) it would be worthwhile to ruminate over the historical development of grant of writ under Article 226 and the jurisdiction enjoyed by this High Court under Article 226.

[34] To really understand the scope of writ of certiorari as understood in our country, reference is generally made to the classic observation of Atkin L.J., in R. v. Electricity Commissioners, (1924) I K.B. 171 wherein it is observed that certiorari may issue when

any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority. This proposition was quoted with approval in many subsequent cases. If we were to adhere to this, it would narrow down the jurisdiction which the Constitution makers conferred on the High Court. Under Article 226 before its present amendment, the High Court could issue writs in the nature of certiorari etc. and directions and orders not only for enforcement of fundamental rights but for any other purpose also. The ambit of jurisdiction under Article 226 may be examined in contradistinction to one conferred on the Supreme Court under Article 32 where the Supreme Court could issue writ for enforcement of fundamental rights alone. The power to issue a direction or order apart from enforcement of fundamental rights but even for statutory rights conferred a wider jurisdiction on the High Court and the High Court's jurisdiction cannot be curtailed or narrowed or constricted by mere reference to the old historical development in which the writ of certiorari was developed and came to be granted by Courts in England. More so because under our Constitution it can also be issued against a private person. In England it can be issued against quasi judicial body being a public authority. Under our Constitution it does not suffer from that limitation. The expansive and extra-ordinary power of the High Courts under Art. 226 is as wide as the amplitude of the language used indicates and so can affect any person even a private individual - and be available for any other purpose - even one for which another remedy may exist. The amendment to Article 226 in 1963 inserting Art. 226(1A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to 'the residence of such person'. It is one thing to affirm the jurisdiction, another to authorize its free exercise like a bull in a China shop. The Supreme Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights. Vide Rohtas industries v. Its Union, A.I.R. 1976 S.C. 425 at page 429. Approaching the matter from this angle it was in terms held that a writ could go against an award made under sec. 10A of the Industrial Disputes Act by an arbitrator appointed by the parties. It was, however, said that the purpose for which power may be exercised is entirely different from not only the manner of exercise but the ultimate order that is passed. The submission is that Court may exercise a power for redress of a grievance within the limits of jurisdiction conferred upon it under Art. 226. But while exercising that power it

has to confine itself within the narrow precincts of the writ because the writ of certiorari by its very nature permits correction of jurisdictional error, namely, the excess or failure to exercise the same and, therefore, in a petition for issuance of a writ of certiorari, this Court must quash the order and cannot go beyond that.

[35] Reliance in this connection was placed on Veerappa v. Raman & Raman Ltd., A.I.R. 1952 S.C. 192. In that case the High Court quashed the proceedings under the Motor Vehicles Act and further directed the Regional Transport Authority to grant permits to the petitioner in respect of certain buses. In the appeal to the Supreme Court exception was taken to the latter part of the direction and that part of the direction by which the authority was directed to grant permit to the petitioner was quashed as being in excess of the power and jurisdiction of the High Court.

[36] In T. C. Basappa v. T. Nagappa, A.I.R. 1954 S.C. 440, after referring to Veerappa's case (supra), the Supreme Court observed with reference to the jurisdiction under Art. 226 that the language used in Art. 226 is very wide and the powers of the High Court in India extend to the issuing of orders or writs, including writs in the nature of habeas corpus etc. as may be considered necessary for enforcement of the fundamental rights and in the case of the High Court for other purposes as well. In view of the express provisions it was said that the Court need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English judges. The Court, it was said, can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as it keeps to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs.

[37] The question really is whether this Court after quashing the order by granting a writ of certiorari cannot modulate its order so as to grant appropriate relief. A petitioner comes to this Court for the issue of a writ of certiorari alleging not merely that there was a failure to exercise jurisdiction or there was an excess in exercising jurisdiction but that the quasi judicial Tribunal has acted in violation of the principles of natural justice or in violation of the statutory rules governing it and it has caused harm to the petitioner by wrongfully terminating his services in such a case for a writ of certiorari should the Court content itself by merely quashing the order by which termination was provided for In other words, is it a correct approach to the problem for in every case where a writ of certiorari is prayed for, the jurisdiction of the Court under Art. 226(1) comes to an end as

soon as the impugned order is quashed. That would be denuding the vital power conferred on the Court by Art. 226. It can not only issue a writ the nature of habeas corpus but appropriate direction an order and this has been more often recognized. In a petition for a writ of certiorari, the Court is required to pass final order so as to grant relief. If the petition is to be dismissed, there is an end of the matter, but if the petition is to be allowed, one has surely to mould the order. To say that a writ of certiorari can be granted only by quashing the order is to denude the writ of its vital effective meaning. We propose to look at some illustrative cases to point out that the Court has power to mould the relief.

