



2023: DIO: 9901



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

% **Reserved on : 25th September, 2023**
Pronounced on: 20th October, 2023
+ **W.P.(C) 17742/2005 & CM APPL. 28229/2017**

DELHI TRANSPORT CORPORATION Petitioner

Through: **Ms. Bhakti Pasrija and Mr. Moksh Pasrija, Advocates**

versus

MAHENDER SINGH Respondent

Through: **Mr. Anjani Kumar, Advocate**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition under Article 226 of the Constitution of India has been filed on behalf of the petitioner seeking the following reliefs:

“(i) Issue a writ of certiorari, quashing the impugned order dated 29.1.2003 passed by the Ld. P.O., Industrial Tribunal No. II, Delhi in O.P. No.56 of 1993;

(ii) Issue any other or further writ, order or direction, thereby allowing the application under Section 33(2)(b) of the LD. Act bearing O.P. No.56 of 1993;

(iii) Any other or further orders, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case, may also be passed in favour of the petitioner and against the respondent.”

FACTUAL MATRIX

2. The petitioner is an undertaking of the National Capital Territory of Delhi (GNCTD). The respondent had joined the services of the petitioner



on 21st December, 1978 as a Conductor and upon joining the said position, he was assigned Batch No. 11928. It is alleged that the respondent abstained himself from his duties from 1st October, 1991 to 31st March, 1993 without any prior permission or authorization from the petitioner.

3. The authority concerned has treated the absence of the respondent from duty as misconduct under Para 4(1) and 19(e) of the Standing Orders governing the conduct of DTC employees (Standing Orders). The preliminary enquiry was instituted against the respondent and after completion of the preliminary enquiry, the charge-sheet dated 25th September, 1992 was issued to the respondent. Thereafter, the show cause notice was issued to him as to why disciplinary action should not be initiated against him under Clause 15(2) of the DRTA Conditions of Appointment and Service, 1952 read with Delhi Road Transportation Law (Amendment) Act, 1971.

4. After completion of the enquiry, the enquiry officer had submitted his report and held that the respondent is guilty of misconduct as defined under Para 4(1) and 19(e) of the Standing Orders. The enquiry officer has also forwarded the case file along with report dated 9th November, 1992 to the disciplinary authority. The disciplinary authority issued a show cause notice dated 26th November, 1992 to the respondent asking him to show cause as to why his service should not be terminated. The respondent has not submitted any reply of the show cause notice as well as reminder sent to him in this respect. The disciplinary authority on the basis of the enquiry report confirmed his removal from the service of the petitioner vide its letter/order dated 20th January, 1993.



5. The petitioner moved an application under Section 33(2)(b) of the Industrial Dispute Act (“I. D. Act”) before the Presiding Officer, Industrial Tribunal-II, Delhi for approval of the action of removal from services of the respondent. The said application was registered as OP No. 56 of 1993. The respondent filed its reply to the application and rejoinder was also filed on behalf of the petitioner. The parties filed their affidavits by way of evidence and cross examination of witnesses was also carried out.

6. The learned Tribunal framed preliminary issues after considering the reply filed by the respondent as well as averments made in the said application under Section 33 (2) of the I. D. Act as follows:

“whether the applicant held an legal and valid enquiry against the respondent according to principles of natural justice?”

7. The learned Tribunal vide its order dated 6th July, 2000 held that the principles of natural justice were not followed during the enquiry proceedings. The learned Tribunal has granted the opportunity to the parties to lead their evidence afresh before the learned Tribunal. The respondent had duly filed its reply to the application under Section 33(2) (b) of the Act, wherein, the absence without permission was not denied.

8. Vide order dated 6th July, 2000 passed by the learned Tribunal, the aforesaid issue of validity of enquiry was decided against the petitioner. On the pleadings of the parties, the learned Tribunal has framed following issues:



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Whether the respondent committed the misconduct as alleged in the chargesheet and pleaded in the petition filed under Section 33(2)(b) of I. D. Act?

Whether the petitioner remitted one month wages to the respondent at the time of his removal from service?

9. The learned Presiding Officer, Industrial Tribunal-II, Delhi *vide* its order dated 29th January, 2003, rejected the application of the petitioner under Section 33(2)(b) of the I.D Act on the ground that as per the Master Attendance Register (MAR), the absence of employees was subsequently treated as leave without pay.

10. Aggrieved by the order dated 29th January, 2003, the petitioner has preferred the instant writ petition.

SUBMISSIONS

(On behalf of the petitioner)

11. Learned counsel appearing on behalf of the petitioner submitted that the impugned order was passed by the learned Tribunal contrary to the principles as laid by the Hon'ble Supreme Court in the judgment of ***DTC vs. Sardar Singh, 2004 (7) SCC 574***. The Hon'ble Supreme Court held that the unauthorized absence from the service constitutes misconduct. It is further held that when an employee absents himself from duty without sanctioned leave, it *prima facie* shows lack of interest in work. In view of the aforesaid judgments, it is settled that unauthorized absence has been treated as leave without pay, hence, it constitutes unauthorized leave.

