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

% *Judgment delivered on: November 18, 2014*

+ **W.P.(C) 7779/2013 & CM No.16548/2013 (for stay)**

M/S NATIONAL HEART INSTITUTE & ANR. Petitioners

Represented by: Mr.Satyakam, Advocate with
Mr. S.K. Shailly, General Manager (F & L) of the
Petitioners.

Versus

GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF
DELHI (LOBOUR) AND ORS. Respondents

Represented by: Mr.Dheeraj Kaushik for
Ms. Raavi Birbal, Advocate for Respondent No.1.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

W.P.(C) No. 7779/2013

1. The present petition is directed against the order dated 06.09.2013, whereby the Learned Tribunal dismissed the application filed by the petitioners under Section 151 CPC.

2. Brief facts of the case are that vide order dated 01.04.2010 services of the respondent No.2/workman was terminated after holding a departmental enquiry. Vide order dated 11.11.2009, Under Secretary (Labour) referred the following question to the Labour Court for adjudication:-

“Whether the demand of bonus raised by the union is justified; if yes, to what relief are they entitled and what directions are necessary in this respect?”

3. Accordingly, a notice dated 03.12.2009 was issued to the workman returnable for 19.01.2010. Thereafter, the aforesaid case was transferred on 08.04.2010 to the Court of Dr. T.R. Naval, Presiding Officer, Labour Court. Accordingly, the said Court issued notice to the petitioners Management.

4. Thereafter, in the month of June, 2010, the petitioners filed an application under Section 33A of the Industrial Disputes Act, 1947 (in short ‘the Act’) on the ground that very reference to the Labour Court was bad in law since the Labour Court had no jurisdiction in the matter and the Labour Court ought to have transferred the said matter to an Industrial Tribunal under the provisions of Section 10(1)(d) of the Act and the reference under Section 10(1)(c) of the Act was bad.

5. The workmen Union, namely, the National Heart Institute Employees Union (in short, ‘the Union), in the bonus case, approached the concerned Authority of the Government and sought transfer of the matter pending before the Labour Court. The said Authority instead of transferring the case issued a fresh notice on the very same subject on 27.04.2011. Acting on the said reference, a case was registered before the Industrial Tribunal vide Suit No.POIT/129/2011. The petitioners received another reference styled as corrigendum issued on 10.08.2011 verbatim to earlier reference except changing the provisions from Sections 10(1)(c) to 10(1)(d) of the Act.

6. The petitioners being aggrieved filed application before the Tribunal on 13.01.2012 calling upon the Tribunal to hold that the reference made was a fresh industrial reference and accordingly *de novo* proceedings should be initiated by directing the workmen union to file a fresh claim in the matter. The said application was decided in favour of the petitioners by the same Tribunal vide order dated 06.09.2012. It was held that since the appropriate Government in the corrigendum reference has not given specific reasons for transfer, therefore, it was not a transfer under section 33 B. Accordingly, the Learned Tribunal directed to initiate the proceedings *de novo* and allowed the application of the petitioners Management.

7. However, the matter pertaining to application under Section 33 A of the Act, was taken up for the first time on 05.10.2012 and on the very said date an application was filed on behalf of the petitioners pointing out that said application had become infructuous since it was deriving strength from a reference which was bad in law and has been abandoned. The same was rejected by passing the impugned order dated 06.09.2013.

8. Mr. Satyakam, learned counsel appearing on behalf of the petitioners submitted that the learned Tribunal while passing the impugned order has relied upon Section 11(1) of the Act but ignored the relevant Section 33 B of the Act which deals with a question. Thus, the learned Tribunal has failed to consider its own order dated 06.09.2012 whereby it was held that the reference dated 27.04.2011 is not a reference transferring the case pending before the Labour Court

pursuant to the reference dated 11.11.2009. If the said order dated 06.09.2012 is correct then the impugned order cannot be sustained. The very transfer by the order dated 02.09.2011 was bad and accordingly the application was not maintainable before the Industrial Tribunal in view of provisions of Section 33 B of the Act.

9. Learned counsel further submitted that the application under Section 33 A of the Act was not maintainable before the Tribunal since the Tribunal itself had held that reference dated 27.04.2011 was not a transfer and was a fresh reference. No case has been made out before the Tribunal that any cause of action inviting Section 33A of the Act has arisen pursuant to the reference dated 27.04.2011. The date fixed for the transfer case was on 01.04.2010 much before the date of present reference 27.04.2011.

