

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

+ **W.P.(C) No. 8368/2008**

% Judgment delivered on: 10.2.2010

Shri Sohan Singh Petitioner
Through: Mr. N.A. Sebastian, Advocate

versus

The Labour Commissioner & Anr. Respondents

Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J. (ORAL)

1. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks to direct the respondent no.1 to initiate recovery proceedings against respondent no.2 u/s 33(C) (1) of the I.D. Act on the application moved by the petitioner for the recovery of back wages and consequential benefits.

2. Brief facts relevant for deciding the present petition are that the petitioner joined the services of the respondent no.2 as Semi-Clerk on 14.4.87 and alleging his involvement in a Trade Union demonstration, a charge sheet was issued against him on 8.3.2000. Thereafter a domestic enquiry was held after which the services of the petitioner were dismissed on 1.4.2003 and an application u/s 33(2) (b) of the I.D Act was filed by the respondent no.2 which was subsequently withdrawn on 15.11.2007.

3. Counsel for the petitioner submits that the petitioner was dismissed from his service on 1.4.2003 and since industrial dispute bearing no. 71/2000 was pending between the petitioner and the management, therefore, the respondent management had filed an application under Section 33 (2) (b) of the I.D. Act to seek approval of the dismissal. Counsel further submits that the said application filed under Section 33(2) (b) of the I.D. Act was withdrawn by the respondent management but even after the said withdrawal, the petitioner was neither reinstated in the service nor his back wages were paid by the respondent management. Counsel further submits that after the withdrawal of the said application, the petitioner vide letter dated 10.3.2009 approached

the respondent no.2 to seek reinstatement in service with full back wages but the same was not acceded to by the respondent no.2. Counsel further submits that the petitioner had filed an application under Section 33(C) (1) of the I.D. Act for recovery of full back wages and all other consequential benefits but the said application of the petitioner was not entertained by the respondent no.1 on the ground that since the order dated 15.11.2007 cannot be treated as award, therefore, the same cannot be implemented under Section 33 (C) (1) of the I.D. Act.

5. The contention of the counsel for the petitioner is that the approach adopted by the respondent no.1 is in clear violation of the principles of natural justice interpreted by the Apex Court in ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma & Ors., 2002 1 LLJ 834.*** Inviting the attention of this court to the said judgment, counsel submits that the Apex Court clearly took a view that the respondent management cannot be placed at a more advantageous position after withdrawing the application moved by it under Section 33 (2) (b) of the I.D. Act as the approval under Section 33 (2) (b) of the I.D. Act is mandatory

and in the absence of the same, the order of the dismissal or discharge becomes void ab-initio and inoperative.

6. I have heard learned counsel for the parties.

7. At the outset, it is observed that nobody has been appearing for respondent no.2 for the last several dates. Respondent no.2 has also not filed counter affidavit to the present petition. Even reply to the 17-B application has not been filed by the respondent. The matter was listed for hearing on 23.9.2009 but as nobody was present on behalf of the parties, the matter was adjourned for the present day i.e. 10.2.2010 and today also nobody has chosen to appear on behalf of the respondent no.2.

8. The issue at the heart of the present case is no more res integra in view of the settled legal position enunciated by the Apex Court in ***Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd (Supra)***. Indisputably, the action of the respondent management dismissing the petitioner was not approved by the competent authority and in fact the application moved by the respondent management under Section 33(2) (b) was withdrawn by it. Once no approval to the said decision of the management was

accorded, then clearly the said order of dismissal became void, inoperative and ineffective and such an order could not bring the jural relationship of employer and employee to an end. If no approval is given by the competent authority then nothing more is required to be done by the employee and the necessary consequence will be as if no order of dismissal had been passed by the management against such an employee. It would be pertinent to reproduce the relevant para of the said judgment here:

"15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, 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.”

8. In the light of the aforesaid legal position, the order of 9.7.2008 passed by the Asstt. Labour Commissioner is ex-facie illegal and cannot be sustained in the eyes of law. The said order is accordingly set aside. The matter is remanded back to the concerned authority for appropriate direction on the application moved by the petitioner under Section 33(C) (1) of the I.D. Act in accordance with law.

9. The petitioner is directed to appear before the office of Labour Commissioner on 2.3.2010.

10. With these directions, the petition stands disposed of.

February 10, 2010
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KAILASH GAMBHIR J.