AFR

ORISSA HIGH COURT : CUTTACK

W.P.(C) No.25979 of 2021

In the matter of an Application under Articles 226 and 227 of the Constitution of India, 1950

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Sikha Sarkar
Aged about 53 years
Wife of Late Jaydev Sarkar
At: Flat No.TS-77, BH Area, Kadma
P.O./P.S.: Kadma
District: East Singhbhum
Jharkhand ... Petitioner

-VERSUS-

1. Union of India
Represented through its General Manager
South Eastern Railway, Garden Reach
Kolkata – 700 043, West Bengal State.

2. Senior Divisional Personnel Officer
South Eastern Railway, Chakradharpur
District: Singhbhum, Jharkhand State.

3. Senior Divisional Electical Engineer (TRS),
Bondamunda, Rourkela – 770 032
District: Sundargarh.

4. Assistant Personnel Officer
South Eastern Railway, Chakradharpur
District: Singhbhum,
Jharkhand State. ... Opposite parties

Counsel appeared for the parties:

For the petitioner : M/s. Prasanta Kumar Nayak, Alok Kumar Mohapatra and Sabyasachi Mishra, Advocates

For the opposite parties : Mr. Partha Sarathi Nayak, Senior Panel Counsel Union of India

P R E S E N T:

THE HONOURABLE ACTING CHIEF JUSTICE DR. B.R. SARANGI

AND

THE HONOURABLE MR. JUSTICE MURAHARI SRI RAMAN

Date of Hearing : 08.01.2024 :: Date of Judgment : 12.01.2024

JUDGMENT

MURAHARI SRI RAMAN, J.—

THE CHALLENGE BY THE PETITIONER:

Judicial review of the Order dated 11.02.2019 passed by the learned Central Administrative Tribunal in Original Application being No.260/00869/2015 is sought for by the petitioner, wife of deceased Khalasi-Helper, subsequently being promoted to the post of Shed Fitter and notionally promoted to the rank of Technical Grade-I, craving for the following relief(s):

"It is therefore prayed that this Hon'ble Court may be graciously pleased to issue Rule NISI calling upon the opposite parties to show cause as to why:

(i) The order dated 11.02.2019 passed by the Hon'ble Central Administrative Tribunal, Cuttack Bench, Cuttack under Annexure-4 shall not be declared as illegal and non est in the eye of law and quashed.

(ii) The Opposite Parties shall not be directed to grant the back wages/arrear salary from dated 01.11.2003 to 04.12.2009 in favour of the petitioner along with interest.

And issue any appropriate order/orders deemed fit in the facts and circumstances of the case."

GENERAL:

2. In the cause title the wife of the employee-Jaydev Sarkar is described as "petitioner" as she is pursuing the matter after death of her husband who was applicant before the Central Administrative Tribunal; but for the sake of convenience, hereinafter wherever reference is made to the petitioner, the same be understood as the employee, "Jaydev Sarkar" (husband of the petitioner).

FACTS:

3. Facts leading to filing of the writ petition to issue direction to the opposite parties to release back wages/ arrear salary from 01.11.2003 to 04.12.2009 in favour of the petitioner are narrated herein *infra*.

3.1. After joining as Khalasi Helper on 16.07.1978, having undergone training for three months at Electrical Training School, Tatanagar, South Eastern Railway, served under the Senior Divisional Electric Engineer (Traction Rolling Stock), Bondamunda, South Eastern Railway in the district of Sundargarh.

3.2. Having not followed procedure established in law, the Disciplinary Authority had inflicted punishment by dismissing the petitioner from service with effect from 01.09.1993. Challenging such action of the Authority the petitioner filed Original Application under Section 19 of the Administrative Tribunals Act, 1985 before the Central Administrative Tribunal, Cuttack Bench, Cuttack which was registered as O.A. No.327 of 1999. Said O.A. came to be disposed of *vide* Order dated 04.11.2004 holding that the Authority had never conducted any enquiry as required to be done under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968. Absence of adherence to the process of law in taking measure for major penalty and violation of the principles of natural justice being found, the learned Central Administrative Tribunal quashed the Order dated 01.09.1993 of the Disciplinary Authority, wherein it was merely stated that "He is dismissed from Railway service with effect from 01.09.1993", with the following directions:

"Respondents are also directed to reinstate the applicant in service and treat the period from 20.02.1994 to 15.05.1999 as medical leave on the strength of medical certificate submitted by the applicant and the remaining period till the date of his reinstatement as leave, as due and admissible."

3.3. Upon joining duty on 14.12.2004, the Authority on 17.12.2004 passed Order of reinstatement with effect from 01.09.1993. Accordingly, the petitioner approached the Authority for extension of service benefits like seniority and promotion, which being not paid any heed to, he carried his grievance to the Central Administrative Tribunal in O.A. No.709 of 2009 by questioning Order dated 15.06.2005, whereby his claim for seniority and promotion were refused. The said Tribunal disposed of the Original Application on 23.06.2009 with the following observation:

"5. Admittedly, the disciplinary proceeding initiated against the applicant has been quashed by this Tribunal as there was no evidence to proceed against him and to award punishment as had been imposed by the disciplinary authority. If so, it is the obligation of the Department to consider the case of the applicant for restoration of his seniority over his juniors. The applicant is also entitled for all his service benefits including promotion to the higher posts. However, as per the contention raised in the counter, since the applicant has not made none of his juniors as party to the O.A., it is only proper for this Tribunal to give direction to the Respondents to consider the applicant's representation for fixation of

his seniority and promotional benefits on giving notice to his juniors who have got promotion. However, it is seen that as per the order of this Tribunal the applicant has to submit leave applications along with medical certificates for regularizing the period of absence and the Respondents have to duly consider the same.

6. With the above observation and direction this O.A. is allowed by setting aside Annexure-A/6 order. Respondents shall consider the entire case within a reasonable time, at any rate within 90 days, on giving sufficient notice to juniors of the applicant who have already been promoted regarding restoration of seniority of the applicant. Ordered accordingly. No costs."

3.4. In compliance of aforesaid Order of the learned Central Administrative Tribunal, on hearing the juniors, by Order dated 12.10.2009 the Senior Divisional Personnel Officer, Chakradharpur placed the petitioner above his immediate junior, namely Sri Jogeswar and accorded promotion in the post of Technical Grade-I with effect from 01.11.2003, *i.e.,* the date on which said junior got promoted. Accordingly, an Order dated 24.11.2009 was passed by the Assistant Personnel Officer, Chakradharpur in pursuance of Order dated 12.10.2009 of the Senior Divisional Personnel Officer, Chakradharpur, which was in compliance of Order dated 23.06.2009 passed in O.A. No.709 of 2006 by the Central Administrative Tribunal.

3.5. Text of Order dated 24.11.2009 reads as follows:

"South Eastern Railway.

Office of the
Sr. Divl. Personnel Officer,
Chakradharpur.

O.O. No: P/ELS/TRS/38/09 Dated 24.11.2009

Sub: Promotion and posting to the post of Tech-1 in Pay Band Rs. 5200-20200/- with Grade Pay of Rs.2800/-

With the approval of the competent authority, the following promotion and posting orders are issued to have immediate effect.

Sri Jaydev Sarkar, Tech-II/TRS/BNDM in Pay Band Rs.5200-20200/- with Grade Pay Rs. 2400/- is promoted as Tech-I in Pay Band Rs.5200-20200/- with Grade Pay Rs. 2800/- and retained at BNDM.

