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* IN THE HIGH COURT OF DELHI AT NEW DELHI
% *Reserved on: 16.11.2022*
Pronounced on: 19.01.2023

\+ **W.P. (C) No. 6347/2006 & C.M. Nos. 5244/2006 & 4752/2007**

D.T.C ..... **Petitioner**
Through: Mr. Sarfaraz Khan, Advocate

versus

RAMESHWAR DAYAL & ANR ..... **Respondents**
Through: Mr. Anuj Aggarwal, Mr. Manas Verma and Mr. Shubham Pundhir, Advocates

\+ **W.P.(C) 2631/2007**

RAMESHWAR DAYAL THRU L.R'S ..... **Petitioner**
Through: Mr. Anuj Aggarwal, Mr. Manas Verma and Mr. Shubham Pundhir, Advocates

versus

D.T.C. ..... **Respondent**
Through: Mr. Sarfaraz Khan, Advocate

CORAM:
HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. This Court, proposes to dispose the following two writ petitions, vide the present common Judgment:

    (i) **W.P(C) No.6347/2006 titled as DTC Vs Rameshwar Dayal.** In this Writ Petition, the Petitioner management is challenging the Award dated 31.05.2003 passed by the

Presiding Officer, Industrial Tribunal No.1, New Delhi in ID No.102 of 2001 titled as *The Management of Delhi Transport Corporation and its Workman Rameshwar Dayal (Impugned Award-I)*

(ii) **W.P (C) No. 2631/2007 titled as Rameshwar Dayal through his legal heirs Vs DTC**. In this Writ Petition, the Respondent Workman is challenging the Award dated 21.02.2007 passed by the Presiding Officer, Industrial Tribunal-II, Karkadooma Courts, Delhi in O.P No. 28/1992 titled as *The Management of Delhi Transport Corporation and its workman Rameshwar Dayal (Impugned Award-II)*

2. The Petitioner/Management terminated the service of the Respondent/Workman vide letter dated 17.01.1992 after conducting a domestic enquiry. At that time, a dispute between the Petitioner/Management and its Workmen relating to the implementation of the 4th Pay Commission report was pending before the learned Labour Court. Hence the Petitioner/Management filed an Approval Application under Section 33 (2) (b) of the Industrial Disputes Act, 1947 (**"I.D. Act"**) before the learned Labour Court seeking the permission of the learned Labour Court to terminate the service of the Respondent/Workman. Learned Labour Court vide Award dated 24.02.2001 dismissed the said approval Application and denied the permission to the Petitioner/Management. The Petitioner/Management challenged the said Award dated

24.02.2001 before this Court in W.P.(C) No. 5860/2001. This Court vide order dated 17.11.2005 allowed the said Writ Petition and remanded the matter back to the learned Labour Court for fresh adjudication. In the meanwhile, the Respondent/Workman vide separate proceedings raised an Industrial Dispute, ID No.101/2001 challenging his termination. Learned Labour Court vide Impugned Award-I held that the domestic enquiry conducted by the Petitioner/Management was vitiated and hence directed the Petitioner/Management for the reinstatement of the Respondent/Workman with back wages and continuity of service. It appears that the factum of the Impugned Award-I was not disclosed to this Court or Labour Court -II which was dealing with the approval Application (OP 28/1992) after the same was remanded back from this Court. Hence vide Impugned Award-II dated 21.02.2007, learned Labour Court-II held that the Respondent/Workman is guilty of misconduct and granted permission to the Petitioner/Management to proceed with the termination order. The Petitioner/Management is aggrieved by the Impugned Award-I whereas the Respondent/Workman is aggrieved by the Impugned Award-II.

