IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4521 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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G S R T C

Versus

RAJESHBHAI L ROHIT

Appearance:

1. Special Civil Application No. 4521 of 2002

MR SUDHANSHU S PATEL for Petitioner No. 1

..... for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 30/04/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Sudhanshu Patel for the petitioner corporation. By way of this petition, the petitioner has challenged the award made by the labour court, Himatnagar in Reference No. 56 of 1997 dated 22nd

May, 2001 whereby the labour court has granted reinstatement with continuity of service but without back wages for the intervening period and further imposed punishment of stoppage of two annual increments with cumulative effect.

Learned advocate Mr. Patel for the petitioner has submitted that the labour court has committed gross error in exercising the powers under section 11-A of the Industrial Disputes Act, 1947. He has also submitted that before the labour court, papers of departmental inquiry were produced by the corporation and on the basis of the said papers, the labour court has come to the conclusion that the misconduct as alleged against the respondent has been found to have been proved and whatever procedure adopted by the corporation for holding departmental inquiry has also been held to have been legal and valid and, therefore, in view of such situation, the labour court ought not to have exercised the discretion under section 11-A of the Industrial Disputes Act, 1947 in favour of the respondent workman. According to his submission, since the respondent was facing the charge of misappropriation and dishonesty, the labour court was not justified in exercising the discretion under section 11-A of the Industrial Disputes Act, 1947 in favour of the respondent workman. He has submitted that such exercise of powers in such a situation has been held to be contrary to law by the Division Bench as well as the learned single Judge of this Court. According to him, in view of the seriousness of the charge proved against the respondent workman and also in view of the past record of the respondent workman wherein he has committed in all fifty defaults, the labour court was not justified in exercising the discretion under section 11-A of the Industrial Disputes Act, 1947 in favour of the respondent workman and, therefore, the labour court was not justified in awarding reinstatement in favour of the respondent workman in view of the past record and seriousness of the charge. Reliance has been placed by Mr. Patel on the decision of this court in Special Civil Application No. 7682 of 1988 dated 8th December, 2000 as well as the decision of the Division Bench of this Court in Letters Patent Appeal No. 225 of 1996 dated 9th December, 1998. He has also relied upon two decisions of the apex court in case of Union of India versus Kulamony Mohanty and Others reported in AIR 1999 SC 2114 as well as the decision in case of Om Kumar and others v. Union of India reported in AIR 2000 SC 3689 and has emphasized on the submission that when the charge of dishonesty and misappropriation has been found to be proved by the concerned Court,then, in such case,

interference with the order of punishment or modification of the punishment imposed by the disciplinary authority is not justified and in such a cases, dismissal is the only proper punishment and, therefore, in view of the principles laid down in the aforesaid decisions, labour court is not justified in passing the award in question. According to his submission, even the judicial review is also having limitation to enter into the merits and reappreciate the evidence and, therefore, according to him, award in question made by the labour court is required to be set aside. Thus, except these submissions as regards exercise of the powers under section 11-A of the Industrial Disputes Act, 1947, no other submissions have been made by Mr. Patel.

In view of such submissions made by Mr. Patel, merits of the matter are required to be examined by this Court. On 6.8.1995, the respondent workman was on duty in the bus on the route Himatnagar - Jorapur; the bus was checked by the checking officers at Navalpur and by making report, it was alleged against the respondent that from one passenger going from Mehtapura to Khedawada, an amount of Rs.3.00 was recovered but the ticket was not issued on the spot and by recovering fare of Rs.3.00 from the passengers from Himatnagar to Dejrota, ticket has not been issued on the spot till the checking point. Pursuant to the said report, the respondent was served with charge sheet no. 270 of 1995. On the basis of the aforesaid charges, departmental inquiry was initiated against the respondent workman and thereafter, the workman was dismissed from service on 27th March, 1996. Against the said action of dismissal, the workman concerned has raised industrial dispute which was referred for adjudication 28th February, 1997.

Before the labour court, the respondent workman has filed the statement of claim at Exh. 5 and written statement thereto was filed at Exh. 12 and thereafter, the respondent has produced documentary evidence list at Exh. 13 wherein copy of the charge sheet, reply, copy of the report and copy of the deposition of the reporter and the findings as well as the show cause notice as well as the dismissal order and rejection of appeal have been produced. Before the labour court, the respondent has filed purshis at Exh. 14 and thereby has not challenged the legality and validity of the departmental inquiry but has raised objection about the validity of the findings recorded by the inquiry officer. Thereafter, the respondent was examined at Exh. 15 before the labour court and his evidence was cross examined by the petitioner corporation. Thereafter, documentary evidence

