

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

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Reserved on: 6th September, 2012

Decided on: 17th September, 2012

+ **W.P.(C) 2255/2004 & CM Nos. 2066/2004 & 5563/2010**

D.T.C.

..... Petitioner

Through: Mr. Uday N. Tiwary, Advocate.

versus

BRAHAM KUMAR

..... Respondent

Through: Mr. Anjum Kumar Singh, Advocate.

AND

+ **W.P.(C) 19103/2005 & CM No.12429/2005**

D.T.C. THRU REGIONAL MANAGER

..... Petitioner

Through: Mr. Uday N. Tiwary, Advocate.

versus

BRAHAM KUMAR

..... Respondent

Through: Mr. Anjum Kumar Singh, Advocate.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. These petitions can be disposed of by a common order as they both relate to the dismissal of the Respondent by the Petitioner. In WP(C) No. 2255/2004 the Petitioner assails the order dated 27th May, 2003 passed by the learned Trial Court whereas in WP(C) No.19103/2005 the Petitioner assails the award dated 18th September, 2004 passed by by the learned Trial Court whereby the termination of the Respondent was held to be illegal and thus he was directed to be reinstated with continuity of service, full back

wages and all consequential benefits from the date of is illegal removal from the service.

2. Learned counsel for the Petitioner contends that the allegations against the Respondent are serious in nature regarding embezzlement of the money taken from 79 passengers and not issuing them tickets. At the time of search 10 passengers were found without ticket. Vide the impugned order dated 27th May, 2003 the approval application of the Petitioner under Section 33 (2) (b) ID Act was rejected merely on the ground that the passengers witnesses were not examined. Though the Trial Court took note of the decision of the Hon'ble Supreme Court in *State of Haryana and another vs. Rattan Singh, 1977 (2) SCC 491* but held that the Petitioner has failed to establish from the judgment of the Hon'ble Supreme Court that the Hon'ble Supreme Court was of the view that the passengers statement was not required. Further the Petitioner failed to show any reason for not producing any primary evidence in the form of passengers/Complainant, thus disentitling it to lead evidence of checking staff. Reliance is also placed on *Kishori Lal vs. DTC, LPA No. 747/2010* decided on 11th March, 2001. Vide the impugned award dated 18th September, 2004 the learned Trial Court allowed the reference in ID No. 290/1996 holding that since the approval application of the Management under Section 33 (2) (b) of the ID Act in OP No. 57/93 was dismissed the workman is deemed to continue in service and is entitled to get full back wages in view of the decision of *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. vs. Ram Gopal Verma and others, AIR 2002 SC 643*. It is contended that the impugned award dated 18th September, 2004 is ex-facie illegal as there is no res-judicata in proceedings under the ID Act. Reliance is placed on *DTC vs. Gyan Chand (ex-conductor), W.P.*

(C) No. 10965-67/2005.

3. Learned counsel for the Respondent on the other hand contends that the learned Trial Court rightly applied the decision of *State of Haryana vs. Rattan Singh* (supra) as the Petitioner did not lead any other evidence to substantiate the alleged misconduct of the Respondent. The inquiry having been held to be not fair and without any substantial evidence on record adduced by the Petitioner the order of dismissal could not be upheld and thus the learned Trial Court rightly directed reinstatement with continuity of services, back wages and all other consequential benefits.

4. I have heard learned counsel for the parties.

5. The facts in nutshell are that the Respondent was appointed as a Conductor with the Petitioner on 21st July, 1983. On 7th November, 1991 the checking staff found the Respondent not issuing the tickets to 79 passengers after collecting due fare from them and non-completion of bus from starting terminal point. On 18th November, 1991 the Respondent was served with the charge sheet for committing the aforesaid irregularity which amounted to misconduct under Sections 19 (b), (f), (h) and (m) of the Standing Orders governing the conduct of DTC employees. On an inquiry being conducted the charges were found proved. A show cause notice was served on the Respondent as to why he be not removed from the services of the Corporation to which the Respondent filed a reply. Finally on 2nd February, 1993 the Respondent was removed from the services as the reply was not found satisfactory. An application under Section 33 (2) (b) of the ID Act was filed by the Petitioner before the Industrial Trial Court after remitting one month wages. The same was registered as OP No. 57/93. A preliminary issue was framed as to whether the inquiry was legal and valid and in

accordance with the principles of natural justice. Vide order dated 7th August, 2002 the issue of validity of inquiry was decided against the Petitioner which order has not been challenged before this Court. In OP 57/93 on the basis of the pleadings following issues were framed:

- “1. Whether the Respondent committed the misconduct as alleged against him?
2. Whether the Petitioner remitted full one month’s wage to the Respondent at the time of dismissal of the service?
3. Relief.”

6. As regards the Issue No. 1 the Petitioner produced Shri R.K. Sharma in the witness box as AW1 who filed his affidavit and exhibited documents Ex. AW1/2 to Ex. AW1/5. The learned Trial Court on the basis that AW1 was not an eye witness and did not see the alleged misconduct by the Respondent and also that the passenger witnesses, which were the primary evidence, were not examined held that the Petitioner failed to show any reason for not producing the primary evidence in the present case nor any request is made which makes the Petitioner disentitle to lead evidence of checking staff and thus the Petitioner has failed to prove the alleged misconduct. This finding of the learned Trial Court is wholly erroneous. Though the decision in *State of Haryana and others vs. Rattan Singh* (supra) was pointed out to the learned Trial Court but the learned Trial Court had failed to take notice thereof. Their Lordships in the said decision held:

- “4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is

true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. However, the courts below mis-directed themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The 'residuum' rule to which counsel for the respondent referred, based upon certain passengers from American jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence not in the sense of the technical rules governing regular court proceedings but in a fair common-sense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the flying squad, is some evidence which has relevance to the charge leveled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground."

