

\$~R-155

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 5425/2001

Decided on 29th October, 2013

DTC Petitioner
Through : Mr. Uday N. Tiwary, Adv.

versus

NARAYAN SINGH Respondent
Through : None

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

A.K.PATHAK, J.(ORAL)

1. Respondent was working with the petitioner as a Conductor. He remained absent from duty for 211 days during the period 1st January, 1991 to 30th November, 1991. Petitioner held an enquiry against the respondent on the charge that he was irregular in attending his duty and was not taking interest in the work, thus, had committed misconduct within the meaning of para 4(i) and 19(h) & (m) of the Standing Orders governing the conduct of the petitioners' employees. Respondent did not participate in the enquiry and was proceeded against ex-parte. Enquiry

Officer considered the evidence adduced by the petitioner and concluded that respondent was guilty of misconduct.

2. Disciplinary Authority considered the enquiry report and issued a show cause notice dated 27th April, 1992 to the respondent. Respondent did not submit any reply. Disciplinary Authority considered the enquiry proceedings and passed the order of removal of respondent from service on 19th May, 1992. On the same day, one month's wages were remitted to the respondent through money order.

3. Petitioner filed an application under Section 33(2)(b) of the Industrial Disputes Act, 1947 ("the Act", for short) before the Industrial Tribunal seeking its approval in view of pendency of wage disputes between the petitioner and its workers. Respondent filed written statement. He alleged that he did not commit any misconduct. He also took a plea that Depot Manager was not competent to take disciplinary action. Enquiry was not conducted as per the Rules and Regulations and principles of natural justice were violated. Respondent alleged that he was on leave during the period of his absence. There was no material before the Enquiry Officer and Disciplinary Authority to hold that

respondent was guilty of misconduct. Reply to the charge-sheet was not considered by the enquiry officer. Respondent was never informed that his leave applications were not received in the office nor that his absence from duty was unauthorised. In the service-book of respondent, petitioner had mentioned that he had remained on leave without pay during the period in question, thus, his absence could not have been treated as unauthorised. Respondent denied that one month's pay was remitted to him.

4. On 15th September, 1993 following issue was framed:-

“Whether applicant held a legal and valid enquiry against the respondent according to principles of natural justice?”

5. Parties were permitted to lead evidence which they did. Upon scrutiny of evidence adduced by the parties, Industrial Adjudicator vide order dated 9th March, 1998 held that enquiry was not held in a proper manner and was vitiated. Thereafter, Industrial Adjudicator proceeded to enquire about the misconduct himself and following additional issues were framed on 9th March, 1998:-

“1. Whether the respondent committed the

misconduct for which he charge-sheeted?

2. Relief.”

6. Petitioner adduced evidence. It examined Smt. Manju Bala as AW2 and Sh. Kamlesh Gupta as AW3. Respondent did not lead any evidence. AW2 Smt. Manju Bala deposed that she had prepared the report of unauthorised absence of respondent from duty for 211 days and proved her report as Ex. AW2/1. In her cross-examination she deposed that respondent was treated on leave without pay. AW3 Sh. Kamlesh Gupta proved the charge-sheet dated 13th December, 1991. He also deposed that pursuant to the report of Enquiry Officer show cause notice Ex. AW3/2 was issued. Past record of the respondent was also proved by this witness as Ex. AW3/1. He deposed that respondent did not file any reply to the show cause notice. Copy of the money order receipt whereby wages were remitted to him, was proved as Ex. AW3/5, certificate containing details of wages of respondent was proved as Ex. AW3/6. Industrial Adjudicator scrutinized the evidence adduced by the petitioner and concluded that petitioners' absence from duty was not unauthorised since he was treated on leave without pay during the said period. As per

the Industrial Adjudicator, once the absence was treated as leave without pay or any other kind of leave, his absence would not amount to “misconduct”. However, it was held that full one month’s wages were remitted to respondent. However, in view of the finding on issue No. 1 approval under Section 33(2)(b) of the Act has been declined vide Award dated 7th February, 2000.

