

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

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**W.P.(C) 3210/2004**

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**Date of decision: 3<sup>rd</sup> May, 2010**

**DELHI TRANSPORT CORPORATION**

**..... PETITIONER**

Through: None.

Versus

**NIHAL SINGH**

**..... RESPONDENT**

Through: Mr. Pratap Shankar & Mr. Swetank  
Shantanu, Advocates.

**CORAM :-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

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. DTC by this petition impugns the order dated 7<sup>th</sup> February, 2001 of the Industrial Tribunal dismissing/rejecting the application of DTC under Section 33 (2)(b) of the Industrial Disputes Act. Notice of this petition was issued on 28<sup>th</sup> July, 2004 on the contention of the counsel for DTC that the respondent workman had also raised an industrial dispute under Section 10 of the I.D. Act qua the same order of his dismissal/removal from service, of which approval was sought by DTC in the application under Section 33 (2)(b) of the ID Act; the said industrial dispute (vide order dated 18<sup>th</sup> October, 2003) had been answered against the respondent workman and the punishment imposed by DTC of removal of the respondent workman had been upheld; it was thus submitted that while the Industrial Tribunal in the order impugned in this petition had refused to give approval to the action of DTC of removal of respondent workman from service,

the Industrial Tribunal in the dispute raised by the respondent workman held the action of DTC of removal of respondent workman to be valid. This Court while issuing notice of the petition also stayed the operation of the order dated 7<sup>th</sup> February, 2001. The said order has continued to remain in force. On 7<sup>th</sup> February, 2006 the application of the respondent workman under Section 17B of the ID Act was allowed. DTC was directed to pay wages at the rate of last drawn wages from 7<sup>th</sup> February, 2001 till the end of February, 2004 and at the rate of minimum wages from 1<sup>st</sup> March, 2004 onwards to the respondent workman. The respondent workman has filed an undertaking to refund the amount received in excess of last drawn wages in the event of this petition being decided in favour of DTC. On 17<sup>th</sup> March, 2010 it was informed that the writ petition preferred by the respondent workman against the award of the Industrial Tribunal in the industrial dispute raised by him had been dismissed on 16<sup>th</sup> April, 2009. On 17<sup>th</sup> March, 2010 the counsels were called upon to also address on the effect, if any, of the industrial dispute having been decided against the respondent workman, on the present petition. The counsels have been heard.

2. I will first take up the aspect of the conflicting orders in the proceedings emanating under Section 33 (2)(b) and those emanating under Section 10 of the ID Act.

3. The order of removal of the respondent workman from service was passed on 4<sup>th</sup> December, 1992. Owing to the then pendency of an industrial dispute between DTC and its workmen, approval of the order dated 4<sup>th</sup> December, 1992 of removal of the respondent workman from service was sought by filing on 4<sup>th</sup> December, 1992 itself an application under Section 33(2)(b). In the said

proceedings a preliminary issue as to the legality and validity of the domestic inquiry preceding the order of removal of the respondent workman from service was framed. The said preliminary issue was decided against DTC. DTC opted to prove the misconduct, for the reason whereof the order of removal from service was made, before the Industrial Tribunal. Finally the Industrial Tribunal vide order dated 7<sup>th</sup> February, 2001 impugned in this petition dismissed the application under Section 33(2)(b) of the ID Act.

4. It appears that the respondent workman also raised an industrial dispute under Section 10 of the Act with respect to the order dated 4<sup>th</sup> December, 1992 of his removal. Reference thereof was made by the appropriate Government to the Industrial Tribunal on 31<sup>st</sup> October, 2001 i.e. nearly eight months after the rejection of the application aforesaid under Section 33(2)(b) of the Act. The reference in the said industrial dispute was answered vide award dated 18<sup>th</sup> October, 2003 i.e. during the time when the present petition was pending. The Industrial Tribunal has in the award dated 18<sup>th</sup> October, 2003 held that the charges against the respondent workman were proved / established and the respondent workman was not only guilty of remaining absent but was also showing lack of interest and was negligent in performing his duties, which is a misconduct. The Industrial Tribunal has in the said award noticed that the application under Section 33(2)(b), had been dismissed. It was however held that notwithstanding the dismissal of application under Section 33(2)(b), the respondent workman was not satisfied and not only raised the industrial dispute but had the same referred for adjudication notwithstanding the dismissal of the application under Section 33 (2)(b) and persisted in the adjudication of the said industrial dispute. The

Industrial Tribunal thus held that it was left with no option but to adjudicate the said dispute.

5. The respondent workman challenged the award dated 18<sup>th</sup> October, 2003 in the industrial reference under Section 10 by filing W.P.(C) No.8201/2009 in this Court. The said writ petition was dismissed vide order dated 16<sup>th</sup> April, 2009 as barred by time/laches. The said order has attained finality.