10. Learned counsel submitted that no useful purpose would be served by continuing the proceedings under Section 33A of the Act when the order of termination of service has now been substantially challenged before the Labour Court by the respondent no. 3 and is pending before the learned Labour Court in I.D. No. 54/2011.

11. It is submitted that the application under Section 33 A of the Act gets transferred under Section 33 B of the Act only when there is transfer of the main case under Section 33 B of the Industrial Disputes Act, 1947. In the present case the appropriate Government did not transfer the reference pending before the said Labour Court by virtue of Section 33 B of the Act, then, the application under Section 33 A of the Act cannot be transferred.

12. Learned counsel further submitted that the learned Tribunal held that the reference before it was a fresh reference and the date of pendency under Section 20(3) of the Act will only start from 27.04.2011 and not from 11.11.2009. Thus, very purpose of Section 33A was to scuttle the process of conciliation and giving an opportunity to the workman to directly approach the court.

13. Learned counsel further submitted that since the matter of termination of service itself is substantially pending before the Labour Court, therefore, no purpose will be served by pursuing another litigation. Thus, both the courts will also have to go into the very same question of validity of termination. If the Tribunal decides that the termination is hit by Section 33 A of the Act, then it will have to test the validity of termination by the known yardsticks in law.

14. To strengthen his arguments, the learned counsel for the petitioners have relied upon a case of ***Rajasthan State Road Transport Corporation and Another Vs. Satya Prakash (2013) 9 SCC 232*** wherein the Supreme Court has held as under:-

“16. While considering the issue, the Court in *Ram Gopal Sharma case 3* noted in para 6 of the judgment that: (SCC p. 248)

“6.....*The object behind enacting Section 33 as it stood prior to its amendment in 1956, was to allow continuance of industrial proceedings pending before any authority/court/tribunal prescribed by the Act in a peaceful atmosphere undisturbed by any other industrial dispute. In course of time, it was felt that the unamended Section 33 was too stringent, for it placed a total ban on*

the right of the employer to make any alteration in conditions of service or to make any order of discharge or dismissal even in cases where such alteration in conditions of service or passing of an order of dismissal or discharge, was not in any manner connected with the dispute pending before an industrial authority.”

Section 33 was, therefore, amended in 1956 to permit the employer to make changes in conditions of service, or to discharge or dismiss employees in relation to matters not connected with the pending industrial dispute. At the same time, it was also felt necessary that some safeguards must be simultaneously provided for the workmen, and therefore a provision was made that the employer must make an application for prior permission if the proposed change in the service conditions, or the proposed dismissal/discharge is in connection with a pending dispute. In other cases where there is no such connection, and where the workman is to be discharged or dismissed, (i) firstly there has to be an order of discharge or dismissal, and then it was laid down in the proviso to Section 33(2)(b) that, (ii) the concerned workman has to be paid wages for one month, and (iii) an application is to be made to the authority concerned before which the earlier proceeding is pending, for approval of the action taken by the employer.

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19. This Section 33A reads as follows:

“33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceeding.- Where an employer contravenes the provisions of Section 33 during the pendency of proceedings [before a conciliation officer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal] any employee aggrieved by such contravention, may make a complaint in writing, [in the prescribed manner,-

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and

(b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before It, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.” (Emphasis supplied)

As can be seen, Sub-section (b) of Section 33A clearly lays down that when such a Complaint is made, the Tribunal shall adjudicate upon the Complaint as if it were a dispute referred to it, and shall submit his or its award to the appropriate Government, and the provisions of this Act shall apply accordingly. Thus, in that complaint, the employee will have to prove his case on merits.

*20. The purpose behind enacting Section 33A and the scope thereof was succinctly explained by Gajendra kar J (as he then was), in a judgment by a bench of three judges in **Punjab National Bank Ltd. v. All India Punjab National Bank Employees Federation** 9. In paragraph 31 thereof the Court noted that (AIR pp. 171-72)*

“31..... the Trade Union movement in the country had complained that the remedy for asking for a reference under Section 10 involved delay, and left the redress of the grievance of the employees entirely in the discretion of the appropriate Government; because even in cases of contravention of Section 33 the appropriate Government was not bound to refer the dispute under Section 10. That

is why Section 33A was enacted to make a special provision for adjudication as to whether Section 33 has been contravened. This section enables an employee aggrieved by such contravention to make a complaint in writing in the prescribed manner to the tribunal and it adds that on receipt of such complaint the tribunal shall adjudicate upon it as if it is a dispute referred to it in accordance with the provisions of the Act.”

