

(2014) 05 DEL CK 0236
In the Delhi High Court
Case No : W.P. (C) 6863/2001

D.T.C.	Vs	APPELLANT
Bahadur Singh and Another		RESPONDENT

Date of Decision : 16-05-2014

Acts Referred:

Industrial Disputes Act, 1947 — Section 33, 33A

Citation : (2014) 3 LLJ 270 : (2014) LLR 708

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Sarfaraz Khan, Advocate for the Appellant; A.K. Bajpai and Mr. M.F. Khan, Advocate for the Respondent

Final Decision : Allowed

Judgement

V. Kameswar Rao, J.—The challenge in this writ petition is to the award dated August 14, 2008 passed by the Industrial Tribunal in Complaint I.D. No. 1650/89, wherein the Tribunal has directed that the respondent be reinstated with continuity in service with 25% back wages.

2. The brief facts are that in the month of March, 1988, the petitioner corporation dismissed a large number of its employees. The respondent No. 1 herein was also dismissed for allegedly participating in an illegal strike from March 17, 1988 to March 19, 1988 and for inciting and instigating other workers to strike work. Suffice to state that the petitioner did not hold inquiry to establish misconduct on the part of the employees before terminating their services. The petitioner invoked the provisions of Section IV of the Essential Services Maintenance Act, 1981 ("ESMA" in short) and holding of inquiry was dispensed with by the authorities invoking the Proviso II to clause 15(2)(c) of Delhi Road Transport Authority (Conditions of Appointment & Service) Regulations, 1952 ("Regulations" in short). Most of the dismissed employees filed writ petitions before this Court for a declaration that the dismissal is in violation of Section 33 of the Industrial Disputes Act, 1947 ("Act" in short). Those writ petitions were

disposed of by the Division Bench of this Court vide a common order dated December 20, 1988, whereby the Court had upheld the vires of Proviso II to clause 15(2)(c) of the Regulations; directing the petitioners to pursue remedy for the contravention of the provisions of Section 33 of the Act; quash the order of the Appellate Authority in whichever cases they have been passed and further directing the Appellate Authority to hold inquiry itself and pass orders as may deem fit. It was also concluded by the Court that even if contravention of Section 33 is proved, The Tribunal is required to go into a further question as to whether the order of discharge or dismissal passed by the petitioner is justified on merit.

3. It appears that the matter was taken in appeal before the Supreme Court wherein order dated March 01, 1989 was passed. Be that as it may, on April 04, 1989 a notice was sent to the respondent No. 1 requiring him to appear before the Appellate Authority for inquiry cum personal hearing. The respondent No. 1 participated in the inquiry and denied the charges. It is noted from the award of the Tribunal that the respondent No. 1 did not bring any co-worker nor produced any document in support of his case. It is also noted that he was also given an opportunity to cross examine the petitioner's witness and also to produce his own witness which he did not avail. Thereafter the Appellate Authority gave its findings on inquiry and confirmed dismissal order passed against respondent No. 1. The respondent No. 1 filed an application u/s 33 of the Act for quashing of order dated March 24, 1989 by which the services of the respondent No. 1 were dismissed with a prayer for reinstatement with full back wages, continuity in service and other consequential benefits. The petitioner in its reply has challenged the maintainability of complaint u/s 33A of the Act. The said issue was decided by the Tribunal vide its order dated August 11, 1999 wherein it was decided that the complaint u/s 33A is maintainable. The management sought permission of the Tribunal to allow it to prove the misconduct on the part of respondent No. 1 and the permission was granted. Accordingly, two further issues were framed in the following manner:

(a) Whether the respondent joined the strike and committed misconduct as alleged in the reply to the complaint filed u/s 33A of the I.D. Act.

(b) Relief.

4. Insofar as the issue No. 1 is concerned, the same was decided by the Tribunal holding that the strike of the workers in which the respondent No. 1 participated was legal. It was also held that the respondent No. 1 joined the strike and committed misconduct.

5. Insofar as the issue No. 2 is concerned, the Tribunal was of the view that the penalty imposed on the respondent No. 1 is not proportionate to the misconduct on the part of respondent No. 1. It had accordingly modified the penalty and directed the reinstatement of respondent No. 1 with continuity in service and 25% as back wages on the basis of last drawn wages.

6. This writ petition had come up for hearing along with other connected matters

which were decided by the learned Single Judge of this Court vide order dated February 03, 2005 wherein this Court has held that there is no infirmity in the order of the Tribunal and dismissed the writ petitions filed by the petitioner corporation. Against the said order the petitioner corporation filed Intra Court Appeals before the Division Bench of this Court. Insofar as the present writ petition is concerned the LPA was numbered as 1634/2005. It is noted that 12 other LPAs were decided by the Division Bench of this Court on August 21, 2006 whereby the Division Bench had dismissed the Intra Court Appeals filed by the petitioner. The judgment of the Division Bench is reported as D.T.C. Vs. Jag Bhushan Lal and Others, as the LPA arising from this writ petition is concerned, the same was decided separately for the reason that it was the stand of the petitioner that this case stands on a different footing as there was a specific finding rendered by the Tribunal that the respondent workman was guilty of misconduct. According to the counsel for the petitioner the Tribunal also held that the respondent No. 1 had not only participated in the strike but also instigated the other workmen to do so.

7. I note that the Division Bench in its order dated August 21, 2006 in the LPA No. 1634/2005 was of the view that the learned Single Judge while deciding this writ petition along with other writ petitions vide order dated February 03, 2005 had failed to notice that the respondent No. 1 was guilty of misconduct and accordingly had set aside the order dated February 03, 2005 in this writ petition and remanded back the matter to be decided afresh on merit without being influenced by any observations made in the impugned judgment dated February 03, 2005. Accordingly, the writ petition having been revived has been re-heard.

