

\$~

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

%

Reserved on: 06.02.2023

Pronounced on: 21.04.2023

+ **W.P.(C) 6494/2003**

DELHI TRANSPORT CORPORATION Petitioner
Through: Mr. U.N. Tiwary, Advocate.

versus

THE P.O., YAD RAM Respondent
Through: Mr. Anil Mittal, Mr. Shaurya
Mittal and Mr. Kumar
Shubham, Advocates.

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. In the present Writ Petition, the Petitioner/Management is challenging the Award dated 13.02.2003 (***Impugned Award***), passed by the Presiding Officer, Industrial Tribunal-II, Karkardooma Courts, Delhi in O.P. No. 297/1994 titled as '*Delhi Transport Corporation Vs Sh. Yad Ram*'.

RELEVANT FACTS FOR ADJUDICATION OF THE PRESENT WRIT PETITION

2. The Respondent/Workman joined as a conductor with DTC on 18.08.1978.
3. It is the case of the Petitioner/Management that the Respondent/Workman used to remain absent from his duty

unauthorizedly without prior permission between the period 01.01.1992 and 31.12.1992 and has not given any application for leave between the same period.

4. Consequently, on the basis of Report dated 06.04.1993 submitted by Junior Pay Bill Clerk, the Petitioner/Management issued a Charge Sheet dated 15.07.1993 to the Respondent/Workman for remaining absent without permission for 140 days between the period 01.01.1992 and 31.12.1992. It is stated in the charge sheet that the Respondent/Workman was on leave without leave application for 59 days and took unauthorized leave without medical certificate for 81 days. It is further stated in the charge sheet that such leaves show complete negligence and carelessness towards duty and amounts to misconduct under Para No. 4 (II) and 19 (H) & (M) of the Standing Order governing the conduct of the DTC employees. However, thereafter, an amended charge sheet dated 26.08.1993 was issued to the Respondent/Workman, whereby the charge against him was amended to “absent from duty” instead of “leave without pay”.
5. It is the case of the Petitioner/Management that the Respondent/Workman replied to the Chargesheet vide an undated Letter wherein he did not dispute the leaves taken by him as mentioned in the Chargesheet and thus, admitted the charges levelled against him. However, it is the case of the Respondent/Workman that he filed reply to the chargesheet

dated 15.07.1993 and no reply was filed to the amended chargesheet.

6. Thereafter, an enquiry was conducted by the Deputy Manager (Traffic). It is the case of the Petitioner/Management that during the enquiry, the Respondent/Workman admitted the charges levelled against him and therefore, the Enquiry Officer did not record statement of any witnesses. Pursuant to enquiry, an enquiry report was submitted to the Disciplinary Authority, Depot Manager, who in turn issued show cause notice dated 19.11.1993 to the Respondent/Workman to show cause as to why he should not be removed from service.
7. It is the case of the Petitioner/Management that since no reply was filed by the Respondent/Workman to the show cause notice, the Disciplinary Authority removed the Respondent/Workman from the service vide Letter dated 23.09.1994 on the basis of enquiry report and past record of the Respondent/Workman. It is further the claim of the Petitioner/Management that the Workman on dismissal was also paid one month wages vide money order dated 23.09.1994.
8. At that time, a dispute between the Petitioner/Management and its Workmen relating to the implementation of the IVth Pay Commission report was pending before the learned Labour Court, so the Petitioner/Management filed an Approval Application under Section 33 (2) (b) of the Industrial Disputes Act, 1947 ('*I.D. Act*'), bearing O.P. No. 297/1994, seeking approval for removal of Respondent/Workman from service.

9. The Respondent/Workman filed his reply denying the allegations levelled against him in the Charge Sheet. Hence the learned Labour Court framed the following preliminary issue:

“Whether the Applicant held a valid enquiry and in conformity with rules of natural justice.”

10. Learned Labour Court, vide order dated 02.09.2002, decided the Preliminary issue with respect to validity of the enquiry against the Petitioner/ Management. Thereafter, the learned Labour Court framed the following issues:

*“1. Whether the Respondent committed the misconduct as alleged against him?
2. Whether the Petitioner remitted full one months wage to the Respondent as per Section 33 (2) (b) of the I.D Act?
3. Relief”*

