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

Date of decision: 14th December, 2015

+ **W.P.(C)10/2014 & CM No.21/2014**

DELHI TRANSPORT CORPORATION Petitioner
Through: Ms. Latika Choudhary, Advocate for Ms.
Avnish Ahlawat, Advocate

versus

RAJ PAL Respondent
Through: Mr. Rohit Aggarwal, Advocate

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The respondent/workman was employed with DTC as a driver. Alleging his termination on 19th February, 1992, he raised an industrial dispute which was referred for adjudication to the Labour Court by the Govt of NCT of Delhi vide reference No. F/24(4219)/92-LAB/99912-17 dated 11th December, 1992 with following terms of reference:-

“Whether the services of Shri Raj Pal have been terminated illegally and/or unjustifiably by the management and if so, to what relief is he entitled and what directions are necessary in this respect?”

2. Thereafter the claim was filed by the workman alleging, inter alia, that he was appointed by the management as driver-cum-fitter w.e.f. 9th September, 1975. On 3rd December, 1990, he met with an accident. The Medical Board of the management advised him light duty and as per the advice, he was given the job of clerk in the store of Gazipur Depot by the management. Since 16th April, 1991 to

18th February, 1992, he was working on the same post. On 19th February, 1992, when he went to resume his duty, he was not allowed to do so and was informed by the Depot Manager that his services were no longer required. He filed a complaint in this regard through his Union before the Labour Department on 20th February, 1992. Conciliation proceedings were started which, however, failed. It was alleged that prior to removal from service, the management did not comply with the provisions of Industrial Disputes Act. The workman sought reinstatement on light duty with continuity of service and full back wages.

3. The claim was contested by the petitioner/management, inter alia, on the ground that after the workman met with an accident, he was recommended same light duty by the hospital authorities, as such, he was given light duty. The workman requested on 19th February, 1992 for a light duty on an application. As such, he was asked to report to the Medical Board for medical check-up on 19th February, 1992 but he declined to receive the letter and did not report to the Medical Board. There was no termination of his services on 19th February, 1992. It was also alleged that during the pendency of the proceedings since the workman did not report for duty, as such, a charge sheet was submitted to him for remaining absent for the period November 1997 to May, 1998. The workman failed to submit any reply and also did not join the inquiry proceedings, as such, his services were terminated on 19th November, 1999.

4. The Labour Court vide award dated 1st October, 2004 held that the termination in the year 1999 was bad for the reason of having not taken approval under Section 33(2) (b) of the Industrial Disputes Act, 1947 owing to the pending dispute pursuant to the reference of the year 1992.

5. Challenge was led to this award by the Management by filing writ petition No.11191/2005. The Single Judge of this Court set aside the award by observing

that the specific dispute which was referred for determination by the Labour Court related to termination of workman on 19th February, 1992 and there was no dispute regarding his termination vide letter dated 19th November, 1999. The Labour Court had travelled beyond the terms of reference and by doing so, exceeded its jurisdiction. The matter was, therefore, remanded back to the Tribunal to decide if there was illegal termination of the workman on 19th February, 1992 and if so, the consequence thereof.

6. LPA No.177/2009 was preferred against the said judgment and the judgment was set aside vide order dated 18th May, 2009 by the Division Bench basically on the ground that pending application under Section 17B of the Industrial Disputes Act had not been decided. The matter was referred back to the Single Judge.

7. Vide order dated 9th May, 2012, the learned Single Judge, though held the award to be bad for the reasons of having not adjudicated on the termination of 1992 but proceeded to decide the dispute himself and held the termination of 1992 to be bad and, accordingly, maintained the relief granted by the Industrial Adjudicator.

