

(2014) 04 DEL CK 0202
In the Delhi High Court
Case No : W.P. (C) 4764/1995

Shiv Kumar Giri

APPELLANT

Vs

The Management of M/s. Hotel Siddhartha Continental and
Another

RESPONDENT

Date of Decision : 16-04-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 210 DLT 241 : (2014) 2 LLJ 569 : (2014) LLR 598

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Anuj Aggarwal and Ms. Aarushi Aggarwal, Advocate for the Appellant; Raavi Birbal and Mr. Nishant Anand, Advocate for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—The challenge in this writ petition is to the award dated April 07, 1995 passed by the Labour Court in I.D. No. 198/87 whereby the Labour Court has answered the reference made by the appropriate Government by holding that the petitioner is not entitled to any relief. Suffice would it be to state that the Industrial Dispute was referred by the appropriate Government vide order dated April 21, 1987 in the following terms:

Whether the termination of services of Sh. Shiv Kumar Giri is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?

2. It was the case of the petitioner that he was in the employment of the respondent-Hotel as an Electric Helper and his last drawn salary was Rs. 475/- per month. With effect from May 02, 1984, he proceeded on leave after getting the same sanctioned, but, he fell seriously ill for which an application was sent to the respondent with the request to extend the leave, which the respondent did. Soon after his recovery from the illness, he resumed his duties on August 20,

1984 along with the medical certificate/fitness, but, the respondent did not allow him to join his duties and asked him to come on the next day. It was his case that, on the next date also, he was told that he would be taken on duty after few days. But even thereafter, he was not allowed to resume the duties. Ultimately, the respondent terminated his services on September 12, 1984 illegally. According to him, the respondent did not pay him legal dues and termination was effected without any charge and enquiry. In his claim petition, he prayed for his reinstatement and continuity in service with full back wages.

3. It was the case of the respondent before the Labour Court that the petitioner's services were never terminated but his name was removed from the roll due to his continuous unauthorized absence from duties and in accordance with the terms and conditions of service. The respondent admitted that the petitioner was in employment as an Electric Helper and was drawing salary of Rs. 475/-. The respondent disputed that the petitioner was honest, diligent worker. According to the respondent, the petitioner was granted leave on account of his sister's marriage w.e.f. May 02, 1984 to May 07, 1984. He had to join on May 08, 1984, but he did not do so, nor he sent any intimation regarding his absence from duties and he remained absent with effect from May 08, 1984 onwards. It was their case that on May 21, 1984, they had informed the petitioner about his unauthorized absence and also directed him to report for duties immediately, not later than May 24, 1984. The said letter was duly received by the petitioner on May 25, 1984 at his native village address. Since the petitioner failed to comply with the terms of letter, another letter dated May 25, 1985 was sent through registered A.D. cover, whereby the petitioner was once again asked to join the duties latest by May 29, 1984. The said letter was received back with the report of the postal authorities that the addressee has gone for treatment to ESI Dispensary, Akbarpur, Distt. Faizabad. The respondent accordingly sent a letter to the ESI Dispensary, Akbarpur, Distt. Faizabad, who informed that the petitioner was granted Medical Certificate from May 19, 1984, and was given fitness certificate on June 09, 1984, whereby the petitioner was declared fit to resume duties on June 11, 1984; he did not join duty on June 11, 1984. According to the respondent, a letter dated July 05, 1984 was written calling upon him to report for duty, even thereafter, he failed to report. It waited till July 20, 1984, when no intimation was received from the petitioner, and he continued to remain unauthorizedly absent from duties even after the grant of fitness certificate whereby he was advised to resume his duties on June 11, 1984, the respondent, vide letter dated July 20, 1984 informed the petitioner that they have no alternative, but to remove his name from the rolls w.e.f. June 11, 1984.

4. The respondent denied the fact that the petitioner reported for duty on August 20, 1984 along with fitness certificate. The respondent's stand was also that in the given circumstances, it was not obligatory to serve any charge-sheet or hold enquiry against the petitioner.

5. Three issues were framed by the Labour Court; one, "whether the petitioner

has abandoned his job, if so, to what effect", the second, "as per terms of reference" and the third, the "relief.

