

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

+ W.P.(C) 3750/2004 and CM APPL Nos. 3066/2004 and 9633/2012

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Reserved on: 5th September, 2012
Decided on: 18th December, 2012

D.T.C. Petitioner
Through: Mr. Sarfaraz Khan and Mr. Mirza
Amir Baig, Advocates.
versus

RAJ KUMAR & ORS. Respondents
Through: Ms. Kittu Bajaj, Advocate.

+ W.P.(C) 16896/2006 and CM APPL NO. 9631/2012

D.T.C. Petitioner
Through: Mr. Sarfaraz Khan and Mr. Mirza
Amir Baig, Advocates.
versus

RAJ KUMAR GUPTA & ANR. Respondent
Through: Ms. Kittu Bajaj, Advocate.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. These writ petitions are being disposed of by this common judgment as the facts in both the petitions are common and the second one is a sequel to the first one. Respondent No.1 Raj Kumar was working as a conductor with the Petitioner during the period from January 1992 to May 1992. He unauthorizedly absented from duty for a total period of 66 days. Consequently a charge-sheet dated 21st July, 1992 was issued to him on

account of his unauthorized absence from duty. The enquiry officer held that the charges were proved against Respondent No.1. On 8th April, 2002 the Management issued a show cause notice to Respondent No.1 as to why he be not removed from services and finally on 22nd October, 1992 the punishment of removal from service was imposed on the Respondent No.1. Due to pendency of the disputes relating to the general demands, the Petitioner filed an application before the Industrial Tribunal under Section 33(2)(b) of the Industrial Disputes Act, 1947 (in short the ID Act) for seeking approval of its action vide OP No. 501/1992. Learned Tribunal framed the preliminary issue on the validity of the enquiry. On 25th September, 2002 the learned Tribunal held that the conclusion drawn by the enquiry officer that Respondent No.1 was guilty was without any basis, contrary to the record available before him and violative of the principles of natural justice. Thus, the enquiry proceedings were held to be vitiated. This order dated 25th September, 2002 of the Tribunal has not been challenged by the Petitioner. Thereafter, the learned Trial Court on the basis of the pleadings of the parties framed the following three issues:

“(i) whether the Respondent is guilty for misconduct as alleged? OPA

(ii) whether the applicant has remitted one month’s salary as per provisions of Section 33(2)(b) of the ID Act? OPA

(iii) Relief.”

2. The Petitioner and Respondent No.1 led their evidence and on the basis of the evidence adduced before it, the learned Tribunal vide the impugned order dated 27th March, 2003 in WP(C) No. 3750/2004 came to the conclusion that the Petitioner has failed to prove the alleged misconduct

of Respondent No.1, and thus the application of the Petitioner under Section 33(2)(b) of the ID Act was dismissed. In the meantime Respondent No.1 raised an industrial dispute challenging the removal from service on which a reference was made by the appropriate Government on the following terms:

“whether removal of Shri Raj Kumar Gupta from services is illegal and unjustified, and if so, to what relief is he entitled and what directions are necessary in this respect?”.

3. The said reference was registered as ID No. 400/93 wherein also on the basis of pleadings of parties, the following issues were framed on 13th January, 1995 (i) whether the domestic enquiry conducted by the management was fair and proper one? (ii) whether services of the workmen have been terminated illegally and unjustifiably by the management? (iii) Relief. Issue No. (i) was treated as the preliminary issue and the parties were directed to lead their evidence. Vide order dated 25th November, 2004 the Tribunal held that the enquiry was conducted in one day and no opportunity was granted to Respondent No.1 to prove his defence and thus in view of the illegality and non-adherence to the principles of natural justice, the enquiry stood vitiated, which is one of the orders impugned in WPC 16896/2006. Further opportunities were granted to the Petitioner to prove the misconduct before the Tribunal, however the Petitioner failed to adduce any evidence and thus the Court closed the management evidence. The Petitioner also did not place any evidence on record regarding the gainful employment of Respondent No.1. The Petitioner having failed to prove the misconduct of Respondent No.1, it was held that the services of Respondent No.1 were terminated illegally and/ or unjustifiably and thus he was entitled to the relief of reinstatement, 60% back wages, continuity of service and all other legal

benefits. This order dated 5th July, 2005 is the second order impugned in WPC 16896/2006.

4. Learned counsel for the Petitioner challenging the order dated 27th March, 2003 contends that by the said impugned order it was held that availing of leave without pay does not amount to misconduct which is contrary to the decision of the Supreme Court in *DTC Vs. Sardar Singh AIR 2004 SC 4161*. The Petitioner having proved the misconduct by leading evidence, this order be set aside or be remanded back in terms of the decision of this Court in *DTC Vs. Satish Kumar in WPC 3857/2003 decided on 11th December, 2007*. Challenging the impugned order dated 25th November, 2004 in WPC 16896/2006 it is contended that the finding of the learned Tribunal that no documents were supplied to the delinquent workman during the enquiry, no proper examination of the witnesses was carried out during the enquiry proceedings and that the enquiry officer did not grant opportunity to examine witnesses to prove the defence of the workman are wholly erroneous & contrary to the evidence on record. The workman did not avail the opportunity to cross-examine the management witness. On specifically opportunity being granted to cross-examine the ATI Inder Singh, the Respondent No.1 stated that he did not want to ask any questions. He further stated that his reply to the charge-sheet be treated as his statement. He did not produce any defence evidence. Further, while issuing charge-sheet, specific opportunity was given to him to inspect the records. Thus, the findings of the learned Tribunal are contrary to the record. There is no violation of the principles of natural justice and hence the impugned order dated 25th November, 2004 is required to be set aside.

