

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: August 17, 2016

Judgment delivered on: September 30, 2016

+ LPA 250/2016, CM Nos.14003-14005/2016 & 14047/2016

DELHI TRANSPORT CORPORATION Appellant

Through: Mr. Uday M. Tiwari, Adv. with Mr.
Sunil Kr. Ojha, Adv.

Versus

RAJENDER KUMAR Respondent

Through: Ms. Padma Priya, Adv. with
respondent in person

CORAM:

**HON'BLE MS JUSTICE INDIRA BANERJEE
HON'BLE MR JUSTICE V. KAMESWAR RAO**

J U D G M E N T

V. KAMESWAR RAO, J

CM No.14004/2016

Exemption allowed subject to all just exceptions.

Application stands disposed of.

CM No.14005/2016

This is an application seeking condonation of 32 days delay in filing the appeal. For the reasons, stated in the application, the delay of 32 days in filing the appeal is condoned.

Application stands disposed of.

CM No.14047/2016

This is an application seeking condonation of delay in re-filing the appeal. For the reasons, stated in the application, the delay in re-filing the appeal is condoned.

Application stands disposed of.

LPA 250/2016

1. The Appeal has been filed by the Delhi Transport Corporation impugning order/judgment dated December 03, 2015, whereby the writ petition filed by the appellant, challenging the Award dated December 9, 2009 in ID 251/08/92 passed by the Labour Court, Karkardooma Courts, Delhi was dismissed.

2. Some of the facts, which are relevant to decide this appeal are, the respondent-Workman was appointed as a sweeper/cleaner with the appellant-Corporation on April 13, 1983. A charge sheet dated November 29, 1988 was issued to the respondent for availing leave without pay for 118 days between the period November 1987 to October 1988. The charge sheet stated that the aforesaid act of the respondent amounted to misconduct within the meaning of para 4(ii) and 19(h) of the Standing Orders governing

the conduct of DTC employees. The charge sheet also stated that the respondent's past record would also be taken into account at the time of passing of the order. The past record of the respondent showed that he was punished with stoppage of one increment with cumulative effect on three occasions for availing excessive leave. The respondent-workman replied the charges and explained that due to his own sickness and that of his wife, son during November 1987 to October 1988, he submitted leave applications. Enquiry was held. The findings of the enquiry officer were in favour of the respondent-workman but the appellant rejected the findings of the enquiry officer. A de-novo enquiry was conducted on January 17, 1989 into the allegations leveled against the respondent. In the charge sheet, as referred above, in which the respondent fully participated wherein he has admitted that he has taken leave without pay because of his illness and the illness of his children. The Enquiry Officer, in his findings found the charges leveled against the respondent as proved. The Disciplinary Authority issued notice dated January 30, 1989 to show cause as to why he should not be removed from the services of the appellant-Corporation. The Disciplinary Authority considered the reply submitted by the respondent and removed him from the services of the Corporation on July 06, 1990.

3. The respondent raised an industrial dispute. The Labour Court passed an Award dated May 25, 1999 in favour of the respondent. The appellant challenged the said Award by way of a W.P.(C) No.4030/2001. Vide order dated November 10, 2004, this Court had allowed the said writ petition and set aside the Award and remanded the matter back to the Labour Court to proceed in accordance with law. Pursuant to the directions of this Court, the parties led their evidence and vide the impugned Award dated December 09, 2009, the appellant was directed to reinstate the workman with continuity of service in the same post by paying the workman a lump sum amount of `50,000/- towards back wages.

4. The contention of the learned counsel for the appellant before the learned Single Judge was that respondent-workman remained absent from his duties without intimation/prior approval for 118 days during the period November 1987 to October 1988, which reflected his complete indifference and carelessness towards his duties and his action amounted to misconduct and the respondent admitted that for a period of 37 days, he did not submit any application for grant of leave. He also relied upon the past conduct of the respondent, which was not found to be unblemished. He relied upon the

judgment of the Supreme Court in the case of *DTC vs. Sardar Singh (2004) 7 SCC 574* and a judgment of this Court passed in *Writ Petition (Civil) No.3798/2011 Delhi Transport Corporation vs. Nain Singh decided on October 20, 2015*.

