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

% *Date of decision: December 21, 2017*

+ W.P.(C) 6244/2003 and CM APPL No. 11994/2005

AAS MOHAMMED Petitioner
Through Mr. Dilshad A. Khan, Advocate

versus

D.T.C. Respondent
Through Ms. Bhakti Pasrija Sethi and Mr.
Moksh Pasrija, Advocates

+ W.P.(C) 498/2004 and CM APP No. 400/2004

D.T.C. Petitioner
Through Ms. Bhakti Pasrija Sethi and Mr.
Moksh Pasrija, Advocates

versus

AAS MOHAMMAD & ANR. Respondents
Through Mr. Dilshad A. Khan, Advocate for
R-1

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

1 These writ petitions arise from an order dated 29th January 2003, passed by the learned Industrial Tribunal-II, Karkardooma Courts, Delhi (hereinafter referred to as the “learned Tribunal”), in an application filed by the Delhi Transport Corporation (DTC), under Section 33(2)(b) of the Industrial Disputes Act, 1947 for approval of its action to remove the

workman- Aas Mohammad from service. The impugned order rejects the said application, filed by the DTC.

2 The DTC, in WP(C) 498/2004, challenges the impugned order, and prays for quashing the same and issuance of a fresh order. *Per contra*, the workman, Aas Mohammad, in WP(C) 6244/2003, prays for implementation of the said order, and his consequent reinstatement in service.

3 Consequent on filing of the above application by the DTC, the learned Tribunal framed a preliminary issue, on the basis of the pleadings of the parties, reading thus:

“Whether fair and proper enquiry was conducted by the applicant?”

4 *Vide* order dated 12th August 2002, the said issue was decided against the DTC and in favour of the workman. It is not in dispute that no challenge was ever preferred, against the said order dated 12th August 2002 which, therefore, may be said to have attained finality.

5 Following thereupon, on the merits, three issues were framed by the learned Tribunal on 12th August 2002 itself, which read thus:

- “(1) Whether the respondent committed the misconduct as alleged against him?
- (2) Whether the petitioner remitted full one month wages to the respondent at the time of this dismissal from service?
- (3) Relief.”

6 The findings of the learned Tribunal, on the aforementioned three issues, as contained in the impugned order dated 29th January 2003, reads thus:

“Issue No.1

To prove its case applicant produced Shri Bhagwati Prasad as AW-1 in exparte evidence who filed his affidavit dated 25.10.2002 in which he deposed that he submitted a report to the concerned authority against the workman on 26.02.1993 whereas perusal of file shows that there is no report dated 26.02.1993 on the record. It is pertinent to mention here that while deciding the enquiry it was categorically observed that the enquiry officer did not examined the reporter whereas on merits Shri Bagwati Prasad claims himself to be reporter of the alleged absence whereas there is no report on record. Consequently, the applicant has failed to prove the alleged misconduct against the respondent. Issue is decided against the applicant.

Issue No.2

AW Bhagwati Prasad deposed in his affidavit that one month notice salary was sent to the workman alongwith the removal letter dated 08.07.1993 by money order. He proved the copies of salary certificate, postal receipt and money order receipts as Ex. AW1/3 to Ex. AW1/7. There is no rebuttal to this effect from the side of respondent. The respondent is already exparte. Consequently, issue is decided in favour of applicant.

Issue No.3

Keeping in view the finding on Issue No.1, approval sought is rejected and application under Section 33(2) (b) of I.D.Act is hereby dismissed. File be consigned to record room.”

7 Ms. Bhakti Pasrija Sethi, appearing for the DTC, submits, at the very outset, that the finding of the learned Tribunal, on Issue no. 1 (*supra*) was erroneous on facts. She submits that the sole ground on which the learned

Tribunal decided the said issue against her client and in favour of the workman, was an affidavit dated 25th October 2002, filed by AW-1 Sh. Bhagwati Prasad, in which he had relied on a report dated 26th February 1993 submitted by him to the authority, against the workman. The learned Tribunal decided this issue against the DTC, on the sole ground that no such report, dated 26th February 1993, was on the record.

8 Ms. Bhakti Pasrija Sethi submits that the error, in the finding of the learned Tribunal, was owing to a parallel error in the affidavit filed by the DTC, before the learned Tribunal, which mistakenly referred to the date of the report as 26th February 1993 instead of 7th January 1993. She submits that, in fact, the proposal to remove the workman was based on a report dated 7th January 1993, filed by Shri Bhagwati Prasad, which was on record before the learned Tribunal. She also submits that the DTC had, in fact, moved an application, before the learned Tribunal, to rectify the error in reference to the date, as contained in the earlier affidavit filed by it and to correct the date to be 7th January 1993. Her contention is that the learned Tribunal had failed to take notice of the said application. In these circumstances, she prays that that the matter may be remanded to the learned Tribunal to reconsider the application of the DTC afresh.