3. It is also pertinent to mention here that after the passing of the impugned Award-I, the Petitioner/Management was not implementing the Impugned Award-I. Hence the Respondent/Workman filed W.P(C) No. 18476/2004 before this Court, praying, inter alia, for the implementation of the Impugned

Award-1. This Court had taken up all the 3 Writ Petitions together and vide order dated 09.04.2010, directed, *inter alia*, as follows:

> *"W.P.(C) 18476/2004 was preferred by the deceased workman seeking direction for his reinstatement with the DTC subsequent to the dismissal by the Labour Court of the application under Section 33(2)(b) of the I.D. Act preferred by the DTC. However, DTC had challenged the rejection of the application under Section 33(2)(b) and that writ petition was allowed and the matter remanded. The Labour Court on remand has allowed the Section 33(2)(b) application and which order has now been challenged by the workman in WP(C) 2631/2007. In the circumstances, WP(C) No. 18476/2004 filed by the workman claiming reinstatement has become infructuous and is disposed of as such. However, the file of the same be tagged to the file of the other two writ petitions as certain documents filed therein may be required in the disposal of the other two petitions.*
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> *As far as the other two petitions are concerned, the counsel for the legal heirs of Rameshwar Dayal states that he has been newly engaged and seeks adjournment.*
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> *Rule in W.P.(C) 6347/2006 & W.P.(C) 2631/2007…"*

4. Hence, in view of the order dated 09.04.2010 and also because of the fact that both the Awards are pertaining to the same domestic enquiry and misconduct, this Court deems it appropriate to consider both the Writ Petitions together.

FACTS GERMANE FOR THE ADJUDICATION OF THE PRESENT WRIT PETITION ARE AS FOLLOWS:

5. Succinctly, the Workman/Sh. Rameshwar Dayal on 17.07.1972 joined his duty as conductor with DTC/Corporation.
6. The Respondent/workman was issued Charge Sheet dated 20.06.1991 alleging unauthorised absence for the period from 31.03.1991 to 14.04.1991 without any prior information to the competent authority. After conducting the domestic inquiry, the

inquiry officer submitted its report dated 24.09.1991 holding that the Charges are proved. The Disciplinary Authority accepted the enquiry report and vide order dated 17.01.1992, the Respondent was removed from service.

7. At that time, a dispute between the Petitioner/Management and its Workmen relating to the implementation of the 4th Pay Commission report was pending before the learned Labour Court. Hence the Petitioner preferred an application for approval under Section 33 (2) (b) of the I.D. Act before the Presiding Officer, Industrial Tribunal-II, Karkadooma Courts, Delhi in O.P. No.28/1992. However, the approval application of the Petitioner/Corporation was rejected by the learned Labour Court *vide* its Award dated 24.02.2001. It was held that Sh. Rameshwar Dayal/Workman did not commit any misconduct to invite punishment of removal from the Petitioner/Corporation.

8. At this juncture, it is also relevant to note that subsequent to the dismissal of the application under Section 33 (2) (b) of the I.D. Act by the learned Labour Court, the Petitioner/Management challenged the rejection order dated 24.02.2001 passed in O.P. No. 28/1992 before this Hon'ble Court in CWP No. 5860/2001. This Court *vide* its order dated 17.11.2005 allowed the writ petition and set aside the order dated 24.02.2001 and further remanded the matter back to the learned Labour Court.

9. In the meanwhile, the Respondent/Workman raised an industrial dispute with respect to his termination. Pursuant to that, Secretary (Labour) of the NCT of Delhi referred the following reference

before the learned Labour Court *vide* its Notification dated 28.08.2001:-

> *"Whether the punishment imposed upon Sh. Rameshwar Dayal, Son of Sh. Albad Singh by the management vide their orders dt. 17-1-92 is illegal and/or unjustified and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws/Govt. Notifications and to what other relies is he entitled and what directions are necessary in this respect?"*

10. Learned Labour Court on the basis of the pleadings of both the parties framed the following issues:

> *"1. Whether the enquiry held was not proper or valid, if so. Its effect?*
> *2. As per the terms of the reference."*

11. Learned Labour Court *vide* the Impugned Award-I dated 31.05.2003 decided the issues in favor of the Workman/Sh. Rameshwar Dayal and further held that enquiry held against the Workman, was not proper and he was not given full opportunity to defend himself. The learned Labour Court furthermore held that the Workman/Sh. Rameshwar Dayal is entitled to be reinstated with continuity in service with full back wages. Pertinently, the Impugned Award-I was published on 14.07.2003 by the appropriate Government and further became enforceable w.e.f 13.08.2003.

