

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

Date of Decision: 20.10.2015

+ **W.P.(C) 3798/2011**

DELHI TRANSPORT CORPORATION

... Petitioner

Through: Mr Uday N. Tiwari and Mr Sunil
Kumar, Advs.

versus

NAIN SINGH

.... Respondent

Through: Mr G.S. Charya, Adv.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The petitioner – Delhi Transport Corporation (hereinafter referred to as ‘the Corporation’) challenges the impugned order dated 01.07.2009 whereby the issue regarding domestic enquiry was decided against the corporation and award dated 02.01.2010 passed by the Presiding Officer, Labour Court, Karkardooma Courts, Delhi in ID No.170/08/95 whereby the removal of the workman from service was held to be unjustified. Consequently, he was directed to be reinstated with continuity of service. A lumpsum compensation of Rs.1 lac was also awarded to the workman towards back-wages and litigation expenses.

2. The respondent (hereinafter referred to as ‘the workman’) was employed as a conductor with the Corporation in the year 1980. On 10.07.1987, he was served with a charge-sheet for misconduct as described

under Rule 19 (h) and (m) of the Standing Orders for obtaining leave without pay for 34 days. After conducting an enquiry he was removed from his service.

3. An industrial dispute was raised by the workman upon which following reference dated 03.04.1995 was made by the government:

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

4. A claim was filed by the workman alleging inter alia that the enquiry was perverse and he was removed on the basis of findings of the Enquiry Officer which was passed by an incompetent authority. The leave without pay is not misconduct. The claim of the workman was resisted by the corporation on the ground that the workman was absent from duty for 34 days without intimation and prior permission. Though the workman denied the charges, the enquiry was conducted in which all the principles of natural justice were followed.

4A. On the pleadings of the parties, following issues were framed:

“(i) Whether the domestic enquiry was not conducted according to the principles of natural justice and is, therefore, not proper, fair and valid?

(ii) As per the terms of reference.”

5. Earlier the enquiry held by the DTC was vitiated by an order dated 04.08.2003. Based on the said finding, the Labour Court passed an award dated 09.09.2003 in favour of the workman holding that the unauthorised

absence did not amount to any misconduct on the part of the workman and that his services were illegally and unjustifiably terminated.

6. Feeling aggrieved, a writ petition being W.P. (C) No. 14901/2004 was filed. A Ld. Single Judge of this Court relied upon the following principles of law laid down by the Apex Court in ***DTC v Sardar Singh***, AIR 2004 SC 4161:

“8. In all these cases almost the whole period of absence was without sanctioned leave. Mere making of an application after or even before absence from work does not in any way assist the concerned employee. The requirement is obtaining leave in advance. In all these cases the absence was without obtaining leave in advance. The relevant paras of the Standing Order read as follows:

"4. Absence without permission:-

- (i) An employee shall not absent himself from his duties without having first obtained the permission from the Authority or the competent officer except in the case of sudden illness. In the case of sudden illness he shall send intimation to the office immediately. If the illness lasts or is expected to last for more than 3 days at a time, applications for leave should be duly accompanied by a medical certificate, from a registered medical practitioner or the Medical Officer of the D.T.S. In no case shall an employee leave station without prior permission.*
- (ii) Habitual absence without permission or sanction of leave and any continuous absence without such leave for more than 10 days shall render the employee liable to be treated as an absconder resulting in the termination of his service with the Organisation.*

19. General Provisions:- Without prejudice to the provisions of the foregoing Standing Orders, the

following acts of commission and omission shall be treated as mis-conduct:

(a).....

(h) Habitual negligence of duties and lack of interest in the Authority's work."

10. 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. 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.”

(Emphasis supplied)

and set aside the order dated 04.08.2003 and the award dated 09.09.2003 and remanded the matter back to the Industrial Adjudicator for fresh adjudication in accordance with law and the principles laid down by the Apex Court.

7. After the remand of the case, none of the parties preferred to lead any further evidence. The enquiry issue was treated as preliminary issue. It was observed that the findings of the Enquiry Officer are based on the statement of the delinquent workman Ex.AW1/3. No witness from the management side was examined to substantiate the charge. The question for consideration was whether the statement made by the workman dated 03.08.1987 could be treated as an admission of the charges. The workman had stated that he had furnished medical certificate for the period of absence alleged. It was observed that in view of this statement, the Enquiry Officer ought to have allowed an opportunity to the workman to produce such medical record or should have directed the corporation to produce the record. The manner of rendering the findings creates an indelible doubt regarding the observance of

the principles of natural justice and as such the preliminary issue was decided in favour of the workman and against the management vide impugned order dated 01.07.2009.

