

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

+ **W.P.(C) 9748-9750/2006 & CMs. 7262/2006, 2090/2007, 3038/2007,
5964/2007 & 14645/2009**

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Reserved on: 5th December, 2012

Decided on: 13th February, 2013

ROMI SHARMA & ANR

..... Petitioners

Through: Mr. H.K. Chaturvedi with Ms. Anjali
Chaturvedi, Advocates.

versus

HOTEL THE OBEROI THRU ITS G.M.

..... Respondent

Through: Mr. Jayant K. Mehta, Advocate.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present petition impugns the order dated 2nd December, 2000 whereby the enquiry was held to be conducted in accordance with the rules and principles of natural justice and the award dated 3rd July, 2001 holding that the punishment awarded to the Petitioners of dismissal of service to be not disproportionate to the misconduct and dismissing the complaint of the Petitioners under Section 33A of the Industrial Disputes Act, 1947 (in short the ID Act) being devoid of merit.

2. Learned counsel for the Petitioners contends that on the learned Trial Court giving finding on the Issue No. 1 that complaint under Section 33A of the ID Act was maintainable as the Management violated the provisions of Section 33(1)(b) ID Act, it could not have proceeded further to adjudicate issue No.2, in view of the decision in *Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd. vs. Shri Ram Gopal Sharma and o*, 2002 (2) SCC 244 (in short the *JZSBVB*). The application of the Management under Section 33 (2) (b) ID Act was dismissed holding that this was a case for seeking permission under

Section 33 (1) (b) and not approval under Section 33 (2) (b) of the ID Act. Reliance is also placed on *Satyabrata Goswami vs. Presiding Officer, Industrial Tribunal, Dibrugarh and others*, 2008 LAB IC 332, *DTC vs. Prem Chand, Ex. Sweeper*, 176 (2011) DLT 476 (DB) and *Tops Security Ltd. vs. Subhas Chander Jha*, 191 (2012) DLT 361 (DB). The finding of the learned Trial Court that the Management violated Section 33 ID Act as no permission was taken under Section 33 (1) (a) ID Act has not been challenged by the Respondent and hence the same has become final.

3. Countering the arguments of the learned counsel for the Respondent regarding concealment of facts, estoppel, res judicata and laches, it is stated that in the earlier round of litigation, the learned Single Judge of this Court and the Division Bench of this Court in LPA 885/2004 did not consider the legal position laid down in JZSBVB (supra) in the right perspective though it held that there was violation of Section 33 of the ID Act. Reference is made to Section 14 of the Limitation Act to contend that if a litigant is pursuing an alternative remedy bonafidely then the time taken in the said remedy has to be excluded. As regards concealment of facts in the writ petition, it is stated that though inadvertently in the writ petition complete facts have not been stated however, the same have been stated in the list of dates and thus there is no material concealment of facts.

4. Learned counsel for the Respondent on the other hand contends that the present petition is liable to be dismissed due to estoppel and the principle of res judicata and laches. The Petitioners earlier challenged the dismissal by way of Writ Petition (C) No. 3115/1998 and sought prosecution which writ petition was dismissed by this Court vide judgment dated 5th July, 2004. This Court clearly held that the petitioner having not challenged the order

dated 2nd December, 2000 and award 3rd July, 2001, the same have become final and have attained finality. Since the principles of res judicata apply to the proceeding under Industrial Disputes Act, consequences must follow. Thus the decision of the learned Single Judge of this Court deciding the three writ petitions, that is, W.P. (C) No. 4361/1997, 2736/1998 filed by the Respondent and W.P. (C) No. 3115/1998 filed by the Petitioner, taken up in LPA No. 885/2004 by the Petitioners, which appeal was also dismissed vide order dated 19th November, 2005 have laid the issues at rest. Even the Review Petition No. 66/2006 filed in LPA No. 885/2004 was dismissed on 10th February, 2006. Having failed in all its attempts and this Court repeatedly noting down that the Petitioners have not challenged the order dated 2nd December, 2000 and award dated 3rd July, 2001, these order/award have now been challenged by concealing material facts in the present writ petition. The issues having attained finality, the Petitioner is precluded from re-agitating the same issues as the same would amount to abuse of the process of the Court. The petitioner cannot now take recourse to Section 14 of the limitation Act as the same is available if a litigant is pursuing wrong remedy bona fide but not in respect of a case where the remedy is not being pursued at all despite repeated observations by this Court. In such a situation, the litigant cannot later on claim that the period spent in the earlier litigation be condoned. It is further contended that *JZSBVB* (supra) has no application to the facts of the present case as the issue decided therein was wholly different. The case of the Petitioner before this Court today is notwithstanding enquiry, notwithstanding proven misconduct, notwithstanding orders having attained finality, he should be put back into service. The decision in *JZSBVB* (supra) cannot confer the right on the

