

(2010) 11 DEL CK 0070

In the Delhi High Court

Case No : Writ Petition (C) No"s. 10965 and 10967 of 2005

Delhi Transport Corporation

APPELLANT

Vs

Sh. Gian Chand (Ex-Conductor)

RESPONDENT

Date of Decision : 30-11-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 10(1), 11(A), 12(5), 33

Citation : (2010) 11 DEL CK 0070

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : J.S. Bhasin, for the Appellant; Prashant Katara, for the Respondent

Judgement

Manmohan Singh, J.—The brief facts of both the cases are that in the year 1968 Respondent was appointed as R/C conductor on daily rates with the Petitioner Corporation and w.e.f. 01.11.1969, he was brought on monthly rate. On 08.06.1993 the Respondent was on duty on bus No. 9922 on interstate route Baijnath/Delhi and at Nargota when the inspecting staff checked the bus they found that the Respondent even after taking the travel fare from two of the passengers did not issue tickets to them and when he was enquired about the same he admitted his mistake. Therefore the Respondent was issued a challan under his signatures.

2. A checking report dated 08.06.1993 was submitted on the basis of which chargesheet dated 24.06.1993 was issued to the Respondent and an oral enquiry was held.

3. The enquiry officer submitted his report dated 12.11.1993 in which he found all the charges against the Respondent fully proved. In view of the said enquiry report the Respondent was issued a show cause notice dated 09.12.1993 by the Petitioner. Instead of replying to the said show cause notice the Respondent moved this Court by writ petition bearing No. 5597/93 which was dismissed in limine and the Respondent was given four weeks time to file reply to the show

cause notice dated 09.12.1993.

4. As Respondent failed to file the reply to the show cause notice, therefore, vide order dated 07.07.1994 he was removed from the service by the Petitioner. Simultaneously, the Petitioner filed an application dated 07.07.1994 u/s 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) before the Industrial Tribunal II, Delhi.

5. The Respondent filed his written statement dated 24.4.1995 to the application alleging inter alia that the entire proceedings of enquiry were liable to be vitiated, therefore approval of action taken by the Petitioner was not maintainable. In the rejoinder, the Petitioner denied the allegation made by the Respondent in the written statement. Mr. S.K. Jacob who was the Enquiry Officer filed his affidavit dated 5.8.1996 in support of the application u/s 33(2)(b) of the Act.

6. The Respondent in January 1998 also raised an industrial dispute before the conciliation officer, the disputes could not be settled and the same was thus referred by the Secretary Labour, Government of NCT of Delhi for adjudication with the following terms of reference:

Whether the removal from services of Sh. Gian Chand is illegal and/or unjustified by the management and if so, to what relief is he entitled and what directions are necessary in this respect ?

7. In the statement of claim filed on 8.5.1998, the Respondent denied all the allegations made in the chargesheet dated 24.6.1993 levelling against him that head taken Rs. 21/- being Rs. 10.50 each from two passengers who were travelling from Palampur to Kangra and he did not issue tickets to them. The Respondent had also denied that he had admitted his mistake that he issued two unquenched tickets No. 799920 and 921. It was contended in the statement of claim that despite of reply, an enquiry was conducted against the principles of natural justice and therefore, prayer was made in the statement of claim that he be reinstated with full back wages, continuity of service and all the other benefits.

8. The Petitioner filed the written statement dated 26.2.1999 alleging that the enquiry was conducted in accordance with the principles of natural justice in which charges were established against the Respondent and the said report proved and he was rightly removed from the service.

9. In May 2001 the Respondent filed his evidence by way of an affidavit marked as Ex. WW1/A and proved letter of removal Ex.WW1/1. In his cross-examination he admitted that he filed the writ petition No. 5597/1993 before this Court which was dismissed. It was admitted by him that he did not file the reply to show cause notice and he had received the copy of the charge-sheet Ex.WW1/M5. It was not denied by him that he was issued censors, warnings and reprimands as per detail of Ex.WW1/M6. The Respondent also did not deny the fact that the tickets were checked up by the checking staff when he was available in the bus. The detail of there cord is stated in Ex.WW-1/M-9.

10. On behalf of the Petitioner an affidavit of Sh. Sushil Jacob, enquiry officer was filed on 20.9.2000 in which he stated that a fair enquiry was conducted into the charges leveled against the Respondent and full opportunity and principle of natural justice was followed as per rules. An affidavit of Sh. Chander Parkash, Traffic Manager, was also filed on behalf of the Petitioner in which it was stated that at that time he was working as depot manager and was aware of the detailed facts and circumstances of the present case.