8. As regards issue no. 2, it was observed that the order of penalty of removal of service passed by the management is not justified. Para 16 of the award reads as under:

- (a) That the evidence of the management namely the evidence of MW-1 does not conclusively establish the lack of interest on the part of the workman in the working and duties of the management corporation.
- (b) That exhibits Ex. MW1/8 to 12 shows that the workman was suffering for which he had furnished the medical certificates. These documents were never denied by the management.
- (c) It was obligated upon the management to have called upon the workman to undergo the medical test by the duly constituted DTC medical board if the management had developed any doubt over the genuineness of the sickness intimated to the management.
- (d) That mere remaining on leave without pay would not expressly and conclusively lead to the exhibition of lack of interest.
- (e) From the evidence led by the management, I am unable to decide any negligence on the part of the workman since the workman has discharged the burden of no negligence on his part for the relevant period. The documents were examined keeping in view of the observations of Hon'ble Supreme Court in para 12 of Sardar Singh (supra).

(f) As rightly argued by AR for the workman Smt. Rashmi B. Singh, this is not a case where the workman has not submitted the leave applications. Applications were given. The management is unable to establish that the leaves were rejected. This is a case where the management admits in the charge itself that the workman was on leave without pay. The punishment of removal from service would be shocking following the ruling of *Hindustan Prefab* (supra), as the management failed to establish the charge of lack of interest.

9. As such, it was held vide award dated 02.01.2010 that the workman was removed unjustifiably and, therefore, he is entitled to reinstatement with continuity of service. A lumpsum compensation of Rs.1 lac was awarded towards back-wages and litigation expenses.

10. The impugned order and award are subject matter of present writ petition in this second round of litigation.

11. Assailing the findings of the learned Labour Court, counsel for the petitioner urged that the charge sheet was issued to the respondent for unauthorized absence for a period 34 days and in the charge sheet, itself, it was mentioned that his past record will also be considered. The respondent submitted the reply wherein he admitted his unauthorized absence for 34 days, however, it was alleged that same was due to his illness. He assured to be regular in future. Even before the enquiry officer, he accepted the charges levelled against him but alleged that he had availed the leave due to his illness. The admission of taking leave without pay was the best evidence

against the workman as held in *DTC vs. Shyamlal*, (2004) 8 SCC 88 and it was for him to prove that he had availed the leave due to his illness. He did not file any medical certificate in support of his averment. He was granted complete opportunity by the Inquiry Officer to bring any witness in his favour but he did not lead any evidence to rebut the charges. A show cause notice was served calling upon him to make representation against the proposed punishment of removal from the service. He did not avail even this opportunity and did not submit any reply. Under the circumstances, on the basis of evidence on record, reply given by him to the charge sheet and the past record, he was removed from the services of the corporation. The findings of the Labour Court holding the inquiry issue against the management is perverse as the Labour Court despite observing that the workman had admitted receipt of charge sheet, copy of the report, his participation in the inquiry and remaining on leave without pay for 34 days, decided the issue of inquiry against the management. Moreover, the findings of the Labour Court in para 16 of the award, holding the imposition of penalty of removal from service unjustified, are perverse as the past record of the respondent was duly proved on record which established lack of interest on the part of the workman in performing duties of the corporation. The workman did not place on record any medical certificate in order to prove that his availing leave without pay is justified on medical grounds and the department witness MW1-Shiv Kumar had denied the suggestion that the medical certificates MW1/1 to MW1/19 were submitted by the workman. Similarly, the inquiry officer Sh. H.C. Gupta had also denied the suggestion that medical certificates Mark-A to G were submitted by the workman. The case was remanded back by the Single Judge for

deciding the matter afresh in the light of the observations made by the Supreme Court in **Sardar Singh's** case. Despite that, the ratio of that judgment was misunderstood by the Labour Court. As such, the impugned award is liable to be set aside.