5. The stand of the respondent-workman before the learned Single Judge was that 118 days leave without pay was sanctioned/regularized by the appellant-Corporation. If the leave was sanctioned and regularized in accordance with Rules, by the Competent Authority then the alleged misconduct is no misconduct in the eye of law and sought to distinguish the judgment of *Sardar Singh (supra)*. The learned Single Judge has relied upon the findings of the first Enquiry Officer, which was referred to by the Labour Court in its Award dated May 25, 1999, wherein it was reflected that leave for the period of 118 days was regularized and was duly sanctioned. On such a finding, it was held by the learned Single Judge that Clause 19(h) of the Standing Orders was not applicable. The learned Single Judge was also of the view, no reasons have been given by the appellant-Corporation as to why, the said enquiry report was not accepted and what was the reason to hold a de-novo enquiry, which gave the findings against the workman. The learned Single Judge also held that even after the matter was remanded back

to the Labour Court, it was found that the evidence reflected that the workman had submitted medical certificates for 41 days. Except for 37 days for which no leave application was moved and for the balance period, leave was taken for different reasons and the learned Single Judge held that no fault can be found with the findings of the Labour Court and also distinguished the judgment of ***Sardar Singh (supra)***. The learned Single Judge also held that the charge against the respondent-workman confined to not submitting leave application for 37 days coupled with the past conduct showing obtaining excessive leave during the year 1986 for which he suffered minor penalty. The learned Single Judge also noted that this prompted the Labour Court to award only a lump sum compensation of `50,000/- towards back wages. Learned Single Judge relied upon the following three cases, while dismissing the writ petition.

- (i) ***AIR 1952 SC 192 Veerappa Pillai v. Raman and Raman Ltd.;***
- (ii) ***AIR 1964 SC 477 Syed Yakoob v. K.S. Radhakrishnan;***
- (iii) ***AIR 1984 SC 1467 Sadhu Ram v. Delhi Transport Corporation.***

6. The learned counsel for the appellant reiterated the submissions, as made before the learned Single Judge, inasmuch as the respondent was

required to get the leave sanctioned before he goes on leave. He states, that in any case, only against 41 days, certificates were submitted and rest of the leaves having not been accounted for, coupled with the past conduct of the respondent, the Labour Court could not have interfered with the second Enquiry Report and the order of removal passed by the Disciplinary Authority. He would heavily rely upon the judgment of the Supreme Court in the case of *DTC v. Sardar Singh (supra)*, to say that the case is covered by the said Judgment and it is not such a case where the respondent could have been let off lightly.

7. On the other hand, Ms. Padma Priya learned counsel appearing for the respondent-workman, on advance notice, would justify the order of the learned Single Judge. She states, that the charge of having availed 118 days leave without pay has not been proved against the respondent, which could have resulted in the penalty of removal, being passed against the respondent. She states, the fact that the respondent had submitted medical certificates, in support of his leave for 41 days and leave for the balance period was for certain justifiable reasons, cannot be disputed. She would state, that taking into account the totality of the facts, the order of removal has been rightly set aside. Two Authorities, having taken a view in favour of the respondent, this

Court would not like to upset the findings and come to a different conclusion.

8. Having heard the learned counsel for the parties, the only question arises for consideration is whether against 118 days leave 41 days was against medical certificates; the submission of the leave application for some period and no leave application for 37 days, and the charge in the charge sheet that the respondent had taken 143 days excessive leave in the year 1986 and 103 days leave in the year 1987 and out of four adverse entries, three adverse entries are about availing of leave without pay, the Labour Court could have interfered with and set aside the penalty of removal imposed on the respondent as upheld by the learned Single Judge.

9. The position of law is well settled in the case of *DTC v. Sardar Singh (supra)*, the Supreme Court has held 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 a conclusion about the employee being habitually negligent in duties and has exhibited

lack of interest in the employer's work. Conclusion regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when the same is unauthorized. It also held that an order passed treating absence as leave without pay after passing an order of termination is only for the purpose of maintaining correct record of service. It relied upon its judgment in the case of *State of M.P v. Harihar Gopal (1969) 3 SLR 274 (SC)*.