[38] In State of Madhya Pradesh v. Bhailal Bhai, A.I.R. 1964 S.C. 1906, the Constitution Bench of the Supreme Court affirmatively answered the question whether a refund of a tax recovered without the authority of law can be refunded by the High Court in exercise of power under Art. 226, of the Constitution. In Firm Mehtab Majid and Co. v. State of Madras, A.I.R. 1963 S. G. 928 the Supreme Court in a petition under Art. 32 made an order for refund of tax illegally collected under Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules 1959. After drawing attention to the aforesaid decision a question was raised whether such an order can be made in a petition under Art. 226 of the Constitution for a writ of certiorari for quashing the assessment order. Now we must confess that was a composite petition for quashing assessment order and for a mandamus for granting relief. That of course cannot be overlooked because it has been so stated in it but the Supreme Court's observation is worth noting. It reads as under:

> "For the reasons given above, we are clearly of opinion that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law."
>
> Consequential relief is ancillary to the main relief. That is why it is called consequential. The main relief that is sought in a writ of certiorari is that a quasi judicial tribunal has either failed to exercise the jurisdiction vested it or has acted in excess of it and that order has caused some harm to the petitioner and he seeks relief. The relief as the main relief that can be given to him is to quash the order but more often it is found that hardly ameliorates or improves the position of the petitioner. There fore, consequential order has always to be made and power to grant the main relief would unless a

contrary intention is somewhere expressed implies the power to grant consequential relief. Therefore, while examining the question of granting writ of mandamus and after looking at the limitations, the Supreme Court in terms said that when a petitioner complains of violation of his statutory rights and approaches the High Court under Art. 226, it has power and jurisdiction to grant consequential relief.

38A. In Dwarka Nath v. Income-tax Officer, A.I.R. 1966 S.C. 81 it was said that the High Court under Art. 226 can issue directions orders or writs other than prerogative writs and thereby the High Courts are enabled to mould the relief's to meet the peculiar and complicated requirements of this country. Issuance of a writ of certiorari means one thing and one thing only that of quashing the order. There is no question of moulding the relief's because there is only one relief that the order need be quashed. Therefore when the Supreme Court on two occasions said that the Court can grant consequential relief in an appropriate case it only meant one thing that even when issuing a writ of certiorari, the Court has to mould the reliefs so as to be effective. Otherwise it will remain a paper relief only.

[39] Two or three further illustrative cases can be looked at. In Behari Lal Baldeo Prasadv. Commissioner, Jhansi Division, (1967) 63 I.T.R. 555, a question arose before the Allahabad High Court whether when auction of a property for non-payment of tax is set aside in a petition under Art. 226 could the Court direct restoration of possession. The Court held that in such a situation the High Court exercising jurisdiction under Art. 226 can direct restoration of possession from the auction purchasers because the source of their possession being auction sale which was held to be illegal. In order to grant effective relief, order for restoration of possession could be made. Now mandamus is issued against a public authority directing it to perform a certain public duty. Auction purchaser was a private individual and yet in a petition under Art. 226 he was directed to restore possession. It would lend assurance to the conclusion that in a proper case even in a petition for a writ of certiorari the relief that can be granted must be moulded according to the circumstances of the case.

[40] It would be advantageous in this connection to refer to one of the recent decisions of the Supreme Court in Director of Inspection v. Pooran Mall & Sons, A.I.R. 1976 S.C. 67. In that case the question arose whether when a direction is given under sec. 132 (5)

or by a Court in writ proceedings, would it be subject to the limitation prescribed under sec. 132 (5) of the Income-tax Act, 1961. If the notified authority could pass the order the question was whether the High Court in a writ petition could pass that order. By a terse observation a very specific answer is given which shows the scope of writ jurisdiction. It would be advantageous to reproduce it in extenso. It reads as under:-

> "It cannot be said that what the notified authority could direct under sec. 132 could not be done by a Court which exercises its powers under Art. 226 of the Constitution. To bold otherwise would make the powers of Courts under Art. 226 wholly ineffective. The Court in exercising its powers under Art. 226 has to mould the remedy to suit the facts of a case."

