

(2010) 09 DEL CK 0084
In the Delhi High Court
Case No : LPA 641 and 645 of 2010

Delhi Transport Corporation

APPELLANT

Vs

Shri Bhawar Lal

RESPONDENT

Date of Decision : 15-09-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 33(2)

Citation : (2010) 172 DLT 589 : (2011) 128 FLR 75 : (2011) 1 LLJ 499

Hon'ble Judges : Dipak Misra, C.J; Manmohan, J

Bench : Division Bench

Advocate : Sarfaraz Khan, for the Appellant; H.K. Chaturvedi and Anjali Chaturvedi, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.

C.M. 15921/2010 in LPA 641/2010

C.M. 15960/2010 in LPA 645/2010

Allowed, subject to all just exceptions.

C.M. 15923/2010 in LPA 641/2010

C.M. 15961/2010 and 15962/2010 in LPA 645/2010

These are the applications for condonation of delay in filing and re-filing the appeals.

For the reasons stated in the applications, delay in filing and refiling the appeals is condoned.

Accordingly, applications stand disposed of.

LPA 641/2010 with C.M. 15920/2010

1. Since the present two Letters Patent Appeals, bearing LPA Nos. 641/2010 and 645/2010 have been filed challenging a common judgment dated 17th May, 2010 passed by the learned Single Judge in W.P.(C) 2196/2004 and W.P.(C) 7952/2005, both these appeals are being disposed of together.

2. It is pertinent to mention that while W.P.(C) 2196/2004 was filed by the appellant-DTC impugning the Industrial Tribunal's (hereinafter referred as "Tribunal") order dated 4th September, 2002 rejecting its application filed u/s 33(2)(b) of Industrial Disputes Act, 1947, W.P.(C) 7952/2005 was filed challenging the Labour Court's Award holding the respondent-workman's termination as illegal and consequently directing the appellant-DTC to reinstate the respondent-workman.

3. The relevant observations of the learned Single Judge while dismissing the two writ petitions are reproduced hereinbelow:

7. I tend to agree with the contentions of the counsel for the respondent workman. Eleven days' absence would not qualify as a very long unauthorized absence so as to fall in the category of habitual absence and/or absence indicative of negligence and showing scant interest in the work of DTC.

8. There is another interesting aspect of the matter. Not only has no evidence of the domestic inquiry alleged to have been conducted been laid before the Industrial Tribunal or before this Court but a perusal of the order dated 10th August, 1992 of removal also does not refer to any inquiry report. It also does not refer to the contentions raised by the respondent workman in his reply. It also does not record any reason as to why mere 11 days' absence, specially when thereafter the respondent workman had reported and furnished medical application, was the workman treated to have committed misconduct. The said order of removal displays a total lack of application of mind by the Disciplinary Authority of the petitioner DTC.

9. The Tribunal, on the evidence recorded before it has reached a factual conclusion of the respondent workman having submitted leave applications, of there being a practice of dropping the leave applications in a box and there being no system of acknowledging the receipt thereof. The Tribunal has by a well reasoned order held that in the circumstances no case for misconduct was made out. Such factual finding of the Tribunal cannot be disturbed by this Court in the exercise of writ jurisdiction particularly when no case therefore is made out. No error is found in the order of the Industrial Tribunal rejecting the application of the petitioner DTC u/s 33(2)(b). The W.P.(C) No. 2196/2004 is thus liable to be dismissed.

10. ...The order of the Labour Court impugned in W.P.(C) No. 7952/2005 deciding the dispute merely on the basis of the order u/s 33(2)(b) proceedings is thus erroneous in law. However, I refrain from remanding the dispute for

adjudication. The order on the application u/s 33(2)(b) in the present case is not on a prima facie view of the matter. The Industrial Tribunal gave an opportunity to the petitioner DTC to establish misconduct and the said opportunity was availed of and evidence led. On the basis of the said evidence, the conclusion of no misconduct having been established was reached. The order on the application u/s 33(2)(b) is thus an order after full trial and the writ petition against the said order having been dismissed, the said order, as far as this Court is concerned, has attained finality and no purpose would be served in granting another opportunity to the petitioner DTC to establish misconduct before the Labour Court.

11. Accordingly, both the writ petitions are dismissed...

4. Mr. Sarfaraz Khan, learned Counsel appearing for the appellant-DTC submitted that as the respondent-workman was absent for eleven days without prior permission, it amounted to a misconduct. In this connection, learned Counsel relied upon a judgment of the Supreme Court in Delhi Transport Corporation Vs. Sardar Singh,

5. Mr. Khan further submitted that even if the Labour Court was not satisfied with the enquiry conducted by the appellant-DTC, the Labour Court should have granted another opportunity to appellant-DTC to establish respondent's misconduct.

6. Having heard the learned Counsel for appellant-DTC and having perused the files, we are of the view that respondent-workman's absence for eleven days did not amount to any misconduct as respondent-workman had remained absent because of illness and he had submitted leave application along with medical certificates to appellant-DTC.

7. Even the Supreme Court in Sardar Singh (supra) has held that one of the exceptions to the cases of unauthorised absence is absence due to sudden illness. In our opinion, habitual absence is only established when there is lack of interest in work. There cannot be any sweeping generalisation. In the present case, both the learned Single Judge and Tribunal have found that respondent-workman was absent because of illness and further that the respondent-workman had intimated the factum of his illness to the appellant-DTC. The relevant observations of the Supreme Court in Sardar Singh (supra) are reproduced hereinbelow:

9... Habitual absence is a factor which establishes lack of interest in work. There cannot be any sweeping generalization. But at the same time some tell-tale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings

xxxx xxxx xxxx xxxx

11. Conclusions regarding negligence and lack of interest can be arrived at by looking into the period of absence, more particularly, when same is unauthorized.

Burden is on the employee who claims that there was no negligence and/or lack of interest to establish it by placing relevant materials. Clause (ii) of Para 4 of the Standing Order shows the seriousness attached to habitual absence. In Clause (i) thereof, there is requirement of prior permission. Only exception made is in case of sudden illness. There also conditions are stipulated, non-observance of which renders the absence unauthorized.

12. The Tribunal proceed in all these cases on the basis as if the leave was sanctioned because of the noted leave without pay. Treating as leave without pay is not same as sanctioned or approved leave.

(emphasis supplied)

8. As far as the grant of another opportunity to appellant-DTC to establish the misconduct is concerned, we are in agreement with the reasons advanced by the learned Single Judge namely that the appellant-DTC despite being given an opportunity by the Tribunal to establish misconduct, had failed to prove the same. In fact, during the proceedings before the Tribunal, the respondent-workman had proved that he had remained absent because of illness and that he had submitted applications for leave along with medical certificates from time to time. Further, the witness of appellant-DTC had admitted that respondent-workman had filed leave application along with medical certificate and during his service, respondent-workman had never been charged with any misbehaviour.

9. Consequently, as the Tribunal's order u/s 33(2)(b) of the Act, 1947 was passed after a full trial, learned Single Judge, in our opinion, rightly declined the request of appellant-DTC to establish respondent's misconduct before the Labour Court.

10. In view of aforesaid, the present appeals and applications, being devoid of merits, are dismissed.