11. By order dated 18.12.2002, the preliminary issued framed on 5.8.1996 i.e.

whether the applicant held a proper inquiry against the Respondent"; was decided against the Petitioner holding that the inquiry stands vitiated. It was also held that the inquiry was not conducted properly.

12. Subsequently, by order dated 1.7.2003, the application of approval filed u/s 33(2)(b) of the Act filed by the Petitioner was dismissed by the same Presiding Officer.

13. In view these orders, the request was made on behalf of the Respondent informing the learned Tribunal that as an approval application of the management was dismissed by the Court, the Respondent be reinstated. It was argued that the effect of rejection of the application is that the dismissal of the Respondent from the service rendered to be non est in view of the order passed by the Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, .

14. The Presiding Officer, Labour Court No. VII, Delhi, by award dated 3.3.2004 held that in view of the settled law, since the workman is deemed to be in continuous service by virtue of dismissal of approval application of the Petitioner, thus the service of the Respondent was terminated illegally and he is entitled to be reinstated with the management with full back wages and continuity of service.

15. The Petitioner DTC has challenged the order dated 18.12.2002, 1.7.2003 passed in O.P. No. 108/1994 and the award dated 3.3.2004 in I.D. No. 65/98 passed by the Presiding Officer, Labour Court No. VII, Delhi, by filing the present two writ petitions against the Respondent Sh. Gian Chand/workman seeking following directions:

In W.P. (C) No. 10965/2005

(a) Issue a writ in the nature of certiorari quashing the impugned order dated 18.12.2002 and 1.7.2003 in O.P. No. 108/94; passed by Sh. P.S. Teji, Presiding Officer, Industrial Tribunal-II, Karkardooma Courts, Delhi.

(b) Approve the order dated 7.7.94 of removal of the Respondent from service by issuance of writ of certiorari or any other writ order or directions. In W.P. (C) No. 10967/2005

(a) Issue a writ in the nature of certiorari quashing the award dated 3.3.2004 in

I.D. No. 65/98; passed by Sh. C.K. Chaturvedi, Presiding Officer, Labour Court No. VII, Delhi.

(b) Approve the order dated 7.7.1994 of removal of the Respondent from service by issuance of writ of certiorari or any other writ order or directions.

16. First of all, let me examine the order dated 18.12.2002 wherein Presiding Officer, Industrial Tribunal-II, Karkardooma Court, Delhi, came to the conclusion that the enquiry was vitiated on the main ground that the enquiry was not conducted properly as none of the passenger travelling in the bus appear as witness before the Enquiry Officer.

17. It appears from the enquiry report that Sh. Jagdish Chandra, Assistant Traffic Inspector, deposed and stated that he had done the checking along with other checking staff of bus No. 9922, Route Baijnath to Delhi and upon inspection it was found that the group of two passengers travelling from Palampur to Kangra gave Rs.21/- to the conductor for tickets but the conductor did not issue the tickets to them. It was stated in the enquiry report that the chargesheet was read over and the Respondent was asked whether he accepted the charges leveled against him or not. However, he refused to accept the charges and also refused to take the help of any worker. In the enquiry report it was mentioned that the Petitioner tried to call the bus passenger as witness, however, the witness did not appear for enquiry.

18. As regard the examination of the passenger as a witness is concerned, the law in this regard is pretty settled. It is not in dispute that the management examined checking staff during the enquiry proceedings to prove the allegations against the workman.

19. The Supreme Court has already settled the law on the issue of non-examination of passenger witnesses in *State of Haryana and Another Vs. Rattan Singh*, wherein it was held that in a domestic inquiry the strict and sophisticated rules of evidence are not applicable and all material which are logically probative for a prudent mind are permissible. The court had said that it is not expected of an employer to chase passengers and record their depositions in support of charges levelled in domestic inquiry proceedings. The sufficiency of material has to be viewed in the context of given facts of each case and even hearsay evidence cannot be ruled out if it was otherwise probable.

20. The Supreme Court in the case of *Karnataka State Road Transport Corporation Vs. B.S. Hullikatti*, held in similar circumstances that the act was either dishonest or was so grossly negligent that the Respondent therein was not fit to be retained as a conductor. It was also held that in such cases there is no place for generosity or misplaced sympathy on the part of the judicial forums and thereby interfere with the quantum of punishment.