> To recall the earliest decision we have just above referred to where the Supreme Court has said that the Court has to mould its reliefs according to the circumstances of the case. That exactly is reaffirmed here in this latest decision. If certiorari is only for quashing of the order, there would never arise a question of moulding the relief to suit the facts of the case. Therefore, the relief to be granted must be made consistent with the prayer made in the case so as to grant full and complete relief to the petitioner to which he is entitled.

[41] In this connection, however, it was said that as in such a situation ordinarily the Court exercises both the power, one under Art. 226 and one under Art. 227, the line demarcating the jurisdiction under both the Articles was not exactly maintained because the High Court exercised jurisdiction under both the Articles. It was said that sometimes writ jurisdiction was exercised by a High Court under Art. 227 and superintendence jurisdiction was exercised under Art. 226 but now that there is no superintending jurisdiction over the Tribunal, specific demarcating line will have to be drawn. It was said that if these two separate and independent jurisdictions are clearly demarcated and kept in view, once there in no superintending jurisdiction under Art. 227, the only course left open to the Court is to quash the order and leave the matter at that, because in some cases a direction that the matter should go back to the Tribunal and be decided in accordance with the observations made in the judgment of the High Court was also considered in excess of jurisdiction.

[42] Reliance was placed on N. D. Trakar v. Lab. App. Tribunal, A.I.R. 1957 Bombay 46.

In an earlier decision Justice J.C. Shah, (as he then was) had quashed the decision of the Labour Appellate Tribunal and remanded the matter to the Tribunal for hearing and when the matter came in appeal it was said that no substantive order can be made by the High Court when it quashes the order of a quasi judicial Tribunal on a writ of certiorari and it was further pointed out that the High Court was not concerned with what would or should happen after the order of the Appellate Tribunal was quashed. A reference thereafter was made to the jurisdiction enjoyed by the High Court under Art. 227 and said that it was a power much larger than that exercised by Courts in England. The Court observed that when the High Court exercises jurisdiction under Art. 227, it is exercising a supervisory jurisdiction and although it may not be able to interfere lightly with the decisions of Courts and Tribunals which are made final by law, it has undoubtedly the power not only to quash the orders made by these Courts and Tribunals but pass substantive orders in place of the order it has quashed or set aside.

[43] Reference was also made to a Full Bench decision of this High Court in Textile Labuur Association v. Ashok Mills, A.I.R. 1977 Gujarat 37 (XVIII G.L.R. 241). This decision of my learned brother was relied upon to submit that a clear distinction has been made between the two jurisdictions enjoyed by this Court under Arts. 226 and 227. It has been observed in that case that the writ petition in the case before the Court was not merely for a writ of certiorari under Art. 226 where the impugned decision would be only quashed and put out of the way, but the relief is claimed in the wider superintendence jurisdiction under Art. 227, where this Court would be able to exercise the same power as that of the Industrial Court and dispose of this long pending litigation so that the just benefits would expeditiously reach the concerned employees who were hard-hit by being deprived of the small increase in their wages.

[44] In this context reliance was also placed on Ahmedabad Mfg. & Calico Ptg Co. v. Rarntahel, A. I. R. 1972 S.C. 1598. The matter in that case had some before the High Court under Art. 227 and the relief given was, after quashing the order of the Industrial Court, a direction issued to the Industrial Court to dispose of the appeal of the petitioner according to law. An incidental discussion took place whether such a direction could be given in a petition under Art. 227 and it; was observed that Article 227 appears to have been used in effect as a substitute for Art. 226 for seeking a direction in nature of a writ for quashing the orders of the subordinate tribunals. And the proceeding before the High Court was treated in that fashion. A word of caution was uttered by the Supreme Court that it should not be understood to have expressed its approval of the use of Art. 227 for seeking relief by way of writs or directions in the nature of writs for which purpose Art.

226 is expressly and in precise language designed. It was, however, also observed that as the petition was under Art. 227 and as the relief granted has finally settled the points affecting the rights of the parties, the order should be treated as the final order made under Art. 226 and the matter was left at that.

