

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

Date of decision: 1st July, 2010.

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W.P.(C) No.3633/2004

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DELHI TRANSPORT CORPORATION.

..... Petitioner

Through: Ms. Saroj Bidawat, Advocate.

Versus

SHYAM LAL

..... Respondents

Through: Ms. Rashmi B. Singh, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

RAJIV SAHAI ENDLAW, J.

1. This writ petition impugns the orders dated 27th August, 2002 and 26th May, 2003 of the Industrial Tribunal on an application filed by the petitioner DTC under Section 33(2)(b) of the ID Act. The Industrial Tribunal vide order dated 27th August, 2002 held that no fair, valid and proper inquiry had been held prior to the order of dismissal of the respondent workman from the service of the petitioner DTC. The petitioner DTC opted to prove before the Industrial Tribunal the misconduct on the charge whereof the respondent workman was dismissed. The Industrial Tribunal vide order dated 26th May, 2003, on the basis of the evidence led, held the misconduct to have not been proved before the Industrial Tribunal

and resultantly dismissed the application under Section 33(2)(b) of the petitioner DTC.

2. Aggrieved therefrom the present writ petition was preferred. This Court vide order dated 5th May, 2004 while issuing notice to the respondent workman stayed the operation of the order dated 26th May, 2003 of the Industrial Tribunal. The respondent workman applied under Section 17B of the ID Act and which application was allowed vide order dated 18th October, 2006.

3. The respondent workman was employed as a Conductor with the petitioner DTC since 1st February, 1984. The bus of the respondent workman was inspected by the Checking Staff of the petitioner DTC on 1st June, 1992 and the respondent workman was found to have issued tickets of denomination of Rs.2/- only after collecting due fare of Rs.3/- from the passengers. Besides the said charge, he was also charged with using unparliamentary language against the officials of the Checking Team and with instigating the commuters against the Checking Staff; the cash with the respondent workman was also found to be short by Rs.21/-; he was also charged with having refused to accept the challan.

4. The Inquiry Officer found the charges to have been established against the respondent workman and the Disciplinary Authority of the petitioner DTC, after issuing show cause notice to the respondent workman, meted out the punishment of dismissal from service to the respondent workman. However, since at that time, a general dispute between the petitioner DTC and its workmen had been referred for adjudication, the petitioner DTC sought approval under Section 33(2)(b) of the

ID Act of its action of dismissal of the respondent workman from service, without prejudice to its contention that the reference aforesaid necessitating the application under Section 33(2)(b), was illegal and was under challenge by the petitioner DTC. But for the said reference, the petitioner DTC was not required to seek approval of its action for dismissal and the remedy of the respondent workman would have been by way of raising a dispute under Section 10 of the ID Act.

5. The respondent workman contested the application under Section 33(2)(b). The Industrial Tribunal framed a preliminary issue as to the validity of the inquiry. The inquiry was held to be invalid vide order dated 27th August, 2002 (supra),

- (a) For the reason of the Inquiry Officer having not bothered to afford opportunity to the respondent workman to ensure the service of the passenger witnesses or to produce the passenger witnesses.
- (b) For the reason of due opportunity to cross-examine the witnesses having not been given.

The contention of the petitioner DTC on the basis of *State of Haryana Vs. Ratan Singh* AIR 1977 SC 1512 that the statement of the passenger witnesses was not required, was held to be not acceptable for the reason of due effort to summon the passenger witnesses having not been made.

6. Even after evidence led before the Industrial Tribunal, vide order dated 26th May, 2003, the misconduct was held to have not been proved for the reasons of :-

- (i) The statement of the passengers having not been recorded by the Checking Staff.
- (ii) Statement of the Driver having not been recorded by the Checking Staff.
- (iii) The challan not bearing the signatures of the respondent workman.
- (iv) There being no statement of any witness of respondent workman having instigated the passengers.

7. The counsel for the petitioner DTC before this Court has contended that the Industrial Tribunal has dismissed the application under Section 33(2)(b) only for the reason that the passenger witnesses having not been examined by the petitioner DTC, neither before the Inquiry Officer nor before the Industrial Tribunal. Reliance is again placed on *Ratan Singh* (supra); it is urged that the same was wrongly ignored by the Industrial Tribunal.

