

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 21.07.2014

+ **W.P.(C) 5990/2013 & CM 13192/2013, 13673/2013**

M/S R.B. SETH JESSA RAM & BROS.

..... Petitioner

versus

M.K. GAUR & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Harvinder Singh and Mr J.S. Saroha.

For the Respondents : Mr N.A. Sebastian for R-2.

Ms Raavi Birbal, Advocate for R-1 and R-3.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has, by way of the present petition under Article 226/227 of the Constitution of India, called into question, the Recovery Certificate dated 19.08.2013 issued by the Deputy Labour Commissioner (Central District, Govt. of NCT of Delhi). The said certificate is hereinafter referred to as the 'impugned order'. The substratal controversy in the present case is, whether recovery of alleged dues under Section 33C(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act') could be issued at the instance of respondent no.2, who according to the petitioner, is not "workman" as defined under Section 2(s) of the Act. The petitioner has further challenged the impugned order, contending that the same has been issued on basis of an order of the Industrial Tribunal

permitting the withdrawal of the applications filed by the petitioner under Section 33(2)(b) of the Act, which could be construed as an award or a settlement that could be enforced under the provision of Section 33C(1) of the Act.

2. Briefly stated the relevant facts are as under:-

2.1. The petitioner is a trust and owns and manages a Hospital known as R.B. Seth Jessa Ram Hospital situated at Karol Bagh, New Delhi (in short the Hospital). Respondent no.2 was an employee of the petitioner and was a part of the nursing staff at the Hospital. According to respondent no.2, she is a diploma holder in General Nursing and Midwifery; she joined the services of the Hospital on 10.06.1992 as a staff nurse and was the senior most in the establishment – the Hospital. Respondent no.2 was designated as the Deputy Nursing Superintendent on 29.10.2010. Whilst, the petitioner contends that respondent no.2 performed managerial functions and functioned as the head of the nursing department, which entailed supervising the nurses and other staff, the same is stoutly disputed by respondent no.2, who asserts that she did not perform any supervisory or managerial functions.

2.2. The petitioner alleges that respondent no.2 was guilty of misconduct and, accordingly, disciplinary action was taken against her. A chargesheet was issued to her on 07.05.2011 and, thereafter, she was dismissed from service on 15.12.2011. At the material time, disputes were pending between the management of the petitioner and its workmen before the Industrial Tribunal (in short Tribunal). Accordingly, the petitioner filed

two applications before the Tribunal under Section 33(2)(b) of the Act disputes pending before the Tribunal, seeking dismissal of respondent no.2 from the services of the Hospital. The petitioner asserted that respondent no.2 was a part of the management cadre in the organizational setup of the Hospital and was not a workman as defined under Section 2(s) of the Act, nonetheless, approval under Section 33(2)(b) of the Act was sought by way of a precautionary measure.

2.3. Pursuant to the application under Section 33(2)(b) of the Act moved by the petitioner, proceedings commenced before the Tribunal which were contested by respondent no.2. On 05.05.2012, the Tribunal framed following issues:-

- “1. Whether the management has conducted valid and proper inquiry against the workman ? OPM
2. If answer to issue No 1 is in negative, whether workman committed misconduct as alleged by the management ? OPM
3. Whether management has complied provisions to proviso to Section 33 (2) (b) of Industrial Disputes Act ? OPM
4. Relief”

2.4. The Tribunal further noted that no other issue arose or was pressed. At the request of the parties, issue nos. 1 & 3 were treated as the preliminary issues. After the petitioner had participated in the proceedings before the Tribunal, it moved two applications dated 06.04.2013 for withdrawal of the approval sought under Section 33(2)(b) of the Act. The only reason given by the petitioner for seeking withdrawal of its application was that respondent no.2 was not a workman and, therefore, her dismissal

from services did not require the approval under the Act. On 27.04.2013, the applications filed by the petitioner under Section 33(2)(b) of the Act was disposed of as withdrawn, however, the Tribunal noted that the same was “*without prejudice to the rights and contentions of the workman, which may be raised, in any proceedings*”. Thereafter, respondent no. 2 proceeded before the learned Assistant Labour Commissioner for recovery of the amounts due on account of arrears of wages, contending that in absence of approval under section 33(2)(b) her dismissal was non-operative. The application filed by respondent no.2 was contested by the petitioner, albeit, unsuccessfully. The Deputy Labour Commissioner (respondent no.1) passed the impugned order which is subject matter of challenge in the present petition.

