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

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Reserved on : 21.09.2022

Pronounced on: 17.10.2022

+ **W.P.(C) 3759/2010**

DELHI TRANSPORT CORPORATION Petitioner

Through: Mr. Uday N. Tiwari and Ms. Saloni
Singh, Advocates.

versus

KALU PRASAD Respondent

Through: Mr. Ravindra S., Advocate.

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. The present petition has been filed under Article 226/227 of the Constitution of India for setting aside the order in O.P. No. 421/1993 titled as "*The workman Sh. Kalu Prasad v. The Management Delhi Transport Corporation*" dated 06.11.2009 passed by the learned Presiding Officer, Industrial Tribunal-II, Karkardooma Court (hereinafter the "**Impugned Order**"). By virtue of the impugned order, the learned Labour Court dismissed the application preferred by the Petitioner/Management under Section 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter "**I.D. Act**").

2. The learned Labour Court vide the Impugned Order held that the amount of Rs.20/- as special allowance towards family planning incentive ought to have been included in one-month wages paid to the Respondent/Workman and failure to do so has resulted in non-compliance of the proviso to Section 33(2)(b) of the I.D. Act.
3. The Respondent, Kalu Prasad was employed as a Conductor with the Petitioner. On 01.05.1992, while the Respondent was on duty on Bus No. 6325, he was checked by the checking staff. Thereafter, some irregularities were found, it was alleged that (1) the Respondent did not issue tickets to five passengers after collecting the due fare of Rs.2 from each of them; (2) the Respondent refused to get his cash and hand block tickets checked; (3) the Respondent refused to accept his challan; (4) the Respondent misbehaved with the checking officials.
4. On the basis of report of Shri Chhedi Lal, ATI, a chargesheet dated 19.05.1992 was issued by the Depot Manager to the Respondent in view of the abovementioned irregularities. An oral inquiry was held *qua* the charges. During the inquiry, statement of Hari Singh, Tr. Sup., Roshan Lal Sharma, T.I. and R.R. Rana, ATI were recorded. The Inquiry Officer found all the charges levelled against the Respondent as 'proved'.
5. The Disciplinary Authority further issued a show-cause notice dated 30.06.1993 to the Respondent regarding why he should not be removed from the service to which the Respondent did not provide any response. Thus, the Respondent was removed from the service on 15.07.1993 and one-month wages amounting to Rs. 2,518/- by Money

Order No. 1985 & 1986 dated 15.07.1993 was remitted. The break-up of the wages was as follows:

Basic Pay	Rs. 1,150.00
Dearness Allowance	Rs. 1,058.00
House Rent Allowance	Rs. 250.00
City Compensatory Allowance	Rs. 45.00
Washing Allowance	Rs. 15.00

6. On the same day, the Petitioner filed an approval application under Section 33(2)(b) of the I.D. Act as required by the statute. The Respondent filed his Written Statement, *inter alia*, denying payment of one-month wages. The learned Labour Court vide Order dated 09.10.2009, decided the issue of validity of the departmental inquiry in favour of the Petitioner.
7. The learned Labour Court vide impugned Order dated 06.11.2009 further held that the Petitioner failed to prove that it had paid one-month last drawn wages at the time of Respondent's removal from service. It was held that the Respondent was entitled to Rs. 20/- as family planning incentive, which was not paid to him even though it was a part of his wages. Accordingly, the learned Labour Court dismissed the Petitioner's approval application under Section 33(2)(b) of the I.D. Act.

SUBMISSION ON BEHALF OF THE PETITIONER

8. Mr. Uday N. Tiwari, learned counsel on behalf of the Petitioner submitted that the Respondent was reinstated in service during the pendency of the matter. He submitted that the special pay given to an
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employee for promoting small family norms is not a part of the wages within the meaning provided to it in Section 2(rr) of the I.D. Act.

