

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

Date of decision: 18th April, 2011

+

W.P.(C) 10800/2005

% DELHI TRANSPORT CORPORATION Petitioner
Through: Ms. Arati Mahajan Shedha, Adv.

Versus

SUDAN PAL Respondents
Through: Mr. Lokesh Kumar, Advocate

AND

+

W.P.(C) 10938/2005

% DELHI TRANSPORT CORPORATION Petitioner
Through: Ms. Arati Mahajan Shedha, Adv.

Versus

SUDAN PAL Respondents
Through: Mr. Lokesh Kumar, Advocate

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

- | | | |
|----|---|-----|
| 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 |

RAJIV SAHAI ENDLAW, J.

1. W.P.(C) No.10800/2005 impugns the award dated 9th July, 2004 of the Labour Court holding the petitioner DTC to have illegally terminated the services of the respondent workman and directing the petitioner DTC to reinstate the respondent workman with continuity of service and full back wages and other consequential benefits. W.P.(C) No.10938/2005 impugns the order dated 3rd August, 2000 of the Labour Court dismissing the application of the petitioner DTC under Section 33(2)(b) of the Industrial Disputes Act, 1947 seeking approval of its disciplinary action resulting in removal of the respondent workman from service. The facts for the disciplinary action as well as of the dispute raised before the Labour Court are the same.

2. The respondent workman was employed as a Conductor with the petitioner DTC. The charge against him was that on 17th June, 1991 he was on duty as a Conductor on route No.319; that the respondent workman while on duty on the said route, after covering a distance of 14 Km., in collusion with the Driver of the bus, stopped the bus at

Gazipur Dairy Farm without any reason and made the passengers on the said bus alight by representing to them that there was some fault with the bus; that in fact there was no fault with the said bus and no intimation of the fault, if any with the bus, as required to be given in case of a fault, was given to the Control Room or to the Depot; that upon the bus not reaching its destination, other staff of the DTC was sent to locate the said bus but without any success.

3. The respondent workman was thus charged with putting the passengers who were made to alight to inconvenience, tarnishing the image of the DTC and causing loss to the DTC by not completing the remaining trip of the bus. The departmental enquiry found the respondent workman to be guilty and the Disciplinary Authority of the petitioner DTC imposed the punishment of removal of the respondent workman from employment. However, in view of the pendency then of a general dispute of the DTC with its workmen, the application aforesaid under Section 33(2)(b) of the I.D. Act seeking approval of the action of removal of the respondent workman from employment was filed.

4. The said application under Section 33(2)(b) was contested by the respondent workman. The Labour Court framed a preliminary issue as to the legality and validity of the departmental enquiry conducted against the respondent workman and as to whether the same was conducted in compliance with the principles of natural justice. The Labour Court vide order dated 21st February, 1998 held the Report of the inquiry and finding of the Inquiry Officer to be perverse for the reason of the Inquiry Officer who was examined as a witness before the Labour Court having in his cross examination admitted that only the Driver knows better regarding the defect in the bus and it was the Driver who was supposed to lodge the report of the defect, if any, in the bus; it was thus held that the respondent workman as Conductor could not be said to have committed any misconduct since the duty to inform about the defect in the bus was of the Driver.

5. The petitioner DTC opted to prove the misconduct before the Labour Court and was granted an opportunity. The Labour Court however vide order dated 3rd August, 2000 impugned in W.P.(C)

No.10938/2005 held that the petitioner DTC had failed to prove the misconduct for the reason of no report of the inspection of the bus having been prepared and the Foreman of the petitioner DTC who deposed to the said effect being not expected to remember after long many years as to whether there was any defect in the bus or not.

6. It was also held that once the petitioner DTC admitted that it was mainly the duty of the Driver to inform the Control Room of the Depot about the defect in the bus, the respondent workman who was merely a Conductor could not be charged with misconduct on that account. It was yet further held that the collusion of respondent workman with the Driver of the bus had not been established.

7. No challenge was made by the petitioner DTC to the order dated 3rd August, 2000 dismissing the application under Section 33(2)(b).

8. However, it appears that during the pendency of the approval application aforesaid, in or about the year 1998, the respondent workman also raised an industrial dispute with respect to his removal and a reference under Section 10 of the I.D. Act came to be made as

under:

“Whether the removal of Shri Sudan Pal from the service by the management is illegal and / or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?”

