

\$~6

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

+ W.P.(C) 4187/2012

% Judgment delivered on: 16<sup>th</sup> September, 2014

BIR SINGH

..... Petitioner

Represented by: Mr. Ravindra S. Garia,  
Adv.

versus

DELHI TRANSPORT CORPORATION

..... Respondent

Represented by: Mr. J.B. Malik, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE SURESH KAIT**

**SURESH KAIT, J. (Oral)**

1. Vide the present petition, petitioner seeks to set aside the order dated 05.01.2012 passed by Industrial Tribunal in O.P. No. 224/94.
2. Brief facts of the case are that the petitioner was a permanent employee of the respondent-DTC. Due to illness he remained absent from duty from 17.4.93 to 27.4.93. Thereafter, he was declared absconder as claimed by the respondent on 28.4.93. The petitioner submitted his medical certificate and leave application which had been admitted by the respondent that the same was received after 28.4.93, however the leaves were sanctioned without pay, accordingly.
3. The respondent removed the petitioner from service by order dated 16.08.94. The respondent-DTC approached the learned Tribunal for official

permission for removal from service, the same was refused vide order dated 23.7.2003.

4. Being aggrieved, the respondent-DTC challenged this order in W.P(C) 8871/2004 before this Court and the same was disposed of vide order dated 3.5.2010 and directed the Tribunal as under:-

“3. The matter is not no longer res integra. The Supreme Court in DTC Vs. Sardar Singh AIR 2004 SC 4161 has held that when an employee absents himself from duty without sanctioned leave, it primarily shows lack of interest in work and DTC can, on the basis of the record, come to the conclusion about the employee being habitually negligent in duty and exhibiting lack of interest in the employer’s work. Though in the facts under consideration in the said judgment, the absence was for a very long period and the observations were made in that context only, the Supreme Court held that the requirement in the standing order of the DTC is of obtaining leave in advance and that merely because in the record of service, the absence is recorded as leave without pay it does not prevent DTC from establishing that the absence amounts to misconduct and habitual absence without permission/sanction of leave and habitual negligence of duty and lack of interest in work.

4. the counsel for the respondent workman has urged that in the present case DTC, neither before the Inquiry Officer nor before the Industrial Court produced its record showing the fate of the application submitted by the respondent workman for leave and cannot be allowed a third chance by this Court. However, the Supreme Court has held that since under the standing order of the DTC, absence for ten days or more without leave renders the employee liable to be treated as an absconder resulting in the termination of his service, once it is established that the employee was absent for ten days and if the employee was unable to show any sanction therefore, the onus is on the employee to prove that such absence without sanction of leave was for such circumstances and for such reasons which rebut the presumption under the standing orders of the same being

habitual and indicative of lack of interest in the employer's work.

5. In the present case, even in the absence of the record produced by DTC of the fate of the application for leave found to have been submitted by the respondent workman, the fact remains that the absence of the respondent workman was without sanction."Mere submission of an application for leave is not sanction of leave as held in the judgment aforesaid of the Supreme Court. The Tribunal was to then decide whether the respondent workman has been able to make out a case of such nature which prevented him from obtaining prior sanction of DTC and even if he was so prevented, whether the facts of the case were such which did not justify the penalty of dismissal from service. Faced with the aforesaid, the counsel for the respondent workman states that the respondent workman be also given liberty to produce evidence on remand.

6. The writ petition is, therefore, allowed. The order dated 23<sup>rd</sup> July, 2003 of the Tribunal is set aside and the matter is remanded to the Tribunal for decision afresh of the application under Section 33(2) (b) in accordance with the judgment aforesaid of the Supreme Court and the observations hereinabove. It is clarified that both the parties shall be entitled to lead fresh evidence before the Tribunal. Since the matter has remained pending for long, the Tribunal is directed to dispose of the same expeditiously. The parties to appear before the Tribunal/Successor Tribunal on 26<sup>th</sup> May, 2010. Litigation expenses have already been paid, no order as to costs."

5. Thereafter vide order dated 05.01.2012 the Tribunal passed order as under:-

" 21. This Tribunal is of the considered view that the conduct of the workman is nothing but irresponsible in extreme and cannot be justified. He had committed misconduct by absence. Admittedly, he had remained absent from 17.4.93 to 9.6.93. He has not brought on record any document before this Tribunal about his suffering from serious ailment, despite opportunity given. Similarly, he has not brought on record medical papers

of ailment of his wife. Thus, it is held that the facts of the case are/were such, which justify/justified the penalty of dismissal of workman from service”.