9. The Impugned Order is liable to be set aside since a similar issue regarding inclusion of special allowance for family planning in one-month wages was in consideration before this Court in ***Shri Trived Prakash v. Delhi Transport Corporation & Anr.***, reported as **2009 SCC OnLine Del 3223**. It was held that special pay of Rs. 20/- would not be a part of allowance or wages as provided under Section 2(rr) of the I.D. Act. Hence, the proviso to Section 33(2)(b) the I.D. Act would not be violated if this special allowance is not included in one-month wages paid to the workman.
10. It was further submitted by the learned counsel that the intention of the legislature in mandating the payment of one-month wages in terms of the proviso to Section 33(2)(b) of the I.D. Act was to soften the rigour of unemployment that the workman would face in view of the removal order. In ***Bharat Electronics Limited v. Industrial Tribunal, Karnataka*** reported as **(1990) 2 SCC 314**, it was held that one-month wages to be paid is for the month following the date of removal. Accordingly, the amount payable is to be determined taking into account what would be payable to the workman for the month following the date of his removal from service.
11. Even assuming without prejudice that Rs. 20/- towards family planning incentive was to be included in the one-month wages payable to the Respondent, it was submitted that the Respondent did not suffer any prejudice on account of non-inclusion of the said amount. The

washing allowance of Rs. 15/- was contingent upon the Respondent performing his duties. Similarly, the City Compensatory Allowance of Rs. 45/- was not to be paid to the Respondent on his removal from service. To adduce his submissions, learned counsel placed reliance on ***T.N. STC v. Joint Commissioner*** reported as ***2008 SCC OnLine Mad 1358***.

12. The learned Labour Court erred in reading the provision i.e., proviso to Section 33(2)(b) of the I.D. Act and proceeded on the basis that the requirement was to pay one-month wages “last drawn” whereas, the proviso requires payment of “wages for one month” from the date of removal.
13. Learned counsel graciously distinguished the judgment cited by the Respondent in the case of ***D.T.C. v. Presiding Officer*** in ***LPA No. 551/2004*** by stating that, during hearing, the Court was not apprised of the relevant Office Order No. 22 dated 18.09.1981 issued by the Petitioner which deals with the special allowance for maintaining a small family norm.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

14. Mr. Ravindra S., learned counsel for the Respondent apprised the court of the developments in the present case. On 13.07.2005, the Petitioner reinstated the Respondent. Further, on 31.10.2014, the Respondent was promoted to the post of Assistant Traffic Inspector (ATI) and thereafter, on 31.05.2017, the Respondent on achieving the age of superannuation retired from service.

15. It was contended that the only issue which arises in the present petition is whether the non-payment of an allowance which forms part of the wages of a workman could be treated as non-compliance for the purposes of Section 33(2)(b) of the I.D. Act, which mandates payment of one-month wages to the Respondent. He further submitted that it is an admitted fact that at the time of Respondent's removal from service, the Petitioner paid him only Rs. 2,518/- whereas, he was entitled to Rs. 2,538/-.
16. The learned counsel further submitted that in *Bharat Electronics Limited (Supra)*, it was held that even a paisa less than the month's wages due under Section 33(2)(b) of the I.D. Act would be fatal to the permission sought through the approval application filed by the Petitioner. By placing reliance on *Prabhakar H. Manjare v. Indian Telephone Industries Ltd.* reported as *1998 SCC OnLine Kar 298*, learned counsel argued that non-payment of requisite wages would make the order of dismissal void for which no approval can be granted under Section 33(2)(b) of the I.D. Act.
17. Learned counsel argued that the issue of special pay of Rs. 20/- for undergoing sterilization operation was considered by this Court in *D.T.C. v. Presiding Officer* in *LPA No. 551/2004* dated 04.09.2006 wherein it was held that the 'Special Pay' for undergoing the sterilization operation was integral to his wages and could not have been withheld while he was paid one-month wages under Section 33(2)(b) of the I.D. Act. He further drew the Court's attention to the fact that the Special Leave to Appeal vide *SLP No. 6842/2007* filed

against the said judgment and order dated 04.09.2006 in *LPA No. 551/2004* was dismissed by the Hon'ble Supreme Court.