Thus by this section the aggrieved employee is given a right to move the tribunal without having to take recourse to Section 10 of the Act.

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*22. This legal position has been reiterated in the judgment of the Constitution Bench in **P.H. Kalyani v. Air France** ¹¹ which has been quoted with approval in paragraph 17 of Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd.³. In that matter, the Respondent employer had applied under Section 33(2)(b), but the workman had also filed a Compliant under Section 33A which was heard like a Reference. Evidence was led therein by the parties, and on its own appraisal of the evidence the Labour Court had held that the dismissal was justified. This Court accepted that finding, and it was held that the approval when granted will relate back to the date when the order of dismissal was passed. On the other hand, if the employer fails to prove the misconduct, the order of dismissal will become ineffective from the date when the dismissal order was passed by the employee. This legal position has been reiterated from time to time [see for instance **Lalla Ram v. D.C.M. Chemicals Works Ltd.** ¹²]. In Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. the Constitution Bench endorsed the view taken in Straw Board and TISCO Ltd. and held that the view expressed in Punjab Beverages was not correct.*

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23. In the present case, the Tribunal accepted that during this very short span of service as a daily wager the Respondent had committed the misconduct which had been duly proved. Having held so, the Tribunal was expected to dismiss the Complaint filed by the Respondent. It could not have passed the order of reinstatement with continuity in service in favour of the Respondent on the basis that initially the Appellant had committed a breach of Section 33(2)(b) of the Act. It is true that the Appellant had not applied for the necessary approval as required under that section. That is why the Complaint was filed by the Respondent under Section 33A of the Act. That Complaint having been filed, it was adjudicated like a reference as required by the statute. The same having been done, and the misconduct having been held to have been proved, now there is no question to hold that the termination shall still continue to be void and inoperative. The de jure relationship of employer and employee would come to an end with effect from the date of the order of dismissal passed by the Appellant. In the facts of the present case, when the Respondent had indulged into a misconduct within a very short span of service which had been duly proved, there was no occasion to pass the award of reinstatement with continuity in service. The learned Single Judge of the High Court as well as the Division Bench have fallen in the same error in upholding the order of the Tribunal.”

15. Moreover, vide Memorandum of Settlement under Section 18(1) read with Section 2(P) of the Act and Rule 58 of the Industrial Disputes (Central) Rules, 1957 (in short ‘ID Rules’) between the petitioners and the Union whereby agreed as under:-

“19. It has been agreed that as per the Payment of Bonus Act, bonus is not applicable to the Hospital. Therefore, the Union at the earliest will withdraw the case bearing No.129/11, pending in the court of Industrial, Delhi.

However, the Management on its discretion may gift the employees on the occasion of Diwali.”

16. On perusal of the order dated 06.09.2012 passed by the learned Tribunal upon an application of the petitioners Management for *de novo* proceedings under reference styled as ‘corrigendum dated 27.04.2011 and 10.08.2011, the learned Tribunal has recorded that the corrigendum dated 27.04.2011 issued by the Under Secretary (Labour) in exercise of powers conferred by Sections 10(1)(c) and 12(5) of the Act was received on 05.07.2011, with copy to the workman through the employee’s Union with directions to file statement of claim with supporting documents and list of witnesses within 15 days. Accordingly, copy of the order was sent to the Tribunal with request to adjudicate the terms of reference and also copy to the Presiding Officer, Labour Court No.V, Delhi, for information. Accordingly, the said Tribunal had issued notices to both the parties for appearance on 11.08.2011. Subsequently, another corrigendum dated 10.08.2011 was received by the same Tribunal with reference to adjudicate at that stage the terms of reference as per Section 10(1)(d) of the Act alongwith copy thereof to the Presiding Officer, Labour Court No.V, Delhi, with request to transfer this case file to the Industrial Tribunal. However, the terms of reference were same in both the aforementioned corrigendum.

