

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

+ W.P. (C) No. 17192/2006

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Reserved on: 8th August, 2012
Decided on: 5th October, 2012

DTC

..... Petitioner

Through: Ms. Aarti Mahajan Shedha, Advocate.

versus

PYARE LAL

..... Respondent

Through: Mr. Arun Bhardwaj and Mr. Narender
Datt Kaushik, Advocate.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioner impugns the orders dated 7th May, 1997 and 11th February, 1999 whereby it was held that a proper enquiry was not conducted by the Petitioner and thus the approval application was dismissed as the Respondent was not guilty of any misconduct regarding unauthorized absence because his absence period was treated as leave without pay.

2. Learned counsel for the Petitioner contends that on the learned Trial Court holding that the inquiry was vitiated, it led evidence of Shri Ravi Chander on whose report the disciplinary proceedings were initiated against the Respondent and who proved that the Respondent remained absent from duty unauthorizedly. After having led the evidence, the learned Trial Court erred in coming to the conclusion that since the absence was regularized the Respondent was not guilty of misconduct in view of the decision of the

Hon'ble Supreme Court in *State of Madhya Pradesh Vs. Harihar Gopal* 1969 SLR 274, *Delhi Transport Corporation Vs. Sardar Singh* 2004 (6) SCALE 613 and *Ex.Constable Maan Singh Vs. Union of India and Ors.* 86 (2000) DLT 484 (DB). The contention of the Respondent that the charge-sheet is vague is contrary to the law as it specifically provides for the number of days when the Respondent absented himself in view of the law laid down in *Devendra Swami Vs. Karnataka State Road Transport Corporation* (2002) 9 SCC 644. Even the previous acts of misconduct can be considered and unless the punishment is shockingly disproportionate, the punishment awarded by the disciplinary authority should not be interfered with in judicial review. As regards explanation for filing the writ petition belatedly it is stated that the matter was assigned to the counsel for the Petitioner after the opinion of the law officer of the Department, however he failed to file the writ petition and kept the Department in dark stating that the writ petition had been filed. It was only later on revealed that the writ petition was not filed and thus it was assigned to another counsel who filed the writ petition.

3. Learned counsel for the Respondent contends that the writ petition is liable to be dismissed on the short ground that the award was passed on 11th February, 1999 whereas the writ petition was filed on 30th October, 2006. Further, the charge framed against the Respondent was not specific and only stated that he had been absent for 22 days from January, 1992 to January, 1993. Further the charge that he availed a total of 214 days of leave without pay which included even leaves with unjustifiable grounds. Further, the charge also related to the previous conduct when the Respondent availed 107 days leaves without pay on similar grounds. Reliance is placed on *Union of India and Ors. Vs. Gyan Chand Chattar* (2009) 12 SCC 78, *Govt. of A.P.*

and Ors. Vs. A. Venkata Raidu (2007) 1 SCC 338, Bharat Petroleum Corporation Ltd. & Ors. Vs. T.K. Raju (2006) 3 SCC 143. The Petitioner led no evidence before the enquiry officer and thus could not prove the charge. Even before the Trial Court only one witness was examined. Reliance is placed on *Management of the Northern Railway Cooperative Credit Society Ltd., Jodhpur Vs. Industrial Tribunal, Rajasthan, Jaipur & Anr. AIR 1967 SC 1182.* The decision in *DTC Vs. Sardar Singh* has no application to the facts of the present case as the issue therein did not involve the leave without pay.

4. I have heard learned counsel for the parties. Briefly the facts giving rise to the present petition are that the Respondent was appointed as a driver with the Petitioner on 23rd May, 1997. The Respondent absented himself on number of occasions amounting to a total absence of 107 days on similar grounds. Thereafter, from January, 1992 to January, 1993 he absented for 22 days besides availing a total of 214 days leave without pay. The Respondent was issued a charge-sheet on 10th February, 1993 with the following charges:

“(a) That you absented from duty unauthorizedly for 22 days during the period January 92 to January 93. The break-up month-wise position is given in the enclosed report is submitted by PBC. You did not even submit leave applications for the aforesaid no. of days, thereby confirming that you absented for those days unauthorizedly.

