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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No.13582/2004 & 4606/03

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3rd January, 2011

1. **W.P.(C) No.13582/2004**

DELHI TRANSPORT CORPORATION

..... Petitioner.

Through: Mr. J.B. Malik,
Advocate.

VERSUS

MADAN GOPAL

..... Respondent

Through: Mr. D.N. Vohra,
Advocate.

2. **W.P.(C) No.4606/2003**

DELHI TRANSPORT CORPORATION

..... Petitioner.

Through: Mr. J.B. Malik,
Advocate.

VERSUS

MADAN GOPAL

..... Respondent

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Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this writ petition under Article

226 of the Constitution of India is to the impugned Award dated 5.12.2003 passed by the Labour Court directing reinstatement of the workman with all consequential benefits from the date of his removal from service.

2. The paras of the impugned Award which deal with the case are paras 6 to 8 which read as under:-

“6. The workman filed his affidavit Ex.AW1/1 in support of his case and also proved various documents Ex. AW1/2 to Ex.AW1/4. As against this, the management examined one Sh. Navtej Singh Duggal, Manager Administration (vigilance) as MW1 who proved his affidavit as Ex.MW1 and proved various documents Ex.MW1/1 to Ex.MW1/6.

7. During the pending adjudication of this case, the DTC had also moved an application U/s 33-2(b) of the I.D. Act for approval of its action of removal of workman from service w.e.f. 26.7.94. This application of DTC was dismissed by Sh.P.S. Teji, Presiding Officer, Industrial Tribunal No.II vide his order dated 2.11.2002. Despite the dismissal of the approval application of the DTC, the workman was not reinstated or paid back wages through the effect of rejection of approval application was to tender the dismissal non-est in view of the judgment of Hon'ble Supreme Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Verma & Ors. Reported as AIR 2002 SC 643.**

8. In view of the settled law in the above noted case, the workman is deemed to be in continuation in service by virtue of dismissal of approval application of the management vide O.P. No.179/94 by the Industrial Tribunal.”

3. It is, therefore, quite clear that the Award does not decide the case on merits but answers the reference in favour of the workman on the ground that an application filed by the management under Section 33(2)(b) of the Industrial Disputes Act, 1947 was dismissed as per the order dated 2.11.2002 (and which is the subject matter of

challenge by the management in the connected writ petition (civil) No.4606/03). Recently, a learned Single Judge of this Court (Rajiv Sahai Endlaw, J.) discussed the scope of hearing of an application under Section 33(2)(b) of the Industrial Disputes Act in the decision rendered in the case of **Delhi Transport Corporation Vs. Shyam Lal** in W.P.(C) No.3633/04 decided on 1.7.2010 reported as Manu/DE/1634/2010. Paras 11 to 16 of this judgment are relevant and are reproduced herein:-

“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 v. D.C.M. Chemical Works Ltd. MANU/SC/0268/1978 : AIR 1978 SC 1004 and Cholan Roadways Limited v. G. Thirugnanasambandam MANU/SC/1080/2004 : 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.

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 therefrom. 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.”

(Emphasis added)

4. It is therefore quite clear that the proceedings under Section 33(2)(b) are only summary proceedings where the only issue to be adjudicated is whether the dismissal of the workman from service is on account of victimization. The merits of the matter with regard to dismissal have to be the subject matter of challenge in a proper industrial dispute which would be raised by the workman. It is this industrial dispute which if raised by the workman, would have to be decided on merits in detail.

5. The Award in the present case shows that the reference is answered in favour of the workman without discussing in detail the respective cases, the evidences and is based only on the ground of dismissal of the application filed by the petitioner/management under Section 33(2)(b) of the Industrial Disputes Act. This becomes clear from para 7 of the impugned Award already reproduced above.

6. It is therefore quite clear that there has been in fact no adjudication on merits with respect to the dispute which was referred to the Labour Court. The impugned Award is therefore clearly illegal and is therefore bound to be set aside and the matter is liable to be remanded back for a fresh decision in accordance with law. Accordingly, the impugned Award dated 5.12.2003 is set aside and the

matter is remanded back to the Labour Court for a fresh adjudication in accordance with law. The payment which is received by the workman under Section 17B would not be liable to be refunded back by the workman to the management and the same will abide the fresh adjudication by the Labour Court. Since this is an old matter, the Labour Court is directed to hear and dispose of the reference within a period of one month from when it receives the order of this Court. Counsel for the management will not be entitled to seek any adjournment in the case before the Labour Court and the same shall be argued by the management on the date the matter is first taken up by the Labour Court.

7. The petition is accordingly disposed of, leaving the parties to bear their own costs.

C.M.Nos.9461/2004

No orders are required in this application and the application stands disposed off.

CM No. 11187/2004

Interim orders stand vacated. The application stands disposed off.

W.P.(C) No.4606/2003

The challenge by means of this petition is to the impugned order dated 2.11.2002 whereby the application under Section 33(2)(b)

of the Industrial Disputes Act, 1947 of the petitioner/management was dismissed. A reference to the impugned Award shows that the Industrial Tribunal has adjudicated the case on merits although the scope of Section 33(2)(b) is only to examine whether the dismissal of the workman was on account of victimization of the workman due to an earlier dispute pending between him and the management. I have already reproduced the relevant paragraphs of the decision in the case of ***Delhi Transport Corporation Vs. Shyam Lal(supra)*** above. In the present case, there is no discussion as regards the refusal of grant of approval on the ground that the workman is being victimized. The Award of the Industrial Tribunal is also therefore liable to be set aside and the matter is also liable to be remanded back to the Industrial Tribunal for a fresh adjudication in accordance with law keeping in mind the decision in the case of ***Delhi Transport Corporation Vs. Shyam Lal (supra)***. The present case be also tagged with the reference pertaining to the industrial dispute which is the subject matter of the Award dated 5.12.2003 passed by the Labour Court and this case be also disposed of within one month by the Industrial Tribunal/Labour Court alongwith adjudication of the dispute which is the subject matter of reference decided by the earlier Award dated 5.12.2003.

The petition is accordingly disposed of, leaving the parties to bear their own costs. Trial Court record be sent back in both the cases.

JANUARY 03, 2011
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VALMIKI J. MEHTA,J