

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

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Date of decision: 20th December, 2012

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LPA No.674/2012

**MANAGEMENT OF BATRA HOSPITAL & MEDICAL
RESEARCH CENTRE**

..... Appellant

Through: Mr. A.K. Singla, Sr. Adv. with Mr.
Mridul Gupta, Adv.

Versus

GOVT. OF NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Amiet Andley, Adv. for R-1.
Respondent No.2 in person.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the judgment dated 31.08.2012 of the learned Single Judge of dismissal of W.P.(C) No.8578/2007 preferred by the appellant. The said writ petition was preferred impugning (i) the Award dated 12.04.2007 of the Industrial Adjudicator on the complaint of the respondent No.2 workman under Section 33A of the Industrial Disputes Act, 1947 and directing the appellant to reinstate the respondent No.2 workman with effect from 31.08.2005 with continuity of service and full back wages and to allow him to resume duties; and (ii) the order dated 27.09.2005 of the Assistant Labour Commissioner under Section 33 (4) of the Act read with Rule 61 of the Industrial Disputes (Central) Rules, 1957 (Rules) declaring *inter alia* the respondent No.2 as a 'protected workman'.

2. The respondent No.2 claimed that he as the General Secretary of the Batra Hospital Employees' Union had sent a letter dated 01.03.2005 by

Registered Post AD to the appellant under Rule 61(1) communicating the names and addresses of the officers of the Union employed in the establishment and who, in the opinion of the Union, should be recognised as 'protected workmen'. The said letter included the name of the respondent No.2 as holder of the post of General Secretary of the Union. On 17.03.2005 the Union filed an application with the Assistant Labour Commissioner under Section 33(4) of the Act requesting for declaration of its office bearers, as mentioned in the communication dated 01.03.2005, as 'protected workmen' for the year 2005-06. It was stated in the said application that inspite of the letter dated 01.03.2005, the appellant had not declared the office bearers of the Union mentioned therein, as 'protected workmen', leaving no option with the Union but to file the said application for declaration of the said workmen, as 'protected workmen'.

3. The order dated 27.09.2005 of the Assistant Labour Commissioner records that though notices of the said application were served on the appellant for 25.04.2005 and for 05.05.2005 but none appeared on behalf of the appellant. The appellant, on the contrary, on 25.03.2005 placed the respondent No.2 under suspension and initiated disciplinary proceedings against him. The appellant finally appeared before the Assistant Labour Commissioner on 06.07.2005 and filed a reply dated 18.07.2005, denying receipt of letter / communication dated 01.03.2005 and contending, that no proof had been filed by the respondent No.2 to show that he was competent to file the said application before the Assistant Labour Commissioner; that the respondent No.2 was a suspended employee and could not be the General Secretary of the Union; that no copy of the constitution of the Union

had been placed on record to show that a suspended employee could be General Secretary of the Union; that no intimation of the selection of the office bearers of the Union had been sent; that the Union did not represent most of the workers and was not formed by the majority inasmuch as the Nurses were not part of the Union.

4. The appellant thereafter vide order dated 31.08.2005 dismissed the respondent No.2 from service and owing to the pendency then of another dispute between the appellant and its workers, also filed an application under Section 33(2)(b) of the Act seeking *post facto* approval of its action of dismissal of the respondent No.2.

5. The Assistant Labour Commissioner vide order dated 27.09.2005 declared the respondent No.2 as a 'protected workman'.

6. No remedy was taken by the appellant immediately after the order dated 27.09.2005. On the contrary, the appellant continued to pursue the application under Section 33 (2)(b) of the Act. At this stage, it may be noted that once the respondent No.2 was declared a 'protected workman' for the year 2005-06 i.e. since prior to his dismissal on 31.08.2005, the application under Section 33(2)(b) of the Act seeking *post facto* approval of his dismissal was misconceived and the appellant under Section 33(3) of the Act was required to obtain prior permission in writing for his dismissal. However no such permission had been taken.

