

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

Judgment reserved on October 12, 2015

Judgment delivered on January 04, 2016

+ **W.P.(C) 6383/2008**

KRISHNA MODEL SECONDARY SCHOOL AND ORS

..... Petitioners

Through: Mrs. Avnish Ahlawat, Adv.

versus

HOSHIARI DEVI & ORS.

..... Respondents

Through: Mr.J.P.Sengh, Sr. Adv. with
Ms.Vanessa Singh, Mr.Baljeet
Singh, Mr.Ajay Kumar, Ms.Sana
Ansari, Advs. for R-1
Mr.G.D. Mishra, SC for R-3

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this writ petition is to the order dated July 18, 2008 passed by the Delhi School Tribunal ('Tribunal' in short) in Appeal No.14/1997 filed by the respondent No.1 herein against order dated December 12, 1996 purporting to be an order of her termination from the services of the petitioner No.1 School.

2. It was the case of the respondent No.1 that she was employed as an Assistant Teacher by the petitioner school however she was not paid according to her scale. It was her case that her work and conduct was

satisfactory showing excellent result. She and other teachers made a representation to the Directorate of Education-respondent No.2 to pay her salary by cheque. It was her case that due to this the management of the petitioner school became vindictive and they entangled her in various criminal cases and started issuing various memos to her. The petitioners dispatched a letter on December 23, 1996 by antedating the same to December 02, 1996 alleging that the petitioner school had surrendered her post. Neither any charge-sheet was served nor any opportunity was granted to her before surrendering her post which had the effect of her termination from the services of the petitioner No.1 School. She had also stated that she was not allowed to enter the school. It was her case that the respondent Nos.2 & 3 had failed to take any action against the petitioners although many irregularities were pointed out.

3. The case of the petitioners was that the order dated December 02, 1996 was not appealable because it simply indicated that the respondent No.1 had abandoned the post. It was their case that the respondent No.1 and few other teachers at the instigation of Sh. Attar Singh Arya who was an ex-office bearer of the school started creating mischief in the school. He wanted to open a new school in the area and wanted to get the students and teachers transferred from the school. An agitation was started by few of the teachers from September 13, 1996 when they

stopped teaching the students. Other teachers and members of the management were manhandled. Even the officers of the education department were not spared. Director of Education was forced to write to the DCP of the concerned district with a request to provide aid and assistance to the school as well as to the officials of the Directorate of Education. Memos were issued to the respondent No.1 and other teachers but to no effect. All teachers except two came and joined the school. Since studies of the students were suffering because of non-cooperation of the teachers including the respondent No.1, permission was sought from the education department to engage adhoc teachers. New teachers were appointed and they started imparting teaching to the students. Despite memos and notice in the newspaper, the respondent No.1 did not join her duties. A final opportunity was given to the teachers including the respondent No.1 to resume duties by November 30, 1996, failing which it would be presumed that they had abandoned their service. Despite that the respondent No.1 did not join the duties. So, a notice was sent on December 02, 1996 informing the teachers and the respondent No.1 that since they had abandoned their posts, they have no right to hold the same. The respondent No.1 was not a confirmed employee and she had abandoned job of her own and had joined Golden Valley Public School since September/October, 1996 so she is not

entitled to any relief.

4. The Tribunal was of the view that the respondent No.1 had been approaching various authorities including the Director of Education, area SHO, informing them that she and other teachers were physically prevented from entering the School from October 23, 1996. The Tribunal also held that there was no intention on the part of the respondent No.1 to abandon her service. She was much interested in continuing with her employment but the ground realities were that she was physically prevented from entering the school premises. The Tribunal held, had it been a case of abandonment of service there was no need for the respondent No.1 to persistently knock at the doors of Directorate of Education and the police authorities. The Tribunal held that the petitioners could not able to prove that the respondent No.1 had any intention to abandon her service. Finally the Tribunal declared the respondent No.1 to be in continuous service of the petitioner No.1 school without any break and had granted 50% of the back wages with effect from December 02, 1996 till the date of the order and thereafter full salary with consequential benefits.