10. The charge in the case in hand, is absence without obtaining leave in advance. The plea of the respondent was, the leave he had taken was for his as well as his children's illness. Against 118 days, medical certificates for 41 days was submitted, still 77 days of leave was unaccounted for. It is not the case of the respondent that the leave for those days was taken in advance. This sufficiently reveals that the conduct of the employee is nothing but irresponsible and can hardly be justified and in view of the Standing Orders, unauthorized leave can be treated as misconduct. Paras 4 and 19 of the Standing Orders, are reproduced as under:-

"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."

11. On a perusal of para 4 of the Standing Orders, it is clear, that it shows the seriousness attached to habitual absence. Clause (i) shows, there is a requirement for prior permission. Non-observance of clause (i) renders the absence unauthorized. In the case in hand, the finding of the Labour Court is as under:-

10. The management in order to establish the misconduct has filed the affidavit of one Ratibhan Chaudhary, who was the disciplinary authority at the relevant point of time. He deposed that workman was absent for 118 days and for 37 days he has not submitted the leave applications. MW 1 received the report of a senior clerk and a charge sheet was issued to the workman. The copy of the report is produced at Ex. MW 1/1. He produced the past record at Ex. MW 1 /2 and Ex. MW 1/3 is the order proposing the penalty and Ex. MW 1 /4 is the order confirming the dismissal. MW 1 testified that after the enquiry report, he considered the 7/13 past record and the reply and then confirmed the punishment. MW 1 was cross-examined by the workman. He admits that the workman had taken the ground that he was under the compelling circumstances and submitted the medical certificate. WW 1 in rebuttal deposed that he submitted the medical certificates and that he was treated by one Dr. Azad of Nangloi. He affirms that he has never lost interest in the working of the corporation. Workman had got marked Mark W-1 to W-4 which are his medical certificates issued by Dr. Azad. The medical certificates are for the period of 11.06.1988 to 20.06.1988 along with separate fitness certificate & another medical certificate for the period 10.08.1988 to 12.09.1988 along with separate fitness certificate. These are all the photocopies of the records, but furnished by the management. From the list of documents furnished by the management,

certain copies of the leave applications are found. The medical certificates produced are for the period covering October, 1988 also.

11. The workman, in his rebuttal did not repel the contention of the management that he has not submitted leave applications for 37 days. This contention of MW 1 goes un rebutted.

12. As directed by the Hon' High Court, I am to examine the lack of interest & the aspect of misconduct. It is noted in Delhi Transport Corporation v/s Sardar Singh, JT 2004 (6) SC 342 that "habitual absence is a factor which establishes lack of interest in work. There can not 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."

13. In a recent unreported ruling of the Division Bench of our High Court in the matter of Vijay Singh v/s DTC (LPA 499/09, DD : 23.11.2009). It is observed that "para 6 of the judgment in Sardar Singh shows that the Supreme Court was dealing with a batch of appeals in which the number of days of absence in different cases alone was noticed. Those cases were ultimately remanded for a fresh consideration."

14. Keeping in view of the above position of law, I am to look into the special features of this case which reveal that the

order of penalty of removal of service passed by the management is not justified for the following reasons:

a) The explanation given by the workman that he was suffering and was made to take leave is proved by the very documents of leave application and copies of medical certificates produced by the management.

b) that the period of leave for which leave applications were submitted is covering the period of accusation in the charge sheet.

c) that the workman cannot be said to have availed intentional leave so as to exhibit lack of interest for the entire period of 118 days as contained in the charges, since the workman had submitted leave applications for a part period.

d) the evidence reveals that the management could only establish that the workman had not submitted the leave applications for 37 days. In the present case, this is not precise charge to impute lack of interest on the part of the workman in the duties of the corporation.

e) the charge as it is framed is not proved to the hilt except for a period of 37 days.

f) the documents and the explanation given by the workman to the charge sheet and that of the contention of the workman in the rebuttal evidence are seemingly probable that he was

suffering from ailment which can not be held as showing lack of interest.

h) the rebuttal evidence of the workman that he had never lost interest in the working of the corporation is to be reckoned in view of the above which shows that the charges as framed by the management are not proved completely before this Court. Hence, for the aforesaid reasons, I find that the order of removal is not justified and the workman is entitled for reinstatement.”