8. There is merit in the said contention of the counsel for the petitioner DTC. The Apex Court in *Ratan Singh* (supra) has not held that the law laid down therein applies only if the passenger witnesses are not available after due efforts to produce them have failed. Rather, this Court in *DTC Vs. N.L. Kakkar* 110 (2004) DLT 493 also relied on by the counsel for the petitioner DTC, has held that the production of passengers either in a domestic inquiry or before the Labour Court in an industrial dispute, is not at all necessary. It was also observed that in most

cases that would be highly impractical because the passenger would have to be traced out, chased and brought before the Inquiry Officer or the Labour Court causing them unnecessary inconvenience and that a pragmatic view of the situation has to be taken. Extending the said logic further, in my opinion the recording of the statements of the passengers at the time of checking/challan cannot always be expected. A passenger in a bus would be highly reluctant to give his name and address or to have his statement recorded for the fear of being summoned subsequently for giving evidence. The Courts have taken notice of the reluctance to give evidence even in case of grave offences. For instance, in *Appabhai Vs. State of Gujarat* AIR 1988 SC 696, the Supreme Court observed that people prefer to keep themselves away from the Court unless it is inevitable. They believe that even crimes, much less civil disputes, are matters between two individuals and they should not involve themselves. The Supreme Court further observed that though this kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap of the petitioner DTC in such cases. The reluctance of passengers to become witnesses for departmental proceedings against the Driver or Conductor of a bus, is thus quite understandable. The counsel for the petitioner DTC in this regard has referred to certain subsequent orders/judgments of this Court also but in view of the aforesaid two judgments need is not felt to refer thereto.

9. The counsel for the respondent workman has relied upon the judgment dated 28th April, 2005 of a Single Judge of this Court in *DTC Vs Maha Singh*, W.P.(C) No.2228/2004 where after noticing *Rattan Singh* and *N.L. Kakkar*

(supra), the writ petition was dismissed on the ground of the findings of the Tribunal being one of fact and being incapable of interference under Article 226 of the Constitution of India. I may however notice that the Supreme Court in *Seema Ghosh Vs. Tata Iron & Steel Company* (2006) 7 SCC 722 has held that if the Industrial Adjudicator decides, ignoring the dicta of the Courts then the award of the Industrial Adjudicator is liable to be interfered with in judicial review. Thus, if the finding of the Industrial Adjudicator as in the present case of the non applicability of the dicta in *Rattan Singh* is found to be for reasons, which do not follow from the said judgment, the respondent workman cannot contend that this Court should not interfere.

10. The petitioner DTC after conducting an inquiry on the charges of misconduct and if it finds the charges to have been established, is entitled to punish its workman and/or to remove him from employment. The recourse of the workman is then to raise an industrial dispute under Section 10 of the ID Act. Section 33(2)(b), however requires the employer to seek approval of its such action if at that time any industrial dispute is pending between the employer and the workman. The industrial dispute, which necessitated the filing of the application under Section 33(2)(b) in the instant case, was not between the petitioner DTC and the respondent workman alone but was a general dispute between the petitioner DTC and its workmen. It was thus not as if, the petitioner DTC owing to pendency of such earlier dispute with the respondent workman alone, can be said to be interested in victimizing the respondent workman.

11. The scope of jurisdiction of the Industrial Adjudicator under Section 33(2)(b), is only to oversee the dismissal to ensure that no unfair labour practice or victimization has been practiced. If the procedure of fair hearing has been observed and a *prima-facie* case for dismissal is made out; approval has to be granted. The jurisdiction of the Industrial Adjudicator under Section 33(2)(b) cannot be wider than this. Reference in this regard may be made to ***Lalla Ram Vs. D.C.M. Chemical Works Ltd.*** AIR 1978 SC 1004 and ***Cholan Roadways Limited Vs. G. Thirugnanasambandam*** AIR 2005 SC 570. The proceeding under Section 33(2)(b) is not a substitute for an industrial dispute referred for adjudication under Section 10. It is for this reason only that the decision on the application under Section 33(2)(b) does not close the right of the respondent workman to raise an industrial dispute under Section 10 of the ID Act.

12. However, the distinction between adjudication of an industrial dispute referred under Section 10 and an approval application under Section 33(2)(b) in practice is found to have been blurred. Applications under Section 33(2)(b) are being treated and tried in the same manner and following the same procedure as an industrial dispute. This has led to a situation, where decision of applications under Section 33(2)(b) is held up for years and/or takes the same time as decision of an industrial dispute under Section 10. Often, it is also found to result in parallel proceedings or duplicate proceedings in both of which witnesses are examined and on same facts and evidence, inconsistent findings returned in two proceedings, in ignorance of other proceeding.