5. Mrs.Avnish Ahlawat, learned counsel for the petitioners would submit that on September 13, 1996 most of the teachers including the respondent No.1 left the school after the assembly by leaving a leave

application for one day leave and took the students outside the school premises on the streets of Najafgarh shouting slogans against the management. The demand of the teachers was to take back Sh. Attar Singh Arya as Manager otherwise they will destabilize the school. The daily routine of the teachers was that they will come in the morning to the school and then start shouting slogans and then would take the students to the streets of Najafgarh where they would indulge in antisocial activities. In this scenario, the petitioner school filed a suit for injunction against the teachers. Before filing of the suit the teachers walked away with the attendance register and no classes were held from September 17, 1996 to September 24, 1996. On the said dates inspection of the school was held at the behest of the then Chief Minister – Late Sh. Sahib Singh Verma and late Sh. Kedarnath Sahni, President, BJP. The inspection team was not allowed to enter the school by the teachers and the students. She would also state that the Deputy Director of the concerned district also gave his report where he had clearly stated that the teachers are indulging in indiscipline and they are provoking the students to do the same. It was their report that some of the teachers are actively involved. The shortcomings of the management were also pointed out and the management was directed to remove the irregularities. She would also highlight that part of the report which

stated that the teachers were not in their classes and the students were shouting in the classes. Even the teachers were shouting loudly using unpalatable language and words. The teachers were found levelling allegations against the officers who visited the school. The chaotic conditions prevailing in the school was unimaginable for which the teachers were fully responsible for such conditions because they were provoking the students to create disorder in the school. The police was called by the teachers. The inspecting team introduced themselves to the police but the teachers with students continued giving statements to the police.

6. According to Ms.Ahlawat, the report clearly suggests the endeavour of the teachers to get the school closed and to accommodate the students in Golden Valley School. She also relies upon the report of the Additional Director of Education which reveals that at the instigation of the teachers, the students manhandled the officials of the Director of Education who were sitting in Principal's office. She would also state that the situation was so grave that the Director of Education vide his letter dated October 16, 1996 requested the DCP (South-West) to keep a close watch around the school premises and the locality particularly when the school re-opens after the Autumn vacation and accordingly a Constable was assigned by the P.S Najafgarh who everyday submitted a

report that no teacher was stopped at the gate of the school. She states that despite memos issued to the teachers including the respondent No.1 not to indulge in the activities and join the school immediately, the respondent No.1 has not joined. According to her, the respondent No.1 does not deny the memos in her reply. She refers to the public notice issued in the newspaper on November 10, 1996, wherein the name of the respondent No.1 and other teachers was given highlighting that they were absenting from duty without any intimation from October, 1996 and their absence is causing considerable loss to the institution and the students and were called upon to resume the duty by November 30, 1996 failing which it will be presumed that they had abandoned their service wilfully. In spite of the public notice the respondent No.1 and others did not come and join their duties. According to her, this aspect was informed to the Director of Education on December 24, 1996 and was also pointed out that few other teachers have joined Golden Valley School which includes the respondent No.1. She states that few teachers came and joined the school except the respondent No.1 and six others out of whom also two had resigned. She would state that none of the teachers including the respondent No.1 had written any letter to the school management that they are willing to join the duties were not allowed to join. According to her, as a matter of fact the respondent No.1

never went to attend the school. She had submitted false and fabricated documents in which she alleged to have replied to the memos by stating that she was not allowed to enter the school by use of force. She has attacked the impugned order by stating, the same was passed without giving opportunity to the petitioners to explain their case. According to her, it was never the case of the teachers including the respondent No.1 that despite attempt they were not being allowed to enter the school. She further states, in the impugned order the Tribunal has not discussed the report of the Director of Education and other admitted documents on record. It is her endeavour to submit that the respondent No.1 was never ready and willing to join the school as was done by other teachers. It was her case that she did not show any intention to join the school as she was working in Golden Valley School. Her submission is that the order of the Tribunal is perverse. She also pleaded, on account of loss of confidence after so many years when the school is running smoothly the respondent No.1 cannot be reinstated. Even after the pronouncement of the judgment by the Tribunal, the respondent No.1 had come to the school with police to gain entry, which shows that the respondent No.1 is not a fit person for reinstatement. She has relied upon the following judgments in support of her submissions:-

“(a) (2004) 7 SCC 574 Delhi Transport Corporation vs.

Sardar Singh

(b) (2005) 5 SCC 337 Viveka Nand Sethi vs. Chairman, J&K Bank Ltd.