was produced by the corporation vide list Exh.16 wherein all the relevant papers have been produced including default card of the respondent workman. Here, it should be noted that before the labour court, the petitioner has filed written statement and then vide list at Exh. 16, documentary evidence has been produced but, except that, the petitioner corporation has remained absent before the labour court. No oral evidence has been led by the corporation before the labour court. In para 7 of the award in question, the labour court has observed in this regard that no oral evidence has been led by the corporation for substantiating the contentions raised by it in its written statement and to prove the documents produced by it vide list Exh. 16. Since the corporation was not remaining present before the labour court and was also not producing oral evidence, the respondent has given purshis at Exh. 19 and has requested the labour court to keep this matter for orders and ultimately the labour court heard the arguments of the respondent workman and thereafter framed issue as to whether the findings given by the competent authority are legal and valid or not and whether the respondent is entitled for the reinstatement in service or not. The labour court has considered the allegations made against the respondent workman wherein it was alleged against the respondent that from one passenger going from Mehtapura to Khedawada, an amount of Rs.3.00 was recovered but the ticket was not issued on the spot and by recovering fare of Rs.3.00 from the passengers from Himatnagar to Dejrota, ticket has not been issued on the spot till the checking point. The charge sheet was served under clause 7A, 12B, 29, 22 and 27 under the ST Discipline Procedure. Thereafter, the labour court has considered the findings recorded by the competent authority and has considered that the two passengers examined during the course of departmental inquiry were declared hostile and, therefore, their evidence was not believed by the competent authority and the competent authority has relied upon the evidence of the reporter for coming to the conclusion that the misconduct as alleged against the workman has been proved against the respondent workman. Thereafter, the competent authority has relied upon the spot statement of the passenger and the respondent workman and considering 24 years' service and fifty defaults in past wherein four defaults were relating to collection of fare and non issuance of the tickets and except the four defaults, other defaults are not relating to dishonesty and/or misappropriation. Thereafter, the competent authority issued show cause notice and called upon the respondent to submit explanation that such negligent and dishonest employee should not be continued

in service and asked him to show cause why he should not be removed from service. Here, it is also required to be noted that the show cause notice was issued by the competent authority considering fifty defaults committed by the workman in past as mentioned in the show cause notice but no past record has been attached to the said show cause notice or the findings. Meaning thereby, when the explanation has been called from the workman relying upon fifty defaults allegedly committed by the workman in past, in such circumstance and situation, it is the duty of the corporation to supply copy of the past record to the workman for enabling him to explain in that regard and also for giving him reasonable opportunity about his past record. It is not disputed by the corporation that in findings, fifty defaults have been taken into account by the competent authority but it is not clear as to whether these fifty defaults have been taken into account for passing the order of dismissal or not. It was merely referred to in the finding but in ultimate finding, it is mentioned that the respondent is held guilty under clause 7A, 12B, 22, 27 and 11 and why he should not be dismissed from service of the corporation but it is not mentioned in the finding that relying upon that and looking to the gravity of misconduct and considering the past record, why he should not be dismissed. Mere reference of past misconduct is not enough but it should to be mentioned whether the past record has been taken into account or not for taking the decision of dismissal and if the past record has has been taken into account for passing the order of dismissal, then, copy of the past record must have to be given to the respondent alongwith the finding so that he can have an opportunity to explain about his past conduct and past record and to say some thing about his past conduct to the competent authority but no such opportunity has been given to the respondent because alongwith the copy of the finding, copy of the past record was not supplied to the respondent workman and thereafter, the labour court has considered the decision of the apex court reported in AIR 1985 SC 1115 and has then considered the family circumstances of the respondent and has also considered the fact that looking to the misconduct of recovery of fare of Rs.8.50 from three passengers without issuing tickets upto the checking point cannot be considered to be the serious misconduct and was of the view that some other punishment is required to be imposed in place of dismissal and, therefore, based upon such considerations, the labour court exercised the powers under section 11-A of the Industrial Disputes Act 1947 and set aside the order of dismissal and ordered for reinstatement of the workman and has further imposed punishment of stoppage of two

annual increments of the workman with recurring effect. Even on that count also, the labour court has observed that in the present proceedings, the petitioner corporation has been remaining absent and no oral evidence has been led by the corporation and no oral submissions have been made by the corporation before the labour court. Thereafter, the labour court has considered the past record and considering past record, has imposed punishment of stoppage of two increments with future effect.

Learned advocate Mr. Patel has submitted that in case of dishonesty and misappropriation of the funds of the corporation, reinstatement ought not to have been granted by the corporation in exercise of the powers under section 11-A of the Industrial Disputes Act, 1947. In support of such contention, he has relied upon the decision of this Court in Special Civil Application No. 7682 of 1988 dated 8th December, 2000 wherein this Court (Coram : B.C. Patel,J.) has observed as under in para 8 of the judgment :

" Thus, considering the aforesaid decisions, it is clear that under section 11A of the Industrial Disputes Act, the Industrial Tribunal or Labour Court is not having unguided power to set aside the justified order passed by the management. The power under section 11A has to be exercised judicially and the Industrial Tribunal or Labour Court can interfere with the decision of the Management under section 11A of the Act only when it is satisfied that the punishment imposed by the management is highly disproportionate to the degree of guilt of the workman concerned. The Court in case of GSRTC vs. KM Parmar (supra) pointed out that this Court has repeatedly held that misappropriation, if held established, would be a major misconduct and normally dismissal order passed by the competent authority should not be interfered with by the Labour Court or the Industrial Court under section 11A of the Industrial Disputes Act. "

Thereafter, in para 11 of the said judgment, this Court has observed as under:

" The Court pointed out that it was not a case of momentary temptation or a solitary instance of indulging in misappropriating public funds. It was also pointed out that on account of unemployment, many persons are waitlisted with

Employment Exchanges many with higher qualifications. Persons who are employed must think that they are better placed than others i.e. those who are waiting in queue for employment. Such employed persons must bear in mind this aspect and when they are in government or public sector, they should see that nothing is reflected against them for want of proper care or because of any misconduct. When an employee has misconducted himself, then, considering the nature of misconduct, orders must be passed. In that case, looking to the repeated acts reflected in the order and the default card, the Court expressed opinion that the impugned order made by the learned Single Judge was required to be confirmed stating that let others waiting in queue get the chance of serving as the person who was appointed has grossly misconducted himself."

