

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

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W.P.(C) No.2196/2004 & W.P.(C) No.7952/2005

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Date of decision: 17th May, 2010

DELHI TRANSPORT CORPORATION

..... Petitioner

Through: Mr. Sarfaraz Khan, Advocate.

Versus

SH. BHAWAR LAL

..... Respondent

Through: Mr. H.K. Chaturvedi, 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. The petitioner DTC has in W.P.(C) No.2196/2004 impugned the order dated 4th September, 2002 of the Industrial Tribunal rejecting the application under Section 33(2)(b) of the Industrial Disputes Act, 1947 of the petitioner DTC for approval of its action to remove the respondent workman from service. The respondent workman had also raised an industrial dispute qua the order of his removal from service. The said industrial dispute was also referred to the Labour Court. The Labour Court in view of the rejection of the application under Section 33 (2)(b) has vide award dated 17th November, 2003 held that the respondent workman is deemed to be in continuous service and axiomatically held the termination to be illegal and unjustified and held the workman entitled to reinstatement. W.P.(C) No.7952/2005 has also been filed by the petitioner DTC impugning the said award.

2. Both the petitions are being listed together for hearing. An order under Section 17B of the ID Act has been made.

3. The respondent workman was removed from service vide order dated 10th August, 1992 under Clause 15(2) (vi) of the DRTA (Conditions of Appointment and Service) Regulations, 1952. It is the case of the petitioner DTC that the respondent workman was absent from the duty unauthorizedly for 11 days from 20th June, 1991 to 30th June, 1991 without any intimation or sanction of leave; that the said conduct amounted to misconduct within the meaning of para 4 (i)(ii) and 19 (h) & (m) of the Standing Orders governing the conduct of DTC employees; that the Disciplinary Authority issued a charge sheet dated 19th December, 1991 to the respondent workman calling upon him to explain as to why the disciplinary proceedings be not initiated against him; that the respondent workman gave an evasive reply stating that there was no negligence on his part and his absence was on account of illness; that the said reply was not found satisfactory and a departmental inquiry ordered and conducted; that the Disciplinary Authority concluded that the charge against the respondent workman was found proved and accordingly meted out the punishment vide order dated 10th August, 1992 of removal from service.

4. The Industrial Tribunal has in the order dated 4th September, 2002 rejecting the application under Section 33 (2)(b) held that no evidence whatsoever was led by the petitioner DTC of having conducted an inquiry. The petitioner DTC has in the present proceedings also not filed any documents whatsoever to show that an inquiry was so conducted. The petitioner DTC has also not challenged the finding of the Tribunal of no evidence of any inquiry having been led. The Tribunal

nevertheless gave opportunity to the petitioner DTC to prove misconduct before the Tribunal. The Tribunal, on the basis of evidence led before it, found –

- a. that the witness of the petitioner DTC in cross examination admitted that a leave application of the respondent workman had been received; the said leave application was put in the box kept by the petitioner DTC; that there is no practice in DTC of issuing receipt of the leave applications; that the leave application was accompanied with a medical certificate; that the respondent workman had sought leave for the period of absence on medical grounds;
- b. that the respondent workman proved that he was not negligent or guilty of misconduct; that he had remained absent because of illness; that he had submitted application for leave from time to time and was not absent without information and had thus not committed any misconduct; that he was down with fever and under the impression that the application must have reached the office;
- c. that in his seven years of service prior thereto he had never been challaned and there was no allegation against him for misbehavior;

The Tribunal thus concluded that it was not established that the respondent workman was absent without intimation; that since the respondent workman had proved that he was ill the question of prior permission did not arise.

5. The Standing Orders aforesaid of the petitioner DTC render an employee to be treated as an absconder, leading to termination of service if absent without leave for more than 10 days. In the present case the absence of the respondent workman

was for 11 days only. What falls for consideration is whether there is any error inviting interference in the order of the Tribunal holding no misconduct of habitual absenteeism and negligence to have been established by mere 11 days of absence. In this regard, it may be recorded that this Court on 21st August, 2006 i.e. even prior to the order of 17B of the ID Act had asked the petitioner DTC to consider whether it should continue with these two writ petitions; it was observed that the pendency of the writ petitions will entail expenditure to DTC by way of wages under Section 17B and eventually payment of back wages without actually availing service of the respondent workman. In spite of the said order DTC does not appear to have applied its mind and instead persisted in continuing with the present petitions.

