

(2010) 05 DEL CK 0260

Delhi High Court

Case No: Writ Petition (C) 4551 of 1998

Ram Krishan and Others

APPELLANT

Vs

D.T.C. and Another

RESPONDENT

Date of Decision: May 26, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 2, 25F

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Meenu Mainee, for the Appellant; Alok Shankar, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.

The nine writ petitioners, by this writ petition impugn the award dated 10th August, 1998 of the Labour Court holding the termination of services of the petitioners by the respondent No. 1 DTC to be legal and valid and finding the petitioners to be not entitled to any relief. Notice to show cause as to why the petition be not admitted was issued. The respondent No. 1 DTC has filed a counter affidavit to the petition. Rule was issued on 5th July, 2000. The parties were sent to the Lok Adalat of this Court but no settlement could be arrived at. The writ petition was dismissed for non-prosecution on 25th August, 2009. C.M. No. 12731/2009 was filed for restoration. On 7th May, 2010 it was clarified that the said application shall be considered when the counsels are ready to address on the merits of the case. The counsels for the parties have been heard. Accordingly, C.M. No. 12731/2009 for restoration of the writ petition dismissed for non-prosecution on 25th August, 2009 is allowed and the writ petition restored to its original position.

2. The nine petitioners along with nine other persons filed a joint claim statement before the Labour Court. It was their case that they were employed as Linemen with

the respondent No. 1 DTC on different dates between the years 1980-82; that on 21st July, 1984 the respondent No. 1 DTC offered to them the post of Junior Clerk; that as per the offer letter, the petitioners were required to clear a qualifying typing test within two years therefrom. The petitioners accepted the offer on the terms contained in the offer letter. The petitioners however failed to clear the typing test and were terminated from employment. It is the contention of the petitioners that the clause in the letter aforesaid requiring them to clear a typing test was superfluous inasmuch as the work of a Junior Clerk for which they were employed, did not require any typewriting work inasmuch as for typing, there are other posts of Stenographers & typist clerks. The petitioners also contend that the action of the respondent No. 1 DTC is discriminatory inasmuch as a large number of other Junior Clerks, who also had not cleared the qualifying typing test, had been regularized. It was yet further the case of the petitioners that in a number of other cases, exemption from qualifying the typing test had been granted by the respondent No. 1 DTC. They further pleaded that the provisions of Section 25F of the ID Act, had not been complied with for the termination of their services.

3. The respondent No. 1 DTC contested the aforesaid claim pleading that the initial appointment of the petitioners as Linemen was on ad-hoc basis and there is no regular post of Linemen; that the petitioners were absorbed in the cadre of Junior Clerk subject to the condition of their qualifying a typewriting test within two years; that the petitioners had accepted the said condition of appointment and now cannot challenge the same. The respondent No. 1 DTC further contended that exemption from typing test under the Service Rules could be granted only to the physically handicapped candidates, who produced certificate of their handicap issued by the concerned authorities.

4. The Labour Court did not accept the contention that the petitioners were not required to do any typing work or that the condition in the appointment letter to the said effect was arbitrary. It was held that the post of a Junior Clerk is like the post of LDC; in all Government offices LDCs are appointed after taking typing test and/or are required to do typing. The Labour Court further held that the petitioners, after having availed the benefit of such condition in the appointment letter could not challenge the same. No case of discrimination was also found. It was held that the exemption from qualifying the typing test granted to the handicapped persons and/or the persons employed in sports quota was justified and the petitioners were not equally placed as the physically handicapped persons and the persons coming through the sports quota. Section 25F was held to be not applicable for the reason of the termination of the services of the petitioners not being by way of retrenchment.

5. The counsel for the petitioners has at the outset contended that even as per the letter of appointment, the services of the petitioners were only "liable to termination" if they failed to pass the typewriting test within a period of two years

from the date of their appointment and were to be not necessarily terminated, upon the petitioners failing to pass the typewriting test. It is contended that from the evidence on record it is clear that relaxation had been granted by the respondent No. 1 DTC to others. It is contended that the petitioners are out of job since the year 1986 and are suffering great hardship. Attention is invited to the order dated 1st October, 2002 in C.W. 6204/2000 titled Raj Srivastava v. D.T.C. and Anr. in which reference is made to an office order dated 22nd November, 1978 of the DTC. As per the said officer order, the Junior Clerks, who had completed the period of probation were to be treated as regular, waiving the condition of the typewriting test. This Court vide order dated 1st October, 2002 (supra) directed benefit of the said office order to be extended to Raj Srivastava, the petitioner therein. It is contended that the petitioners in the present case are also entitled to a similar order as in that writ petition. It has been enquired from the counsel for the petitioners as to whether the petitioners had before the Labour Court placed reliance on any such office order. The counsel has fairly conceded that no reliance on the said office order was placed before the Labour Court. The said office order does not find mention in the award of the Labour Court. The petitioners did not refer to the said office order in the writ petition or in any subsequent affidavit. Resultantly, the respondent No. 1 DTC has not had any occasion to respond to the same.