12. Learned counsel appearing on behalf of the petitioner submitted that the learned Tribunals erroneously came to a conclusion that there is



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no misconduct, based on statement purportedly given by the reporter of case to the Enquiry Officer as per MAR, the employee had availed leave without pay. The learned Tribunal has failed to appreciate the evidence adduced before it showing that the leave application had been submitted after the period of absence and no wages were paid during the period of absence to the respondent.

13. It is further submitted that the learned Tribunal failed to appreciate that the respondent had remained absent without prior intimation or permission and that this period was treated as leave without pay was only for the purpose of settling his accounts/or his service record. Treating the absence of the respondent as leave without pay in no way absolves the respondent of the misconduct committed by him.

14. Learned counsel appearing on behalf of the petitioner vehemently submitted that the learned Tribunal had exercised its jurisdiction as vested in it by going beyond its scope of scrutiny under Section 33(2)(b) of the I.D. Act which only contemplates power to see, (1) whether the proposed action is in accordance with Standing Orders, (2) whether the employees have been given one month's wages and (3) whether prescribed application has been moved.

15. It is submitted that in the absence of allegation that the action of the petitioner was motivated by vindictiveness, victimization or unfair labour practice, the application of the petitioner ought to have been allowed. It is further submitted that the learned Tribunal was bound to accord approval/permission under Section 33(2)(b) of the I. D. Act to the petitioner as the finding of the enquiry officer was supported by legal evidence before learned Tribunal and also the documents on record.



16. Learned counsel appearing on behalf of the petitioner submitted that in view of the aforesaid discussions, the order dated 29th January, 2003 passed by the learned P. O., Industrial Tribunal No. II, Delhi in O. P. No. 56 of 1993 is to be set aside and the instant petition may be allowed.

(On behalf of the respondent)

17. Learned counsel appearing on behalf of the respondent submitted that the impugned order dated 29th January, 2003 was passed after due appreciation of evidence which is not amenable to writ jurisdiction. It is further submitted that the Writ Court has no power to re-appreciate the evidence by way of the writ petition. It is submitted that the instant writ petition is barred by delay and laches. It is submitted that the impugned order was passed on 29th January, 2003 and the instant petition was filed in year 2005 i.e. after about two years. The petitioner had failed to explain the delay of two years in filing the writ petition.

18. It is submitted that as per MAR, the respondent has taken “the leave without pay” and he was not absent from the duty unauthorizedly..

19. Learned counsel appearing on behalf of the respondent submitted that the finding and conclusion arrived at by the Enquiry Officer in the enquiry proceeding is totally wrong and *dehors* the principles of natural justice as the finding is totally silent as to the statement of the conductor Yograj, who was produced by the petitioner to prove the guilt of the respondent, regarding MAR and its relevancy and weightage. Therefore, the order passed by Enquiry Officer was arbitrary and non-speaking.



20. It is submitted that the ratio of the case of *Sardar Singh (Supra)* heavily relied upon by the petitioner is not attracted in the present matter because in *Sardar Singh's* case it was the learned Tribunal who held that absence from duty was treated as leave without pay. There is no reference to the statement of DTC regarding employees had taken leave without approval. It is submitted that there is difference between “treated leave without pay” and “taken leave without pay”. In the later case, the leave amounts to have approved. In view of the above facts and circumstances, the instant petition is devoid of any merit and is liable to be rejected.

ANALYSIS AND FINDINGS

21. This Court has given consideration to the submissions of the learned counsel appearing on behalf of the petitioner, learned counsel for the respondent and perused the averments in the petition and the documents on record.

22. In the instant petition, the petitioner/DTC has challenged the order of the ‘approval’ under Section 33(2)(b) of the I. D. Act leading to the dismissal order of the workman/respondent passed by the DTC. The practices invariably adopted by the learned Tribunal was that on receiving the application under this Section, it has mechanically framed a preliminary issues as to the validity of the enquiry and called upon the management to lead its evidence. It is not in dispute that the enquiry report/records always accompanied the ‘approved application’ and that the authenticity of the reports/records has not been challenged by the workman. The workman has instead assailed the validity of the enquiry. The questions which have to be addressed are *firstly*, whether, the



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procedure followed by the learned Tribunal is in accordance with law and *secondly*, if the treatment of absence of the workman on leave without pay amounts such absence to as ‘misconduct’.

23. For proper adjudication of the aforesaid issue, it is necessary to reproduce the relevant provisions of the I. D. Act, Standing Orders governing the Conduct of DTC Employees and regulation as follows:.

33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.—

“2. During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],

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(b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

“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



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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.

*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:
(e). Habitual late attendance without permission."*

24. Clause 15 of the DRTA Conditions of Appointment and Service, 1952 reads as follows:

"2. Discipline- the following penalties may, for misconduct or for a good and sufficient reason be imposed upon an employee of the Delhi Transport Authority:

(i) xxxxxxxx

(v).xxxxxx

(vi). Removal from the service of the Delhi Road Transport Authority.

(vii) Dismissal from the service of the Delhi Road Transport Authority.