N.B.:

1. *He is found suitable for promotion to the post of Tech-I in Pay Band Rs.5200-20200/- Gr. Pay Rs.2400/- vide this O.O. No: P/ELS/TRS/09 dated 24.11.2009.*

2. *His promotion is ordered from the date of promotion of his immediate junior Sri Jogeswar, Tech-I/TRS/BNDM (i.e. 01.11.2003) and actual benefit will be given at par his junior.*

3. *He may exercise option to fix his pay in terms of Estt. Srl. No: 231/81, if so desires within one month from the date of issue of promotion order.*

4. *His date of taking over independent duty should be intimated to this office.*

5. *The actual monetary benefit should be extended from the date of taking over the charges in the higher Grade i.e. Tech. Gr.-I*

Asstt. Personnel Officer,
Chakradharpur."

3.6. Challenging aforesaid Order dated 24.11.2009, the petitioner approached the said Tribunal by way of filing Original Application which bears O.A. No.260/00729/ 2010. Said O.A. came to be disposed of on 27.01.2015 with a direction to the Divisional Railway Manager, South Eastern Railway, Chakradharpur to consider the representation dated 15.03.2010, if not already disposed of.

3.7. The petitioner was intimated by Senior Divisional Engineer (TRS), Bondamunda *vide* Letter dated 30.04.2015 that the representation dated 15.03.2010 had already been disposed of on 03.03.2011 and it was made known to him that,

"The representation dated 15.03.2010 of Sri J.D. Sarkar, Tech.I of ELS/BNDM has been disposed of by allowing him the pay of his juniors as stated in his application and his pay has been revised at Rs.13,910/- with effect from 01.07.2009 and actual from 04.12.2009, i.e. the date of shouldering higher charge of Tech.I vide this Office Order No.E/TRS/BNDM/38/2011, dated 03.03.2011."

3.8. While working as Senior Technician under the Senior Divisional Electrical Engineer in Pay Band of Rs.9300/- — 34800/- + Grade Pay or Rs.4200/- and PC-7 Level-6, the petitioner got retired from service on 30.04.2017 on attaining age of superannuation.

3.9. Questioning legality of fixation of pay from 04.12.2009 by virtue of Office Orders dated 24.11.2009 and 12.10.2009, the petitioner filed Original Application, registered as O.A. No.260/00896/2015, which stood disposed of on 11.02.2019, with the following observation:

> *"14. We would like to note that the respondents had already disposed of representation dated 15.03.2010 preferred by the applicant by communicating their decision on 03.03.2011. It is not a case where the applicant has been superseded by his junior which having been challenged, he has been promoted retrospectively from the date his junior was so promoted. It is also not a case where the administration has wrongly denied him promotion. Although the applicant has not mentioned regarding the exact nature of allegations made against him in the criminal case, in Paragraph-6 of the counter have made the following averments:*
>
> *'*** it is respectfully submitted that time and again the applicant had suffered several punishment, i.e., in 1988 minor penalty of stoppage of privilege pass, in the year 1992 suffered major penalty of removal which was reduced to reversion by the Appellate Authority and finally in the year 1993 had suffered*

penalty of dismissal. It may kindly be taken note of that the applicant was placed under suspension vide office order dated 16.08.1993 as he was arrested by RPF/Eastern Railway/Hoarash-2 on 10.08.1993 at Rishra Railway Station and found in possession of a brief case containing Railway Blank paper Ticket Book, used Railway Tickets etc. and arrested committing crime punishable under the Railway Property (Unlawful Possession) Act. Finally, the misconduct of the applicant was proved during inquiry and punishment of dismissal from service passed terminating the service of the applicant with effect from 01.09.1993. It is needless to indicate here that the order of dismissal was upheld by this Hon'ble Tribunal dismissing the OA filed by the applicant. However, on remand of matter by the Hon'ble High Court, the Hon'ble Tribunal reconsidered the matter and allowed the OA on technical grounds. While directing the Authority to reinstate the applicant, this Hon'ble Tribunal also passed orders how the entire period of applicant from the date of suspension till his reinstatement will be treated. Accordingly, steps were taken by the Railway Administration and the benefits as due and admissible extended to the applicant without any further delay.'

15. *As the misconduct of the applicant was proved during Inquiry, punishment of dismissal from service was imposed. Subsequently, after the matter was remitted back to this Tribunal by the Hon'ble High Court and as already mentioned earlier, this Tribunal reconsidered the matter and allowed the OA directing reinstatement of the applicant. The applicant has not made out a case that he was not gainfully employed during the period he was out of*

service due to dismissal. In the peculiar facts and circumstances of the case, this Tribunal is not satisfied that any illegality has been committed by the respondents in not allowing back wages in favour of the applicant for the period in question.

16. For the reasons discussed above, the O.A. is held to be without any merit and the same is dismissed with no order as to costs."

3.10. Dissatisfied with improper fixation of pay, the petitioner made representation for revision of his pay, which could not be pursued as he passed away on 22.02.2020 due to illness. On account of intervening COVID-19 pandemic situation the wife of Jaydev Sarkar could not approach this Court immediately, but presented this writ petition on 26.08.2021.

REPLIES OF THE OPPOSITE PARTIES TO THE CONTENTS OF THE WRIT PETITION:

4. Turning the ball to the side of the petitioner, the opposite parties have contended that the petitioner was issued with a major penalty by proceeding with Charge Memo No. E/TRS/BNDM/D&A/1361, dated 14/27.05.1993 citing frequent absence from duty and he was dismissed from service in consequence thereof. On being challenged before the Central Administrative Tribunal in O.A. No.327 of 1999, the same got dismissed on the ground that the challenge is hit by limitation. The petitioner further carried the matter to this Court in OJC No.10619 of 2001 wherein aforesaid order of the

Tribunal got set aside and the Tribunal upon rehearing directed for treating the period from 20.02.1994 to 15.05.1999 as on medical leave on the strength of the medical certificate furnished by the petitioner and directed for his reinstatement.

4.1. Pursuance thereto, the petitioner was reinstated in service with effect from 01.09.1993 *vide* Sr. EEE/TRS/BNDM Letter No. E/TRS/BNDM/CC/JDS/ 3732, dated 10/11.12.2004 and the period from 20.02.1994 to 15.05.1999 was treated as medical leave on the strength of medical certificate produced by the petitioner. The period from 20.02.1994 to 22.02.1994 ws treated as SLAP from 23.02.1994 to 03.06.1994 as SLHAP and from 04.06.1994 to 15.05.1999 as SLWP. His service period was also continued notionally from 16.05.1999 to 13.12.2004 by granting him extraordinary leave.

4.2. The petitioner, being aggrieved by non-accordance of promotion, having approached the Central Administrative Tribunal, direction was issued *vide* Order dated 23.06.2009 in O.A. No.709 of 2006 to the effect that the concerned parties be heard and the position of the petitioner be fixed accordingly. Therefore, his case was considered and the seniority of the petitioner was placed above his immediate junior Sri Jogeswar, but on *pro forma*. However, he was not allowed actual arrear as

during the period aforesaid he "did not actually shoulder the duties and responsibilities of the higher post". It is denied by the answering opposite parties that there was "administrative error or lapses", and affirmed that the petitioner was out of employment on account of his "misconduct".