11. The Petitioner/Management examined Smt. Renu Bala as AW-1 to substantiate their case. The Respondent/Workman stepped into the witness box as RW-1.
12. Pursuant to hearing the parties, the learned Labour Court vide the Impugned Award dated 13.02.2003, dismissed the approval application. Learned Labour Court held that availing of leave without pay does not amount to misconduct. Being aggrieved by the Impugned Award, the Petitioner/ Management filed the present Writ Petition praying, *inter alia*, for quashing of the Impugned Award.
13. It is not out of place to mention here that in the meanwhile, the Respondent/Workman raised an industrial dispute qua his termination under section 10 of the I.D Act. The appropriate Government referred the said industrial dispute to the learned

Labour Court and the same was treated as an Industrial Dispute being I.D.No.144/2001 titled as '*The Management of M/s Delhi Transport Corporation and its Workman Shri Yad Ram Yadav*'. In the said proceedings, the learned Labour Court, vide Award dated 15.10.2003, was pleased to answer the reference against the Respondent/ Workman. However, the Respondent/Workman did not challenge the said Award dated 15.10.2003 till the year 2010. Hence the Petitioner/ Management had withdrawn the present Writ Petition vide Order dated 16.09.2009. However, later on, the Respondent Workman filed Writ Petition, W.P.(C) 1910/2010, assailing the Award dated 15.10.2003. In view of the same, the Petitioner/Management filed an application for restoring the present Writ Petition. Hence vide Order dated 01.08.2012, this Court restored the present Writ Petition to its original position for adjudication.

14. It is also pertinent to mention here that this Court had allowed the application of the Respondent/ Workman under Section 17B of I.D. Act vide its Order dated 15.10.2004, whereby this Court gave a direction to the Petitioner/ Management to pay the last drawn wages to the Respondent/ Workmen from the date of award. This Court further ordered on the submission of the learned counsel for the Petitioner/ Management that the Respondent/ Workman may be taken back into service till the pendency of the present Writ Petition, subject to the outcome of this Writ Petition. Pursuant to such order, the Respondent/ Workman joined the duty as conductor with Petitioner/

Management on 21.03.2005. Thereafter, the Respondent/ Workman filed another application seeking modification/ amendment of Order dated 15.10.2004 passed by this Court praying, *inter alia*, for an amendment in the Order dated 15.10.2004 to the effect that the Respondent/ Workman may be paid full salary in parity with other similarly placed conductors instead of the last wages drawn by the Workman. This Court, vide its Order dated 16.03.2009, clarified that necessary directions may be passed in the said application at the time of final disposal of the present Writ Petition.

SUBMISSIONS ADVANCED ON BEHALF OF PETITIONER/ MANAGEMENT

15. It is stated by Mr. U.N. Tiwary, learned counsel for the Petitioner/Management that the learned Labour Court has given an erroneous finding that leave without pay does not amount to misconduct. It is submitted that it did not take into consideration the fact that the charge against the Respondent/Workman was amended to “absent from duty” instead of “leave without pay” vide an amended charge sheet dated 26.08.1993.
16. It is submitted by Mr. U.N. Tiwary, the learned counsel for the Petitioner/Management that if the leaves taken by the Respondent/Workman were noted in the monthly attendance register (‘MAR’) as leave without pay, it does not mean that the leaves were sanctioned by the Petitioner/Management or that he was granted leave without pay. Therefore, the learned Labour Court, has wrongly observed that the period of absence of

Respondent/Workman has already been treated as leave without pay.

17. Further, it has been stated that the law has been settled by the Hon'ble Supreme Court of India in its decision in *DTC v. Sardar Singh* reported as (2004) 7 SCC 574, that mere treating the period of unauthorized absence as leave without pay will not result in the workman being declared not guilty of misconduct.
18. It is further submitted by Mr. Tiwary, learned counsel for the Petitioner/Management that while passing the Impugned Award, the learned Labour Court failed to observe the past service record of the Respondent/Workman while determining the question of his misconduct.
19. Mr. Tiwary submits that the Workman has stated the reason of his leaves in his leave applications as illness, but before the enquiry officer he stated that he was absent on account of bereavement of his father, wife and uncle. However, he was not able to produce death certificate of anyone before the enquiry officer or before the learned Labour Court, except for his father. Mr. Tiwary submits that this shows that the contention of Respondent/Workman was afterthought and he misled the enquiry officer and the learned Labour Court by stating different reasons for his absence.
20. With these submissions, the learned counsel for the Petitioner/Management prays for the setting aside of the Impugned Award.