18. While citing *Siddharam Satlingappa Mhetre v. State of Maharashtra* reported as (2011) 1 SCC 694, learned counsel argued that the doctrine of per incuriam will be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue. He emphasized that the Petitioner has no right to deduct any amount from the wages payable to the Respondent in compliance of Section 33(2)(b) of the I.D. Act. Thus, in view of the inclusive definition of 'wages' in Section 2(rr) of the I.D. Act, and the mandate under Section 33(2)(b) of the I.D. Act, it is apparent that the Impugned Order is based on a correct position of law and fact, and therefore, deserves no interference.

LEGAL ANALYSIS

19. Heard the arguments advanced by the respective learned counsel for the parties and perused the documents placed on record.

20. It is an admitted position that the Petitioner did not pay Rs. 20/- as family planning incentive to the Respondent as part of his wages while paying him one-month wages as per Section 33(2)(b) of the ID Act. The expression 'wages' under Section 33(2)(b) of the I.D. Act has to be understood as defined under Section 2(rr) of the I.D. Act. Wages means and includes the basic wages and all allowances which the workman concerned was 'entitled' to draw on the day when the order of dismissal was passed and the application was made before the learned Labour Court.

21. The learned Labour Court narrowed down the dispute to whether one-month wages as stipulated under proviso to Section 33(2)(b) of the I.D. Act includes the special pay or not. The learned Labour Court opined that:

“16. It is not disputed on behalf of the Management that workman had been getting Rs 20 as family planning incentive. If it is so, then this allowance was personal to the workman. Even if he had remained on leave he would have been entitled to this allowance. In my opinion, therefore, it was part of his wages.

17. AR for the management has relied upon an order of Industrial Tribunal-II to press his contention that under Pension Rules and FRRS, special pay is not included in wages in salary for the purpose of computation of pension. Here the wages have been defined under I.D. Act. Being the special law, it will prevail upon the general law. In view of the definition of “wages” given in section 2 (rr) I.D. Act wages include any allowance which takes into its sweep the personal pay by way of incentive given to the workman. It is admitted case of the Management, the wages paid to the workman were Rs 2518 which did not include the special allowance of Rs 20/-. In my opinion, therefore, the Management did not pay to the workman one month last drawn as required under proviso to section 33(2)(b).”

22. The learned Labour Court dismissed the approval application of the Petitioner stating that the Petitioner did not pay the Respondent a part of his wage to which he was entitled. Thus, the controversy before this Court is limited to whether the special pay granted to the workman as an incentive for family planning was part of the one-month wages for the purpose of Section 33(2)(b) of the I.D. Act. In order to address the

said controversy, it is important to examine the judicial pronouncements cited by the parties in this regard:

- (i) The Division Bench of this Court considered the identical issue in ***D.T.C. v. Presiding Officer*** in **LPA No. 530/2004** vide order dated 17.05.2004, the Hon'ble Division Bench held as follows:

“We are required to answer the question whether the workman was entitled to get Rs. 20/- by way of special pay in regular course. Can it be said that it was not necessary to include it in wages in view of the fact that the respondent workman was entitled to get Rs. 20/- by way of a policy every month? Unlike in the case of special allowance for "night shift", the employee in this case had already done what he had to do to be eligible for the special pay. It had already assumed the character of wages and no further act was required on his part. It is in this view of these facts that we are of the opinion that no error has been committed by the learned Single Judge and therefore, this appeal is required to be dismissed.”