[45] Reference in this connection was also made to Thakur Birendra Singh v. The State of Madhya Pradesh and Others, (1969) 3 S.C.C. 489. In that case a petition was filed challenging the orders of the Collector of Jabalpur prohibiting the petitioner from cutting and removing any forest produce from certain lands. The High Court took the view that the revenue Courts had made a wrong approach to the main question wad as there were errors of law apparent on the face of the record, quashed the orders directing at the same time that the case is remitted to the Collector for a fresh decision with advertance to the observations made is the order after giving to the petitioner an opportunity of being beard. Exception was taken to the latter part of the direction by which the case was remitted to the Collector. It was held that the High Court was not sitting in appeal over the decision of the Board of Revenue and once the orders complained of are quashed the matter should have been left at large without any further directions leaving the revenue authorities free to take any steps allowable under the law. With these observations the appeal was allowed, however, making it simultaneously clear that the revenue authorities will be entitled to take any steps for reviewing the earlier orders and making alterations in the records sanctioned by law and in doing so, they will not be bound by any expression of opinion of the High Court. In this last decision no question was raised as to the scope and ambit of jurisdiction of the High Court while issuing a writ of certiorari nor does this judgment purport to over-rule the earlier decision of the Supreme Court to which we have made a reference in which it has been twice affirmed that to make the relief complete, consequential relief can be granted or the Court should so modulate its order as the circumstances of the case require while issuing a writ under Art. 226. Therefore it cannot be said that a complete departure is made on the question under discussion in this judgment.

[46] It would equally be advantageous to refer to a decision of the Madras High Court in Muthiah PilLal v. Panchayat Union Commissioner, 1972 Lab. I.C. 795 where the question arose in the context of social welfare workers who were superannuated keeping in view certain rule which, was ultimately challenged. The challenge was that the Government order by which some of the adversely affected employees were superannuated could not supersede the rule under Art. 309. The argument was accepted in a petition under Art. 226 and it was held that the petitioners should succeed.

The case would have ended with quashing of the offending Government order but it was urged before the Court as to what would happen to those who pursuant to the offending Government order were superannuated and were out of service and whether any relief could be given to them. The Court proceeded to answer this problem by observing that it would create an anomaly if such persons who have already left the service and who have sought necessary relief from the Court should not be provided with an effective relief but only a paper advantage. As directions can also be given even though the rule asked for is one (or certiorari as such directions are issued to advance the remedy and to prevent the mischief, a direction was given that in such cases wherein the Social Welfare Workers were asked to quit the service on the strength and application of the impugned rule, they should be deemed to have continued in the service. The matter was put on principle observing that as the Courts in India need not be confined to the time honoured concept attaching to the high prerogative writs issued in England but must keep in mind the language of the relevant Article which is couched in wider language and, therefore, it would be true to say that even where the petitioner prays for a writ of certiorari while granting it the Court should mould its reliefs so as to give the effective relief.

[47] Before concluding the discussion on this point we may refer to P. J. Irani v. State of Madras, A.I.R. 1961 S.C. 1731. The majority judgment in that case while reiterating the argument that the Court should not interfere with the order made by the State Government in exercise of the writ jurisdiction under Art. 226 as the order was made bona fide and as no motive was attributed to the State Government, but the power and jurisdiction of the High Court under Art. 226 of the Constitution is not limited to the issue of writs falling under particular groupings, such as the certiorari, mandamus, etc., as these writs have been understood in England but the power is general to issue any direction to the authorities, viz., for enforcement of fundamental rights as well as for other purposes.

[48] On a conspectus of these decisions it would be futile to urge that in a petition purely to be treated under Art. 226 before its recent amendment by the 42nd Constitution Amendment Act the High Court can merely quash the order and cannot do anything more. It would make-the power of the Court inane and colourless and this can be well illustrated by the facts of this case.

[49] The inquiry by the domestic tribunal was contrary to the mandatory, provision of the relevant standing orders applicable to the imployer's institution. The inquiry was in

respect of a charge which did not constitute misconduct even on facts admitted or on the facts alleged by the employer and not controverted. The Labour Court completely overlooked the law of the land, namely, the decisions of the Supreme Court especially on the question whether before upholding the decision of the domestic tribunal, can it be said that what was alleged was misconduct within the relevant Standing Order and whether the prescribed mandatory procedure was followed or not and whether rules of natural justice were complied with or not. The legal position is not in controversy. In such a case the order is vitiated, the inquiry being itself illegal and defective. Now what do we do If Mr. Nanavati is right we quash the order and the matter goes back to the Labour Court. What has the Labour Court to do but merely to pass an order for reinstatement and back wages ? Even on the question of back wages the relevant decisions of the Supreme Court which are binding have not bee taken into consideration. Should we merely pay a lip sympathy to the form rather than the substance of the matter Therefore, having examined the arguments of Mr. Nanavati from all possible angles, we cannot persuade ourselves to accept the submission and our hands are further fortified by the language in which Art. 226 as at present stands on the Constitution is couched.