6. On perusal of impugned order passed by the learned Tribunal reveals that after considering the evidence led by the parties, vide order 6.4.2002, preliminary issues were decided against the respondent-management, thereafter vide order dated 23.7.2003 dismissed the approval sought by the respondent. The said order was challenged before this Court by which the case was remanded back to the Tribunal.

7. The case of respondent DTC before the Tribunal was that the application for leave was received after 29.04.93, after the date he was declared absconder and mere submission of an application for leave is not sanction of leaves. The issue before the Tribunal was that whether the petitioner-workman has made out the case of such nature which prevented him from obtaining prior sanction from DTC and if he was so prevented whether the facts of the case were such which did not justify the penalty of dismissal from service.

8. Accordingly, the management examined Shri Sanjay Saxena as AW-1. In his affidavit, he reiterated the contents of the approval petition. However, in the cross-examination deposed that he had no personal knowledge regarding inquiry proceedings and deposing on the basis of record. Further admitted that copy of the past service record was not supplied to the petitioner-workman. Also admitted that as per rules of DTC, whenever a workman absents continuously for more than 10 days without intimation, then a memorandum is to be sent to the workman to report for duty, or in the case of illness to be present before the medical board.

However, he denied that no memorandum was sent to the workman to report for duty as per prevalent OP NO.224/94. Further, admitted that an application along with medical record was received after his continuous absent without intimation for 10 days for the period from 17.4.93 to 28.4.93. The said witness also admitted that Office Order No. 91 dated 16.8.62 passed by the management which was executed as per Ex.AW1/R3. It is also admitted that notice declaring him absconder was not sent to the workman.

9. The petitioner-workman examined Sh. Bir Singh, as RW-1. In his affidavit he deposed that before declaring the workman as absconder no letter was served upon him as per the rule of management as AW1/R3. Further deposed that the report on which charge sheet was based was only for the period of 10 days and further charge sheet regarding absent from duty from 29.4.93 to 9.6.93 is baseless. However, in cross-examination, he admitted that he did not report for duty from 17.4.93 to 9.6.93.

10. By officer order dated 16.8.62 Ex.AW1/R4 it has been declared that on receipt of case of unauthorised absence from duty, a notice shall be issued by AGM (A) through registered post immediately to the employee concerned at his residential address available in the office record by asking him to show cause, if any, by a particular date, and place as to why his services should not be terminated. In case of non-receipt of reply from employee within the prescribed period, orders declaring him as an absconder and termination from services shall be issued by Assistant General Manager (Administration). However, in case reply to show cause notice is received, the aforesaid authority shall pass suitable orders keeping in view the conduct of the employee and his undertaking. It is admitted fact that the respondent-

DTC failed to produce any order of absconding of the petitioner. It was orally submitted before the Tribunal that he declared absconder on 29.4.93. It is also admitted that the respondent received leave application on 29.4.93 and accordingly the leave application was sanctioned without pay.

11. Learned Tribunal has relied upon the case of *Delhi Transport Corporation vs. Sardar Singh 2004 (VIII) AD (SC) 371* wherein it has been held as under:-

“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”.

12. The case of the respondent is that he remained absent from duty from 17.4.93 to 9.6.93. Petitioner explained the reasons for the absence and submitted his medical document from 17.4.94 to 24.5.93 and thereafter his wife was sick from 26.5.93 to 9.6.93 and documents to that effect also submitted by the petitioner to the respondent. Accordingly, his leave was sanctioned for the whole aforesaid period of 17.4.93 to 9.6.93, however, without pay.

13. The issue before this court for consideration is that if the petitioner failed to take prior permission on the ground of illness from the DTC whether he could be terminated from the service. The case of the petitioner is that he remained ill for the period he was absent from duty and accordingly he sent leave application with medical documents from his native village which admittedly was received on 29.4.93, i.e., 11<sup>th</sup> day of his absence and the same has been sanctioned by the respondent, however,

without pay. If the leave of the petitioner has been sanctioned by the respondent then there was no justification to remove him from the service. Therefore, the *Sardar Singh (Supra)* is not applicable in the present case.

14. It is admitted fact that the past service record of the petitioner was neither supplied to him nor produced before the Tribunal. Thus, the Tribunal has erred in recording the finding that the termination order was legal and justified on the basis of past record which was relied by the respondent DTC.

15. Consequently the petitioner is reinstated in service with continuity in service with 50 per cent back wages.

16. Accordingly, the petition is allowed on above terms with no order as to costs.

**SURESH KAIT, J**

**SEPTEMBER 16, 2014**

*Nk/jg*