3. It is contended by the learned counsel for the petitioner that respondent no.2 was working as the head of nursing department and other nurses were working under her supervision and control. It is further contended that the respondent no.2 was authorized to sanction the leave, gate passes, fixed their shift schedule as well as appraise the performance of nurses. Accordingly, the respondent no.2 would not fall within the definition of workman within the meaning of Section 2(s) of the Act. It was further contended that order dated 27.04.2013 of the Tribunal disposing of the petitioner’s application under Section 33(2)(b) of the Act, as withdrawn could not be construed as an award or a settlement which could be enforced under Section 33C(1) of the Act and, therefore, the impugned order was wholly without jurisdiction.

4. The contentions raised by the petitioner were controverted by the learned counsel for respondent no.2, who asserted that there were certain disputes pending between workmen and the management of the Hospital, and respondent no.2 was an office bearer of the employee's union (R.B. Seth Jessa Ram and Nursing Home Employees Union) and had been agitating certain issues with the management of the Hospital on behalf of the workmen. The learned counsel for respondent no.2 pointed out that there was a history of litigation between the management and the workman and false charges had been fabricated against the respondent no.2 to victimise her for the stand taken by her against the management. He further contended that the contention that respondent no.2 was not a workman was an afterthought and this contention had not been pursued by the petitioner before the Tribunal. He submitted that the employees' union as well as other employees including respondent no.2 had approached this Court by way of a writ petition (i.e. being W.P.(C) 5857/2011), *inter alia*, on the ground that the petitioner therein were not being permitted to enter the Hospital. The said petition was disposed of by an order dated 16.08.2011. According to respondent no.2, the petitioner did not raise the contention that respondent no.2 was not a workman in those proceedings. It was submitted that the management of the petitioner had been holding negotiations with the office bearers of the union including respondent no.2 from time to time and several meetings had been held to resolve the issues between the workmen and the management. It was asserted that in none of those meetings had the management of the petitioner ever raised an objection that respondent no.2 was not a workman. It was contended that

by its conduct, the petitioner had accepted respondent no.2 as a workman and thus, could not be permitted to contend to the contrary.

5. I have heard the learned counsel for the parties.

6. The principal dispute that is now raised by the petitioner is that respondent No.2 cannot be considered as a workman within the definition of Section 2(s) of the Act. The petitioner had filed two applications for approval under Section 33(2) (b) of the Act on 16.12.2011 i.e. immediately after dismissing respondent No.2 from service on 15.12.2011. Although, it was averred in the said application that respondent No.2 was not a workman within the meaning of Section 2(s) of the Act and that the application was filed as a “precautionary measure”, it is apparent that the petitioner did not press this objection at any stage. By an order dated 05.05.2012, which was passed in the presence of the counsel for the petitioner, the Tribunal had struck issues and had further noted that “*no other issue arises or is pressed*”. It is thus apparent that the petitioner had not raised the controversy with regard to respondent No.2 not being a workman under the Act and, consequently, no issue with respect to this dispute was struck. Respondent No.2 has asserted that she was an office bearer of the employees’ union and had participated, on behalf of workmen, in negotiations between the workmen and the management. After having participated in the proceedings before the Tribunal for a considerable period of time, the petitioner finally decided to raise this objection once again. One can only hazard a guess that the petitioner decided to withdraw it’s application under Section 33(2)(b), on the ground that respondent No.2

was not a workman under the Act, because no such issue had been framed on the question whether respondent No.2 was a workman.

7. Respondent no. 2 has also asserted that, although, her designation may be high sounding but she has been performing her duties as a nurse and had not been entrusted with managerial or supervisory functions. It was further contended, that respondent no. 2 had been representing the employee's Union as an office bearer in meetings held with the management of the petitioner. It was contended that the petitioner had, all along, accepted respondent no. 2 as a workman, so much so, that even in the proceedings held in this court in respect of a writ petition filed by respondent no.2 along with other workmen, the petitioner had not urged any contention to the effect that respondent No.2 was not a workman.

8. In view of the rival contentions, it is apparent that the question whether respondent no. 2 is a workman is a contentious one and it is also a matter of dispute whether the petitioner ought to be permitted to raise the same in view of its conduct. I do not consider it appropriate to consider these issues in the present proceedings under Article 226/227 of the Constitution of India.

