

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

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W.P.(C) No. 2267/2007

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Judgment delivered on: 05.3.2010

Mr. Veer Chand

..... Petitioner.

Through: Mr. G.S. Charya, Adv.

versus

D.T.C.

..... Respondent.

Through: Ms. Aarti Mahajan Shedha,
Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J.Oral:

1. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks to challenge the award dated 13.7.2006 passed by the Labour Court in ID

NO.266/99 whereby the reference was answered against the petitioner workman by upholding his termination as legal and justified.

2. Brief facts relevant for deciding the present petition are that the petitioner was employed with the respondent corporation as a tyre-man in 1983 and was served with a charge sheet dated 10.6.1992 where it was alleged that the petitioner remained absent from duty from 24.2.1992 to 11.5.1992. Thereafter, inquiry proceedings were initiated against the petitioner where he was held guilty of misconduct and hence his services were terminated vide order dated 20.11.1992. Subsequently, the petitioner raised an industrial dispute bearing ID No. 266/99 whereby the Ld. Labour court vide order dated 13.7.2006 upheld the punishment of removal awarded to the petitioner. Feeling aggrieved by the same, the petitioner has preferred the present petition.

3. Before addressing the arguments, at the outset, counsel for the petitioner submits that the petitioner is ready to forego his back wages if he is reinstated back in service with continuity of service and consequential benefits. Dealing with the merits, counsel for the petitioner submits that the petitioner remained on leave only for a very short period i.e. from 24.4.92 to 11.5.92 on account of death of his mother and marriage of his brother and there was no intentional or unauthorized absenteeism on the part of the petitioner which could have led to inflicting such a serious punishment of termination of service of the petitioner. Counsel for the petitioner further submits that the past record of the petitioner is absolutely clean, as in his nine years of service he never misconducted himself or was punished or penalized for any misconduct. Counsel thus submits that the case of the petitioner deserved interference with the quantum of punishment by the labour court in exercise of the powers under Section 11-A of the I.D. Act. Distinguishing the decision of the Apex Court in

Delhi Transport Corporation Vs. Sardar Singh, AIR 2004 SC 4161, counsel submits that unlike the facts of the said case, the case of the petitioner in the instant case is not that of unauthorized habitual absenteeism and therefore, the punishment of removal awarded to the petitioner is clearly a case in which disproportionate punishment has been awarded and thus should have shocked the conscious of the Tribunal.

4. Refuting the said submissions of counsel for the petitioner, counsel for the respondent submits that the case of the petitioner is squarely covered by the judgment of the Apex Court in ***Sardar Singh's case (Supra)*** as the petitioner remained absent from his duties from 24.4.92 to 11.5.92 and such unauthorized absenteeism on his part certainly exhibited his lack of interest in his duties. Counsel for the respondent further submits that even the past record of the petitioner was not absolutely clean as earlier also he remained unauthorizedly absent from his duties and had

been warned twice due to such unauthorized absence. Counsel thus submits that the learned Labour Court rightly did not interfere to reduce the punishment awarded by the respondent as clearly the case of the petitioner in no circumstances can be considered to be one of disproportionate punishment.

5. I have heard learned counsel for the parties.

6. The only issue with which this court in the present petition is concerned is that as to whether the case of the petitioner deserved any interference by the Tribunal in exercise of its jurisdiction under Section 11-A of the I.D. Act to reduce the punishment of the petitioner for the unauthorized absence from his duties for the said period. Indisputably, neither the petitioner applied for the said leave in advance nor the said leave was ever sanctioned by the respondent, therefore, this Court would proceed with the assumption that the petitioner remained absent from his duties from 24.4.92 to 11.5.92 unauthorisedly. The

parameters to interfere in the punishment under Section 11-A of the I.D. Act are well settled. The Courts and the Tribunals can interfere with the decision of the disciplinary authority, only when they are satisfied that the punishment imposed by the disciplinary authority is shockingly disproportionate to the gravity of the charges alleged and proved against a delinquent employee and not otherwise. Reference can be made in this regard to the decision of the Apex Court in the case of ***V. Ramana v. A.P.S.R.T.C. and Ors: (2005)IIILLJ725SC***, wherein it stated:

"The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

To put it differently unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course, if the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary authority or the Appellate Authority to reconsider the penalty imposed."

