

\$~

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

*Judgement Reserved on: 6<sup>th</sup> August, 2018*

*Judgement Pronounced on: 10<sup>th</sup> September, 2018*

+ **LPA 202/2016**

**DELHI TRANSPORT CORPORATION**

.....Appellant

Through: Mr. Sarfaraz Khan and Mr. Mirza Amir,  
Advocates

Versus

**DEV RAJ SINGH**

.....Respondent

Through: Mr. G. S. Charya, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL**

**SANGITA DHINGRA SEHGAL, J.**

1. The present appeal has been filed by the appellant under Clause X of the Letters Patent Act, read with Rule 10 of the Delhi High Court Rules, assailing the order dated 27.01.2016 (hereinafter referred to as 'Impugned Order') passed by the learned Single Judge whereby the order dated 26.02.2003 passed by the Presiding Officer, Industrial Tribunal-II, Karkardooma Courts, Delhi, was upheld.
2. Briefly stated, facts necessary for the disposal of the present appeal are that, the respondent herein was employed as Body Fitter on 15.04.1983 with the appellant/Delhi Transport Corporation

(hereinafter referred as 'appellant corporation') which is a body corporate constituted under Section 33 of the Road Transport Corporation Act, 1950, read with Delhi Transport Laws (Amendment) Act, 1971. During the course of his employment, the respondent availed 93<sup>1</sup>/<sub>2</sub> days Leave Without Pay (LWP) in the year 1991, for which he was charge sheeted by the appellant corporation on the ground that the irregularity in the attendance amounts to lack of interest in the Corporation's work and habitual absenteeism. As per the appellant corporation the said absenteeism tantamounts to misconduct within the meaning of para 4 (ii) 19 (h) and 19 (m) of the Standing Orders governing the conduct of the D.T.C. employees and also under Section 15(2) of the Delhi Road Transport Authority Act (hereinafter referred to as 'DRTA Act'). Following the said charge sheet, an enquiry was conducted by the appellant corporation and on the basis of the report of the Enquiry Officer dated 31.03.1993, the disciplinary authority of the appellant corporation issued a Show Cause Memorandum dated 19.04.1993 directing the respondent to show cause as to why his services should not be terminated/removed/dismissed from service. Subsequently the respondent was removed from the service by the appellant corporation vide order dated 26.05.1993 and full one month's wages were remitted to him vide money orders No.3222 and 3223. To obtain approval of the said removal order, the appellant corporation filed an application under Section 33-2(b) of the Industrial Disputes Act, 1947 (hereinafter

referred as the 'I.D Act') before the Industrial Tribunal. The respondent denied all the charges levelled against him by way of his reply dated 27.05.1992 wherein it was stated that the leave was taken due to his own illness and illness of his other family members.

3. On the basis of the pleadings of the parties, the Industrial Tribunal vide order dated 02.09.1996 decided the preliminary issue that *Whether the applicant held a legal and valid enquiry against the respondent according to principles of natural justice*, and held the same in favour of the respondent. Further the following two issues were framed:

*(i) Whether the respondent committed the misconduct for which he was charge sheeted?; and*

*(ii)Relief;* and vide order dated 26.02.2003, the application filed by the appellant corporation was dismissed.

4. Challenging the order dated 26.02.2003 passed by the Industrial Tribunal, the appellant corporation preferred a writ petition before a learned Single Judge of this Court, seeking quashing/setting aside of the said order. The ld. Single Judge vide impugned order dated 27.01.2016 dismissed the petition whilst *inter-alia* observing as under:-

*"Here, a dismissal is unfair on the part of the petitioner-management who have gone through the reasons for availing the leave of the respondent-workman at the first stage and accorded the leave which crystallised into authorised leave. Therefore, the availing of the*

*abovementioned leave, i.e., 93 ½ days leave without pay, is violative of the rules will not sustain in the eyes of law without taking any steps to investigate whether the leave granted was the result of conspiracy or the leave availed is the subject matter of fraudulent action on the part of respondent-workman. Consequently, the authorised leave is not a misconduct on the part of the respondent-workman. It is expected that the canons of good industrial practice must be followed. Lord Mackay once stated in Polkey's case:*