8. LPA 657/2012 was preferred challenging this judgment. The appeal was allowed and the impugned judgment dated 9th May, 2012 was set aside primarily on the ground that the reference made to the Labour Court was regarding termination dated 19th February, 1992. No finding with respect to the alleged termination dated 19th February, 1992 was returned by the Labour Court. The petitioner/DTC had denied alleged termination dated 19th February, 1992, as such, the disputed question of fact arose as to whether the services of the respondent/workman were actually terminated on 19th February, 1992 or not. The finding of this disputed question of fact should, in the first instance, have been

given by the Labour Court and learned Single Judge was not justified in taking it upon himself to analyse the evidence produced by the parties during the course of the award proceedings and return a finding of facts. The disputed question of fact ought not to be decided in exercise of writ jurisdiction and should be decided at least initially by the Court/Tribunal which records evidence in the matter. As such, the matter was remitted back to the Labour Court to answer the reference made to him with respect to alleged termination dated 19th February, 1992.

9. Thereafter, the present award dated 7th May, 2013 which is under challenge in this writ petition was passed by the learned Labour Court, holding that refusal on the part of the management allowing the workman to join duty on 19th February, 1992 without any justifiable reason amounts to termination. As such, the workman was awarded back wages @ 25% from the date of termination, i.e., 19th February, 1992 till the date of his superannuation which was taken as 60 years and consequential retiral benefits. Management was also directed to pay Rs.11,000/- towards cost of proceedings. The management was directed to pay the entire amount including arrears of pension to the workman within a period of one month from the date of publication of the award failing which management was liable to pay interest @ 9% per annum till realization.

10. Feeling aggrieved, this writ petition has been filed.

11. I have heard learned counsel for the parties and have also perused the record and also the written submissions filed by the petitioner.

12. Learned counsel for the petitioner submits that no order terminating the services of the workman on 19th February, 1992 was passed at any point of time. The respondent neither moved any application before the Labour Court nor came forward to join the duty. The respondent was issued charge sheet dated 1st January, 1993 for remaining absent w.e.f. 19th February, 1992 to 9th December,

1992. Thereafter another charge sheet for absence from November, 1997 to May, 1998 was issued and after inquiry, he was removed from his services w.e.f. 19th November, 1999. Under the circumstances, there is no question of treating the workman as superannuated on attaining the age of 60 years and directing payment of 25% back wages from 19th February, 1992. In the case of drivers, the retirement age is 55 years and he has to be medically fit to reach the age of superannuation of 58 years and then 60 years. Date of birth of the workman is 6th September, 1951. He attained 55 years on 30th September, 2006. The workman was never declared fit either by DTC Medical Board or any other board. Therefore, under no circumstances, he could go beyond 55 years of age. There is no evidence on record to show that management did not allow the workman to perform duty w.e.f. 19th February, 1992. No adverse inference could have been drawn against the management for non-production of the attendance register as it was nobody's case that on 19th February, 1992 workman performed his duties. Even no direction was given to the management to produce the register. The award of the Tribunal is perverse. Under no circumstances, the workman can be allowed 25% back wages up to 60 years of age when the superannuation age of the driver is 55 years. The manner in which the workman had approached the union the very next day and did not make any effort to join the duty when management throughout insisted that his services were never terminated clearly indicates that he pre-planned everything in advance to allege that he was not allowed to work and will manage to get reinstatement with wages. As such, it was submitted that the award be set aside.

13. Learned counsel for the respondent, on the other hand, submits that the workman was appearing before the Medical Board from time to time as and when asked by the Management. He himself requested on 18th February, 1992 that he be sent again to DTC Medical Board for his check up. That being so, there was no question of his refusal to receive the letter dated 19th February, 1992 or his failure

to report to the Medical Board. On 19th February, 1992, when the workman went to report for duty, he was not allowed to join the same. As such, it tantamounts to his termination without compliance of provisions of law. The impugned award does not suffer from any infirmity which calls for interference. As such, the petition is liable to be dismissed. Learned counsel for the respondent, however, did not oppose the submission of learned counsel for the petitioner that in the facts and circumstances of this case, age of superannuation of the respondent be taken as 55 years.