7. The respondent No.2 on 04.04.2006 filed the complaint aforesaid under Section 33A of the Act averring that though he was a 'protected workman' but he had been dismissed from service without prior permission.

8. The appellant contested the said complaint under Section 33A of the Act averring that the respondent No.2 on the date of dismissal was not a 'protected workman' and that he was gainfully employed elsewhere.

9. The Industrial Adjudicator, vide Award dated 12.04.2007 on the said complaint under Section 33A of the Act has found / held:

- (i) that the respondent No.2 workman had proved the copy of letter dated 01.03.2005 supra as well as the postal receipt of dispatch thereof by Registered Post AD as well as the AD Card returned acknowledging receipt thereof by the appellant;
- (ii) that the appellant during the cross examination of the respondent no.2 workman had not put any suggestion that the said letter was not received by the appellant;
- (iii) that similarly in cross examination of the respondent No.2, his statement in chief that he was the General Secretary of the Union had not been controverted;
- (iv) that thus while service on the appellant of the letter dated 01.03.2005 stood proved, no reply admittedly had been given thereto by the appellant;
- (v) that it was not the plea of the appellant that anybody else was a protected workman for the year 2005-06;

- (vi) that the appellant having not objected to the communication dated 01.03.2005 within 15 days thereof, the workmen mentioned therein automatically became entitled to the status of protected workmen and had also been held so by the Assistant Labour Commissioner. Reliance in this regard was placed on ***M/s Batra Hospital and Medical Research Centre of Sh. Aishi Ram Batra Charitable Trust Vs. Batra Hospital Employees' Union*** 2004 III LLJ Delhi 914;
- (vii) that since the respondent No.2 was a protected workman, the appellant was required to obtain prior permission under Section 33(3) of the Act before dismissing him, instead of filing approval application under Section 33(2)(b) of the Act; and,
- (viii) that the appellant was thus in violation of the provisions of Section 33(3) of the Act.

Accordingly, the order dated 31.08.2005 of dismissal of the appellant was set aside and the appellant directed to reinstate the respondent No.2 with effect from 31.08.2005 with continuity of service and full back wages and to allow the respondent No.2 to resume duties.

10. It was thereafter that the writ petition from which this appeal arises was filed, impugning not only the Award dated 12.04.2007, but also the order dated 27.09.2005 of the Assistant Labour Commissioner.

11. The learned Single Judge has dismissed the writ petition holding that the date from which the workman gets recognition as 'protected workman' is the date of the communication by the employer to the Union under Rule

61(2) of the Rules; however where the employer does not communicate its decision to the Union recognising status of 'protected workman', the decision of the Assistant Labour Commissioner is final and relates back to the date when the employer was to communicate the same, i.e. within 15 days of receipt of the communication; that merely because the order of the Assistant Labour Commissioner stated that it had come into force with immediate effect would not mean that the effect thereof did not relate back to a date within 15 days of receipt of communication dated 01.03.2005; that the status of workman cannot be kept in jeopardy merely because of the delay in the decision by the employer; reliance was placed on *Air India Ltd. Vs. Indian Pilots Guild* 2005 Lab I.C. 1286.

12. The senior counsel for the appellant before us has contended, that the Assistant Labour Commissioner, in the order dated 27.09.2005, did not decide the defences raised by the appellant to the application for declaration of 'protected workman'; that no inquiry was done into the elections of the Union. It is contended that even in the complaint proceedings under Section 33A of the Act, the respondent No.2 did not discharge the onus of proving the elections to the Union in which he claimed to have been elected as the General Secretary and on which basis he had sought declaration as 'protected workman'. Attention is invited to the cross examination in the said proceedings of the respondent No.2. Reliance in this regard is placed on *Voltas Ltd. Vs. Voltas Employees' Union* 136 (2007) DLT 450 and on the judgment dated 16.12.2002 of the High Court of Bombay in Writ Appeal No.1049/2002 titled *Cipla Employees Union Vs. Assistant Commissioner of Labour*.

