

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

Date of decision: 23rd March, 2011

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W.P.(C) No.974/2001

D.T.C.

..... Petitioner

Through: Mr.Ashok Kumar Verma for
Ms. Aarti Mahajan Shedha, Advocate.

Versus

SATBIR SINGH & ORS

..... Respondents

Through: Mr. Pradeep Kumar, Advocate

AND

WP(C) No. 5892/2005

SATBIR SINGH

.....Petitioner

Through: Mr. Pradeep Kumar, Advocate.

Versus

D.T.C. & ANOTHER

..... Respondents

Through: Mr.Ashok Kumar Verma for
Ms. Aarti Mahajan Shedha, 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. WP(C) 974/2001 was filed impugning the order dated 21st January, 2000 of the Industrial Tribunal rejecting the application dated 26th May, 1989 of DTC under Section 33(2)(b) of the Industrial Disputes Act, 1947 seeking approval of its action of the removal of the workman from the services of DTC. The said application was necessitated owing to the pendency then of a general dispute between the DTC and its workmen. Notice of the writ petition was issued and a reply to the writ petition was filed by the workman. However, the writ petition was disposed of on 2nd December, 2002 in view of the judgment dated 25th September, 2002 of the Division Bench of this Court in *Sardar Singh Vs. DTC*. In or about February / March, 2006 DTC filed an application for revival of the writ petition on the ground of the judgment of the Division Bench of this Court in *Sardar Singh* (supra) having been upset by the Supreme Court in *DTC Vs. Sardar Singh* AIR 2004 SC 4161. Notice of the said application was issued to the workman. Vide order dated 24th April, 2007 the writ petition was permitted to be revived. The said order has attained finality.

2. WP(C) 5892/2005 was filed by the workman seeking mandamus commanding the DTC to reinstate him in service with full back wages and all consequential benefits upon dismissal by the Industrial Tribunal of the application aforesaid of the DTC under Section 33(2)(b) of the ID Act. Notice of the said writ petition was also issued and the said writ petition was ordered to be taken up together with WP(C) 974/2001. The fate of WP(C) 5892/2005 is dependent upon the outcome of the WP(C) 974/2001.

3. Though the application under Section 33(2)(b) was dismissed as far back as on 21st January, 2000 and more than 11 years have elapsed since then but neither do I find any order in either of the petitions of reinstatement of the workman nor do I find any application under Section 17B of the ID Act to have been preferred by the workman, though in the counter affidavit filed in WP(C)974/2001 a reference thereto has been made.

4. Thus what falls for adjudication is the validity of the order aforesaid of the Industrial Tribunal dismissing the application of the DTC under Section 33(2)(b) of the ID Act.

The counsels for the parties have been heard.

5. The workman was employed as a driver with the DTC and was charged with availing excess leave of 256 days without pay during the period from January, 1987 to June, 1988 and which was stated to be a misconduct within the meaning of para 4(ii) and 19(h) of the Standing Orders governing the conduct of the DTC employees. The inquiry conducted found the charge to be proved against the workman. The Disciplinary Authority of the DTC imposed the punishment of removal from service on the workman and filed the application aforesaid under Section 33(2)(b) of the ID Act.

6. The defence of the workman to the application under Section 33(2)(b) *inter alia* was that he had submitted the applications for leave and had not received any communication regarding disapproval or non-sanction of leave. Absence for 256 days was however not denied. It was further the defence of the workman that since for the period of absence he was marked as on “leave without pay”, the charge of unauthorized absence without leave could not be sustained.

7. The Industrial Tribunal framed a preliminary issue as to the validity of the departmental inquiry held prior to the order of removal of the workman from service. The parties led evidence on the said preliminary issue and vide order dated 17th May, 1999 the Industrial Tribunal held the departmental inquiry to be vitiated for the reason of the Inquiry Officer being not justified in proceeding *ex parte* against the workman. DTC having sought to prove the misconduct before the Industrial Tribunal, issues in that regard were framed.

8. Neither of the parties led any evidence thereafter and the Industrial Tribunal vide order dated 14th January, 2000 closed the evidence of the parties and adjourned the matter for consideration. Vide order dated 21st January, 2000 impugned in this petition, the application under Section 33(2)(b) was dismissed solely on the ground that the charge framed was not made out owing to the DTC in its record having treated the workman on leave without pay. It was held that by marking the workman on leave without pay, DTC had itself regularized and condoned the unauthorized absence of the workman. It was thus held that no case of misconduct was made out.