12. Learned counsel for the respondent, on the other hand, submitted that in the charge sheet given to the workman although it was mentioned that the past record will be considered but the contents of the past record were never supplied to him. Moreover, admission of the respondent regarding availing 34 days leave without pay was not unconditional. The workman had clarified that he had availed leave due to illness. That being so, in view of **DTC vs. Krishan Kumar**, 2008 LAB. IC 511, the inquiry officer was wrong in observing that the workman had admitted his guilt. Even if it is assumed that the workman was unauthorizedly absent, in view of **Krushnakant B. Parmar vs. Union of India and Anr.**, (2012) 3 SCC 178, it was incumbent upon the management to prove that the unauthorized absence was wilful which it has failed to prove. Reliance was also placed on **VijaySingh vs. Delhi Transport Corporation**, ILR (2009) 1 Supp. (7) Delhi 400 and **Delhi Transport Corporation vs. Om Singh**, 144 (2007) DLT 94.

13. Learned counsel further submits that the impugned award does not suffer from any infirmity which calls for interference. As such, the writ petition is liable to be dismissed.

14. Having given my considerable thoughts to the respective submissions of learned counsel for the parties and perusing the record, in my view, the

award passed by the learned Labour Court cannot be sustained due to the following reasons:

The workman was served with chargesheet on the following allegations:-

"It is reported against you that from January, 1987 to March, 1987 you were on leave without pay for 34 days. Also during this time you have also taken your other due leaves. Your above act shows your lack of interest towards your duty. You are found guilty of violating rules under the above.

Your this act comes under indiscipline under the para 19 (H) of Act of Delhi Transport Corporation meant for the workman of the corporation.

A copy of the report of Shri Shiv Kumar dated 16.6.87 on which the charge sheet is based is attached.

A copy of your past record is also attached which will be kept in view while passing final orders if you want a personal hearing you should pray for it in your reply.

Your clarification should reach the undersigned within 10 days of receipt of this charge-sheet. If you fail to do so your case will be decided without informing you in the future."

15. The workman sent a reply admitting therein that from January, 1987 to March, 1987, he remained on leave without pay because of his illness. He assured to perform his duties properly in future. It is relevant to note that no medical certificate was enclosed with the reply. Thereafter the disciplinary inquiry was initiated against him. At that time, the workman was duly informed that if he wanted to bring any witness, he could do so. The workman appeared before the Inquiry Officer wherein also he accepted the charge by reiterating that he had availed the leave due to his illness. At this juncture also, he did not file any medical certificate. In cross-examination, the workman admitted having participated in the inquiry and that he was on leave without pay for 34 days.

16. Under the circumstances, the factum of availing 34 days leave without pay was not even disputed by the workman either in the reply to the charge sheet or during inquiry proceedings. In *Shyam Lal* (supra), it was held by the Supreme Court that it is fairly settled position in law that admission is the best piece of evidence against the person making the admission. However, it is open to the person making the admission to show why the admission is not to be acted upon. Counsel for the respondent, on the other hand, relied upon *Krishan Kumar*(supra) where also so far as the legal position is concerned, it was reiterated that the admission should be clear, conclusive, precise, unambiguous and free from doubt. It was further observed that if an admission is capable of two interpretations, an interpretation unfavourable to the person making it should not be put on his admission.

17. Since the workman had taken the plea that he had availed leave without pay due to his illness, the burden was on him to prove this fact that the leave applied by him were duly supported by medical certificate and the same were duly sanctioned. As seen above, neither any such medical certificate was either filed by him along with reply to the charge sheet or during the inquiry proceedings. Despite the fact that while issuing notice of inquiry proceedings, the workman was informed to bring any witness, however, at this stage also workman did not seek any opportunity to furnish medical certificate or prove the factum of his illness. MW1-Shiv Kumar had denied the suggestion that the medical certificates Ex.MW1/W1 to MW1/W19 were submitted by the workman. In view of *Sardar Singh* (supra), burden of proof was on the workman to prove that there was no negligence or lack of interest. It was only during the proceedings before the

Labour Court and in his submission before the Court that he took the plea that his leave was duly sanctioned and that he had filed medical certificate. There is no evidence on record to prove that the leave were sanctioned. Treating as leave without pay is not same as sanctioned or approved leave. The same is only for the purpose of maintaining correct record of service. Despite the fact that the burden is on the employee as per **Sardar Singh** (supra), learned Labour Court erred in observing that medical certificates filed by the workman were denied by the management and that if the management had any doubt over the genuineness of the sickness intimated to the management, it should have called upon the workman to undergo medical test by the duly constituted DTC medical board. Although the Labour Court observed that the documents were examined in view of the observations of the Hon'ble Supreme Court in **Sardar Singh**, however, this finding does not find support from the material available on record.