25. As per the scope of the Section 33(2)(b) of the I. D. Act, the Labour Court/Tribunal is required to find out whether the domestic enquiry held against the workman suffers from the incurable defects. The scope of enquiry of the Labour Court/Tribunal while exercising jurisdiction under Section 33(2)(b) of the I. D. Act has two phases. Firstly, the Labour Court/Tribunal will consider as to whether or not a *prima facie* case for discharge or dismissal is made out on the basis of the



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domestic enquiry, if such enquiry does not suffer from any defect, namely, it has not been held in violation of principles of natural justice and the conclusion arrived at by the employer is *bona fide* or that there was no unfair labour practice or victimization of the workman. Thus, entire exercise has to be undertaken by the Labour Court/Tribunal on examination of the record of enquiry and nothing more. In the event where no defect is detected, the approval must follow. The second stage comes when the Labour Court/Tribunal finds that the domestic enquiry suffers from one or the other legal ailment. In that case, Labour Court/Tribunal shall permit the parties to address their respective evidence and on appraisal thereof Labour Court/Tribunal shall conclude its enquiry whether the discharge or any other punishment intending dismissal is justified.

26. It, thus, stands out that though the Labour Court /Tribunal while exercising their jurisdiction under Section 33(2)(b) are empowered to permit the parties to lead evidence in respect of the legality and propriety of the domestic enquiry held into the misconduct of a workman, such evidence would be taken into consideration by the Labour Court/Tribunal only if it is found that the domestic enquiry conducted by the management is such that the standard of proof required therein can be ‘preponderance of probability’ and not a ‘proof beyond all reasonable doubts’ suffers from inherent defects or is violative of principles of natural justice. In other words, the Labour Court or the Tribunal cannot without first examining the materials placed on record in the domestic enquiry, jump to a conclusion that the evidence produced in the domestic enquiry is not enough and mechanically, permit the parties to lead



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evidence as if it is an essential procedural part of the enquiry to be held under Section 33(2)(b) of the I. D. Act.

27. The Labour Court or Tribunal, therefore, while holding enquiry under Section 33(2)(b) cannot invoke the adjudicatory powers vested in them nor can they in the process of formation of their *prima facie* view under Section 33(2)(b), dwell upon the proportionality of the punishment.

28. The Supreme Court recently in the judgment of ***John D'Souza v. Karnataka SRTC, 2019 SCC OnLine SC 1347*** held as follows:

“23. Section 33(2)(b) of the Act, thus, in the very nature of things contemplates an enquiry by way of summary proceedings as to whether a proper domestic enquiry has been held to prove the misconduct so attributed to the workmen and whether he has been afforded reasonable opportunity to defend himself in consonance with the principles of natural justice. As a natural corollary thereto, the Labour Court or the forum concerned will lift the veil to find out that there is no hidden motive to punish the workman or an abortive attempt to punish him for a non-existent misconduct.

24. The Labour Court/Tribunal, nevertheless, while holding enquiry under Section 33(2)(b), would remember that such like summary proceedings are not akin and on a par with its jurisdiction to adjudicate an “industrial dispute” under Sections 10(1)(c) and (d) of the Act, nor the former provision clothe it with the power to peep into the quantum of punishment for which it has to revert back to Section 11-A of the Act. Where the Labour Court/Tribunal, thus, do not find the domestic enquiry defective and the principles of fair and just play have been adhered to, they will accord the necessary approval to the action taken by the employer, albeit without prejudice to the right of the workman to raise an “industrial dispute” referable for adjudication under Section 10(1)(c) or (d), as the case may be. It needs pertinent mention that an order of approval granted under Section



33(2)(b) has no binding effect in the proceedings under Sections 10(1)(c) and (d) which shall be decided independently while weighing the material adduced by the parties before the Labour Court/Tribunal.

25. The scope of enquiry vested in a Labour Court or Tribunal under Section 33(2)(b) has been the subject-matter of a catena of decisions by this Court. In *Martin Burn Ltd. v. R.N. Bangerjee* [*Martin Burn Ltd. v. R.N. Bangerjee*, 1958 SCR 514 : AIR 1958 SC 79] , a three-Judge Bench of this Court considered the scope of enquiry under Section 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950 whereunder also permission to discharge a workman was required to be obtained in the manner which was somewhat similar to Section 33(2)(b) of the 1947 Act. This Court, thus, held : (AIR p. 85, para 27)

“27. The Labour Appellate Tribunal had to determine on these materials whether a *prima facie* case had been made out by the appellant for the termination of the respondent's service. A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a *prima facie* case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record.”