6. What falls for consideration is whether the order in the industrial dispute proceedings under Section 10, against the respondent workman attaining finality has any legal impact on this pending challenge to the order under Section 33 (2)(b). The findings in the order in Section 33(2)(b) proceedings, under challenge in this petition, are contrary to the findings in the proceedings under Section 10. While in Section 33(2)(b) proceedings it has been held that the domestic inquiry preceding dismissal was perverse and misconduct alleged had not been proved before the Tribunal, in the Section 10 proceedings not only has it been held that appropriate inquiry was conducted but also that DTC was justified in passing the order of dismissal.

7. I have recently in *DTC Vs. Rishi Prakash* MANU/DE/0748/2010 dealt with the said aspect. The contention there also was that as per the law laid down in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma* MANU/SC/0030/2002, upon dismissal/rejection of the application under Section 33(2)(b), the order of dismissal becomes ineffective from the date it was passed and the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer. A Division Bench of this Court in *Sh. Rajender Singh Vs. DTC* 98 (2002) DLT 706 has also held that upon

rejection of an application under Section 33(2)(b), the workman is not required to raise an industrial dispute for his reinstatement and is entitled to reinstatement merely for the reason of rejection of application under Section 33(2)(b). Another Single Judge of this Court in **Delhi Transport Corporation Vs. Sh. Ramesh Chander** MANU/DE/1101/2009 held a writ petition challenging the award under Section 10 of the Act in favour of the workman to be barred by *res judicata* for the reason of the order of the Labour Court dismissing the application under Section 33(2)(b) of the Act and the said order having not been challenged by the DTC.

8. However, another Single Judge of this Court in **Shri Trived Prakash Vs. Delhi Transport Corporation** MANU/DE/3004/2009 held that where the writ petition of the workman against the award in a Section 10 proceeding in favour of the employer has been dismissed, the challenge by the workman to the grant of permission under Section 33(2)(b) cannot succeed. It was held that in a Section 33(2)(b) proceeding only prima facie view has to be taken whereas in a Section 10 proceeding, the Labour Court or Tribunal is under an obligation to examine all the contentions raised by both the parties on the merits of the case in detail. Similarly, the Supreme Court in **Dharampal Vs. National Engineering Industries Ltd.** AIR 2002 SC 510 held that in a proceeding under Section 33(2)(b) only a prima facie view is to be taken and which ordinarily ought not to be interfered with in a writ proceeding and the appropriate course for the workman is to invoke Section 10 to work out his rights. Recently another Division Bench in **Bilori Vs. DTC** MANU/DE/2218/2009 held that findings under Section 33(2)(b) cannot operate as *res judicata* in a reference under Section 10. It was further found that the Division Bench of this Court in **Delhi Transport Corporation Vs. Ram Kumar**

MANU/DE/0168/1981 examined in detail the question of proceedings under Section 33(2)(b) and Section 10, arising from the same cause of action. It was held that the scope of inquiry under Section 10 is much wider than the scope of inquiry for according or refusing approval under Section 33(2)(b). It was further held that what is done under Section 33(2)(b) is not adjudication.

9. In *Rishi Prakash* (supra) I thus reached a conclusion that an award or an order in a proceeding under Section 10 would constitute *res judicata* in a proceeding under Section 33(2)(b) of the Act.

10. Thus, following the aforesaid logic, the present petition challenging the order under Section 33(2)(b) is entitled to succeed on this ground alone.

11. The counsel for the respondent workman has however invited attention to *Tata Iron and Steel Company Ltd. Vs. S.N. Modak* (1965) II LLJ 128 (SC). However the said judgment does not address the issue aforesaid. It is a judgment only on the proposition that the disposal of the industrial dispute which necessitated the filing of application under Section 33(2)(b) does not make the said application infructuous. The said judgment thus does not convince me to hold otherwise than as held in *Rishi Prakash*.

12. However, after the decision in *Rishi Prakash*, I have come across the following passage in *Engineering Laghu Udyog Employees' Union Vs. Judge, Labour Court and Industrial Tribunal* 2004 SCC (L&S) 974:

“13. When in terms of the proviso appended to clause (b) of sub-section (2) of Section 33 of the Act, an approval is sought for and is refused, the order of dismissal becomes void. If an approval is not obtained, still, the order of punishment cannot

be given effect to. It is, therefore, not correct to contend that the Tribunal in a reference under Section 10 of the Act, when passes an order recording a finding of misconduct, brings life into the dead. Unfortunately, the Court did not take notice of the binding decisions in *Motipur Sugar Factory case* and *Firestone case*.”

Though on first blush it appears that the same covers the field and the conclusion reached in *Rishi Prakash* is contrary to the said binding dicta of the Supreme Court but I find that the said question did not fall for consideration in that case. The appeal before the Supreme Court was against the judgment of the High Court dismissing the writ petition of the workman against the award holding that the workman was guilty of misconduct and order of his dismissal from employment was justified. There was no Section 33(2)(b) proceeding in that case. The contention however was that since the award found that no domestic inquiry had been conducted and misconduct was permitted to be proved and proved before the Labour Court, the order of dismissal from service should not relate back to the date on which the same was made by the employer without domestic inquiry but should be with effect from the date of the award. It was in that context that the aforesaid observation came to be made. With all humility, I am unable to hold the same to be a binding precedent, when the question did not fall for adjudication in that case. The aforesaid passage also, thus does not make me take a different view from that in *Rishi Prakash*.