6. The counsel for the petitioner DTC has placed strong reliance on ***DTC Vs. Sardar Singh*** AIR 2004 SC 4161 laying down that mere making of an application after or even before absence from work does not in any way assist the concerned employee, the requirement being of obtaining leave in advance and the burden is on the employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials. It was held that clause (ii) of para 4 of the Standing Orders shows the seriousness attached to habitual absence and there is a requirement therein of prior permission and the only exception is in the case of sudden illness. The counsel thus contends that the admitted absence in the present case of 11 days without prior permission amounts to misconduct as laid down in the said judgment. On the contrary, the counsel for the respondent workman has invited attention to the factual matrix in ***Sardar Singh*** (supra) case. It is highlighted that the unauthorized absence in the cases before the Supreme Court

was of 171, 92, 105, 294, 95, 137, 188, 166 & 272 days and it was in this context that the observations were made. It is further highlighted that the expression used by the Supreme Court was of absence from duty without sanctioned leave “for very long period”. It is contended that 11 days cannot qualify as “very long period” for the respondent workman to meet the same fate as in *Sardar Singh* case.

7. I tend to agree with the contentions of the counsel for the respondent workman. Eleven days’ absence would not qualify as a very long unauthorized absence so as to fall in the category of habitual absence and/or absence indicative of negligence and showing scant interest in the work of DTC.

8. There is another interesting aspect of the matter. Not only has no evidence of the domestic inquiry alleged to have been conducted been laid before the Industrial Tribunal or before this Court but a perusal of the order dated 10th August, 1992 of removal also does not refer to any inquiry report. It also does not refer to the contentions raised by the respondent workman in his reply. It also does not record any reason as to why mere 11 days’ absence, specially when thereafter the respondent workman had reported and furnished medical application, was the workman treated to have committed misconduct. The said order of removal displays a total lack of application of mind by the Disciplinary Authority of the petitioner DTC.

9. The Tribunal, on the evidence recorded before it has reached a factual conclusion of the respondent workman having submitted leave applications, of there being a practice of dropping the leave applications in a box and there being no system of acknowledging the receipt thereof. The Tribunal has by a well

reasoned order held that in the circumstances no case for misconduct was made out. Such factual finding of the Tribunal cannot be disturbed by this Court in the exercise of writ jurisdiction particularly when no case therefor is made out. No error is found in the order of the Industrial Tribunal rejecting the application of the petitioner DTC under Section 33(2)(b) . The W.P.(C) No.2196/2004 is thus liable to be dismissed.

10. That brings me to W.P.(C) No.7952/2005. An order under Section 33 (2)(b) is ordinarily on a *prima facie* view of the matter and does not bar the matter from being revisited in/on a dispute being raised under Section 10. I have in ***DTC v. Rishi Prakash*** MANU/DE/0748/2010 and ***DTC v. Nihal Singh*** W.P.(C) No.3210/2004 decided on 3rd May, 2010 also taken a view that notwithstanding the dismissal of an application under Section 33(2)(b), if the workman raises an industrial dispute qua the same transaction and the said dispute is decided against the workman, the workman would be deemed to be dismissed from service. The order of the Labour Court impugned in W.P.(C) No.7952/2005 deciding the dispute merely on the basis of the order under Section 33(2)(b) proceedings is thus erroneous in law. However, I refrain from remanding the dispute for adjudication. The order on the application under Section 33(2)(b) in the present case is not on a *prima facie* view of the matter. The Industrial Tribunal gave an opportunity to the petitioner DTC to establish misconduct and the said opportunity was availed of and evidence led. On the basis of the said evidence, the conclusion of no misconduct having been established was reached. The order on the application under Section 33 (2)(b) is thus an order after full trial and the writ petition against the said order having been dismissed, the said order, as far as this Court is

concerned, has attained finality and no purpose would be served in granting another opportunity to the petitioner DTC to establish misconduct before the Labour Court.

11. Accordingly, both the writ petitions are dismissed. Litigation costs having been paid earlier, no order as to costs. The petitioner DTC to comply with the orders impugned in this petition within six weeks of today, failing which the petitioner DTC shall also be liable to pay simple interest at the rate of 9% per annum on the arrears due to the respondent workman.

**RAJIV SAHAI ENDLAW
(JUDGE)**

17th May, 2010
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