4.3. It is further clarified by the opposite parties that in connection with the direction contained in the Order dated 23.06.2009 of the learned Central Administrative Tribunal passed in O.A. No.709 of 2009 on placing the petitioner as senior to Sri Jogeswar, his promotion to the post of Tech.-II was ante-dated and given effect from 02.11.1996 and he was further promoted *vide* Office Order dated 24.11.2009 to the post of Tech.-I with effect from 01.11.2003, *i.e.*, the date on which his immediate junior Sri Jogeswar got promotion.

4.4. Accordingly, the pay of the petitioner was fixed notionally at higher grade applicable to the promotional post by virtue of Office Order No. ETRS/BNDM/2/2010, dated 07.01.2010. Strong exception has been taken by the opposite parties by stating that "the petitioner has accepted the Office Order *vide* Sr.DPOCKP's Office Order No. P/ELS/TRS/38/09, dated 24.11.2009 and assumed higher responsibility without any objection". So, the petitioner cannot blow hot and cold simultaneously by

accepting one part of the Order, while disputing the other.

4.5. The petitioner approached the learned Central Administrative Tribunal in O.A. No.729 of 2010 with prayer to fix the scale of pay at Rs.13,910/- as had been fixed in the case of his junior. The said Tribunal without expressing merit of the matter, while disposing of said O.A. directed *vide* Order dated 15.01.2015 to consider the grievance of the petitioner. Considering the representation dated 15.03.2010 of the petitioner, Office Order No.SER/P-CKP/CC/565/JS/15, dated 04.06.2015 was issued by revising the pay at Rs.13,910/- with effect from 01.07.2009 and he was granted actual pay from 04.12.2009, *i.e.,* "the date of shouldering higher charges of Tech-I *vide* Office Order No. E/TRS/BNDM/38/2011, dated 03.03.2011".

4.6. Assailing said decision, the petitioner approached the Central Administrative Tribunal, Cuttack Bench, Cuttack by way of filing Original Application being O.A. No.869 of 2015, which came to be disposed of *vide* Order dated 11.02.2019.

4.7. It is also placed on record for consideration that by Judgment dated 14.01.2015 of the Judicial Magistrate, 5th Court, Serampore, Hooghly delivered in C.R. No.350 of 1993 (T.R. No.18 of 1994), in the case of alleged possession of Railway Excess Fare Ticket Book, and

other incriminating documents, the petitioner, facing trial under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966, was found "not guilty" and acquitted under Section 248 of the Code of Criminal Procedure, 1973 inasmuch as "the prosecution had miserably failed to prove and establish that the seized properties were recovered and seized from the possession of the accused itself and the benefit of doubt which has arisen surely goes in favour of the accused person". Appeal being preferred by the State suffered dismissal by the Additional Sessions Judge, Fast Track Court, Serampore *vide* Order dated 22.07.2021 in Criminal Appeal No.74 of 2015 with the following observation:

"It appears from the death certificate that the appellant Joydeb Sarkar is no more alive. He died on 22.02.2020 at Jamshedpur, Jharkhand. I do not find any justified reason to disbelieve the certificate issued by the Registrar (Birth & Death), Jamshedpur, Jharkhand.

Under the above circumstances this Court has left no option, but to close the case."

4.8. Under the aforesaid fact-situation, the opposite parties submitted that no lapse or error can be imputed against the Authorities and the notional benefit as accorded to the petitioner is just and proper. Accordingly, the opposite parties urged for dismissal of the writ petition.

5. Refuting the principle "no work, no pay" as made applicable by the opposite parties, rejoinder affidavit has come to be filed in response to the stand taken in the counter affidavit, the petitioner attempted to make out a case that as he has been given promotion in the post of Technical Grade-I with effect from 01.11.2003, actual pecuniary benefit ought to have been extended, for it is the employer-authority who did not allow him to work and discharge his duty.

HEARING OF WRIT PETITION BEFORE THIS COURT:

6. This matter was on board on 08.01.2024 for "admission". It is conceded by counsel for the respective parties that the pleadings have been completed and as the employee, who was denied arrear salary/back wages even though his promotion was considered with retrospective effect from 01.11.2003 is dead since 22.02.2020, and his wife has been pursuing the matter, the counsel for both the sides insisted for disposal at the stage of admission itself. Therefore, this Court heard Sri Prasanta Kumar Nayak, learned Advocate for the petitioner; Sri Partha Sarathy Nayak, learned Advocate for the opposite parties.

SUBMISSIONS AND ARGUMENTS OF RESPECTIVE PARTIES:

7. Sri Prasanta Kumar Nayak, learned Advocate for the petitioner pressed in service the date chart as forming

part of rejoinder affidavit filed on behalf of the petitioner on 02.08.2022 and placed following from said affidavit:

> *"24.11.2009 In pursuance to the Order by the Senior Divisional Personnel Officer, Chakradharpur, the applicant pay was fixed in the scale of pay of promoted post i.e. in Technical Grade-I with effect from 01.11.2003 and actual benefits were given at par with his junior and the actual monetary benefit should be extended from the date of taking over the charges in the higher grade i.e. the Technical Grade-I."*

7.1. Advancing argument further Sri Prasanta Kumar Nayak, learned Advocate for the petitioner urged that irrelevant and non-germane reason that "the Senior Divisional Personnel Officer, Chakradharpur determined the seniority of the applicant with effect from the date of promotion and pay fixation at par with his immediate junior namely Sri Jogeswar, but passed the order that no arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts and the enhanced pay shall be payable from the date of actual promotion" has been ascribed by the opposite parties.

7.2. Placing reliance on *Ramesh Kumar Vrs. Union of India, AIR 2015 SC 2904*, Sri Prasanta Kumar Nayak, learned Advocate vehemently submitted that the learned Central Administrative Tribunal has misdirected in applying the ratio of said Judgment inasmuch as it failed to

appreciate that the petitioner could not discharge duty due to non-allowance to work by the employer. So, for the fault of the opposite parties, the petitioner should not be made to suffer. With reference to factual merit of the matter as narrated, Sri Prasanta Kumar Nayak, learned Advocate submitted that the principle enunciated by the Hon'ble Supreme Court of India that "no work, no pay" has been misplaced.

7.3. Continuing his argument Sri Prasanta Kumar Nayak, learned Advocate exerted that there is no thumb rule to follow doctrine of "no work, no pay" in every situation and the instant case is distinguishable on facts. To illustrate, he went on to submit that the disciplinary proceeding initiated against the petitioner ended in setting aside of the order of dismissal from service and regularisation of absence by considering the period not worked as on medical leave; and the criminal case instituted also got terminated on finding him "not guilty". Consequent upon consideration of representation of the petitioner pursuant to direction of the learned Central Administrative Tribunal he was given promotional post and also revised pay. Therefore, Sri Prasanta Kumar Nayak, learned Advocate strenuously urged that as the circumstance would suggest that the petitioner could not work due to circumstances not within his control, but attributable to the employer, he should have been extended the

pecuniary benefit coterminous with promotion. He asserted that if the petitioner-delinquent was acquitted on the ground of benefit of doubt in the criminal case, then it is incumbent on the opposite parties to grant him back wages.

7.4. In order to buttress his argument, the counsel for the petitioner has made reference to *Union of India Vrs. K.V. Jankiraman, (1991) 4 SCC 109; State of Kerala Vrs. M. Bhaskaran Pillai, (1997) 5 SCC 432 = (1997) 1 Suppl. SCR 87 = AIR 1997 SC 2703;* and *Shobha Ram Raturi Vrs. Haryana Vidyut Prasaran Nigam Limited, (2016) 16 SCC 663.*

7.5. The vehemence of argument of Sri Prasanta Kumar Nayak, learned Advocate was on the non-observance by the Authority as also the Central Administrative Tribunal of the law laid down with regard to the reinstatement with full back-wages when the order for dismissal from service is held to be illegal and set aside by the competent authority.

