

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

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WP(C) No.6078/2003

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Date of decision:16th April, 2010

DELHI TRANSPORT CORPORATION

..... Petitioner

Through: Mrs. Saroj Bidawat, Advocate.

Versus

SHRI RAM KANWAR & ORS.

..... Respondents

Through: Mr. K.K. Tyagi with Mr. Iftekhar Ahmad,
Advocate.

AND

WP(C) No.9368/2004

SHRI RAM KANWAR

..... Petitioner

Through: Mr. K.K. Tyagi with Mr. Iftekhar Ahmad,
Advocate.

Versus

DELHI TRANSPORT CORPORATION

..... Respondent

Through: Mrs. Saroj Bidawat, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | NO |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported
in the Digest? | NO |

RAJIV SAHAI ENDLAW, J.

1. Shri Ram Kanwar (hereinafter referred to as the workman) was employed with the employer DTC as a Driver since 25th July, 1981. On 16th November, 1983 he met with an accident while performing his duties. However, he continued to work for the employer DTC till 16th January, 1992 when he was retired

prematurely by the employer DTC in exercise of the powers under Clause 10 of DRTA (Condition of Appointment & Service) Regulations, 1952 i.e. on the ground of his medical unfitness to perform the duties of a Driver. An industrial dispute was raised by the workman and the following reference was made to the Labour Court:-

“Whether the termination of Shri Ram Kanwar by way of premature retirement is illegal and/or unjustified and if, so to what relief is he entitled and what directions are necessary in this respect?”

2. The Labour Court has in the award dated 1st October, 2002 held that it stood proved on record that the workman was declared medically unfit for the post of Driver. It was further held that though under Clause 10 of the Regulations (supra), the employer DTC had power to give premature retirement to the workman if declared medically unfit for performing his duties due to some physical infirmity/disability but The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 had already come into force. It was held that though the said Act was not in existence on 16th January, 1992 when the services of the workman were prematurely terminated but keeping in view the object and purpose of the Act and it being a social legislation for the welfare of employees who acquire disability during service, the Labour Court held that the benefit of Section 47 of the said Act could be extended to the pending cases in which the services of employees were terminated by way of premature retirement on the basis of disability acquired during the period of service. The Labour court thus held the order of premature retirement of the workman to be illegal and unjustified and violative of Section 47 of the Disabilities Act. It was also held that no notice or notice pay or any compensation

had been given to the workman at the time of termination of his services by way of premature retirement and on this account also the termination was held to be illegal. The Labour Court granted the relief of reinstatement in service along with 50% back wages to the workman. It was however observed that the employer DTC was free to accommodate the workman to any suitable job in view of Section 47 (supra).

3. Aggrieved from the aforesaid award, employer DTC preferred W.P.(C) 6078/2003 on two grounds only. Firstly, it is contended that the Disabilities Act has prospective effect only and the Labour Court erred in giving retrospective effect thereto. Secondly, it is contended that the workman had applied for being re-designated as a Peon on medical grounds; however as per the service rules, the Peon was required to be 8th class pass while the workman was only 4th class pass and thus did not have qualification for the post of Peon. It is pleaded that the workman was however given an opportunity for the post of Store Attendant and which he did not avail.

4. W.P.(C) 6078/2003 preferred by the employer DTC came up before this Court first on 22nd September, 2003 when this Court held that the award warranted no inference in so far as it granted the relief of reinstatement to the workman. However on the plea of the counsel for the employer DTC that the workman by not accepting the lower post of Store Attendant had disintitiled himself from claiming back wages, notice of the writ petition confined to the said aspect only was issued and the operation of the award in respect of 50% back wages was stayed. The said order continues to be in force.

5. The workman also thereafter preferred W.P.(C) 9368/2004 seeking modification of the award; it is the case of the workman that the Labour Court ought to have granted the relief of reinstatement with full back wages and all benefits instead of 50% back wages only. Notice of the said writ petition was also issued and the same is being taken up with W.P.(C)6078/2003.

