

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

LPA No.921 of 2011

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Judgment Reserved on:30.3.2012

Judgment Delivered on:20.4.2012

DELHI TRANSPORT CORPORATION

... APPELLANT

Through :

Mr. Uday N. Tiwari, Advocate.

VERSUS

NAND KISHORE

... RESPONDENT

Through:

Mr. Sanjoy Ghose, Advocate
with Mohd. Farrukh, Advocate.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. In this Letters Patent Appeal filed by the appellant Delhi Transport Corporation (DTC) challenge is laid to the judgment dated 12.9.2011 passed by the Learned Single Judge of this Court in W.P.(C) 6608/2011 which was preferred by the DTC questioning the validity of Award dated 21.8.2010 passed by the Labour Court, Delhi directing the reinstatement of the respondent workman with continuity of service but without back wages. The relevant facts leading to the filing of this appeal

are as under:

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The respondent workman was working as a Bus Conductor with the appellant when on 27.10.1993 he was issued a chargesheet for remaining absent from duty for 32 days during the period 1.1.1993 to 30.6.1993 . In this chargesheet it was stated “past record will be taken into consideration at the time of passing the final orders in this case”. A domestic inquiry was held. During the inquiry, the workman admitted his absence but his explanation was that it was on account of sickness. Charge was held proved. As per the Inquiry Report, apart from 32 days of unauthorized absence which was the subject matter of charge, the workman had also remained unauthorisedly absent for 194 days in 1991 and 173 days in 1992 and also between 7.10.1993 to 9.11.1993. Show cause notice was issued 17.6.1994 proposing the punishment of removal from service. The penalty of removal was inflicted upon the appellant vide orders dated 18.7.1994.

2. The workman thereafter raised industrial disputes which was referred to the Labour Court with the following terms of reference:-

“Whether the removal of Shri Nand Kishore from service is illegal and/or justified and if so, what relief is he entitled and what directions are necessary in this respect?”

3. The Labour Court framed the issues and one preliminary issue related to the validity of the inquiry conducted against the workman. Vide order dated 29.1.2005 this issue was decided in favour of the workman holding that the inquiry conducted was not valid and in violation of the principle of natural justice. Thereafter, Award dated 28.11.2005 was passed granting reinstatement with 75% back wages. The DTC preferred writ petition thereagainst which was allowed vide orders dated 20.7.2009. Award was quashed and the matter was remanded back to the Labour Court for fresh decision on merits after giving opportunity of hearing to both the parties.

4. On remand, the Labour Court examined the matter afresh after giving opportunity to both the parties and proceedings culminated into Award dated 21.8.2010. The Labour Court held that misconduct on the part of the respondent stood proved on the evidence led before it. However, at the same time, according to the Labour Court, the punishment of removal from service was excessive having regard to 32 days absence of the workman and, therefore, exercising the power given to the Labour Court under Section 11A of the Industrial Disputes Act, it reduced the penalty to stoppage of two increments with cumulative effect. The direction was given to reinstate the workman but without back wages.

5. The DTC challenged this Award by filing the writ petition which has been dismissed by the learned Single Judge vide orders dated 12.9.2011. The contention of the DTC before the writ Court (which remains in this appeal also) was that the Labour Court took into consideration the unauthorized absence of 32 days only and failed to take into account the past record of the workman which was exhibited in the proceedings through the Management witness. It was submitted that the past record showed that the workman had remained absent without leave for long periods and the disciplinary authority had passed the order of removal taking entire facts into consideration including the past record. This plea of the appellant is rejected by the learned Single Judge in the following manner:-

“3. This is the second round of litigation. Earlier when the Tribunal had set aside the order of dismissal and directed reinstatement of the workman, the said order was challenged in this Court and the case was remanded to the Tribunal for fresh consideration. During the pendency of this writ petition, in lieu of the order under Section 17B of the Industrial Disputes Act, 1947, the workman was reinstated by the DTC. He was working throughout with the DTC till the making of the impugned Award.

