

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.08.2013

+ **LPA 164/2013**

I.S. RANA

..... Appellant

versus

M/S. CENTAUR HOTEL

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr J.S. Bhasin with Ms Rashmi Priya.

For the Respondent : Ms Tanu Priya Gupta.

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED, ACTING
CHIEF JUSTICE**

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. This appeal challenges the order dated 07.02.2013 passed by a learned Single Judge of this Court in the writ petition being W.P.(C) 2934/1997. The appellant was an employee of the respondent and was dismissed from service pursuant to a disciplinary inquiry held against him. The appellant/employee raised a dispute before the Industrial Tribunal which culminated in an award in his favour. The learned Single Judge has set aside the award passed by the Industrial Tribunal. The appellant being aggrieved by the same has preferred the present appeal.

2. The dispute in the present appeal revolves around the question whether the learned Single Judge was correct in setting aside the award when admittedly the appellant was a protected workman and respondent had failed and neglected to obtain the approval as required under Section

33(2)(b)/33(3) of the Industrial Dispute Act, 1947 (hereinafter referred to as the “Act”). The brief facts relevant to consider the controversy in the present appeal are as under.

3. The appellant was an employee of Hotel Corporation of India and was employed at Centaur Hotel, New Delhi (the respondent herein). The appellant joined the respondent as a House Keeping Attendant and was employed in this capacity from 16.08.1985 till his dismissal from service on 16.02.1988. It is alleged that on 17.06.1987, the appellant was to report for his duties at 09:30 am but he was late and reported at 10:27 am. He also failed to punch his attendance card at the end of his shift. It is further alleged that on the night of 17.06.1987 at about 11:00 pm the appellant unauthorisedly entered the lobby of the hotel in a drunken state and is stated to have physically assaulted another employee and caused “breach of peace” and “nuisance” in the hotel premises. It is alleged that the conduct of the appellant terrorized the guests and also caused loss of reputation and business to the hotel. The appellant was issued a chargesheet in respect of his aforementioned conduct on 22.07.1987 which constituted grave misconduct under Regulation 73(i), 73(xi) & 73(xviii) of the Hotel Corporation of India Employees Service Regulations. The relevant extract of the said Regulations are as under:-

“REGULATION NO.73(i)

“.....Commission of any act subversive of discipline and of good behaviors”

REGULATION NO.73(xi)

“Breach of any law, rules, regulations or order applicable to the establishment”.

REGULATION NO.73(xviii)

“Drunkenness, riotous, indecent behavior committing nuisance on the premises of the establishment.....”.

4. The appellant denied the allegation made in the chargesheet dated 22.07.1987, however, his explanation was not found to be satisfactory and the respondent constituted an inquiry to be conducted by the Personnel Manager of Centaur Hotel, Mumbai. The Inquiry Officer submitted his finding on 01.02.1988, wherein he concluded that the appellant was guilty of the charges leveled against him. The said inquiry report was accepted by the respondent who dismissed the appellant from service on 16.02.1988.

5. It is relevant to state that admittedly at the material time an industrial dispute was pending between the respondent and its workmen with regard to the system of service charges and bonus payable to the employees. It is also not disputed that the appellant was a protected workman within the meaning of the explanation to Section 33(3) of the Act, being an office bearer of a trade union connected with the respondent.

6. The appellant filed a complaint under Section 33A of the Act, before the Industrial Tribunal against the order of his dismissal, *inter alia*, challenging the inquiry proceeding held by the respondent as also the conclusion reached by the Inquiry Officer. After completion of the pleadings, the Tribunal framed the following issues:-

- “1. Is this complaint maintainable in view of the preliminary objection filed in the reply? (OPC)
2. Did the respondent commit contravention of the provision of Section 33 of the Industrial Disputes Act? (OPC)
3. What relief, if any, is the Complainant entitled to? (OPC)”

7. The complaint filed by the appellant was found to be maintainable. It was admitted by the respondent before the Tribunal that an industrial dispute between the workman and the management of the respondent was pending with regard to the system of levy of service charge on guests which had been set in place instead of the system of collecting “tips”. It was also not disputed that the appellant was a protected workman. Indisputably, the management of the respondent had to comply with Section 33 of the Act which the respondent had failed to do. Although, the Tribunal held that there was violation of Section 33 of the Act inasmuch as the respondent had not sought the approval under Section 33(2)(b) or Section 33(3) of the Act, the Tribunal held that the same was not sufficient for the appellant to get any relief and that the respondent was entitled to justify its action of dismissing the appellant from its employment. The Tribunal then proceeded to examine the evidence led before the Inquiry Officer and concluded that the findings of the Inquiry Officer holding the appellant guilty of the charges was not sustainable. Based on this conclusion, the Tribunal made an award dated 09.05.1997 reinstating the appellant in service with full back wages.

8. The award passed by the Tribunal was challenged by way of a writ petition by the respondent, which was allowed. The learned Single Judge examined the allegations made against the appellant as well as the evidence placed before the Inquiry Officer and concluded that there was sufficient evidence before the Inquiry Officer to come to the conclusion that the appellant was guilty of the charges framed in the chargesheet issued to him and that the Tribunal had erred in interfering with the disciplinary proceedings initiated by the respondent.

