

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

% Judgment delivered on: 10th January, 2011

+ **LPA No. 183/2007**

D.T.C. Appellant
Through Mr.Sarfaraz Khan, Adv.

versus

PREM CHAND EX SWEEPER Respondent
Through Mr.H.K. Chaturvedi, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. Whether reporters of the local papers 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 |

DIPAK MISRA, CJ

Calling in question the legal sustainability of the order dated 7th December, 2006 passed by the learned Single Judge in WP (C) No. 16938/2005, the present intra-court appeal has been filed.

2. The factual score which requires to be exposted are that the respondent-workman was a sweeper under the appellant, namely, Delhi

Transport Corporation (for short 'the corporation'). A disciplinary proceeding was initiated against him on 29th April, 1993 on the ground that he had remained unauthorizedly absent for 107 days during the period between 1st January, 1991 and 31st December, 1991. In the disciplinary enquiry, he was found guilty and thereafter the disciplinary authority imposed the punishment of removal and issued the said order on 20th August, 1993.

3. As during that period an industrial dispute was pending between the management and the workman, a proceeding under Section 33(2)(b) of the Industrial Disputes Act, 1947 (for brevity 'the Act') was initiated seeking approval from the labour court. The said application was dismissed on 2nd September, 1996 for non-payment of costs. The said order of dismissal was challenged before this Court in WP (C) No. 1584/2001, which was dismissed by an order dated 13th March, 2001. The said order was not assailed before the superior forum and, therefore, was allowed to attain the finality.

4. It is apt to note that when the corporation had filed the application seeking approval from the labour court, the workman had taken recourse to the appropriate procedure for seeking reference to the labour court as he was

grieved with the order of removal. As the conciliation failed, the matter was referred to the labour court. The labour court dealt with the said reference forming the subject matter of ID No. 1045/1994 and allowed the same by the order dated 9th August, 2004. The Presiding Officer, labour court, directed workman to be entitled to reinstatement with full back wages.

5. Being dissatisfied with the aforesaid order, the management-appellant preferred a writ petition before the writ court contending, inter alia, that when the proceeding under Section 33(2)(b) of the Act was dismissed for want of prosecution, it was obligatory on the part of the labour court to address the controversy on merits and it was totally illegal on his part to allow the reference on the ground that no order of dismissal did exist in the eyes of law. It was also contended before the learned Single Judge that the grant of full back wages was absolutely unwarranted in the obtaining factual matrix.

6. The learned Single Judge, as is perceptible from the order impugned, referred to the decision in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Shri Ram Gopal Sharma and others*, (2002) 2 SCC 244 and came to hold that the order passed by the labour court as regards the issue that the order of removal had become extinct was absolutely impeccable. As far as the grant

of back wages is concerned, the learned Single Judge referred to the decisions in *State of M.P. and others v. Arjun Lal Razzak, 2006 (2) LLJ 104* and *Haryana State Electricity Development Corporation Ltd. v. Mamni, 2006 (2) LLJ 244* and came to hold that grant of Rs.50,000/- towards back wages would subserve the cause of justice.

7. Assailing the legal propriety, Mr.Sarfaraz Khan, learned counsel for the appellant has contended that both the labour court as well as the learned Single Judge has fallen into grave error in their appreciation of the decision in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* (supra). It is contended that when the application preferred under Section 33(2)(b) of the Act has been dismissed on the foundation that the costs was not deposited, even if it is given stamp of approval by this Court, the same could not operate as res judicata and it is incumbent on the part of the labour court to advert to the merits of the case and written findings. Learned counsel has commended us to a learned Single Judge's decision of the Karnataka High Court in *Management of M/s. Indian Aluminium Co. Ltd., Belgaum, v. S. Nagaiah, 2005 Lab. I.C. 2444.*

8. Combating the aforesaid submission, Mr.H.K. Chaturvedi, learned counsel for the respondent submitted that the order passed by the labour

court, which has been concurred with by the learned Single Judge is absolutely impregnable and the ratio laid down in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* (supra) has been appositely understood and appreciated. Learned counsel has contended that the said decision has been explicitly elaborated in *Engineering Laghu Udyog Employees, Union v. The Judge, Labour Court and Industrial Tribunal and another, 2004 (1) SCALE 666* and hence there is no trace of doubt that once the application preferred under Section 33(2)(b) meets with any kind of extinction, it cannot give rise to life to the proceeding under Section 10 of the Act like a phoenix. It is urged by him that the decision of the Karnataka High Court in *Management of M/s. Indian Aluminium Co. Ltd.* (supra) is not applicable to the facts of the case as the finding recorded therein only relates to the facet of res judicata and further the same does not aid or assist the controversy in issue.