(emphasis supplied)

28. Another three-Judge Bench of this Court in *Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar* [*Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar*, (1971) 1 LLJ 543 SC] , held an in-depth scrutiny in the scope of jurisdiction vested in an Industrial Tribunal under Section 33(2)(b) of the Act and ruled as follows : (LLJ para 10)



“10. The question as to the scope of the power of an Industrial Tribunal in an enquiry under Section 33(2) of the Industrial Disputes Act has by now been considered by this Court in a number of decisions and is no longer in dispute. If the Tribunal comes to the conclusion that the domestic enquiry was not defective, that is, it was not in violation of the principles of natural justice, it has only to see if there was a prima facie case for dismissal, and whether the employer had come to a bona fide conclusion that the employee was guilty of misconduct. In other words, there was no unfair labour practice and no victimisation. It will then grant its approval. If the Tribunal, on the other hand, finds that the enquiry is defective for any reason, it would have to consider for itself on the evidence adduced before it whether the dismissal was justified. If it comes to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified it would give its approval to the order of dismissal made by the employer in a domestic enquiry. (See P.H. Kalyani v. Air France [P.H. Kalyani v. Air France, (1964) 2 SCR 104 : AIR 1963 SC 1756] .) Where, therefore, the domestic enquiry is conducted in violation of the principles of natural justice evidence must be adduced before the Tribunal by the employer to obtain its approval. Such evidence must be adduced in the manner evidence is normally adduced before the Tribunal, that is, witnesses must be examined and not by merely tendering the evidence laid before the domestic enquiry, unless the parties agree and the tribunal given its assent to such a procedure. (See K.N. Baruah v. Budla Beta Tea Estate [K.N. Baruah v. Budla Beta Tea Estate Civil Appeal No. 1017 of 1965, decided on 9-3-1967 (SC)] , decided on 9-3-1967.) It is clear, therefore, that the jurisdiction of a tribunal under Section 33(2) is of a limited character. Where the domestic enquiry is not defective by reason of violation of principles of natural justice or its findings being perverse or by reason of any unfair labour practice, the tribunal has only to be satisfied that there is a prima facie case for dismissal. The



tribunal in such cases does not sit as an appellate court and come to its own finding of fact.”

(emphasis supplied)

29. *The view taken in Mysore Steel Works (P) Ltd. [Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar, (1971) 1 LLJ 543 SC] was reiterated in Lalla Ram v. DCM Chemical Works Ltd. [Lalla Ram v. DCM Chemical Works Ltd., (1978) 3 SCC 1 : 1978 SCC (L&S) 396] , where this Court analysed Section 33(2)(b) of the Act and held as follows : (Lalla Ram case [Lalla Ram v. DCM Chemical Works Ltd., (1978) 3 SCC 1 : 1978 SCC (L&S) 396] , SCC p. 9, para 12)*

“12. The position that emerges from the abovequoted decisions of this Court may be stated thus : In proceedings under Section 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (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 regard being had to the position settled by the decisions of this Court in Bengal Bhatdee Coal Co. Ltd. v. Ram Probesh Singh [Bengal Bhatdee Coal Co. Ltd. v. Ram Probesh Singh, AIR 1964 SC 486 : (1964) 1 SCR 709] , Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar [Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar, (1961) 1 LLJ 511 : (1960-61) 19 FJR 15 (SC)] , Hind Construction & Engg. Co. Ltd. v. Workmen [Hind Construction & Engg. Co. Ltd. v. Workmen, AIR 1965 SC 917 : (1965) 2 SCR 85] , Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd. [Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd., (1973) 1 SCC 813 : 1973 SCC (L&S) 341] and Eastern Electric & Trading Co. v. Baldev Lal [Eastern Electric & Trading Co. v. Baldev Lal, (1975) 4 SCC 684 : 1975 SCC (L&S) 282] that though



generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment; (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. If these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If, however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.”

(emphasis supplied)

30. This Court in the above cited decisions has, in no uncertain terms, divided the scope of enquiry by the Labour Court/Tribunal while exercising jurisdiction under Section 33(2)(b) in two phases. Firstly, the Labour Court/Tribunal will consider as to whether or not a prima facie case for discharge or dismissal is made out on the basis of the domestic enquiry if such enquiry does not suffer from any defect, namely, it has not been held in violation of principles of natural justice and the conclusion arrived at by the employer is bona fide or that there was no unfair labour



practice or victimisation of the workman. This entire exercise has to be undertaken by the Labour Court/Tribunal on examination of the record of enquiry and nothing more. In the event where no defect is detected, the approval must follow. The second stage comes when the Labour Court/Tribunal finds that the domestic enquiry suffers from one or the other legal ailment. In that case, the Labour Court/Tribunal shall permit the parties to adduce their respective evidence and on appraisal thereof the Labour Court/Tribunal shall conclude its enquiry whether the discharge or any other punishment including dismissal was justified. That is the precise ratio decidendi of the decisions of this Court in (i) Punjab National Bank Ltd. [Punjab National Bank Ltd. v. Workmen, (1960) 1 SCR 806 : AIR 1960 SC 160] , (ii) Mysore Steel Works (P) Ltd. [Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar, (1971) 1 LLJ 543 SC] and (iii) Lalla Ram [Lalla Ram v. DCM Chemical Works Ltd., (1978) 3 SCC 1 : 1978 SCC (L&S) 396] cases.

33. It, thus, stands out that though the Labour Court or the Tribunal while exercising their jurisdiction under Section 33(2)(b) are empowered to permit the parties to lead evidence in respect of the legality and propriety of the domestic enquiry held into the misconduct of a workman, such evidence would be taken into consideration by the Labour Court or the Tribunal only if it is found that the domestic enquiry conducted by the management on the scale that the standard of proof required therein can be “preponderance of probability” and not a “proof beyond all reasonable doubts” suffers from inherent defects or is violative of principles of natural justice. In other words, the Labour Court or the Tribunal cannot without first examining the material led in the domestic enquiry jump to a conclusion and mechanically permit the parties to lead evidence as if it is an essential procedural part of the enquiry to be held under Section 33(2)(b) of the Act.