7. In the present case a perusal of the Trial Court record show that AW1 Shri R.K. Sharma stated in his affidavit that he was working as Assistant Vigilance Inspector. On 7th November, 1991 when he along with Raj Singh, Kanhya Lal, S.N. Mittal ATI and S.K. Tyagi, ATI was on duty of checking.

The bus was checked at Gurgaon at 20.45 hours. Though the workman had taken fare from the 79 passengers but he did not issue tickets to them and when confronted he admitted his fault and surrendered unpunched tickets to them. The statements of the passengers were recorded which were signed by the Respondent as well. He also identified the signatures of his colleague on the challan. The copies of the bills, reports, challan, unpunched tickets were exhibited as Ex. AW1/1 to Ex. AW1/5. In the cross-examination, this witness stated that he did not check the cash with the conductor at the time of checking and the Respondent did not receive fare in his presence. On the basis of this statement and the fact that the passengers witnesses, which were primary witnesses, were not examined the Trial Court came to the conclusion that there was no evidence to prove the misconduct and hence dismissed the approval application of the Petitioner. This decision of the learned Trial Court is contrary to the law laid down by the Hon'ble Supreme Court in *State of Haryana vs. Rattan Singh* (supra). Thus, the same is liable to be set aside. It is ordered accordingly.

8. As regards the impugned order dated 18th September, 2005 it may be noted that the learned Trial Court applied the principle of Res judicata in view of the dismissal of the approval application and decided the issue against the Petitioner. This is also contrary to the law laid down by the Hon'ble Supreme Court in *M/s G. Mckenzie and Co. Ltd. vs. Its workmen and others*, AIR 1959 SC 389 wherein it was held that a finding in an inquiry under Section 33 (2) (b) of the ID Act does not operate as res judicata under a proceeding under Section 10 of the ID Act. The report reads:-

“16. As to the applicability of the principle of res judicata the argument raised by counsel for respondents was that the

findings of the State Industrial Tribunal in proceedings under section 33 of the Act which were confirmed by the Labour Appellate Tribunal barred the right of the management of the appellant company to start a fresh enquiry in respect of the same incident which formed the subject matter of the previous enquiry. There is no force in this contention, which seems to be based on a misapprehension as to the nature and scope of proceedings under section 33. That section does not confer any jurisdiction on a Tribunal to adjudicate on a dispute but it merely empowers the Tribunal to give or withhold permission to the employer during the pendency of an industrial dispute to discharge or punish a workman concerned in the industrial dispute. And in deciding whether permission should or should not be given, the Industrial Tribunal is not to act as a reviewing tribunal against the decision of the management but to see that before it lifts the ban against the discharge or punishment of the workmen the employer makes out a prima facie case. The object of the section is to protect the workmen in pending industrial disputes against intimidation or victimisation. As said above principles governing the giving of permission in such cases are that the employer is not acting mala fide, is not resorting to any unfair labour practice, intimidation or victimisation and there is no basic error or contravention of the principles of natural justice. Therefore when the Tribunal gives or refuses permission it is not adjudicating an industrial dispute, its function is to prevent victimisation of a workman for having raised an industrial dispute. The nature and scope of proceedings under section 33 shows that removing or refusing to remove the ban on punishment or dismissal of workmen does not bar the raising of an industrial dispute when as a result of the permission of the Industrial Tribunal the employer dismisses or punishes the workmen. *Atherton West & Co. Ltd. v. Suti Mill Mazdoor Union* (1953) ILLJ321SC , *Lakshmi Devi Sugar Mills v. Pt. Ram Sarup* (1957) ILLJ17SC .

17. In the *Automobile Products of India Ltd. v. Rukmaji Bala* (1955) ILLJ 346 SC, Das J., (as he then was) said at p. 1256:-

"The purpose of these two sections (section 33 of the Industrial Disputes Act and section 22 of the Industrial Disputes (Appellate Tribunal) Act) being to determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under these two sections is to accord or withhold permission".

18. As the purpose of section 33 of the Act is merely to give or withhold permission and not to adjudicate upon an industrial dispute, any finding under section 33 would not operate as res judicata and bar the raising of an industrial dispute nor is there anything in the section itself or in the findings arrived at by the Industrial Tribunal in section 33 proceedings dated June 6, 1954, or of the Labour Appellate Tribunal dated March 29, 1955, which would debar the appellant company from holding the second enquiry or dismissing the workmen provided the principles above set out are complied with."

9. It is thus evident that the impugned award dated 18th September, 2004 is also contrary to the law laid down by the Hon'ble Supreme Court and thus the same is also set aside. The matters are remanded back to the learned Trial Court for reconsideration in the light of the law laid down. The writ petitions and applications are disposed of accordingly.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 17, 2012
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