(c) (2004) 4 SCC 268 UP State Bridge Corporation Ltd. vs. UP Rajya Setu Nigam S. Karamchari Sangh

(d) AIR 2008 SC 1525 New India Assurance Co. Ltd. vs. Vipin Behari Lal Srivastava

(e) (1982) 2 SCC 328 Anil Kumar Chakraborty and Anr. Vs. M/s Saraswatipur Tea Company Ltde.

(f) (1974) 3 SCC 152 The Binny Ltd. vs. Their Workmen

(g) (1969) 3 SCC 653 M/s Ruby General Insurance Co. Ltd. vs. Sh. PP Chopra

(h) (2001) 9 SCC 609 Kanhaiyalal Agrawal and Ors. vs. Factory Manager, Gwalior Sugar Company Ltd.

(i) (1972) 3 SCC 806 Binny Ltd. vs. Their Workmen

(j) New India Co-operative Bank Ltd vs. Shankar B. Bangera W.P.(C) No. 2677/2003

7. On the other hand, Mr. J.P. Sengh, learned Senior Counsel for the respondent No.1 has vehemently argued that the writ petition filed by the petitioners include certain documents which were not part of the record of the appeal before the Tribunal. He also states that some documents which were filed before the Tribunal have not been filed before this Court. In other words, it is his submission that those documents which were not part of the Tribunal record would not like to be considered by

this Court in these proceedings. On merit, it is his submission that the order passed by the Tribunal is just and proper. He would also state that the action against the respondent No.1 was a vindictive one as the respondent No.1 and other teachers had made representations to the authorities with regard to irregularities committed by the petitioners. It is when the school authority stopped the teachers and the respondent No.1 from discharging their duties they started representing to the respondent Nos.2 & 3 as well as to the police authorities. The respondent No.1 had filed the representations so made to the authorities along with the appeal. No objection was ever raised by the petitioners on those documents, which the Tribunal has referred to and considered. According to him, the respondent No.1 had categorically denied joining any other school. He would also state, immediately after receiving the impugned order December 02, 1996 on December 24, 1996 the respondent No.1 approached the Tribunal on January 14, 1997 i.e. within three weeks from the date of receipt of the order. According to him, in response to the reply before the Tribunal, in the rejoinder the respondent No.1 had categorically stated that she is ready and willing to perform her duties provided she is permitted to do so. He would state that the reliance now placed by the petitioner school through Annexure-E was never filed before the Tribunal. Even otherwise, according to Mr.Sengh the said

documents pertain to the statements of some police personnel given on the letterhead of the petitioner school and cannot be relied upon. The said documents are totally false and fabricated. He also states that even assuming for the sake of argument that the petitioner and other teachers were sitting on strike and not attending the duties even the same would not constitute abandonment of service by the respondent No.1 in view of the ratio of the judgment of the Supreme Court in the case reported as **1979 (1) SCC 590 G.T. Lad & Ors. vs. Chemical and Fibres of India Ltd.**, on which the Tribunal has relied upon while allowing the appeal in favour of the respondent No.1. In the last it is his submission that the new proposition advanced by the petitioners of loss of confidence is untenable inasmuch as the respondent No.1 along with other teachers brought to the notice of respondent Nos.2 & 3 some of the irregularities being committed by the petitioners which on inspection were found to be correct by the inspecting team, which is reflected in the report of the team. Hence, it is not a case of loss of confidence to represent against illegalities committed by the petitioners and such a plea cannot be accepted. He would rely upon the judgment in the **G.D. Lad & Ors. (supra) and 113 (2004) DLT 742 Arun Industries vs. Presiding Officer, Labour Court, Delhi & Ors.** in support of his contentions.