6. Insofar as the issue No. 1 is concerned, the Labour Court concluded that the petitioner remained absent without informing the respondent in violation of Certified Standing Orders, Clause 23 despite his being declared fit by the ESI Dispensary on June 09, 1984 and as such, he must be deemed to have left his services of the company and his employment thereby automatically terminated, and thereby deciding the issue in favour of the respondent.

7. Insofar as the issue No. 2 is concerned, the Labour Court concluded that the action of the respondent does not amount to retrenchment as the petitioner was given ample opportunity of being heard before the action is taken by the respondent and since the unauthorized absence amounts to misconduct, and which the respondent has amply proved before the Court. Accordingly, the Labour Court denied the relief to the petitioner.

8. Mr. Anuj Aggarwal, learned counsel for the petitioner would submit that the termination of the petitioner is punitive inasmuch as no opportunity of being heard before terminating his services was given to the petitioner. According to him, the petitioner was in fact, not well and as such, could join duties only on August 20, 1984 along with medical certificate. He would deny the receipt of letters dated August 20, 1984 and September 12, 1984 by which letters, his services were terminated. He would contest the stand of the respondent that since the petitioner has abandoned the job and in view of the provisions of the employment standing orders of the respondent, they were justified in terminating the services of the petitioner. He relied upon the following judgments in support of his contentions:

1. D.K. Yadav Vs. J.M.A. Industries Ltd., .
2. G. T. Lad and Others Vs. Chemical and Fibres of India Ltd., .
3. Karnataka State Road Transport Corpn. Vs. Smt. Lakshmiddevamma and Another, .
4. (1983) 2 LLJ 415, Shambhu Nath Goyal Vs. Bank of Baroda & Ors.
5. New Delhi Municipal Council Vs. Parveen Chand Sharma,
6. Haryana Roadways, Delhi Vs. Thana Ram .

9. On the other hand, Ms. Raavi Birbal, learned counsel appearing for the respondent would support the award of the Labour Court and would urge that this Court would not like to interfere with the conclusion so arrived at by the Labour Court. She would rely upon the judgment of the Punjab and Haryana High Court, reported as (1999) 1 LLJ 224, Lakshmi Kant Vs. Presiding Officer, Industrial Tribunal-cum-Labour Court, Gurgaon and Anr.; 2001(1) LLJ 174, Punjab & Sind Bank Vs. Sakattar Singh in support of her contention that since the petitioner had not offered any explanation for remaining unauthorizedly

absent from duty, the decision on the part of the respondent to remove the petitioner is justified.

10. Before I deal with the rival contentions, it would be necessary for me to point out, that, none of the parties have filed the complete record of the Labour Court, because of which the documents, on which the Labour Court relied upon, could not be seen nor their effect noted. Further, even the Labour Court record was not available, as the same was not traceable as per report of Mr. Rakesh Kumar Sharma, POLC-XVII dated 05.04.2013. So while pending this judgment, I rely on the award and the record of this writ petition. I note some of the documents as relied upon by the Labour Court in its award are the leave application for the period between May 2, 1984 and May 7, 1984 for a period of six days was got sanctioned by the petitioner through his application Ex. WW1/M3; letter dated May 21, 1984 written by the respondent to the petitioner Ex. WW1/5 calling upon the petitioner to report for duty latest by May 24, 1984; Mark-Y is another letter dated May 25, 1984 written by the respondent, calling upon the petitioner to report by May 29, 1984; Ex. MW1/4 is a letter sent by the respondent to the Medical In-charge, ESI Dispensary, Akbarpur, Faizabad. Ex. MW1/9 is para 23 of the Certified Standing Orders, under which provision, the name of the petitioner was struck off; Ex. MW1/8 is the letter dated July 20, 1984 written by the respondent to the petitioner whereby the name of the petitioner was struck off from the rolls of the Hotel.

11. It appears that one of the conditions in the terms of appointment of the petitioner was that he would be governed by Standing Orders, Rules, Regulations and Instructions for the time being in force. Para 23 of the Certified Standing Orders (Ex. MW1/9) is reproduced as under:

23. (a) If an employee remains absent beyond the period of any kind of leave originally granted or subsequently extended, he shall be deemed to have abandoned the services of the Hotel and his name shall be struck off from the rolls of the Hotel unless he returns to duty within 8 days of the expiry of the leave so granted and explains his overstay to the entire satisfaction of the Management.