8. Sri Partha Sarathy Nayak, learned Senior Panel Counsel for the Union of India appearing for the opposite parties led his argument by contending that due to his misconduct, the petitioner was proceeded with and dismissed from service. The circumstance might have prevailed at the relevant point of time which punishment got set aside and during the period the petitioner did not

work was directed to be considered as on medical leave. The tenor of Order of the learned Central Administrative Tribunal while directing the petitioner to furnish medical certificate before the authority *vide* Order dated 23.06.2009 in O.A. No.709 of 2006 did not issue positive direction to accord the petitioner to avail pecuniary benefit. Laying stress upon Order dated 27.01.2015 passed in O.A. No.260/00729/2010 by the Central Administrative Tribunal, wherein subject-matter for consideration was Order dated 24.11.2009 of the Assistant Personnel Officer, Chakradharpur, the learned counsel submitted that in the said Order direction was given to the Divisional Railway Manager, South Eastern Railway, Chakradharpur to consider representation dated 15.03.2010, if the same was still pending. Nonetheless, it was specifically observed that said Order was passed "without expressing any opinion of the matter".

8.1. Furthermore, the acquittal of the petitioner from the charge under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966 read with Section 248 of the Code of Criminal Procedure, 1973, was not to be construed as clean acquittal; rather, the Judgment of the Judicial Magistrate, 5th Court, Serampore, Hooghly indicates that the reason for acquittal was one of "the benefit of doubt" as the prosecution had "miserably failed to prove and establish" the charge.

8.2. Therefore, emphatically Sri Partha Sarathi Nayak, learned counsel appearing for the opposite parties submitted that it is not the employer who can be hauled up for the petitioner having been put out of service. Therefore, questioning the veracity of submission of Sri Prasanta Kumar Nayak, learned counsel for the petitioner, Sri Partha Sarathi Nayak, learned counsel for opposite parties forcefully argued that the conspectus of principles laid down in the decisions referred to by the counsel for petitioner, being distinguishable on facts, would be in aid of the case of the opposite parties.

8.3. Amplifying his submission, Sri Partha Sarathi Nayak, learned counsel for the opposite parties would submit that the decision rendered by the Hon'ble Supreme Court of India in the case of *Union of India Vrs. Tarsem Lal, (2006) 10 SCC 145* has relevance to the instant case.

DISCUSSIONS AND ANALYSIS:

9. Perusal of rejoinder affidavit filed by the petitioner in reply to the contents of the counter affidavit of the opposite parties would reveal that the relief sought for has been confined to the following effect:

> *"3. That the present rejoinder is being filed on behalf of the petitioner to the reply filed by the Railway to the captioned writ petition preferred by the petitioner challenging the Order dated 11.02.2019 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack and further praying for a direction to*

the Railway to grant back wages/arrear salary from 01.11.2003 to 04.12.2009 in favour of the petitioner with interest."

10. It is factually determined by the authority concerned that the petitioner was to be placed senior to his immediate junior Sri Jogeswar and was promoted to the post of Technical Grade-I with effect from 01.11.2003, *i.e.,* the date on which said immediate junior got promoted. The exercise of determination of seniority and promotion was considered in compliance of direction of the learned Central Administrative Tribunal, Cuttack Bench, Cuttack *vide* Order dated 23.06.2009 passed in O.A. No.709 of 2009.

10.1. For benefit of understanding the approach of the authority in determining the seniority and reason for granting no arrear as claimed by the petitioner, it is apt to reproduce the Office Order dated 12.10.2009:

"South Eastern Railway

Office of the
Sr. Divl. Personnel Officer
Chakradharpur
Dt. 12.10.2009

*No.E/CC/JDS/TRS/BNDM/*06

To

Sri Jayadev Sarkar,
Technician-Gr.II, Sr.DEE (TRS)/BNDM.

Sub: Compliance of Hon'ble CAT/CTC's Order dtd. 23.06.09 passed in O.A. No. 709 of 2006

***

The instant petition had been filed by you praying inter alia to interpolate your name in the seniority list and promote you to higher post at par with your junior.

The matter was disposed off by an Order dtd. 23.06.2009 with certain direction upon the Respondents. The operative part of the order is reproduced below:

*'*** this OA is allowed by setting aside Annexure-A/6 order. Respondents shall consider the entire case within a reasonable time at any rate within 90 days on giving sufficient notice to juniors of the applicants who have already been promoted regarding seniority of the applicant.'*

In obedience to the Hon'ble Tribunal's Order dtd. 23.06.2009 and in compliance thereof a Memorandum was issued vide Sr.DPO/CKP's Memo No. E/CC/IDS/TRS/BNDM/06 dtd. 31.07.2009 to implement the Order of Hon'ble Tribunal in letter and spirit.

Consequently, your seniority position has been determined with respect to the date of promotion of your immediate junior, i.e., Sri Jogeswar, Tech-Gr-I, Sr. DEE (TRS)/BNDM as per the available records.

The relevant service particulars of your immediate junior Sri Jogeswar are given below:

1. *Date of promotion to the post of Tech-III* — *10.09.1990*

2. *Date of promotion to the post of Tech-II* — *02.11.1996*

3. *Date of promotion to the post of Tech-I* — *01.11.2003*

In this connection, it is stated that your promotion at par with your immediate junior Sri Jogeswar will be regulated as detailed below:

i) Promotion to the post of Tech-II will be antedated w.e.f. 02.11.1996 on proforma basis with respect to the date of promotion of your immediate junior Sri Jogeswer.

ii) Your promotion to the post of Tech-I at par with your junior will be regulated in accordance with Para 223 of IREM Vol.I, 1989 which stipulates that a Railway Servant may be promoted to fill any post whether Selection post or a Non-selection post, only if, he is considered fit to perform the duties attached to the post. As such, your promotion to the post of Tech-I is subject to your bring adjudged suitable for such promotion.

iii) Further, it will be pertinent to mention herein that your pay in the higher grade, on promotion, shall be fixed on proforma basis at the proper stage but no arrears on this account shall be payable as you did not actually shoulder the duties and responsibilities of the higher post, and the enhanced pay shall be payable from the date of actual promotion. This provision of Railway Rules regarding non-

payment of back wages on proforma promotion have been upheld by Hon'ble Supreme Court in Judgment dtd. 13.08.1997 in Civil Appeal No. 8904 of 1994 (Union of India & Ors Vrs. P.O. Abraham & Ors) and in Civil Appeal No. 4222/2006 arising out of SLP (C) No. 23021/2005 in Union of India (through General Manager, Northern Railway & Others) Vrs. Shri Tarsem Lal & Others in judgment dtd. 21.09.2006 [(2006) Supp. 6 SCR 456].

In view of the above facts and circumstances, your claim for promotion and pay fixation at par with your junior Sri Jogeswar will be regulated as per the aforementioned rules.

The receipt of this order may please be acknowledged.

(Anand Madhukar)
Sr. Divl. Personnel Officer
Chakradharpur"

11. The basis for denying the arrear salary in the promotional post, but to accord salary in the promotional post from the date of performing actual duties in the higher post *vide* aforesaid Office Order is the decision of Hon'ble Supreme Court of India in *Union of India Vrs. Tarsem Lal, (2006) Supp. 6 SCR 456*, which runs as follows:

"This Court has occasion to deal with the same issue in Union of India and Ors. Vrs. P.O. Abraham and Ors. in C.A. 8904 of 1994 decided on 13.08.1997. In that case the appeal was filed against the order of the Emakulam

Bench of CAT. Reliance was placed by the Union of India and its Functionaries in that case on Railway Board's Circular dated 15/17 September, 1964 which inter alia provided as follows:

'No arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher post.'

