

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

+ **W.P. (C) No. 5344/2003**

Decided on: 11th December, 2012

D.T.C.

..... Petitioner

Through: Mr. Hanu Bhaskar, Adv.

versus

THE P.O., I.T. NO. II & ANR.

..... Respondents

Through: Mr. Anuj Aggarwal, Adv. for R-2.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J (ORAL)

1. By this petition the Petitioner challenges the order dated 19th September, 2002 whereby the approval application of the Petitioner under Section 33(2)(b) of the Industrial Disputes Act (in short the ID Act) was dismissed as the Petitioner failed to prove the alleged misconduct.

2. Learned counsel for the Petitioner contends that the decision of the learned Trial Court is contrary to the law laid down in *DTC. Vs. Sardar Singh (2004) 7 SCC 574* wherein it has been held that even if absence is treated as leave without pay the same is a misconduct. The learned Trial Court misdirected itself in passing the impugned award and the same is liable to be set aside and the matter be remanded back.

3. Learned counsel for the Respondent on the other hand contends that after the enquiry was held to be perverse no right accrued to the Petitioner to

prove the misconduct before the learned Trial Court and the learned Trial Court had no jurisdiction to take evidence as the scope of interference under Section 33(2)(b) ID Act is limited. Learned counsel for the Respondent has stated that absence from duty is not a misconduct and the employer is required to prove that the absence was willful and not for compelling circumstances. Reliance is placed on *Krushnakant B. Parmar Vs. Union of India (UOI) and Anr.* (2012) 3 SCC 178. Reliance is also placed on the order of this Court in the writ petition filed by the Respondent No.2 which was disposed of issuing a mandamus to the Petitioner herein to treat the Respondent as continuing in service with all consequential benefits vide order dated 9th September, 2003. In response learned counsel for the Petitioner points out that the order dated 9th September, 2003 in W.P.(C) 2300/2003 has been recalled by this Court on 28th September, 2007 and thus reliance of the learned counsel for the Respondent thereon is wholly unjustified.

4. I have heard learned counsel for the parties. Briefly the facts are that the Respondent No.2 was appointed as a driver with the Petitioner in the year 1979. Since the Respondent No.2 remained absent for 98 days from 1st February, 1990 to 31st December, 1990 without intimation and prior permission, a charge-sheet was issued to him on 3rd June, 1991 on the allegations that the Respondent No.2 was habitual in remaining absent and had no interest in performing the duties amounting to misconduct. An enquiry officer was appointed and the Respondent admitted the charge leveled against him before the enquiry officer and stated that he did not want to carry on with the enquiry any further. The enquiry officer found that 4

days leave had been sanctioned and the same was deducted and a finding was returned that the Respondent No.2 was absent unauthorizedly for 94 days. Pursuant to the decision of the enquiry officer, the disciplinary authority issued a show cause notice to the Respondent No.2 as to why he be not removed from services of the Corporation. Not satisfied from the explanation rendered by Respondent No.2 the disciplinary authority came to the conclusion of removing the workman from his services, also taking into consideration the 19 adverse entries against the Respondent No.2 including fatal accidents, injuries to the passengers and causing accidents with other buses as well. Pursuant to removal from services an application under Section 33(2)(b) of the ID Act was filed seeking approval of the order passed by the disciplinary authority. By the impugned award the application of the Petitioner was rejected. Hence the present petition.

5. In the approval application under Section 33(2)(b) ID Act a preliminary issue regarding legality and validity of the enquiry proceedings was framed which was decided against the Petitioner vide order dated 11th April, 2001. That order is not under challenge in the present petition. Subsequently, on the other issues i.e. whether the Respondent committed misconduct as mentioned in the petition under Section 33(2)(b) ID Act and whether the Petitioner remitted one month's salary at the time of removal of the Respondent No.2 from his services, on the issue No.1 the Trial Court held that availing of leave without pay is not a misconduct and hence the Petitioner has failed to prove the alleged misconduct.

6. In *Delhi Transport Corporation Vs. Sardar Singh* (2004) 7 SCC 574 it was held:

“9. When an employee absents himself from duty, even without sanctioned leave for a very long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Orders 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 employees concerned were remaining absent for long periods which affects the work of the employer and the employee concerned 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 generalisation. But at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings.

10. Great emphasis was laid by learned counsel for the respondent employee on the absence being treated as leave without pay. As was observed by this Court in *State of M.P. v. Harihar Gopal* [(1969) 3 SLR 274 (SC)] by a three-Judge Bench of this Court, even when an order is passed for treating absence as leave without pay after passing an order of termination, that is, for the purpose of maintaining correct record of service. The charge in that case was, as in the present case, absence without obtaining leave in advance. The conduct of the employees in this case is nothing but irresponsible in the extreme and can hardly be justified. The charge in this case was misconduct by absence. In view of the governing Standing Orders unauthorised leave can be treated as misconduct.

11. Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when same is unauthorised. Burden is on the

employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials. Clause (ii) of para 4 of the Standing Orders shows the seriousness attached to habitual absence. In clause (i) thereof, there is requirement of prior permission. Only exception made is in case of sudden illness. There also conditions are stipulated, non-observance of which renders the absence unauthorised.

12. The Tribunal proceeded in all these cases on the basis as if the leave was sanctioned because of the noted leave without pay. Treating as leave without pay is not same as sanctioned or approved leave.

13. That being the factual position, the Tribunal was not justified in refusing to accord approval to the order of dismissal/removal as passed by the employer. The learned Single Judge was justified in holding that the employer was justified in passing the order of termination/removal. The Division Bench unfortunately did not keep these aspects in view and reversed the view of the learned Single Judge.