He has also relied upon the decision of the Division Bench of this Court in Letters Patent Appeal No. 225 of 1996 dated 9th December, 1998 wherein the Division Bench of this Court (Coram : B.C. Patel & M.S. Shah,JJ.) has observed as under in para 11 and 12:

"11. Learned Single Judge observed that

"looking to the gravity of charge of misappropriation of funds by regularly correcting way bills which has been accepted to be true by the tribunal, it does not stand to reason that any punishment less than dismissal from service could warrant, could be justified. It is required to be noted that the Labour Court came to the conclusion that the finding of the departmental inquiry was legal and proper". The appellant was, therefore, held guilty of misappropriating public funds. In such a case, the Labour Court ought not to have interfered with the punishment which was awarded to him by the employer. The Labour Court lost sight of the employee's conduct and his past record. It overlooked the facts that even prior to the several instances mentioned in the record, the appellant misconducted himself on several occasions and was punished. In a case where an employee dealing with public funds is found misappropriating the funds of the Corporation on repeated occasions, it would be unwise to keep such a person in public employment.

12. This is not a case of momentary

temptation or a solitary instance of indulging in misappropriating public funds. If there is a good past record and on account of compulsion employee is found misconducting once, question of proportionate punishment may arise. Tribunal has seriously erred in passing an order of reinstatement in the same post without imposing any punishment. Withholding backwages is not an order of punishment. Again, by reinstating on the same post, the Tribunal has lost sight of opportunities available to indulge in similar activities. In case of a bus conductor who is found guilty for misappropriating, punishment must be deterrent to him as also to others. Common man would be the suffer in case of a conductor found guilty of misappropriating funds of a Corporation which is a public undertaking. In our opinion, the appellant, a bus conductor who is found guilty misappropriating public funds not once but looking to the record on several occasions deserves no sympathy as GSRTC had no faith in him because he misconducted himself, has rightly taken the decision. Decision taken rightly cannot be substituted because of misplaced sympathy by stating that no record of past misconduct is produced though in fact it was produced."

He relied upon the decision of the apex court in case of Union of India versus Kulmony Mohanty and others reported in 1999 SC page 2114 wherein the apex court has observed as under in the Head Note itself :

"Administrative Tribunals Act (13 of 1985) S. 14 - Interference with quantum of punishment Legality - Punishment of compulsory retirement imposed on employee on grounds of having committed breach of trust of amount payable to another employee - Tribunal found on facts, that finding regarding commission of breach of trust is based on material - Tribunal not disturbing said finding, but interfering with quantum of of punishment - Commits illegality - Punishment imposed neither excessive nor disproportionate Tribunal cannot interfere with quantum even within discretionary powers - Plea of leniency on grounds of lapse of long period from date of misappropriation - Employee already retired and his son suffering from bone cancer had died Employee held entitled to superannuation benefits. "

He has also relied upon the decision in case of Pavankumar versus Union of India reported in AIR 2000 SC 3689. Head Note G and H of the said decision are reproduced as under:

"(G) Administrative Law - Administrative decision - imposing punishment in disciplinary cases - Judicial review - Confined to Wednesbury principles only.
Constitution of India Art. 311.
Industrial Disputes Act (14 of 1947), Sch.2, Item 6."

"(H) Constitution of India, Art.311 Punishment imposed on delinquent employee Interference Irregularity in grant of DDA land to a company Delinquent senior most officer in DDA Disciplinary Authority finding his misconduct proved. However, imposing minor penalty of censure - Minor penalty imposed considering the complicated stage at which delinquent was required to handle case and absence of mala fides - It cannot be said that among permissible minor punishments, the choice of punishment of 'censure' wasviolative of Wednesbury Rules - Case hence not referred to the Vigilance Commissioner for the upward revision of punishment.

Administrative Law - Punishment imposed by Disciplinary AUthority - Judicial Review "

In support of his submissions, learned advocate Mr. Patel has relied upon four decisions, in all, and except that, he has not relied upon any other decision. It is, therefore, required to be ascertained by this Court as to whether the principles laid down in the aforesaid four decisions are applicable to the facts of the present case or not.