- (ii) Another Division Bench of this Court in ***D.T.C. v. Presiding Officer*** in **LPA No. 551/2004** vide order dated 04.09.2006 also considered the identical issue and held, *inter alia*, as follows:

“ 8. In light of the above settled position, we are of the view that in the instant case the 'special pay' granted to the respondent workman for undergoing the sterilization operation was integral to his wages and could not have been withheld while paying one month's wages to him in terms of Section 33(2)(b) of the I.D. Act. The argument that the workman need not be paid 'special pay' after the termination, and

therefore, he was only paid one month's wages minus the special pay needs only to be noticed to be rejected. If such an interpretation were to be adopted, then the logical consequence would be that the workman was not even entitled to one month's pay after the termination. What Section 33(2)(b) of the I.D. Act does is to introduce a legal fiction requiring the payment of wages, for one more month after the termination, calculated on the basis of what the workman was entitled to on the date of his termination. On this basis, it can hardly be disputed that the workman in the instant case was also entitled to the 'special pay' as part of the monthly wages. It is really the principle that matters not so much the quantum involved.

9. We have examined the impugned order dated 26.5.1992 of the Tribunal. We are of the view that the Tribunal took the correct view in holding that the withholding of the special pay amounted to a contravention of Section 33(2)(b) of the I.D. Act. The learned Tribunal has correctly applied the decision of the Hon'ble Supreme Court in Bharat Electronics Ltd. (supra) to arrive at such a conclusion."

- (iii) **SLP (C) No. 6842/2007** filed against the order dated 04.09.2006 in LPA No. 551/2004 was dismissed. Hence, the settled law in this regard clearly states that the 'special pay' granted to the Respondent/Workman for undergoing the sterilization operation was integral to his wages and could not have been withheld while paying one month's wages to him in terms of Section 33(2)(b) of the I.D. Act.
- (iv) Learned Single Bench of this Court in **Trived Prakash (Supra)**, vide order dated 13.10.2009, considered the said

aspect and appears to be taking a contrary view. The relevant portion of the said Judgment reads, as follows:

“6. The petitioner was paid notice pay at the time of his removal from service. The special pay of Rs. 20/- for maintaining a small family norms, in the opinion of this Court, is not a part of allowance or wages as provided in Section 2(rr) of the the Industrial Disputes Act, 1947. Even otherwise, this Court is of the view that the scope of inquiry under Section 33(2)(b) is different from the scope of inquiry in a reference under Section 10 of the Industrial Disputes Act, 1947. Under Section 33(2)(b), the Court has only to make a strong prima-facie view at the time of granting or rejecting approval whereas in reference under Section 10 of the Industrial Disputes Act, 1947, the Labour Court or the Tribunal is under an obligation to examine all the contentions raised by both the parties on the merits of the case in detail. The reference under Section 10 has been dismissed against the petitioner and the challenge to the same has also been rejected by this Court in writ petition being W.P.(C.) No. 9140/2009 vide order dated 03.07.2009.

7. In view of what has been stated above, the instant application filed on behalf of the respondent No. 1 management is allowed and the writ petition being W.P.(C.) No. 6939/2001 is also dismissed.”

- (v) **LPA No. 648/2009** was filed against the said order of the learned Single Judge and the same was dismissed vide order dated 05.09.2016. The relevant portion of the said Judgment, *inter alia*, reads as follows:

“7. The appellant had filed Writ Petition No.6939/2001 challenging the orders dated 2nd

January, 1999 and 25th August, 2001 and the same was dismissed by the impugned order of the Single Judge dated 13th October, 2009. The contention of the appellant was that he was not paid special allowance of Rs. 20 as per the Office order No. 22 dated 18th July, 1981. The Single Judge has held that the Special Allowance of Rs.20 for maintaining a small family would not form part of allowance or wages as provided under Section 2(rr) of the 1947 Act.

8. The relevant portion of the Office Order dated 18th July 1981 reads:-

“... The rate of personal pay would be equal to the amount of the next increment due at the time of grant of the concession and will remain fixed during the entire service. In the case of persons drawing pay at the maximum the rate of personal pay would be equal to the amount of the increment last drawn...”