9. The said reference remained pending without much progress. When the said reference proceedings were listed before the Labour Court on 3rd March, 2004 for cross examination of the respondent workman, the respondent workman produced the order dated 3rd August, 2000 (supra) dismissing the application under Section 33(2)(b). The Labour Court in view of the dicta in ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma*** AIR 2002 SC 643 laying down that upon dismissal of the application under Section 33(2)(b), the workman becomes entitled to be reinstated even without any direction in this regard, held that upon dismissal of the application under Section 33(2)(b) on 3rd August, 2000, the respondent workman was deemed to be in continuous service of the petitioner DTC and accordingly answered the reference on 9th July, 2004 in favour of the respondent workman and against the petitioner DTC.

10. The petitioner DTC first filed W.P.(C) No.10800/2005 impugning the award aforesaid. The same came up before this Court first on 6th July, 2005 when while issuing notice thereof, the operation of the award was stayed. The petitioner DTC thereafter filed W.P.(C) No.10938/2005 impugning the order dated 3rd August, 2000 of dismissal of application under Section 33(2)(b). Notice thereof was got issued owing to the pendency of W.P.(C) No.10800/2005 and vide interim order dated 8th July, 2005, the operation of the order dated 3rd August, 2000 also stayed.

11. The counsels for the parties have been heard. The counsel for the respondent workman informs that on an application under Section 17B of the I.D. Act, the respondent workman has been receiving 17B wages at the rate of minimum wages. The counsel for the petitioner DTC has at the outset contended that the Labour Court could not have decided the reference under Section 10 of the ID Act on the basis of the order under Section 33(2)(b) dismissing the application in as much as the scope of the two proceedings is different; while the enquiry by the

Industrial Adjudicator under Section 33(2)(b) is a summary enquiry, the enquiry in a reference under Section 10 is detailed and the Labour Court ought to have decided the reference only after giving an opportunity to the parties to complete their evidence.

12. Though the argument aforesaid appears attractive and I have also in *Delhi Transport Corporation Vs. Shyam Lal* ILR (2010) V Delhi 431, *Delhi Transport Corporation Vs. Rishi Prakash* 2010 IV AD (Delhi) 399 (intra court appeal being LPA No.508/2010 whereagainst was dismissed on 10th February, 2011) and *Delhi Transport Corporation Vs. Nihal Singh* 169 (2010) DLT 727 held that the scope of the two proceedings is different and an order under Section 33(2)(b) is ordinarily not *res judicata* in decision of a reference under Section 10 but on further consideration, it is found that it would be so only where the application under Section 33(2)(b) has been allowed or where the order of dismissal of application under Section 33(2)(b) is under stay in a challenge thereto by the employer. The present was a case where the award on industrial dispute was made after four years of the dismissal

of application under Section 33(2)(b) and when till that date there was no challenge to the order of dismissal of application under Section 33(2)(b). The Labour Court, though has not expressly so recorded, is thus not found to have committed any error in presuming the order of dismissal of the application under Section 33(2)(b) to have attained finality and given effect thereto. Strictly speaking, the effect of the dismissal of the application under Section 33(2)(b) and attaining finality would be to render the reference of industrial dispute arising from the same facts / circumstances to be infructuous. It is noticeable that the writ petition challenging the award also was filed prior to the writ petition challenging the order of dismissal of application under Section 33(2)(b).

13. As far as the challenge to the dismissal of the application under Section 33(2)(b) is concerned, the same has been made after exactly five years from the order. The counsel for the petitioner DTC fairly admits that there is no explanation given in the petition or in the paper book for the said long delay in preferring the petition and which itself,

in my opinion would be determinative of the fate of the petition. The nature of the order under Section 33(2)(b) is such that the challenge, if any, thereto ought to be immediate. If the management / employer chooses not to challenge the dismissal of its application under Section 33(2)(b), the workman can safely assume that the employer does not want to challenge the same or to press the order of dismissal. The belated challenge would thus be liable to be rejected as barred by laches, acquiescence and waiver.

14. The counsel for the petitioner DTC has however stated that the disciplinary proceedings arising out from the said facts / transaction were initiated also against the Driver of the subject bus and who was also found guilty and dismissed; that application under Section 33(2)(b) seeking approval of the order of the removal of the Driver was also filed and was allowed and which order was challenged by the Driver. She states that perhaps the delay in challenging the order under Section 33(2)(b) in the present case was occasioned for the said circumstances.