9. The Supreme Court in *Sardar Singh* (supra) on examination of the Standing Orders applicable to employees of DTC held that when an employee absents himself from duty even without sanctioned leave for long period, it prima facie shows lack of interest in work and the Disciplinary Authority of DTC, on the basis of the record, can come to a conclusion about the employee being habitually negligent in duty and having exhibited lack of interest in employer's work. It was further held that conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly when same is unauthorized 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 further held that para 4(ii) of the Standing Orders shows the seriousness attached to habitual absence. It was yet further held that treating absence as leave without pay for the purposes of maintaining correct record of service did not imply that DTC had condoned or waived the misconduct.

10. It would thus be seen that the order of the Industrial Tribunal cannot be sustained in the light of the judgment of the Supreme Court in *Sardar Singh* and owing to which judgment the writ petition was revived.

11. The counsel for the workman has however argued that the DTC in the present case has not challenged the order of the Tribunal holding the departmental inquiry to be vitiated; that DTC had failed to lead any evidence whatsoever on the aspect of misconduct and the Tribunal instead of dismissing/rejecting the application under Section 33(2)(b) on the ground of non prosecution erred in dismissing it on merits as aforesaid. He has further contended that the workman is now about 65 years of age and ought to be granted the relief for this reason only.

12. I do not find any merit in the contentions aforesaid. Non-challenge by DTC to the order of the Tribunal holding the departmental inquiry to be vitiated cannot come in the way of DTC challenging the final order rejecting the application. Even otherwise I find that even though the writ petition does not expressly seek the relief of setting aside of the earlier order of the Tribunal holding the departmental inquiry to be vitiated but in paras 12 and 13 and in

Grounds II and V thereof, has impugned the said finding of the tribunal also. It thus cannot be said that the DTC has not challenged the order of the Tribunal holding the departmental inquiry to be vitiated.

13. As far as the argument of the counsel for the workman of DTC having not led any evidence on the issue of misconduct and having not proved the misconduct before the Tribunal is concerned, a perusal of the record of the Tribunal requisitioned in this Court shows that at the stage of evidence on the preliminary issue on the validity of the inquiry itself, evidence on the aspect of misconduct was also led by the DTC and the witness of the DTC cross examined with respect thereto. Thus the entire record as to the charge of DTC against the workman of misconduct, was before the Industrial Tribunal. The Tribunal thus cannot be said to have erred in, having not dismissed the application for non prosecution and having decided the same on merits.

14. Even otherwise the pleadings in the application under Section 33(2)(b) did not controvert the factual position of the workman being absent. It was the defence of the workman that he had sent applications for leave and had not been communicated rejection thereof. The Supreme Court in ***Sardar Singh***

has held that once unauthorized absence is admitted, the burden is upon the employee / workman to prove that there was no negligence and/or lack of interest by placing relevant material. It cannot be lost sight of that not only the DTC but the workman also failed to lead any evidence before the Tribunal. Thus, in accordance with **Sardar Singh** it has to be held that in the face of admitted unauthorized absence, it was the workman who failed to lead any evidence.

15. I have, during the hearing itself, put to the counsel for the workman that, in any case, it is open to the workman, if aggrieved from the order of removal from service, to raise an industrial dispute. It is only in such a dispute that a complete adjudication can be undertaken and the scope of inquiry under Section 33(2)(b) in any case is limited. I have in **DTC Vs. Shyam Lal** ILR (2010) V Delhi 431 held that the scope of inquiry under Section 33(2)(b) is only to see whether any case of victimization is made out; if the workman has not pleaded a case of victimization owing to pendency of an earlier dispute or has not made out a case of action of which approval is sought having been taken against him to settle scores with him in the earlier

dispute or to derive unfair advantage in the earlier dispute , no further inquiry on the application under Section 33(2)(b) is necessary and the same is required to be allowed immediately.

16. A perusal of the reply of the workman to the application under Section 33(2)(b) in the present case does not show any such plea having been taken. Thus the application under Section 33(2)(b) was in any case required to be allowed immediately. The reasons given by the Industrial Tribunal in the present case in any case, as aforesaid, cannot stand owing to the dicta in *Sardar Singh*. If the workman otherwise intends to challenge the dismissal, it is always open to him to do so under Section 10 of the ID Act.

17. The counsel for the workman has sought to argue that it would be unfair to now ask the workman to raise the industrial dispute especially when he has already crossed the age of superannuation. I am however not swayed by the said argument because in any case I am intrigued by the workman in the present case having, as aforesaid, neither sought any order under Section 17B nor sought his interim reinstatement. All this suggests that the workman has been gainfully employed elsewhere.

18. WP(C) 974/2001 therefore succeeds and is allowed. The order dated 21st January, 2000 of the Industrial Tribunal rejecting the application of the petitioner DTC under Section 33(2)(b) is set aside/quashed and approval under Section 33(2)(b) is granted to the DTC to remove the workman from service.

19. Axiomatically WP(C)5892/2005 is dismissed. It is however clarified that the workman shall be entitled to raise an industrial dispute if so desires, in accordance with law. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

March 23, 2011
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