21. The Apex Court in the case of *Regional Manager, RSRTC v. Ghanshyam v. Sharma*, (2002) 1 LLJ 234 SC has held that the order of dismissal could not be

interfered. Jurisdiction is to be exercised judiciously. It has held:

Though u/s 11A, the labour court has jurisdiction and powers to interfere with the quantum of punishment, however, the discretion has to be used judiciously. When the main duty or function of the conductor is to issue tickets and collect fare and then deposit the same with the road transport corporation and when a conductor fails to do so, then it will be misplaced sympathy to order his reinstatement instead of dismissal.

22. Thus, the finding in the order dated 18.12.2002 of the Presiding Officer are without any discussion of the settled law on the issue involved as it appears from the order.

23. Let me now discuss the order dated 1.7.2003 passed by the same Presiding Officer wherein the Petitioner's application u/s 33(2)(b) of the Act for approval of its action to remove the Respondent from service was dismissed while discussing the issues framed in the matter.

24. The following issues were framed:

1 Whether the Respondent committed the misconduct as alleged against him?

2 Whether the Petitioner remitted full one month's wage to Respondent at the time of his removal from service?

3 Relief.

25. As regard the issue No. 1 is concerned, the Presiding Officer decided the said issue against the Petitioner for the reason that since the Petitioner did not produce any passenger or independent witness in support of its case, therefore, the Petitioner had failed to prove the alleged misconduct of the Respondent.

26. The Apex Court in the case of Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another, has clearly laid down the proceedings u/s 33(2)(b) of the Act under which the application for approval of action taken by management (dismissal/termination for misconduct) is moved before the Industrial Tribunal, the jurisdiction of the Tribunal is confined to the enquiry as to (i) Whether a proper domestic enquiry in accordance with the relevant standing orders and principle of natural justice has been held (ii) Whether a prima facie case for dismissal issued on legal evidence adduced before the domestic tribunal is made out (iii) Whether the employer had come to a bonafide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimize the employee regard being had to the position set aside by the Supreme Court that though generally speaking the award of punishment for misconduct under the Standing Order 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 malafides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shock legally

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 time applied to the authority before which the then industrial dispute is pending for approval of the action taken by him.

27. In the case of *The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. Vs. B. Dasappa, M. T. represented by the Binny Mills Labour Association*, the Supreme Court has held that the settled position in law is that permission u/s 33 of the Industrial Dispute Act, 1947 should be refused if the Tribunal is satisfied that the management's action is not bonafide or that the principles of natural justice have been violated or that the materials on the basis on which the management came to a certain conclusion could not justify any reasonable person in coming to such a conclusion as regards the workman's misconduct that the management has not acted bonafide. A finding that the management has acted bonafide will ordinarily not be reached if the materials are such that a reasonable man could not have come to the conclusion which the management has reached. In every case, therefore, it would be proper for the tribunal to address itself to the question, after ascertaining, that the principles of natural justice have not been violated whether the material on which the management has reached a conclusion adverse to the workman, a reasonable person could reach such a conclusion. In such a case the Industrial Tribunal is not called upon to decide whether in its opinion the evidence given by the witness was true but only whether when the enquiring officer (domestic enquiry) stated that he considered such evidence creditable he had acted like a reasonable man. The Industrial Tribunal could not examine the evidence on record to come to a better view, regarding the guilt of the concerned workman nor could it examine the evidence to decide as to whether the evidence on record conclusively proved the guilt of the concerned workman. In the instant case the refusal by the Industrial Tribunal to grant the permission asked for by the employer was held unjustified.

28. The reference made u/s 10(1)(c) and 12(5) of the Act is the full fledged adjudicatory jurisdiction of the authority, under which the Tribunal has the power to review/re-open the findings of the domestic enquiry, the question of adequacy or sufficiency of the evidence and to examine each and every document/material

and witnesses on record.

29. Further, in the case of *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, , the labour court has now been clothed with the power of re-appreciating the evidence in the domestic enquiry and satisfy itself whether the said evidence relied on by an employer establishes the misconduct alleged against the workman.

30. It is settled law that when the reference is made u/s 10(1)(c) of the Act to the labour court/industrial tribunal, the tribunal has the power to determine the legality and justification for termination of service and has the jurisdiction to grant appropriate relief.