(b) If an employee remains absent without permission or leave for a period exceeding 8 days and does not report on duty even after notice from the Management, he shall be deemed to have abandoned his service with the hotel and his name shall be struck off from the rolls of the company.

12. From a perusal of the aforesaid provision, it is noted that in the eventuality, an employee remained absent beyond the period of any sanctioned leave and subsequent extended leave, he shall be deemed to have abandoned the services of the respondent-Hotel and his name shall be struck off from the rolls if fails to report within eight days of such expiry of leave. It also stipules that even after intimation, if the employee remains absent beyond eight days, he shall be deemed to have abandoned his services and his name shall be struck off from

the rolls of the company. The validity of the aforesaid provision has come up for consideration before the Supreme Court in the case reported as Syndicate Bank Vs. The General Secretary, Syndicate Bank Staff Association and Another, wherein the facts are that a clerk cum typist with the bank was in the habit of remaining unauthorizedly absent from duty for long period. On the last occasion, he absented himself from work on April 07, 1985. He applied for leave upto May 27, 1985. The leave was not sanctioned by the bank and he was communicated the decision. Still, the employee did not report for duty. On May 16, 1985, the bank sent a notice to the employee about his unauthorized absence. On November 19, 1985, the bank invoked Clause 16 of the IVth Bipartite Settlement between the Management of the Bank and the employees. It called upon the employee to show cause for his continuous absence and to report back for work by December 19, 1985, failing which, he would be deemed to have voluntarily retired from the services of the bank for his continuous absence from April 08, 1985. The notice sent returned back with the report of the postal authorities "refused to receive the same". Accordingly, the bank vide order dated December 19, 1985 invoked the Clause 16 of the Bipartite Settlement and treated the employee as having voluntarily abandoned the service. The Supreme Court, considering the provision under which, the employee was treated to have voluntarily abandoned the service, has held as under:

17. It is no point laying stress on the principles of natural justice without understanding their scope or real meaning. There are two essential elements of natural justice which are: (a) no man shall be judge in his own cause; and (b) no man shall be condemned, either civilly or criminally, without being afforded an opportunity of being heard in answer to the charge made against him. In course of time by various judicial pronouncements these two principles of natural justice have been expanded, e.g., a party must have due notice when the tribunal will proceed; the tribunal should act independently and should not be biased against any party; its action should be based on good faith and order (sic) and should act in a just, fair and reasonable manner. These in fact are the extensions or refinements of the main principles of natural justice stated above.

18. The Bank has followed the requirements of clause 16 of the Bipartite Settlement. It rightly held that Dayananda has voluntarily retired from the service of the Bank. Under these circumstances, it was not necessary for the Bank to hold any inquiry before passing the order. An inquiry would have been necessary if Dayananda had submitted his explanation which was not acceptable to the Bank or contended that he did report for duty but was not allowed to join by the Bank. Nothing of the like has happened here. Assuming for a moment that inquiry was necessitated, evidence led before the Tribunal clearly showed that notice was given to Dayananda and it is he who defaulted and offered no explanation of his absence from duty and did not report for duty within 30 days of the notice as required in clause 16 of the Bipartite Settlement.

19. This undue reliance on the principles of natural justice by the Tribunal and

even by the High Court has certainly led to a miscarriage of justice as far as the Bank is concerned. The conduct of Dayananda as an employee of the Bank has been astounding. It was not a case where the Tribunal should have given any relief to Dayananda and yet the Bank was directed to reinstate him with continuity of service and mercifully the latter part of the relief the High Court struck down. There was no occasion for the Tribunal to direct that Dayananda be reinstated in service or for the High Court not to have exercised its jurisdiction under Article 226 of the Constitution to set aside the award.