The other principle that requires to be kept in view, is that of maintaining the integrity of legal reasoning and the legitimacy of the conclusions by the Courts as held by the Apex Court in case of ***Kerala Solvent Extractions Ltd. v. A. Unnikrishnan and Anr : (1994)IILLJ888SC*** . Relevant para of the same is upheld is reproduced as under:

"In recent times, there is an increasing evidence of this, perhaps well meant but wholly unsustainable tendency towards a denudation of the legitimacy of judicial reasoning and process. The reliefs granted by the courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability."

7. The Apex Court in ***Sardar Singh's case (Supra)***, which is an authoritative pronouncement of the Apex Court so far unauthorized absenteeism of an employee is concerned, held as under:

"9. When an employee absents himself from duty, even without sanctioned leave for very long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Order as quoted above relates to habitual negligence of duties and lack of interest in the Authority's work. When an employee absents himself from duty without sanctioned leave the Authority can, on the basis of the record, come to a conclusion about the employee being habitually negligent in duties and an exhibited lack of interest in the employer's work. Ample material was produced before the Tribunal in each case to show as to how the concerned employees were remaining absent for long periods which affect the work of the employer and the concerned employee was required at least to bring some material on record to show as to how his absence was on the basis of sanctioned leave and as to how there was no negligence. Habitual absence is a factor which establishes lack of interest in work. There cannot be any sweeping generalization. But at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings.

10. Great emphasis was laid by learned counsel for the respondent-employee on the absence being treated as leave without pay. As was observed by this Court in State of Madhya Pradesh v. Harihar Gopal 1969 (3) SLR 274 by a three-judge Bench of this Court, even when an order is passed for treating absence as leave without pay after passing an order of termination that is for the purpose of maintaining correct record of service. The charge in that case was, as in the present case, absence without obtaining leave in advance. The conduct of the employees in this case is nothing but irresponsible in extreme and can hardly be justified. The charge in this case was misconduct by absence. In view of the Governing Standing Orders unauthorized leave can be treated as misconduct.

11. Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when same is unauthorized. Burden is on the employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials. Clause (ii) of Para 4 of the Standing Order shows the seriousness attached to habitual absence. In clause (i) thereof, there is requirement of prior permission. Only exception made is in case of sudden illness. There also conditions are stipulated, non-observance of which renders the absence unauthorized."

Undoubtedly, unauthorized absenteeism of an employee from his duties prima facie shows lack of interest in his work, yet, however, the moot question is whether such unauthorized absenteeism, even for a short period would warrant punishment equivalent to the one where delinquent employee remains unauthorizedly absent for a much larger period or if the past record of such an employee exhibits clear lack of interest on his part. Under no circumstances, the case of misconduct of unauthorized absence can be equated with a case of misappropriation of money, where the courts have taken a view that even for misappropriation of a smaller amount of money, the employee can be awarded the same punishment as can be awarded to an employee found involved in misappropriation of larger amount of money. There also cannot be any dispute that every employee is required to obtain due sanction of his leave to meet the requirements of standing orders of the respondent but in certain exigencies the employee can apply for leave after he joins back his duties. The illustrated cases can be a

sudden death in the family, the employee falling seriously ill at a distant place or any other untoward incident happening in the family or any other extenuating circumstances where the employee gives more importance to the imminent state of affairs than to think of applying for leave and take the sanction thereof. Even in all such cases the moment the employee comes out of such a situation then necessarily without any further delay he should approach his employer with the leave application to obtain sanction of his leave.

8. In the present day time of stress, tension and large scale unemployment, it would not be advisable to throw a person out of employment without looking into the severity of his misconduct. The past conduct and the severity of the present misconduct certainly would be factors of great importance to determine the extent of punishment to be awarded to such an employee.