4. The impugned Award has discussed the evidence in some detail. Although it is correct that there is no discussion of the past record of

the workman, a perusal of the same reveals that in three instances, the Petitioner was 'warned' 'advised' or 'censured'. It appears that no charge sheet was issued to the workman for his having been on leave without pay for 194 days in 1991 and 173 days in 1992. Consequently, it is not possible to appreciate the circumstances under which those leaves were taken by the workman, whether he had submitted any leave application and whether those leaves were sanctioned or not. These details are also not clear from the evidence led before the Tribunal."

6. Questioning the validity of the aforesaid reasoning given by the learned Single Judge it is argued by the learned counsel for the DTC that the error committed by the learned Single judge is that it proceeded on the basis that the past record of the respondent should also have been the subject matter of the charge sheet. He submitted that the past conduct of an employee can be taken into account for purposes of determining the quantum of punishment even though it may not be the subject matter of the charge as held in the case of *Union of India Vs. Bishamber Das Dogra*, (2009) 13 SCC 102 in the following manner:-

"24. In *State of Mysore v. Manche Gowda* [1964] 4 SCR 540, this Court held that the disciplinary authority should inform the delinquent employee that it is likely to take into consideration the past conduct of the employee while imposing the punishment unless the proved charge against the delinquent is so grave that it may independently warrant the proposed punishment.

Though his previous record may not be subject matter of the charge at the first instance.”

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26. Similarly in Director General, RPF v. Ch. Sai Babu [2003]1SCR729 , this Court held as under:-

“6.....Normally, the punishment imposed by a disciplinary authority should not be disturbed by the High Court or a tribunal except in appropriate cases that too only after reaching a conclusion that the punishment imposed is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of charges proved against, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected of and discipline required to be maintained, and the department/establishment in which the delinquent person concerned works.”

(Emphasis added)

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“28. In Govt. of A.P. and Ors. v. Mohd. Taher Ali AIR 2008 SC 375 , this Court rejected the contention that unless the past conduct is a part of charge-sheet, it cannot be taken into consideration while imposing the punishment observing that "there can be no hard and fast rule that merely because the earlier misconduct has not been mentioned in the charge sheet it cannot be taken into consideration by the punishing authority. Consideration of the earlier misconduct is often necessary only to reinforce the opinion of the said authority."

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31.It is settled legal preposition that habitual absenteeism means gross violation of discipline [vide *Burn & Co. Ltd. v. Wormess* AIR 1959 SC 529; and *L&T Komatsu Ltd. v. N. Udayakumar* (2008)ILLJ849SC].

7. He also relied upon the judgment in *Delhi Transport Corporation Vs. Sardar Singh* (2004) 7 SCC 574 wherein the Supreme Court held that when an employee absents himself from work without sanctioned leave for a long periods, it prima facie shows lack of interest in work. The Supreme Court in that case upheld the penalty of removal from service in such cases.

8. The learned Counsel states that the habitual absence of the respondent from his duties is clear from his past record, where he has three adverse entries on account of unauthorized absence. The respondent's leave record for the years 1991, 1992 and 1993 show that he was absent for 194 days, 173 days and 213 days respectively. He thus submitted that there was no illegality in the punishment imposed on the respondent of removal from service.

9. Learned counsel for the respondent workman, on the other hand, submitted that the writ petition was dismissed by the learned Single Judge in *limine* refusing to exercise the discretion under Article 226 of the Constitution

of India as it was not only a second round of litigation; the workman had been reinstated pursuant to the orders passed under Section 17 B of the Industrial Disputes Act and had been working throughout with the DTC till the passing of the second Award; the workman had been denied wages for the intervening period; and that though there was no discussion of past record; no chargesheet had been issued on earlier occasions against the workman. He thus submitted that having regard to the limited scope of writ jurisdiction, the learned Single judge has rightly dismissed the writ petition.

10. On the scope of writ jurisdiction, the learned counsel referred to the following judgments:-

This Court in ***MCD Vs. Asha Ram*** 2005 Vol. II AD (Delhi) 285 has set out parameters for intervention in industrial adjudication in the following words:-

“The position of law in respect of interference by writ court under Article 226 of the Constitution of India is well settled in view of the following:-

(a) The Supreme Court in para 5 in ***Sadhu Ram Vs. Delhi Transport Corporation***, AIR 1984 SC 1467 observed:

“....nor we think that it was right for the High Court to interfere with the Award of the Labour Court under Article 226 on a mere technicality. Article 226 is a device to secure and advance justice and not otherwise. In the result, we allow the appeal, set-aside the judgment of the High Court and restore the Award of the Presiding officer.”