The scheme therefore, did not envisage any separate payment under a particular head, as is being suggested by the appellant. An employee under the scheme was entitled to a personal pay equal to the amount of next increment due at the time of grant of concession which would remain fixed. In case a person was drawing pay at the maximum, he was entitled to personal pay equal to the amount of increment last drawn. Pertinently, an amount of Rs. 2909 was remitted to the appellant by Money Order dated 2nd August, 1994 and only thereafter was the application for approval of the removal of the appellant from services filed under Section 33(2)(b). The appellant had not questioned or challenged the quantum of the wages and the amount remitted at any stage for the Industrial Tribunal.

9. It is noticed that the punishment of removal was made the subject matter of a reference to the

Industrial Tribunal. By order dated 6th January, 2007, the punishment was upheld and at that stage too, the appellant did not challenge the quantum of wages paid. The order dated 6th January, 2007 was challenged by the appellant in W.P. (C) No.9140/2009 which was dismissed in limine vide order dated 3rd July, 2009. The said order has attained finality.

10. In these circumstances, we find no merit in the present appeal and the same is accordingly dismissed.”

23. From the perusal of the case laws as discussed herein above, it is evident that the Division Bench of this Court in **LPA No. 530/2004** and **LPA No. 551/2004** has categorically held that ‘special pay’ of Rs. 20/- granted to the workman for undergoing sterilization operation was an integral part of his wages and hence withholding of the special pay amounts to contravention of Section 33(2)(b) of the I.D. Act. SLP filed against the decision of the Hon’ble Division Bench in LPA No. 551/2004 was also dismissed. Hence, the law is settled in this regard. It is pertinent to mention here that in ***Trived Prakash (Supra)***, the earlier decisions in this field were not considered and hence, being *per incuriam*, it cannot be treated as a binding law in this field. Even otherwise, the facts of ***Trived Prakash (Supra)*** are distinguishable from the facts of the present case. In ***Trived Prakash (Supra)***, the validity of the domestic enquiry conducted by the Management was challenged by the workman in a separate proceeding before the learned Labour Court and the validity of the said enquiry was upheld by the learned Labour Court and the High Court. In the present case, the

Respondent never challenged the validity of the domestic enquiry conducted by the Management before the learned Labour Court. Hence, the facts of the present case are different and distinguishable from the facts of *Trived Prakash (Supra)*.

24. This Court is bound by the law laid down by the Hon'ble Division Bench in **LPA No. 530/2004** and **LPA No. 551/2004**. The special pay of Rs. 20/- granted to the workman as an incentive for family planning was part of his one-month wages for the purpose of Section 33(2)(b) of the I.D. Act. The non-payment of Rs. 20/- towards the incentive for family planning amounts to violation of the mandatory condition of Section 33(2)(b) of the I.D. Act. Hence, the learned Labour Court was right in rejecting the application filed by the Petitioner under Section 33(2)(b) of the I.D. Act.

25. It is a well settled principle of law that the Writ Court does not sit in appeal over the decision of the Industrial Tribunal. It does not reappraise the evidence which formed the basis of the decision by the Tribunal. So long as there was evidence before the Industrial Tribunal to arrive at a particular conclusion, the Writ Court will not adjudge the sufficiency of such evidence. In the present case, the finding of the learned Labour Court is based on the well settled position of law and hence there is no infirmity or perversity in the view taken by the learned Labour Court. The Impugned Order vide which the learned Labour Court rejected the application filed by the Petitioner seeking approval for terminating the service of the Respondent is hereby upheld.

26. During the pendency of the present Writ Petition, the Petitioner reinstated the Respondent/Workman back in service (without prejudice to the rights of the D.T.C. in the present proceedings) who has now already been superannuated from the service. Since, the application filed by the Petitioner seeking approval of the learned Labour Court for terminating the service of the Respondent/Workman has been rejected, the workman will be treated as 'in service' during the whole period and will be entitled for all the service benefits accordingly.

27. In view of the detailed discussions herein above, the present Writ Petition is dismissed. No order as to costs.

OCTOBER 17, 2022

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GAURANG KANTH, J.

