

2013 SCC OnLine Del 681 : (2013) 200 DLT 149 : (2013) 138 FLR
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In the High Court of Delhi
(BEFORE MUKTA GUPTA, J.)

Salora International Ltd. Petitioner
Mr. Anurag Lakhota, Mr. Rishi Kulshreshtha, Advs.

Versus

Sushil Kumar Respondent
Mr. R.K. Uppal, Adv.

W.P. (C) No. 6740/2010

Decided on February 18, 2013

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioner impugns the order dated 13th November, 2002 passed by the learned Labour Court holding that the enquiry conducted by the Petitioner was not fair and proper and the award dated 18th November, 2009 wherein in view of the order dated 13th November, 2002 it was held that the termination of the Respondent was illegal and non-est in the eyes of law and thus he was entitled to continuity in service without any break and to receive all consequential benefits.

2. Learned counsel for the Petitioner contends that the Respondent was transferred to Kashipur where he refused to join and thus it was a clear case of abandonment by the Respondent. Relying upon *Inder Dev Yadav v. National Thermal Power Corporation* 2002 LLR 361 it is contended that the employee cannot decide the place where he has to work and in case the employee does not join at the transferred place, the same amounts to abandonment of service. The abandonment not being a misconduct does not require an enquiry. The reliance of the learned Trial Court on *DTC v. Shri Shishu Pal* 2000 (85) FLR 431 is misconceived as the same is no more good law being based on the decision in *D.K. Yadav v. JMA Industries Ltd.* 1993 (67) FLR 111. *D.K. Yadav* (supra) came up for consideration before the Hon'ble Supreme Court in *Syndicate Bank v. The General Secretary, Syndicate Bank Staff Association* 2000 LLR 689 and it was held that undue reliance on the principles of natural justice by the Tribunal and the High Court led to miscarriage of justice as far as the bank is concerned and in view of the conduct of the employee he was not entitled to any relief, yet the bank was directed to reinstate him with continuity of service. Relying upon *Shri Gian Chand v. Secretary (Labour) Delhi Administration* 1994 LLR

319 it is stated that failure of an employee to comply with the directions of the transfer did not amount to termination but abandonment and since the employee failed to perform the action as directed, the intention can be inferred from the act and conduct of the parties. Even in *Inder Dev Yadav v. National Thermal Power Corporation* 2002 LLR 361 it was held that if the employee failed to comply with the transfer order the name of the employee will be held to be rightly struck off from the rolls. In *U.P. Singh v. Punjab National Bank* 2011 LLR 708 it was held that if the employee fails to report to the Branch office as directed, the employer can draw an irresistible presumption of abandoning the job. It is the admitted case of the Respondent that vide letter dated 29th June, 1992 Ex.WW1/8 his services were terminated due to abandonment and an admitted fact is not required to be proved. Further the Respondent never challenged the transfer to Kashipur and thus he is now estopped from raising the issues which are beyond the terms of reference. Since the Delhi office of the Petitioner did not know about the abandonment letter dated 29th June, 1992 so during the conciliation proceedings the Respondent was asked to join the duties, however he did not report for duty and thus the intention of abandonment is clear. Where the workman does not join at the transferred place and does not challenge the transfer order, the same amounts to abandonment and no enquiry is required for the said purpose. Even if the Petitioner had vide letter dated 29th June, 1992 terminated his services due to abandonment, in view of the offer of rejoining given during conciliation proceedings, the said letter would be deemed to have been recalled. On a charge-sheet being issued, the Respondent did not appear and thus enquiry could not have been held to be not fair and proper. The Respondent in the pleadings never proved that he was unemployed during the interregnum period and thus he was not entitled to back wages. Further once the Respondent was offered reinstatement during the pendency of conciliation proceedings which he declined, the learned Trial Court could not have directed reinstatement of the Respondent. Reliance is placed on *Tej Pal v. Gopal Narain & Sons* 2006 LLR 1142. As held in *ECP Ltd. (now Salora Internaitonal Ltd.) v. Shri Om Prakash Singh & P.O. Labour Court* in W.P. (C) No. 2817/2006 decided by this Court on 28th September, 2007. Any relief granted to a workman who expressly refuses to answer the call of duty would amount to misplaced sympathy. Hence the impugned order and the award be set aside. Lastly it is contended that even if the finding of the Trial Court that the enquiry held was illegal is to be accepted, the learned Trial Court ought to have given the Petitioner an opportunity to adduce evidence to prove the misconduct before it as the Petitioner had already reserved the said right in the

written statement.