(b) That during the aforesaid period you availed a total of 214 days LWP which includes leave rejection due to various reasons/ late submission of leave application. This further confirms that you remained absent from duty unauthorizedly.

(c) Besides during the previous year i.e. 1991 you availed a total no. of 107 days of LWP on similar grounds as mentioned in para (a) & (b) above.

The above act, thus, constitutes mis-conduct within the meaning of para 19 (f), (h) & (m) of the standing orders governing the conduct of DTC employees.”

5. The Respondent did not reply to the charge-sheet. He was called for the domestic enquiry on the 2nd March, 1993 but he did not appear. Despite repeated intimation he did not appear and finally on the basis of the report of the enquiry officer a show cause notice was issued to the Respondent on 23rd March, 1993. The Respondent did not even reply to the said show cause notice and finally he was removed from service on 27th April, 1973. He was simultaneously remitted one month's wages and an application under Section 33(2)(b) of the Industrial Disputes Act, 1947 (in short the ID Act) was filed before the learned Trial Court for approval of its action as an industrial dispute concerning DTC workers for demand of implementing Fourth Pay Commission's report was pending adjudication. The Respondent opposed the application and challenged the validity of the enquiry report. A preliminary issue regarding the validity of the domestic enquiry conducted by the Petitioner was framed. The preliminary issue was decided against the Petitioner vide order dated 7th May, 1992 and it was held that the enquiry was not fair and just and contrary to the principles of natural justice. However, the Petitioner was given opportunity to adduce evidence before the Trial Court to establish the misconduct of the Respondent. Thus, management produced its witness Shri Ramesh Chand on whose report disciplinary enquiry was conducted. AW1 Ramesh Chand tendered his

evidence by way of affidavit Ex.AW1/A and the documents AW1/1. AW1 also placed on record the dates on which the Respondent was absent in the form of leave statement. It also stated that the enquiry officer had since retired from the Corporation and the enquiry was conducted as per rules and the principles of natural justice and despite sufficient opportunity, the Respondent failed to defend himself or appear before the enquiry officer. In the cross-examination of AW1 it was admitted that the entire period of absence of 214 days has been treated as leave without pay as mentioned in Ex.AW1/1. It was also stated that the period of absence of 107 days in the year 1991 was also treated as leave without pay. The learned Trial Court in view of the admission of the witness that the entire period of absence of 214 days has been treated as leave without pay and even period of absence of 107 days in the year 1991 was treated as leave without pay, came to the conclusion that the Respondent was not guilty at all of any misconduct.

6. The Hon'ble Supreme Court in *State of Madhya Pradesh Vs. Harihar Gopal* (supra) held:

“7. It was urged before the High Court on behalf of the State that the order granting leave was only for the purpose of regularizing the absence from duty and for maintaining a true account of absence from duty, and had not the effect of first sanctioning leave to the respondent to which he was entitled, and then removing him from service for absence from duty. The High Court rejected this contention observing:

“.....when the leave was granted even though belatedly, it had the effect of authorizing with retrospective effect the petitioner's (respondent's) absence from duty during the period for which it was sanctioned. Having thus authorized the petitioner's (respondent's) absence from duty, it was not open to the

State Government to proceed on the basis that his absence was unauthorized.”

These observations proceed upon a misconception of the sequence in the orders passed by the State Government and the true effect of the order granting leave. The order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service, and adjustment of leave due to the respondent and for regularizing his absence from duty. Our attention has not been invited to any rules governing the respondent's service conditions under which an order regularizing absence from duty subsequent to termination of employment has the effect of invalidating termination. Both the orders, one terminating the employment of the respondent, and the other granting leave are made “by order and in the name of the Governor of Madhya Pradesh”, and they are signed by L.B. Sarje, Deputy Secretary to the Government of Madhya Pradesh, General Administration Department. We are unable to hold that the authority after terminating the employment of the respondent intended to pass an order invalidating the earlier order by sanctioning leave so that the respondent was to be deemed not to have remained absent from duty without leave duly granted.