18. Further finding that the evidence of the management does not conclusively establish the lack of interest on the part of the workman in the working and duties of the management also cannot be sustained as in **Sardar Singh**(supra), it was observed that when an employee absents himself from duty, even without sanctioned leave for a very long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Orders 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 the conclusion about the employee's being habitual negligent in duties and the same showing an exhibited lack of interest in the employer's work. In the charge sheets itself, workman was informed that his past conduct will be considered. Same was

duly proved by MW1-Shiv Kumar. As per past record of the employee, he had availed following leave without pay:-

S. No.	Month and year	LWP on medical ground	LWP other than MC but authorise	unauthorized leave	total	L.O.D.
1	Jan, 85 to 31, Dec., 1985	20	98	141	259	Nil
2.	Jan, 86 to 31, Dec., 1986	43	83	52	178	5 times
3.	Jan, 87 to 31, Sept., 1987	19	30	41	90	5 times

19. Under the circumstances, ample material was produced before the Tribunal to show as to how the employee was remaining absent for a long period which affected the work of the employer. After the inquiry officer submitted a report proving the charge against the delinquent employee, a show cause notice was served upon the workman proposing his removal from the service of the corporation and calling upon him to give representation within ten days, however, the workman even, at this stage, failed to submit any representation or explanation. That being so, on the basis of evidence on record, reply given by him to the charge sheet, he was ordered to be removed from the service of the corporation vide order dated 16th September, 1987.

20. Judgment rendered in ***Krushnakant B. Parmar*** (supra) is clearly distinguishable. It was observed that even if unauthorized absence from duty is proved, it is further to be seen whether the absence is wilful. In the absence of proving the same, the absence does not amount to misconduct. In that case, it was observed that the inquiry officer on appreciation of evidence though held that the appellant was unauthorizedly absent from duty but failed to prove that the absence was wilful. There the workman had taken a specific defence that he was prevented from attending duty by the complainant who prevented him to sign attendance register and also brought on record various documents in support of his defence. The complainant refused to appear before the inquiry officer in spite of service of summons. Two other witnesses although appeared, but did not make any statement against the workman. Under those circumstances, it was held that ignoring the aforesaid evidence, on the basis of surmises and conjectures, the inquiry officer held the charge proved.

21. ***Vijay Singh***(supra) is also distinguishable as in that case charge against the workman was unauthorized absence from duty for a period of 102 days during the period 1.1.91 to 31.12.91. Workman adduced the reason for his absence on account of abnormal behaviour of his minor daughter. This stand was consistently taken by him before every forum. The disciplinary authority did not touch the ground urged by the workman for his absence nor referred to his past misconduct of a similar nature as such, it was held that the order passed by the disciplinary authority is without application of mind.

22. Similarly, *Om Prakash*(supra), has no application. In that case, the period of absence of 14 days was explained by application and medical certificate while reporting for duty. No document that respondent was habitual absentee in past was enclosed with charge sheet filed before the Industrial Adjudicator. As such, order of removal was held to be illegal.

23. In the instant case, the disciplinary authority observed that the conductor accepted the charges without any pressure and promised to do his duties properly in future and that he would not take leave without pay. This promise cannot be understood to be taken seriously as in the past also he made such promises. His two annual increments with cumulative effect were stopped on this count. Also, during inquiry, he promised not to avail such leave without pay but even after issuance of charge sheet, he availed such leave, as such, it was observed that he was not interested in the service of corporation. In view of the aforesaid evidence available on record, the findings of the Labour Court, which has been given ignoring the available material on record, cannot be sustained.

24. It is settled law that in exercise of the jurisdiction u/s 226/227 of the Constitution of India, this Court does not sit as a Court of appeal over the award of inferior court. However, once it is shown that certain important facts on record have not been considered which were material for determination of the real issues between the parties, then this Court can interfere in the findings of the lower court.

25. That being so, the writ petition is allowed. The impugned order dated 1st July, 2009 and award dated 2nd January, 2010 are set aside.

26. The petition stands disposed of. Pending application, if any, also stands disposed of.

(SUNITA GUPTA)
JUDGE

OCTOBER 20, 2015
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