9. At the very outset, we may state with profit that there is no dispute on the factual score. There is also no dispute about the grant of back wages of Rs.50,000/- as Mr H.K. Chaturvedi, learned counsel for the respondent-workman fairly stated that the matter was carried to the Apex Court by the respondent for enhancement of the back wages by way of Special Leave to

Appeal which was dismissed in limine. Thus, the only controversy that we are required to dwell upon is whether once an application preferred under Section 33(2)(b) of the Act becomes extinct, either on merits or for want of prosecution, is it incumbent on the part of the labour court to deal with the reference relating to the order of dismissal.

10. In this context, we may refer with profit to the decision rendered by the Constitution Bench in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* (supra). Be it noted, the question that was posed by the Constitution Bench to be adverted to, reads as follows: -

“If the approval is not granted under Section 33(2)(b) of the Industrial Disputes Act, 1947, whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under Section 33(2)(b) would not render the order of dismissal inoperative?”

11. As there were two distinct views, the said issue was referred to the Constitution Bench. Their Lordships referred to the Constitution Bench decision in *P.H. Kalyani v. M/s. Air France Calcutta, 1964 (2) SCR 104* and eventually in paragraphs 13 and 14 came to hold as follows: -

“13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso

to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them are already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a

workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to

raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.”

12. We have quoted in extenso as we are of the considered opinion that it is necessary on the part of the management to appreciate that their Lordships of the Apex Court have scanned the anatomy of the Act and recorded the conclusion. It is expected on the part of the statutory organization to understand the law in the field and to fight a case in a court of law. The ambitious stance put forth by the management that when an application under Section 33(2)(b) of the Act is dismissed for want of prosecution, the same cannot be given the status of non-approval is sans substratum and we are fortified by what has been stated by their Lordships in the said case, which is reproduced below: -

“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.”

13. At this juncture, it is worthwhile to refer to the law laid down in *Engineering Laghu Udyog Employees Union* (supra). In the said case, a

three-judge Bench of the Apex Court referred to the decisions in *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha*, 1980 (2) SCR 145 and *P.H. Kalyani* (supra) and expressed the view as follows: -

“When in terms of the proviso appended to clause (b) of Section 33 of the Act, an approval is sought for and is refused the order of dismissal becomes void. If an approval is not obtained still, the order of punishment cannot be given effect to. It is, therefore, not correct to contend that the tribunal in a reference under Section 10 of the Act, when passes an order recording a finding of misconduct, brings life into the dead. Unfortunately, the Court did not take notice of the binding decisions in *Motipur Sugar Factory’s* case (supra) and *Firestone’s* case (supra).

We may further notice that *P.H. Kalyani’s* case (supra) has also recently been followed by another Constitution Bench in *Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and others*, 2002 (2) SCC 244.”

14. In view of the aforesaid pronouncement of law, there can be no scintilla of doubt that when there is no approval by the industrial adjudicator on an application preferred under Section 33(2)(b) of the Act, the order of dismissal is ab initio void. What is ab initio void, as has been held in the case of *Gujarat Steel Tubes Ltd.* (supra), is void and does not exist. Once the order of dismissal did not exist, the relation between the employer and the employee continued and there was no severance of status. The reference

that was made to the labour court was in respect of the selfsame charges and when there has been no approval as requisite under Section 33(2)(b) of the Act, the question of addressing the said reference on merits by the labour court was totally unwarranted because the said order had already paved the path of extension. The labour court does not adjudicate a lis in the vacuum. Ergo, we do not find any error in the approach of the labour court and the stamp of approval given by the learned Single Judge.

15. In view of our aforesaid analysis, the appeal stands dismissed with costs, which is assessed at Rs.10,000/- (Rupees Ten Thousand only).

CHIEF JUSTICE

JANUARY 10, 2011
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SANJIV KHANNA, J