workman which he does not have. Further the impugned order/award suffer from no illegality. Moreover this Court would exercise its jurisdiction under Article 226 of the Constitution sparingly and not in a case which suffers from delay and laches.

5. I have heard learned counsel for the parties and perused the record.

6. The facts in nutshell are that on 30th May, 1994 three of the Petitioners before this Court and two other workmen unauthorisedly entered into the 'Baan Thai' Restaurant of the Respondent and after surrounding the Restaurant Manager Javed I. Baig abused him with filthy language and questioned him regarding marking one Davind Sherpa Steward as absent, physically pulled Shri Baig and threw him out of the restaurant. In view of this misconduct the five workmen were suspended on the same day pending disciplinary enquiry. On the same day again, they forcibly trespassed into the main kitchen of the Respondent, occupied a table therein, started interfering with the work of the kitchen and made proactive utterances loudly. Show cause was issued as to why disciplinary action should not been taken and a domestic enquiry was conducted thereafter. The Petitioners filed a writ petition being W.P. (C) No. 861/1995 before this Court praying that the Management be directed to permit them to have a Defence Assistant of their choice which the Respondent conceded and the writ petition was disposed of on the same date, that is, on 27th April, 1995.

7. On 17th November, 1995 the Petitioners made a complaint to the government regarding their continued suspension pending the domestic inquiry on which followings terms of reference were sent for adjudication.

“Whether the continuance of suspension of S/Sh. D.S. Teja, Ram Charan, Lalit Kumar Shandilya and Romi Sharma is

illegal and/or unjustified and if so, to what relief are they entitled and what directions are necessary in this respect

In ID No. 2/1996 the Tribunal framed two issues, that is, 1. Whether the reference is made in law for the reasons stated in the preliminary objection Nos. 3, 4 and 5 in the written statement of the Management? 2. As in terms of reference.”

8. On 31st May, 1996 the domestic enquiry was completed and the charges were proved. The Petitioners were dismissed from service. Thus the Management filed an application under Section 33 (2) (b) of the ID Act for approval of the action taken against the dismissed workmen. The Petitioners filed an application under Section 33A of the ID Act before the learned Trial Court claiming that their dismissal had been effected during the proceedings before learned Trial Court in ID 2/1996 and thus the dismissal was related to a matter connected with the pending dispute. In respect of this application under Section 33A of the ID Act, learned Trial Court framed the following issues:

“1. Whether the respondent/Management contravened the provisions of Section 33 of the ID Act?

2. If issue NO. 1 is decided in favour of the complainants, whether the enquiry held against the complainants was not fair and proper as claimed by them?

3. To what relief, if any, are the complainants entitled?”

9. On 13th June, 1997 learned Trial Court passed a preliminary award deciding the issues framed relating to the preliminary objections raised by the Management in ID No. 2/1996. The issue no. 1 in ID 2/1996 was decided against the Management however it upheld the right of the