6. The employer DTC has in affidavit dated 19th October, 2005 filed in W.P.(C)6078/2003 stated that upon this Court not entertaining the writ petition qua the relief of reinstatement, the workman was reinstated to the post of Store Attendant. It is also disclosed in the said affidavit that the workman had in execution of the award aforesaid received back wages through attachment of the bank account of employer DTC in the sum of Rs.1,37,259/-.

7. The counsel for the employer DTC has also urged only two submissions before this Court. Firstly, that the Disabilities Act has only a prospective operation and is not applicable to the workman who was prematurely retired on medical grounds before coming into force of the said Act. It is contended that the award of 50% of the back wages on the basis of the Disabilities Act is not justified. Secondly, it is contended that since the employer DTC had offered the post of Store Attendant to the workman and which he had not availed of, the award for 50% of the back wages is bad for this reason also. It is also urged that even otherwise, the workman having not worked for the employer DTC ought not to be granted any wages for the said period and in any case is not entitled to full back wages as claimed. The principle of “no work no pay” is sought to be invoked.

8. Per contra, the counsel for the workman has contended that the plea that the workman was offered the post of Store Attendant is an afterthought and has been

taken for the first time before this Court and the same is not permissible. It is further contended that no document in this regard also has been placed before this Court. It is also urged that the award also gives a reason of non compliance with Section 25F of the ID Act by the employer DTC and in which respect no averment/argument has been made by the employer DTC. It is urged that the award is entitled to be upheld on this ground alone. It is also contended that the award does not give any reason for giving only 50% of the back wages to the workman. Reliance is placed on *M/s. Hindustan Tin Works Pvt. Ltd. Vs. The Employees of M/s. Hindustan Tin Works Pvt. Ltd.* AIR 1979 SC 75 laying down that where the termination of service is found to be illegal, the workman is entitled to full back wages. The counsel for the employer DTC in rejoinder sought opportunity to file documents to show that the workman had been given an option to join as a Store Attendant and which he did not avail of. However the said opportunity was declined.

9. As far as the first argument of the employer DTC of the Disabilities Act being not applicable to the facts of the present case is concerned, I find that the hearing in these petitions on 22nd July, 2008 was adjourned awaiting the decision of the Division Bench of this Court qua the retrospective operation or applicability otherwise of the provisions of Disabilities Act. The matter is now no longer *res integra*. The Division Bench of this Court in *DTC Vs. Harpal Singh* (156) 2009 DLT 481 has, after consideration of the entire gamut of case law, while holding that the provisions of Section 47 of the Disabilities Act cannot be given retrospective operation, held that the benefit thereof can certainly be extended to any pending proceedings. This has been held to be the mandate of Article 41 of the

Constitution of India. The reference of the industrial dispute in the present case was made on 11th November, 1992 i.e. prior to coming into force of the Disabilities Act and the proceedings before the Labour Court in the present case were pending when the said Act came into force and in the circumstances no error can be found with the award giving the benefit of Section 47 of the said Act to the workman.

10. That brings me to the question whether the award calls for any interference in so far as restricting the award of back wages to the workman to 50% only. The employer DTC has opposed the same on the ground that the workman had been offered the alternate job of Store Attendant and had failed to avail of the same and thus is not entitled to even 50% of back wages. I enquired whether such plea was taken by the DTC before the Labour Court. While the counsel for the DTC has expressed inability to reply, the counsel for the workman has handed over in the court a copy of the written statement dated 26th February, 1993 filed by the DTC to the claim of the workman before the Labour Court. No such plea is found to be contained therein. On the contrary, it is the plea of DTC in the said written statement that though the workman had sought alternative employment but DTC no other alternative assignment to offer to the workman. However I find that the workman has in his counter affidavit in W.P.(C)6078/2003 dealt in detail with the said aspect. It is pleaded therein that on request of the workman for alternative job, DTC had directed him to report for medical checkup for the post of Store Attendant or Peon; that the workman appeared before the Medical Board but was told to get specific certificate as to whether the medical examination was to be for the post of Peon or for the post of Store Attendant; that DTC thereafter instructed

him to go for medical examination for the post of Store Attendant but the medical examination was not conducted and on the contrary he was directed to undergo a medical examination for the post of Driver. It is his categorical assertion that no job of Store Attendant or any other alternative post was offered to him. DTC in its rejoinder affidavit has not controverted the said pleas. In the circumstances, the plea of the employer DTC taken before this Court for the first time that the workman was offered the job of Store Attendant and failed to avail of the same is not believable and cannot come in the way of the claim of the workman for back wages.