3. Learned counsel for the Respondent contended that the Respondent was dismissed from service with effect from 28th September, 1995. It was not a case of abandonment but of dismissal pursuant to an enquiry. In the written statement filed by the Petitioner it is admitted that the Respondent was dismissed from service. Thereafter, learned counsel for the Respondent argued that his services were terminated not pursuant to an enquiry but in view of letter dated 29th June, 1992. Since the Respondent was taking contrary stands, the statement of the Respondent and the counsel was recorded by this Court vide order dated 4th December, 2012 wherein the Respondent clarified that he was not dismissed pursuant to the enquiry but pursuant to the letter dated 29th June, 1992. It is stated that the plea of abandonment was rejected by the Trial Court. Further the workman was called on 29th December, 2010 and when the workman went to the factory, the same was found closed. There is no merit in the petition and the same be dismissed.

4. I have heard learned counsel for the parties and perused the record. The Respondent was appointed as Wireman with the Petitioner on 14th February, 1983. He was transferred to the Kashipur unit of the company with effect from 23rd April 1992 through the letter dated 22nd April 1992. The Respondent did not report for duty at the Kashipur unit but sent a letter dated 29th April, 1992 which was replied by the Management vide letter dated 5th May, 1992 informing him the transfer to be legal and justified and directed him to report for duties at Kashipur. On 29th June, 1992 the Kashipur unit of the Petitioner informed the Respondent that since he has not reported for duty his lien on employment has been lost and it has been deemed that he has left his service himself. Along with the letter dated 29th June, 1992 Ex.WW1/8 a cheque of Rs. 7418.90 paise clearing his account was also sent. The Respondent did not reply, however filed a civil suit against the order of transfer which was dismissed on 15th January, 1994 as being not maintainable. The Respondent filed a claim before the conciliation officer on 15th April, 1994 wherein he stated that his services were terminated with effect from 23rd April, 1992. The Petitioner replied that his services were not terminated but he was transferred to Kashipur and the Respondent could still join the duties at Kashipur unit. On 7th September, 1994 a charge-sheet was issued to the Respondent for willfully flouting the transfer order dated 22nd April,

1992 by the management at Delhi unaware of the letter dated 29th June, 1992 sent by the Kashipur unit. In reply to the charge-sheet, the Respondent stated that he would not join the duties at Kashipur, however he should be taken back in the unit of the company at Delhi and paid full back wages. The Respondent did not join the enquiry and thus on an ex-parte enquiry being conducted, the enquiry officer held that the charges against the Respondent of not reporting at the transferred place and flouting the orders of the management were proved. A show cause notice was issued as to why he be not dismissed from service and finally on 28th September, 1995 the Respondent was dismissed from service. Since no conciliation took place, a reference was sent to the learned Labour Court on the following terms:

"Whether the services of Shri Sushil Kumar have been terminated illegally and/or unjustifiably by the Management, and if so, to what relief is he entitled and what directions are necessary in this respect?"

5. In the claim statement filed, the respondent stated that he was appointed on 14th February, 1983 as a Wireman and his services were terminated on 23rd April, 1992 in view of the transfer from Delhi unit to unit at Kashipur. On 16th March, 1991 the Respondent along with other workman asked for legal benefits and thus on 28th April, 1992 the Respondent was transferred all of a sudden to the Kashipur unit. It is stated that while terminating the services neither notice nor notice pay was given and thus provisions of Section 25F and G of the ID Act were violated. On the basis of pleadings of the parties following issues were framed:

- i. Whether fair and proper domestic inquiry has not been held?
- ii. Whether the services have been terminated illegally and unjustifiably?"

6. In the written statement filed it was stated that the Respondent was dismissed after holding a proper and legal enquiry and the management relied thereupon, however the management also reserved its right and prayed that in case the Court comes to the conclusion that the enquiry was not valid on any ground then the management be permitted to produce evidence in support of the charges before the Court. It was denied that the Respondent was removed on 23rd April, 1992. It was further reiterated that since the Respondent did not join at Kashipur unit, an enquiry was conducted wherein the Respondent did not participate and finally his services were terminated on 28th September, 1995. In the evidence by way of affidavit filed by the Respondent, he produced the letter dated 29th June, 1992 of the Kashipur unit of the Petitioner whereby it was stated that he has lost

the lien on the services and had abandoned the services. In view of this evidence, the Petitioner filed an application before the learned Trial Court on 11th November, 2002 seeking amendment in the written statement which was dismissed on 27th May, 2003 for the reason that the issue of enquiry had been decided against the Petitioner and thus there was no ground for allowing the amendment in the written statement. However the order dated 27th May, 2003 dismissing the application of the Petitioner for amendment in the written statement is not under challenge before this Court.