(b) The Supreme Court in **Harbans Lal Vs. Jag Mohan, (1985)**

4 SCC 333 in para 5 held as under:-

“.....The limitations on the jurisdiction of the High Court under Article 226 of the Constitution are well settled. The writ petition before the High Court prayed for a writ in the nature of certiorari, and it is well known that a writ in the nature of certiorari may be issued only if the order of the inferior tribunal or subordinate court suffers from an error of jurisdiction, or from a breach of the principles of natural justice or is vitiated by a manifest or apparent error of law. There is no sanction enabling the High Court to reappraise the evidence without sufficient reason in law and reach findings of fact contrary to those rendered by an inferior court or subordinate court. When a High Court proceeds to do so, it acts plainly in excess of its powers.”

(c) The Supreme Court in *Calcutta Port Shramik Union Vs.*

Calcutta River Transport Association & ors. 1988 (Sup.)

SCC 768 in para 10 observed:-

“The object of enacting the Industrial Disputes Act 1947 and of making provision therein to refer disputes to tribunals for settlement is to bring about industrial peace. Whenever a reference is made by a Government to an industrial tribunal it has to be presumed ordinarily that there is a genuine industrial dispute between the parties which

requires to be resolved by adjudication. In all such cases an attempt should be made by Courts exercising powers of judicial review to sustain as far as possible the awards made by industrial tribunals instead of picking holes here and there in the awards on trivial points and ultimately frustrating the entire adjudication process before the tribunals by striking down awards on hyper-technical grounds. Unfortunately the orders of the Single Judge and of the Division Bench have resulted in such frustration and have made the award fruitless on an untenable basis.”

(d) The Supreme Court in ***Sudhoo Vs. M/s Haji LalMohd. Biri***

Works & Ors. 1990 Lab. I.C 1538 in para 8 ruled:-

“We have gone through the statements of two witnesses produced by the appellant before the authority. The findings of the authority are based on appreciation of evidence produced by the parties before the authority. We do not agree with the High Court that the finding recorded by authority are based on no evidence. The high Court should not have interfered with the findings of the fact reached by the prescribed authority on appreciation of evidence.”

(e) The Supreme Court in ***Govt. of A.P. & ors. Vs. Mohd. Nasrullah***

khan (2006) 2 SCC 373 has held as under:-

“The High Court exercising power of judicial review under Article 226 of the Constitution does not act as an Appellate Authority. Its jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any resulting in manifest miscarriage of justice or violation of principles of

natural justice. Judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority.”

11. He also submitted that the past record of the workman would indicate that there were only three incidents prior to the charge sheet for 32 days unauthorized leave. Of these two of them i.e. censure date 8.11.1980 was for absence w.e.f. 28.10.1980 to 30.10.1980 (for two days) and a warning dated 15.10.1980 for absence for 1 day's duty on 10.6.1980. Both these incidents were even prior to his regular employment which was on 14.07.1982. After his regularization, there is no adverse order against the workman as the “warning” dated 20.11.1985 for absence for 1 day on 21.7.1985 was reduced to “advise” vide order dated 13.1.1986.

12. It was also submitted that the Leave Record for the past three years only has a handwritten addendum of “LWP”. Therefore, it is rightly held by the learned Single Judge nowhere does it state that whether any chargesheet has been issued for the same or whether it included sanctioned leave.

13. He also submitted that Section 11A of the ID Act gives sufficient powers to the labour Court to interfere with the punishment imposed if the same is disproportionate or unjustified and this discretion was exercised by the Labour Court on sound principles after taking into consideration the material facts. He referred to various cases of DTC itself where such punishments were interfered with as disproportionate.