Before the labour court, the respondent has filed statement of claim and written statement thereto was filed by the petitioner corporation and documentary evidence was produced and thereafter, the workman was examined before the labour court. Except the oral evidence of the respondent workman, no other oral evidence has been led before the labour court. Before the labour court, nobody had remained present on behalf of the corporation and no oral submissions were made by the corporation and the case has been kept for orders because of the purshis filed by the respondent workman at

Exh. 19. From the record, it appears that sufficient opportunity has been given by the labour court to the petitioner corporation but the corporation has not utilized such opportunities given by the labour court. Before the labour court, by filing the purshis, the respondent has submitted that he is not challenging the legality, validity and propriety of the departmental inquiry and is challenging the findings and has prayed that he should be reinstated in service by exercising the powers under section 11-A of the Industrial Disputes Act, 1947. Such request made by the respondent workman was considered by the labour court. Such purshis filed by the workman with a prayer for exercise of the power under section 11-A of the Act has not been objected by the Corporation by filing objections to such prayer or by remaining present and by making submissions that this is not a case where such powers and discretion should be exercised in favour of the respondent workman. It is an admitted fact that the corporation has not been remaining present before the labour court and no oral submissions were made before the labour court on behalf of the corporation. Present petition has been filed by the corporation challenging the award in question knowing fully well that that no oral evidence was led on behalf of the corporation before the labour court, no oral submissions were made on behalf of the corporation before the labour court and the prayer made by the workman for exercise of the discretionary powers under section 11-A of the Industrial Disputes Act, 1947 has also not been objected by the Corporation before the labour court. In view of these facts, it is the duty of the Corporation to explain before this Court as to how it could not remain present before the labour court and why no oral evidence was led before the labour court by it and why no oral submissions were made and objections were not filed against the purshis filed by the workman and what were the reasons which had prevented the corporation from doing all these things before the labour court. I have gone through the averments made by the corporation in the present petition. Nowhere the corporation has explained in this regard. So, in absence of such appearance, for want of oral evidence and oral submissions made on behalf of the corporation and also for want of objections against the prayer for exercise of the discretionary powers, the labour court has believed the case of the workman and has accepted the request of the workman concerned. In this petition, the petitioner is challenging the legality, validity and propriety of the award made by the labour court on the ground that the labour court has committed an error in granting reinstatement in favour of the workman and in exercising

the discretion under sec. 11-A of the Act in view of the fact that the misconduct has been found to be proved against the workman and also in view of the past record wherein the respondent has committed 50 defaults. The petitioner, for the first time, is pointing out before this Court all these aspects and, therefore, this Court is required to consider the decisions relied upon by the petitioner before this Court in light of these aspects. If the Corporation would have availed the opportunities given by the labour court and would have appeared before the labour court by submitting its case before the labour court by producing documentary evidence and leading oral evidence and if the petitioner would have objected the prayer for exercise of the discretionary powers under section 11A of the Act by filing objections before the labour court, then, the labour court would have got an opportunity to consider the same. In absence of that, the labour court has rightly considered the request made by the respondent workman. According to my opinion, this court cannot examine the validity of the award by permitting the petitioner to fill up the gaps and lacunas to test the award in question that these are the judgments and views of this court and of the apex court not considered by the labour court and that is how the labour court is in error in exercising such discretion. This is not proper to examine the validity of the award when there was nothing on record pointed out by the corporation before the labour court. Therefore, in absence of oral evidence and oral submissions made by the petitioner before the labour court and since no decisions were cited by the petitioner before the labour court which have been cited before this court for the first time, it would not be proper for this court to consider and examine the validity of the award on the basis of the decisions cited for the first time before this court. It was the duty of the petitioner to cite these decisions before the labour court and to make oral submissions before the labour court and to point it out before the labour court as to why the labour court should not exercise the powers in favour of the workman. If that would have been done by the petitioner, then, it would have become the duty of the labour court to consider all these aspects while making the award. Therefore, according to my opinion, since the decisions which have been cited before this court for the first time were not cited before the labour court and since no oral submissions were made by the petitioner before the labour court, the labour court was right in exercising such discretion in favour of the workman and on that count, it cannot be said that the labour court has committed any error while granting reinstatement with punishment of

stoppage of two annual increments with cumulative effect.

Learned advocate Mr. Patel has relied upon the past record before this Court at page-40, Annexure-B and has submitted that in past, 50 defaults were committed by the respondent workman. It is not material as to how many defaults were committed by the workman in past but it is material to see as to what was the nature of misconduct in past committed by the workman and what was the punishment imposed for the commission of such misconduct. I myself have perused the entire past record where in almost all the cases, fine of one rupee or two rupees or three rupees or four rupees have been imposed by the corporation and some increments have been stopped and in one case at Sr. No. 10, the respondent was placed in minimum time scale. Therefore, out of entire fifty defaults, excepting four cases wherein allegation is that of recovery of fare and non issuance of tickets, in remaining cases, charge is not that of recovery of fare and non issuance of ticket. Thus, looking to this past record and looking to the minor penalties imposed therein as stated above, it cannot be said that any serious misconduct has been committed and, therefore, looking to this past record, it cannot be said that the dismissal or discharge was the only proper punishment. Therefore, according to my opinion, the labour court has rightly granted reinstatement and imposing punishment of stoppage of two annual increments with cumulative effect after considering the length of service and minor misconducts committed by the workman in past.