13. The Supreme Court has upheld the validity of such a provision and has held that even while invoking the provision, compliance of principle of natural justice must be made. In other words, the vires of para materia provision has been upheld. In the present case, I find that the petitioner was called upon by the respondent vide its letter dated May 25, 1984 and June 19, 1984 (Ex. MW1/6) to join the duties. In fact, enquiries were also made by the management from the ESI Hospital, where the petitioner said to have been undergoing treatment. It has also come on record that the ESI authorities had declared the petitioner fit to join the duties on June 11, 1984. The absence of the petitioner after June 11, 1984 is unauthorized. As per his own version, he could not join his duties only on August 20, 1984 by the time the respondent had already invoked the said provision of the Certified Standing Orders. There is a compliance of the said Certified Standing Order inasmuch as the petitioner remained absent more than eight days and the said provision was rightly invoked by the respondent. Further, the Labour Court in para 20 to 24 has concluded as under:

20. In the instant case, the management in para 2 of the written statement hereinbefore had a detailed sequence of event as to how they have written letters not only to the workman but they also cared to write letters to the Akbarpur Dispensary and despite the fact that he was declared fit by the ESI authorities on 9.6.84 and given joining time on 11.6.84 but he failed to join. Even a letter was written to him thereafter on 5th July, 84 calling upon him to join the duty, which is Ex. MW1/4 was written. Even thereafter when he failed to report for duty, his name was removed from the rolls vide letter Ext. MW1/8. It is pertinent to note that in the rejoinder filed by the workman, he never controverted the fact and allegations of the management in reply to the para 2, it is stated that "the contents of para 2 of the written statement are wrong as stated hence denied and those of the corresponding para of the statement of claim are reaffirmed being correct". Thus he failed to give any explanation as to why he failed to report on duty despite the fact he was declared fit by the ESI authorities as it is evident from the reply given by Dr. R.S. Mishra, Incharge, ESI Dispensary Akbarpur which is placed on record as Ext. MW1/7, till he entered in the witness box. The explanation given by him in his statement dated 19.4.91 before this court is relevant and is reproduced:

I was discharged from the ESI Dispensary, Faizabad on 11.6.84. After reaching my home, I get serious so I went for treatment at Zila Parishad Osdhalaya,

Bangaon, Bhidi, U.P. (Objected to) as the dispensary Akbarpur is 25 Km. from my home and the rivers were flooded due to heavy rains. I wrote a letter to the management on 12.6.84 for extension of leave. The letter is marked D. The UPC receipt is Ext. WW1/9.

21. This new story put forth was never stated by him either at the time of filing of statement of claim or at the time when he filed the rejoinder. It is just an improvement and appeared to be afterthought. His claim was that after reaching him, after he was discharged by the ESI Dispensary on 11.6.84, he fell ill. This assertion is belied by the reply of Dr. Misra stated above as it in fact he was discharged from the dispensary on 9.6.84 and was given joining time for two days and was declared fit to join duty on 11.6.84. He claimed that it was rainy season and rivers were flooded so he could not inform the management rather he had gone to Jila Parishad Aushadhalaya. If his version is accepted as true, the perusal of letter dated 12.6.84 revealed that it was typed letter, not only this, the other letters purported to have been written by him are also typed letters. It further belied his version that he could not move out due to heavy rain whereas the typing facilities are available only in Akbarpur. In his cross-examination, he admitted that Ext. WW1/14 was get typed by my brother from Akbarpur. He also admitted in his cross-examination that he never remained admitted in ESI Dispensary as there are not any facilities of admission for patients.

22. This being the position of the evidence led by the workman concerned. It is germane from the record that the management in all seriousness, tried to inform him that he has to report on duty and explain the circumstances for his absence or furnish the required medical certificate but he failed to do so and came out with the afterthought story, under these circumstances, it cannot be held from any stretch of imagination that sufficient opportunities of being heard have not been provided to the workman concerned. It is now well settled by the authoritative pronouncement of the Supreme Court of the Supreme Court in Buckingham and Carnatic Co. Ltd. Vs. Venkatiah, 1963(7) FLR 343 and National Engineering Industries Ltd. Vs. Hanuman, 1967(15) FLR 259 that Certified Standing Orders have statutory force under the Industrial Employment (Standing Orders) Act, 1946. The workman remained absent without informing the management, in violation of the Certified Standing Orders Clause 23 despite his being declared fit by the ESI on 9.6.84, he must be deemed to have left the services of the company and his employment thereby automatically terminated. A certificate of fitness without anything more cannot be said to amount to explanation for absence without leave as envisaged in the relevant standing orders. See The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, and Free Wheel India Ltd. (supra).