9. The appellant has contended before us that once the Tribunal had found that the respondent had not complied with provisions of Section 33(2)(b)/ 33(3) of the Act, the same would render the order dismissing him from service inoperative and consequently, he was liable to be reinstated. It is contended that the learned Single Judge erred in not considering that having once found that the provisions of Section 33(2)(b)/33(3) of the Act were violated, no further inquiry was necessary. The appellant relied on the decision of a constitution bench of the Supreme Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and others: (2002) 2 SCC 244** and the decision of this court in the case of **Tops Security Ltd. v. Subhash Chander Jha: 191 (2012) DLT 361** in support of his contention that in view of the admitted position that the respondent had not complied with the mandatory provisions of section 33 of the Act, the order dismissing the appellant from service was liable to be declared as inoperative and the appellant was liable to be reinstated with back wages.

10. We have heard the learned counsel for the parties.

11. The relevant provisions of Section 33 & 33A of the Act are set out hereunder:-

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings:-

(1) xxxx xxxx xxxx xxxx xxxx

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such 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 workman-

- a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
- 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.

(3) Notwithstanding anything contained in sub- section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-

- a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

- b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.- For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being a member of the executive or other office bearer of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) xxxx xxxx xxxx xxxx

(5) xxxx xxxx xxxx xxxx”

12. The principal question raised before us is whether the Tribunal was required to go into the merits of the substantive dispute regarding dismissal of the appellant from services including the conduct of inquiry by the Inquiry Officer in view of the fact that contravention of the provision of Section 33(2)(b)/33(3) of the Act was established. The Tribunal held that the employer would have the right to justify the action against a workman even though it was established that Section 33 of the Act had been violated. The learned Single Judge did not examine this issue but only considered the question whether the evidence collected by the Inquiry Officer was sufficient to arrive at finding that the appellant was guilty of charges framed against the appellant.

13. In our view, the controversy urged before us is squarely covered by the decision of a Constitution Bench of the Supreme Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.** (*supra*). In that case, the Supreme Court had, *inter-alia*, framed the following question for consideration:-

“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?”

14. The Supreme Court held that failure to make an application under Section 33(2)(b) of the Act would amount to non-compliance with the mandatory provisions of the Act and this would render the order of punishment inoperative. The contention that the order of punishment would not become void or inoperative till the same was set aside under Section 33A was not accepted by the Court. The relevant extract from the said decision of the Supreme Court is held as under:-

“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.

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 proceedings 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.”

16. Section 31 speaks of penalty in respect of the offences stated therein. This provision is not intended to give any remedy to an aggrieved employee. It is only to punish the offender. The argument that Section 31 provides a remedy to an employee for contravention of Section 33 is unacceptable. Merely because penal provision is available or a workman has a further remedy under Section 33A to challenge the approval granted, it cannot be said that the order of discharge or dismissal not become inoperative or invalid unless set aside under Section 33A. There is nothing in Sections 31, 33 and 33A to suggest otherwise even reading them together in the context. These sections are intended to serve different purposes.”

15. Following the decision of the Supreme Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.** (*supra*), this Court has further clarified, in the case of **Tops Security Ltd.** (*supra*), that once a complaint is made under Section 33A of the Act and it established that there has been a violation of Section 33(2)(b) of the Act then the Tribunal has merely to

direct that employee be given an appropriate relief. The relevant extract from the said decision is reproduced hereunder:-

“It is, therefore, abundantly clear that the employee may file a complaint with regard to the relief that is required to be given to the employee in respect of the contravention of the provisions of Section 33. In other words, where no application seeking an approval under Section 33(2)(b) of the said Act is made by the employer, the employee may yet make a complaint under Section 33A seeking relief of reinstatement and payment of back wages. It is that dispute which will be taken up by the Industrial Tribunal which will obviously go into the question as to whether there has been or there has not been compliance with the mandatory provisions of Section 33(2)(b) of the said Act. Once the Tribunal comes to the conclusion that the mandatory provisions have been contravened, the only thing that needs to be done by the Tribunal is to direct that the employee be given an appropriate relief by way of reinstatement and by making an order with regard to back wages. The Tribunal is not required to go into the question of as to whether the dismissal was good or bad, on merits.”

16. In the present case, admittedly there has been a violation of Section 33 of the Act inasmuch as the respondent has not sought the approval of the Industrial Tribunal under Section 33(2)(b) of the Act. The Tribunal has also held that the appellant is a protected workman and as such the provisions of Section 33(3) of the Act are also attracted and no action against the appellant could be taken without the express written permission, of the Tribunal before which the industrial dispute was pending.

17. In view of the above discussions, it is not necessary to examine whether the evidence collected and available with the Inquiry Officer was sufficient to hold the appellant guilty of the charges leveled against him.

18. We, accordingly, set aside the impugned judgment dated 07.02.2013 passed by the learned Single Judge. We further hold that the order of dismissal dated 16.02.1988 would be inoperative till the permission of the Tribunal is obtained by the respondent. It is clarified that we have not expressed any opinion with regard to the question whether the disciplinary inquiry held by the respondent and the finding returned by the Inquiry Officer were valid or not.

19. Having held that once violation of Section 33 of the Act has been established, there was no requirement for the Tribunal to examine the merits of the dispute, we also set aside the findings in respect of the inquiry proceedings and the substantive merits of the dispute returned by the Tribunal while considering the issue of relief (issue no. 3, framed by the Tribunal). However, we uphold the operative decision of the Tribunal in reinstating the appellant in service with back wages.

20. The present appeal is disposed of, in the above terms. The parties are left to bear their own costs.

VIBHU BAKHRU, J

BADAR DURREZ AHMED, ACJ

AUGUST 8, 2013
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