7. No doubt the disciplinary authority has to prove that the absence was willful and in the absence of such a finding the absence will not amount to misconduct. However, the willfulness of the absence can be proved on the basis of leave applications if at all filed by the employee and other material on record. In the case in hand, the learned Trial Court failed to consider the entire material and only held that since the absence has been treated as leave without pay, the same is not a misconduct.

8. Further, with regard to the jurisdiction of the Court to have examined the issue of misconduct independently after coming to the conclusion that the enquiry was not proper, in *Engineering Laghu Udyog Employees' Union*

Vs. The Judge, Labour Court and Industrial Tribunal and Anr. (2003) 12 SCC 1, it was held:

“9. It is not in dispute that in a proceeding for obtaining approval of an order of dismissal from the Labour Court or the Industrial Tribunal, as the case may be, in terms of Section 33(2)(b) of the Act or where a reference has been made under Section 10 thereof, if it is found that an inquiry has been conducted in violation of the principles of natural justice, the employer is entitled to raise the said question in its written statement by way of preliminary issues and pray for grant of such an opportunity to prove the charges levelled against him.

10. In *Workmen v. Motipur Sugar Factory (P) Ltd.* [*Workmen v. Motipur Sugar Factory (P) Ltd.*, AIR 1965 SC 1803 : (1965) 3 SCR 588] this Court held: (AIR p. 1808, para 11)

“11. It is now well settled by a number of decisions of this Court that where an employer has failed to make an enquiry before dismissing or discharging a workman it is open to him to justify the action before the Tribunal by leading all relevant evidence before it. In such a case the employer would not have the benefit which he had in cases where domestic inquiries have been held. The entire matter would be open before the Tribunal which will have jurisdiction not only to go into the limited questions open to a Tribunal where domestic inquiry has been properly held (see *Indian Iron & Steel Co. Ltd. v. Workmen* [AIR 1958 SC 130 : 1958 SCR 667]) but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. We may in this connection refer to *Sasa Musa Sugar Works (P) Ltd. v. Shobрати Khan* [AIR 1959 SC 923 : 1959 Supp (2) SCR 836] , *Phulbari Tea Estate v. Workmen* [AIR 1959 SC 1111 : (1960) 1 SCR 32] and *Punjab National Bank Ltd. v. All India Punjab National Bank Employees' Federation* [AIR 1960 SC 160 : (1960) 1 SCR 806] . These three cases were further considered

by this Court in *Bharat Sugar Mills Ltd. v. Jai Singh* [(1962) 3 SCR 684 : (1961) 2 LLJ 644] and reference was also made to the decision of the Labour Appellate Tribunal in *Ram Swarath Sinha v. Belsund Sugar Co.* [1954 LAC 697] It was pointed out that ‘the important effect of omission to hold an enquiry was merely this: that the Tribunal would not have to consider only whether there was a prima facie case but would decide for itself on the evidence adduced whether the charges have really been made out’. It is true that three of these cases, except *Phulbari Tea Estate case* [AIR 1959 SC 1111 : (1960) 1 SCR 32] , were on applications under Section 33 of the Industrial Disputes Act, 1947. But in principle we see no difference whether the matter comes before the Tribunal for approval under Section 33 or on a reference under Section 10 of the Industrial Disputes Act, 1947. In either case if the enquiry is defective or if no enquiry has been held as required by Standing Orders, the entire case would be open before the Tribunal and the employer would have to justify on facts as well that its order of dismissal or discharge was proper. *Phulbari Tea Estate case* [AIR 1959 SC 1111 : (1960) 1 SCR 32] , was on a reference under Section 10, and the same principle was applied there also, the only difference being that in that case there was an enquiry though it was defective. A defective enquiry in our opinion stands on the same footing as no enquiry and in either case the Tribunal would have jurisdiction to go into the facts and the employer would have to satisfy the Tribunal that on facts the order of dismissal or discharge was proper.”

The employer, thus, has got a right to adduce evidence before the Tribunal justifying its action, even where no domestic inquiry whatsoever has been held.

11. Yet again in *Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.* [(1973) 1 SCC 813 : 1973 SCC (L&S) 341 : (1973) 3 SCR 587] this Court while interpreting the provision

of Section 11-A of the Act held that in terms thereof, the management need not necessarily rely on the materials on record as while introducing Section 11-A of the Act, the legislature must have been aware of the decisions of this Court which are operating in the field for a long time. This Court enunciated several principles bearing on the subject and, therefore, it held that it was difficult to accept that the expression “materials on record”, used in the proviso to Section 11-A was set at naught. The Court formulated the propositions of law emerging from the decisions rendered by this Court, the relevant portions whereof are as under: (SCC pp. 827-28, para 32)

“32. From those decisions, the following principles broadly emerge:

(1)-(3) * * *

(4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.

(5) * * *

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

(7) It has never been recognised that the Tribunal should straight away, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) * * *”

Even in *Firestone case* [(1973) 1 SCC 813 : 1973 SCC (L&S) 341 : (1973) 3 SCR 587] no distinction, thus, has been made between a defective inquiry and no inquiry.”

9. Thus, in view of the legal position as laid down in *DTC Vs. Sardar Singh* (supra) the impugned award is set aside. The matter is remanded back to the learned Labour Court for deciding the matter afresh. The parties are directed to appear before the learned Labour Court on 8th January, 2013.

10. Petition is disposed of.

(MUKTA GUPTA)

DECEMBER 11, 2012

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