34. If the awards/orders of the Labour Court or the judgments passed by learned Single Judge(s) [Karnataka SRTC v. John D'Souza, 2017 SCC OnLine Kar 4473 : ILR



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2017 Kar 4711] , [John D'Souza v. Karnataka SRTC, 2012 SCC OnLine Kar 8848 : (2012) 135 FLR 731] , [Karnataka SRTC v. John D'Souza, 2014 SCC OnLine Kar 12814] and the Division Benches [Karnataka SRTC v. John D'Souza, 2018 SCC OnLine Kar 3778] , [Karnataka SRTC v. John D'Souza, 2016 SCC OnLine Kar 8041 : ILR 2016 Kar 3357] , [John D'Souza v. Karnataka SRTC, 2013 SCC OnLine Kar 10303 : (2013) 5 Kant LJ 99] of the High Court are evaluated on these principles, it appears to us that all of them went partly wrong and their respective orders suffer from one or the other legal infirmity. While the Labour Court and the learned Single Judge(s) have erroneously presumed that no enquiry can be held under Section 33(2)(b) without asking the parties to lead their evidence, the learned Division Benches of the High Court have proceeded on the premise that in a prima facie fact-finding enquiry under Section 33(2)(b) no evidence can be adduced or considered by the Labour Court except what is on the record of domestic enquiry. Both the views do not go hand in hand with the law laid down by this Court in Punjab National Bank [Punjab National Bank Ltd. v. Workmen, (1960) 1 SCR 806 : AIR 1960 SC 160] , Mysore Steel Works (P) Ltd. [Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar, (1971) 1 LLJ 543 SC] and Lalla Ram [Lalla Ram v. DCM Chemical Works Ltd., (1978) 3 SCC 1 : 1978 SCC (L&S) 396] cases. The Division Bench of the High Court solely depended upon Martin Burn Ltd. [Martin Burn Ltd. v. R.N. Bangerjee, 1958 SCR 514 : AIR 1958 SC 79] and Cholan Roadways Ltd. [Cholan Roadways Ltd. v. G. Thirugnanasambandam, (2005) 3 SCC 241 : 2005 SCC (L&S) 395] to hold that the scope of enquiry under Section 33(2)(b) being limited to see that prima facie the enquiry is just and proper, the Labour Court is precluded from asking the parties to lead any other evidence. Such a view is not in conformity with the exposition of law in Punjab National Bank [Punjab National Bank Ltd. v. Workmen, (1960) 1 SCR 806 : AIR 1960 SC 160] , Mysore Steel Works (P) Ltd. [Mysore Steel Works (P) Ltd. v. Jitendra Chandra Kar,



(1971) 1 LLJ 543 SC] and Lalla Ram [Lalla Ram v. DCM Chemical Works Ltd., (1978) 3 SCC 1 : 1978 SCC (L&S) 396] cases, cited above. The Labour Court did not exceed its jurisdiction in permitting the parties to adduce the evidence before it though it erred in relying upon the same without holding that the enquiry was defective or the punitive action was vitiated for want of bona fides. The finding on Issue 1 that the domestic enquiry was held in a proper and fair manner also acquires significance here. Still further, the scope and object of Section 33(2)(b) cannot be expanded to an extent that the very scheme of adjudication of an “industrial dispute” under Sections 10(1)(c) and (d) read with Section 11-A of the Act becomes superfluous.”

29. In the judgment of ***The Lord Krishna Textiles Mills vs. its workman***, AIR 1961 SC 860, the Hon’ble Supreme Court held as follows:

“...In view of the limited nature and extent of the enquiry permissible under section 33(2)(b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by S.33(2)(b) and the proviso are satisfied or not. Do the standing orders justify the order of dismissal? Has an enquiry been held as provided by the standing order? Have the wages for the month been paid as required by the proviso? and, has an application been made as prescribed by the proviso? This last question does not fall to be decided in the present appeal because it is common ground that the application has been properly made Standing Order 21 specifies acts of omission which would be treated as misconduct, and it is clear that under 21(s) threatening or intimidating any operative or employee within



the factory premises is misconduct for which dismissal is prescribed as punishment. This position also is not in dispute. There is also no dispute that proper charge-sheets were given to the employees in question, an enquiry was properly held, and opportunity was given to the employees to lead their evidence and to cross-examine the evidence adduced against them; in other words, the enquiry is found by the Tribunal to have been regular and proper. As a result of the enquiry the officer who held the enquiry came to the conclusion that the charges as framed had been proved against the workmen concerned, and so orders of dismissal were passed against them. In such a case it is difficult to understand how the Tribunal felt justified in refusing to accord approval to the action taken by the appellant.