12. However, it appears that the factum of passing of the Impugned Award-I was not brought to the notice of this Court in W. P (C) No. 5860/ 2001. Hence this Hon'ble Court *vide* its order dated 17.11.2005 allowed the writ petition and set aside the Award dated 24.02.2001 and further remanded the matter back to the

learned Labour Court for deciding the approval Application (OP No. 28/1992).

13. Hence in compliance of the directions of this Court, learned Labour Court on remand, *vide* impugned Award –II allowed the approval application preferred by the Petitioner/Management under Section 33(2) (b) of the I.D. Act. It is pertinent to mention here that the Respondent/Workman expired during the pendency of these proceedings and hence his legal heirs were contesting the case on his behalf. After examining the enquiry proceedings, learned Labour Court came to the conclusion that the Respondent/Workman is guilty of misconduct and granted permission to the Petitioner/Management to terminate the service of the Respondent/Workman.

14. The Petitioner/Management is aggrieved by the Impugned Award-I whereas the legal heirs of the Respondent/Workman is aggrieved by the Impugned Award-II.

SUBMISSIONS ON BEHALF OF THE PETITIONER MANAGEMENT

15. Mr. Sarfaraz Khan, learned counsel for the Petitioner/ Management while relying on the Impugned Award-II submitted that the present case is squarely covered by the judgment of the Hon'ble Supreme Court in ***DTC v. Sardar Singh*** reported as ***(2004) 7 SCC 574***. He submitted that the Workman did not give any sufficient explanation for his unauthorized absence from duty for 15 days i.e. for the period 31.03.1991 to 14.04.1991 which is misconduct within the meaning of Para 4 (ii) and 19 (h & m) of the Standing orders governing the conduct of DTC employees.

16. Learned counsel for the Petitioner/Management further submitted that a proper domestic enquiry was conducted as per the rules, regulations and principles of natural justice. The Workman was given full opportunity to defend his case and accordingly after perusing all the material on record the punishment for termination was awarded *vide* order dated 17.01.1992 to the Workman/Sh. Rameshwar Dayal and on the same day one month's wage was also remitted to him by way of money-order. It is also his contention that since the services of the workman was terminated by way of punishment for misconduct, hence the provision under Section 25-F of the I.D Act would not be attracted.
17. It is also the contention of the learned counsel for Petitioner/Management that the Workman/Sh. Rameshwar Dayal was never sincere in his work. The conduct of the Workman in the past as well has not been good. He submitted that the Disciplinary Authority after the receipt of the enquiry report from the Inquiry Officer went through the same and also considered the past record of the workman in which there were 20 adverse entries. The leave record for the past 3 years shows that the Workman/Sh. Rameshwar Dayal was on leave without pay for a period of 408 days besides seeking essential leaves and sick leave which were 33 and 14 in number. Further, in 1988, 1989 and 1990 the workman availed 71 days, 173 days and 164 days leave without pay respectively. Hence, it is clear that the workman was habitual in taking leaves and the principle of leave without pay was only to correct the records and it was in no way an approval

of the action/misconduct as committed by the individual employee. Further, despite several warnings and penalties, the Workman never took any interest in his work and remained habitually negligent. He also remained unauthorized absent from duty for 15 days i.e. for the period 31.03.1991 to 14.04.1991.

18. Mr. Khan also contended that the learned Labour Court in passing the Impugned Award-I dated 31.05.2001 did not follow the correct procedure as per the industrial law relating to domestic enquiries. He further submitted that the issue with regard to the validity of the Domestic Enquiry should have been decided first before investigating into merits of the case.

19. Learned counsel for the Petitioner/Management while relying on the Impugned Award-II submitted that under Section 33 (2) (b) of the I.D. Act, the learned Labour Court has to consider as to whether *prima facie* case has been made out by the employer for dismissal of the employee. Further, he submitted that in case the enquiry has been conducted after giving due opportunity to the workman, and the principles of natural justice have been complied with, the learned Labour Court ought to give permission on the approval application which has rightly been done by the learned Labour Court in the present case.