12. From the above, it is noted that the Labour Court has only noted that the medical certificates for the period June 11, 1988 to June 20, 1988; August 10, 1988 to September 12, 1988 and October 1988 were produced. The total period is of 41 days, as has come on record. The Labour Court also notes that, against 37 days, the workman had not submitted any leave application. That apart, the Labour Court notes that for the rest of the period, leave applications were given by the respondent. Mere submitting the leave application would not meet the requirement of para 4 of the Standing Orders. It is the case of the respondent that he had taken leave for his children's illness as well. Assuming that the medical certificates submitted was for his illness, surely for the illness of his children, he could have sought prior permission from the Authorities. In any case, for against 37 days, there was

no leave application. Hence, to that extent charge stands proved. In other words, the conclusion of the Labour Court at (h) above that the charges as framed by the Management are not proved completely before the Court, may not be tenable. Hence, the case of the respondent gets covered under para 4 of the Standing Orders. The past conduct of the respondent, also reveals absence for a very long duration of 143 days (1986), 103 days (1987) and three adverse entries are about availing leave without pay. The circumstances does suggest that the respondent was guilty of the misconduct under para 4 and 19 of the Standing Orders and the case in hand is squarely covered by the law laid down by the Supreme Court in the case of **Sardar Singh (supra)**. Further, the position of law with regard to Section 11A of the Industrial Disputes Act, 1947 is very clear, inasmuch as the Labour Court may interfere with the quantum of punishment awarded by the employer but ordinarily discretion exercises by employer should not be interfered with. It is not a case where the penalty of removal is unjustified. The Labour Court could not have set aside the order of removal.

13. That apart, even the learned Single Judge has erred in not considering the facts in proper perspective and in para 16, the learned Single Judge had relied upon the report of the first Enquiry Officer noting that leave was

regularized and was duly sanctioned. The learned counsel for the petitioner was right in submitting that the report of the first Enquiry Officer could not have been considered as the same was not accepted, which resulted in initiating a de-novo proceedings, which action has not been challenged by the respondent. The learned Single Judge could not have taken the act of regularization of leave in favour of the respondent and against the appellant herein, more particularly, when the Supreme Court relying upon *State of M.P. v. Harihar Gopal (supra)*, has held that treating absence as leave without pay after passing an order of termination is for the purpose of maintaining correct record of service. It is a case, where the learned Single Judge has not in proper perspective considered the ratio laid down by the Supreme Court in *DTC v. Sardar Singh (supra)* and by upholding the order of the Labour Court has come to an erroneous conclusion. We note for benefit, the following paragraphs of the judgment in the case of *DTC v. Sardar Singh (supra)*.

“9. 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.

10. 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.

11. 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.

12. 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.

13. That being the factual position, the Tribunal was not justified in refusing to accord approval to the order of dismissal/removal as passed by the employer. The learned Single Judge was justified in holding that the employer was justified in passing order of termination/removal. The Division Bench unfortunately did not keep these aspects in view and reversed the view of learned Single Judge.”

14. It is a case where the Labour Court has failed to follow the law laid

down by the Supreme Court and the Award is an erroneous exercise of jurisdiction vested in it. Consequently, the learned Single Judge has erred in upholding the order of the Labour Court. The reliance placed by the learned Single Judge on the judgments of the Supreme Court in *Veerappa Pillai (supra)*, *Syed Yakoob (supra)*, *Sadhu Ram (supra)* and *Mohanlal Thakkar v. Paschim Gujarat Vij Co. Ltd. and Anr. (2004) 6 SCC 434*, are concerned, there is no dispute on the propositions as laid down by the Apex Court in those judgments.

15. Noting the facts of this case, the order of the learned Single Judge is liable to be set aside, so also the order passed by the Labour Court in ID 251/08/92. The appeal is allowed. No costs.

CM No.14003/2016 (for ad-interim stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

INDIRA BANERJEE, J

SEPTEMBER 30, 2016

ak/jg