
(2010) 04 DEL CK 0028

In the Delhi High Court

Case No : Writ Petition (C) No. 9632 of 2003

Delhi Transport Corporation

APPELLANT

Vs

Sh. Rishi Prakash

RESPONDENT

Date of Decision : 05-04-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 33(2)

Citation : (2010) 126 FLR 468 : (2010) 3 SLR 228

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : J.N. Aggarwal, for the Appellant; Anil Mittal, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The petitioner DTC in this writ petition impugns the order dated 3rd October, 2002 of the Industrial Tribunal rejecting the application of the petitioner DTC u/s 33(2)(b) of the Industrial Disputes Act, 1947 seeking approval of its order dated 6th July, 1992 of termination of services of the respondent workman employed as a driver with the petitioner DTC. The respondent workman died on 20th February, 2010 during the pendency of this petition and is now represented by his legal representatives.

2. The petitioner DTC has charged the respondent workman with unauthorized absenteeism for 148 days between 1st January, 1991 and 31st January, 1992. Under Clause 4(ii) of the Standing Orders of the petitioner DTC habitual absence without permission or sanction of leave and continuous absence without such leave for more than 10 days renders the employee liable to be treated as an absconder, resulting in termination of his services. Similarly, Clause 19(h) thereof constitutes habitual negligence of duties and lack of interest in work as a misconduct. The inquiry conducted by the petitioner DTC found the respondent workman guilty of habitual absence without permission, negligence in performance of duty and lack of interest in work and the disciplinary authority of the petitioner DTC vide order dated 6th July, 1992 levied the punishment of

removal of service on the respondent. However, since at that time an industrial dispute between the petitioner DTC and its employees in general relating to certain pensionary benefits was pending, the approval application u/s 33(2)(b) was necessitated and came to be filed.

3. It transpires that the respondent workman also raised a dispute of his termination aforesaid. The following dispute was referred to the Labour Court u/s 10 of the I.D. Act.

Whether the removal of Rishi Prakash Sharma is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?

4. However, strangely enough the application of the petitioner DTC u/s 33(2)(b) and the dispute aforesaid raised by the respondent workman and referred to the Labour Court u/s 10 of the ID Act proceeded in two different courts/foras.

5. The Industrial Tribunal before which the application u/s 33(2)(b) had been preferred, on 6th March, 1996 framed a preliminary issue as under:

Whether the applicant held a legal and valid inquiry against the respondent?

6. The Labour Court to which the industrial dispute u/s 10 of the Act had been referred, on 21st February, 1997 framed an issue as under:

Whether the inquiry conducted by the management against the workman was free, fair and valid?

7. The Industrial Tribunal considering the application u/s 33(2)(b), vide order dated 4th July, 2001 held that the inquiry officer had not provided opportunity to the DTC to establish its case and at the same time the respondent workman was deprived of the opportunity to establish his defence by way of cross examination of the witnesses of DTC and from the record of his service maintained by DTC; it was also held that use of the past record of the respondent workman in the manner as was done by the inquiry officer in his finding was also against the principles of natural justice; it was thus held that the finding of the inquiry officer was perverse and not based on unqualified admission of charges and the procedure adopted to conduct the inquiry was defective. The preliminary issue framed in the Section 33(2)(b) proceedings was thus decided against the DTC and in favour of the respondent workman.

8. The same issue as to validity of the same inquiry, framed in the industrial dispute in the proceedings u/s 10 of the ID Act was vide order dated 31st August, 2001 of the Labour Court decided in favour of the petitioner DTC. It was held that the inquiry preceding the termination of the service of the respondent workman was fair, proper and valid.

9. It would thus be seen that contradictory findings qua the departmental inquiry preceding the termination were rendered in the two proceedings. Strangely enough there is no explanation as to why neither of the parties applied for consolidation of the two proceedings or brought the orders in one to the notice of

the presiding officer in the other proceeding.

10. Be that as it may, the Industrial Tribunal seized with the 33(2)(b) proceedings, after deciding the preliminary issue against the petitioner DTC proceeded to determine whether the misconduct on the ground whereof the services of the respondent workman had been terminated could be established by the petitioner DTC before the Industrial Tribunal or not. It was found that of the 148 days for which the respondent workman had admittedly remained absent, he was absent for 72 days without intimation and for the balance 76 days he had given a leave application which had been rejected. The Industrial Tribunal held that the petitioner DTC had failed to establish that the rejection of the leave application for 76 days had been communicated to the respondent workman. It was also held that the order of rejection had not been brought on record in the proceedings u/s 33(2)(b). Yet further it was held that even after having made an application for leave for 76 days, the respondent workman could not be said to be absent without any intimation. The Industrial Tribunal held that the DTC had failed to show any judgment/rule/instructions by which the leave is to be treated as misconduct. Consequently, it was held that DTC failed to prove any misconduct though it was found to have complied with the other requirements of law of termination of employment. Consequently, the application u/s 33(2)(b) was dismissed vide order dated 3rd October, 2002 impugned in this writ petition.

11. In the parallel proceedings of industrial dispute u/s 10, the Labour Court vide order dated 19th August, 2004 after upholding the validity of inquiry went into the question whether the punishment of termination meted out was disproportionate to the misconduct. It was held that the charge of absenteeism for 148 days was serious and showed that the respondent workman was not interested in performing duties. In the circumstances, the reference was decided in favour of the petitioner DTC and against the respondent workman. The removal of the respondent workman was held to be legal and justified and he was held not entitled to any relief.

