

(2013) 02 DEL CK 0244

In the Delhi High Court

Case No : Writ Petition (C) No. 7771 of 2010 and CM 20146 of 2010

Salora International

APPELLANT

Vs

Soma Paul

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 25F, 33

Citation : (2013) 4 AD 343

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Anurag Lakhotia and Mr. Rishi Kulshreshtha, for the Appellant; R.K. Uppal, with Respondent in person, for the Respondent

Judgement

Mukta Gupta, J.—By the present petition the Petitioner impugns the order dated 13th November, 2002 passed by the learned Labour Court holding that the enquiry conducted by the Petitioner was not fair and proper and the award dated 18th November, 2009 wherein in view of the order dated 13th November, 2002 it was held that the termination of the Respondent was illegal and non-est in the eyes of law and thus he was entitled to continuity in service without any break and to receive all consequential benefits. Learned counsel for the Petitioner contends that the Respondent was transferred to Kashipur where she refused to join and thus it was a clear case of abandonment by the Respondent. Relying upon *Inder Dev Yadav Vs. National Thermal Power Corporation Ltd. and Another*, it is contended that the employee cannot decide the place where he has to work and in case the employee does not join at the transferred place, the same amounts to abandonment of service. Relying upon *Inder Dev Yadav Vs. National Thermal Power Corporation Ltd. and Another*, it is contended that the employee cannot decide the place where he has to work and in case the employee does not join at the transferred place, the same amounts to abandonment of service. The abandonment not being a misconduct does not require any enquiry. The reliance of the learned Trial Court on *D.T.C. Vs. Shishu Pal and Others*, is misconceived as the same is no more good law being based on the decision in *D.K. Yadav Vs.*

J.M.A. Industries Ltd., came up for consideration before the Hon"ble Supreme Court in Syndicate Bank Vs. The General Secretary, Syndicate Bank Stff Association and Another, and it was held that undue reliance on the principles of natural justice by the Tribunal and the High Court led to miscarriage of justice as far as the bank is concerned and in view of the conduct of the employee he was not entitled to any relief, yet the bank was directed to reinstate him with continuity of service. Relying upon Gian Chand Vs. Secretary (Labour) Delhi Administration, it is stated that failure of an employee to comply with the directions of the transfer did not amount to termination but abandonment and since the employee failed to perform the action as directed, the intention can be inferred from the act and conduct of the parties. Even in Inder Dev Yadav Vs. National Thermal Power Corporation Ltd. and Another, it was held that if the employee failed to comply with the transfer order the name of the employee will be held to be rightly struck off from the rolls. In U.P. Singh Vs. Punjab National Bank, it was held that if the employee fails to report to the Branch office as directed, the employer can draw an irresistible presumption of abandoning the job. It is the admitted case of the Respondent that vide letter dated 7th July, 1992 Ex. WW1/8 her services were terminated due to abandonment and an admitted fact is not required to be proved. Further the Respondent never challenged the transfer to Kashipur and thus she is now estopped from raising the issues which are beyond the terms of reference. Since the Delhi office of the Petitioner did not know about the abandonment letter dated 7th July, 1992 so during the conciliation proceedings the Respondent was asked to join the duties, however she did not report for duty and thus the intention of abandonment is clear. Where the workman does not join at the transferred place and does not challenge the transfer order, the same amounts to abandonment and no enquiry is required for the said purpose. Even if the Petitioner had vide letter dated 7th July, 1992 terminated her services due to abandonment in view of the offer of rejoining given during conciliation proceedings, the said letter would be deemed to have been recalled. On a charge-sheet being issued the Respondent did not appear and thus enquiry could not have been held to be not fair and proper. The Respondent in the pleadings never proved that she was unemployed during the interregnum period and thus she was not entitled to back wages. Further once the Respondent was offered reinstatement during the pendency of conciliation proceedings which she declined, the learned Trial Court could not have directed reinstatement of the Respondent. Reliance is placed on Tej Pal Vs. Gopal Narain & Sons & Anr. 2006 LLR 1142. As held in ECP Ltd. (now Salora International Ltd.) Vs. Shri Om Prakash Singh & P.O. Labour Court in W.P. (C) No. 2817/2006 decided by this Court on 28th September, 2007. Any relief granted to a workman who expressly refuses to answer the call of duty would amount to misplaced sympathy. Hence the impugned order and the award be set aside. Lastly it is contended that even if the finding of the Trial Court that the enquiry held was illegal is to be accepted, the learned Trial Court ought to have given the Petitioner an opportunity to adduce evidence to prove the misconduct before it as the Petitioner had already reserved the said right in the written statement.

2. Learned counsel for the Respondent contended that the Respondent was dismissed from service with effect from 28th September, 1995. It was not a case of abandonment but of dismissal pursuant to an enquiry. In the written statement filed by the Petitioner it is admitted that the Respondent was dismissed from service. Thereafter, learned counsel for the Respondent argued that her services were terminated not pursuant to an enquiry but in view of letter dated 7th July, 1992. Since the Respondent was taking contrary stands, the statement of the Respondent and the counsel was recorded by this Court vide order dated 11th December, 2012 wherein the Respondent clarified that she was not dismissed pursuant to the enquiry but pursuant to the letter dated 7th July, 1992. It is stated that the plea of abandonment was rejected by the Trial Court. There is no merit in the petition and the same be dismissed.