31. To invoke Section 11A of the Act, it is necessary that an industrial dispute of the type mentioned therein should have been referred to an Industrial Tribunal for adjudication. The Supreme Court has already laid down that what is done u/s 33(2) is not adjudication. That Section 11A has not enhanced the power of the Tribunal while dealing with an application u/s 33 was also emphasized by the Supreme Court. The Supreme Court after referring to various cases has denied the scope of industrial tribunal jurisdiction over application made u/s 33(2)(b) of the Act for approval of workman's dismissal, in the case of *Cholan Roadways Limited Vs. G. Thirugnanasambandam*, and observed that the lower fora misdirected themselves in law by not posing unto themselves the correct questions. The Tribunal did not apply the principle of *res ipsa loquitur* which was relevant for this case. It also took into consideration, an irrelevant fact namely, non examination of passengers of the bus- which was not germane for determining the issue. The tribunal also failed to apply the correct standard of proof namely "preponderance of probability" but (on the contrary) applied the standard of proof required for a criminal trial.

32. The Division Bench of this Court in the case of *Delhi Transport Corporation Vs. Ram Kumar and another*, has clearly distinguished the scope of Section 33(2) (b), Section 10 and Section 11A of the Act, held that where the employer has not sought an opportunity to adduce evidence, where domestic enquiry is vitiated, there is duty cast upon the Tribunal, suo-moto to call upon the employer to adduce additional evidence to substantiate the charges.

33. Similar view was taken by another Division Bench of this Court in the case of *Surender Pal v. Management of DTC 152 (2008) DLT 671*. It was held:

11. Notwithstanding this clear position of law, an effort was again made before the Supreme Court to urge that a decision given while approving or refusing permission for dismissal would amount to *res judicata* in subsequent adjudication when a reference is made u/s 10. This plea was expressly negatived in *Lakshmi Devi Sugar Mills Ltd. Vs. Pt. Ram Sarup*, .

12. In *Mckenzie and Co. Ltd. Vs. Its Workmen and Others*, , the Supreme Court expressly rejected the argument that the findings of the State Industrial Tribunal

in proceedings u/s 33 of the Act which were confirmed by the Labour Appellate Tribunal barred the right of the management of the Appellant company to start a fresh enquiry in respect of the same incident which formed the subject matter of the previous enquiry. The Court observed thus:

16. ...There is no force in this contention, which seems to be based on a misapprehension as to the nature and scope of proceedings u/s 33. That section does not confer any jurisdiction on a Tribunal to adjudicate on a dispute but it merely empowers the Tribunal to give or withhold permission to the employer during the pendency of an industrial dispute to discharge or punish a workman concerned in the industrial dispute. And in deciding whether permission should or should not be given, the Industrial Tribunal is not to act as a reviewing tribunal against the decision of the management but to see that before it lifts the ban against the discharge or punishment of the workmen the employer makes out a prima facie case. The object of the section is to protect the workmen in pending industrial disputes against intimidation or victimisation. As said above principles governing the giving of permission in such cases are that the employer is not acting mala fide, is not resorting to any unfair labour practice, intimidation or victimisation and there is no basic error or contravention of the principles of natural justice. Therefore when the Tribunal gives or refuses permission it is not adjudicating an industrial dispute, its function is to prevent victimisation of a workman for having raised an industrial dispute. The nature and scope of proceedings u/s 33 shows that removing or refusing to remove the ban on punishment or dismissal of workmen does not bar the raising of an industrial dispute when as a result of the permission of the Industrial Tribunal the employer dismisses or punishes the workmen. *Atherton West and Co. Ltd. Vs. Suti Mill Mazdoor Union and Others*, .

18. As the purpose of Section 33 of the Act is merely to give or withhold permission and not to adjudicate upon an industrial dispute, any finding u/s 33 would not operate as res judicata and bar the raising of an industrial dispute nor is there anything in the section itself or in the findings arrived at by the Industrial Tribunal in Section 33 proceedings dated 6th June, 1954 or of the Labour Appellate Tribunal dated 29th March, 1955 which would debar the Appellant company from holding the second enquiry or dismissing the workmen provided the principles above set out are complied with.

13. Our attention is also drawn to the Division Bench judgment of this Court in *Delhi Transport Corporation Vs. Ram Kumar and another*, , where the Division Bench after an exhaustive consideration of the relevant decisions of the Supreme Court rejected the argument that the findings recorded u/s 33(2)(b) of the Act would operate as res judicata in industrial dispute raised by the workman u/s 10 of the Act.