8. It is the contention of learned counsel for the petitioner that the Tribunal has erred in interfering with the penalty of dismissal imposed on the respondent No. 1, more so when the Tribunal has held that the respondent No. 1 has committed misconduct. He would state that the Division Bench has noted this aspect and had remanded the matter back to this Court for a fresh hearing which would itself demonstrate that the Division Bench has accepted the stand of the petitioner that case of this nature should not be interfered with.

9. On the other hand, learned counsel for respondent No. 1 has placed before me a copy of the order passed by the Supreme Court in batch of SLPs filed by DTC before the Supreme Court against order of the Division Bench in Jag Bhushan Lal (supra), wherein the Supreme Court while granting leave has directed that those employees who have not crossed the age of superannuation shall be reinstated forthwith and shall be paid 50% of the back wages and stayed the payment of the balance amount. According to him the case of the respondent No. 1 is also identical and he would also be entitled to reinstatement.

10. Mr. Sarfaraz Khan, learned counsel for the petitioner would object to such a plea advanced on behalf of respondent No. 1 and would state that the case of respondent No. 1 cannot be compared with the other employees who had succeeded before the Division Bench of this Court and were parties in SLP before

the Supreme Court. In fact he states that the Division Bench of this Court while deciding the batch of LPAs had separated the LPA filed against order dated February 02, 2005 in this writ petition would show that the case of the employees in the other appeals are not identical. He would further submit that the Tribunal has in clear and unequivocal terms has held that the respondent No. 1 was not performing duty with the management from March 17, 1988 to March 19, 1988 and also held that the petitioner has been able to establish that the respondent No. 1 also instigated other workers to participate in the strike.

11. Having heard the learned counsel for the parties, one of the question that would arise for consideration is whether the respondent No. 1 is identically situated like the employees in whose favour the appeal was dismissed by the Division Bench of this Court in the batch of LPAs on August 21, 2006 and which are subject matter of SLPs in the Supreme Court. The answer is no. This I say for the reason that the Division Bench has in LPA No. 1634/2005 has held so and it is precisely for that reason, it had set aside the order of the learned Single Judge dated February 03, 2005 and remanded the matter back to this Court for a fresh consideration.

12. Now the only question which needs to be considered in this case is whether the conclusion of the Tribunal on issue No. 2 that the penalty of dismissal is disproportionate to the misconduct of the respondent No. 1. The law is well settled in this regard. The reasoning given by the Tribunal in holding that the penalty of dismissal is disproportionate is that the respondent No. 1 participated in the strike and instigated the workers to strike the work and he did so in response to the cause of the employees of the DTC. According to the Tribunal the employees were asking for the implementation of recommendations of the 4th Pay Commission. The Tribunal adjudicated the matter in favour of the workmen. The cause for which the respondent No. 1 committed misconduct was common to all the employees. That apart the Tribunal also observed that the petitioner intended to consider the case of the respondent No. 1 for reinstatement subject to fulfilling certain conditions including expressing of regret for joining the strike.

13. I find that the Tribunal has given justifiable reasons in interfering with the order of penalty. Whether the direction for reinstatement with continuity of service and back wages upto 25% on the last drawn wages is a substituted penalty for the dismissal, the answer is no. This I say so, as there is no such penalty listed under Rule 15(2) of the Regulations and a penalty should be one amongst the listed ones, which are as under:

Discipline:- (a) The following penalties may for misconduct or for a good and sufficient reason be imposed upon an employee of the Delhi Road Transport Authority:-

(i) Censure including reprimand and warning.

(ii) Withholding of increment or promotion including stoppage at an efficient bar.

- (iii) Reduction to a lower post or time scale or to a lower stage in a time scale.
- (iv) Recovery from pay or the security or any other dues of the whole or part of any pecuniary loss caused to the Delhi Road Transport Authority by negligency default or breach of orders. The term pecuniary loss shall include damage to or loss of stores expressly entrusted to the person concerned for custody.
- (v) Suspension.
- (vi) Removal from the services of the Delhi Road Transport Authority.
- (vii) Dismissal from the service of the Delhi Road Transport Authority.
- (viii) Fines as provided in the Payment of Wages Act.

14. The Tribunal on a view that the penalty was disproportionate should have confined itself to the listed penalties and not anything beyond it. Since the Tribunal has failed to substitute the penalty of dismissal with the listed penalties, this Court is of the view that the appropriate would be to remand the case back to the Appellate Authority keeping in view the conclusion of the Tribunal that the penalty of dismissal being disproportionate to the misconduct, and the penalty of removal would also entail forfeiture of the entire service, appropriate listed penalty except the penalty of removal and dismissal be imposed and the said penalty would relate back to the date of the award i.e. August 14, 2000. The respondent No. 1 would stand reinstated (if not attained the age of superannuation) in view of the limited scope of penalty to be imposed by the Appellate Authority, and on such penalty the respondent No. 1 would be entitled to the arrears of pay with effect from August 14, 2000 only. It is made clear that the respondent No. 1 would not be entitled to any back wages between the period March 24, 1988 till August 14, 2000 but the said period would be treated on duty for the purpose of seniority, promotion, notional increments/pay fixation and pension etc. Accordingly, I set aside the order of the Tribunal to the limited extent the Tribunal had granted the relief of reinstatement and continuity in service with 25% back wages on last wages drawn.

15. The Appellate Authority shall pass appropriate orders on penalty in terms of the directions in para No. 14 of this order within a period of 2 months from today and grant benefits thereon within two months thereafter. The writ petition is accordingly allowed in terms of the above.

16. No costs.

C.M. No. 11111/2011

Dismissed as infructuous.