

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 1st February, 2018

Pronounced on: 2nd July, 2018

+ W.P.(C) 10966/2004 & CM APPL. 7778/2004

D.T.C.

..... Petitioner

Through: Mr. Fahad Imtiaz, Adv.

versus

DHARAMVIR SINGH

..... Respondent

Through: Ms. Komal Aggarwal with
Mr. Anil Mittal, Advs.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

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JUDGMENT

C. HARI SHANKAR, J.

1. Pursuant to, and following upon, a disciplinary proceeding held against him, the respondent-workman Dharamvir Singh was terminated from the services of the petitioner-corporation (hereinafter referred to as 'the DTC'), *vide* order dated 29th October, 1987. The workman initiated an industrial dispute, which was referred, by the competent government, for adjudication, to the Labour Court, on 16th February, 1989, *vide* the following term of reference:

“Whether the termination of the services of Sh. Dharamvir Singh is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?”

2. As is the norm in such cases, the Labour Court framed a preliminary issue, reading thus:

“(i).Whether the enquiry conducted by the management is fair and proper?”

3. The aforementioned preliminary issue was decided, by the Labour Court, *vide* order dated 12th October, 2001, against the DTC, holding that the inquiry proceedings, as conducted against the respondent-workman, were vitiated, being violative of the principles of natural justice.

4. Again, as is the norm in such cases, despite the inquiry proceedings, conducted by it against the respondent-workman, being thus held to be vitiated, the DTC was afforded an opportunity, by the Labour Court, to establish, before it, the charges against the respondent-workman.

5. The impugned award, dated 10th July, 2003, observes that, despite grant of the said opportunity, no effort was made, by the DTC, to establish the case against the respondent-workman. In fact, a reading of impugned award makes it clear that the only contention advanced, by the DTC, before the Labour Court, was that the respondent had been gainfully employed, consequent on his termination.

6. The Labour Court has, after observing that no effort was made, by the DTC, to establish the allegations against the respondent-workman before it, also rejected the DTC's contention that the respondent-workman was gainfully employed, as no evidence to this effect was led by the DTC.

7. Resultantly, the impugned award directs reinstatement of the respondent-workman with full back wages.

8. The DTC claims to be aggrieved thereby.

9. Before this Court, there is no challenge to the award dated 12th October, 2001 (*supra*), of the Labour Court, which held the inquiry, as conducted by the DTC against the respondent-workman, to be violative of the principles of natural justice and vitiated thereby. No effort was made to challenge the said award when it was passed. Neither do the prayers, in the present writ petition, seek quashing of the said award. In fact, the DTC has not even extended, to this Court, the courtesy of placing the said award, dated 12th October, 2001, on record, so that this Court could peruse the same.

10. The award dated 12th October, 2001, therefore, has become immune from challenge, having attained finality.

11. The inquiry against the respondent, as conducted by the DTC, consequently, stands vitiated, as having been conducted in violation of the principles of natural justice.

12. No effort was made, by the DTC, either, to prove the charges against the respondent-workman before the learned Labour Court, despite grant of opportunity therefor. It is not the case of the DTC, in these proceedings, that it had actually made any such effort. Rather, the DTC seeks, in this writ petition, to justify the dismissal of the services of the respondent-workman on merits. Having allowed the opportunity, to do so, as extended by the Labour Court, to go abegging, it is clearly not open, to the DTC, to exhort this Court to perform the function of the Labour Court, and examine the merits of the charges against the respondent at this stage afresh.

13. Ironically for the DTC, it appears to have missed the bus.

14. No effort has been made, in these proceedings, either, to prove that the respondent was gainfully employed at any point of time. The finding, in the impugned award, on this aspect of the matter, is also, therefore, unexceptionable.

15. The precedential pendulum, on the issue of onus of proof, qua the factum of gainful employment having been secured by the workman whose service was terminated, has, over the years, swung both ways. In *Talwara Cooperative Credit and Service Society*

Limited vs. Sushil Kumar, (2008) 9 SCC 486, it has been observed, by a bench of two learned Judges of the Supreme Court, that there had been a paradigm shift in the matter of burden of proof as regards the gainful employment and that the extent legal position, on that date, was that the burden would be on the workman. Subsequently, however, other Benches, also of two learned Judges of the Supreme Court in each case have, *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. ED.), (2013) 10 SCC 324* and *Bhuvnesh Kumar Dwivedi vs. Hindalco Industries Limited, (2014) 11 SCC 85*, observed, to the contrary, that the burden was on the employer, to establish that the employee had not been gainfully employed after his termination from service. The rationale, for so holding, is provided in para 38.3 of the report in *Deepali Gundu Surwase (supra)* in the following words:

“38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service.”

16. The prevalent legal position, therefore, appears to be that the burden of proof, on the issue of gainful employment of the employee, after his removal/termination from service, is on the employer; in other words, it is for the employer to prove that the employee was, in

fact, gainfully employed, and not for the employee to prove the contrary.

17. In that view of the matter, no exception can be taken, to the observation, of the Labour Court, that the DTC had failed to lead any evidence to indicate that the respondent-workman had been gainfully employed, consequent to his termination.

18. Resultantly, this writ petition is completely devoid of merits, and is dismissed accordingly.

19. Per consequence, the benefits which would have enured to the respondent-workman, consequent on the impugned award, would now be disbursed, by the DTC, to his legal heirs, who have been brought on record. Any payments, made to the respondent-workman during these proceedings, consequent upon orders passed by this Court, needless to say, would be eligible to adjustment therein.

20. The DTC is directed to comply with this judgment within a period of four weeks of the receipt, by it, of a certified copy thereof.

21. There shall be no order as to costs.

**C.HARI SHANKAR
(JUDGE)**

JULY 2, 2018

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