13. Notwithstanding the aforesaid finding, it is deemed expedient to, independently of the above, consider the challenge to the order dismissing the application under Section 33(2)(b). The charge against the respondent workman

was of unauthorized absence from duty from 12<sup>th</sup> July, 1991 onwards. The Tribunal found that the respondent workman had failed to appear before the Inquiry Officer despite service of notice and the Inquiry Officer was therefore justified in proceeding *ex parte* against him. Notwithstanding the same, Tribunal held the inquiry to be perverse for the reason of the Inquiry Officer having not noticed certain other facts.

14. The Courts have held that the scope of jurisdiction of the Tribunal 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, the approval has to be granted. The jurisdiction of the Tribunal / Labour Court under Section 33(2) cannot be wider than this. Reference in this regard may be made to ***Lalla Ram Vs. Management of DCM Chemical Works Ltd.*** AIR 1978 SC 1004 and ***Cholan Roadways Limited Vs. G. Thirugnanasambandam*** AIR 2005 SC 570.

15. The Tribunal/Labour Court must not sit in appeal over the findings of the Inquiry Officer. Where the Inquiry Officer, having considered all aspects of the case has found the employee guilty of misconduct, the Industrial Tribunal could not re-appreciate the evidence and refuse approval. All that can be examined by the Tribunal is that opportunity was given to the worker concerned to establish his innocence and there is a prima facie case made out against him on the basis of the record of the domestic inquiry. The Tribunal is not to see whether on the weight of evidence a different conclusion is possible. The Tribunal is not empowered to review the decision of the management. The mere circumstance that the Tribunal was inclined to arrive at a different conclusion of fact on its appreciation of the same

evidence will not entitle it to withhold the approval sought for by the management for dismissal of the worker so long as the management's findings could not be shown to be perverse or based on no evidence. The Tribunal is to look only to ensure that there is no lack of bona fides and victimization on the part of the management. The Tribunal can over-turn the findings handed over by the Inquiry Officer only if they are perverse. A finding can be said to be perverse in case it is not supported by any legal evidence. If a finding arrived at by the Inquiry Officer is such that no reasonable person could have arrived at that finding on the material before him then also the finding can be said to be perverse. If the finding is not a perverse one, in the said sense, and if there is prima facie evidence to support the finding, the Tribunal cannot refuse to grant approval to the order passed by the management. It is only on finding the principles of natural justice to have been violated or bias by the Inquiry Officer against the employee that the inquiry report is to be disregarded.

16. It is settled law that a finding on an application under Section 33(2)(b) is not *res judicata* if a labour dispute under Section 10 is also raised. Reference in this regard also may be made to **Ram Kumar** (supra), **DTC Vs. Delhi Administration** MANU/DE/7595/2007 and **Bilori** (supra). Thus if the employer seeks approval under Section 33(2)(b) of the Act and the same is granted, the same will not come in the way of the workman raising an industrial dispute qua the termination and/or in the way of the Labour Court in deciding afresh whether the termination of employment is illegal or unjustified. If that be the position, an application under Section 33(2)(b) cannot be decided as a labour dispute and the scope of inquiry under section 33(2)(b) is much narrower.

17. All the aforesaid well settled principles have been given a go by in the present case. In spite of finding the domestic inquiry to be in accordance with the principles of natural justice and sufficient opportunity having been given to the respondent workman and the respondent workman having failed to appear, the Industrial Tribunal proceeded to re-appraise the evidence and which is not permissible in law.

18. Even the said re-appraisal of evidence and finding thereon is contrary to law as now declared in *DTC Vs. Sardar Singh* AIR 2004 SC 4161. The Supreme Court has held that when an employee absents from duty without sanctioned leave it *prima facie* shows lack of interest in work and DTC can on the basis of the record come to a conclusion about the employee being habitually negligent in duties and having exhibited lack of interest in employer's work. It was held that the employee is required to at least 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 was a factor held to establish lack of interest in work. It was further held that mere making of an application after or even before absence from work does not in any way assist the employee concerned. It was held that the requirement is of obtaining leave in advance. Thus what follows is that once absence is established, it is for the workman to prove that such absence was with permission or sanctioned.

19. In the present case the Tribunal held the inquiry to be perverse merely because some leave applications submitted by the respondent workman to DTC were found on record and which record was held to have been available to the Inquiry Officer also. The Tribunal held that in the absence of evidence about the

fate of the leave application it could not be said that the respondent workman was guilty of unauthorized absence. The said reasoning of the Tribunal is contrary to the judgment in *Sardar Singh* (supra). The order dismissing the application under Section 33(2)(b) can thus not be sustained on merits either.

20. The petition is, therefore, allowed. The order of the Tribunal impugned in this petition in dismissing the application of the petitioner DTC under Section 33 (2)(b) is set aside/quashed. Axiomatically, permission under Section 33(2)(b) is granted to the petitioner DTC.

The writ petition is allowed.

No order as to costs.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

**3<sup>rd</sup> May, 2010**  
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