3. I have heard learned counsel for the parties and perused the record. The Respondent was appointed as Wire-girl with the Petitioner on 9th December, 1984. She was transferred to the Kashipur unit of the company with effect from 20th June, 1992 through the letter dated 18th June, 1992. On 7th July, 1992 the Kashipur unit of the Petitioner informed the Respondent that since she has not reported for duty his lien on employment has been lost and it has been deemed that she has left her service herself. Along with the letter dated 7th July, 1992 Ex. WW1/8 a cheque of Rs. 5279.95 paise clearing her account was also sent. The Respondent filed a civil suit against the order of transfer which was dismissed on 15th January, 1994 as being not maintainable. The Respondent filed a claim before the conciliation officer on 15th April, 1994 wherein she stated that her services were terminated with effect from 20th June, 1992. The Petitioner replied that her services were not terminated but she was transferred to Kashipur and the Respondent could still join the duties at Kashipur unit. On 7th September, 1994 a charge-sheet was issued to the Respondent for willfully flouting the transfer order dated 18th June, 1992 by the management at Delhi unaware of the letter dated 7th July, 1992 sent by the Kashipur unit. In reply to the charge-sheet the Respondent stated that she is not ready to obey the transfer order and she should be taken back in the unit of the company at Delhi and paid full back wages. The Respondent did not participate in the enquiry and thus on an ex-parte enquiry being conducted the enquiry officer held that the charges against the Respondent of not reporting at the transferred place and flouting the orders of the management were proved. A show cause notice was issued as to why she be not dismissed from service and finally on 28th September, 1995 the Respondent was dismissed from service. Since no conciliation took place a reference was sent to the learned Labour Court on the following terms:

Whether the services of Smt. Soma Paul have been terminated illegally and/or unjustifiably by the Management, and if so, to what relief is he entitled and what directions are necessary in this respect?

4. In the claim statement filed, the respondent stated that she was appointed on

9th December, 1984 as a Wire-girl and her services were terminated on 20th June, 1992 in view of the transfer from Delhi unit to unit at Kashipur. On 16th March, 1991 the Respondent along with other workman asked for legal benefits and thus on 18th June, 1992 the Respondent was transferred all of a sudden to the Kashipur unit.

It is stated that while terminating the services neither notice nor notice pay was given and thus provisions of Section 25F and G of the ID Act were violated. On the basis of pleadings of the parties following issues were framed:

- i. Whether fair and proper domestic inquiry has not been held?
- ii. Whether the services have been terminated illegally and unjustifiably?

5. Vide impugned order dated 13th November, 2002, issue No. 1 regarding fair and proper domestic inquiry was decided against the Petitioner and vide impugned award dated 18th November, 2009 the learned Trial Court observed that the inquiry should have been conducted prior to the dismissal or termination of the workman and the in the present case, the inquiry was conducted after the termination and in view thereof the inquiry was found to be bad and issue No. 1 was decided against the Petitioner vide order dated 13th November, 2002. It may be noted that the Petitioner in his written statement before the learned Trial Court had pleaded that in case the enquiry is held to be invalid on any ground, the management be given an opportunity to produce evidence in support of the charges before it. However, no such opportunity was granted to the Petitioner.

6. The most important crucial issue in the present case is that despite the admitted case of both the parties being that the services of the Respondent were terminated vide letter dated 7th July, 1992 in view of the evidence by way of affidavit of the management and the Respondent exhibiting Ex. WW1/8 the learned Trial Court vide the impugned award simply held the second issue of termination against the Petitioner on the ground that the management had terminated the services on 7th July, 1992 without conducting an enquiry and thus the order of termination was bad in law. No doubt, the issue of enquiry was decided against the Petitioner, however it is well-settled that even in a case where no enquiry has been conducted the management can prove the misconduct by leading evidence before the Trial Court and the Trial Court is bound to grant that opportunity to the management when the same has been sought for in the written statement. As noted above in the written statement filed by the Petitioner, though the stand taken was that the Respondent was dismissed pursuant to an enquiry, however it was specifically pleaded that in case the issue of enquiry was held against the Petitioner they be permitted to prove the misconduct.

7. In Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh, it was held:

61. From the above decisions the following principles broadly emerge -

(1) If no domestic enquiry had been held by the management, or if the

management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider that evidence so adduced before it, on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by it, in the first instance, and alternatively and without prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more that the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management, are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action

taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo moto the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference u/s 10 or by way of an application u/s 33 of the Act.

8. Thus, it has been categorically laid down that after the enquiry issue is decided against the management, the evidence is required to be independently considered by the Trial Court in case the management seeks leave to adduce evidence at the appropriate time, which has been done in the present case, and only thereafter a finding can be arrived at with regard to the misconduct. During the enquiry of misconduct by the Trial Court, it is bound to consider any fresh material that is also placed on record de-hors the disciplinary enquiry material.

9. In view of the legal position not having been adhered to by the learned Trial Court, the impugned award dated 18th November, 2009 is set aside. The matter is remanded back to the learned Trial Court to decide the matter afresh in light of the aforesaid legal position. Parties are directed to appear before the learned Trial Court on 11th March, 2013. Petition and application are disposed of Trial Court record be sent back. The amount of Rs. 103875/- deposited by the Petitioner, which is lying in the FDR, in this Court shall be subject to the final outcome of the matter before the learned Trial Court and the learned Trial Court shall be at liberty to pass necessary directions in this regard.