One Bench of CAT held that clause to be invalid. But in Virender C Kumar, General Manager, Northern Railways, New Delhi Vrs. Avinash Chandra Chadha and Ors., (1990) 3 SCC 472 the view was held to be not correct. The order in Abraham's case (supra) reads as follows:

'This appeal is directed against the order of the Central Administrative Tribunal, Ernakulam Bench, in O.A. No. 649/1990 dated 30th September, 1991. Though the appeal challenges the order in its entirety, Mr. Goswami, learned senior counsel for the appellants, fairly stated that the appeal is now confined only to the payment of back-wages ordered to be given by the Tribunal.

By the order under appeal, the Tribunal has allowed the application which challenged the Railway Board Circular dated 15/17 September, 1964. The said Circular inter alia, contains the following clause:

'No arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts.'

Consequent to the deletion of the above clause, further directions were given. Learned counsel submits that the clause, which has been directed to be removed, is in accordance with the judgment of this Court in Virender Kumar, General Manager, Northern Railways, New Delhi Vrs. Avinash Chandra Chadha & Ors., (1990) 2 SCR 769.

This Court, in that case, held on principle of 'no work no pay' that the respondents will not be entitled to the higher salary as they have not actually worked in that post. *The clause, which has been directed to be deleted by the Tribunal, being in consonance with the ruling of this Court, we are of the opinion that the Tribunal was not right in directing the deletion of that clause. Accordingly, to that extent this appeal is allowed. The result is that the respondents will be given deemed promotion, if any, before retirement and also the benefit in the matter of fixing pension. No costs.'*

In view of what has been stated in Virendra's case (supra) and P.O. Abraham's case (supra), Tribunal and the High Court were not justified in granting relief to the respondent. Reliance on Harbans Singh Vrs. State of Punjab, (1995) Supp. 3 SCC 471 was uncalled for."

11.1. Taking note of decision rendered in *Union of India Vrs. K.V. Jankiraman, (1991) 4 SCC 109,* the Supreme Court of India in the case of *Sudha Srivastava Vrs. The Comptroller & Auditor General of India, (1995) Supp. 4 SCR 797 = AIR 1996 SC 571*, made the following observations:

*"*** This Court in Union of India Vrs. K.V. Jankiraman, (1991) 4 SCC 109 has held that when the 'sealed cover' procedure is followed and the sealed cover is opened on the complete exoneration of the employee from all the charges, then notional promotion is to be given to him from the date when his juniors were promoted.* ***Arrears of salary could be granted from the date of the notional promotion having regard to the circumstances of the case****. In this connection, it was observed as follows:*

'We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complete, it is not possible to anticipate and enumerate exhaustively all the circumstances, under which such consideration may become necessary. ***To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interest.*** *We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (III) of paragraph 3 of the said Memorandum, viz., 'but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion', we direct that in*

place of the said sentence the following sentence be read in the Memorandum:

'However, whether the officers concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and ***if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/ criminal prosecution.*** *Where the authority denies arrears of salary or part of it, it will record its reasons for doing so.'*

***

Even otherwise, if the husband of the appellant was not to be promoted, he would certainly be entitled to receive salary in the lower post till the date of his death in October 1981. In Jankiraman's case (supra), it was observed by this Court that when an employee is completely exonerated and is not visited with penalty, then he has to be given the benefit of salary of the higher post along with the other benefit on the date on which he would normally have been promoted but for the disciplinary/ criminal proceedings. ***Moreover, this is not a case where the acquittal of the deceased was as a result of his being given the benefit of doubt or on account of non-availability of evidence.*** ****."*

11.2. This Court is not oblivious of position with regard to retrospective promotion *vis-à-vis* benefits flowing therefrom as discussed in the case of *Union of India Vrs. B.M. Jha, (2007) 11 SCC 632*:

"5. We have heard learned counsel for the parties. It was argued by learned counsel for the respondent

that when a retrospective promotion is given to an incumbent, normally he is entitled to all benefits flowing therefrom. However, this Court in State of Haryana Vrs. O.P. Gupta, (1996) 7 SCC 533 and followed in A.K. Soumini Vrs. State Bank of Travancore, (2003) 7 SCC 238 has taken the view that ***even in case of a notional promotion from retrospective date, it cannot entitle the employee to arrears of salary as the incumbent has not worked in the promotional post****. These decisions relied on the principle of "no work no pay". The learned Division Bench in the impugned judgment has placed reliance on State of A.P. Vrs. K.V.L. Narasimha Rao, (1999) 4 SCC 181. In our view, the High Court did not examine that case in detail. In fact, in the said judgment the view taken by the High Court of grant of salary was set aside by this Court.* ***Therefore, we are of the view that in the light of the consistent view taken by this Court in the abovementioned cases, arrears of salary cannot be granted to the respondent in view of the principle of "no work no pay" in case of retrospective promotion.*** *Consequently, we allow this appeal and set aside the impugned order of the High Court dated 17.05.2000 passed by the Division Bench of the High Court as also the order dated 11.01.2000 passed by the Central Administrative Tribunal, Principal Bench."*

11.3. Principle of "no work, no pay" has been reiterated in *Gowramma C (dead) by Lrs. Vrs. Manager (Personnel) Hindustan Aeronautical Ltd., (2022) 1 SCR 734* as follows:

"9. ***It is true that no work no pay is a principle which is apposite in circumstances where the employee does not work but it is not an absolute principle, which does not admit of exceptions.*** *In this regard we may notice that in one of the judgments relied upon by the respondents, namely, State of Kerala Vrs. E.K. Bhaskaran Pillai, (2007) 6 SCC 524 = AIR 2007 SC 2645 which, in fact, dealt with issue as to monetary benefits when retrospective promotion is given, this Court held:*

*'*** So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard-and-fast rule. The principle "no work no pay" cannot be accepted as a rule of thumb. There are*

exceptions where courts have granted monetary benefits also.

***

12. ***The most important question is whether the employee is at fault in any manner. If the employee is not at all at fault and she was kept out of work by reasons of the decision taken by the employer, then to deny the fruits of her being vindicated at the end of the day would be unfair to the employee.*** *In such circumstances, no doubt, the question relating to alternative employment that the employee may have resorted to, becomes relevant. There is also the aspect of discretion which is exercised by the Court keeping in view the facts of each case. As we have already noticed, this is a case where apart from the charge of the employee having produced false caste certificate, there is no other charge. Therefore, we would think that interests of justice, in the facts of this, would be subserved, if we enhance the back wages from 50% to 75% of the full back wages, which she was otherwise entitled. The appeals are partly allowed. The impugned judgments will stand modified and the respondents shall calculate the amount which would be equivalent to 75% of the back wages and disburse the amount remaining to be paid under this judgment within a period of six weeks from today to the additional appellants."*

11.4. In *Shobha Ram Raturi Vrs. Haryana Vidyut Prasaran Nigam Ltd., (2016) 16 SCC 663* the observation of the Hon'ble Supreme Court of India runs as follows with respect to consideration of fault of employer:

"3. Having given our thoughtful consideration to the controversy, we are satisfied, that after the impugned order of retirement dated 31-12-2002 was set aside, the appellant was entitled to all consequential benefits. ***The fault lies with the respondents in not having utilised the services of the appellant for the period from 01.01.2003 to 31.12.2005. Had the appellant been allowed to continue in service, he would have readily discharged his duties.*** *Having restrained him from rendering his services with effect from 01.01.2003 to 31.12.2005, the respondent cannot be allowed to press the self-serving plea of denying him wages for the period in question, on the plea of the principle of 'no work no pay'."*

11.5. Taking into account the Judgment rendered in *State of Kerala Vrs. E.K. Bhaskaran Pillai, (2007) 6 SCC 524 = AIR 2007 SC 2645,* in the case of *Ramesh Kumar Vrs. Union of India, AIR 2015 SC 2904,* it has been observed as follows:

"13. We are conscious that even in the absence of statutory provision, normal rule is "no work no pay". ***In appropriate cases****, a court of law* ***may take into account all the facts in their entirety*** *and pass an appropriate order in consonance with law.* ***The principle of "no work no pay" would not be attracted where the respondents were in fault in not considering the case of the appellant for promotion and not allowing the appellant to work on a post of Naib Subedar carrying higher pay scale.*** *In the facts of the present case when the appellant was granted promotion w.e.f. 01.01.2000*

with the ante-dated seniority from 01.08.1997 and maintaining his seniority alongwith his batchmates, it would be unjust to deny him higher pay and allowances in the promotional position of Naib Subedar."

11.6. Conspectus of aforesaid decisions would make it clear that where the employee was denied or rendered unable to discharge duty as the fault lies with the employer, the rule of "no work, no pay" may not attract and, as such the principle "no work no pay" cannot be accepted as a rule of thumb. The imprimatur in aforesaid discussed cases leads to show that said proposition is subject to variation "in appropriate cases", and discretion has been left open to be exercised by the court of law which "may take into account all the facts in their entirety".

12. Cognizance of the facts obtained on record have been taken that due to absenteeism, the petitioner was dismissed from service, but for intervention of this Court and consequently the Central Administrative Tribunal, Cuttack Bench, Cuttack, he was reinstated in service and thereby, his seniority was antedated with promotion at par with his immediate junior; with further fact that the petitioner faced trial under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966, which ended in acquittal on the ground of "the benefit of doubt".

12.1. In such view of the matter, the Central Administrative Tribunal came to return a finding that "It is not a case where the applicant has been superseded by his junior which having been challenged, he has been promoted retrospectively from the date his junior was so promoted. It is also not a case where the administration has wrongly denied him promotion". It is also noted that the petitioner had not mentioned "regarding the exact nature of allegations made against him in the criminal case". Considering pros and cons of the matter, the learned Central Administrative Tribunal came to conclude that,

> *"In the **peculiar facts and circumstance of the case**, this Tribunal is not satisfied that any illegality has been committeed by the respondents in not allowing back wages in favour of the applicant for the period in question".*

13. Since Central Administrative Tribunal has adjudicated matter on consideration of facts and recorded finding with conclusion, there is little scope to exercise power of judicial review under Article 226/227 of the Constitution of India. So far as scope of power to exercise jurisdiction under Article 226/227 of the Constitution while examining the legal sanctity of Order of the Central Administrative Tribunal, it is felt expedient to refer to the guidelines outlined by the Hon'ble Supreme Court.

13.1. It is trite that observations of Courts are neither to be read as Euclid's theorems nor as provisions of Statute

and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases. Reference may be had to *Bharat Petroleum Corpn. Ltd. Vrs. NR Vairamani, (2004) 8 SCC 579; Sarva Shramik Sanghatana (KV), Mumbai Vrs. State of Maharashtra, (2008) 1 SCC 494; Bhuwalka Steel Industries Limited Vrs. Bombay Iron & Steel Labour Board, (2010) 2 SCC 273; Union of India Vrs. Arulmozhi Iniarasu, (2011) 9 SCR 1 = (2011) 7 SCC 397.*

13.2. It is well known principle that, if two views are possible, then obviously the error will not be an error apparent from the record. See, *Maharashtra State Seeds Corporation Ltd. Vrs. Hariprasad Drupadrao Jadhao, (2006) 3 SCC 690.*

13.3. In *Central Council for Research in Ayurvedic Sciences Vrs. Bikartan Das, (2023) 11 SCR 731 = 2023 INSC 733* following passage has been quoted from *Satyanarayan Laxminarayan Hegde and Others Vrs. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137 = (1960) SCR 890* in order to cull out true purport of *certiorari* jurisdiction *vis-à-vis* interference on the ground where two views are possible:

"***An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.*** *As the above discussion of the rival contentions show the alleged error in the present case is far from self-evident and if it can be established, it has to be established by lengthy and complicated arguments. We do not think such an error can be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ.*

***

This Court in Parry and Company Limited Vrs. Commercial Employees' Association, Madras and Another (1952) 1 SCC 449 = AIR 1952 SC 179, held:

"14. The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice. Thus there was absolutely no grounds here which would justify a superior court in issuing a writ of certiorari for removal of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi-judicial functions. ***What the High Court has done really is to exercise the powers of an appellate court and correct what it considered to be an error in the decision of the Labour Commissioner. This obviously it cannot do.*** *The position might have been different if the Labour Commissioner had omitted to decide a matter which he was bound to decide and in such cases a mandamus might legitimately issue commanding the authority to determine questions which it left undecided [Board*

*of Education Vrs. Rice, 1911 AC 179 (HL)]; **but no certiorari is available to quash a decision passed with jurisdiction by an inferior tribunal on the mere ground that such decision is erroneous.** The judgment of the High Court, therefore, in our opinion, is plainly unsustainable."*

13.4. In *Rattan Enterprises Vrs. State of Odisha, 2023 SCC OnLine Ori 2342* reference was made to very many decisions of Hon'ble Supreme Court of India *inter alia General Manager, Electrical, Rengali Hydro Electric Project, Odisha Vrs. Giridhari Sahu, (2019) 10 SCC 695 = (2019) 12 SCR 293* to have clear authority on the issue of writ of *certiorari*. It has been explained that an erroneous decision in respect of a matter which falls within the authority of the Tribunal would not entitle a writ applicant for a writ of *certiorari*. However, if the decision relates to anything collateral to the merit, an erroneous decision upon which, would affect its jurisdiction, a writ of *certiorari* would lie. A tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of *certiorari* may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of *certiorari* but it must be a manifest error apparent on the face of the proceedings, *e.g.* when it is

based on clear ignorance or disregard of the provisions of law.

13.5. The Hon'ble Supreme Court of India stated in *Orissa Administrative Tribunal Bar Association Vrs. Union of India, (2023) 6 SCR 731* as follows:

"The effect of Section 28 of the Administrative Tribunals Act, therefore, was that appeals from the OAT lay directly to the Supreme Court under Article 136 of the Constitution. However, this changed with the decision of this Court in L. Chandra Kumar Vrs. Union of India (1997) 3 SCC 261. In its decision in that case, this Court inter alia ruled that:

a. *Clause 2(d) of Article 323-A and clause 3(d) of Article 323-B were unconstitutional to the extent that they excluded the jurisdiction of the High Courts under Articles 226 and 227 and of the Supreme Court under Article 32 of the Constitution;*

b. *Section 28 of the Administrative Tribunals Act was unconstitutional as were 'exclusion of jurisdiction' clauses in all other legislation enacted under Articles 323-A and 323- B;*

c. *The jurisdiction conferred upon the High Courts under Articles 226 and 227 and upon the Supreme Court under Article 32 of the Constitution form a part of the basic structure of the Constitution; and d. Other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution.*

As a consequence of this decision, challenges under Article 226 of the Constitution to the decisions rendered by the SATs lay to Division Benches of the respective High Courts within whose jurisdiction the SATs operated. The Supreme Court's jurisdiction could be invoked under Article 136 against the decisions of the High Courts."