12. The respondent workman has not challenged the award aforesaid of the Labour Court in the proceedings u/s 10 of the Act. The same has been allowed to attain finality. Now only this writ petition into the validity of the order of rejection of application u/s 33(2)(b) is for adjudication.

13. The Industrial Tribunal has held the misconduct to have been not proved for the reason of the respondent workman having applied for leave of 76 days out of 148 days of absence and the communication of rejection of the application for leave to the respondent workman having not been established. The question which thus arises is whether making of an application for leave is sufficient to justify otherwise admitted absence which is a misconduct within the meaning of Clauses 4(ii) & 19(h) (supra) of the Standing Orders. The Industrial Tribunal proceeded on the premise that once such application for leave has been made, the onus shifts on the DTC to communicate the rejection of the said leave

application. However, the language of the Standing Orders is "habitual absence without permission or sanction of leave...." The literal interpretation thereof would be that the workman cannot be absent without first obtaining the permission or sanction. Mere applying for the same is not sufficient. There is however no need to delve further on the subject as the same is not *res integra*. The Supreme Court in *Delhi Transport Corporation Vs. Sardar Singh*, has held that mere making of an application, after or even before absence from work, does not in any way assist the employee concerned. It was held that the requirement is of obtaining leave in advance. It thus held that once absence is established, it is for the workman to prove that such absence was with permission or sanction. The reasoning given by the Tribunal is thus contrary to law.

14. The Tribunal has also not given any reasoning as to why on the ground of absence without intimation for the other 72 days the dismissal of the petitioner under Clause 4(ii) & 19(h) (*supra*) of the Standing Orders was not made out. It is significant that the said orders make absence for more than 10 days liable for termination. Here the absence without intimation was admittedly for 72 days. Thus irrespective of the non communication of the rejection of leave application for 76 days, the termination of service of the respondent for the absence of the other 72 days was in any case made out.

15. The order of the Tribunal rejecting the application u/s 33(2)(b) is thus found to be perverse on this ground alone and is liable to be quashed/set aside.

16. However, I must also adjudicate the effect of the award in the industrial dispute u/s 10 of the Act. Upon attention of the counsel for the respondent workman being invited to the same, he contends that as per the law laid down in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others*, upon dismissal/rejection of the application u/s 33(2)(b), the order of dismissal becomes ineffective from the date it was passed and not from the date of rejection of the application and the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer.

17. My research shows that the Division Bench of this Court in *Shri Rajender Singh Vs. Delhi Transport Corporation and Another*, has also held that upon rejection of an application u/s 33(2)(b), the workman is not required to raise an industrial dispute for his reinstatement and is entitled to reinstatement merely for the reason of rejection of application u/s 33(2)(b). I also find that another Single Judge of this Court in *Delhi Transport Corporation Vs. Sh. Ramesh Chander*, held a writ petition challenging the award u/s 10 of the Act in favour of the workman to be barred by *res judicata* for the reason of the order of the Labour Court dismissing the application u/s 33(2)(b) of the Act and the said order having not been challenged by the DTC. Another Single Judge of this Court in *Shri Trived Prakash Vs. Delhi Transport Corporation and Another* held that where the writ petition of the workman against the award in favour of the employer has been dismissed, the challenge by the workman to the grant of

permission u/s 33(2)(b) cannot succeed. It was held that u/s 33(2)(b) the court has only to make a strong prima facie view at the time of granting or rejecting approval whereas in reference u/s 10, the Labour Court or Tribunal is under an obligation to examine all the contentions raised by both the parties on the merits of the case in detail. Similarly, the Supreme Court in Dharampal Vs. National Engg. Inds. Ltd. and Another, held that in a proceeding u/s 33(2)(b) only a prima facie view is to be taken and which ordinarily ought not to be interfered with in a writ proceeding and the appropriate course for the workman is to invoke Section 10 to work out his rights. Recently another Division Bench in Bilori Vs. DTC, held that findings u/s 33(2)(b) cannot operate as res judicata in a reference u/s 10.

18. However, none of the aforesaid judgments deal with the situation as has arisen herein i.e. of inconsistent findings in the proceedings u/s 33(2)(b) and in the Section 10 proceedings.

19. The Division Bench of this Court in Delhi Transport Corporation Vs. Ram Kumar and another, examined in detail the question of proceedings u/s 33(2)(b) and Section 10, arising from the same cause of action. It was held that the scope of inquiry u/s 10 is much wider than the scope of inquiry for according or refusing approval u/s 33(2)(b). It was further held that what is done u/s 33(2)(b) is not adjudication.

20. Even though the aforesaid judgment of the Division Bench of this Court is of prior to the judgment of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra) but to my mind the principles laid therein remained unaffected by the judgment in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. An award or an order in a proceeding u/s 10 would be res judicata in a proceeding u/s 33(2)(b) of the Act.

21. Thus in the view of this Court, this writ petition is entitled to succeed on this ground alone as well.

22. Consequently, a writ of certiorari is issued setting aside/quashing the order dated 3rd October, 2002 of the Industrial Tribunal rejecting the application preferred by the petitioner DTC u/s 33(2)(b) of the Act and approval u/s 33(2)(b) is granted to the petitioner DTC for its order dated 6th July, 1992 of termination of services of the respondent workman. However, no order as to costs.