It has been urged before us by the appellant that in holding the present enquiry the Tribunal has assumed powers of an appellate court which is entitled to go into all questions of fact; this criticism to us to be fully justified. One has merely to read the order to be satisfied that the Tribunal has exceeded its jurisdiction in attempting to enquire if the conclusions of fact recorded in the enquiry were justified on the merits. It did not hold that the enquiry was defective or the requirements of natural justice had not been satisfied in any manner. On the other hand it has expressly proceeded to consider questions of fact and has given reasons some of which would be inappropriate and irrelevant if not fantastic even if the Tribunal was dealing with the relevant questions as an appellate court. "The script in which the statements have been recorded"; observes the Tribunal, "is not clear & fully decipherable". How this can be any reason in upsetting the finding of the enquiry it is impossible to understand. The Tribunal has also observed that the evidence adduced was not adequate and that it had not been properly discussed. According to the Tribunal the charge- sheets should have been more specific and clear and the evidence should have been more satisfactory. Then the Tribunal has proceeded to examine the evidence, referred to some discrepancies in the



statements made by witnesses and has come to the conclusion that the domestic enquiry should not have recorded the conclusion that the charges have been proved against the workmen in question. In our opinion, in making these comments against the findings of the enquiry the Tribunal clearly lost sight of the limitations statutorily placed upon its power and authority in holding the enquiry under S. 33(2)(b). It is well known that the question about the adequacy of evidence or its sufficiency or satisfactory character can be raised in a court of facts and may fall to be considered by an appellate court which is entitled to consider facts; but these considerations are irrelevant where the jurisdiction of the court is limited as under S. 33(2)(b). It is conceivable that even in holding an enquiry under section 33(2) (b) if the authority is satisfied that the finding recorded at the domestic enquiry is perverse in the sense that it is not justified by any legal evidence whatever, only in such a case it may be entitled to consider whether approval should be accorded to the employer or not; but is essential to bear in mind the difference between a finding which is not supported by any legal evidence and a finding which may appear to be not supported by sufficient or adequate or satisfactory evidence. Having carefully considered the reasons given by the Tribunal in its award under appeal, we have no hesitation in holding that the appellant is fully justified in contending that the Tribunal has assumed jurisdiction not vested in it by law, and consequently its refusal, to accord approval to the action taken by the appellant is patently erroneous in law.”

30. In ***Delhi Cloth and General Mills Co. vs. Ludh Budh Singh***, AIR 1972 SC 1031, the Hon’ble Supreme Court had interpreted Section 33 (1)(b) and held as follows:

“37. The Industrial Tribunal has to consider whether the appellant has made out a prima facie case for permission being granted for the action proposed to be taken against the



workmen for that purpose the Tribunal was justified in considering the nature of the allegations made against the workman, the findings recorded by the Enquiry Officer and the materials that were available before the Enquiry Officer, on the basis of which such findings had been recorded. Accepting the contention of Mr. Anand that it was within the jurisdiction of the Enquiry Officer to accept the evidence of Sujan Singh and Rampal will be over- simplifying the matter and denying the legitimate jurisdiction of the Tribunal in such matters to consider whether the findings are such as no reasonable person could have arrived at on the basis of the materials before the Enquiry Officer. If the materials before the Enquiry Officer are such. from which the conclusion arrived at by the Enquiry Officer could not have been arrived at by a reasonable person, then it is needless to state, as laid down by this Court in (1969) 1 SCR 753=(AIR 1969 SC 983) that the finding has to be characterised as perverse. If so the Industrial Tribunal has ample jurisdiction to interfere with such a finding.”

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60. From the above decisions the following Principles broadly emerge:

(1) If no domestic enquiry had been held by the management, or if the management makes it clear that it. does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider the evidence so adduced before it, on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by it, in the first instance, and alternatively and without prejudice to



its plea that the enquiry is proper and binding. simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more, that the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management, are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal. if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra. as the request to



adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If



the Tribunal decides that the domestic enquiry has not been held properly it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference under Section 10 or by way of an application under Section 33 of the Act.

61. Having due regard to the above principles, as could be gathered from the decisions, referred to above, in our opinion, the application filed by the management for permission to adduce evidence was highly belated. We have already emphasised that the enquiry proceeding before the Tribunal is a composite one, though the jurisdiction of the Tribunal to consider the validity of the domestic enquiry and the evidence adduced by the management before it. are to be considered in two stages. It is no doubt true that the management has got a right to adduce evidence before the Tribunal in case the domestic enquiry is held to be vitiated. The Tribunal derives jurisdiction to deal with the merits of the dispute only if it has held that the domestic enquiry has not been held properly. But the two stages in which the Tribunal has to conduct the enquiry are in the same proceeding which relates to the consideration of the dispute regarding the validity of the action taken by the management. Therefore, if the management wants to avail itself of the right, that it has in law of adducing additional evidence, it has either to adduce evidence, simultaneously with its reliance on the domestic enquiry or should ask the Tribunal to consider the validity of the domestic enquiry as a preliminary issue with a request to grant permission to adduce evidence, if the decision of preliminary issue is against the management. An enquiry into the preliminary issue is in the course of the proceedings and the opportunity given to the management, after a decision on the preliminary



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issue, is really a continuation of the same proceedings before the Tribunal.”