14. It is thus a settled law that notwithstanding the permission accorded by the Industrial Tribunal, it is open for the workman to raise an industrial dispute u/s 10 of the Act with regard to the termination of the services for which approval

had already been obtained from the Industrial Tribunal u/s 33(2)(b) of the Act. Therefore, the findings recorded in a proceeding u/s 33(2)(b) of the Act cannot operate as res judicata. The interpretation adopted by the learned single Judge would make the whole exercise of industrial adjudication u/s 10 of the Act futile and meaningless. The scope of Section 33 of the Act is extremely limited and all that is done u/s 33 of the Act is to give or refuse permission and there is no industrial adjudication by the Tribunal in those proceedings. The Tribunal is called upon to adjudicate the industrial dispute only when the matter is referred u/s 10 of the Act to the Tribunal.

34. The law being that notwithstanding the permission accorded by the Tribunal an Industrial Dispute can be raised, it is not understood by what logic it can be suggested that any finding given u/s 33(2)(b) would be barred on the principles of res-judicata in adjudication u/s 10. Thus, the findings of the Tribunal are sustainable in law.

35. As regard the finding of issue No. 2 that there was no compliance of Section 33(2)(b) of the Act as the payment of one month's wage is an essential mandate and has not been followed by the Petitioner in the present case is concerned, the learned Counsel for the Respondent has referred the decision of the Apex Court in the case of S. Ganapathy and others Vs. Air India and another, wherein it was held that the proviso to Section 33(2)(b) mandates two steps, that unless the workman is paid wages for one month and an application as contemplated is made by the employer to the tribunal for approval of his action, no such workman can be discharged or dismissed. The intention of the legislature in providing such a contingency was to soften the rigor of unemployment that the workman will face, against whom an order of discharge or dismissal has been passed.

36. The case of the Petitioner is that the Petitioner produced AW-4 Smt. Kusum Sharma before the trial court who filed her affidavit dated 19.2.2003 in which she deposed that one month's salary of Rs. 3368/- was sent to the Respondent by money order along with removal letter dated 7.7.1994. The Petitioner also proved the documents as Ex.AW4/1 to AW4/5.

37. The Petitioner has not disputed the fact that the salary was received back as the said money order was undelivered and the same was re-deposited with the cash section in Naraina Depot. In the cross-examination of AW4 Smt. Kusum Sharma, the Respondent only gave a suggestion regarding the non-payment of one month's wages. It is also pertinent to mention that when the application u/s 33(2)(b) was filed before the Industrial Tribunal-II, in para 12 of the application a specific statement was made by the Petitioner that the Petitioner remitted one month's wages by money order dated 7.7.1994 as required under the said provision. In the written statement, the Respondent has not specifically denied the said compliance. Merely, a casual statement was made by the Respondent that the application filed by the Petitioner was not in compliance with the said provision and contrary to law. In the evidence filed on behalf of the Respondent

there is nonspecific statement that the Petitioner has not sent the one month's wages to the Respondent. Rather in the cross-examination, it was admitted by the Respondent that he did not receive one month salary as he was out of station.

38. No doubt, the said compliance was necessary in view of the specific provision of law and the Respondent under these circumstances is entitled for one month's salary.

39. Therefore, the findings of the Presiding Officer made in both the orders dated 18.12.2003 and 1.7.2003 passed in O.P. No. 108/1994 are quashed.

40. In view of the above discussions, I would say that propositions and legal situations which have been canvassed before this Court have not been considered and discussed by Tribunal as it is evident from orders passed. There is nothing on record to show that as to whether the Tribunal was inferred about the legal scenario and more specifically the decisions of the Supreme Court as referred by the counsel before this Court, otherwise the Tribunal might have arrived at different conclusion.

41. Consequently, the subsequent order in industrial dispute No. 65/98 which was passed on 3.3.2004 by the Presiding Officer, Labour Court No. VII on the basis of the dismissal of the application for approval of the Petitioner is also quashed.

42. Therefore, without hesitation, I deem it appropriate to state that impugned orders suffer from legal infirmities and the same are quashed. The matter be placed before the same Tribunal for reconsideration in the light of the discussion referred above. These writ petitions are accordingly disposed of. No costs.

43. List the matter on 11.01.2011 before the Tribunal. L.C.R. be also sent along with this order.