**SUBMISSIONS ADVANCED ON BEHALF OF
RESPONDENT/ WORKMAN**

21. It is the main contention of the Respondent/ Workman that the Petitioner/Management should have challenged the Order dated 02.09.2002 passed in O.P. No. 297/1994 by learned Labour Court, whereby the issue of enquiry was decided against the Petitioner/Management. It is stated that the Petitioner/Management could not have filed the Writ Petition challenging the Impugned Award without challenging the Order dated 02.09.2002.
22. It is argued that since Order dated 02.09.2002 has not been challenged by the Petitioner/Management, it is still effective and approval under Section 33(2)(b) of the I.D. Act cannot be granted till the time that Order is set aside.
23. Mr. Anil Mittal, learned counsel for the Respondent/Workman relied upon the judgment of this Court in ***Birmati Vs Presiding Officer, Industrial Tribunal-II & Ors.***, reported as ***2022 SCC Online Del 2891***, wherein it has been held that an industrial tribunal or labour court can delve into the question of validity of an enquiry under Section 10 of I.D. Act only and not in an approval application under Section 33(2)(b) of I.D. Act. It is stated that even if in the present case, the learned Labour Court went into the issue of validity of the domestic enquiry and declared the enquiry to be vitiated, so the said Order can be challenged before this Court only through a writ petition and not by way of proceedings under Section 10 of I.D. Act.

24. Further, Mr. Anil Mittal, learned counsel for the Respondent/Workman has placed reliance upon the decision of Supreme Court in *John D' Souza Vs Karnataka State Road Transport Corporation*, reported as (2019) 18 SCC 47, while stating that the powers exercised by a court under Section 10 and 33(2)(b) of I.D. Act are different and do not overlap.
25. Mr. Mittal, learned counsel for Respondent/Workman placed reliance upon the decision of Hon'ble Supreme Court in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs Shri Ram Gopal Sharma & Ors.*, reported as AIR 2002 SC 643 in order to substantiate his contention that the order of removal from service will have no effect once the approval application under Section 33(2)(b) of I.D. Act of the Petitioner/Management is dismissed.
26. It is further argued by Mr. Mittal, learned counsel for Respondent/Workman that the Workman had given detailed reasons for his absence from duty before the enquiry officer but his statement was considered as an admission of charges against him by the enquiry officer. It is stated that there was no such admission by the Respondent/Workman but still his statement was considered as admission due to the bias of the enquiry officer against him. Therefore, the Respondent/ Workman was subject to victimization by the acts of the Petitioner/Management. Mr. Mittal, learned counsel for Workman has placed reliance upon decision of Supreme Court in *Chikkam Koteswara Rao Vs Chikkam Subbarao & Ors.*

reported as *AIR 1971 SC 1542*, while submitting that there should be no ambiguity in the admission and it must be clear and conclusive.

27. With these submissions, the learned counsel for the Respondent/Workman prays for the dismissal of the writ Petition.

LEGAL ANALYSIS

28. This Court has heard the arguments advanced by the counsel for the parties and also examined the documents placed on record and the judgments relied upon by the parties.
29. In this Writ Petition, the Petitioner/Management is challenging the Impugned Order passed by the learned Labour Court whereby the Application filed by the Petitioner/Management under Section 33 (2)(b) was rejected. At this stage, it is apposite to refer to the decision of Hon'ble Supreme Court in *John D' Souza (Supra.)* The Hon'ble Supreme Court, while referring to the earlier decisions on this point, reiterated that the enquiry envisaged under Section 33 (2) (b) of the I.D. Act is a limited enquiry and is in the nature of summary proceedings. The Hon'ble Supreme Court explained the ambit of enquiry to be conducted while considering an Application under Section 33(2)(b) of the I.D. Act. According to the Hon'ble Supreme Court, the following questions to be examined while considering an Application under Section 33(2)(b) of the I.D. Act:

- (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders conducted/ whether principles of natural justice has been complied with.
- (ii) whether a *prima facie* case for dismissal based on legal evidence adduced before the domestic tribunal is made out
- (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee
- (iv) whether the employer has paid or offered to pay wages for one month to the employee and
- (v) whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

30. In view of the ratio laid down by Hon'ble Supreme Court, the learned Labour Court, vide its Order dated 02.09.2002, held that the enquiry made by the enquiry officer was vitiated. Thereafter, the Petitioner/Management led evidence before the learned Labour Court in order to prove the misconduct of the Respondent/Workman. Vide impugned Order, the learned Labour Court came to the finding that the Petitioner/Management failed to prove the misconduct as alleged by them in the chargesheet and rejected the approval application.

