

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

+ **W.P.(C.) No. 10211/2005**

Judgment Reserved on: 26.08.2009

% **Judgment Delivered on: 31.08.2009**

SUDHIR SHARMA Petitioner

! Through: Mr. N.D. Pancholi, Advocate.

Versus

\$ NATIONAL GANDHI MUSEUM Respondent

^ Through: Mr. Ajay Kumar Tandon, Advocate.

CORAM:

HON'BLE MR. JUSTICE S.N. AGGARWAL

1. Whether reporters of Local paper 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**

S.N.AGGARWAL, J (ORAL)

The petitioner in this writ petition has prayed for issuance of a writ of mandamus or any other appropriate writ or directions against the respondent and to declare the order of his compulsory retirement passed by the respondent on 16.09.2004 as non-est and inoperative as no approval was taken by the respondent from the Industrial Tribunal-III under Section 33(2)(b) of the the Industrial Disputes Act, 1947 in a pending industrial dispute in I.D. No. 63/2004. The petitioner has also prayed for consequential directions against the respondent directing it to reinstate him in service with full back wages and other benefits w.e.f. 16.09.2004.

2. Briefly stated the facts of the case relevant for the disposal of this

writ petition are that the petitioner was appointed as a Museum Assistant in the National Gandhi Museum of the respondent on 02.01.1997. On 14.06.2002, the Director of the respondent had abolished the option for the employees of the respondent for compensatory leave for duties on National and Gazetted Holidays against the wishes of the employees of the Gallery Section. The employees of the Gallery Section of the respondent were agitated against the abolition of the option and they registered their protest against the same. On 28.06.2003, the employees of the Gallery Section of the respondent passed a Resolution to raise an industrial dispute under the Industrial Disputes Act, 1947 for restoration of the option of compensatory leave and authorised the petitioner to pursue the dispute and represent them before the labour authorities. On 02.01.2004, the respondent issued a charge-sheet to the petitioner and proposed the punishment of compulsory retirement in the charge-sheet alleging that he had assaulted the Assistant Director of the respondent in the office.

3. Aggrieved therefrom, the petitioner had filed a writ petition being W.P.(C.) No. 478/2004 in this Court and had challenged the charge-sheet and the proposed punishment of compulsory retirement as it was proposed without holding any inquiry. In that writ petition, the respondent gave a statement to the Court that it will hold a fair inquiry against the petitioner and in view of the said statement made on behalf of the respondent, the above-mentioned writ petition filed by the petitioner was disposed of by this Court vide its order dated 12.07.2004 reserving liberty for the petitioner to challenge the outcome of the inquiry and the punishment, if awarded to him.

4. In the meanwhile, the appropriate Government referred the dispute

of compensatory leave between the parties on 27.05.2004 for adjudication to the Industrial Tribunal-III. During pendency of the said industrial dispute before the Industrial Adjudicator, the respondent passed an order of compulsory retirement against the petitioner on 16.09.2004 as he was found guilty of the charges by the Inquiry Officer. On 23.09.2004, the respondent had filed an approval application for approval of compulsory retirement of the petitioner w.e.f. 16.09.2004 under Section 33(2)(b) of the Industrial Disputes Act, 1947. The petitioner had filed his reply to the said approval application. However, the approval application under Section 33(2)(b) was withdrawn by the respondent on 08.12.2004 as it was of the view that no approval under Section 33(2)(b) was required for compulsory retirement of the petitioner.

5. After application under Section 33(2)(b) was withdrawn by the management, the petitioner approached the Chairman of the respondent on 08.12.2004 and also personally met other members of the Executive Committee of the respondent society from time to time and requested them to take him back on duty with back wages but the respondent refused to pay any heed to his said request and hence he has filed the present writ petition for directions to the respondent to take him back on duty and give him back wages w.e.f. the date of his compulsory retirement, i.e., 16.09.2004 as no approval under Section 33(2)(b) was obtained by the petitioner for imposing punishment of compulsory retirement on him during the pendency of the industrial dispute vide ID No. 63/2004 regarding abolition of compensatory leave in lieu of duties done by the employees on National and Gazetted Holidays. The petitioner has alleged in the writ petition that since the application for approval under Section 33(2)(b) filed by the respondent was withdrawn

by it on 08.12.2004, he is deemed to have continued in the service of the respondent in view of the Full Bench judgment of Hon'ble the Supreme Court in the matter of ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.***

Versus Shri Ram Gopal Sharma and Others, AIR 2002 SC 643.