8. Having heard the learned counsel for the parties, the issue which

arises for consideration is whether in the facts the respondent No.1 said to have abandoned her post in the petitioner No.1 school. The Tribunal relied upon the following letters addressed by the respondent No.1 to the Director of Education, SHO, to the school:-

- “(i) Letter dated 22/10/1996 to Director of Education*
- (ii) Letter dated 23/10/1996 to SHO*
- (iii) Letter dated 24/10/1996 to SHO*
- (iv) Letter dated 24/10/1996 to Director of Education*
- (v) Letter dated 25/10/1996 to Director of Education*
- (vi) Letter dated 25/10/1996 to SHO*
- (vii) Attendance Sheet to Directorate of Education from 30/10/1996 to 02/11/1996*
- (viii) Letter dated 31/10/1996 to School*
- (ix) Reply sent on 04/11/1996 to Show Cause dated 26/10/1996 & 29/10/1996*
- (x) Letter dated 13/11/1996 to Director of Education*
- (xi) Letter dated 15/11/1996 to School*
- (xii) Letter dated 16/11/1996 to School*
- (xiii) Letter dated 26/11/1996 to School*
- (xiv) Letter dated 20/12/1996 to School”*

9. An issue was raised during the submissions by Ms.Ahlawat that the complaints/representations made by the respondent No.1 between September 15, 1996 to October 25, 1996 to the SHO, DCP, Director of Education and filed by the respondent No.1 before the Tribunal were not responded to as opportunity to file response was not given to the

petitioners. I had called for the record of the Tribunal and noted from the same that the respondent No.1 had filed documents relating to the complaints/ representations made to Director of Education, SHO and DCP by the teachers by way of a compilation on February 22, 2008 when the Tribunal had passed the following order:-

“Both the parties have filed the documents after exchanging copies. List this matter for final arguments on 7/04/2008.”

10. Suffice to state, no opportunity was sought for by the petitioners to file a response to the documents filed by the respondent No.1. Even otherwise I note, it is not the case of the petitioner No.1 in the writ petition that it did not receive any reply on the memos issued to the respondent No.1.

11. In fact I note, in one of its communications dated November 18, 1996 to the Director/Education Officer, Zone (XXII), Directorate of Education the petitioner school had stated as under:-

“Despite all these efforts made by the management these teachers have not reported for duty and rather arranging flimsy and concocted grounds that they have been threatened and restricted of the entry in the school. These are all concocted and frivolous made out story by these teachers.”

12. The aforesaid reveals, the school had noted the stand of the teachers that they have been threatened and restricted from entering the school. The school has not called upon the Director of Education to impress upon the teachers including the respondent No.1 to resume their duties. It is not the case where the petitioner school had not received response to its notices/memos. It is also not the case of the petitioner No.1 School that it did write to the teachers and the respondent No.1 that their allegation that the School is not allowing them to enter the school is incorrect or concocted. On perusal of the letters dated October 30, 1996 to Director of Education, November 26, 1996 to School, December 17, 1996 to Director of Education, September 15, 1996 to SHO, October 22, 1996 to Director of Education, October 23, 1996 to SHO, October 24, 1996 to SHO, October 25, 1996 to SHO, letter dated Nil to the Director of Education (page 420), letter dated October 24, 1996, letter dated Nil (page 427), letter dated Nil (page 429), letter dated November 04, 1996 to the School, letter dated October 23, 1996 to the Dy. Director of Education, it is clear that it is the petitioner No.1 school which had prevented the entry of the teachers including the respondent No.1 into the school.

13. That apart, it is noted that the respondent No.1 in her letter dated November 15, 1996 in response to the letter of the School dated

November 07, 1996 has stated as under:-

“As for the axing of my salary for Sept., 1996 and complete disallowance of salary for October, 1996, it is stated that the step taken by you is wholly arbitrary, whimsical and illegitimate. In fact in Sept., 1996 there was no disruption of studies and same continued smoothly throughout the month. As for Oct., 1996, I had performed my duty sincerely and diligently upto 10.10.96. The School was closed for Dussehra vacation from 11.10.96 to 21.10.96. After vacation I had worked in the school on 22.10.96 and 24.10.96. However, thereafter you had not allowed me to enter the school by use of force. In response to your notice dt. 8.11.96 asking me to resume duty, I had reported for duty to Shri Bhim Singh, Manager, Gramin Siksha Santha on 14.11.96. He had taken my representation dt. 14.11.96 containing reply to the said Memo/notice dt. 8.11.96 without due acknowledgement. The said representation contained my joining report also. However, he did not allow me to enter the building and resume my work.

