

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **LPA No. 167/2003**

Shri Prem Shankar Driver Appellant
Through Mr. B.K. Patel, Advocate.

VERSUS

Chief General Manager, DTC Respondents
Through Ms. Avnish Ahlawat with
Mr. Hanu Bhaskar, Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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

ORDER
% **04.04.2011**

SANJIV KHANNA, J.

The appellant in the present intra court appeal, Prem Shankar now represented by his legal heirs, has challenged the decision dated 10th January, 2003 passed in Civil Writ No. 2246/2002. By the impugned judgment, the learned single Judge has dismissed the writ petition, inter alia, holding that the appellant had retired from service and, therefore,

cannot be reinstated. It has been further held that whether or not appellant was gainfully employed and entitled to back wages was a disputed question of fact that cannot be decided in a writ petition and the appropriate remedy was to approach the authorities under the Industrial Disputes Act, 1947 (Act, for short).

2. The appellant was appointed and was working as a driver with the respondent DTC. He was charge-sheeted and removed from service in 1974. Since an industrial dispute was pending, an application under Section 33(2)(b) of the Act was filed by the respondent. Tribunal by order dated 17th May, 1982, held that it was not possible to grant approval of removal of the appellant on the basis of the enquiry made by the respondent management. However, in view of the request made by the respondent, the management was allowed to produce evidence in support of their case. Issues were framed and the parties were directed to lead evidence. By order dated 1st April, 1989, the industrial adjudicator held that the management was not able to substantially establish the misconduct with which the petitioner was charged. The

effect thereof was that the tribunal refused to grant approval under Section 33(2)(b) of the Act.

3. The two orders dated 17th May, 1982 and 1st April, 1989 were made subject matter of challenge by the respondent in Civil Writ No. 1245/1990. By judgment dated 27th January, 1995, the writ petition was dismissed and the said order, it is accepted, has attained finality.

4. The net result of the aforesaid proceedings is that the application filed by the respondent seeking approval of their action under Section 33(2)(b) of the Act, to remove the appellant from service has been rejected. Thus, the appellant is deemed to be in service all along and the order of removal is void and a nullity. The aforesaid legal proposition is now well established and accepted. In ***Tata Iron and Steel Co. Ltd. v. S.N. Modak***, (1965) 3 SCR 411, it has been held as under:

“5. It is also settled that if approval is granted, it takes effect from the date of the order passed by the employer for which approval was sought. If approval is not granted, the order of dismissal or discharge passed by the employer is wholly invalid or inoperative, and the employee can legitimately claim to continue to be in the employment of the employer notwithstanding the order passed by him dismissing or discharging him. In other words, approval by the prescribed authority makes the order of discharge or

dismissal effective; in the absence of approval, such an order is invalid and inoperative in law.

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11. In other words, the order being incomplete and inchoate until the approval is obtained, cannot effectively terminate the relationship of the employer and the employee between the appellant and the respondent; and so, even if the main industrial dispute is finally decided, the question about the validity of the order would still have to be tried and if the approval is not accorded by the Tribunal, the employer would be bound to treat the respondent as its employee and pay his full wages for the period even though the appellant may subsequently proceed to terminate the respondent's services. Therefore, the argument that the proceedings if continued beyond the date of the final decision of the main industrial dispute would become futile and meaningless, cannot be accepted."

5. The Supreme Court in the case of ***T.N. State Transport Corpn. v. Neethivilangan, Kumbakonam***, (2001) 9 SCC 99 has observed:

"16. From the conspectus of the views taken in the decisions referred to above the position is manifest that while the employer has the discretion to initiate a departmental inquiry and pass an order of dismissal or discharge against the workman the order remains in an inchoate state till the employer obtains order of approval from the Tribunal. By passing the order of discharge or dismissal de facto the relationship of employer and employee may be ended but not the de jure relationship for that could happen only when the Tribunal accords its approval. The relationship of employer and employee is not legally terminated till approval of discharge or dismissal is

given by the Tribunal. In a case where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition filed under Section 33(2)(b) of the Act on merits the employer is bound to treat the employee as continuing in service and give him all the consequential benefits. If the employer refuses to grant the benefits to the employee the latter is entitled to have his right enforced by filing a petition under Article 226 of the Constitution. There is no rational basis for holding that even after the order of dismissal or discharge has been rendered invalid on the Tribunal's rejection of the prayer for approval the workman should suffer the consequences of such invalid order of dismissal or discharge till the matter is decided by the Tribunal again in an industrial dispute. Accepting this contention would render the bar contained in Section 33(1) irrelevant. In the present case as noted earlier the Tribunal on consideration of the matter held that the employer had failed to establish a prima facie case for dismissal/discharge of the workman, and therefore, dismissed the application filed by the employer on merits. The inevitable consequence of this would be that the employer was duty-bound to treat the employee as continuing in service and pay him his wages for the period, even though he may be subsequently placed under suspension and an inquiry initiated against him."

6. ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal***

Sharma, (2002) 2 SCC 244 it has been held :

"7. The proviso expressly and specifically states that no workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer. It is clear from the proviso to Section 33(2)(b) that the employer may pass an order of dismissal

or discharge and at the same time make an application for approval of the action taken by him. In *Strawboard case* dealing with the contention that if the employer dismisses or discharges a workman and then applies for approval of the action taken and the Tribunal refuses to approve the action, the workman would be left with no remedy as there is no provision for reinstatement in Section 33(2), it is held that:

“If the Tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fall and thereupon the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer.”

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14. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if the order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement.....”

7. The aforesaid ratio has been recently referred to and applied by this bench in ***Delhi Transport Corporation versus Shri Ramesh Chander*** in LPA No. 610 Of 2005, dated 4th April, 2011.

8. In view of the aforesaid legal position, the appellant now represented by legal heirs will be entitled to back-wages from the date of removal till the date of his superannuation. Thereafter, the appellant, now represented by LRs will be entitled to retirements benefits in accordance with service conditions and as per law. In these circumstances, the impugned decision dated 10th January, 2003, passed by the learned Single Judge is set aside and mandamus in the form of directions mentioned above is issued to the respondent. The appeal is accordingly disposed of. In the facts of the case, there will be no orders as to costs.

SANJIV KHANNA, J.

CHIEF JUSTICE

April 4, 2011
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