

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

Date of decision: 30th March, 2012

+ LPA NO.132/2012

% DELHI TRANSPORT CORPORATION Appellant
Through: Mrs. Avnish Ahlawat & Ms. Latika
Sharma, Advs.

Versus

SH. GURCHARAN SINGH Respondent
Through: Mr. Vinay Sabharwal & Mr. Rakesh
Kumar, Advs.

AND

+ LPA NO.134/2012

% DELHI TRANSPORT CORPORATION Appellant

Through: Mrs. Avnish Ahlawat & Ms. Latika
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Versus

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CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

RAJIV SAHAI ENDLAW, J.

1. These two intra-court appeals impugn the orders both dated 17.01.2012 of the learned Single Judge dismissing W.P.(C)

No.17157/2005 and W.P.(C) No.6173/2003 respectively preferred by the appellant DTC.

2. The respondent workman was employed as a Driver with the appellant DTC since 03.02.1984. He was on 17.07.1993 charged for unauthorized absence from 11.01.1993 to 15.02.1993. An inquiry was conducted and the respondent workman removed from service on 22.11.1993.

3. The appellant applied under Section 33(2)(b) of the Industrial Disputes Act, 1947 for approval of its action of removal of the respondent workman from service. The said application was dismissed by the Industrial Adjudicator vide order dated 21.08.2002 and impugning which W.P.(C) No.6173/2003 (supra) was filed by the appellant DTC. Though the appellant DTC in the said writ petition had claimed interim stay of the order dated 21.08.2002 of the Industrial Adjudicator but the said application was dismissed on 24.09.2003.

4. However since inspite of dismissal on 21.08.2002 of the application under Section 33(2)(b) of the Act and notwithstanding the dismissal on 24.09.2003 of the application for stay of the said order, the appellant DTC did not take the respondent workman back into duty and also did not pay any wages to him, the respondent workman applied to the Industrial Adjudicator under Section 33C(2) of the Act. The Industrial Adjudicator

vide order dated 10.03.2004 directed the appellant DTC to pay the admitted amount then due of ₹5,63,100/- to the respondent workman. The appellant DTC failed to pay the said amount and the Industrial Adjudicator vide order dated 12.07.2004 directed recovery thereof by attachment of the bank account of the appellant DTC. The appellant DTC then filed W.P.(C) No.17157/2005 (supra) impugning the said order.

5. The respondent workman applied under Section 17B of the I.D. Act in W.P.(C) No.6173/2003. The said application of the respondent workman was allowed by the learned Single Judge on 09.09.2011 by directing payment to the respondent workman with effect from 01.05.2008. The appellant DTC sought clarification of the said order, pleading that the age of retirement of a driver in DTC was 55 years and thus payment under Section 17B of the I.D. Act could be only till the date the respondent workman attained the age of 55 years and not beyond that. However in the order dated 29.11.2011 on the said application; it is recorded that the counsels for the parties had agreed that this controversy be kept open to be resolved at an appropriate stage and the appellant DTC, without prejudice to its said contention, pays 17B wages to the respondent workman till he attained the age of 60 years. The said order is as under:

“With the consent of counsel for the parties this application filed by the petitioner-management is disposed of by making a clarification that the respondent-workman shall get the benefit of payment of wages as ordered by this Court on

9th September, 2011 with effect from 1st May, 2008 till the date of his reaching the age of 60 years, which age according to the case of the respondent-workman is correct age of his superannuation though petitioner claims the same to be 55. It is agreed by counsel for the parties that this Controversy can be kept open to be resolved at an appropriate stage in the matter and today without prejudice to the contentions of the parties in this regard, respondent-workman can be ordered to receive his wages from 1st May, 2008 till that he attained the age of 60 years.

It is also agreed that the respondent-workman shall give an undertaking by filing his affidavit that he shall refund the wages which he shall be getting pursuant to today's consent clarificatory order, in the event of this Court accepting the position that respondent-workman could not have got wages beyond the age of 55 years even if the petitioner finally loses in the matter. Necessary undertaking be filed by the respondent-workman within three weeks from today and thereafter the petitioner-management shall make the payment to him within three weeks. This application is disposed of accordingly."

6. Both the writ petitions were thereafter listed before the learned Single Judge on 17.01.2012. The appellant DTC had not complied with the order in W.P.(C) No.6173/2003 under Section 17B of the I.D. Act. The learned Single Judge being of the view that the appellant DTC being in non compliance of the direction of the Court (under Section 17B of the Act) did not deserve to be heard in the writ petition in which Rule had not been issued till then, dismissed W.P.(C) No.6173/2003 for disobedience by the appellant / petitioner DTC of the Court's order.

7. As far as W.P.(C) No.17157/2005 against the order of the Industrial Adjudicator under Section 33C(2) of the Act was concerned, the Industrial Adjudicator held that since no interim stay of the order dated 21.08.2002 of the Industrial Adjudicator dismissing the application under Section 33C(2) of the Act had been granted in W.P.(C) No.6173/2003, no fault could be found in the said order inasmuch as once approval application under Section 33(2)(b) of the Act is rejected, the legal consequence is that the workman is deemed to be in service and is entitled to his wages. Reliance is placed on *M.D., Tamil Nadu State Transport Corporation Vs. Neethivilangam Kumbakonam* 2001 Lab. I.C. 1801 & *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma* 2002 (1) L.L.J. 834.