Apart from what is stated above, material aspect is that the competent authority has, at the time of issuing the show cause notice, served copy of the findings upon the respondent mentioning and referring that in past, the respondent has committed fifty defaults out of which four defaults are relating to dishonesty and after perusal of this, it appears that the punishment is not based upon the past record but it was based upon the present misconduct. Therefore, two aspects are required to be examined that if the past record is considered to be the basis for passing punishment of dismissal, then, in such circumstances, it was the duty of the competent authority to supply copy of the past record to the respondent while issuing show cause notice alongwith findings but no copy of past record has been furnished to the respondent at the time of issuing show cause notice to the respondent. In view of these aspects of the matter, according to my opinion, the Corporation cannot take shelter or support of the order of punishment by citing the past record or the past misconducts committed

by the respondent workman in past since the copy of the past record has not been supplied to the delinquent while issuing the show cause notice to the respondent workman. From the record, upon perusal of the findings recorded by the competent authority, it is clear that the finding as well as the order of dismissal is based only upon the present misconduct in question and, therefore, whether the punishment based upon the present misconduct is proportionate or not has to be looked into or examined by the labour court only by keeping in view the present misconduct, gravity thereof and not considering the past record and past misconduct copies of which were not supplied to the respondent and which was not forming part and parcel of the material on record and the past record, unless the same is made the material on record and copies thereof are supplied to the respondent workman, cannot be made the basis of the order of punishment and in this case, admittedly, it has not been made the basis of punishment of dismissal by the competent authority and, therefore, labour court cannot look into the past record. This aspect has been examined by the apex court and it was observed that when the punishment is based upon the gravity of present misconduct and the past misconduct both, then, it is the duty of the competent authority or the disciplinary authority to supply copy of such past record and past misconduct to the respondent workman alongwith the show cause notice so as to enable the workman concerned to explain or to submit something about the same and it amounts to giving of reasonable opportunity to the respondent workman. In case of State of Mysore versus K. Manche Gowda reported in AIR 1964 SC page 506, it has been held by the apex court in para 7 and 8 of the judgment as under:

"7. Under Art. 311(2) of the Constitution, as interpreted by Under Art. 311(2) of the Constitution, as interpreted by this Court, a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges levelled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action: see the decision of this Court in the State of Assam v. Bimal Kumar Pandit(1). If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned

in proposing a particular punishment: he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment was mainly based upon the previous record of a Government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of the Government servant. It would be no answer to suggest that every Government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him; nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. This contention misses the real point, namely, that what the Government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact .was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was punished, it would be open to him to put forward before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry. He may have many other explanations. The point is not whether his explanation would be acceptable, but whether he has been given an Opportunity to give his explanation. We cannot accept the doctrine of "presumptive knowledge" or that of "purposeless enquiry", as their acceptance will be subversive of the principle of "reasonable opportunity". We, therefore, hold that it is incumbent upon the authority to give the Government servant at the second stage reasonable

opportunity to show cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation.

8. Before we close, it would be necessary to make one point clear. It is suggested that the past record of a Government servant, if it is intended to be relied upon for imposing a punishment, should be made a specific charge in the first stage of the enquiry itself and, if it is not so done, it cannot be relied upon after the enquiry is closed and the report is submitted to the authority entitled to impose the punishment. An enquiry against a Government servant is one continuous process, though for convenience it is done in two stages. The report submitted by the Enquiry Officer is only recommendatory in nature and the final authority which scrutinizes it and imposes punishment is the authority empowered to impose the same. Whether a particular person has a reasonable opportunity or not depends, to some extent, upon the nature of the subject matter of the enquiry. But it is not necessary in this case to decide whether such previous record can be made the subject matter of charge at the first stage of the enquiry. But, nothing in law prevents the punishing authority from taking that fact into consideration during the second stage of the enquiry, for essentially it, relates more to the domain of punishment rather than to that of guilt. But what is essential is that the Government servant shall be given a reasonable opportunity to know that fact and meet the same.

In view of the aforesaid decision of the apex court, it is also necessary to consider one decision of the apex court in case of D.K. Yadav versus M/s. J.M.A. Industries Ltd. reported in 1993 (3) SCC 617. Relevant observations made in para 9, 10, 11 and 12 of the said judgment are reproduced as under:

9. It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and be given him/ her an opportunity

of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. In Mohinder Singh Gill & Anr. v. The Chief Election Commissioner & Ors. [1978] 2 SCR 272 at 308F the Constitution Bench held that 'civil consequence' covers infraction of not merely property or personal right but of civil liberties, material deprivations and nonpecuniary damages. In its comprehensive connotion every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th Edition, page 1487 defined civil rights are such as belong to every citizen of the state or country they include rights capable of being enforced or redressed in a civil action. In State of Orissa v. Dr. (Miss) Binapani Dei & Ors., this court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice.

10,In State of West Bengal v. Anwar Ali Sarkar [1952] SCR 289, per majority, a seven Judge bench held that the rule of procedure laid down by law comes as much within the purview of Art. 14 of the Constitution as any rule of substantive law. In Maneka Gandhi v. Union of India,. [1978] 2 SCR 62 1, another bench of seven judges held that the substantive and procedural laws and action taken under them will have to pass the test under Art, 14. The test of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to he reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Even executive

authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice.

