

(2005) 02 DEL CK 0134

In the Delhi High Court

Case No : Writ Petition (C) No. 4044 of 2001

Delhi Transport Corporation

APPELLANT

Vs

Shri Sardar Singh

RESPONDENT

Date of Decision : 03-02-2005

Acts Referred:

Citation : (2005) 118 DLT 63 : (2005) 80 DRJ 611 : (2005) 105 FLR 1124 :
(2005) 2 LLJ 430 : (2006) 1 SLJ 222

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Raj Birbal and S.P. Arora, for the Appellant; K.C. Dubey, for the Respondent

Final Decision : Allowed

Judgement

Swatanter Kumar, J.—This case was taken out for re-hearing at the request of the learned counsel appearing for the respondent workman Shri Sardar Singh. In fact, the judgment in this case was reserved on 9.12.2004 but on the request of counsel for the workman the case was taken up and further arguments have also been heard.

2. The Delhi Transport Corporation questions the correctness of the award dated 16.9.1999 passed by the Presiding Officer, Labour Court VIIIth, Delhi in I.D. No. 370 of 1997.

3. The Delhi Transport Corporation is a body corporate created u/s 3 of the Road Transport Corporation Act, 1950 read with the Delhi Transport Laws (Amendment) Act, 1971 having perpetual succession and common seal. The corporation is involved in providing transportation in Delhi. The workman Sardar Singh was appointed as a Conductor with the corporation on daily wages on 8.8.1978. The services of the workman was regularised on 9.3.1979. According to the management the workman was absent from duty for a period of 171 days without any information and appropriate sanction of leave from 1.11.1987 to

31.10.1988. However out of 171 days, 63 days leave was sanctioned and 15 days leave was rejected. There was no leave application for remaining 93 days. Treating this to be a misconduct within the regulation, particularly referring to para 4(II) and 19(h) of the standing orders governing the conduct of the DTC employees, a charge-sheet was served on 25.11.1998. On 28.11.1998 enquiry proceedings were initiated against the workman who denied the articles of charge and offered his defense. Upon conclusion of the departmental enquiry the enquiry officer gave his report on 27.12.1998 holding the articles of charge proved. Thereafter, after issuance of show cause notice he was dismissed from service vide order dated 6.7.1990 and was also paid one month's wages as per law. The corporation thereafter filed an application u/s 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as the "Act") before the Industrial Tribunal, Delhi which as already noticed was rejected by the labour court. Against this order of the labour court DTC have come up in writ petition before the High Court and the writ was allowed. However, upon an appeal the Letters Patent Bench allowed the LPA and set aside the judgment of the learned single Judge. The judgment of the Division Bench was assailed in SLP before the Supreme Court which was finally disposed of by the Supreme Court along with other appeals vide judgment Delhi Transport Corporation Vs. Sardar Singh, .

4. During the pendency of the proceedings on an application u/s 33(2)(b) of the Act the workman have also raised an industrial dispute on 10.5.1991. After permitting the parties to complete their pleadings and leading the evidence in support thereof the presiding officer, labour court vide his award dated 31.5.2001 answered the reference in favor of the workman and allowed him re-instatement with 50% back wages. This award is challenged by the Delhi Transport Corporation in the present writ petition.

5. Learned counsel appearing for the corporation contended that in view of the findings recorded by the Supreme Court in the case of Sardar Singh (supra) the workman has no case and the writ petition should be allowed by setting aside the award dated 16.9.1999. On the other hand, learned counsel appearing for the workman contended that the scope of the proceedings u/s 10(1)(c) of the Act is much wider in its scope and ramification .Even if the approval u/s 33(2)(b) is granted by the Court of competent jurisdiction still the entire matter can be re-looked by the presiding officer, labour court in exercise of its power u/s 10 of the Act.