9. Under Section 11-A of the I.D. Act, a very wide discretion vests with the Labour Court/Tribunals to feel

satisfied as to whether the order of the Disciplinary Authority directing or imposing the punishment of discharge or dismissal is justified or not. In ***R.N. Parmar Vs. Gujarat Electricity Board, (1983) ILLJ 261 Guj.*** the Division Bench of the Gujarat High Court while dealing with the powers that vest with the Labour Courts and the Tribunals under Section 11-A of the I.D. Act held as under:

"It is a benevolent power conferred on the Labour Court and has to be exercised in the spirit in which the provision has been enacted in order to further the intendment and purpose of the legislation, Keeping aglow before the mental eye some very important dimensions of the matter, viz.:

(1) There is widespread unemployment in our country and it is difficult to secure a job to earn enough to keep body and soul together unlike in developed countries.

(2) The State does not provide social benefits like unemployment allowance to enable a discharged employee to sustain himself and his family to some extent, as is being done in the developed countries.

(3) In imposing punishment on an erring employee an enlightened approach informed with the demands of the situation and the philosophy and spirit of the times requires to be made. It cannot be a matter of the ipse dixit of the disciplinary authority depending on his whim or caprice.

(4) Be it administration of criminal law or the exercise of disciplinary jurisdiction in departmental proceedings, punishment is not and cannot be the 'end' in itself. Punishment for the sake of punishment cannot be the motto. Whilst deliberating upon the jurisprudential dimension the following factors must be considered –

(1) In a disciplinary proceeding for an alleged fault of an employee punishment is imposed not in order to seek retribution or to give vent to feeling of wrath.

(2) The main purpose of a punishment is to correct the fault of the employee concerned by making him more alert in the future and to hold out a warning to the other employees to be careful in the discharge of their duties so that they do not expose themselves to similar punishment. And the approach to be made is the approach parents make towards an erring or misguided child.

(3) It is not expedient in the interest of the administration to visit every employee against whom a fault is established with the penalty of dismissal and to get rid of them. It would be counter productive to do so for it would be futile to expect to recruit employees who are so perfect that they would never commit any fault.

(4) In order not to attract the charge of arbitrariness it has to be ensured that the penalty imposed is commensurate with the magnitude of the fault. Surely one cannot rationally or justly impose the same penalty for giving a slap as one would impose for homicide.

(5) When different categories of penalties can be imposed in respect of the alleged fault one of which is dismissal from service, the disciplinary authority perforce is required to consult himself for selecting the most appropriate penalty from out of the range of penalties available that can be imposed, having regard to the nature, content and gravity of the default. Unless the disciplinary authority reaches the conclusion that having regard to the nature, content and magnitude of the fault committed by the employee concerned it would be absolutely unsafe to retain him in service the maximum penalty of dismissal cannot be imposed. If a lesser penalty can be imposed without seriously jeopardising the interest of the employer the disciplinary authority cannot impose the maximum penalty of dismissal from service. He is bound to ask his inner voice and rational faculty why a lesser penalty cannot be imposed.

(6) It cannot be overlooked that by and large it is because the maximum penalty is imposed and total ruination stares one in the eyes that the employee concerned is obliged to approach the Court and avail of the costly and time-consuming machinery to challenge in desperation the order passed by the disciplinary authority. If a lesser penalty was imposed, he might not have been obliged to take recourse to costly legal proceedings which result in loss of public time and also result in considerable hardship and misery to the employee concerned.

(7) When the disciplinary proceedings end in favour of the employee the employer has often to pay back wages say for about 5 years

without being able to take work from the employee concerned. On the other hand, the employee concerned would have had to suffer economic misery and mental torture for all these years. Even the misery of being obliged to remain idle without work would constitute an unbearable burden. And when the curtain drops everyone is left with a bitter taste in the mouth. All because extreme penalty of dismissal or removal is imposed instead of a lighter one.

(8) Every harsh order of removal from service creates bitterness and arouses a feeling of antagonism in the collective mind of the workers and gives rise to a feeling of class conflict. It does more harm than good to the employer as also to the society.