11.The law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Art. 14 and such law would be liable to be tested on the anvil of Art. 14 and the procedure prescribed by a statute or statutory rule or rules or orders effecting the civil rights or result in civil consequences would have to answer the requirement of Art. 14. So it must be right,just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative. inquiry as well as the quasi-.judicial enquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial enquiry and not to administrative enquiry. It must logically apply to both.

12.Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Art. 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Art. 14 has a pervasive processual potency and

versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this Court that the principles of natural justice are part of Art. 14 and the procedure prescribed by law must be just, fair and reasonable.

Learned advocate Mr. Patel for the petitioner corporation has relied upon the past record and has submitted that in past, fifty misconducts were committed by the workman and has submitted that in view of such past record of the workman, he cannot be continued in service and cannot be permitted to deal with the funds of the corporation which are the funds of the public exchequer. In respect of this contention, it is necessary to know the nature of work performed by the conductor. While working as a conductor, one has to recover the fares from the passengers and to issue tickets. In what circumstances, he has to perform such duties? He has to work during entire year, during the rainy season of monsoon, winter and then during the summer in a bus by keeping himself away from his family for an indefinite period. These aspects were taken into account by the High court of Karnataka in case of KSRTC versus B.M. Patil reported in 1996 Lab IC 109. In para 6, 7, 8,9,10, 11 and 12, it has been observed by the High Court of Karnataka as under:

6. In this case, the misconduct for which the extreme punishment visited the worker is causing a very negligible loss to the employer. A serious question that arises in such cases would be besides the legality of the punishment, the morality of imposing such a severe punishment as well. While imposing a punishment, the employer should first consider whether the delinquent committed the offence with intent to make unlawful gain and to pilfer the revenue of the employer. Was it with intention to gain 50 paise that the worker committed the present misconduct? Was he in such a depraved circumstances that he desired to make an illegal gain of a trivial amount of 50 paise ? What was the number of passengers travelling in the bus and is it possible that he would have accidently omitted to issue tickets ? Is it not possible that while he was in the process of issuing tickets, the two persons might have boarded the

bus ? several cases we come across, such omission takes place in buses loaded with more than the permitted number of passengers. Such may be cases of human error committed by the Conductor while issuing tickets to passengers travelling in a bus with passengers much more than the permitted number. The disciplinary authority should keep in mind all facts of problem before it awards the extreme penalty of dismissal.

7. A misconduct like the above on several instances is not committed insistentionally. It is too much to image that a worker would have omitted to issue tickets deliberately to gain few rupees at the risk of his job. More often, it is due to the crowd in the bus that he misses to issue tickets than a desire by him to gain few rupees. The castastrophe that may befall is more serious than what is sought to be prevented. First it visits the employee. He is rendered jobless. It generates a litigation which in the present pattern spreads over years producing ultimately a disgruntled employee. Actually the real victim of any such punishment is the family of the worker whose bread winner is jobless. The future is rendered bleak to them and it in its turn causes greater hardship to the society than it intended to cure.

8. That apart,t he management also shares the losses in another way. When the worker is dismissed, someone else will have to be placed in his place to discharge the duties. And if the worker is ordered to be reinstated ultimately with back wages, virtually there will be double payment. i.e. two persons would have to be paid for a single job. IN the case of a public sector undertaking, the loss is passed on the common man, the tax payer.

9 The question then would be in the case of a Conductor (as in the instant case) who has a past history, should the employer ignore the same ? This is a case, the remedy for which the employer himself should discover and the solution is not far to discover. In the case of a ticketless traveller the management has designed a method to curb the same by imposing fine on them. The object with which this is done is so that he may not repeat travelling in the bus

without tickets. This method can certainly be considered of imposing penalty on the Conductor himself who is discovered to be intentionally pilfering the revenue of the Corporation.

10. We may notice that in all these cases of non issue of tickets, we may take note of the fact that there are two parties joining to commit the misconduct i.e. the Conductor and the passenger. If the conductor wants to make an unlawful gain, then, he has to collect the fare and fail to issue tickets. In such an event, the passenger who boards the bus must cooperate with the conductor. If he has to cooperate, then, he should be familiar to the Conductor and he should agree to be a party to commit the misconduct at the risk of paying penalty in the event of being caught by the inspecting staff. It is too much to imagine that the conductor will hatch a conspiracy to pilfer revenue of the Corporation as and when stray passengers board the bus at various stages. If the Conductor wants to make an illegal gain by the omission to issue tickets, the passenger has to be condescending party. This is really unlikely. Hence, the benefit of doubt in cases of stray lapses should be that the omission to issue tickets may be accidental.