7. That is how, petitioner is before this Court by way of present writ petition under Article 226 of the Constitution of India.

8. In Delhi Transport Corporation vs. Sardar Singh, AIR 2004 Supreme Court 4161, Supreme Court has held as under:-

“7. In all these cases almost the whole period of absence was without sanctioned leave. Mere making of an application after or even before absence from work does not in any way assist the concerned employee. The requirement is obtaining leave in advance. In all these cases the absence was without obtaining leave in advance. The relevant paras of the Standing Order read as follows:

"4. Absence without permission:-

(i) An employee shall not absent himself from his duties without having first obtained the permission from the Authority or the competent officer except in the case of sudden illness. In the case of sudden illness he shall send

intimation to the office immediately. If the illness lasts or is expected to last for more than 3 days at a time, applications for leave should be duly accompanied by a medical certificate, from a registered medical practitioner or the Medical Officer of the D.T.S. In no case shall an employee leave station without prior permission.

(ii) Habitual absence without permission or sanction of leave and any continuous absence without such leave for more than 10 days shall render the employee liable to be treated as an absconder resulting in the termination of his service with the Organisation.

19. General Provisions:- Without prejudice to the provisions of the foregoing Standing Orders, the following acts of commission and omission shall be treated as mis-conduct:

(a).....

(h) Habitual negligence of duties and lack of interest in the Authority's work."

8. Clause 15 of the Regulations so far as relevant reads as follows:

"2. Discipline:- 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).....

(vi) Removal from the service of the Delhi Road Transport Authority.

(vii) Dismissal from the service of the Delhi Road Transport Authority.

....."

9. When an employee absents himself from duty, even without sanctioned leave for very

long period, it prima facie shows lack of interest in work. Para 19(h) of the Standing Order as quoted above relates to habitual negligence of duties and lack of interest in the Authority's work. When an employee absents himself from duty without sanctioned leave the Authority can, on the basis of the record, come to a conclusion about the employee being habitually negligent in duties and an exhibited lack of interest in the employer's work. Ample material was produced before the Tribunal in each case to show as to how the concerned employees were remaining absent for long periods which affect the work of the employer and the concerned employee was required at least to bring some material on record to show as to how his absence was on the basis of sanctioned leave and as to how there was no negligence. Habitual absence is a factor which establishes lack of interest in work. There cannot be any sweeping generalization. But at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings.

10. Great emphasis was laid 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 unauthorized leave can be treated as misconduct.

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 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.

13. 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.”

9. Supreme Court in the context of Regulation 25 and paras 4(i) 2(ii) as well as 19(h) has taken a view that if an employee absents himself from duty without sanctioned leave for very long period it prima facie shows lack of interest in work. Habitual absence is a factor which establishes lack of interest. It is for the employee to show as to how his absence was on the basis of sanctioned leave and as to how there was no negligence. In view of the governing Standing Orders unauthorised leave can be treated misconduct. Treating as leave without pay is not same as sanctioned or approved leave.

10. Accordingly, I am of the view that Industrial Adjudicator has committed a patent error of law in holding that the petitioner had failed to establish unauthorised absence of respondent for 211 days, in view of the admission of AW2 that period of absence of respondent was treated as period of leave without pay. Industrial Adjudicator has also committed a patent error of law by holding that unauthorised absence from duty does not amount to misconduct. In this case, respondent had remained absent for 211 days. As per the respondent, he was on leave. Admittedly, he

did not lead any evidence before the Industrial Adjudicator to show that he was on sanctioned leave. It is the case of the petitioner that respondent remained absent without sanctioned leave. Merely because, respondent was treated on leave without pay, would not automatically mean that he remained on sanctioned leave.

11. For the forgoing reasons, impugned order is set aside/quashed and permission under Section 33(2)(b) of the Act is granted to petitioner.

12. Writ petition is allowed.

A.K. PATHAK, J.

OCTOBER 29, 2013

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