31. In the case of ***Air India Corporation Bombay vs. V. A. Rebellow & Anr.*** 1972 1 LLJ 501, the Hon’ble Supreme Court emphasized the limited scope of Section 33 of the I. D. Act as follows:

“The basic object of these two sections broadly speaking appears to be to protect the workmen concerned in the disputes which form the subject-matter of pending conciliation proceedings or proceedings by way of reference under S. 10 of the Act, against victimisation by the employer on account of raising or continuing such pending disputes and to ensure that those pending proceedings are brought to expeditious termination in a peaceful atmosphere, undisturbed by any subsequent cause tending to further exacerbate the already strained relations between the employer and the workmen. To achieve this objective a ban, subject to certain conditions, has been imposed by S. 33 on the ordinary right of the employer to alter the terms of his employees' services to their prejudice or to terminate their services under the general law governing contract of employment and S.33A provides for relief against contravention of S.33, by way of adjudication of the complaints by aggrieved workmen considering them to be disputes referred or pending in accordance with the provisions of the Act. This ban, however, is designed to restrict interference with the general rights and liabilities of the parties under the ordinary law within the limits truly necessary for accomplishing the above object. The employer is accordingly left free to deal with the employees when the action concerned is not punitive or mala fide or does not amount to victimisation or unfair labour practice. The anxiety of the Legislature to effectively achieve the object of duly protecting the workmen against victimisation or unfair labour practices consistently with the preservation of the employer's bona fide right to maintain discipline and efficiency in the industry for securing the maximum



production in a peaceful harmonious atmosphere is obvious from the overall scheme of these sections. Turning first to S.33. sub-s.(1) of this section deals with the case of a workman concerned in a pending dispute who has been prejudicially affected by an action in regard to a matter connected with such pending dispute and sub-s.(2) similarly deals with workman concerned in regard to matters unconnected with such pending disputes. Sub-section (1) bans alteration to the prejudice of the workman concerned in the conditions of service applicable to him immediately before the commencement of the proceedings and discharge or punishment whether by dismissal or otherwise of the workman concerned for misconduct connected with the dispute without the express permission in writing of the authority dealing with the pending proceeding. Sub-section (2) places a similar ban in regard to matters not connected with the pending dispute but the employer is free to discharge or dismiss the workman by paying wages for one month provided he applies to the authority dealing with the pending proceeding for approval of the action taken. In the case before us we are concerned only with the ban imposed against orders of discharge or punishment as contemplated by cl. (b) of the two sub-sections. There are no allegations of alteration of the complainant's terms of service. It is not necessary for us to decide whether the present case is governed by sub-s.(1) or sub-s.(2) because the relevant clause in both the sub-sections is couched in similar language and we do not find any difference in the essential scope and purpose of these two sub-sections as far as the controversy before us is concerned. It is noteworthy that the ban is imposed only in regard to action taken for misconduct whether connected or unconnected with the dispute. The employer is, therefore, free to take action against his workmen if it is not based on any misconduct on their part. In this connection reference by way of contrast may be made to sub-s.(3) of S.33 which imposes an unqualified ban on the employer in regard to action by discharging or punishing the workmen whether by dismissal or otherwise. In this sub-



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section we do not find any restriction such as is contained in cl. (b) of sub-ss. (1) and (2). Sub-section (3) protects "protected workman" and the reason is obvious for the blanket protection of such a workman. The Legislature in his case appears to be anxious for the interest of healthy growth and development of trade union movement to ensure for him complete protection against every kind of order of discharge or punishment because of his special position as an officer of a registered trade union recognised as such in accordance with the rules made in that behalf. This explains the restricted protection in sub.ss. (1) of (2)."

32. A Division Bench of Punjab and Haryana High Court in *M/s. Meters and Instruments Pvt. Ltd. Vs. Devi Dayal Sharma & Anr.* 1981 SCCOnline P& H 400 opined that once it was found by the Tribunal that unfair labour practice or victimization was absent from the management's conduct, the Tribunal has no jurisdiction to refuse permission under Section 33(2) of the I. D. Act.

33. The proper procedure to be adopted in respect of "approved applications" under Section 33(2)(b) is to issue notice to the workman so that he is given an opportunity of being heard, in order to ascertain his response to the material presented by the management. If the Court finds that there is genuine doubt as to the authenticity of the material/records produced by the management, it may be called upon to prove them. No other evidence is relevant at this stage. The Court should thereupon perused the material on record to return a finding as to whether the tests enunciated in the *Lord Krishna Textiles Mills (supra)* have been successfully answered, if not, the approval should be declined at that stage.



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34. In the instant case, it is admitted fact that the workman was dismissed for a misconduct not connected with the Industrial Dispute and hence, the Section 33(2)(b) is a relevant statutory provision to be applied in this case. The respondent abstained himself from his duties from 1st October, 1991 to 31st March, 1992, without any prior permission or authorization from the petitioner. A report in this regard was made by the authorities and the respondent issued a chargesheet after a preliminary enquiry was conducted by the Department asking him to show cause as to why disciplinary action should not be taken under Clause 15(2) of DRTA Conditions of Appointment and Service, 1952 read with Delhi Road Transportation Laws (Amendment) Act, 1971.