13. If the object of Section 33(2)(b) is only to prevent victimization of an employee in dispute with the management/employer, the scope of inquiry by the Industrial Adjudicator while dealing with and deciding such application cannot possibly be the same as while dealing with and deciding an industrial dispute. If an application under Section 33(2)(b) is to be dealt with and scope of inquiry therein so limited, the disposal thereof should not take long. The findings returned by the Industrial Adjudicator on an application under Section 33(2)(b) are “*prima-facie*” and not “final” and not binding in a subsequent industrial dispute. The findings can be “*prima-facie*” only if returned on the basis of “summary” examination and not if returned on the basis of “detailed examination” as in adjudication of industrial disputes.

14. However, it is found that the Industrial Adjudicators, after completion of pleadings in an application under Section 33(2)(b), frame a preliminary issue qua validity of domestic inquiry, allow examination of witnesses on such preliminary issues and if decide preliminary issues against the management/employer and if the management/employer has exercised the option to prove misconduct before the Industrial Adjudicator, frame issues thereon, again allow evidence and then adjudicate. Very often, the reply to the application under Section 33(2)(b) not even found to contain defence of victimization or found to contain vague and general pleas qua victimization; the pleas as relevant in an industrial dispute are raised and adjudicated. In a large number of cases, the complete inquiry proceedings/reports are not even found on the file of Industrial Adjudicator.

15. In my view, the Industrial Adjudicators should insist on the complete record/report of domestic inquiry and the disciplinary authority to be produced along with an application under Section 33(2)(b). Thereafter, the pleadings should be perused minutely to see whether any case of victimization is made out. If the workman has not pleaded a case of victimization owing to pendency of an earlier dispute or has not made out a case of action of which approval is sought having been taken against him to settle scores with him in the earlier dispute or to derive unfair advantage in the earlier dispute, or if the pleadings in this respect are vague and without particulars, no further inquiry by the Industrial Adjudicators is needed and the application under Section 33(2)(b) should be allowed immediately. Even if pleas are taken by the workman of the domestic inquiry having been conducted in violation of the Standing Orders/Rules or the principles of natural justice, but the same is not attributable to victimization as aforesaid, such pleas ought not to be adjudicated in Section 33(2)(b) proceedings but should be left to be adjudicated in the industrial dispute if raised under Section 10 of the Act. The earlier industrial dispute owing where to Section 33(2)(b) application is necessitated, in a large number of cases is not of the individual workman against whom application under Section 33(2)(b) is filed but has been raised by all workmen of the establishment or their union and with respect to their general service conditions. In such cases, the management/employer generally cannot be said to have taken the action of which approval under Section 33(2)(b) is sought, by way of victimization, unless it is shown that such workman was responsible for initiating/instigating or pursuing the earlier dispute.

16. If the workman in his reply to Section 33(2)(b) application or otherwise does make out a case of victimization, the industrial adjudicator should then proceed to see by examination of domestic inquiry proceedings whether the same is borne out therefrom. However, such examination should again be limited to whether, to ensure dismissal of workman, he has been as a matter of design, deprived of or prevented from proper opportunity or from proving his case. Such examination has to be narrower than examination of validity of domestic inquiry in an industrial dispute under Section 10. For instance, while an inadvertent breach of prescribed procedure of inquiry may entitle the industrial adjudicator in a Section 10 proceeding to hold the domestic inquiry to be vitiated but unless such breach is found to be intended to prevent the workman from placing his version before the Inquiry Officer, so as to ensure finding against him, the same may not constitute a ground in a Section 33(2)(b) proceeding to hold the domestic inquiry to be vitiated.

17. Once (in a Section 33(2)(b) proceeding) the domestic inquiry is held to be vitiated for the reason of victimization, the Industrial Adjudicator should weigh, if victimization is quite evident, need may not arise to give opportunity to the management/employer to prove misconduct before the Industrial Adjudicator; however if evidence of victimization in domestic inquiry is not so strong, the Industrial Adjudicator may proceed to determine whether charge of misconduct is false by way of victimization or not. If the workman is *prima facie* found guilty of misconduct, approval should still be granted by allowing the application under Section 33(2)(b) and leaving the workman to raise other pleas in the industrial dispute under Section 10. For the said limited aspect, the Industrial Adjudicator

may record evidence but within the confines aforesaid and without expanding the scope of inquiry.