11. Hence, the disciplinary authority should reserve the punishment of dismissal only in extreme cases. It is where the exercise of discretion by the disciplinary authority steps in. It cannot and should not be like a robot, its justice should be moulded with humanism and understanding. it should really assess each case on its own merit. The fact that on a past occasion the delinquent might have acted in a particular manner does not mean that on the particular occasion as well he would have acted with intent to cause loss to the employer. Each set of facts should be decided with reference to evidence regarding the said allegation and those allegation should be the basis of the decision. May be, the past conduct of the worker may be a ground to assume that the delinquent may have had propensity to commit the misconduct and to assess the quantum of punishment to be imposed. But that by itself cannot provide any foundation to hold that the present conduct of the worker is a misconduct.

12. In this case, admittedly, there is a default numbering 146 with respect to which the employer had occasion to impose punishment. This is not a disputed fact as well. May be the charges with respect to the above said default would be innocuous or minor. In several cases it may not be the intention of the petitioner to commit any misconduct. He might have admitted the guilt as well to avoid protracted proceedings. As can be seen from the history sheet produced, in several cases, one or two passengers were not issued with tickets. One cannot say that this was done with the intention of gaining the money involved. If so, it would be harsh to take those circumstances as well while moulding the punishment. But it must be stated that in this case that the facts clearly spell out that the worker had been negligent in discharging his duties. Hence the Labour Court will be justified in awarding full backwages to the worker who has shown total indifference to his duties. "

In aforesaid decision, the workman concerned was having about 147 past misconduct and yet the workman was ordered to be reinstated by the labour court which was confirmed by the Karnataka High Court while observing the difficulties faced by the Conductor in performing duties as a conductor and therefore, for the purpose of high-lighting the difficulties faced by the Conductors, I have quoted the observations made by the Karnataka High Court in aforesaid decisions.

Therefore, in view of the observations made by the apex court in respect of the past record and nature of work performed by the conductor and also in view of the facts of the present case, wherein it has been alleged against the respondent herein that he recovered an amount of Rs.8.50 ps. from three passengers but not issued tickets upto the checking point, the passengers concerned had boarded the bus from Metapura and the bus was checked at Navalpura i.e. in between and admittedly it was not checked at the destination place where the passengers concerned were required to leave the bus and the distance between the place of boarding the bus and checking point was not so much long and the respondent was doing the road booking by issuing the tickets after collecting the fares and the way bill was found to be open. The question is whether while working as such and while doing the road booking, can it be said that there was an intention to commit an act of dishonesty and

misappropriation in not issuing the tickets after collecting the fares. The question would have been different if the way bill would have been found to be closed. It is more so when the bus was not checked at the destination point but was checked in between at Navalpura after Metapura from where the passengers who were found ticketless but fares were paid had boarded. In light of these facts, it cannot be said that there was an intention of misappropriation and dishonesty as submitted by Mr. Patel. The act of conductor was not completed i.e. road booking was going on and tickets were to be issued after the fares were collected and in the mean time, bus was checked, admittedly not at the destination point but at Navalpura after Mehtapura. In such circumstances, it has to be inferred and presumed in favour of the workman that the work of issuance of tickets was in progress and the workman would have issued the tickets to those passengers who had boarded from Metapura. The labour court has considered all these aspects of the matter and keeping in view the gravity of misconduct alleged against the workman, the labour court, in exercise of the powers under section 11-A of the Industrial Disputes Act, 1947, found that the order of dismissal was harsh and disproportionate. Looking to the findings recorded by the inquiry officer, past record was not made the basis for the order of dismissal and while passing the order of dismissal, the competent authority has considered only present misconduct and this has rightly been appreciated by the labour court in exercise of the powers under sec.11A of the Act. Once when the order of dismissal has been based upon the misconduct in question and at that time, the past misconduct was not made the basis for the purpose of imposing extreme penalty of dismissal, then, according to my opinion, the labour court is not obliged to consider the past misconduct which was not made the basis for the order of dismissal. However, inspite of such clear position, the labour court has examined and considered the past record while granting relief in favour of the workman in exercise of the powers under sec. 11A of the Act and considering the length of service of about 24 years, the labour court has granted reinstatement in favour of the workman.

It is a settled principle of law that at the time of passing the punishment order, it is the duty of the authority concerned to consider certain relevant factors like socio economic back ground of the workman, family circumstances of the workman concerned, compelling circumstances to commit the misconduct, length of service and then past record. IN this case, the labour court has

rightly considered the family circumstances of the respondent workman and has rightly granted reinstatement in favour of the workman by passing the award in question.

I have examined the award in question. Considering the submissions made by Mr. Patel, I may make it clear that these submissions are not available to the corporation before this court since such submissions were admittedly not made by the corporation before the labour court. Before the labour court, the corporation admittedly remained silent and pointed out nothing. No objections were raised by the corporation before the labour court against the purshis filed by the workman for exercise of the powers under section 11A of the Act. The submissions which are now being made before the Court were not made by the corporation before the labour court and the labour court was not having an opportunity to examine and consider such submissions. Therefore, in view of these peculiar facts of the present case, the decisions cited by Mr. Patel before this Court are not applicable on facts and are not helpful to the petitioner.