20. It was his contention that the learned Labour Court *vide* the Impugned Award-II rightly rejected the contention of the learned counsel for the Workman that he had filed any application prior to 15.04.1991 for seeking leave or there was any prior information regarding his absence. Further, the learned Labour Court also

rightly rejected the arguments on behalf of the workman that since the absence was treated as leave without pay, which meant that leave was granted and it did not show or mean that the long absence was to be construed as lack of interest in the work. Pertinently, it is necessary for the workman in case of sudden illness that he shall send intimation to the Petitioner/Management immediately and if his illness lasts or is expected to last for more than 3 days at a time. The application for leave should be duly accompanied by a medical certificate from a registered medical practitioner or the medical officer of the Petitioner/Management. It is clearly seen that the workman failed to prove that he had given any advance intimation either on telephone or by sending an application.

21. Learned counsel for the Petitioner/Management relied on the judgment of the Hon'ble Supreme Court in ***Maan Singh v. Union of India and Others*** reported as ***2003 (3) SCC 464*** and submitted that, the Apex Court in this judgment has held that the action of the Disciplinary Authority in dismissing the employee is justified, if there was unauthorized habitual absence from duty for long periods on several occasions.

22. Further, the reply filed by the Petitioner/Management in W.P (C) 2631 of 2007 reveals that the payment upto April 2004 was made through attachment, in which only the calculation of the wages was submitted before the concerned authority and not the EPF and since now the approval application has been granted by the

learned Labour Court vide the Impugned Award-II, nothing has to be paid to the Workman.

23. With these submissions, learned counsel for the Petitioner/Management prays for setting aside of the Impugned Award-I.

SUBMISSIONS ON BEHALF OF THE RESPONDENT/WORKMAN

24. Learned Counsel for the Workman, Mr. Anuj Aggarwal while relying on the Impugned Award-I elaborated his submissions in 5 limbs.

25. *Firstly*, it was his contention that the enquiry conducted by the learned Labour Court stood abated due to death of the Workman/Sh. Rameshwar Dayal. To substantiate his arguments, he relied on the judgment of the Lahore High Court in ***Mst. S. Yasmin v. Pakistan Railways, etc.,*** in *W.P No. 16949 of 2014* decided on 23.06.2016 and also on the judgment of this Court in ***Neeraj v. Air India Ltd***., reported in ***2017 SCC OnLine Del 11645***.

26. *Secondly,* he submitted that the material before the learned Labour Court cease to be "material on record" and the Corporation/DTC failed to lead and prove the misconduct by filing fresh documents/evidences before the learned Labour Court. For this the counsel for the Respondent/Workman relied on the judgment of the Hon'ble Supreme Court in ***Neeta Kaplish v. Presiding Officer*** reported as ***(1991) 1 SCC 517***.

27. *Thirdly,* he submitted that the deceased Workman/Sh. Rameshwar Dayal has not committed any misconduct whatsoever. He further

assertively submitted that 'absence from duty' is not misconduct and it is only 'willful unauthorized absence' which amounts to misconduct. In the present case, the workman, was undisputedly suffering from acute dysentery and due to the said reason he was unable to attend his duty from 31.03.1991 to 14.04.1991. He furthered his submissions by submitting that the medical certificate, as submitted by the workman on 15.04.1991 along with the leave application, has not been disputed by the Petitioner/Management. He also submitted that neither the Enquiry Officer nor the learned Labour Court has disputed the authenticity of the said medical certificate. Consequently, there is no 'willful unauthorized absence' on the part of the deceased workman/Sh. Rameshwar Dayal. For that, he relied on the judgment of the Hon'ble Apex Court in ***Krushnakant B. Parmar v. Union of India and Anr.*** reported as ***(2012) 3 SCC 178*** and the judgment of this Court in matter of ***DTC v. Om Singh*** reported as **2007 SCC OnLine Del 1204**.

