

(2006) 09 DEL CK 0022

In the Delhi High Court

Case No : Writ Petition (C) 16609 of 2004

Delhi Transport Corporation

APPELLANT

Vs

Krishan Kumar

RESPONDENT

Date of Decision : 15-09-2006

Acts Referred:

Industrial Disputes Act, 1947 — Section 33(2)

Citation : (2006) 09 DEL CK 0022

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Alok Shankar, for the Appellant; Mohinder Madan, for the Respondent

Final Decision : Allowed

Judgement

Shiv Narayan Dhingra, J.—By this writ petition, the petitioner has challenged the legality of order of the Industrial Tribunal-II dated 3.3.2003 whereby Tribunal dismissed the application of the petitioner u/s 33(2)(b) of the Industrial Dispute Act.

2. Briefly, the facts are that respondent workman was employed as an Assistant Store Keeper with the petitioner corporation at its B.B.M.Depot. His duty was on the petrol pump of the depot. It was found that there was a difference of 110 liters of diesel in the consumption statement during his duty on 02.6.1990. When the respondent was asked about this difference, he gave a written Explanation, wherein he stated that on that day he had to hurriedly hand over the charge to his reliever as he had received information about the serious illness of his wife and he was in tension because of this information there could be a mistake made by him. He also sought permission to deposit cost of 110 litres of diesel. A charge-sheet was issued to him about this on 18.6.1990 and he gave reply to this charge-sheet on 20.6.1990. In reply to the charge- sheet, he stated that on 02.6.1990 due to rush of the buses he forgot to make an entry in respect of some buses which might have taken diesel and also gave excuse of being in tension due to illness of his wife and handing over of charge hurriedly to his

reliever without making proper entry. After receiving the reply to the charge-sheet, the management got some suspicion and made wider enquiries into the conduct on duty of the respondent on the petrol pump of depot. Enquiries were made from the General Manager, Punjab Roadways, whose buses used to take diesel from the depot and on enquiry from Pathankot Depot of Punjab Roadways, it was found that respondent had been issuing false certificates to the buses of the Pathankot Depot from time to time about defect in diesel pump/electricity failure and he was not supplying the diesel to the buses. Mr. Kashmira Singh, another Assistant Store Keeper was sent to Pathankot Depot to bring the information. A preliminary enquiry was initiated into the conduct of the respondent by an Assistant Accounts officer. Statement of the respondent was also recorded by the Assistant Accounts officer and after making preliminary enquiry, the earlier charge-sheet issued for the difference of 110 liters of diesel was withdrawn and a comprehensive charge-sheet including all other misconducts discovered by the petitioner was issued. In this charge-sheet, it was alleged that respondent with the intention to cheat willfully issued false certificates to the drivers of Bus Nos. PB 12-8856, PB 12-8867 (two times) and PJG 4095 on 25.5.1990, 26.5.1990, 28.5.1990 and 30.5.1990 respectively. The other charge was that on 30.5.1990 Bus no. PJB 4014 came to him to take diesel, he issued a checking note No. 204024 but, thereafter, from the checking note he deleted Bus No. 4014 and instead wrote Punjab Roadways Bus No. PC 12-9407 and, thereafter, cancelled the checking note illegally. On 2.6.1990 he issued High Speed Diesel to Punjab Roadways, Pathankot Bus No. PJG 4100 and did not make an entry of the same in the record. To compensate the difference of 110 liters of diesel, on 2.6.1990 he dishonestly made a false entry of this amount of diesel. On 26.5.1990 he wrongfully changed the opening balance from 944660 to 944664.

3. After charge-sheet was furnished to him, he did not give any reply to the charge-sheet and the matter was referred for enquiry to the enquiry officer. Enquiry was conducted into the charges and enquiry officer found all the charges proved against the respondent. The report of enquiry officer was sent to Disciplinary Authority and a copy of the report was given to the respondent. Disciplinary Authority issued a show cause notice to respondent dated 6.11.1991 and after considering the reply given by the respondent Disciplinary Authority removed the respondent from the service. An application was filed before the Labour Court u/s 33(2)(b) seeking approval of the action taken by the petitioner under this provision as required under law.