Respondent to suspend the workmen in view of the industrial employment (Standing) order, 1946. It was further held that the reference was valid. As regards the suspension, it was held that the initial suspension was bad however the suspension after the charge sheet issued was valid. The Petitioner did not challenge the award dated 13th June, 1997 however the Respondent/Management challenged the same before this court by filing W.P. (C) No. 4361/1997. In the meantime, learned Trial Court dismissed the application of the Management filed under section 33 (2) (b) of the ID Act vide order dated 15th May, 1998 as not maintainable on the ground that the Management was required to file an application under Section 33 (1) (b) ID Act for permission and an application under Section 33(2)(b) seeking approval was not maintainable. The Management challenged the order dated 15th May, 1998 in Writ petition (C) No. 2736/1998. In the meantime, the Petitioners filed a Writ Petition being W.P. (C) No. 3115/1998 which is the bone of contention with the following prayers:

- “a) Call for the records of the case,
- b) Declare that the 'Right of Life' guaranteed under Article 21 of the Constitution includes the right not to be exploited and not subject to penury,
- c) consequently declare that the failure of the Management, the respondents 3 to 7, herein in not obtaining the prior permission of the Hon'ble Tribunal before dismissing the petitioner workmen is arbitrary, illegal and violative of Articles 14 and 21 of the Constitution.
- d) Issue a writ of mandamus or any other appropriate writ, order or direction directing the appropriate Government to initiate the prosecution proceedings against the respondents 3 to

7 for violating and contravening Section 33 of the Industrial Disputes Act, 1947."

10. It may thus be seen that the Petitioners sought the same reliefs before this Court by way of writ petition which were pending before the learned Trial Court in the reference and application under Section 33A of the ID Act. During the pendency of the abovementioned writ petitions before this Court the impugned order dated 2nd December, 2000 and award dated 3rd July, 2001 were passed. Vide the impugned order dated 2nd December, 2000 learned Trial Court on the issue no. 2 held that the domestic enquiry conducted by the Respondent was valid and proper. As per the rules and principles of natural justice the finding of the enquiry officer was not perverse and thus the issue was decided in favour of the Management and against the petitioners. The application of the Petitioner under Section 33 A of the ID Act was dismissed by the impugned award dated 3rd July, 2001. All the above three writ petitions, that is, W.P. (C) No. 4361/1997 and 2736/1998 filed by the Management and W.P. (C) No. 3115/1998 were heard together and decided by the common impugned judgment of this Court dated 5th July, 2004. It may be noted that this Court specifically noted that despite the proceedings before the learned Trial Court in the reference and the application under Section 33A of the ID Act having culminated into the order/award, the petitioners had not challenged the same and thus they have attained finality. This Court in para 29 and 32 clearly noted that the Petitioners had not challenged the order dated 2nd December, 2000 and award dated 3rd July, 2001. This Court though dismissed the challenge to the reference dated 17th November, 1995 in W.P. (C) No. 4361/1997 however it quashed the award dated 3rd June,

1997 and held the suspension orders to be valid. W.P. (C) No. 2736/1998 was allowed by this Court and the order dated 15th May, 1998 dismissing the application filed by the Management under Section 33 (2) (b) of the ID Act as not maintainable was set aside. It was held:

“82. Issue could be looked at from another angle. The workmen had filed an application Under Section 33A of the I.D Act 1947. The Tribunal adjudicated upon the merits of the dismissal of the workmen and held in favor of the management. Vide order dated 2.1.2000, merits of the inquiry as well as dismissal order was upheld. Vide order dated 3.7.2001, application of the workmen under Section 33A was dismissed. The two orders dated 2.12.2000 and 3.7.2001 have attained finality. The workmen have not challenged the same. Consequences must flow. *res judicata* applies to case of *Industrial Law.(1978)IILLJ161SC* , *Workmen of Cochin Port Trust vs. Board of Trustees; MANU/SC/0370/1975 : (1975)IILLJ373SC* , *The Punjab Co-operative Bank vs. R.S.Bhatia and 1993 II L.L.J 60 (P&H)*, *The Punjab State Co-operative Bank Ltd vs. Presiding Officer.*

83. The workmen, under the circumstances cannot seek any relief in view of the judgment of the Supreme Court on which they relied, being the decision reported as (2002)ILLJ834SC , *Jaipur Zilla Sahakari Bhandar Vikas Bank Ltd vs. Ram Gopal Sharma & Ors.* Had the workmen not filed an application under Section 33A of the I.D Act 1947 or had the same not been dismissed, issue would have to be determined in the light of the decision of the Supreme Court in *Jaipur Zilla Sahakari Bhandar (supra)* but having exercised their right by invoking Section 33A and having failed therein, the order against them not having been challenged, workmen would not be entitled to any relief as prayed for by and under W.P(C) No.3115/1998.