28.Mr. Aggarwal submitted that the enquiry conducted by the Inquiry Officer was not in accordance with the principles of natural justice as a workman has right to avail leave without pay. The entry of leave without pay was also made in his service, and he has not committed any misconduct. As such his termination amounts to retrenchment which is bad and illegal and is in violation of Section 25-F and 25-G of the I.D Act.

29.*Fourthly*, he submitted that the past record of the deceased workman cannot be taken into consideration in the present case

because the alleged misconduct i.e., the 'willful unauthorized absence' from duty has not been proved by Petitioner/Management, neither before the Inquiry Officer nor before the learned Labour Court. He also substantiated this limb by relying on the judgment of this in ***Shirani Devi v. The management of M/s Delhi Transport Corporation*** in *LPA 484 of 2017* decided on 10.01.2019.

30.*Fifthly*, he contended that the termination of the services of the Workman/Sh. Rameshwar Dayal was in violation of Section 33(2) (b) of the I.D Act. He further submitted that the LRs of the deceased Sh. Rameshwar Dayal are entitled to all the consequential benefits, including full backwages. For that, he relied on the judgment of the Hon'ble Supreme Court in ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and Anrs.*** reported as ***(2002) 2 SCC 244***.

31.*Lastly,* he prayed that if in any case, if this Hon'ble Court comes to the conclusion that the Workman/Sh. Rameshwar Dayal is guilty of the alleged misconduct, no recoveries be made from the LRs of the deceased workman. He substantiated this contention by relying on the judgment of the Hon'ble Supreme Court in ***State of Punjab and Ors. v. Rafiq Masih and Ors.*** reported as ***(2015) 4 SCC 334***.

32.Further, it was also admitted by learned counsel for the Workman that the deceased workman had filed application for implementation of the Impugned Award-I and recovery certificate dated 05.12.2003 was issued and the workman received payment

up to April 2004, through attachment proceedings before the Labour Commissioner and the concerned S.D.M.

LEGAL ANALYSIS

33. This Court had heard the arguments advanced by the learned counsels for both the parties and perused the documents on record and Judgments relied upon by the parties.

34. Before adverting to the facts of the present case, it is important to examine the law regarding Section 33 (2) (b) and Section 10 of the I.D. Act. Learned Single Judge of this Court in ***W.P (C) No.3633/2004*** titled as ***DTC Vs Shyam Lal*** examined the scope of Section 33(2) (b) and Section 10 of the Industrial Disputes Act. 1947. It is profitable to reiterate the discussion of the learned Single Judge in this regard:

> *"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.*
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> *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 whereto 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 thereform. 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."

35. Hence from the perusal of the above stated Judgment, it is clear that the scope of enquiry under Section 33(2) (b) and Section 10 of the I.D. Act are different and distinct. Enquiry under Section 33(2)(b) of the I.D. Act is only to oversee the dismissal to ensure that no unfair labour practice or victimization has been practiced. Hence the findings recorded by the learned Labour Court during the enquiry under Section 33(2) (b) of the I.D. Act regarding the validity of the domestic enquiry is only a *prima facie* view and not a final view. The veracity of the domestic enquiry conducted by the Petitioner/Management and the misconduct of the Respondent has to be examined in a proceeding arising out of

Section 10 of the I.D. Act. Proceedings under Section 33(2)(b) of the I.D. Act cannot be termed as a substitute for the proceedings under Section 10 of the I.D. Act.

36. Based on this legal principle, this Court proceeds to examine the facts of the present case. Impugned Award-I is arising out of Section 10 of the I.D. Act proceedings whereas Impugned Award-II is arising out of the proceedings under Section 33 (2) (b) of the I.D. Act. Vide the impugned Award-I, the learned Labour Court held that the Respondent/Workman is not guilty of any misconduct. Hence, after the passing of impugned Award-I, the approval Application OP No.28/1992 itself has become infructuous and it ought not to have been proceeded with.