8. There is another aspect of the case which also does not appear to have been considered by the High Court. The charge against the respondent was that he had absented himself “without obtaining leave in advance”. The Enquiry Officer characterized the conduct of the respondent as “irresponsible in extreme and can hardly be justified.” The Enquiry Officer clearly intended that in failing to report for duty and remaining absent without obtaining leave, the respondent had acted in manner irresponsible and unjustified. On the finding of the Enquiry Officer that charge was proved and the order, dated March 9, 1962, had no effect on the charge that the respondent had remained absent without obtaining leave in advance.”

7. Further in *Delhi Transport Corporation Vs. Sardar Singh* (supra) their Lordships held:

“11. 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 Madhya Pradesh v. Harihar Gopal* 1969 (3) SLR 274 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 extreme and can hardly be justified. The charge in this case was misconduct by absence. In view of the Governing Standing Orders unauthorized leave can be treated as misconduct.

12. 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.

13. 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.”

8. Thus, in view of the law laid down by the Supreme Court, even if the absence is treated as leave without pay, the same does not absolve the

employee of his misconduct of absence. Thus, the learned Trial Court grossly erred in holding the same to be not a misconduct.

9. Learned counsel for the Respondent has further stressed that when the impugned award was passed the law laid down by the Supreme Court in *DTC Vs. Sardar Singh* was not applicable and thus the decision rendered was not contrary the law. It may be noted that the decision of the Trial Court is clearly contrary to the earlier decision of the Supreme Court in case of *State of M.P. Vs. Harihar Gopal* (supra) and thus this contention of the learned counsel for the Respondent holds no ground. As regards the next contention of the learned counsel for the Respondent that the charges are vague, it may be noted that in the present case a leave statement was placed on record. The dates on which the Respondent was absent need not and could not have been spelt out in the charge framed against the Respondent. The same was enclosed and placed before the Trial Court. Thus, there was sufficient notice to the Respondent for the case he had to meet. The decision rendered in *Union of India & Ors. Vs. Gyan Chand Chattar* has no application to the facts of the case as in the said case their Lordships were dealing with the charges of corruption and in that respect their Lordships held that the serious charges of corruption are required to be proved to the hilt as it brings civil and criminal consequences upon the employee concerned. In *Bharat Petroleum Corporation Ltd.* (supra) their Lordships held that when details were given in the charge the High Court was wrong in coming to the conclusion that the charges were vague and indefinite. In *Management of Northern Railway Cooperative Credit Society Ltd.* (supra) the charges against the Respondent therein were to instigate and conspire to paralyse the

working of the society, disobedience of orders in not attending for Medical Examination, taking part in the issue and distribution of certain leaflets issued etc., thus it was held that the charges were vague as no specific dates or incidents were given.

10. In the present case the charges informed the period i.e. the number of days the Respondent has been absent during the year, hence the same cannot be said to be vague. In view of the aforesaid discussion the order of termination by the Petitioner does not suffer from any illegality and the regularization of leave without pay is only for the purpose of maintaining correct record of service which does not interfere nor obliterate the order of dismissal from service.

11. As regards the contention of the learned counsel for the Respondent regarding delay in filing the writ petition, it may be noted that in writ petition, sufficient cause for delay has been explained. Ordinarily, a writ petition filed after three years should not be entertained though no period of limitation is prescribed. However, where sufficient cause is explained which in this case is due to negligence of the counsel, a belated writ petition can be entertained. In *Devendra Swami* (supra) it was held:

“5. Having heard the learned counsel for the parties, we are satisfied that in the facts and circumstances of this case, the Division Bench did not err in condoning the delay in filing the appeal. The lawyer engaged by the respondent Corporation was holding the papers and did not inform the Corporation of the decision in the writ petition. The Corporation, having felt convinced of the default on the part of the lawyer, removed him from the panel of the Corporation and engaged another counsel through whom the writ appeal was filed. Sufficient cause for condoning the delay in filing the appeal was made

out. Discretion to condone delay under Section 5 of the Limitation Act has been judiciously exercised by the High Court, placing reasons on record and is not open to interference by this Court.”

12. In view of the aforesaid discussion, I find that the impugned order dated 11th February, 1999 of the Trial Court is contrary to the law laid down by the Hon’ble Supreme Court. The same is set aside. The approval application is decided in favour of the Petitioner. Petition is disposed of accordingly.

(MUKTA GUPTA)
JUDGE

OCTOBER 05, 2012
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