

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
EXTRAORDINARY CIVIL ORIGINAL JURISDICTION

+ WP(C) No.6758/2007

Date of pronouncement: 18-10-2010

DTC Petitioner
Through Mr. Anand Nandan, Advocate.

versus

PREM PRAKASH THROUGH
LRs Respondent
Through Mr. A.K. Trivedi, Advocate.

CORAM:
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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

SUDERSHAN KUMAR MISRA, J. (ORAL)

1. The impugned order dated 26th February, 2003 reveals that the Tribunal concluded that the respondent remained absent on the basis of Exhibit AW 1/1, which is a report prepared by Mr. Bhagwan Das. This report is based on the Attendance Sheet, i.e. SAR. At the same time, Exhibit AW1/R-1, which was also filed by the DTC/petitioner before the Tribunal, is the "MAR", which showed that the respondent was on leave without pay. However, being on leave without pay is quite different from being absent. The respondent's contention is that availing of leave without pay does not amount to misconduct, and that the Tribunal has correctly believed that the respondent was on leave without pay and not absent. The respondent's further contention is that, however, if there

are any consequences of having been on leave without pay, those could follow.

2. Counsel for the DTC contends that in the case of **DTC v. Sardar Singh**, 2004 (VIII) AD (SC) 371, the issue of misconduct has been examined by the Supreme Court in the context of the requirement to obtain sanction for the leave sought, in advance. It has held that even if some leave without pay is still available to the employee, it does not exempt the employee from applying for and obtaining the necessary leave, before he actually goes on leave, and not doing so amounts to misconduct. It was in this context that the Supreme Court had also examined the standing order No.4 of the DTC which deals with "Absence without permission". It was ultimately held in paragraph 9 as follows:

"9. When an employee absent 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."

3. In the present case also, counsel for the DTC states that from

1990-1994 the respondent was in the habit of absenting himself, and that he remained absent for 759 days. He further states that the conduct of the respondent in absenting himself from duty without having leave sanctioned exhibits a lack of interest and habitual negligence with regard to his work. He submits that these absences were telltale features that were also noticed by the management whilst deciding to terminate the service of the respondent, notwithstanding the fact that the notice of termination was ultimately prompted by the respondent taking 12 days' leave without pay, without previous sanction.

4. On the other hand, it is contended by counsel for the respondent that the impugned order was passed on 26th February, 2003 and the present writ petition impugning that award came to be filed only on 11th September, 2007. In the meanwhile, on 18th March, 2003, the respondent/workman had died and the petitioner chose to file the instant writ petition against the legal representatives of the deceased. Counsel for the respondent relies on a decision of the Supreme Court in the case of **Basudeo Tiwary v. Sido Kanhu University & ors.,** (1998) (8) SCC 194, in particular paragraph 4 thereof, for the proposition that since the respondent had died before the filing of the writ petition against his legal representatives, therefore, the impugned award of the Tribunal could not be interfered with. I do not agree. Paragraph 14 of the aforesaid judgment merely shapes the relief to be granted in view of the fact that the appellant/workman in that case, who had challenged his dismissal, had died during the pendency of the appeal. Naturally, if the court came to the conclusion that the termination of service of that appellant/workman was bad, consequences would ensue to his legal representatives, to the extent permitted by law. In such a situation,

while there can be no reinstatement, all the monetary benefits that would have been available to the deceased appellant would have flowed to his legal representatives, if any. In the present case, the DTC, who is the employer, is contending that the termination of the respondent/workman was proper and that the award directing his reinstatement deserves to be quashed. That is another thing altogether. I do not see anything to prevent this. Were this Court to accept the petitioner's contention, i.e. if the employer/DTC were to succeed, all monetary benefits that could have flowed in terms of the award either to the workman himself or to his legal representatives after his death, would be quashed.

5. Counsel for the respondent then relies on the decision of this Court in the case of **Bhoop Singh v. UOI & Ors.**, WP(C) No.501/97, decided on 8th January, 2010, and in particular paragraph 8 thereof. A perusal of paragraph 8 of the aforesaid judgment shows that, that judgment was rendered with regard to the status of the service of an ex-employee, whose termination had been set aside and who had since died, as a result of which the respondent/employer was not in a position to issue another show cause notice and decide the matter afresh. In those circumstances, and also keeping in mind paragraph 79 of the P & T Manual, Vol.III of Swamy's Compilation of CCS (CCA) Rules, which were applicable to that case, and which stated that proceedings came to an end immediately on the death of alleged offender; no disciplinary proceedings could be continued thereafter. Consequently, since the notice to show cause, as well as the order of termination, had already been set aside, there was no question of issuing any fresh notice to show cause or for any further enquiry to be carried out against the deceased

employee. It, therefore, followed in that case that the said employee was deemed to be in service up to his date of demise and would be entitled to all the relevant benefits. To my mind, this judgment also does not help the respondent. It does not mean that in every case where the workman dies before proceedings can be instituted impugning the Tribunal's Award, the employer is automatically divested of his constitutional remedy and the award becomes immune from challenge. I find no force in submissions of the counsel for the respondent on this aspect of the matter. Here, what is being examined is the validity of the decision given by the Tribunal in the impugned award, whereby termination of the workman was set aside. Simply because the respondent has died cannot possibly mean that the validity of the decision given in favour of the workman cannot be impugned. It is not as if disciplinary proceedings are being initiated afresh against the deceased workman. In that view of the matter, surely, the correctness or otherwise of the decision setting aside the termination of the respondent/workman's service can always be examined.

6. Further, a perusal of the charge-sheet dated 18th November, 1993 shows that the same was issued to the workman on the ground that he was not interested in the job and remained absent from 22nd September, 1993 to 3rd October, 1993 without any information or prior approval. At the same time, the report, on the basis of which this charge-sheet was prepared, along with a copy of the respondent's past record which was intended to be relied on with a view to proving the fact that the workman was not interested in his job, was also annexed with the charge-sheet. Admittedly, the past record of the respondent clearly sets out repeated and habitual absence, all of which were without intimation or sanction.

For all the aforesaid reasons, to my mind, the conclusion drawn in the impugned award that availing of leave without pay does not amount to misconduct, has been passed in a cursory manner and without due application of mind. Basic facts such as failure to apply for and obtain sanction for the leave have not been examined. The same deserves to be set aside.

7. In this view of the matter, and looking to the fact that even the Supreme Court in **Sadar Singh's** case (supra) has clearly held that habitual absence can only lead to the conclusion of negligence and lack of interest in pursuing the job, the writ petition deserves to be allowed. The impugned finding in Issue No.1 in the order passed by the Tribunal dated 26th February, 2003 is set aside. The application of the petitioner/DTC filed under Section 33(2) (b) of the Industrial Disputes Act, 1947, which was filed before the Tribunal, is allowed.

8. The petition stands disposed of in the above terms.

CM Nos.12798/2007 & 15720/2009

9. Since the main petition has been allowed and disposed of, these applications have become infructuous and the same are disposed of as such.

SUDERSHAN KUMAR MISRA, J.

OCTOBER 18, 2010
dr