14. A perusal of record reveals that the undisputed facts are that the workman was appointed by the management as driver-cum-fitter w.e.f. 9th September, 1975. On 3rd December, 1990 he met with an accident, and thereafter he was advised light duty by the medical board of the management. Accordingly, he was given the job of a clerk. From time to time, he was directed by the management to report to the medical board and he had been reporting to the medical board whereupon on its advice, he was given a lighter duty. It is the case of the workman that on 18th February, 1992, he submitted an application to the management for his medical check up. This fact is not denied by the petitioner. Para 5 of the written statement filed by the petitioner before the Labour Court in this regard is material and is reproduced as under:-

“5. That in reply to para 5, it is submitted that the workman was sent by the Depot Manager for Medical check-up to the Medical Board (Inderprastha Depot). As per the medical Board Reports dated 9.3.91, the concerned workman was declared unfit for the duty of a driver and the workman was given light duty. The workman was again sent for medical check-up on 9.5.91, the workman was again declared unfit for the duty of a driver for three months w.e.f. 10.5.91. The workman was then again sent for medical check-up as per chairman’s instruction, the workman was again declared unfit for the duty of a driver w.e.f. 29.7.91 and the workman was given light duty for three months. After the expiry of three months the workman was again declared unfit for further 16 weeks w.e.f. 30.10.91 for the duty of a driver by the Medical Board. After the expiry of this duration on 19.2.92 the driver had requested for light duty on an application. The workman was then again sent for medical check-up on 19.2.92 vide letter

dated 19.2.92, but the workman neither received the letter for medical check-up nor reported to the Medical Board for medical check-up. It is denied that the workman was allowed duty upto 18.2.92 as alleged.”

(emphasis added)

15. The averments made in this paragraph itself reflect that the petitioner admitted that the workman himself moved an application requesting for a light duty. The petitioner examined MW1-Sh. Tej Pal Singh, Dy. Manager who filed his affidavit and exhibited various documents Ex.MW1/1 to Ex.MW1/8. Ex.MW1/6 is a letter written by the workman to the Depot Manager, Gazipur Depot stating that the period of light duty given to him for 16 weeks on the basis of the recommendations of the DTC Medical Board had expired on 18th February, 1992 and he requested that he be sent again to DTC Medical Board for his check up. As such, this letter which was produced by the management itself goes to show that it was the workman himself who requested for his medical check up on 18th February, 1992. The management, however, relied upon Ex.MW1/7 a letter dated 19th February, 1992 issued by the Depot Manager calling upon the workman to appear before the Medical Board, IP Depot for his medical check up. It is the case of the management that the workman refused to accept this letter and did not appear before the Medical Board.

16. Learned Labour Court rightly observed that it is not duly proved as to whether the workman refused to accept this letter Ex.MW1/7. There is no report on Ex. MW1/7 that it was ever tendered to the workman or that it was refused by him. Name of the person who might have tendered the same to the workman is not disclosed by the management either in the written statement or even in the affidavit of MW1. Moreover, it is not the case of the management that the letter was sent at the residential address of the workman. Keeping in view the admitted fact that the workman himself prayed for his check up by the Medical Board of the Management on 18.2.1992, it is difficult to believe that he would refuse to accept

Ex.MW1/7 and refused to undergo medical examination.

17. According to the workman, when he was not allowed to join duties on 19th February, 1992, he made a complaint whereupon the matter was referred to the conciliation officer. It is nowhere the case of the management that any notice was given to the workman to join his duties after 19th February, 1992 or that it issued any charge sheet against him for his unauthorized absence from duty and conducted any domestic inquiry in this regard. For the first time in the written synopsis filed by the DTC, it is alleged that the respondent was issued a charge sheet dated 1st January, 1993 for remaining absent w.e.f. 19th February, 1992 to 9th December, 1992. Such a plea was never taken by the petitioner before any forum, although, as seen above, the litigation between the parties is pending since the year 1992 till date. Even here, it is not clarified as to what was the fate of this charge sheet. It is alleged that another charge sheet for absence from November, 1997 to May, 1998 was issued and in that inquiry, he was removed from his services w.e.f. 19th November, 1999. If a charge sheet was issued on 1st January, 1993, no explanation is forthcoming as to why it was not taken to its logical end. Moreover, why the department maintained silence since 1992 till 1998 when the charge sheet for remaining absent from duty from November, 1997 to May, 1998 for a period of 212 days was issued where after, he was removed from his services w.e.f. 19th November, 1999. The initiation of disciplinary proceedings against the respondent belies its own stand that he was not reporting for duty from 19th February, 1992 onwards and it only shows that a paper formality was being completed to show that his services had actually been terminated in the year 1999 and not in the year 1992.