37. Learned Labour Court, while passing the impugned Award-I, was not aware of the fact that the Petitioner/Management already challenged the Award dated 24.02.2001, whereby the approval application was rejected, before this Court in W. P. (C) No.5860/2001. By the passing of the impugned Award-1, the approval application, O.P No. 28/1992 itself has become infructuous. Hence the W.P (C) No. 5860/2001, which was arising out of OP No. 28/2001 had also become infructuous. However, both the parties miserably failed to point out before this Court in W. P. (C) No. 5860/2001 that the impugned Award-I arising out of Section 10 of the I.D. Act is already passed. Hence this Court vide order dated 17.11.2005 remanded the matter back to the learned Labour Court-II for fresh examination of the approval Application O.P No.28/1992. Both the parties failed to

point out before the learned Labour Court-II also that industrial dispute arising out of Section 10 of the I.D. Act had already culminated into an Impugned Award-I. Hence the learned Labour Court-II conducted a full-fledged enquiry and held that the Respondent/Workman is guilty of misconduct. All these proceedings were arising out of the approval application being O.P. No.28/1992, which had already become infructuous by the passing of Impugned Award-I. This Court deprecates the conduct of both the parties which led to the wastage of considerable judicial time.

38. Be that as it may, the opinion expressed by the learned Labour Court under Impugned Award-II regarding the misconduct of the Respondent/Workman can be termed as '*prima facie*' view and not final view.

39. Whereas in the impugned Award-I, the learned Labour Court examined the validity of the domestic enquiry and the misconduct committed by the Respondent/Workman in detail. Learned Labour Court examined as to whether there was negligence or lack of interest on behalf of the deceased Workman in performing his duties. It is expedient to examine the charge sheet on the basis of which the Workman has been held liable for misconduct. Relevant part of the charge sheet dated 20.06.1991 issued to the Respondent/Workman is reproduced hereunder:

> *"You were found absent for 15 days from your duty from 31.3.91 to 14.4.91 without prior information and permission of Competent Authority which shows your being uninterested in the services of Corporation.*

Your above said act is a misconduct under Section 4 (11), 19 (h) and 19 (m) of standing orders of DRTA which governed the duties of employees of the Corporation.

Copy of report upon which charge sheet is based on is attached. Copy of your past record is attached. Your past record will be considered at the time of passing of final order.

If you want personal hearing in the matter then apply for the same in your explanation. Your explanation must be reached in the office of undersigned within 10 days after receiving this charge sheet. If you want to see any document of reliance, which is available in record, then report to undersigned within 24 hours after receiving this charge sheet."

40. A bare perusal of the charge sheet reveals that the allegation against the Respondent/Workman was that he was absent for a period 15 days from his duty without prior information, which shows him being uninterested in the services of the Petitioner Management. It is further stated that the absence without information and permission amounts to misconduct under Section 4 (11), 19 (h) and 19 (m) of the Standing Orders of DRTA. Furthermore, it is also stated that the past record of the workman would also be considered at the time of passing the final order and a copy thereof is also attached to the chargesheet. In reply, the Respondent/Workman submitted that he had sent an application for leave through his blind brother who gave the said application to some person at the gate of Kalkaji Depot. Further, he also gave his medical and fitness certificate along with his application on the day he resumed his duty i.e. 15.04.1991.

41. Hence it is evident that as soon as he joined back in service on 15.04.1991, he submitted an application along with his medical

and fitness certificate. Pertinently, no orders were passed as to the acceptance or rejection of this application.

42. This Court in the matter of ***Om Singh*** **(supra)** has faced with a similar situation as in the present case, wherein ***Sardar Singh*** **(supra)** was distinguished and it was held that immediately after having remained absent for 14 days, the workman had submitted an application for leave supported by a medical certificate. The said application was neither rejected nor any order was passed by the Management therein. Relevant portion of the said Judgment reads, inter alia, as follows:

> *"5. The period of absence was also 14 days, which stand explained by the application submitted by the respondent while reporting for duty on 11th June, 1992. It was necessary for the appellant to act upon the said application either way. It is true that in the charge sheet, reference was made to the past records but the same was for the purpose of passing the final order. The specific charge was salient in this regard. It appears that the respondent was warned sometime in 2004 for not stopping the bus inspite of request by passengers at the bus stand. This was the only document of past conduct enclosed with the charge sheet. No documents that the respondent was a habitual absentee in the past was enclosed with the charge sheet filed before the industrial adjudicator.*
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> *xxx*
>
> *8. Considering the facts and circumstances of the case, we are of the considered opinion that it cannot be said that any interference by the appellate Court is called for. There are no valid grounds for reversing the orders passed by the industrial adjudicator and the learned Single Judge. At this stage, learned Counsel relied upon the decision of the Supreme Court in DTC v. Sardar Singh reported in 2004 (6) 613. In our considered opinion, the facts in the said case are distinct and different from the case in hand. In the present case immediately after having remained absent for 14 days the respondent had submitted an application for leave supported by a medical certificate. The said application has not been rejected by*

> *the appellant and no order has been passed. The facts in detail have been stated above."*

43. The Respondent/Workman was absent from duty for 15 days, however, he had valid reason for the said period of absence. Further he submitted his leave application with medical certificates as soon as he joined back in service. However, the Petitioner/Management failed to consider the same. Hence the Petitioner/Management has failed to prove the misconduct as alleged against the Respondent/Workman.

44. Further, perusal of the enquiry report also reveals that no document showing the past record was produced before the Inquiry Officer and the same has also not been dealt by him in the report. It was only the Disciplinary Authority who gave some observations on the past record, but it was not coupled with any evidence. The relevant portion of the order of the disciplinary Authority reads, *inter alia*, as follows:

> *"I have thoroughly studied the complete case file, and the report given by the Enquiry Officer in the matter of Charge sheet against Shri Rameshwar Dayal, Conductor, B. No. 8189.1 am in complete agreement with the views expressed by the Enquiry Officer showed in the Investigation result. Shri Rameshwar Dayal, Conductor, B. No. 8189 is fully guilty in this matter, 1 studied the past record also of the accused in which there are 20 entries out of which one entry of taking leave without pay and five entries are related to be for being absent without any intimation from his duty. The past leave record of the accused was also seen in which the accused in the your 1988 took 71, in 1989 = 173, and in 1990 has taken 164 days leave, without pay. From this it is clear that the accused does not take interest in the work of the Nigam. There is nothing appropriate to keep such employee in the services of the Nigam. Hence in my temporary view, 1 propose the punishment of removal of Shri Rameshwar*

Dayal, Conduct, B. No. 8189, from the services of this Nigam, in this matter, for which show cause notice may be issued to him.

Sd/-
Depot Manager."

45.The instances of past conduct would only be relevant if the misconduct is proved, which has not been done in the present case as the Workman immediately after resuming his duties has submitted his leave application along with his medical and fitness certificate. This Court in the matter of ***Shirani Devi and Ors.*** **(supra)**, categorically held that past conduct in a case would only be relevant if the misconduct is proved and states as follows:

> *"22. Learned counsel for the DTC then sought to suggest that there were past instances of misconduct of the Appellant which justified the punishment of removal from service. With the DTC not having been able to prove the misconduct of the Appellant, the question of quantum of punishment does not arise. The instances of past misconduct would be relevant only if the misconduct in the present case is proved. The past instances cannot constitute proof of misconduct in the present instance. That had to be proved by leading credible evidence which the DTC failed to do."*

46.Learned Labour Court dealt with these aspects in detail in the impugned Award-I dated 31.05.2003. Relevant part of the Impugned Award-I is reproduced hereunder:

> *"13. As such, it is apparent that the copy of his past record was not annexed with the charge sheet. It is further clear that his past record will not be a consideration of a factor while arriving at the conclusion that he is not interested in the work, but will be considered only at the time of final orders i.e. to say that the adverse conduct if any, was not a part and parcel of the charged. The workman was not called upon to explain or defend the same.*

14. The perusal of enquiry proceedings and repots as proved by MW1 shows that during the enquiry only one witness was examined who has simply stated that the workman remained absent without information for the period 31-3-91 to 14-4-91 regarding which he had not sent any information to the office of the Management. There is no statement for the period for the period from 10.04.1991 to 14.04.1991 as mentioned in the charge sheet. Enquiry proceedings further reveals that the report was not produced during the enquiry. Further, the witness was not chosen to be cross examined. No further witness on any other aspect was examined, meaning thereby that the past record was not produced as evidence during the enquiry.