4. The Tribunal framed a preliminary issue to the effect, whether the applicant held a valid and legal enquiry against the respondent according to principles of natural justice. This issue was decided by the Tribunal vide its order dated 2.8.2002. The material part of the finding of the Tribunal are as under:

The perusal of file shows that Enquiry officer was transferred without any written order. The enquiry officer Vijender Trivedi was not examined to prove his part of

enquiry proceedings but the same were relied upon by Sh. Suneet Mudgal and he did not conducted the enquiry fresh. The perusal of record further shows that defense assistant was not provided to delinquent officer. There is ample material on the record which shows the lack on the part of the enquiry officer. In his cross examination he admitted that he has not supplied the list of witnesses and documents. The proceedings of the enquiry were done not in accordance of the law and in principle of natural justice.

5. However, the management had also sought permission to adduce evidence in case the enquiry held was vitiated and the Tribunal had framed following issues apart from the preliminary issue.

1. Whether the respondent committed misconduct as alleged against him?

2. Whether the petitioner remitted full one month's wage to respondent at the time of his dismissal?

3. Relief.

6. Tribunal after going through the evidence led by the parties observed that the petitioner had failed to establish that shortage as alleged occurred on 2.6.1990 during duty of delinquent or during duty of Kashmira Singh, consequently, it was held that applicant/petitioner had failed to prove the misconduct against the respondent.

7. The order of Tribunal has been challenged by the petitioner on the ground that Tribunal wrongly held that enquiry was invalid since the documents and the record amply proved that the workman had participated in the proceedings and the documents of enquiry proceedings were supplied to him against his signature. The scope of Tribunal's enquiry was limited to examine the prima facie case because it was proved on record that there was loss of 110 liters of diesel. Merely, because the enquiry officer in its cross-examination stated that he did not remember whether the loss was recorded on register on 2.6.1990 or not, the application could not have been dismissed. The Tribunal was only to see whether prima facie case was made out or not.

8. The other ground taken is that the Tribunal over-stepped its jurisdiction by examining the case on merits. The scope of the enquiry u/s 33(2)(b) was limited and the Tribunal was to see whether there was prima facie case made out against the respondent and the respondent had not been removed malafidely by adopting, unfair labour. It is stated that Tribunal ignored the admission of the workman about difference of 110 liters of diesel having occurred due to mental tension.

9. In the counter affidavit filed by the respondent respondent had stated that writ petition was not maintainable since no Board Resolution for filing the writ has been placed on record. The misconduct alleged against the respondent was never established and the action of the petitioner of removing the respondent was vindictive in nature. The Tribunal had rightly held that petitioner has failed to

prove the charges. The action of the petitioner in removing respondent was malafide, the enquiry was a camouflage. It is also denied in the counter affidavit that checking note was cancelled after making manipulations. The checking note was corrected at the instance of bus driver and after the checking note got spoiled, a fresh checking note was issued. There was no shortage or difference when petitioner handed over charge to his reliever on 2.6.1990. The enquiry was conducted in violation of principles of natural justice.

10. A perusal of the award would show that the Tribunal held that enquiry was vitiated because i) the enquiry officer was transferred without any written order. ii) Mr. Vijender Trivedi, first enquiry officer was not examined to prove his part of enquiry proceedings. iii) Mr. Suneet Mudgal did not conduct fresh enquiry and he proceeded further with the enquiry from the point it was left by Mr. Vijender Trivedi. iv) defense Assistant was not provided to delinquent. v) There was material to show lack on the part of the enquiry officer. vi) Mr. Suneet Mudgal admitted that he had not supplied list of witnesses and documents to the respondent. vii) The proceedings of enquiry was not done according to the law and principles of natural justice. If the above grounds are valid grounds to hold that an enquiry was not conducted in accordance with the principles of natural justice and do these grounds stand in the wake of evidence of record is the issue to be decided.