18. It is not the case of the petitioner that the respondent voluntarily abandoned the services of the petitioner as held in *Shiv Kumar vs. Hansita*, 2011 LLR 13. The abandonment of service is a question of intention which can be gathered from

the totality of the facts and circumstances of each case. There has to be clear evidence on record to show that despite grant of reasonable opportunity to the employee by the management, he failed to join back his duties without any sufficient reasons and, therefore, in the absence of any such cogent and convincing evidence, voluntary abandonment on the part of the employee cannot be readily inferred. The prompt action on the part of the workman whereby he made a complaint through his union before the Labour Department on 20th February, 1992 itself reflects that he never had the intention to abandon the duties.

19. On the other hand, although the management has alleged that it never terminated the services of the workman but there is nothing on record to show that despite the fact that the matter was reported to the Labour Department by the workman, any letter was written to the workman calling upon him to join the duties. In fact, after 19th February, 1992, no action was taken against the workman till the year 1998 when it was alleged that after issuing a charge sheet, his services were terminated. Under the circumstances, the learned Labour Court rightly came to the conclusion that the workman was refused to join duty by the management w.e.f. 19th February, 1992 without any justifiable reason which amounts to termination. This finding does not warrant any interference.

20. As regards the relief part, it has come on record that the workman has since attained the age of superannuation, therefore, the learned Labour Court granted back wages @ 25% from the date of termination, i.e., 19th February, 1992 till the date of superannuation and all the benefits to which he is entitled on his

superannuation.

21. Learned counsel for the petitioner, in this regard, relied upon ***DTC vs. Sh. Dharampal & Ors.***, LPA 1214/2007 where Court took note of office order No. 99/63 dated 4th October, 1963 issued by the management governing service conditions of the workers including the drivers working in erstwhile Delhi Transport undertaking that a part of MCD now taken over by Delhi Transport Corporation which provides for retirement age of all employees of the corporation as 55 years later extended up to 58 years while that of the drivers was kept at 55 years extendable on year to year basis subject to their medical fitness. The benefit of extension was made applicable even upto 60 years on the basis of their medical fitness vide Circular dated 30th June, 1998. Relying upon these circulars, counsel submits that the retirement age, in the case of the drivers, is 55 years and he has to be medically fit to reach the age of superannuation of 58 years and then to 60 years. The date of birth of the respondent is 6th September, 1951. He attained 55 years on 30th September, 2006. He was never declared medically fit either by the DTC or any other board. Therefore, under no circumstances, superannuation could go beyond 55 years of age.

22. During the course of arguments, learned counsel for the respondent/workman did not dispute the aforesaid submission of the learned counsel for the petitioner and submitted that age of superannuation of respondent be taken as 55 years. It is a matter of record that due to the accident, the workman was being declared unfit for the job of driver and was being kept on light duty. There is nothing on record to show that he was declared medically fit either by DTC medical board or any other board. Therefore, his date of superannuation is to be taken as 55 years. The relief granted by the learned Labour Court is, therefore, clarified to the extent that the petitioner is directed to pay back wages @ 25% from the date of termination, i.e., 19th February, 1992 till 30th September,

2006 and all benefits to which he is entitled on his superannuation subject to adjustment of any amount which may have been paid to the workman during the pendency of these litigations. The remaining part of the award directing the management to pay Rs.11,000/- towards cost of proceedings is maintained. The aforesaid amount along with all benefits to which he is entitled on superannuation be paid to the workman within a period of eight weeks.

23. The writ petition stands disposed of accordingly. Pending application also stands disposed of.

(SUNITA GUPTA)
JUDGE

DECEMBER 14, 2015/rs