84. A declaration is accordingly issued that the dismissal of the workmen is legal, valid and has attained finality.

85. W.P(C) NO.3115/1998 filed by the workmen is dismissed. W.P(C) No.4361/1997 and W.P(C) No.2736/1998 are allowed as per the direction in para 59 and 81 above. No costs.”

11. This Court however dismissed the writ petition (Civil) No. 3115/1998 filed by the Petitioners and held that in view of the circumstances of the case, the petitioners could not seek any relief relying upon the decision in *JZSBVB* (supra). It was held that had the petitioners not filed an application under Section 33 (A) of the ID Act or had the same not been dismissed, the issue would have to be determined in the light of the decision of the Hon’ble Supreme Court in *JZSBVB* (supra). But having exercised the right by invoking Section 33A ID Act and having failed therein and the order against them not having been challenged, the workman would not be entitled to any relief as prayed for in W.P. (C) No. 3115/1998. It may be noted that when these three writ petitions were heard, the impugned order and award had been passed for nearly 3-3½ years and the award published more than two years back however, the petitioners took no steps to challenge the same.

12. Aggrieved by the judgment of this court dated 5th July, 2004 declaring that the dismissal of the workmen was legal, valid and had attained finality the Petitioners filed LPA No. 885/2012. Even at that stage the Petitioners chose not to make a statement that they would be challenging the impugned order and award dated 2nd December, 2000 and 3rd July, 2001. The Petitioners again raised the issue raised in the present petition, regarding the application of the judgment in *JZSBVB* (supra). The Division Bench of this Court held:

“19. No doubt, the Tribunal had by its order dated 13.6.1997 and 2.12.2000 held that Section 33 of the Industrial Disputes Act had been violated. However, it is important to note that

merely because the worker proves the violation of Section 33 it does not automatically follow that the Tribunal must necessarily set aside the punishment and order reinstatement without examining anything further vide Punjab N.Bank Vs. A.I.P.N.B.E. Federation AIR 1960 SC 160. Termination of service in violation of S.33 is not void or non-est vide Phoenic Plywood V. I.T., 1979 (38) F.L.R. 153 Ker. and also M/s. Punjab Beverages Pvt. Ltd. Vs. Suresh Chand, AIR 1978 SC 995. The Tribunal, on proof of violation of Section 33, must go further and consider the cause on merits vide Delhi Cloth and Gen. Mill Vs. Rameshwar AIR 1961 SC 689 and also P.N. Misra V. State of U.P. 1973 I LLJ 354 All, Equitable Coal Co. Ltd. Vs. Algu Singh, 1958 I LLJ 793 SC, Hindustan General Electrical Corp. Ltd. Vs. B. Prasad, 1971 II LLJ. 340 S.C. As the Supreme Court observed: "...an employee would not succeed in obtaining an order of reinstatement merely by proving contravention of Section 33 by the employer. After such contravention is proved it would still be open to the employer to justify the impugned dismissal on merits." Vide Delhi Cloth & General Mills v. Rameshwar (supra), C.A. Rodrick V. Karam Chand Thapar, 1963 I LLJ 248 SC, Punjab National Bank Ltd. v. Their Workmen, 1959 II LLJ. 666 S.C. etc. From this point of view the scope of Section 33A is wider than that of Section 33, for whereas in the former the Tribunal can go into merits, in the latter it cannot do so vide Andhra Pradesh State Road Transport Corpn. 1971 LIC 222; Automobile Products v. Rukmaji 1955 I LLJ 346 S.C., Indramer Co. v. Baren De 1958 II LLJ. 556 S.C.; Delhi Cloth Mills v. Addl. Tribunal 1960 II LLJ. 712 S.C.