31. On perusal of the record, it shows that the learned Labour Court, has rejected the approval application of the Petitioner/Management solely on the ground that the Petitioner/Management has regularized the unauthorized absence of the Respondent/Workman as 'leave without pay' in its MAR. Learned Labour Court observed that leave without pay does not amount to misconduct. The relevant portion from the Impugned Order is extracted below:

"7. To prove the issue applicant produced AW-1 Smt. Renu Bala who filed her affidavit and further relied upon the documents Ex. AW1/1 to Ex.AW1/6. She was cross-examined during which she admitted that she submitted the report Ex. AW1/1 dated 31.03.93 and as per the report, the report had been prepared on the basis of MAR and the respondent had availed leave without pay. She also brought the original MAR and as per the MAR, respondent had been shown on leave without pay. She further admitted that the charge sheet Ex. AW1/2 is dated 13.7.93 in which it is alleged against the respondent that he had availed leave of 140 days. On the other hand Respondent entered into the witness box and submitted that he availed 140 days leave without pay during the period 1.1.92 to 31.12.92.

8. To appreciate the case of parties, I have gone through the report Ex. AW1/1 and Charge sheet. The report and charge sheet shows that the period of absence of respondent had already been treated as period of leave without pay. It shows that: the charge sheet itself is unfounded. Admittedly, availing of leave without pay does not amount to misconduct. Consequently, it is held that applicant has failed to prove the alleged misconduct against the respondent. Issue is decided against the applicant."

32. It is apposite to refer to the following extract from the decision of Supreme Court in ***Sardar Singh (supra)***:-

“9. When an employee absents himself from duty, even without sanctioned leave for a very long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Orders 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 employees concerned were remaining absent for long periods which affects the work of the employer and the employee concerned 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 generalisation. But at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings.

10. Great emphasis was laid by learned counsel for the respondent employee on the absence being treated as leave without pay. As was observed by this Court in State of M.P. v. Harihar Gopal [(1969) 3 SLR 274 (SC)] by a three-Judge Bench of this Court, even when an order is passed for treating absence as leave without pay after passing an order of termination, that is, for the purpose of maintaining correct record of service. The charge in that case was, as in the present case, absence without obtaining leave in advance. The conduct of the employees in this case is nothing but irresponsible in the extreme and can hardly be justified. The charge in this case was misconduct by absence. In view of the governing Standing Orders unauthorised leave can be treated as misconduct.

11. Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence,

more particularly, when same is unauthorised. 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 Orders 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 unauthorised.”

33. Therefore, in view of the decision passed by the Hon’ble Supreme Court in ***Sardar Singh (supra)***, it is conspicuous that the learned Labour Court has committed a manifest error apparent on the face of record. A perusal of the above-mentioned paragraphs shows that leaves without advance permission may be treated as unauthorized absence. Further, in view of the governing Standing Orders, unauthorized leaves may be treated as misconduct by absence from duty. Thus, even if the leaves taken by the Respondent/Workman in the present case were marked as leave without pay in the record of the Petitioner/Management, it does not mean that the same were authorized leaves. It was proved by the Petitioner/Management before the learned Labour Court that the Respondent/Workman had taken all the leaves without any prior permission and all his leave applications were rejected by the Petitioner/Management. On the contrary, the Respondent/Workman was not able to prove the reasons which he had stated for taking those leaves. Further, it is pertinent to note that a perusal of the rejected leave applications show that the Respondent/Workman had taken different grounds for his leaves in the leave application and

before the enquiry officer. Thus, the learned Labour Court committed an error apparent on the face of record.

34. Learned counsel for the Respondent/Workman argued that the Petitioner/Management failed to challenge the order dated 02.09.2002 whereby the learned Labour Court held that the enquiry conducted by the Petitioner/Management was vitiated. However this Court is not convinced with the averment of the Respondent/Workman as the order dated 02.09.2002 is merged with the impugned Order. Hence once impugned Order is held to be unsustainable in law, order dated 02.09.2002 also goes automatically.
35. In view of the detailed discussions herein above, the present writ petition is hereby allowed and the Impugned Award is set aside. Application, bearing CM No. 6195/2007, seeking amendment/modification to the Order dated 15.10.2004 to the effect that full salary may be paid to the Respondent/Workman by the Petitioner/Management is also dismissed.
36. As held by Hon'ble Supreme Court in ***John D'Souza (Supra)***, while examining an Application under Section 33(2)(b) of the I.D. Act, the opinion expressed by the learned Labour Court is preliminary in nature. Therefore, the findings of the learned Labour Court in the present proceedings will not affect while considering the proceedings initiated by the Respondent/Workman under Section 10 of the I.D Act.

37. Accordingly, the present Writ Petition is hereby allowed. The approval application filed by the Petitioner/Management is allowed. No order as to costs.

GAURANG KANTH, J.

APRIL 21, 2023