*"the statutory test shows that at least some aspects of the manner of the dismissal fall to be considered whether a dismissal is unfair since the action of the employer in treating the reason as sufficient for dismissal of the employee will include at least part of the manner of the dismissal." "*

5. Mr. Sarfaraz Khan, learned counsel for the appellant corporation submits that the impugned order is liable to be set aside as the same is untenable in law and facts; that the respondent absented himself from work for 93½ days and as the said Leave Without Pay was not sanctioned or authorized by the appellant corporation, it amounts to misconduct within the meaning of para 4(ii) 19(h) and 19(m) of the Standing Orders governing the conduct of the D.T.C. employees and also under Section 15(2) of the DRTA Act; that although the respondent's absence from work has been recorded as Leave Without Pay by the appellant corporation, for the purpose of maintaining the record of service, however the same does not amount to authorization or sanctioning of leave by the corporation; that the post facto approval

of the said leave as LWP does not cure the misconduct; that the Standing Orders specifically stipulate that the leave must be obtained in advance except in case of sudden illness, and in case of unauthorized absenteeism the same shall be treated as misconduct; that the burden of proof is upon the respondent who however failed to show that there was no negligence and/or lack of interest on his part in discharging his service; that the termination of services of respondent by the appellant corporation was not due to any victimization but due to misconduct under the Standing Orders of the Appellant Corporation; that the observations made by the Id. Single Judge that the leave of 93<sup>1</sup>/<sub>2</sub> days as LWP is authorized leave is erroneous and perverse in terms of the settled position of law. Reliance was placed on the judgement rendered by the Supreme Court in the case of *DTC v. Sardar Singh* reported in (2004) 7 SCC 574, to state that unauthorized absence from duty ought to be treated as misconduct.

6. On the other hand, Mr. G. S. Charya, learned Counsel for the respondent submits that the impugned order does not suffer from the vices of illegality or perversity, as it is based on the evidence on record and the facts of the case; that as the respondent has availed 93<sup>1</sup>/<sub>2</sub> days Leave Without Pay which has been duly authorized by the appellant corporation, the same shall therefore not constitute misconduct within the meaning of para 4(ii) 19(h) and 19(m) of the Standing Orders governing the conduct of the D.T.C. employees and also under Section 15(2) of the DRTA Act; that the decision of the

appellant corporation for the removal of the respondent from its services for his having availed 93<sup>1</sup>/<sub>2</sub> days Leave Without Pay is not maintainable in view of the appellant corporation's office order dated 14.12.1988 as per which the leave once sanctioned/regularised as Leave Without Pay, cannot be later on invoked as a ground of misconduct; that hence no approval could have been accorded by the Industrial Tribunal to the perverse order of termination passed by the appellant corporation; that therefore there is no infirmity in the order passed by the learned Single Judge that calls for interference by this Court.

7. We have heard the learned counsel for the parties and perused the material available on record.
8. In this appeal the only question that falls for consideration is whether the misconduct as alleged in the chargesheet drawn-up against the respondent, would squarely fall within para 4(ii) 19(h) and 19(m) of the Standing Orders governing the conduct of the D.T.C. employees.
9. The relevant paragraphs of the Standing Orders read 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 DTS. 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 Organization .*

**19. General Provisions:-**

*Without prejudice to the provisions of the foregoing Standing Orders, the following acts of commission and omission shall be treated as misconduct:*

*a)...*

*(f) Habitual breach of any rules, law, instructions or orders etc. applicable to the employees of the authority.*

*(h) Habitual negligence of duties and lack of interest, in the Authority's work.*

*(m) Any other activity not specifically covered above, but which is prima facie detrimental, to the interests of the organisation.*