15. In the enquiry report also the enquiry officer had not at all dealt with or has made any observation regarding the past record and after disbelieving the version of the workman that he was compelled to take leave because of his illness and that he had sent applications through his brother, on the ground that if the workman was so ill than instead of getting himself treated at a Private Hospital he should have got treated in Govt. Hospital, returned a finding that the charge stands proved. There is no averment by any witness that the conduct of the workman amounts not taking interest in the work of the management. Nor such a finding had been returned by the enquiry officer that because of remaining absent for 15 days, the conduct amounts to not taking interest in the work of the management.

16. Perusal of record further shows that the disciplinary authority took into consideration, the findings of the enquiry officer as well as the past record of the workman and issued a show cause notice dated 25-1-91 Ex. MWl/2, but even in the same the workman had not been called upon to explain his past conduct. Nor there is a mention that because of the past conduct the punishment proposed is just and sufficient.

17. It may not be out of place to mention here that the purpose of issuance of show cause notice is two-fold. One is to give an opportunity to the workman, to dispel the findings given by the enquiry officer and secondly to make his submissions with regard to the proposed punishment and in the present case, the show cause notice do not serve the purpose for which it is required to be served.

> *18. It may not be out of place to mention here that MWl had admitted in his cross examination that the workman had submitted an application on 15-4-91 along with medical certificate, but as per the record produced by the management, no orders were passed accepting or rejecting the same and simply the same was put in his leave record.*
> *19. In view of the facts that the workman had moved an application stating grounds of medical illness after availing the leave and the said application was not disposed off, and in view of the fact that the past service record of the workman never formed a part and parcel of the charge sheet, nor the workman was asked to explain or defend the same, and in view of the fact that such a past record was never supplied to the workman and was not relied upon during the enquiry and even do not form part and parcel of a show cause notice, the findings that because of absence for 15 days for which the application submitted was undecided, cannot be sustained. Coupled with the fact that approval application filed by the management was dismissed and no writ petition has been filed by the management against the same meaning thereby that the workman continues to be in deemed service of the management because of declining of approval and the order of termination becoming honest, it is held that the enquiry held against the workman was not proper as he was not given the full opportunity to defend himself nor the charges stood proved against him. Issue No. 1 is decided against the management.*
> *20. Since, there is no stand of the management in the written statement that in case enquiry is vitiated it be allowed to prove the charges by leading evidence before this Tribunal and even otherwise there being a basic defect in the charge sheet itself, no such permission can be granted. The workman is entitled to reinstatement with continuity of service."*

47.This Court also fully subscribes to the views of the learned Labour Court as expressed in the Impugned Award-I and there is no impunity or perversity in the impugned Award-I. Therefore, this Court, while exercising jurisdiction under Article 226 of the Constitution, is not inclined to interfere with the findings of the

learned Labour Court. Hence, impugned Award-I is hereby upheld and W.P (C) No. 6347/2006 is hereby dismissed.

48. It is clarified that on account of the death of the Respondent/Workman, the Legal heirs of the deceased workman is entitled to entire back wages with all other consequential benefits, calculated on the notional basis.

49. As discussed herein above, the impugned Award-II grants permission to the Petitioner/Management to proceed with the termination order. However, the termination order itself was set aside by the learned Labour Court vide the impugned Award-I. Hence the approval application, OP No.28/1992 itself had become infructuous. Learned Labour Court ought not have been proceeded with the OP No.28/1992. However, due to the callous and negligent attitude of the parties, the impugned Award-I was not brought to the notice of this Court or learned Labour Court. Since OP No.28/1992 was infructuous, the writ petition arising out of the impugned Award-II, i.e. W.P (C) No. 2631/2007 has also become infructuous.

50. In view of the detailed discussions herein above, W.P (C) No.6347/2006 is hereby dismissed on merits. W.P.(C) No.2631/2007 is dismissed as infructuous. No order as to costs.

GAURANG KANTH, J.

JANUARY 19, 2023
PS