20. Hence merely because the application of the management under Section 33(2)(b) for approval of its action had been rejected by the Tribunal, it does not follow that the termination order had automatically become void or non-est. We fully agree with the view taken by the learned Single Judge in the impugned judgment that since the workmen filed an application under Section 33A which was rejected, they cannot claim reinstatement merely because the application of the

management under Section 33(2)(b) had been rejected. In *M/s Punjab Beverages Pvt. Ltd. v. Suresh Chand*, AIR 1978 SC 995 it was held:

‘It will, therefore, be seen that the first issue which is required to be decided in a complaint filed by an aggrieved workman under Section 33A is whether the order of discharge or dismissal made by the employer is in contravention of Section 33. The foundation of the complaint under Section 33A is contravention of Section 33 and if the workman is unable to show that the employer has contravened Section 33 in making the order of discharge or dismissal the complaint would be liable to be rejected. But if the contravention of Section 33 is established, the next question would be whether the order of discharge or dismissal passed by the employer is justified on merits. The Tribunal would have to go into this question and decide whether, on the merits, the order of discharge or dismissal passed by the employer is justified and if it is, the Tribunal would sustain the order, treating the breach of S.33 as a mere technical breach..... But this much is clear that mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement, because inquiry under Section 33A is not confined only to the determination of the question as to whether the employer has contravened Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.’”

21. In any event, assuming that the suspension on 30.5.1994 was invalid, it would remain invalid at most only till 6.6.1996 when admittedly the charge sheet was issued. Hence from 6.6.1996 the suspension order certainly became valid.

22. The misconduct conducted by the Appellants was very serious and we have no sympathy for such workmen. In fact no organization can function if such action of indiscipline and

misconducts are permitted or tolerated. The recent trend of Supreme Court decisions have all deprecated such misconducts by workmen in no uncertain terms and have held that such acts cannot be tolerated as they are subversive of the discipline of the establishment, vide *Mahindra and Mahindra v. N.B. Narawade* JT 2005(2) SC 583, *Employers Management, Colliery, M/s Bharat Cooking Coal Ltd. etc. V. Bihar Colliery Kamgar Union through Workmen* AIR 2005 SC 2006, and *U.P.S.R.T.C. v. Subhash Chandra Sharma* AIR 2000 SC 1163 etc. In our opinion, no organization can run smoothly and efficiently if such kind of indiscipline and misbehavior is countenanced.

23. We fully agree with the learned Single Judge and dismiss the appeal.”

13. In the present petition the Petitioners are re-agitating the same legal issue which has already been decided against them by the learned Single Judge of this Court and upheld by the Division bench. In view of the specific finding of the Division Bench on the issue being re-agitated by the Petitioners, no further consideration thereof is called for by this Court.

14. Further the present petition is liable to be dismissed on the ground of delay, laches and acquiescence. The impugned order/award were passed on 2nd December, 2000 and 3rd July, 2001 respectively and the Petitioners were continuously litigating however they chose not to challenge the same and waited till the dismissal of the review petition being Review Petition No. 66/2006 in LPA No. 885/2004 on 10th February, 2006 and thereafter filed the present petition. This is not a case covered under Section 14 of the Limitation Act. Further in the present petition no such prayer for condonation of delay has been made and it is only orally submitted that the petitioners were bonafidely pursuing an alternate remedy. The learned

Single Judge of this Court repeatedly held that the order dated 2nd December, 2000 and award dated 3rd July, 2001 having not been challenged have attained finality. In such a situation the Petitioners cannot be said to be pursuing the alternate remedy bonafidely.

15. The Hon'ble Supreme Court in *U.P. Jal Nigam & Another Vs. Jaswant Singh and Anr.* (2006) 11 SCC 464 has held:

12. The statement of law has also been summarised in *Halsbury's Laws of England*, para 911, p. 395 as follows:

“In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.

13. In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into

consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"

16. Petition and applications are dismissed.

(MUKTA GUPTA)
JUDGE

FEBRUARY 13, 2013
‘vn’