18. It is hoped that by following the aforesaid procedure, Section 33(2)(b) proceedings will be disposed of expeditiously, as they were intended to be and shall not languish for years, as has been happening.

19. The Industrial Tribunal in the present case has totally misconstrued the scope of Section 33(2)(b). The application under Section 33(2)(b) has been dealt with as a labour dispute and the termination found illegal by placing the onus, as in a labour dispute, on the petitioner DTC.

20. I have perused the reply of the respondent workman to the application under Section 33(2)(b) in the file of the Industrial Tribunal requisitioned before this Court. It does not contain even a plea of victimization. The respondent workman does not deny that his bus was checked by the staff as aforesaid. It is not his case that the management of the petitioner DTC or any of its officials fabricated or manipulated the said incident or check or raid to have him dismissed from service. In the absence of the said pleas, the checking of the bus of the respondent workman appears to have been done in the routine course. It is also not the plea of the respondent workman that any of the Checking Staff was inimical to him or they acted on the behest of the management of the petitioner DTC or any officials inimical towards him. It is also not his case that the inquiry proceedings were motivated by any such reasons. In the absence of any such pleas, it is not understandable as to why the Checking Staff of the petitioner DTC would make a

report as aforesaid against the respondent workman, but in the normal course of the performance of their duties. The domestic inquiry also appears to have been conducted in a routine manner and without any ill-will or ulterior motives. Thus the essential ingredient of Section 33(2)(b) of victimization is completely missing in the present case.

21. The ingredient of fair hearing and opportunity also, as aforesaid has to be construed in a proceeding under Section 33(2)(b) in the context of victimization only. The scope of examination thereof under Section 33(2)(b) is much more limited than under Section 10 of the ID Act. Thus the element of fair play and compliance of the principles of natural justice in a proceeding under Section 33(2)(b) are also to be examined only to see that the same have not been breached to victimize the workman. In the absence of any plea of victimization, ordinarily there should be no case of the inquiry being bad.

22. The Industrial Tribunal in the order dated 27th August, 2002, has also given the reason of non-supply of documents along with charge-sheet but the admitted position is that the respondent workman participated in the inquiry proceedings. The counsel for the respondent workman in this regard relies on *DTC Vs. Pratap Singh* 140 (2007) DLT 117, but it was not a case under Section 33(2)(b). I have already held above that the test of validity of the domestic inquiry in a proceeding under Section 33(2)(b) is different from that in an industrial dispute under Section 10 of the ID Act. The all pervasive element to be examined in a Section 33(2)(b) proceeding is of victimization and in which respect there is no plea also in the present case.

23. The evidence before the Inquiry Officer as well as before the Industrial Tribunal of the Inspecting Team/Staff of the petitioner DTC in the present case, is admittedly against the respondent workman. In the face of the same, the Industrial Tribunal ought to have allowed the application under Section 33(2)(b) leaving the respondent workman free to raise his grievance in an industrial dispute under Section 10 of the ID Act. It was inquired from the counsel for the petitioner DTC whether any industrial dispute has been raised by the respondent workman in the present case; the answer is in the negative.

24. In the circumstances, while allowing the present writ petition and setting aside/quashing the orders dated 27th August, 2002 and 26th May, 2003 (supra) of the Industrial Tribunal impugned in the present writ petition and while granting approval to the petitioner DTC under Section 33(2)(b), liberty is granted to the respondent workman to if he so desires, raise an industrial dispute with respect to his dismissal. Further since in the unfortunate circumstance aforesaid, the matter has remained pending for long, it is clarified that in the event of such dispute being raised by the respondent workman within three months of today, the same shall be adjudicated by the Industrial Adjudicator notwithstanding the delay in raising the same. The respondent workman is also given liberty to raise the said dispute by directly approaching the Industrial Adjudicator under Section 10A of the ID Act and without being required to approach the Conciliation Officer, since in view of the aforesaid, no amicable settlement between the parties appears possible.

25. The writ petition is disposed of in terms of the above. Costs of litigation having already been paid, no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

1st July, 2010
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