Under section 11-A of the Act, the labour courts and the industrial tribunals are enjoying powers to grant appropriate reliefs in case of dismissal, discharge or termination of services if it is found by the labour court or the tribunal that the order of dismissal, discharge or termination is unjust, harsh and disproportionate to the charge levelled against the workman. In the decisions relied upon by Mr. Patel, one of which is of the Single Judge and the another is that of the Division bench of this Court, it has not been held that in case of alleged dishonesty and misappropriation, powers under section 11-A of the Act cannot be exercised by the labour court but in both the decisions, it has been held that in such cases, the labour court is required to consider relevant factors while exercising such powers and granting reliefs. IN this case, while exercising such powers and granting the reliefs, the labour court has also considered the past misconducts though same were not made the basis for passing the order of dismissal by the competent authority. Therefore, it cannot be said that the labour court has blindly exercised such powers without considering any facts of the case. The apex court has held that in exercise of such powers, the labour court can reappreciate the evidence which was led in the departmental inquiry. It has also been held that the labour court or the industrial tribunal as the case may be can take different view and form different conclusion than the one which has

been formed by the competent authority.

This aspect has been examined by the apex court in case of Workmen of M/s. Firestone Tyre and Rubber Co. of India P. Ltd. versus The Management and others reported in A.I.R. 1973 S.C. page 1227 where, in para 37 of the decision it has been held by the apex court as under:

"37. We are not inclined to accept the contentions advanced on behalf of the employers that the stage for interference under Section 11A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be remembered that a tribunal may hold that the punishment is not justified because the misconduct alleged and found proved is such that it does not warrant dismissal or discharge. The Tribunal may also hold that the order of discharge or dismissal is not justified because the alleged misconduct itself is not established by the evidence. To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately, it may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge. That is why, according to us, section 11A now gives full power to the Tribunal to go into the evidence and satisfy itself on both these points. Now the jurisdiction of the Tribunal to reappraise the evidence and come to its conclusion enures to it when it has to adjudicate up on the dispute referred to it in which an employer relies on the findings recorded by him in a domestic enquiry, Such a power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognized in a Tribunal when it was deciding a dispute on the basis of evidence adduced before it for the first time. Both categories are now put on a par by Section 11A."

Therefore, considering the powers enjoyed by the labour court under section 11A of the Act in view of the aforesaid decision of the apex court and also considering the entire aspects of the matter, according to my opinion, the labour court has not committed any error apparent on the face of the record.

Therefore, it cannot be said that the labour court has committed any jurisdictional error or material irregularity in directing the petitioner to reinstate the respondent wormkan in service without back wages of interim period. It is a clear case of due application of mind. No error has been committed by the labour court in passing the award of reinstatement with continuity of service which would warrant interference of this Court in exercise of the powers under Article 226 and/or 227 of the Constitution of India.

In case of IOB versus IOB Staff Workmen Union reported in 2000 SCC Lab. and Service, 471, the apex court has considered the scope of Art. 226/227 of the Constitution of India and observed that the interference with the pure findings of fact and reappreciation of evidence is totally impermissible. The High Court is not having appellate powers and insufficiency of evidence or another view is possible has been held to be no ground for interference with the order of the lower authority. Similarly, recently, in case of Sugarbhai M. Siddiq versus Ramesh S. Hankare, reported in 2001-8 SCC 477, the apex court has examined the scope of powers under Article 226/227 of the Constitution of India and has held that the High court must ascertain whether such court or tribunal is having jurisdiction to deal with the matter or not and whether the order in question is vitiated by procedural irregularity or not. In the instant case, learned advocate Mr. Patel has not been able to point out any procedural irregularity or that the award in question is vitiated by procedural irregularity. He has also not been able to point out that the labour court was not having the jurisdiction to deal with the matter.

Recently, in 2002 scope of jurisdiction under Article 226 and/or 227 has been examined by the apex court in case of Ouseph Mathai and Others versus M. Abdul Khadir reported in (2002) 1 SCC page 319. In the said decision, the apex court has held that the jurisdiction under Article 227 of the Constitution cannot be invoked, as a matter of right. As regards the scope of jurisdiction under Article 227 of the Constitution of India, it has been held that mere wrong decision is not a ground for exercise of jurisdiction under Article 227. The apex court has held that the High Court may intervene under Article 227 only where it is established that the lower court or tribunal has been guilty of grave dereliction of duty and flagrant abuse of power, which has resulted in grave injustice to any party.

Recently, in case of Roshan Deen versus Preeti Lal reported in (2002) 1 SCC 100, as regards the purpose of powers conferred on High Court under Article 226 and 227, the apex court has observed that the purpose is to advance justice, not to thwart it. It has been further observed that even where justice is the by product of an erroneous interpretation of law, High Court ought not to wipe out such justice in the name of correcting the error of law. In para 12 of the said decision, the apex court has observed as under:

> "12. We are greatly disturbed by the insensivity reflected in the impugned judgment rendered by the learned Single Judge in a case when judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. v. District Judge, Unnao). The very purpose of such constitutional powers being conferred on the High courts is that no man should be subjected to injustice by violating the law. The lookout of the High court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

Therefore, considering all these aspects of the matter, according to my opinion, there is no substance in the petition filed by the corporation and the same is required to be dismissed at the threshold. Same is, therefore, dismissed.

30.4.2002. (H.K. Rathod,J.)
Vyas