10. Para 4 of the Standing Order demonstrates the repercussions of habitual absenteeism and thus under Clause (1), there is a requirement of prior permission, exception being the cases of sudden illness. Non-Observance of conditions so stipulated renders the absence unauthorized, ultimately resulting into termination of services.
11. Indisputably, the respondent workman herein was absent from duty for 93<sup>1</sup>/<sub>2</sub> days in the year 1991 for which he had been charge-sheeted by the appellant corporation on 15.05.1992. It is the case of the appellant corporation that the unauthorized long absence from duty, shows negligence of duties and lack of interest in the employers work

and thus tantamounts to misconduct under the Standing Orders. Reliance has been placed on the judgement of the Supreme Court in ***DTC vs. Sardar Singh*** reported in **2004 (6) Scale 613** that deals with matters wherein charges have been framed for absence without obtaining leave in advance. Relevant portion of the judgement reads as under:

*" 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 tell-tale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings."*

12. From the well settled position of law and also in view of the Governing Standing Orders it is clear that unauthorized leave can be treated as misconduct. However where the leave has been



sanctioned/granted well in advance, the same cannot be subsequently urged as a ground of termination of services of the charged employee, holding him/her liable for misconduct. Neither the Standing Orders of DTC nor the judgment in *Sardar Singh (supra)* hold that in all cases of absenteeism, the order of termination or any other punishment shall follow. The law laid down in the said judgement elucidates the period of unauthorized absenteeism which differs from the facts in the present case where the leave without pay as so availed by the respondent workman was pre sanctioned by the appellant corporation.

13. It is also not the case of the appellant corporation that prior leave sought by the respondent-workman was ever rejected/denied. Therefore the appellant corporation having already authorized/granted leave to the respondent and also regularized it as Leave Without Pay cannot proceed against him for misconduct. It would not be in the interest of justice that the respondent be punished twice by treating leave without pay and thereafter terminating his service
14. Approaching the matter from this angle, due consideration may also be given to the office circular dated 14.12.1988, according to which, the appellant corporation/DTC itself mandates that (i) where Competent Authority sanctioned leave without pay, no charge is made out as the same stands regularized as leave without pay and (ii) where leave applications have been rejected or no application has been received from the employee, for all intent and purposes, the said employee can be treated as absent.

15. Bare reading of the aforementioned provisions of the said circular makes it clear that once a period of absence is regularized as leave without pay, there remains no irregularity on the part of an employee and no misconduct can be said to have been committed.
16. Furthermore, the Supreme Court in the case of ***Glaxo Laboratories (I.) Ltd v. Presiding Officer, Labour Court, Meerut***, reported in **1984 AIR 505** has inter-alia observed that once the acts complained of did not constitute misconduct under the office circular dated 14.12.1988, then no penalty could be imposed upon the petitioner for such acts. Reference may be invited to the following para:

*"Some misconduct neither defined nor enumerated and which may be believed by the employer to be misconduct ex-post facto would not expose the workmen to a penalty. It cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant Standing Order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant Standing Order but yet a misconduct for the purpose of imposing a penalty."*

17. Thus the present case would be squarely covered by the law laid down in the aforesaid judgement, as the act of commission/omission of the respondent workman in the instant case does not fall under Para 4(ii) 19(h) and 19(m) of the Standing Orders governing the conduct of the DTC employees, as alleged by the appellant.

18. There is no dispute that when an employee absents himself from service, without sanctioned leave for a long period, it prima facie shows lack of interest in work of the employer. In such cases the authority can, on the basis of the record, reach to a conclusion about the employee being habitually negligent in duties and exhibited lack of interest in the employer's work and thus hold him responsible for misconduct under the Standing Orders. However in the instant case, the appellant corporation having duly authorized/sanctioned leave to the respondent-workman cannot be allowed to treat the same ex post facto as misconduct. That being the factual position, therefore, the Id. Single Judge was justified in upholding the decision of the Industrial Tribunal disapproving the order of termination/removal passed by the appellant corporation.
19. Under these circumstances, the appeal being bereft of merit is dismissed.
20. Accordingly, the appeal stands disposed of, so also pending application(s), if any.

**SANGITA DHINGRA SEHGAL, J.**

**G.S.SISTANI, J.**

**SEPTEMBER 10, 2018**

**gr//**