9. The essential question to be considered, is whether in the given facts and circumstances, recourse to section 33C(1) of the Act was available to respondent no. 2 and whether respondent no.1 could resort to proceedings under that provision to recover the wages claimed by respondent no.2

10. Before proceeding further it would be necessary to refer to provisions of Section 33 C (1) of the Act which is reproduced below:-

“Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter VA or Chapter VB the workman himself or any other person authorized by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue:

Provided that every such application shall be made within one year from the date on which the money became due to the workman from the employer:

Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period. ”

11. A Plain reading of the said provision indicates that the same relates to recovery of money which is due to a workman from an employer “*under a settlement or an award or under Provisions of Chapter VA or Chapter VB..*”. In the present case there is no award whereunder any payment is due to respondent No.2. Indisputably, the order dated 27.04.2013 passed by the Industrial Tribunal cannot be construed as an award in favour of respondent No.2, which could be executed under Provisions of Section 33C(1) of the Act. Thus, although the conduct of the petitioner is less than fair, the same would not entitle respondent No.2 to take recourse to Section 33C (1) of the Act

12. The learned counsel for the petitioner has contended that an appropriate recourse open for respondent no.2 would be to make a complaint under Section 33A of the Act and the question whether respondent no.2 is a workman within the meaning of Section 2(s) of the Act could be decided in those proceedings. It was further submitted that the inquiry against respondent no.2 was just and proper and the question with respect to the misconduct of respondent no.2 and the validity/illegality of the punitive measure taken by the management could also be decided in those proceedings. In my view, the contention that respondent no.2 could approach the Tribunal under Section 33A of the Act is merited. Whilst, the defence of the petitioner that respondent no.2 is not a workman, can be considered in such proceedings if initiated, I am unable to accept that the petitioner should be permitted to contend that respondent no.2 had been legally terminated from services in those proceedings as the same would be contrary to the decision of the 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. The Supreme Court had considered the scheme of the Act and 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 the 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 the 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 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A 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 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of the 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 33-A 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 33-A, 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 33-A 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 33-A 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. Following the aforementioned decision of the Supreme Court, this Court in the case of **Tops Security Ltd. v. Subhash Chandra Jha: 191 (2012) DLT 361** has also clarified that in the case where the employer has not followed the mandatory provisions of Section 33(2)(b), the employee may make a complaint under Section 33A and seek the relief of reinstatement and payment of back wages and in such cases, the Tribunal is not required to examine whether the dismissal of the employee was legal. Relying on the aforesaid decisions, a similar view was also taken by a Divisional Bench of this Court in **I.S. Rana v. M/s Centaur Hotel: LPA 164/2013, decided on 08.08.2013**. The relevant extract from the decision in ***Tops Security Ltd. (supra)*** reads as under:-

“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

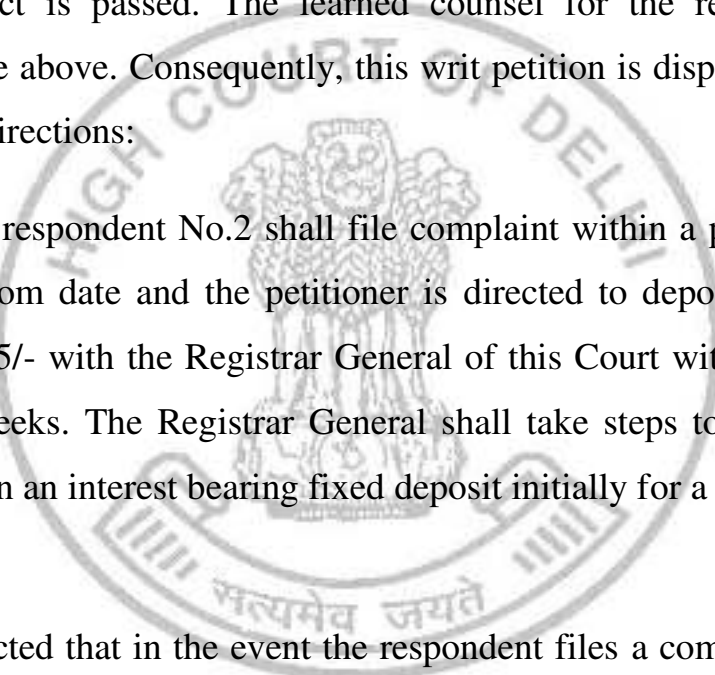
question of as to whether the dismissal was good or bad, on merits.”