7. On 13th November, 2002 the issue of enquiry was held against the Petitioner. It was held that according to the management the Respondent/workman was dismissed from services on 28th September, 1995 whereas the Respondent/workman claims that he was dismissed on 23rd April, 1992 and the letter of the management dated 29th June, 1992 states that the Respondent had lost his lien and had abandoned his services. It was thus held that since the Petitioner had unilaterally put an end to the services of the Respondent on 29th June, 1992, there was no fun in instituting the enquiry two years later in the year 1994 which ought to have been conducted before issuance of the termination letter and thus no fair and proper enquiry was conducted. After the impugned order dated 18th February, 2002, the management filed its further affidavit by way of evidence wherein it relied upon its standing orders and stated that the Respondent was transferred to Kashipur unit and since he did not report there, the services of the Respondent were terminated by the Kashipur unit on account thereof.

8. The crucial issue to be looked into in the present case is that despite the admitted case of both the parties that the services of the Respondent were terminated vide letter dated 29th June, 1992 in view of the evidence by way of affidavit of the management and the Respondent exhibiting Ex.WW1/8 the learned Trial Court vide the impugned award simply held the second issue of termination against the Petitioner on the ground that the management had terminated the services on 29th June, 1992 without conducting an enquiry and thus the order of termination was bad in law. No doubt, the issue of enquiry was decided against the Petitioner, however it is well-settled that even in a case where no enquiry has been conducted, the management can prove the misconduct by leading evidence before the Trial Court and the Trial Court is bound to grant that opportunity to the management when the same has been sought for in the written statement. As noted above, in the written statement filed by the Petitioner, though the stand taken was that the Respondent was dismissed pursuant to an enquiry,

however it was specifically pleaded that in case the issue of enquiry was held against the Petitioner they be permitted to prove the misconduct. In the case in hand the Petitioner filed evidence by way of affidavit of Shri Raghunath Singh MW2 on 4th August, 2003 who was also cross-examined on 15th January, 2004. The Respondent in the cross-examination did not dispute the letter Ex.WW1/8, and thus it was the case of the Respondent also that his services were terminated pursuant to letter dated 29th June, 1992 which stand the Respondent and his counsel have reiterated before this Court which has been recorded vide the order dated 4th December, 2012. The learned Trial Court virtually reiterated the order passed by its predecessor on the issue of enquiry and held the termination to be illegal.

9. In *Delhi Cloth and General Mills Co. v. Ludh Budh Singh* (1972) 1 SCC 595 it was held:

"61. From the above decisions the following principles broadly emerge -

"(1) If no domestic enquiry had been held by the management, or if the management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider that evidence so adduced before it, on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by it, in the first instance, and alternatively and without prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more that the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management, are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of

such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as *prima facie* proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic

enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo moto the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference under Section 10 or by way of an application under Section 33 of the Act."

10. Thus, it has been categorically laid down that after the enquiry issue is decided against the management, the evidence is required to be independently considered by the Trial Court in case the management seeks leave to adduce evidence at the appropriate time, which has been done in the present case and only thereafter a finding can be arrived at with regard to the misconduct. During the enquiry of misconduct by the Trial Court it is bound to consider any fresh material that is also placed on record de-hors the disciplinary enquiry material.

11. In view of the legal position not having been adhered to by the learned Trial Court, the impugned award dated 18th November, 2009 is set aside. The matter is remanded back to the learned Trial Court to decide the matter afresh in light of the aforesaid legal position. Parties are directed to appear before the learned Trial Court on 11th March, 2013.

12. Petition is disposed of. Trial Court record be sent back. The amount of Rs. 1,10,000/- so deposited by the Petitioner in this Court, which is lying in the FDR, shall be subject to the final outcome of the matter before the learned Trial Court and the learned Trial Court shall be at liberty to pass necessary directions in this regard.

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