It is established beyond any shadow of doubt that I have never abstained from duty wilfully/unauthorisedly on any of the working days. However, I have been obstructed by the management to go to my work place by use of force on 23.10.96 and beyond 24.10.96. In support of my contention that I had actually performed my duty in the school throughout Sept., 1996 and upto

24.10.96 in October, 1996, I am enclosing a copy of the relevant portions of Teacher's Diary, which have been duly countersigned by the Vice-Principal. If in the face of this sound, reliable and indisputable evidence, I am being denied my legitimate dues then I am forced to draw the conclusion that despotic law is rampant in the school. Arbitrary, unethical and illegal actions of the management of the school are extra constitutional since they go on undeterted without any check by the Education Deptt. I am entitled to fully pay and allowances even for the period when I was forced to stay away from my work. I reserve my right to dispute the amount representating 12 days salary."

14. The reliance now placed by the petitioner No.1 school on the report given by the Constable said to have been posted at the gate that the teachers' entry was not prevented cannot be accepted as the said reports were not filed before the Tribunal and also it is not known in response to which communications, the said reports were tendered. That apart, the reports are on the letterhead of the petitioner No.1 school. No credence can be placed on the same. Further, the school has failed to prove that the respondent No.1 had joined the Golden Valley School by placing any credible evidence. Had it placed any evidence in that regard, possibility the plea of abandonment could have been accepted. The

heavy reliance placed by Ms.Ahlawat on the report of the inspecting authorities would not be of any help to the petitioners. At the most, it reflects the conduct of the teachers and students but would not support the plea of abandonment advanced by the petitioners. The judgments relied upon by Ms.Ahlawat on the plea of loss of confidence i.e. **Anil Kumar Chakraborty & Anr. (supra)**, **The Binny Ltd. (supra)**, **M/s Ruby General Insurance Co. Ltd. (supra)**, **Kanhaiyalal Aggarwal & Ors. (supra)** and **Binny Ltd. (supra)**, would not be of any help to the petitioners inasmuch as, the same are relevant only if the relief of reinstatement is granted, which can't be granted as I have been told that the respondent No.1 has attained the age of superannuation. Even otherwise, the judgments relied upon by Ms.Ahlawat on the issue of abandonment would not be applicable to the facts of this case inasmuch as in **Delhi Transport Corporation (supra)** the Supreme Court was concerned with the case of a Conductor against whom departmental proceedings were initiated on the ground of misconduct due to unauthorized long absence from duty; negligence of duties and lack of interest in the employer's work. The terms and conditions of appointment and service were governed by the applicable service regulations. According to the petitioner- DTC, unauthorized absence was indicative of negligence and lack of interest in employer's work

amounted to misconduct. After finding the employee guilty, the disciplinary authority imposed penalty of dismissal/removal from service. The Tribunal in exercise of its power under Section 33(2)(b) of the Industrial Disputes Act, 1947 held that the enquiry was not proper and granted opportunity to the employer to lead further evidence to justify its action. After the employer led its evidence, the Tribunal held that availing leave without pay did not amount to misconduct. It is noted that since the employer had treated absence from duty as leave without pay, it indicated sanction of leave and, therefore, also there was no misconduct. The learned Single Judge of the High Court held that the disapproval was not proper. In appeal the Division Bench of this Court held that the Tribunal's conclusion was in order. The Supreme Court was of the following view in para No.9 and 11:-

“(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.

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(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.”

In the case in hand, it is the case of the teachers and respondent

No.1 that they were prevented from entering the School, which has been accepted by the Tribunal. If the teachers are prevented from entering, surely they can't be said to be unauthorizedly absent, which is the case in the judgment on which reliance was placed. The judgment has no applicability.

15. In *Vivekanand Sethi (supra)*, the Supreme Court had noted that after the period of leave came to an end in June, 1983 the workman did not report for duties. Except for asking for grant of medical leave, he did not submit any explanation for his absence satisfying the management that he has not taken up any other employment or avocation and that he had no intention of not joining his duties. Mere sending of an application for grant of leave much after the period of leave was over, as also the date of resuming duties cannot be said to be a bona fide act on the part of the workman. Opportunities after opportunities indisputable had been granted to the workman to explain his position but he chose not to do so except filing applications for grant of medical leave and that too without annexing proper medical certificates. In the aforementioned fact situation, the Supreme Court held that there is no reason as to why the bank could not arrive at a satisfaction that the workman had no intention to join his duties. The Supreme Court also noted that though the said order was passed on May 17, 1984, a representation to the bank was

made by the workman to reconsider the said decision after a period of three years and two months by a letter dated July 31, 1987. Yet again, a dispute was sought to be raised by issuance of a legal notice in the year 1989. The bank had clearly stated that the workman had been carrying on some business elsewhere. It may be stated here, the impugned order in ***Vivekanand Sethi (supra)*** was on invoking the rule regarding voluntary cessation of employment by the employee. No such rule exists here. The facts in the said case are at variance with the facts of the case in hand, which have been noted above. The judgment has no applicability.