13. The senior counsel for the appellant has next contended that the Industrial Adjudicator, in Award dated 12.04.2007 erred in granting full back wages to the respondent No.2. It is contended that no evidence had been led by the respondent No.2 of unemployment / non-employment and in the absence thereof the Award insofar as for full back wages could not have been sustained. Reliance in this regard is placed on *Metropolitan Transport Corporation Vs. V. Venkatesan* (2009) 9 SCC 601 and on *Kendriya Vidyalaya Sangathan Vs. S.C. Sharma* (2005) 2 SCC 363.

14. It is lastly argued that the appellant had also filed an application under Section 340 of the Code of Criminal Procedure, 1973 (Cr.P.C.) in the writ petition (being Criminal Miscellaneous Application No.1310/2004) which has also been dismissed by the learned Single Judge vide the impugned judgment, though without giving any reasons whatsoever. It is contended that the said application was preferred because respondent No.2 during the pendency of the writ petition filed an application under Section 17B of the Act stating that he was unemployed but after the appellant had filed photographs showing employment elsewhere of the respondent No.2, he had abandoned the said application and which was sought to be revived after two years. It is thus contended that the respondent No.2 is guilty of filing false affidavit qua his unemployment, when he was employed.

15. Though the respondent No.2 through counsel has filed caveat but the respondent No.2 appears in person. Be that as it may, we have extensively heard the counsel for the appellant and being unable to find any merit in the appeal, do not feel the need to call upon the respondent No.2.

16. We may also notice that though the judgment of the learned Single Judge in Para No.3 thereof records that the appellant had challenged the declaration of the respondent No.2 as a 'protected workman' for the year 2002-03 also by filing W.P.(C) No.7748/2002 which was dismissed on 19.05.2004 and appeal whereagainst being LPA No.743/2004 is still pending consideration but the said appeal being LPA No.743/2004 does not pertain to the respondent No.2 and pertains to another workman viz. Sh. Vijay Singh. We have today by a separate judgment disposed of the said appeal being LPA No.743/2004 discussing in detail the law relating to Section 33 of the Act and Rule 61 and in view thereof need is not felt to reiterate the same in this judgment. Suffice it is to summarize what we have held. We have held that upon the communication under Rule 61(1) of the Industrial Disputes (Central) Rules being served on the employer, if the employer within 15 days neither responds thereto nor raises any objection thereto, i.e. does not raise any dispute within the meaning of Rule 61(3&4), the persons who are notified by the Union as 'protected workmen' shall stand recognised; however if the employer raises a dispute, then the workers' Union is required to refer the same to the Regional Labour Commissioner (Central) or Assistant Labor Commissioner (Central) concerned and whose decision if in favour of the workmen, will relate back to the date when the employer ought to have recognised the names proposed by the Union as 'protected workmen'.

17. In accordance with the said judgment, the order dated 27.09.2005 of the Assistant Labour Commissioner declaring the respondent No.2 as 'protected workman' would relate back to 01.03.2005 or latest 15.03.2005.

18. Though the learned Single Judge has not considered but in our view, the challenge by the appellant in the writ petition filed in or about November / December, 2007 to the order dated 27.09.2005 of the Assistant Labour Commissioner declaring the respondent No.2 as a 'protected workman' was highly belated and barred by laches / waiver. The order dated 27.09.2005 of the Assistant Labour Commissioner was final and could have been challenged by the appellant only by filing a writ petition. The appellant however did not challenge the said order and continued to pursue the application under Section 33(2)(b) of the Act which in view of the said order, was in any case not maintainable. Even when the respondent No.2 on 04.04.2006 filed the complaint under Section 33A of the Act on the basis of the said order dated 27.09.2005, the appellant still did not challenge the said order. We may highlight that the validity of the order dated 27.09.2005 of the Assistant Labour Commissioner could not have been gone into neither in the proceedings under Section 33(2)(b) of the Act nor in the complaint proceedings under Section 33A of the Act before the Industrial Adjudicator, who were bound by the said order. There was thus no reason for the appellant to await the outcome of the complaint proceedings under Section 33A of the Act for challenging the order dated 27.09.2005. We are thus not inclined to entertain such belated challenge to the order dated 27.09.2005.