9 Though, unquestionably, the DTC has, in the present writ petition, filed an application, (figuring at page 30 of the paper book) which purports to have been filed under Section 151 of the Code of Civil Procedure, 1908, for correction of the typographical mistake, in mentioning the date of the report and seeking its correction to 7th January 1993, instead of 26th February

1993 as originally mentioned, there is nothing to indicate that the said application was actually filed before the learned Tribunal. No copy of any such application figures in the Lower Court Record, which was requisitioned by this Court. Ms. Bhakti Pasrija Sethi submits that a few pages i.e. pages 22 to 26 of the Lower Court Record seem to be missing. It is true that, in the running numbers appearing at the head of the pages, pages 22 to 26 do not appear in the Lower Court Record; however, it does not appear that these pages could have contained, the application preferred by Ms. Bhakti Pasrija Sethi, especially as page 21 is the first page of an order passed by the learned Tribunal, and page 27 is the fourth page of an order passed by the Tribunal. Ms. Bhakti Pasrija Sethi also placed reliance on an inquiry report dated 4th May 1993, contained at pages 61 to 63 of the Lower Court Record, which is titled “*Shri Aas Mohammad, Chalak, Batch No. 14107, ke virudh arop patrit mamle ka janch parinam*”, which was exhibited as Ex. AW1/D in the proceedings. The first sentence of this report purports to state that the case against the workman was based on a report dated 7th January 1993. Ms. Bhakti Pasrija Sethi’s contention is that this document should also have informed the learned Tribunal that the case was based on a report dated 7th January 1993 and not dated 26th February 1993.

10 Apart from the above, there is no reference, to the application for correction, stated to have been filed before the learned Tribunal, at any point in the pleadings in the present writ petition, though the said document has been annexed, as already mentioned hereinabove, at page 30 of the paper book. Neither is there any averment to the effect that such an application was ever filed ever before the learned Tribunal. A perusal of the impugned

order passed by the learned Tribunal too, does not indicate that the attention of the learned Tribunal had been drawn to the fact that the decision against the workman was taken on the basis of a report dated 7th January 1993, or that its attention was invited to the application for correction, stated to have been filed before the learned Tribunal.

11 Mr. Dilshad A. Khan, appearing for the workman, however, very fairly states that the learned Tribunal could be requested to examine the matter once more. He, however, reserves his objections, regarding the right of the DTC, to adopt the stand that the report wherefrom the proceedings emanate was dated 7th January, 1993.

12 While it is true that a conditional mandamus ought, normally, not to be issued, I have no option but to do so in the present case. The record of the learned Tribunal appears to be haphazard. The pagination also appears discordant. Several documents do not contain any page numbers. Some pages appear to be missing. It is not possible for me, therefore, to come to any conclusive finding regarding the issue of whether the purported application for correction of the date, in the affidavit of Shri Bhagwati Prasad, was actually filed before the learned Tribunal or not. Solely for this reason, and the insistence of Ms. Bhakti Pasrija Sethi that such an application, had, in fact, been moved before the learned Tribunal, for correction of the date of the report from 26th February 1993 to 7th January 1993, and in view of the fair stand adopted in this regard by Mr. Dilshad Khan appearing for the workman, I deem it appropriate to dispose of this writ petition with the following directions:

- (i) In case the application figuring at page 30 of the present writ petition, stated to have been moved under Section 151 of the CPC, for correction of the reference, in the affidavit of Shri. Bhagwati Prasad, to the date “26th February 1993, to read as “7th January 1993”, is not found to have been filed before the learned Tribunal, the impugned order dated 29th January 1993, passed by the learned Tribunal, stands upheld and the present writ petition would, consequently stand dismissed without any order as to costs.
- (ii) If, however, the application at page 30 of the writ petition is found to actually have been filed before the learned Tribunal, the impugned order would stand set aside, and the learned Tribunal would have to consider the said application on its merits and taken decision thereon. In case the tribunal is inclined to allow the application, needless to say the application filed by the DTC under Section 33 (2)(b) of the Act would be considered afresh.
- (iii) For ascertaining the actual position regarding the application figuring at page 30 of the present petition, the application under Section 33(2)(b), filed by the DTC, is again directed to be put up before the learned Tribunal. The learned Tribunal would examine the record and determine to itself as to whether the application for correction of the affidavit of Shri Bhagwati Prasad has actually been filed by the DTC or not. In case the said application is found to be on the record of the learned

Tribunal, the learned Tribunal is directed to issue notice to the parties and reconsider the matter, in terms of direction (ii) in para 12 (*supra*), after hearing them in the matter.

13 These writ petitions are disposed of, in the above terms.

14 No order as to costs.

C.HARI SHANKAR, J

DECEMBER 21, 2017
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