16. In ***UP State Bridge Corporation Ltd. & Ors. (supra)***, the Supreme Court was considering a case with regard to a Company registered under Section 616 of the Companies Act. The terms and conditions of employees of the Company were governed by Standing Orders certified under the U.P. Industrial Employment (Standing Orders) Rules, 1946.

Clause L-2.12 of the Standing Orders stipulated as under:-

“Any workman who remains absent from duty without leave or in excess of the period of leave originally sanctioned or subsequently extended for more than 10 consecutive days, shall be deemed to have left the services of the corporation on his own accord, without notice, thereby terminating his contract of service with the corporation and his name will accordingly be struck off the rolls”.

17. It is noted by the Supreme Court that from October 12, 1995 the respondent workmen did not attend their jobs. On October 18, 1995, the Company issued an order inter-alia that the workmen are absent from duty from October 12, 1995 and were notified that those who do not present themselves for duty and do not perform work or discharge their duty, then in accordance with the provision contained in clause L-2.12 of the Standing Orders, those workmen who are continuously absent for more than 10 days, shall be presumed that they have left the services of the Corporation without any notice and thus, their contract of service with the Corporation has come to an end and accordingly, their names shall be removed from the muster roll. On December 22, 1995 as amended on December 28, 1995 a similar notice was published in a Hindi newspaper. On January 19, 1996 an order was issued putting an end to the services of 168 workmen on the presumption that they had abandoned their services with the Corporation on their own. On May 9, 1996, one of the workmen namely Anand Prakash filed a writ petition in the High Court before Lucknow Bench challenging the order of termination. The writ petition was dismissed on the ground that the workman could raise an industrial dispute if he so desired. A second writ petition was filed by the respondent Union in the High Court at Allahabad. This writ petition was allowed by orders, which were the

subject matter of the appeal before the Supreme Court. The learned Single Judge came to the conclusion that the word “absence” did not by itself mean “abandonment of service” and when an employee went on strike it was not the intention to abandon service. It was said that *“Resorting to strike is neither misuse of leave nor overstaying of leave. Standing Order does not provide for any provision as to how the question of strike is to be dealt with”*. It was further held that the strike was not illegal as no notice was required to be given to the respondent under Section 22 of the Industrial Disputes Act, 1947. It was also held that in any event whether the strike was illegal or legal, it did not amount to abandonment of service justifying action under clause L-2.12. At the most, it would be an action of misconduct for which a punishment was provided under the Standing Orders after an inquiry. As there was no inquiry before the services of the workmen were terminated, therefore, the impugned order of termination was also held to have been passed in violation of principles of natural justice. Finally, it was held that the order was also bad because it did not specify the period, during which the workman was supposed to be absent and therefore, an order was not an order within the meaning of clause L-2.12 and could not be sustained. An appeal filed by the Company was rejected by the Division Bench. The Division Bench, in addition, noted that the project being completed,

there was no question of appointing the respondents in any other project. This submission was however rejected on the ground that there was no specific pleading to this effect and no details had been given of the project nor of the employees engaged therein nor were the appointment letters of the respondents produced. The Supreme Court in paras 20, 21, 22, 23 & 24 has held as under:-

“20. The constitutional validity of CSO L-2.12 has not been questioned by the respondent. The respondent has contended that the illegal strike cannot amount to abandonment of service for the purpose of clause L-2.12 of the Standing Orders (CSO). But was there a strike at all? Or was it mass absenteeism unconnected with the terms and conditions of service?”