13.6. In *Union of India Vrs. P. Gunasekaran, AIR 2015 SC 545*, the Hon'ble Supreme Court of India propounded the following guidelines:

"The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re-appreciation of the evidence. The High Court can only see whether:

a. *the enquiry is held by a competent authority;*

b. *the enquiry is held according to the procedure prescribed in that behalf;*

c. *there is violation of the principles of natural justice in conducting the proceedings;*

d. *the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*

e. *the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;*

f. ***the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;***

g. *the disciplinary authority had erroneously failed to admit the admissible and material evidence;*

h. *the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;*

i. *the finding of fact is based on no evidence. Under Article 226/227 of the Constitution of India, the High Court shall not:*

(i). *re-appreciate the evidence;*

(ii). *interfere with the conclusions in the enquiry, in case the same has been* conducted *in accordance with law;*

(iii). *go into the adequacy of the evidence;*

(iv). *go into the reliability of the evidence;*

(v). ***interfere, if there be some legal evidence on which findings can be based.***

(vi). ***correct the error of fact however grave it may appear to be;***

(vii). *go into the proportionality of punishment unless it shocks its conscience.*"

13.7. In the case of *State of Andhra Pradesh Vrs. S. Sree Rama Rao, AIR 1963 SC 1723,* the Hon'ble Supreme Court made the following observations:

"The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it 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 in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or; where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and ***if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution****."*

13.8. Having noticed aforesaid observation as found in *S. Sree Rama Rao (supra),* in *Ram Lal Bhaskar Vrs. State Bank of India, (2011) 12 SCR 1036,* it has been enunciated as follows:

"8. ***Thus, in a proceeding under Article 226 of the Constitution, the High Court does not sit as an***

Appellate Authority over the findings of the disciplinary authority and so long as the findings of the disciplinary authority are supported by some evidence the High Court does not re-appreciate the evidence and come to a different and independent finding on the evidence. *This position of law has been reiterated in several decisions by this Court which we need not refer to, and yet by the impugned judgment the High Court has re-appreciated the evidence and arrived at the conclusion that the findings recorded by the enquiry officer are not substantiated by any material on record and the allegations leveled against the respondent No.1 do not constitute any misconduct and that the respondent No.1 was not guilty of any misconduct."*

13.9. Pertinent here to have regard to the following observations made in *State of Karnataka Vrs. N. Gangaraj, (2020) 1 SCR 616*:

"*8. In State of Andhra Pradesh Vrs. S. Sree Rama Rao, AIR 1963 SC 1723, a three Judge Bench of this Court has held that* ***the High Court is not a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant****. It 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. The Court held as under:*

*'7. *** **The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the***

decision of the authorities holding a departmental enquiry against a public servant: it 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 in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. ***'*

9. *In B.C. Chaturvedi Vrs. Union of India, (1995) 6 SCC 749, again, a three Judge Bench of this Court has held that power of judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eyes of the court.* ***The Court/Tribunal in its power of judicial review does not act as an appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence.*** *It was held as under:*

> *'12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives*

fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. ***When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence.*** *Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may*

interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

13. *The disciplinary authority is the sole judge of facts. Where appeal is presented, the Appellate Authority has co-extensive power to re-appreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant.* ***Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal.*** *In Union of India Vrs. H.C. Goel, (1964) 4 SCR 781, this Court held at page 728 that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued.'*

10. *In High Court of Judicature at Bombay through its Registrar Vrs. Shashikant S. Patil, (2000) 1 SCC 416, this Court held that* ***interference with the decision of departmental authorities is permitted if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry while exercising jurisdiction under Article 226 of the Constitution.*** *It was held as under:*

'16. *The Division Bench of the High Court seems to have approached the case as though it was an appeal against the order of the*

administrative/disciplinary authority of the High Court. Interference with the decision of departmental authorities can be permitted, while exercising jurisdiction under Article 226 of the Constitution if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry or if the decision of the authority is vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority, on the very face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. But we cannot overlook that the departmental authority (in this case the Disciplinary Committee of the High Court) is the sole judge of the facts, if the enquiry has been properly conducted. ***The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article 226 of the Constitution.***'

11. *In State Bank of Bikaner and Jaipur Vrs. Nemi Chand Nalwaya, (2011) 4 SCC 584, this Court held that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the*

evidence or the reliable nature of the evidence will not be ground for interfering with the findings in departmental enquiries. The Court held as under:

'7. ***It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries.*** *Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. Courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (vide B.C. Chaturvedi Vrs. Union of India, (1995) 6 SCC 749, Union of India Vrs. G. Gunayuthan, (1997) 7 SCC 463, and Bank of India Vrs. Degala Suryanarayana, (1999) 5 SCC 762, High Court of Judicature at Bombay Vrs. Shashi Kant S Patil, (2001) 1 SCC 416).*

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12. *The fact that the criminal court subsequently acquitted the respondent by giving him the benefit of doubt, will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. The standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him.*

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14. *On the other hand learned counsel for the respondent relies upon the judgment reported as Allahabad Bank Vrs. Krishna Narayan Tewari, 2017 2 SCC 308, wherein this Court held that if the disciplinary authority records a finding that is not supported by any evidence whatsoever or a finding which is unreasonably arrived at, the Writ Court could interfere with the finding of the disciplinary*

proceedings. We do not find that even on touchstone of that test, the Tribunal or the High Court could interfere with the findings recorded by the disciplinary authority. It is not the case of no evidence or that the findings are perverse. The finding that the respondent is guilty of misconduct has been interfered with only on the ground that there are discrepancies in the evidence of the Department. The discrepancies in the evidence will not make it a case of no evidence. The Inquiry Officer has appreciated the evidence and returned a finding that the respondent is guilty of misconduct.

15. *The disciplinary authority agreed with the findings of the enquiry officer and had passed an order of punishment. An appeal before the State Government was also dismissed.* ***Once the evidence has been accepted by the departmental authority, in exercise of power of judicial review, the Tribunal or the High Court could not interfere with the findings of facts recorded by reappreciating evidence as if the Courts are the Appellate Authority.*** *We may notice that the said judgment has not noticed larger bench judgments in S. Sree Rama Rao and B.C. Chaturvedi as mentioned above. Therefore, the orders passed by the Tribunal and the High Court suffer from patent illegality and thus cannot be sustained in law. Accordingly, appeal is allowed and orders passed by the Tribunal and the High Court are set aside and the order of punishment imposed is restored."*

13.10. The Hon'ble Supreme Court in the case of *State of Haryana Vrs. Rattan Singh, (1977) 2 SCC 491* while

dealing with standard of proof and evidence applicable in the domestic inquiry, held as under:

> *"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. Ail materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act.* ***For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good.*** **** The simple point is, was there some evidence or was there no evidence not in the sense of the technical rules governing regular court proceedings but in a fair common-sense way as men of understanding and worldly wisdom will accept.* ***Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny.*** *Absence of any evidence in support of a ending is certainty available for the*