6. In response to notice of this writ petition, the respondent has filed its counter affidavit and has taken a stand that the petitioner is not entitled for reinstatement or back wages in view of punishment of compulsory retirement imposed on him vide order dated 16.09.2004 after he was found guilty of assaulting the Assistant Director of the respondent in the office in domestic inquiry held against him. As per the respondent, it was not required to obtain the approval under Section 33(2)(b) for compulsory retirement of the petitioner because according to the respondent, approval of the Industrial Adjudicator in terms of proviso to Section 33(2)(b) is required only in case of discharge or dismissal.

7. I have heard the arguments of learned counsel for both the parties and have also gone through the judgments referred and relied upon by them to appreciate their rival arguments. It was not disputed by Mr. Tandon appearing on behalf of the respondent that on the date the petitioner was compulsorily retired vide order dated 16.09.2004, an industrial dispute vide ID No. 63/2004 between the parties relating to abolition of compensatory leave in lieu of duties done by the employees on National and Gazetted Holidays was pending adjudication before the Industrial Adjudicator. It is also not disputed that on account of pendency of the said industrial dispute, the respondent had filed an approval application under Section 33(2)(b) [OP No. 5/2004 in ID No. 63/2004] for approval of Industrial Adjudicator for compulsory retirement of the petitioner. It is further not disputed that the said approval application

filed by the respondent was withdrawn by it on 08.12.2004. The order dated 08.12.2004 by which the approval application of the respondent under Section 33(2)(b) was dismissed as withdrawn is Annexure P-2 at pages 20-21 of the Paper Book.

8. The question that needs to be considered by this Court is the effect of withdrawal of the approval application under Section 33(2)(b) by the respondent. Mr. Ajay Kumar Tandon, learned counsel appearing on behalf of the respondent had argued that the punishment of compulsory retirement imposed on the petitioner vide order dated 16.09.2004 does not fall within the ambit of proviso to Section 33(2)(b) which provides for approval only if the management wants to dismiss or discharge an employee pending adjudication of an industrial dispute. The submission of Mr. Tandon was that the compulsory retirement comes under the category of punishment other than discharge or dismissal. He had argued that the management of the respondent was well within its right to pass an order of compulsory retirement against the petitioner in terms of provisions contained in Section 33(2)(b) and according to him, approval of the Industrial Adjudicator was required only in case the punishment which the management intends to inflict upon a delinquent employee comes within the purview of proviso to Section 33(2)(b). Mr. Tandon has relied upon a judgment of the Hon'ble Supreme Court in ***Paramjeet Singh Patheja Versus ICDS Ltd. reported as AIR 2007 SC 168*** and also on a Single Bench decision of Guwahati High Court in ***Smt. Baby Deb Versus Ajit Deb reported as AIR 2008 Gauhati 49*** to contend that the different words used by the legislature in different Sections of a Statute or an Act are to be given their natural meaning and have to be understood in general form, for the purpose they have been used by the legislature. There is no dispute about the proposition of law laid down in

these judgments because it is a settled proposition of law that a provision in a Statute or an Act must be construed by the Court in such a manner that no part of it is rendered nugatory or ineffective. The submission of Mr. Tandon was that since in Section 33(2)(b), the legislature has permitted the management to discharge or punish a delinquent employee whether by dismissal or otherwise during the pendency of an industrial dispute in accordance with the Standing Orders applicable to a workman concerned in such a dispute or where there are no such Standing Orders, in accordance with the terms of the contract, whether express or implied between him and the contractor. According to learned counsel for the respondent, the approval of the Industrial Adjudicator is required only in case of dismissal or discharge and not in case of any other punishment.

9. In order to appreciate the above arguments relating to construction of Section 33(2)(b) advanced by the learned counsel for the respondent, it will be necessary to refer to the provisions of Section 33(2)(b) which are extracted below :-

“(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute 2[or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--

(a) XXXXXXXXXXXXXXXX

(b) For any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.”

10. It may be noted that the proviso to Section 33(2)(b) contemplates

three things mentioned therein, viz., (i) dismissal or discharge; (ii) payment of wages for one month; and (iii) making of an application by the employer for approval of its action. The application for approval has to be part of the same transaction so that the employer when he takes an action under Section 33(2)(b) for dismissing or discharging an employee immediately informs the authority before whom the industrial dispute between the parties is pending so that its action can be scrutinized by such authority. In case, the required approval of the Industrial Adjudicator is either not given or taken, the order of discharge or dismissal against the delinquent employee becomes non-est.