19. Even otherwise, we do not find any infirmity in the order dated 27.09.2005 of the Assistant Labour Commissioner. As aforesaid, delivery of the letter dated 01.03.2005 under Rule 61(1) on the appellant stood proved. The senior counsel for the appellant also has not challenged the said finding and rightly so. The same is a finding of fact and without any perversity

being shown, is not open to challenge in exercise of powers of judicial review. Once, it is found that the communication dated 01.03.2005 stood served on the appellant and the appellant has maintained a quietus and did not object to the communication of the Union as to 'protected workmen' for the year and / or did not raise any dispute, the respondent No.2 stood accepted as 'protected workman' and the employer in the proceeding under Rule 61(4) could not raise other disputes. The reliance in this regard placed by the appellant on *Voltas Ltd.* supra, is misconceived. In that case, the employer immediately on receipt of communication under Rule 61(1) had objected thereto and had raised various queries on the Union and the Union instead of furnishing the said information had approached the Assistant Labour Commissioner under Rule 61(4). It was in these circumstances that a Single Judge of this Court held that the Labour Commissioner was required to go into all the disputes raised by the employer and could not have without deciding the same declare the workman as 'protected workman'. On the contrary, here, we reiterate, no objection was raised. As far as the reliance by the senior counsel for the appellant on *Cipla Employees Union* supra, is concerned, we find the same to be bereft of any discussion and not laying down any law and having no precedential value.

20. Once no error is found with the order dated 27.09.2005 of the Assistant Labour Commissioner declaring the respondent No.2 as a 'protected workman', the complaint under Section 33A of the Act of the appellant having dismissed the respondent No.2 from service without compliance of Section 33(3) of the Act was justified and no error can be found with the Award dated 12.04.2007.

21. That brings us to the main ground of challenge by the senior counsel for the appellant i.e. of the respondent No.2 being not entitled to back wages. However there also, we find that the present is not a case of an order of dismissal being set aside but of there being no order of dismissal in accordance with law. We reiterate that the respondent No.2 being a 'protected workman', the appellant could not have dismissed him without prior permission under Section 33(3) of the Act and which had admittedly not been taken. Though the Industrial Adjudicator has in the Award dated 12.04.2007 used the expression 'reinstate' but we are of the view that the question of reinstatement arises when there is an order of dismissal in accordance with law, even if it may be interfered with by the Industrial Adjudicator or this Court. However the effect of non compliance of Section 33(3) of the Act is that there is in fact no order of dismissal and the respondent No.2 has in law continued in employment / service and would naturally be entitled to wages etc. Thus the judgment in ***Metropolitan Transport Corporation*** supra, has no application. The senior counsel for the appellant was unable to show any judgment where back wages has been denied notwithstanding non compliance of Section 33(3) of the Act or 33(2)(b) of the Act. Rather the Supreme Court in ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma*** (2002) 2 SCC 244 has held that the effect of dismissal of an application under Section 33 (2)(b) of the Act is of continuance of an employee in employment i.e. as if the employee had never been dismissed.

22. The last challenge by the appellant is to the dismissal of the application under Section 340 of the Cr.P.C. Though undoubtedly the

learned Single Judge has not separately dealt with the same but it cannot be lost sight of that the order under Section 340 Cr.P.C. is a discretionary order. Even otherwise the plea of the appellant in the application under Section 340 Cr.P.C. is of the respondent No.2 who was employed with the appellant as a Nursing Assistant running his practice as a Doctor. The senior counsel for the appellant agrees that the respondent No.2 is not qualified to practice as a Doctor. No cognizance of the earnings even if any from illegality can be taken. We therefore are not inclined to interfere with the discretion exercised by the learned Single Judge in dismissing the application under Section 340 Cr.P.C.

Axiomatically, the appeal is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

DECEMBER 20, 2012

‘gsr’..