[50] A writ can issue under Art. 226(1) for the enforcement of the fundamental rights. Formerly the language was " for the enforcement of any of the rights conferred by Part III and for any other purpose". The expression "other purpose" were construed wide enough to include various illegalities. The expression "other purpose" is omitted. But look at the language employed in clauses (b) and (c) of Art. 226(1). It clearly envisages the situation with which we are confronted. A writ, direction or order can issue from this High Court for the redress of any injury of a substantial nature if the injury is caused by reason of the contravention of any provision of the Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made therein. Now the standing orders are statutory. The injury is caused by not following the Standing Orders. Rules of the natural justice govern every quasi judicial inquiry. A contravention of it makes the order void is a matter no more in dispute and what is the injury inflicted ? The man is thrown out of job. In the case of work-a-day life we cannot envisage any injury causing greater hardship by inflicting more harm than deprivation of service and consequent starvation. It is undoubtedly not only inflicted on the person but his dependants directly. In the life of a man having a work-a-day life, we are unable to foresee any injury which causes greater harm than deprivation of his own source of livelihood and if this injury is not substantial, we would be searching in vain for substantial injury and the injury is inflicted for an alleged act which could not be termed

misconduct or would not fall in any of the provisions of the relevant Standing Orders. Therefore, in a proper translated language, the employer inflicted a substantial injury for an imaginary grievance. The injury is substantial. It is inflicted on a citizen of this country and it is inflicted in contravention of statutory regulations, namely, the Standing Orders. Power is conferred on this High Court to grant redress. The word "redress" means restoring the position as it stood prior to the injury. If any other meaning is to be given, grant him relief which would remove the injury. The word "redressing" is something akin to dressing the wound. The injury inflicted, when it is required to be redressed, it can only mean that the wound be healed, the suffering be removed and the original position before the suffering be restored. In the context of the present situation we are unable to give any other meaning to the word "redress" of any injury. If we have to redress the injury in the manner in which Mr. Nanavati wants us, namely, by quashing the order, this petitioner would be merely wondering how his injury is at all redressed. He is only to he told that instead of his forum there is another forum where his grievance will be redressed. Constitutional power cannot be whittled down like this. It has to be given full meaning and effect. The amendment we have been told has been done after examining what has gone on while exercising writ jurisdiction and to make it possibly more effective. The words used are "grant relief where injury is of a substantial nature by redressing it. We may also turn to the language of clause (c). There the expression used is "redress of any injury by reason of any illegality in any proceedings by or before any authority". Labour Court is certainly an authority. The proceedings were before the Labour Court. The Labour Court did not look at the law of the land. The Labour Court did not redress itself to the first question whether what was alleged was a misconduct at all and the proceeding was a proceeding initiated by the workman for redress of grievance, namely, reinstatement and back wages. The proceeding was started by the petitioner before an authority constituted under a statute. The illegality committed by the Labour Court is patent on the record in the sense that it did not care to look at the problem according to the law as laid down in this country and in force in this country. Therefore, after the introduction of clauses (b) and (c) in Art. 226(1), we have no doubt in our mind that we cannot be confined to the narrow grooves of old historical notions with regard to writs in England but in the context of socio-economic justice, we must mould the reliefs as to be effective. That is what we must do and therefore this cloud or doubt about our power must stand dispelled by the discussion herein and we must grant the appropriate relief.

[51] Accordingly this writ petition is granted by quashing the order of the Labour Court dated June II, 1975 and directing that the petitioner be reinstated immediately with full

back wages to be paid within a period of four weeks from to-day. Respondents to pay the costs of the petitioner quantified at Rs. 500/-.

[52] At this stage Mr. K. S. Nanavati made an oral request for issuance of a certificate under Art. 133(1) of the Constitution. All throughout we have followed and examined and applied the decisions of the Supreme Court. There is no substantial question of law of any general public importance which, in our opinion, ought to be decided by the Supreme Court in this case and, the therefore, the request is rejected and the certificate is refused.

Petition allowed: Leave to appeal refused.