8. Notice of both the appeals was issued and we have heard the counsels for the parties.

9. Though the counsel for the appellant DTC has argued that the respondent workman in the present case attained the age of 55 years on 31.01.2006 and even if were to be reinstated consequent to dismissal of the application under Section 33(2)(b) of the Act was not entitled to 17B wages after 31.01.2006 and thus the order dated 09.09.2011 (supra) directing payment of 17B wages with effect from 01.05.2008 is bad and W.P.(C) No.6173/2003 could not have been dismissed for the reason of non compliance of the 17B order which is illegal but the counsel for the

respondent workman has rightly contended that the order dated 17.01.2012 impugned in LPA No.134/2012 is consequential to the order dated 29.11.2011 which is a consent order.

10. The appellant DTC having agreed to make payment under Section 17B till the date the respondent workman attains age of 60 years even though without prejudice to its rights and contentions, cannot now be heard to contend otherwise and the remedy, if any of appellant DTC is before the learned Single Judge only, in view of our order herein below.

11. However the fact remains that the occasion for the learned Single Judge to adjudicate the aforesaid controversy did not arise since thereafter the writ petition itself was dismissed on 17.01.2012 owing to the non compliance by the appellant DTC of the 17B order. We would thus first take for consideration the question whether a writ petition can be dismissed for non prosecution for the reason of non compliance of order for payment under Section 17B of the Act.

12. The counsel for the respondent workman has argued that jurisdiction under Article 226 of the Constitution of India is a discretionary one and upon the petitioner being found to be in defiance of interim directions issued in the writ petition, no error can be found in the dismissal of the writ petition on this ground alone. He further contends that a litigant in violation of the order of the Court has no right of hearing.

13. One of us (Rajiv Sahai Endlaw, J.) in ***Govt. of NCT of Delhi Vs. D.S. Bawa*** MANU/DE/1423/2010 had the occasion to consider whether a writ petition can be dismissed for the reason of non compliance of the order under Section 17B of the Act. Notice was taken of ***Hindustan Zinc Ltd. Vs. Industrial Tribunal*** (2001) 10 SCC 211 deprecating the practice of disposing of writ petitions for the reason of non-compliance with the order under Section 17B, without dealing with the merits and the judgment of the Division Bench of the Madhya Pradesh High Court in ***Krishi Upaj Mandi Samita Bada Malhara Vs. Yashwant Singh Bundela*** MANU/MP/0622/2007 to the same effect. It was thus held that the writ petition challenging the award of the Industrial Adjudicator cannot be dismissed for non compliance of the order under Section 17B of the Act. Mention may also be made of another judgment, again of one of us (Rajiv Sahai Endlaw, J.) in ***Vimal Kumar Vs. Ramesh Negi*** MANU/DE/2041/2011, the question wherein also was whether the remedy of contempt was available against non compliance of an order under Section 17B of the Act. Notice therein was taken of ***Uma Shankar Vs. Hindustan Carbide Pvt. Ltd.*** MANU/DE/0415/2004 where this Court had dismissed the contempt petition for the violation of order under Section 17B of the Act and to ***T. Sudhakar Prasad Vs. Govt. of A.P.*** MANU/SC/0811/2000 and of ***R.N. Dey Vs. Bhagyabati Pramanik*** 2000 (4) SCC 400 deprecating the use of Contempt of Court jurisdiction as a method of executing a decree or implementing an order for which the law

provides appropriate remedy. Reliance was also placed on ***Kishorbhai Dahyabhai Solanki Vs. Nagjibhai Muljibhai Patel*** (2002) II LLJ 1034 Guj (DB) and on ***Abdul Razack Sahib Vs. Mrs. Azizunnissa Begum*** AIR 1970 Mad 14 holding that penal sanctions under the contempt procedure should not be invoked for default of compliance with such orders and that the high function of a Court of Justice proceedings by way of Contempt of Court should not be employed as a legal thumbscrew by a party against his opponent for enforcement of his claim. Reliance was also placed on ***Dr. Bimal Chander Sen Vs. Kamla Mathur*** 1983 Cri LJ 495, ***Shri Puneet Parkash Vs. Shri Jai Parkash*** MANU/DE/0773/2010 and on ***Anand Kumar Deepak Kumar Vs. Haldiram Bhujawala*** 146 (2008) DLT 100 holding that once a mechanism for enforcement of the order is provided, contempt would not lie. It was thus held that since the order under Section 17B is enforceable under Section 33C(1) of the Act, contempt would not lie.

14. We concur with the said reasoning and do not feel the need to discuss the matter any further.

15. In that view of the matter, LPA No.134/2012 dismissing W.P.(C) No.6173/2022 for the reason of non compliance of the order under Section 17B of the Act has to be necessarily allowed and the matter remanded to the learned Single Judge for decision in accordance with law.

16. As far as LPA No.132/2012 is concerned, this Court in *DTC v. Virender Singh* 116 (2005) DLT 266 and *Krishan Chander v. DTC* MANU/DE/1393/2008 has held that dismissal of an application under Section 33(2)(b) of the Act does not automatically entitle the workman to full wages and it is still open to the Court to adjudicate on the quantum of wages to which the workman may be entitled to. One of us (Rajiv Sahai Endlaw, J) in *DTC v. Sudan Pal* MANU/DE/1434/2011 has also had occasion to consider this question. Unfortunately neither were the said dicta brought to the attention of the learned Single Judge nor any hearing on the said aspect held. In the circumstances, without expressing any opinion on the said aspect and leaving it open to the parties to address before the learned Single Judge, we allow LPA No.132/2012 by setting aside the order dated 17th January, 2012 of dismissal of W.P.(C) No. 17157/2005 and remanding the matter to the learned Single Judge.

17. The parties to appear before the learned Single Judge on 15th May, 2012.

No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MARCH 30, 2012

‘gsr’..