6. There can be no doubt to the legal submission on behalf of the workman that scope of the proceedings u/s 10 of the Act is certainly much wider and relief can be granted to the workman even if there was an order granting approval by the Industrial Tribunal u/s 33(2)(b) of the Act. But this will depend on the facts and circumstances of each case. In this regard, reference can also be made to the judgment of the Supreme Court in the case of M.D., Tamil Nadu State Transport Corporation Vs. Neethivilangan Kumbakonam, where the Supreme Court held as under:

"12. Sub-section (2) of S.33 deals with alteration in the conditions of service or the discharge or punishment by dismissal or otherwise of the workman concerned in the pending dispute but in regard to any matter not connected with such pending dispute. Though this provision also places a ban in regard to matters not connected with the pending dispute, it leaves the employer free to discharge or dismiss a workman by paying wages for one month and making an application to the authority dealing with the pending proceedings for its "approval" of the action taken. There is a distinction between matters connected with the industrial dispute and those unconnected with it. Thus, a balance between the interests of the workmen and the employer is sought to be maintained in the provisions of Section 33. The action taken u/s 33(2) will become effective only if "approval" is granted. If the "approval" is refused, the order of dismissal will be invalid and inoperative in law. In other words, the order of dismissal has to be treated as non est and the workman will be taken never to have been dismissed.

16. From the conspectus of the views taken in the decisions referred to above the position is manifest that while the employer has the discretion to initiate a departmental inquiry and pass an order of dismissal or discharge against the workman the order remains in an inchoate state till the employer obtains orders of approval from the Tribunal. By passing the order of discharge or dismissal de facto relationship of employer and employee may be ended but not the de jure relationship for that could happen only when the Tribunal accords its approval. The relationship of employer and employee is not legally terminated till approval of discharge or dismissal is given by the Tribunal. In a case where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition filed u/s 33 of the Act on merit the employer is bound to treat the employee as continuing in service and give him all the consequential benefits. If the employer refuses to grant the benefits to the employee the latter is entitled to have his right enforced by filing a petition under Article 226 of the Constitution. There is no rational basis for holding that even after the order of dismissal or discharge has been rendered invalid on the Tribunal's rejection of the prayer for approval the workman should suffer the consequences of such invalid order of dismissal or discharge till the matter is decided by the Tribunal again in an industrial dispute. Accepting this contention would render the bar contained in Section 33(1) irrelevant. In the present case as noted earlier the Tribunal on consideration of the matter held that the employer had failed to establish a *prima facie* case for dismissal/discharge of the workman, and Therefore, dismissed the application filed by the employer on merit. The inevitable consequence of this would be that the employer was duty bound to treat the employee as continuing in service and pay him his wages for the period, even though he may be subsequently placed under suspension and an enquiry initiated against him.

17. In the facts and circumstances of the case it is our view that the High court committed no illegality in issuing a direction to the appellant for reinstating the

respondent and pay him the back wages."

and in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, where the Supreme Court held as under:

" 14. Where an application is made u/s 33 proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed, consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position, there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint u/s 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint u/s 33A and that the order of dismissal or discharge becomes invalid or void only when it is set aside u/s 33A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to section 33. It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to section 33, section 33A would be meaningless and futile. The said section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

16. Section 31 speaks of penalty in respect of the offences stated therein. This provision is not intended to give any remedy to an aggrieved employee. It is only to punish the offender. The argument that section 31 provides a remedy to an employee for contravention of section 33 is unacceptable. Merely because penal

provision is available or a workman has a further remedy u/s 33A to challenge the approval granted, it cannot be said that the order of discharge or dismissal does not become inoperative or invalid unless set aside section 33A. There is nothing in sections 31, 33 and 33A to suggest otherwise even reading them together in the context. These sections are intended to serve different purposes."