5. As regards the impugned order dated 5th July, 2005 it is contended that since the Petitioner did not lead any evidence despite sufficient opportunity before the Tribunal after the enquiry was held to be vitiated, the learned Tribunal held that the termination was illegal. Since no evidence was led, the Petitioner may not have any case on this count, however the impugned order dated 27th March, 2003 and 25th November, 2004 are required to be set aside and on their being set aside the matter is required to be remanded back to the learned Trial Court. Reliance is placed on *Surender Pal Vs. Management of Delhi Transport Corporation 152 (2008) DLT 671 DB*; *Shri Kishan Singh Vs. Delhi Transport Corporation 2007 (140) DLT 300*.

6. Learned counsel for the Respondent on the other hand contends that in WPC No. 3750/2004 since the order dated 25th September, 2002 holding that the enquiry was vitiated has not been challenged, the Petitioner has no case seeking setting aside of the order dated 27th March, 2003 declining to grant approval to the Petitioner. When the approval is refused, the order of dismissal would be void ab-initio, as if not passed in view of *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Shri Ram Gopal Sharma & Ors. AIR 2002 SC 643* and thus no cause for adjudication would be left in the industrial dispute 400/93. Further leave without pay is of two kinds i.e. sanctioned and unsanctioned. It is admitted by the Petitioner that Respondent No.1 had given leave applications for all the 66 days. Whether the leave without pay is sanctioned or not would not be known to Respondent No.1, as no communication was made in this regard. Respondent No.1 was not aware that no sanction was granted and thus leave without pay was termed as unauthorized. The decision in the case of *DTC*

Vs. Sardar Singh (supra) has no application as the same cannot be generalized to every fact situation. Once the disciplinary enquiry was held to be vitiated vide order dated 25th September, 1992 and an enquiry was conducted by the Tribunal, the earlier disciplinary enquiry gets washed out and only the enquiry conducted by the Tribunal can be looked into. In the said enquiry before the Tribunal only one witness D.K. Shukla, the disciplinary authority was examined, who was not the author of the enquiry report and any of the documents. Further no leave record was produced in the Tribunal. Reliance is placed on *Cholan Roadways Ltd. Vs. G.Thirugnanasambandam* AIR 2005 SC 570 to contend that when a document is produced in a Court or a Tribunal, it has necessarily to be a genuine document and its contents to be true. If the entries are challenged, the other side must prove each of such entries by producing the books. Reliance is placed on *Workmen of Messrs Firestone Tyre and Rubber company of India (P.) Ltd. Vs. Management & Ors.* (1973) 3 SCR 587 to contend that the decision of the Tribunal is within its jurisdiction as laid down by the Hon'ble Supreme court and thus does not warrant interference by this Court. The documents filed on record do not per se prove the charges. The Petitioner never intimated that the leaves were sanctioned or not, and thus there is no merit in the contention of the learned counsel for the Petitioner. Hence the Petitions be dismissed.

7. I have heard learned counsel for the parties. The Hon'ble Supreme Court in *Workmen of Messrs Firestone Tyre and Rubber company of India (P.) Ltd.* (supra) laid down the following principles governing the

jurisdiction of Tribunal when adjudicating disputes relating to dismissal or discharge.

“We have exhaustively referred to the various decisions of this Court, as they give a clear picture of the principles governing the jurisdiction of the Tribunal when adjudicating disputes relating to dismissal or discharge.

From those decisions, the following principles broadly emerge :-

- (1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.
- (2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.
- (3) When a proper enquiry has been held by an employer, and the finding of misconduct is plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fide.
- (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) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a *prima facie* case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(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 straightaway, 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) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in *The Management of Panitole Tea Estate v. The Workmen* [1971] (1) S.C.R. 742, within the judicial decision of a Labour Court or Tribunal.”