14. The learned counsel for the petitioner has placed the decision of the Supreme Court in **Rajasthan Court Transport Corporation & Anr. v. Satya Prakash**: 2013 (137) FLR 1035, in support of his contention that even if the employer does not make an application, under Section 33(2)(b) of the Act it could nonetheless raise a defence to a complaint made by employee under Section 33A of the Act. This contention cannot be accepted as this is precisely what was addressed by a constitution bench of the Supreme Court in ***Jaipur Zilla Sahakari Bhoomi Vikas Bank*** (*supra*). The Supreme Court had clearly opined that in the event the employer had not followed the mandatory provision of Section 33(2)(b) of the Act, the order of discharge or dismissal would become inoperative. An employer who does not make an application under Section 33(2)(b) of the Act or withdraws one, could not be rewarded for not following the mandatory provisions of law. The facts in the case of ***Rajasthan State Road Transport*** (*supra*) were materially different. In that case, the employee had filed a civil suit where the first issue that was struck was whether the order of termination of the employee was bad in law for being against the principals of natural justice. The Court had returned the finding that employee was given sufficient opportunity for being heard and in the circumstances the principles of natural justice could not be stated to have been violated. The Court also observed that the conduct of the employee indicated that he did not want the root of the incident to be brought on record. The said suit was dismissed as it was held that the cause of action had not arisen within the territorial jurisdiction of the Court. Subsequently,

the Tribunal also examined the evidence and came to the conclusion that the charge against the employee was proved. Despite the charges of misconduct having been proved against the employee, the Tribunal granted relief to the employee only on the ground that provisions of Section 33(2)(b) of the Act had not been complied with. The decision of the Tribunal was sustained by a Single Judge, as well as, a Division Bench of the Rajasthan High Court. However, the Supreme Court set aside the decisions of the High Court as well as the Tribunal as in the facts of that case, it was certainly open for the employer (the appellant before the Supreme Court) to contend that the charges of misconduct had already stood proved in earlier proceedings initiated by the employee. However, the decision of the Supreme Court in the case of **Rajasthan State Road Transport** (supra) cannot be read to mean that where a complaint is made by an employee that its employer as violated the provisions of the Act by terminating his services without approval under Section 33(2)(b) of the Act, it would be open for the employer to take a defence on merits that the termination was legal and warranted. This would entail the Tribunal examining the charges of misconduct in proceedings where Section 33(2)(b) had, admittedly, been violated. This interpretation would render the provisions of Section 33(2)(b) of the Act completely otiose and as pointed out by the Supreme Court in **Jaipur Zilla Sahakari Bhoomi Vikas Bank** (supra), this would amount to rewarding an employer who does make an application under Section 33(2)(b) by relieving him of his statutory obligations and that such approach destroys the protection specifically given to an employee against possible victimisation, unfair labour practice or harassment.

15. In view of the above discussion, the impugned order is set aside.

16. The learned counsel for the respondent states that it would file an appropriate application under Section 33A of the Act within a period of four weeks. He further states that he would be satisfied if the petitioner is directed to deposit the amount as indicated in the recovery certificate in this Court, to abide by the decision of the Tribunal in those proceedings and if a direction for expeditious disposal for his proposed complaint under Section 33A of the Act is passed. The learned counsel for the respondent is agreeable to the above. Consequently, this writ petition is disposed of with the following directions:

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- a) That the respondent No.2 shall file complaint within a period of six weeks from date and the petitioner is directed to deposit a sum of ₹7,26,065/- with the Registrar General of this Court within a period of six weeks. The Registrar General shall take steps to deposit the amount in an interest bearing fixed deposit initially for a period of six months.
 - b) It is directed that in the event the respondent files a complaint under Section 33A of the Act, the Tribunal shall dispose the same expeditiously, preferably within a period of three months.
 - c) It shall be open for the petitioner to raise the contention that respondent No.2 is not a workman and the same shall be decided by the Tribunal uninfluenced by any observation made in this judgment.

- d) The deposit made by the petitioner with the Registrar General of this Court shall be subject to the decision of the Tribunal and shall be dealt with in accordance with the directions that may be issued by the Tribunal.
- e) In the event the Tribunal comes to the conclusion that respondent No.2 is a workman, it shall pass an order accordingly. The petitioner would then be at liberty to revive its application under Section 33(2)(b) of the Act.

JULY 21, 2014
RK



VIBHU BAKHRU, J