21. Besides the submission that a person on illegal strike does not abandon his job is erroneous. An illegal “strike” cannot by definition be “authorised absence”. It would be a contradiction in terms. We may also draw support from Section 25-B which defines “continuous service” as

“uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman” (emphasis supplied)

The specific exclusion of persons on illegal strike plainly means that the period a person is on illegal strike does not amount to service. Different considerations would not doubt prevail where the strike is legal. Workers on strike continue to be in service although they may have ceased work. If the strike is a legal one such cessation of work or refusal to continue would be absence authorised by law. Under CSO L-2.12 a presumption is to be drawn against an employee if such employee is unauthorisedly absent. Clearly, a person on illegal strike and a person on

legal strike are both “absent”, but the absence of the first is unauthorised and the second is not. CSO L-2.12 raises a presumption against the employee and it is for the employee to rebut that presumption by adducing the evidence. It is, therefore, imperative that the factual basis is determined by the appropriate forum. In any event the decisions cited by the learned counsel for the respondent as noted earlier, are factually distinguishable. In *Express Newspaper* there was no condition of service similar to Certified Standing Order L-2.12. The fact of strike was also not in dispute. The management had issued notice terming the strike as unauthorised abandonment. In other words, abandonment was pleaded as a fact on the basis of the strike. The contention of the employer was that there was no order of termination of service by the employer but a relinquishment of service by the workmen. The submission was not accepted because the respondents by going on strike clearly indicated that they wanted to continue in their employment but were only demanding better terms. Such an attitude, far from indicating abandonment of employment, emphasised the fact that the employment continued as far as they were concerned. The management could not, by imposing a new term of employment, unilaterally convert the absence from duty of striking employees into abandonment of their employment.

22. The fact of strike was also admitted in *G.T. Lad*. Here again there was no condition of service similar to CSO L-2.12. The management had issued a notice calling upon the workmen to report within a specified period otherwise it would be construed as an abandonment. The workmen failed to report within the aforesaid period. The management struck out the names of the workers from the rolls on the ground that the workmen were not interested in service and had totally abandoned it. This Court held that the abandonment was not a question of fact which was required to be proved. Where the only evidence was absence because of strike, there was no abandonment. It was also held, following

Express Newspaper that it was not open to the Company to introduce such changed terms and conditions of service pending an industrial dispute.

23. *D.K. Yadav is an authority for the proposition that the principles of natural justice would have to be read in the standing orders. That was a case where there was a standing order similar to CSO L-2.12 except that 8 days' margin was granted within which the workman was required to return and satisfactorily explain the reasons for his absence or inability to return after the expiry of leave. This view was reiterated in the later decision of this Court in Lakshmi Precision Screws Ltd v. Ram Bahagat where it was held that the element of natural justice³ was an inbuilt requirement of the standing orders.*

24. *In this case, the appellant Corporation had issued two notices calling upon the workmen represented by the respondent to return to duty. The workmen did not respond to either of the notices. As we have noted it was not pleaded that the advertisement did not sufficiently comply with the principles of natural justice. The notice was issued giving an opportunity to the respondent to show cause why the presumption should not be drawn under CSO L-2.12. The respondent did not show cause. In the circumstances, the management drew the presumption in terms of the CSO.*

18. From the perusal of the conclusion of the Supreme Court in ***U.P. State Bridge Corporation Ltd. (supra)***, it is clear that the Supreme Court has distinguished the judgment in ***G.D. Lad & Ors. (supra)***, on which reliance was placed by Mr. J.P. Sengh, learned Senior Counsel for respondent No.1 and also relied upon by the Tribunal while allowing the appeal. That apart, it is noted that there is no such stipulation para-

materia to CSO L-2.12 as was prevalent in the case of *U.P. State Bridge Corporation Ltd. (supra)*. It is also noted that the action was taken by the petitioner in that case invoking the said provision of the Standing Order. Unlike in the case in hand wherein I have already concluded above that on facts it is not a case of abandonment as contended by the petitioners. That be so, the judgment would not be applicable to the facts of the present case.