15. However, in the absence of any explanation on affidavit, no such oral explanation can be entertained. In my view W.P.(C) No.10938/2005 preferred after five years of the order impugned therein is liable to be dismissed on that ground alone and the effect of dismissal whereof would automatically lead to the dismissal of the other writ petition.

16. The counsel for the petitioner has also contended that even if the petition challenging the dismissal of application under Section 33(2)(b) were to be barred by time, the other writ petition impugning the award is within time.

17. Again the argument though attractive, has no merit. The order under Section 33(2)(b) was made long back and was allowed to stand and the effect will have to be given thereto and once the effect is given thereto, the challenge to the award as aforesaid has become infructuous. The Division Bench of this Court recently in ***D.T.C. v. Prem Chand*** 176 (2011) DLT 476 has held that when there is no approval by the Industrial Adjudicator on an application under Section 33(2)(b), the order of dismissal is *ab initio* void i.e. does not exist and once the order of dismissal does not exist, the question of addressing the reference (of dispute raised qua said dismissal) on merits by the Labour Court is totally unwarranted.

18. The counsel for the petitioner DTC has also contended that the respondent workman himself raised the dispute after a long delay of seven years. However, the same would also be immaterial to the facts and circumstances hereinabove.

19. However to satisfy the judicial conscience, the merits of the case have also been examined and the counsels heard.

20. The counsel for the petitioner DTC has referred to Executive Instructions of the DTC in her possession as to the duties of the Conductor and which Executive Instructions are stated to be in force at the contemporaneous time also. From the same, it is urged that it is the duty of the Conductor to help the Driver in intimating the default in the bus to the Central Control Room of the DTC immediately through any means whatsoever. It is thus contended that there can be no perversity in the departmental proceedings holding the respondent workman, even though a Conductor, guilty. Much reliance is also placed on the fact of the bus having been brought back to the Depot by the respondent workman and the Driver of the bus themselves; it is contended that it is

evident therefrom that the bus could not be suffering from any fault. It is contended that thus the reasoning given by the Labour Court of there being no report of inspection of the bus, is erroneous in as much as the facts speak for themselves.

21. I have enquired from the counsel for the petitioner DTC as to on the basis of what record, it is stated that the bus was brought back by the respondent workman and the Driver on their own. The counsel states that since the record is that no intimation was given, there could be no other way in which the bus could be brought back to the Depot by the Driver and the Conductor. It is urged that the Driver and the Conductor could not be expected to of their own having the fault repaired.

22. Per contra, the counsel for the respondent workman has contended that in the absence of any charge to the said effect, no presumption can be drawn. He has also invited attention to the cross examination of the Inquiry Officer before the Labour Court in which he had admitted that in the departmental inquiry the respondent

workman was not given any opportunity to have the assistance of the co-worker; that no list of witnesses and list of documents were provided to the respondent workman before starting the inquiry; that there was no Presenting Officer on behalf of the management and that there was no statement of the respondent workman in the inquiry proceedings and that the Inquiry Officer had not made any efforts to summon anybody from the Workshop staff to ascertain whether the bus was actually defective or not; not even the Foreman of the petitioner DTC. Reference is also made to the statement in the cross examination that it is only the Driver who knows better regarding the defect in the bus and it is the Driver who is supposed to lodge the report of the defect of the bus. Reference is yet further made to admission in the cross examination that the charges had not been dealt with separately in the inquiry report. He has thus contended that no error can be found in the order of the Labour Court dismissing the application under Section 33(2)(b).

23. Though the scope of two proceedings i.e. a reference under Section 10 and the approval application under Section 33(2)(b) is different as noted above but again as noted in *Shyam Lal* (supra), the same appears to have been blurred. In the present case also, the proceedings under Section 33(2)(b) appear to have been conducted as a reference under Section 10. In view of the said prevalent procedure, it was recorded in the judgment (supra) that where the Court finds that the proceedings under Section 33(2)(b) have been conducted as a reference under Section 10, the order in application under Section 33(2)(b) may have relevance in a Section 10 proceedings also. I find the present case to be one of such nature.

24. My judicial conscience is thus satisfied that besides the aspect of long delay, even otherwise there is no error requiring judicial review of the order of dismissal of Section 33(2)(b) application. This Court in exercise of judicial review would not interfere with the appreciation of evidence by the Labour Court. The Labour Court in the face of the evidence before it, has formed a view of no case of misconduct on the

part of the respondent workman having been proved, neither in the departmental inquiry nor before the Labour Court and even if this Court is to, on the same material, form a different view, the same is no ground to interfere with the said order.