11. The enquiry was entrusted to enquiry officer vide written order dated 23.1.1991 Ex AW1/2 proved by Mr. Suneet Mudgal in his evidence. This enquiry was initially started by Mr. Vijender Trivedi and since Mr. Vijender Trivedi was transferred to Scindia House, the enquiry was entrusted to Mr. Suneet Mudgal. It is true that no written order has been proved of entrusting enquiry to Mr. Suneet Mudgal but one fails to understand how this prejudiced the respondent. If an enquiry officer conducting enquiry is transferred from the station, the enquiry is bound to be entrusted to another officer. It cannot be stated this was against the principles of natural justice. The conclusion arrived at by the Tribunal is strange.

12. The other ground is that Mr. Vijender Trivedi was not examined to prove his part of enquiry proceedings. The personal appearance of Mr. Vijender Trivedi to prove the proceedings conducted by him was not required under any principles of natural justice. The succeeding enquiry officer, who appeared in the court could prove the entire enquiry proceedings. What is required to be proved is record of the enquiry proceedings as conducted. There is no personal attachment of an enquiry officer with the proceedings. Change of Presiding officer in a court or in a Tribunal does not vitiate the proceedings of the Tribunal. Similarly, the change of enquiry officer whether by an oral order or a written order cannot vitiate the proceedings of domestic enquiry. The personal appearance of the enquiry officer, who conducted part of the proceedings to prove the proceedings is not necessary. The succeeding enquiry officer can prove the proceedings. It was now well settled principle of law that the principles of the Evidence Act have no application in a domestic enquiry. In Maharashtra State Board of Secondary and

Higher Secondary Education Vs. K.S. Gandhi and Others, , Supreme Court held:

37. It is thus well-settled law that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation etc. seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof. In our considered view inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish.... The standard of proof is not proof beyond reasonable doubt "but" the preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof cannot be put in a straitjacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts and circumstances in a given case.

The standard of proof is the same both in civil cases and domestic enquiries.

13. There is no illegality committed by Mr. Suneet Mudgal in proceeding with the enquiry from the point his predecessor Mr. Vijender Trivedi had left the enquiry. This is normally done in all enquiries and by all Tribunals. Mr. Suneet Mudgal was not required to conduct the enquiry afresh. As far as non providing of defense assistant is concerned, the Tribunal would have been enlightened, if the Tribunal had perused the record of the enquiry. It is seen from the record of the enquiry that the respondent had been creating hindrances in proceedings with the enquiry and had at all stages been trying to stall the enquiry. He first refused to accept the copy of the proceedings of his enquiry and expressed his inability to further participate in the enquiry vide order dated 1.4.1991. The respondent asked for various documents; some were provided to him and some he was asked to inspect. He refused to inspect the documents and then all documents were provided to him. He was asked to give in writing the receipt of the copies received by him which he refused to give in writing and enquiry was adjourned due to these reasons again and again. He was asked to nominate a defense assistant to help him in the enquiry. He was told he has a right to appoint any workman of the petitioner organization. On 20.2.1991, he was given opportunity to appoint his representative, he prayed for one week's time for bringing his representative, so the enquiry was adjourned. On 22.2.1991, he gave a letter seeking permission to bring a government official, who was not working in DTC as his defense assistant, this application was rejected. Enquiry officer recorded

on 13.3.1991 that respondent refused to take any worker of DTC as his representative and continued himself with the enquiry. So the conclusion arrived at by the Tribunal that he was not provided any defense assistant is contrary to record. The Tribunal has made a vague observation that there was ample material and record to show lack on the part of the enquiry officer, no such material has been pointed out by the Tribunal nor is available on the record. Next, it is stated by the Tribunal that in cross-examination Mr. Sumeet Mudgal admitted that he had not supplied list of witnesses and documents. This statement of enquiry officer Mr. Suneet Mudgal in no way could have vitiated the enquiry because Mr. Suneet Mudgal had started with the enquiry mid-way. The enquiry was initially conducted by Mr. Vijender Trivedi and list of witness and documents were supplied by Mr. Vijender Trivedi. It seems that the Presiding officer had not bothered either to go through the record or to read the enquiry report. The conclusion arrived at by the Presiding Officer in his order dated 2.8.2002 is perverse and cannot stand the scrutiny of the law.