14. At the end, learned counsel pleaded that it was not a case for interference in this appeal when the learned Single Judge has also examined the matter and did not find any merit in the writ petition. For this purpose, he relied upon the following observations of the Supreme Court in the case of ***Harjinder Singh Vs. Punjab State Warehousing Corporation***, AIR 2010 SC 1116:-

“17. Before; concluding, we consider it necessary to observe, that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the/Industrial Disputes Act and other similar legislative Instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of

the people, ensure equality between men and women and equitable distribution of material resources of the community to sub-serve the common good and also ensure that the workers get their dues.”

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19.The preamble and various Articles contained in Part IV of the Constitution promote social justice so that life of every individual becomes meaningful and he is able to live with human dignity. The concept of social justice engrafted in the Constitution consists of diverse principles essentially for the orderly growth and development of personality of every citizen. Social justice is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species, Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation of every section of the society. In a developing society like ours which is full of unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst to reach the ladder of justice. The philosophy of welfare State and social justice is amply reflected in large number of judgments of this Court, various High Courts, National and State industrial Tribunals involving interpretation of the provisions of the Industrial Disputes Act, Indian Factories Act, Payment of Wages Act, Minimum Wages Act, Payment of Bonus Act, Workmen's Compensation Act, the Employees Insurance Act, the Employees Provident Fund and Miscellaneous Provisions Act and "the Shops and Commercial Establishments Act enacted by different States.

23. *Of late, there has been a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalisation are fast becoming the raison d'etre of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman-employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied*

by entertaining the specious and untenable grounds put forward by the employer - public or private.”

15. According to us, the matter does not call for detailed examination. The only plea is that past record of the respondent workman showed that he was a habitual absentee but that was not taken into consideration by the learned Labour Court while inflicting penal of removal to that of stoppage of two increments with cumulative effect. We may observe at the outset that the Ld. Counsel for the DTC is right that past record could be seen for imposing penalty even when chargesheet, as held in ***Bishamber Das Dogra*** (supra). However, the manner in which past record is sought to be projected is not correct. This past record which is annexed by the appellant as Annexure A-3, as per the service is as under:-

Sr. No.	Order of Officer	Reason	Form of penalty
1.	KJD/AI(T)/Susp117/85/7480/dt.20.11.85	“Warned” for absent from his duty without information on dt. 21.7.85	“warned”
2.	KJG/Ai(T)/Appeal/45/85/86/245 dt.13.1.86	The punishment of warning reduced “Advised”	“Advised”
3.	KJD/AICD/mt-84/80/80/6721 dt.	“Warning for absent same duty on 10.6.80	“Warning”

	15.10.1980		
4.	KJD/AICT/MT.190/80/77 4 dt.8.11.80	“Censure’ for absent from duty w/o intimation w.e.f. 28.10.80 to 30.10.80	“Censured”
Leave Record w.e.f. last three year earn etc.			
	1991	194	
	1992	173	
	1993	213	

16. It is clear from the above that on two occasions the petitioner was warned, once advised and once censured. The two instances of warning and censure are of 1980 when the workman was not even in regular employment. There is one incidence of warning on 21.7.1985 that too, for absent for one day only. Thereafter the chargesheet on the basis of which present proceedings arise, is of the year 1993. This past record is hardly convincing to prove that the appellant was habitual absentee. The entire thrust is on the leave record of last three years i.e. 1991, 1992 and 1993. However, this record is based on “leave” which does not indicate whether the appellant remained absent unauthorisedly. On the contrary, it shows that leave was granted. When the matter is to be examined in this context, the learned Single judge rightly pointed out that the DTC has not been able to show

under which circumstances the leave was obtained. The very fact that the leave is granted “as it is not the case of the DTC the workman remained untuthorisedly absent during this period” would show that the reasons for remaining leave was found to be justified. This record, therefore, cannot become the basis of imposing severe penalty of removal from service. Various judgments cited by the learned counsel for the DTC would have, thus, no bearing on the facts of this case. We agree with the learned counsel for the respondent that in such circumstances, the learned Single judge rightly did not exercise is limited jurisdiction available under Article 226 of the Constitution while entertaining writ petition against an Award by the Labour Court.

17. We do not find any merit in this writ petition which is accordingly dismissed with costs quantified @ 15,000/-.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

APRIL 20, 2012
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