25. What has however perturbed me is that the effect of upholding the dismissal order would be to deem that the order of removal had never been passed and in which case, the respondent workman would be entitled to reinstatement even without any direction of this Court or of any other fora and with full back wages and all consequential benefits. It appears inequitable to allow the same when the respondent workman has not worked for the petitioner DTC for the last 20 years and during which long time it is safe to assume that he must be doing some other vocation.

26. The counsel for the petitioner in this regard has referred to ***DTC Vs. Virender Singh*** 116 (2005) DLT 266 where also while dismissing the challenge to the dismissal of application under Section 33(2)(b), the

back wages to which the workman was entitled to were restricted to 40% only. The counsel for the petitioner DTC thus states that it is open to the Court to pass such an order.

27. Per contra, the counsel for the respondent workman with reference to ***Jaipur Zila Sahakari*** (supra) has contended that once the Constitution Bench has laid down that upon the dismissal of application under Section 33(2)(b), the order of discharge/dismissal/removal has to be deemed to have never been passed and the employee having continued in service, the question of this Court reducing the back wages does not arise. Reference in this regard is also made to ***Rajinder Singh Vs. DTC*** 2003 IV AD (DELHI) 332 and the order dated 15th December, 2009 of the Division Bench of this Court in LPA No.525/2009 titled ***Shri Anup Singh Vs. DTC*** and order dated 4th April, 2011 of the Division Bench of this Court in LPA No.167/2003 titled ***Shri Prem Shankar Driver Vs. Chief General Manager, DTC***.

28. A careful perusal of the judgment in ***Virender Singh*** (supra) shows that in that case the workman had also preferred a writ petition seeking the relief of reinstatement and this Court after dismissing the writ petition of the DTC against the order of dismissal of application under Section 33(2)(b) had proceeded to consider the prayer in the writ petition of the workman and while allowing the said prayer restricted the back wages to 40%. The respondent workman in the present case has not made any such prayer and is relying upon the Constitution Bench dicta in ***Jaipur Zila Sahakari*** only. I fail to see as to in exercise of which power can this Court restrict the consequence of the order of dismissal of the application under Section 33(2)(b) attaining finality. Once the Apex Court in ***Jaipur Zila Sahakari*** has laid down the effect of dismissal of application under Section 33(2)(b), this Court cannot allow the imagination to boggle merely because the consequences appear to be grave. It is further felt that the said question was not considered in ***Virender Singh*** and thus ***Virender Singh*** cannot be said to be a precedent to the said effect.

29. The counsel for the respondent workman has stated that the respondent workman is now about 53 years of age and has only five to seven years of service left and wants to join duty and intends to put an end to this litigation and has without prejudice to the rights and contentions of the respondent workman offered that subject to the petitioner DTC not litigating further, the respondent workman would be willing to accept 50% only of the back wages and consequential benefits to which he is entitled to, minus the 17B wages already received by him. It is however stated that this offer is subject to the petitioner DTC reinstating the respondent workman into duty and paying him the amounts so due within 9 weeks of today and if the petitioner DTC does not do so, the respondent workman, in accordance with law would be entitled to the entire back wages and consequential benefits etc.

30. Thus while dismissing the two writ petitions, it is directed:

- (i) That though the respondent workman in accordance with law, upon dismissal of the writ petitions is entitled to full back wages and all consequential benefits including promotion etc., minus the amounts already received under Section 17B but if the petitioner DTC does not litigate further and within nine weeks of today reinstates the respondent workman and also pays the respondent workman 50% of all the monetary dues on account of back wages, consequential benefits accruing owing to Assured Career Promotions etc., within nine weeks from today, the petitioner DTC shall not be liable to pay the balance 50% of the said amount and the 50% so paid shall be received by the respondent workman in full and final settlement of all his claims against the petitioner DTC.
- (ii) However, in the event of either of the aforesaid things being not done within nine weeks from today, the respondent workman would be entitled to the full amount as aforesaid found due to him.

- (iii) It is clarified that the monetary benefits are to be calculated on the basis of ACPs only and the monetary benefits, if any, due out of promotion to selection post, may be determined even after nine weeks by constituting a special DPC for that purpose.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

APRIL 18, 2011

‘gsr’