35. The petitioner in the given circumstances ordered a domestic enquiry into the allegations of misconduct against the respondent. After completion of the detailed enquiry and giving the opportunity of personal hearing to the respondent to defend himself, the enquiry officer gave a finding that the respondent was guilty of misconduct and forwarded the case filed along the report dated 9th November, 1992 to disciplinary authority.

36. The disciplinary authority on receipt of the finding of the enquiry officer issued a show cause notice dated 26th November, 1992 to respondent asking him to show cause as to why his services should not be terminated. The reminder has also been sent to the respondent for reply of the aforesaid show cause notice. The respondent did not give any reply to the show cause notice as well as the reminder sent to him. Since no reply was received by the petitioner from the respondent, the disciplinary authority on the basis of the enquiry report as well as the past record of



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the respondent, confirmed his removal from the service vide its letter/order 20th January, 1993. The petitioner moved an application under Section 33(2)(b) of the Industrial Disputes Act before the Presiding Officer, Industrial Tribunal-II for approval of the action of approval from services, of the respondent.

37. The charge against the respondent was that he had absent himself unauthorizedly from the duty without obtaining leave in advance. The enquiry officer characterized the conduct of the respondent as irresponsible and unjustifiable. The enquiry officer also clearly intended that in failing to report for duty and remaining absent without obtaining leave, the respondent had acted in manner irresponsible and unjustified. Entire enquiry proceedings have been completed by the enquiry officer after following the principles of natural justice and given a chance to the respondent to defend himself against the charges leveled against him. Therefore, there is no violation of the principles of natural justice in conducting the enquiry proceeding. This Court does not find any irregularities in the proceeding of the enquiry conducted by the enquiry officer in the instant case.

38. 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 conclusion about the employee being habitually negligent in duties and an exhibited lack of interest in the employer's work. There were ample



materials produced as evidence before the learned Tribunal to show as to how the employee concerned/respondent was absent for a long period of time i.e. 65 days which affected the work of the employer and 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.

39. The learned counsel appearing on behalf of the respondent/employee laid great emphasis on the absence of the respondent being treated as leave without pay and in this regard, also relied upon the remark in the MAR as “leave without pay”. The Hon’ble Supreme Court in the case of *State of M. P. vs. Harihar Gopal, 1969 3 SLR 274* held that even when an order is passed for treating absence as leave without pay after passing an order of termination, it is only for the purpose of maintaining correct record of service of the employee which has been terminated .

40. The charge against the respondent in the instant case is that he was found absent for long time without obtaining leave in advance. The conduct of the employee is nothing but irresponsible and negligent. According to the governing Standing Orders, unauthorized leave is treated as misconduct.

41. Hence, in the instant petition, the employee was charged for misconduct due to his unauthorized absence.

CONCLUSION

42. After perusing the entire documents/records in the instant case, I find that oral enquiry and detailed investigation was held in this case by



the enquiry officer and the respondent was given full opportunity of defending himself. It is also found that the enquiry was conducted and concluded strictly in accordance with rules and in no stage any principle was flouted. The Tribunal has refused to grant an approval of the order of removal of the respondent from service under Section 33(2)(b) of the I.D. Act only on the basis of MAR report and ignoring all other material on record. As per the discussions in the forgoing paragraphs, it is settled that the Tribunal shall not refuse the approval under Section 33(2)(b) if the proper opportunity of defence had been given to the workman in the disciplinary proceedings.

43. The conclusions regarding negligence and lack of interest can be arrived by looking into the period of absence more particularly, when same is unauthorized. Burden is on the employee to prove by placing relevant materials on record, that there was no negligence or lack of interest on his part. Clause (1) of Para 4 of Standing Orders shows that there is requirement of prior permission of leave and an exception is made only in the case of sudden illness of the employee. The non-observance of stipulated conditions renders the absence unauthorized.

44. The learned Tribunal proceeded in the instant case on the basis of note as 'leave without pay' in MAR. Treating as leave without pay is not same as sanctioned or approved leave.

45. It is *prima facie* evident that the enquiry was conducted in fair and legal manner and the punishment was in accordance with the statutory provisions. *Prima facie*, it was a case of passing punitive orders. There was not even a hint of unfair labour practice, or victimization. The



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Tribunal unnecessarily ignored all the materials that were available before it and only relied upon one document i.e. MAR report.

46. That being the factual position, the learned Tribunal was not justified in refusing to accord approval to the order of dismissal/removal as passed by the employer.

47. In view of the above facts and discussion, the impugned order dated 29th January, 2003 passed by Learned P.O., Industrial Tribunal- No. II, Delhi in O.P. No. 56/1993 cannot be sustained and therefore, the same is set aside. The approval under Section 33(2) (b) of I.D Act is hereby accorded for the dismissal/removal order passed by the petitioner against the respondent.

48. Both issues as framed by this Court are decided accordingly.

49. The instant writ petition is, accordingly, allowed and stands disposed of. The pending applications, if any, also stand disposed of.

50. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

OCTOBER 20, 2023
gs/db