8. In *Workmen of Messrs Firestone Tyre and Rubber company of India (P.) Ltd.* Case, it was further held that while deciding an application for permission under 33(1) or approval under 33(2) of the ID Act the Tribunal is exercising only a very limited jurisdiction. An order of dismissal or discharge passed even with the permission or approval of the Tribunal can form the subject of a dispute and as such referred for adjudication. Their Lordships held:

“It is to be noted that an application made, by an employer Under Section 33(1) for permission or 33(2) for approval has still to be dealt with according to the principles laid down by this Court in its various decisions. No change has been effected in that section by the Amendment Act. It has been held by this Court that even in cases where no enquiry has been held by an employer before passing an order of dismissal or discharge, it is open to him to adduce evidence for the first time before the Tribunal. Though the Tribunal is exercising only a very limited jurisdiction under this section, nevertheless, it would have applied its mind before giving permission or approval. Section 33 only imposes a ban. An order of dismissal or discharge passed even with the permission or approval of the Tribunal can form the subject of a dispute and as such referred for adjudication. Quite naturally, when the dispute is being adjudicated, the employer will rely upon the proceedings that were already held before a Tribunal Under Section 33. They will form part of the materials on record before the Tribunal. The contention of Mr. Deshmukh that if no enquiry is held, the

order of dismissal will have to be set aside, if accented, will lead to very incongruous results. The Tribunal would have allowed an employer to adduce evidence before it in proceedings Under Section 33 for the first time even though no domestic enquiry had been held. If it is held that another Tribunal which adjudicates the main dispute, has to ignore those proceedings and straightaway order reinstatement on the ground that no domestic enquiry had been held by an employer, it will lead to very startling results. Therefore, an attempt must be made to construe Section 11A in a reasonable manner. This is another reason for holding that the right to adduce evidence for the first time recognized in an employer, has not been disturbed by Section 11A.”

9. In the facts of the present case, it would be noted that though in OP 501/92 the order dated 25th September, 2002 holding the enquiry to be vitiated was not challenged, however the Petitioner and the Respondent adduced evidence before the Tribunal. The only reason why the learned Tribunal came to the conclusion that the misconduct was not proved was for the reason that the period of absence of Respondent No.1 was treated as period of leave without pay which report had been prepared even prior to issuance of charge-sheet. It was held that availing of leave without pay does not amount to misconduct, and thus the Petitioner had failed to prove the alleged misconduct of the Respondent. This finding of the learned Tribunal is contrary to the law laid down in *DTC Vs. Sardar Singh* (supra) wherein it was held:

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

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

10. As held by the Hon’ble Supreme Court while interpreting Clause (ii) of para 4 of the Standing Order of the Petitioner that seriousness is attached to the habitual absence and the burden is on the employee who claims that there was no negligence by placing relevant material. In the case in hand, Respondent No.1 has placed nothing on record to show that his absence from duty was justified. I find no merit in the contention of learned counsel for Respondent No.1 that there was no way that Respondent No.1 would know whether the leave has been sanctioned or not. Along with the charge-sheet all the documents were supplied to Respondent No.1. Further, the

Respondent No.1 was given opportunity to inspect the records which Respondent No.1 did not avail. As held by the Supreme Court, the onus was on Respondent No.1 to discharge that the absence was for a genuine reason and the said onus having not been discharged, the impugned order dated 27th March, 2003 cannot be sustained and is set aside accordingly.

11. In W.P.(C) No. 16896/2006 vide the order dated 25th November, 2004 the enquiry was held to be vitiated. The reasons for holding the enquiry to be vitiated was that there was no proper examination of the witnesses during the enquiry proceedings, no document was supplied to the delinquent workman and the enquiry officer had not granted opportunity to examine witnesses to prove the defence of the workman. I have gone through the material placed in ID No. 400/93. A perusal of the evidence in inquiry shows that Respondent No.1 never disputed that he was not aware that his leave without pay has not been sanctioned. His entire grievance was against Shri Inder Singh Mann who was the presenting officer. The witness examined by the Petitioner was the disciplinary authority who issued the show cause notice pursuant to the enquiry report and directed removal. All documents had been examined by him. From a perusal of the cross-examination, it is evident that the genuineness of the documents is not disputed. Respondent No.1 filed an application for production of documents by the management which application was decided by the learned Tribunal vide order dated 6th August, 1999 by a detailed order and it was held that the workman was seeking direction to the management to file the same documents filing of which documents was objected by the management. The said documents were already exhibited on 22nd January, 1999 and thus there

was no need for the said documents again. As regards the letter dated 14th August 1992 the same was allowed as the same was relevant to the preliminary issue. Opportunities were given both to the Petitioner and the Respondent to file affidavits. Hence to my mind the finding of the learned Tribunal in the order dated 25th November, 2004 holding that the enquiry was vitiated is contrary to the record. Further the award dated 5th July, 2005 is consequential to the order dated 25th November, 2004 as no evidence was led by the Petitioner. Since the Petitioner is able to satisfy on the basis of evidence led that the enquiry was not vitiated and that there was evidence to prove, the award dated 5th July, 2005 is also liable to be set aside and it is ordered accordingly.

12. In view of the aforesaid discussion, the impugned orders/awards are set aside and the matter is remanded back to the learned Tribunal to decide the OP No. 501/1992 and ID No. 400/93 afresh in view of the law laid down by the Supreme Court.

13. Both the petitions and applications are disposed of.

(MUKTA GUPTA)
JUDGE

DECEMBER 18, 2012
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