(9) Taking of a petty article by a worker in a moment of weakness when he yields to a temptation does not call for an extreme penalty of dismissal from service. More particularly when he does not hold a sensitive post of trust (pilferage by a cashier or by a store-keeper from the stores in his charge, for instance, may be viewed with seriousness. A worker brought up and living in an atmosphere of poverty and want when faced with temptation, ought not to, but may, yield to it in a moment of weakness. It cannot be approved, but it can certainly be understood particularly in an age when even the rich commit economic offences to get richer and do so by and large with impunity. (And even tax evasion or possession of black money is not considered to be dishonourable by and large). A penalty of removal from service is therefore not called for when a poor worker yields to a momentary temptation and commits an offence which often passes under the honourable name of Kleptomania when committed by the rich.

The Labour Court in exercising its power to reduce the penalty has to inform itself of these considerations and play the role assigned to it by its creator loyally and faithfully and in harmony”

The Tribunal thus while exercising its judicial discretion under Section 11-A of the I.D. Act has to take into consideration all the relevant facts and the circumstances of the case before reaching a final conclusion as to whether a

particular case deserves due consideration in the reduction of the punishment or not.

10. The High Court while exercising jurisdiction under Article 226 and 227 of the Constitution ordinarily does not interfere with such a discretion of the industrial adjudicator unless it is felt by the High Court that the industrial adjudicator has not properly exercised its jurisdiction based on well established principles of law or discretion exercised by the Tribunal is arbitrary, perverse or irrational. The Apex Court in the recent judgment of ***Jagdish Singh Vs. Punjab Engineering College and Ors., AIR 2009 SC 2458*** held as under:

“The instant case is not a case of habitual absenteeism. The appellant seems to have a good track record from the date he joined service as a sweeper. In his long career of service, he remained absent for 15 days on four occasions in the month of February and March 2004. This was primarily due to sort out the problem of his daughter with her in-laws. The filial bondage and the emotional attachment might have come in his way to apply and obtain leave from the employer. The misconduct that is alleged, in our view, would definitely amounts to violation of discipline that is expected of an employee to maintain in the establishment, but may not fit into the category of gross violation of discipline. We hasten to add if it were to be habitual absenteeism, we would not have ventured to entertain this appeal.

11. In the result, we allow the appeal and set aside the order passed by the disciplinary authority dated 30.09.2004 and affirmed by the
W.P.(C) No. 2267/2007

High Court vide its order dated 28.08.2007. Taking the totality of the facts and circumstances of the case and having due regard to unblemished record of the appellant, and the reasons for which he remained absent without obtaining permission, the ends of justice would be met, if punishment imposed by the disciplinary authority is modified to that of stoppage of two increments with cumulative effect and further declare that he would not be entitled for any monetary benefits during the period he was out of service and that period would be counted only for the purpose of his service benefits. We direct the disciplinary authority to issue appropriate orders in this regard within one month from the date of production of certified copy of this Court's order by either of the parties."

In ***Sardar Singh's case (Supra)*** also the Apex Court was dealing with those employees who remained absent for a longer period and therefore the facts of ***Sardar Singh's case (Supra)*** are not near to the facts of the present case, where the present petitioner remained unauthorisedly absent for a short period from 24.04.92 to 11.5.92. The facts of the present case are almost identical to the facts of ***Jagdish Singh's case (Supra)*** where also the employee remained absent for a period of 15 days on four occasions and the Apex Court held that such a case cannot be considered as a case of habitual absenteeism.

11. In the light of the above legal position, this court is of the view that the learned Tribunal has not judiciously

exercised its discretion under Section 11-A of the I.D.Act as the case of the petitioner under no circumstance can be considered to be a case of habitual absenteeism even if the past record is taken into consideration, therefore, the case of the petitioner does not deserve grant of such a severe punishment of removal from service.

12. Since the counsel for the petitioner has already offered that the petitioner is ready to forego his entire back wages, therefore, in my view the ends of justice would be best served if the petitioner is reinstated back into the service without grant of any back wages but with continuity of service with grant of consequential benefits.

13. In the light of the above discussion, the present petition is allowed.

March 05, 2010

KAILASH GAMBHIR,J