6. This Court is of the opinion that the judicial review under Article 226 of the Constitution of India, does not entitle this Court in the aforesaid facts to allow new material to be taken into consideration and on which the respondent DTC has not had any occasion to respond. The pleadings in the Raj Srivastava case are also not before this Court. From the order dated 1st October, 2002 in the Raj Srivastava case, it is not clear whether it is an entire office order dated 22nd November, 1978, which is recorded therein. The petitioners have been out of employment of the respondent No. 1 DTC as aforesaid since the year 1986 and it is now not deemed expedient to allow a new factual controversy to be raised. The Supreme Court recently in [Ramesh Kumar Vs. State of Haryana](#), held that a plea raised for the first time before the High Court and that too only during the arguments ought not to have led the High Court to interfere with the factual finding rendered by the Labour Court. To the same effect is the dicta of the Division Bench of this Court in [Mitahn Lal Goel and Another Vs. R.K. Baweja and Another](#), holding that a plea requiring an investigation of fact cannot be raised before the High Court for the first time. Thus no reliance can be permitted to be placed on the aforesaid order dated 1st October, 2002 of this Court in the Raj Srivastava case or on the office order mentioned therein.

7. The counsel of the petitioners states that Raj Srivastava was similarly placed as the petitioners. The counsel for the petitioners contended discrimination on this ground as well. However, this Court is unable to find the name Raj Srivastava in the order of reference of the dispute to the Industrial Adjudicator from which this petition has arisen. It is also not known whether there was any interim order in favour of Raj Srivastava. In the present case, there is none. There can be no

discrimination on the basis of material not placed at the appropriate time.

8. The counsel for the petitioners has further contended that the petitioners have been discriminated qua others. It is contended that the witnesses of the respondent No. 1 DTC in cross-examination admitted that exemption had been given to certain persons from clearing the typing test but did not volunteer that the said persons fall in the exempted categories. The counsel for the petitioners in cross-examination of the witness aforesaid of the respondent No. 1 DTC ought to have put that the exempted persons did not fall in the handicapped or the sports category but did not do so. In the absence of the petitioners' in the cross-examination having elucidated complete facts in this regard, the award cannot be interfered with on the basis of surmises and conjunctures. There is no material before this Court to determine whether the said persons fall in the exempted categories or not.

9. The findings of the Labour Court are findings of fact. No case of discrimination has been held to be made out. There is nothing to show that the finding of the Labour Court is a perverse finding or a finding contrary to the material on record. The view formed by the Labour Court on the basis of the evidence lead, is a possible view on the available material and the Legislature having not provided for the remedy of appeal against the order of the Labour Court, this Court in the exercise of discretion under Article 226 of the Constitution of India would not interfere on such grounds.

10. As far as the contention of the counsel for the petitioners of the appointment letter only making the services of the petitioners "liable to termination" and not for automatic termination is concerned, in the opinion of this Court, the intent of the letter was that the petitioners were given probation/contingent employment subject to clearing the typing test. The petitioners if aggrieved by the condition ought to have challenged the same. The petitioners accepted the same condition and attempted to clear the typing test but failed in the same. It is apparent that the petitioners were aware that to be entitled to continue in employment they were required to clear the typing test. The view of the Labour Court that the petitioners having taken advantage of the said letter and having gained appointment, even though under probation or contingent, under the respondent No. 1 DTC cannot now be permitted to challenge such a condition is also not capable of interference in these proceedings. The offer letter is quite clear. The appointment was purely temporary. The petitioners were to be on probation for one year. They cannot now be heard to say that inspite of their failing in the typing test, a decision to terminate or not to terminate them was required to be taken. The counsel for the petitioners has also drawn attention to the chapter in Swamy's Complete Manual on Establishment and Administration for Central Government Offices, relating to "typewriting test for LDC in subordinate and attached offices and confirmation". However there is nothing to show that the same is applicable to the respondent No. 1 DTC. The same provides for grant of exemption from typing test. Whether to grant

such exemption or not is an executive decision and this Court cannot issue a mandamus to the respondent No. 1 DTC to grant exemption to the petitioners from the typing test and to which the parties had agreed. The Division Bench of this Court in [Ram Kumar Vs. M.C.D. and Others](#) relying on various dicta of the Supreme Court, held that even a non statutory executive order/notification is not enforceable by a writ of mandamus. Moreover, the challenge of the petitioners to non-grant of exemption to them on the ground of discrimination has not been upheld. The petitioners thus cannot contend otherwise now.

11. The counsel for the petitioners lastly contended that the condition for clearing of the typing test is against the principles of natural justice. The said argument cannot be understood. It was upto the respondent No. 1 DTC to decide the qualifications which are required from its LDCs. There can be no breach of the principles of natural justice in the respondent No. 1 DTC insisting on those seeking employment with it, qualifying the typing test.

12. This Court also does not find any error in the order of the Labour Court insofar as it held no case of retrenchment to have been made out. The appointment of the petitioners as aforesaid was temporary on probation and contingent. Upon the petitioners failing to qualify the typing test within the time agreed as per the contract between the petitioners and the respondent No. 1 DTC their employment/contract automatically came to an end and the case is covered by Section 2(oo)(bb) of the ID Act.

13. There is no merit in the petition, the same is dismissed. No order as to costs.