*court to look into because it amounts to an error of law apparent on the record. ***"*

13.11. The Supreme Court in the case of *M.V. Bijlani Vrs. Union of India, (2006) 5 SCC 88* laid down as under:

"25. ***It is true that the jurisdiction of the court in judicial review is limited.*** *Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidences to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."*

13.12. Following observation in *General Manager (Operations), State Bank of India Vrs. R. Periyasamy, (2015) 3 SCC 101* may be relevant:

"11. It is interesting to note that the learned Single Judge went to the extent of observing that the concept of preponderance of probabilities is alien to domestic enquiries. On the contrary, it is well known that the

standard of proof that must be employed in domestic enquiries is in fact that of the preponderance of probabilities. In Union of India Vs. Sardar Bahadur, (1972) 4 SCC 618 this Court held that a disciplinary proceeding is not a criminal trial and thus, the standard of proof required is that of preponderance of probabilities and not proof beyond reasonable doubt. This view was upheld by this Court in State Bank of India Vrs. Ramesh Dinkar Punde, (2006) 7 SCC 212. More recently, in State Bank of India Vs. Narendra Kumar Pandey, (2013) 2 SCC 740, this Court observed that a disciplinary authority is expected to prove the charges leveled against a bank-officer on the preponderance of probabilities and not on proof beyond reasonable doubt."

13.13. Pertinent here to notice the case of *Lalit Popli Vrs. Canara Bank, (2003) 3 SCC 583*, wherein the Hon'ble Supreme Court of India has made following observation:

"17. While exercising jurisdiction under Article 226 of the Constitution the High Court does not act as an appellate authority. Its jurisdiction is circumscribed by limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice. Judicial review is not akin to adjudication of the case on merits as an appellate authority."

13.14. Thus, it is clear, as held in *Abhiram Samal Vrs. Indian, Bank, 128 (2019) CLT 321,* that,

*"*** writ of certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of*

jurisdiction, i.e., when a subordinate court is found to have acted:

(i) without jurisdiction— by assuming jurisdiction where there exists none, or

(ii) in excess of its jurisdiction— by overstepping or crossing the limits of jurisdiction , or

(iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice."

13.15. The Hon'ble Supreme Court in *Amarendra Kumar Pandey Vrs. Union of India, 2022 LiveLaw (SC) 600* summarised the scope of judicial review as follows:

"31. When we say that where the circumstances or material or state of affairs does not at all exist to form an opinion and the action based on such opinion can be quashed by the courts, we mean that in effect there is no evidence whatsoever to form or support the opinion. ***The distinction between insufficiency or inadequacy of evidence and no evidence must of course be borne in mind. A finding based on no evidence as opposed to a finding which is merely against the weight of the evidence is an abuse of the power which courts naturally are loath to tolerate.*** *Whether or not there is evidence to support a particular decision has always been considered as a question of law. [See Reg. Vrs. Governor of Brixton Prison, Armah, Ex Parte, (1966) 3 WLR 828 at p. 841].*

32. It is in such a case that it is said that the authority would be deemed to have not applied its mind or it

did not honestly form its opinion. The same conclusion is drawn when opinion is based on irrelevant matter. [See Rasbihari Vrs. State of Orissa, AIR 1969 SC 1081].

33. *In the case of Rohtas Industries Ltd. Vrs. S.D. Agarwal and another, AIR 1969 SC 707, it was held that the existence of circumstances is a condition precedent to form an opinion by the Government. The same view was earlier expressed in the case of Barium Chemicals Ltd. and another Vrs. Company Law Board and others, AIR 1967 SC 295.*

34. *Secondly, the Court can inquire whether the facts and circumstances so found to exist have a reasonable nexus with the purpose for which the power is to be exercised. In other words, if an inference from facts does not logically accord with and flow from them, the Courts can interfere treating them as an error of law. [See Bean Vrs. Doncaster Amalgamated Collieries, (1944) 2 All ER 279 at p. 284]. Thus, this Court can see whether on the basis of the facts and circumstances found, any reasonable man can say that an opinion as is formed can be formed by a reasonable man. That would be a question of law to be determined by the Court. [See Farmer Vrs. Cotton's Trustees, 1915 AC 922]. Their Lordships observed:*

*"*** in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only." [See also Muthu Gounder Vrs. Government of Madras, (1969) 82 Mad LW 1].*

35. *Thirdly, this Court can interfere if the constitutional or statutory term essential for the exercise of the power has either been misapplied or misinterpreted. The Courts have always equated the jurisdictional review with the review for error of law and have shown their readiness to quash an order if the meaning of the constitutional or statutory term has been misconstrued or misapplied. [See Iveagh (Earl of) Vrs. Minister of Housing and Local Govt., (1962) 2 QB 147; Iveagh (Earl of) Vrs. Minister of Housing and Local Govt. (1964) 1 AB 395].*

36. *Fourthly, it is permissible to interfere in a case where the power is exercised for improper purpose. If a power granted for one purpose is exercised for a different purpose, then it will be deemed that the power has not been validly exercised. If the power in this case is found to have not been exercised genuinely for the purpose of taking immediate action but has been used only to avoid embarrassment or wreck personal vengeance, then the power will be deemed to have been exercised improperly. [See Natesa Asari Vrs. State of Madras, AIR 1954 Mad 481].*

37. *Fifthly, the grounds which are relevant for the purpose for which the power can be exercised have not been considered or grounds which are not relevant and yet are considered and an order is based on such grounds, then the order can be attacked as invalid and illegal. In this connection, reference may be made to Ram Manohar Vrs. State of Bihar, AIR 1966 SC 740; Dwarka Das Vrs. State of J. and K., AIR 1957 SC 164 at p. 168 and Motilall Vrs. State of Bihar, AIR 1968 SC 1509. On the same principle, the administrative action will be*

invalidated if it can be established that the authority was satisfied on the wrong question: [See (1967) 1 AC 13]."

CONCLUSION & DECISION:

14. The Central Administrative Tribunal in its Order dated 11.02.2019 has elaborately discussed the material placed on record and took a conscientious decision. The petitioner had not made out any case that "he was not gainfully employed during the period he was out of service due to dismissal". Further reason as reflected in the impugned order shows that the petitioner was acquitted on the ground of "benefit of doubt". His reinstatement and according seniority with promotion was given on intervention of the Court and Tribunal. It is also manifest from the impugned order that the employer was not at fault for the petitioner being not able to discharge his duty. However, taking a holistic view of the entirety of matter, the Central Administrative Tribunal, Cuttack Bench, Cuttack has confirmed the decision of the authority concerned "in not allowing back wages" taking note of "peculiar facts and circumstances of the case".

15. With the delineated scope for judicial review as discussed above, on recording plausible reasons based on relevant facts supported by the material on record, this Court is of the considered opinion that the decision rendered by the Central Administrative Tribunal,

Cuttack Bench, Cuttack *vide* Order dated 11.02.2019 passed in O.A. No.260/00869/2015 does not suffer from any infirmity in law so as to warrant interference by this Court.

16. Under aforesaid premises, this Court does not find illegality in taking decision and conclusion arrived at nor is there any procedural irregularity committed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack. Hence, the writ petition, sans merit, deserves to be dismissed.

16.1. In fine, the writ petition stands dismissed, but in the circumstances without any order as to costs.

(MURAHARI SRI RAMAN)
JUDGE

DR. B.R. SARANGI, ACJ. I agree.

(DR. B.R. SARANGI)
ACTING CHIEF JUSTICE