19. Insofar as the judgment of the Supreme Court in the case of *New India Assurance Co. Ltd.(supra)*, the Supreme Court was considering a case of termination of an employee remained unauthorisedly absent for more than 600 days, for which a charge sheet was issued. It was the case of the employee that he was suffering from Tuberculosis. He applied for medical leave but Management did not pass any order on his application. However, medical certificate from registered Medical Practitioner stating diagnosis and probable duration of treatment as required under Rules, was not produced. The Management vide its letter, directed him to join back immediately, failing which presumption of abandonment of job etc was to be drawn. Respondent did not join even after receipt of the said letter. It is noted that the case of the appellant was really not of abandonment but of unauthorised absence. The Supreme Court also noted, the sick leave can be granted only on the production of a medical

certificate from a registered Medical Practitioner clearly stating as far as possible the diagnosis and probable duration of treatment. There was no such indication in the certificates purported to have been furnished by the respondent. It was also noted, that the respondent even did not join after receipt of the letter dated August 3, 1994. The charges against the respondent inter-alia were; (i) wilful insubordination and disobedience of lawful and reasonable orders of his superiors; (ii) absence without leave, without sufficient grounds or proper or satisfactory explanation; (iii) absence from his appointed place of work without permission or sufficient cause. The Supreme Court relied upon *Vivekanand Sethi (supra)*, while allowing the writ petition. Suffice to state, that as noted by the Supreme Court, the case of the appellant was not really of abandonment but of unauthorised absence. That apart, in *New India Assurance Co. Ltd.(supra)*, a charge sheet was issued to the respondent workman, which was proceeded with and resulted in his termination. It is not the case of the petitioners herein that a charge sheet was issued to the respondent No.1 before effecting the termination. Rather, they have pleaded abandonment of service. As I have concluded above, the case of abandonment is not proved, more particularly when the case of the respondent No.1 was that they were restrained from entering into the School. This judgment is not applicable to the facts of this case and is

distinguishable.

20. Similarly, reliance placed by Mrs. Ahlawat in *New India Co-operative Bank Ltd (supra)*, is concerned, in the said case, the High Court was concerned with a case where the respondent workman joined the services of the petitioner on October 1, 1985. On October 6, 1992, he was posted at the Mulund branch of the Bank. After resuming duty for one day, the respondent workman remained absent without leave from 7th to 24th October 1992. He resumed duties on 28th October 1992 and submitted a leave application. For a short while, he was asked to report at the branch at Golibar and was thereafter required to report for duty at the Mulund Branch on 9th November, 1992. After working at the Mulund Branch from 11th to 14th November, 1992, the respondent remained absent without intimation from 16th to 28th November, 1992. He resumed on 30th November, 1992 and submitted a leave application. On and from 2nd December 1992, the respondent remained absent without leave and without any intimation to the employer. The employer addressed letters to the respondent on December 5 1992, February 15, 1993, June 14, 1992 and June 26, 1993 calling upon him to resume duty. By a final notice dated June 26, 1993 which was served by Registered A.D, the respondent was informed that if he failed to report for duty, the Bank would presume that he had no desire to resume and that he had

voluntarily abandoned service. On July 14, 1993, the Bank informed the respondent that he was presumed to have voluntarily abandoned service and that his name had been struck off from the muster rolls. The High Court was of the view that the question as to whether the abandonment of service has been established has to be determined on the basis of the facts and the surrounding circumstances including inter-alia the length of the absence and the explanation, if any, that the workman has to tender for his absence from duty without permission. The High Court referred to the judgment of the Supreme Court in the case of *Syndicate Bank vs. General Secretary, Syndicate Bank Staff Association*, 2000 II CLR 472 and *Vivekanand Sethi (supra)*, wherein the Supreme Court upheld the action of the employer in terms of the provisions of the bipartite settlement where an employee is absent for 90 or more days, unless an employee reported for duty within that period or furnished an explanation justifying his absence to the satisfaction of Management, he was deemed to have voluntarily retired from service. It appears, even in the *New India Co-operative Bank Ltd. (supra)*, the High Court was considering one such case wherein the conditions of service stipulated or empowered the employer to voluntary retire a person from service remaining unauthorisedly absent without any information and who does not report for duty despite calling upon him to do so. In any case, as

stated above, there is no such provision, shown to this Court, where the petitioners were empowered to declare the respondent No.1 to have abandoned the post on being absent without an explanation/justification for certain period. Even otherwise, I have held, the respondent No.1 had explanation to offer and in the circumstances would not constitute abandonment.

21. In view of my discussion above, I hold, the ultimate conclusion of the Tribunal that respondent No.1 has not abandoned her post, is proper. The respondent No.1 would be entitled to the benefits till the date of her attaining the age of superannuation but no question of reinstatement. The writ petition is dismissed.

22. No costs.

(V.KAMESWAR RAO)
JUDGE

JANUARY 04, 2016/km/ak