23. The issue is according decided in favour of the management and against the workman.

ISSUE No. 2

24. In view of my above detailed discussion, wherein it is proved on record that Shri Shiv Kumar Giri, the concerned workman after got sanctioned the leave w.e.f. 2.5.84 to 7.5.84 remained absent till he sent a medical certificate on 31.5.84, w.e.f. 19.5.84 to 26.5.84 and from 2.6.84 to 8.6.84. Though he is claiming that he had already sent a medical certificate w.e.f. 9.5.84 to 16.5.84, but the letter of the Incharge, ESI Akbarpur Ext. MW1/7, does not state that they ever issued such certificate. Even otherwise, the workman never reported for duty after he was declared fit on 9.6.84, which I may state on the cost of repetition. Under these circumstances, the only alternative for the management was to call upon the workman to explain the circumstances for his unauthorised absence, but despite that no explanation was put forth. It is not disputed that unauthorized absence is amount to mis-conduct. There were two alternatives with the management either to hold an enquiry after serving a full fledge charge sheet for the misconduct or the management was also empowered to take action under the rules. Even if it is presumed for the argument sake that before resorting to removing of the name from the rolls, the management failed to hold any departmental enquiry, they are within their legitimate right to prove the factum of mis-conduct before this court. It is now well settled law that "where an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify the action before the tribunal by leading all relevant evidence before it; see Workmen of Motipur Sugar Factory (Private) Limited Vs. Motipur Sugar Factory, , and the cases mentioned therein. But that principle can apply only if some charge was made against the workman and either there was no inquiry or it is found to be defective. When no charge whatsoever has been made against the workman, there can be no question of proving it before the tribunal.

14. Insofar as the judgment relied upon by the learned counsel for the petitioner in D.K. Yadav's case (supra) is concerned, the same would not be applicable in the facts of this case inasmuch in this case, the opportunity was given to the petitioner to explain the reason for his absence and was called upon to join his duties by a particular time period; whereas in D.K. Yadav's case (supra), the workman was, inter alia, intimated that he had wilfully absented from duty continuously for more than eight days without leave; he deemed to have left the service of the company on his own. Insofar as the judgment of the Division Bench of this Court in Thana Ram's case (supra) is concerned, the same would not be applicable as in the said case, the workman was proceeded departmentally for certain misconduct. The departmental enquiry was held to be in violation of principles of natural justice as the management did not produce any evidence before the Labour Court to establish the absence of the workman from duties and the absence was for only five days in the said case whereas in the present case, the removal was effected by invoking Clause 23 of the Certified Standing Orders, which does not require issuance of charge sheet and proper disciplinary proceedings before removing the incumbent from service. Similar is the case of G.T. Lad's case (supra) inasmuch in that case, the Supreme Court

has rejected the plea of the management that the workman has abandoned the services on the ground that there is no provision in the Certified Standing Orders by virtue of which, the company would have terminated the services of the appellant, whereas in this case, there is a specific provision in the Certified Standing Orders that if in the eventuality, the employee remains unauthorisedly absent, his services could be terminated. The said provision having been invoked by the respondent, the same is justified. Insofar as the case of Laxmi Kant (supra) is concerned, the same has no applicability in this case inasmuch as there is no question of the respondent-management to seek liberty to adduce evidence when no enquiry was conducted by it. Such a request becomes relevant only when there is an enquiry which has been vitiated by the Labour Court being in violation of principles of natural justice and fair play.

15. Insofar as the Praveen Chand Sharma's case (supra) is concerned, the Division Bench of this Court granted compensation in lieu of reinstatement with full back wages. Since by this judgment, I have upheld the action of the respondent, the said proposition would not be applicable in the facts of this case. In view of the discussion above, I do not find any merit in the writ petition. The same is dismissed with no order as to costs.