7. The above enunciation of law by the Supreme Court does not render the workman remediless even if approval has been granted by the competent forum. But this cannot be adopted an absolute proposition of law and have to be determined on the facts and circumstances of each case. Whether the findings recorded in the approval of application would bar subsequent adjudication on the plea of res judicata or construction res judicata is primarily a matter of fact and not law. If the findings with regard to the fairness of the enquiry and misconduct has been completely established in the earlier proceedings and approval for action taken which includes the quantum of punishment has also been upheld then it will be very difficult to state as a proposition of law and that the subsequent proceedings can be determined on merits, trial and evidence, particularly when the evidence in the previous proceedings u/s 33(2)(b) of the Act has been upheld by the highest court of the land. It is a settled canon of principles that the multiplicity of proceedings should be avoided and wherever the questions raised in the proceedings are squarely adjudicated upon and are determined and decided by the forum of competent jurisdiction then the approach of law would be to prevent their adjudication before an appropriate forum. But where the findings are inadequate or did not fully and finally determined and decided the dispute then the parties can take recourse to other appropriate remedy which otherwise is permissible and admissible under the specific provisions of the Statute. Applying this principle to the facts and circumstances of the present case, it would be appropriate to refer back to the judgment of the Supreme Court in the case of petitioner (as Sardar Singh is the same person as was involved in that case). The Supreme Court in its judgment allowed the appeal and accepted the view taken by the single Judge of the High Court while declining the view taken by the Division Bench. It recorded findings on misconduct, willful absence and obviously as the approval sought for order of dismissal from service which was also granted. I wonder anything remains to be adjudicated upon in this petition. Reference can be made to the following conclusions of the Court:

" 11. Great emphasis was laid down by learned counsel for the respondent-employee on the absence being treated as leave without pay. As was observed by this Court in State of Madhya Pradesh v. Harihar Gopal 1969 (3) SLR 274 by a three-judge Bench of this Court, even when an order is passed for treating absence as leave without pay after passing an order of termination, that is for the purpose of maintaining correct record of service. The charge in that case was, as in the present case, absence without obtaining leave in advance. The conduct of the employees in this case is nothing but irresponsible in extreme and can hardly be justified. The charge in this case was misconduct by absence. In

view of the Governing Standing Orders unauthorised leave can be treated as misconduct.

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

13. The Tribunal proceeded 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.

14. That being the factual position, the Tribunal was not justified in refusing to accord approval to the order of dismissal/removal as passed by the employer. The learned Single Judge was justified in holding that the employer was justified in passing order of termination/removal. The Division Bench unfortunately did not keep these aspects in view and reversed the view of learned Single Judge.

15. We, Therefore, allow these appeals and affirm the view taken by learned Single Judge while reversing that of the Division Bench.

16. The appeals are allowed to the extent as indicated above."

8. The bare reading of the above findings recorded by the Supreme Court clearly shows that their Lordships was satisfied with charge of misconduct and absence had been proved and the absence was unauthorised. The conclusion in regard to negligence and lack of interest was also found to be correct and their Lordships specifically noted with the burden that there was no negligence or lack of interest by placing an appropriate material. While declining to accept the approach of the Tribunal treating his absence as leave without pay their Lordships allowed the appeal, affirmed the view of the Single Judge while reversing that of the Division Bench. In other words, the view taken by the learned single Judge of the High Court was approved. The findings with regard to unauthorised absence, misconduct and enquiry being proper was specifically recorded by their Lordships of the Supreme Court. In the circumstances and on the basis of the same facts as pleaded in that case this Court can not hold that the award of the labour court can be accepted as correct in law. The vital jurisdiction vested in the labour court u/s 10(1)(c) of the Act would also require the Court to determine the matters in relation to fairness of enquiry and if the enquiry is found to be fair and just then liberty to the parties have been given to move the Court for proving misconduct and even refer the question of quantum of punishment. In the present case the enquiry was held to be proper, the misconduct was established and the approval sought was with regard to the removal of employee from service when the order was already passed by the management. Once approval is granted the order

becomes effective and enforceable. The cause of action in favor of the workman to challenge such an order would obviously be there but if the findings on essential ingredients have already been recorded on appropriate determination and upheld by the highest court of the land then it will not be appropriate for this Court to come to a contrary conclusion, on the same facts.

9. For the reasons afore-stated this writ petition is allowed and the award of the Labour Court is set aside.