11. In fact, the main thrust of argument of learned counsel for the respondent was that the punishment of compulsory retirement does not fall within the scope of expression “discharge” or “dismissal” used in proviso to Section 33(2)(b) and for that reason, no approval was required of the Industrial Adjudicator for compulsory retirement of the petitioner. This argument, in my opinion, is wholly misconceived and is not tenable in law. It was held by the Hon'ble Supreme Court in ***Murari Mohan Deb. Versus Secretary to the Government of India and Others, reported as AIR 1985 SC 931*** that when there is no rule fixing the age of compulsory retirement or if there is one and the servant is retired before the age prescribed therein, then that can be regarded only as dismissal or removal within Article 311(2) of the Constitution.

12. In ***Moti Ram Deka Etc. Versus General Manager, N.E.F. Railways, Maligaon, Pandu, Etc. Reported as 1964 (5) SCR 683***, it was held by a seven-Judge Bench of the Hon'ble Supreme Court as under:-

“compulsory retirement before age of superannuation is not an incident of tenure. It does not work automatically. It is not conceived in the interest of the employee. It is a mode of terminating his employment at the discretion

of the appointing authority. As a matter of fact, whatever the language used in that connection, it is a punishment imposed on him. It not only destroys his title but also inevitably carries with it a stigma and hence such a termination is dismissal or removal within the meaning of Art.311.”

13. It is evident from the above two judgments of the Hon'ble Supreme Court that the order of compulsory retirement comes within the purview of expression “discharge” or “dismissal” used in proviso to Section 33(2)(b). In the present case, the impugned order of compulsory retirement was passed by the respondent against the petitioner after holding domestic inquiry against him in which he was found guilty. The order of compulsory retirement passed by the respondent against the petitioner is stigmatic in nature. It was not disputed by the counsel for the respondent that on the day, order of compulsory retirement was passed against the petitioner, an industrial dispute relating to abolition of compensatory leave in lieu of duties on National and Gazetted Holidays was pending adjudication before the Industrial Adjudicator. Since the order of compulsory retirement in terms of the above two judgments of the Hon'ble Supreme Court can only be treated as an order of dismissal for the purposes of proviso to Section 33(2)(b), it was obligatory upon the respondent to have obtained the approval of Industrial Adjudicator for compulsory retirement of the petitioner. In fact, the respondent had filed an application under Section 33(2)(b) in the pending industrial dispute for approval of the Industrial Adjudicator but for reasons best known to the respondent, the said application was withdrawn by it on 08.12.2004. The effect of withdrawal of the approval application by the respondent is that the petitioner is deemed to have continued in the service of the respondent in view of Constitution Bench judgment of the Hon'ble the Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank's case (supra), in which it was held as under :

“Not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

14. In view of the above judgment of the Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank's Case (supra), the conclusion cannot be anything else but to hold that the petitioner is deemed to have continued in the service of the respondent because approval for his compulsory retirement under Section 33(2)(b) was not taken by the respondent.

15. In **M.D. Tamil Nadu State Transport Corporation Vs. Neethivilangan Kumbakonam, reported as AIR 2001 Labour Industrial Cases 1801**, it was held by the Hon'ble Supreme Court that the employer is bound to treat its employee as continuing in service and give him all consequential benefits in case either approval under Section 33(2)(b) is refused by the Tribunal or the application is withdrawn by the employer. It has also been held in this case that if the employer denies benefits of deemed service to the employee, then the employee can enforce his

rights by way of a writ petition.

16. In view of the clear law on the subject laid down by the Hon'ble Supreme Court in the aforementioned judgments, I have no hesitation in holding that the petitioner is entitled to all consequential benefits of employment from the date of his compulsory retirement till date as the order of his compulsory retirement, for want of approval under Section 33(2)(b), is non-est and ineffective.

17. For the foregoing reasons, this writ petition is allowed and the respondent is hereby directed to reinstate the petitioner in service with back wages forthwith. The arrears of wages be paid by the respondent to the petitioner within 8 weeks from today. Liberty is, however, granted to the respondent to initiate fresh proceedings against the petitioner as per law, if it is so advised in the matter. The parties are left to bear their own costs.

August 31, 2009
bsr/ma

S.N.AGGARWAL
[JUDGE]