11. It is not as if the workman was working/employed elsewhere. The workman has been persisting with the claim against DTC and has also rejoined employment with DTC. If he had any better opportunity in the interregnum he would not have rejoined the employment with DTC as a Store Attendant. I also find that the employer DTC, in relation to its workmen suffering disability, has been not only violating the orders of the courts but also not been abiding by its own policy. The Supreme Court in *Anand Bihari Vs. Rajasthan State Road Transport Corporation* (1991) 1 SCC 731, even before coming into force of the Disabilities Act, had held in relation to Drivers of Road Transport Corporation that workmen suffering disability owing to occupational hazards are entitled to be absorbed in other posts. In Special Leave Petition (C) No.1575/1991 titled *Shri Vedi Prakash Singh, Conductor vs. DTC*, the Supreme Court vide order dated 5th August, 1991 (as reported in *DTC Vs. P.O., Labour Court IV* 105 (2003) DLT 208) had also deprecated the refusal of DTC to accommodate its employees suffering from disability in other or equivalent posts and issued directions in this regard. In

Baljeet Singh Vs. DTC 83 (2000) DLT 286 it is noted that DTC vide its office order dated 13th November, 1995 provided a scheme for payment of compensation to those employees who were rendered medically unfit in the posts to which they were appointed. Similarly in ***Shri Sunil Kumar Vs. DTC*** 120 (2005) DLT 499 this court held that DTC ought to have endeavoured to find a position for the workman which would permit him to continue in service even if his injury has disabled him to discharge the functions of his post and that it is not open to the DTC to claim that termination of services on the grounds of medical disability was valid. Similarly in ***Dilbagh Singh Vs. DTC*** 123 (2005) DLT 318 also, DTC was directed to reinstate the driver with back wages.

12. It would thus be seen that notwithstanding the orders in cases involving DTC itself, DTC not only failed to follow the same or its own policy but has vexatiously contested the present petition. If DTC had followed the said orders, it could have availed work from the workman in lieu of wages. The situation today, being of own creation of DTC, it cannot be permitted to urge that it ought not to be made to pay wages for the period for which the workman has not worked.

13. Even otherwise, once it is found that the action of the employer is illegal and in defiance of several similar orders of the courts and also of the own policy of the employer and further when the workman had no opportunity to benefit from the employer not giving work to him, I do not see any reason for not awarding full back wages to the workman. The workman has after all been without his wages for that time. DTC has not been able to establish that the workman was given opportunity to work and which was refused by the workman. The only deduction which can be made from the wages is the amount which would have been

expended / spent by the workman if made to work, in stepping out of the house. However, since in the present case considerable time has elapsed and no interest is being granted to the workman on the arrears of back wages, payment whereof remains stayed under orders of this Court for the last nearly seven years, I do not deem it appropriate to make deduction on the said account also from the back wages.

14. W.P.(C) 6078/2003 preferred by the employer DTC is accordingly dismissed and W.P.(C)9368/2004 preferred by the workman is allowed by modifying the award dated 1st October, 2002. It is held and directed that the workman shall be entitled to full instead of only 50% of the back wages. The workman has also claimed the relief of continuity in service and other benefits. However neither any arguments have been addressed in that respect nor do I find any reason to grant any such relief to the workman. The workman having himself applied for being absorbed in the post of a Store Attendant and having been so absorbed is not entitled to any such relief. DTC is directed to pay the balance arrears of back wages to the workman within six weeks hereof failing which it shall incur simple interest at 7% per annum. The parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

16th April, 2010
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