14. The powers of a Tribunal u/s 33(2)(b) have been clearly laid down by Supreme Court in Cholan Roadways Ltd. v. G. Thirugnansambandam case ; Supreme Court observed: There cannot, however, be any doubt whatsoever that the principles of natural justice are required to be complied with in a domestic enquiry. It is, however, well known that the said principle cannot be stretched too far nor can it be applied in a vacuum.

The jurisdiction of the Tribunal while considering an application for grant of approval has succinctly been stated by this Court in Martin Burn Ltd. Vs. R.N. Banerjee, . While exercising jurisdiction u/s 33(2)(b) of the Act, the Industrial Tribunal is required to see as to whether a prima facie case has been made out as regards the validity or otherwise of the domestic enquiry held against the delinquent, keeping in view the fact that if the permission or approval is granted, the order of discharge or dismissal which may be passed against the delinquent employee would be liable to be challenged in an appropriate proceeding before the Industrial Tribunal in terms of the provision of the Industrial Disputes Act. In Martin Burn case this Court stated: (AIR p.85, para 27)

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 while 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. (see Buckingham and Carnatic Co. Ltd v. Workers of the Company 1952 Lab AC 490

It is further trite that the standard of proof required in a domestic enquiry vis-a-

vis a criminal trial is absolutely different. Whereas in the former preponderance of probability? would suffice; in the latter, ?proof beyond all reasonable doubt? is imperative. In view of law laid down by Supreme Court and my above discussion, I find that order of the Tribunal that enquiry was vitiated is bad in law

15. A perusal of the order of the Tribunal dated 3.3.2003 whereby the Tribunal dismissed the application u/s 33(2)(b) would show that the Tribunal did not even conceive the facts properly. Tribunal recorded that the allegations against the respondent was that he refused to give diesel to buses of Punjab Roadways on account of non functioning of pump and non- availability of electricity whereas there was no such charge. The charge against the respondent was that he issued false certificates to the driver of buses of Punjab Roadways about non functioning of pump and non-availability of electricity, so that, the drivers could take diesel from private petrol pumps. Tribunal also observed that petitioner had failed to establish if the shortage of diesel had occurred on 2.6.1990 during the duty hours of the respondent or of Kashmira Singh. The Tribunal ignored the entire enquiry report and the evidence which has come on record. Mr. Kashmira Singh was a person, who had been asked by the management to go to Punjab and hold enquiries about the buses of Punjab Roadways taking diesel. There is no evidence to show that Kashmira Singh was on duty on 2.6.1990. While the witnesses and the applicant had categorically stated that the shortage of diesel had occurred during the duty of respondent on 2.6.1990 merely because the witness could not orally remember if it was shown in the register on 2.6.1990 or not a witness cannot be disbelieved. The records are maintained in the public offices, by tribunals, by enquiry officers and courts only because the facts stated cannot be remembered orally. If it had been the capacity of a man to keep everything in memory, there would have no necessity of maintaining of records, whenever something is asked and there is record, the witness should be allowed to refer to the record. If a witness states that he does not remember about the entry orally, it cannot be concluded that the witness was false or he was not a truthful witness. No witness can be expected to remember all these things. The documents were available with the Tribunal but the Tribunal did not bother to look into these documents and held that no shortage of diesel was proved.

16. I consider the Tribunal misdirected itself and wrongly held that enquiry was vitiated and thereafter wrongly held that charge of shortage was not proved. The writ petition is allowed and the order of the Tribunal dated 3.3.2003 is set aside. The application u/s 33(2)(b) of the petitioner is allowed.