17. On the other hand, learned counsel appearing on behalf of the respondent No.2/workman submitted that the petitioners have attended the conciliation proceedings. Vide Rule 10B(1) of ID Rules, while

referring an industrial dispute for adjudication to a Labour Court or National Tribunal, the Central Government shall direct the party, raising the dispute, to file a statement of claims with relevant documents. Learned counsel submitted that word 'shall' denotes that it is mandatory on the part of the Central Government to direct the party, raising the dispute, to file a statement of claim.

18. The first term of reference dated 11.11.2009 read as under:-

“Whether the demand for bonus raised by the Union is justified; if yes, to what relief are they entitled and what directions are necessary in this respect?”

Accordingly, copy of the same was sent to the petitioners Management. Thus, the petitioners had knowledge of the reference.

19. Vide order dated 27.04.2011, corrigendum was issued on the same terms of reference and difference was only that instead of referring the case to the Labour Court, the dispute was referred to the Industrial Tribunal for adjudication.

20. Thereafter, workman moved an application dated 16.07.2011 for transfer of proceedings pending before the Labour Court to the Industrial Dispute Tribunal.

21. Learned counsel submitted that the said corrigendum was amounted to start proceedings *de novo* only. Moreover, the learned Tribunal vide its order dated 06.09.2012 opined that the proceedings in the case should be started *de novo* in the absence of any specific order from the Government in the corrigendum reference.

22. Learned counsel submitted that if any violation of the Act is committed by the employer, then, the said employer can be prosecuted.

23. To strengthen the aforesaid propositions, the learned counsel has relied upon a case of ***Blue Star Employees Union Vs. Ex. Off. Principal Secy. to Govt. and Anr., (2000) 8 SCC 94***, wherein the Apex Court held as under:-

“1. Certain disputes having arisen between the appellant union and respondent No. 2, a reference was made to the Industrial Tribunal [hereinafter referred to as 'the Tribunal'] in I.D. No. 2 of 1990. Pending adjudication of the said dispute, it is alleged that respondent No. 2 coerced the workmen to individually enter into settlement under Section 18(1) of the Industrial Disputes Act, 1947 [hereinafter referred to as 'the Act']. However, Balanarsimha and Mallesh refused to sign the settlement. Thereafter, the respondent No. 2 is stated to have notified the seniority list of mechanics of the weigh bridge/weighing machines department, while Mallesh was transferred, orders of termination of service of Balanarsimha and another was made. The seniority list exhibited was for the purpose of termination of the services of the said Mallesh. Balanarsimha and Mallesh made a complaint under Section 33A of the Act complaining that the provisions of Section 33 of the Act had not been complied with in modifying their conditions of service. An award was made by the Tribunal holding that the termination of services of Balanarsimha and Mallesh is justified and dismissed the complaint. Thereafter, an industrial dispute was sought to be raised and the Government by an order made on April 8, 1991 stated that the dispute raised does not merit reference for adjudication as the Tribunal has passed awards dismissing the cases of Balanarsimha and Mallesh. This order was challenged before the High Court in a writ petition. The learned Single Judge took the view that the

workmen cannot avail two opportunities for the same relief once on appearing before the Labour Court in individual capacity under Section 10(2A) of the Act although application was made under Section 33A of the Act and second by employees union of which the appellant is a member and, therefore, the Government is right in rejecting the application. This view on being affirmed on appeal before the division bench, this appeal by special leave is filed.

2. It is not clear from the order of the learned Single Judge of the High Court as to how the conclusion could be drawn that an application or complaint under Section 33A of the Act could become a reference to the Tribunal under Section 10(2A) of the Act. The only complaint made by the workmen was in their individual capacity under Section 33A of the Act and not as contemplated under Section 10(2A) of the Act. Neither the learned Single Judge nor the division bench considered the scope of the proceedings arising under Section 33A of the Act and the effect of findings recorded in such an inquiry. The Division Bench proceeded on the basis that the complaint before the Tribunal having been adjudicated the award would operate as res judicata.

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6. In the present case, we have been taken through in detail the award made in the case of Balanarsimha and Mallesh and we find that the Tribunal has not focused its attention to the first of the question whether there has been any contravention of Section 33 of the Act to enable it to proceed further to decide whether the employee is entitled to any relief under the Act or not. The merely consider the question that the employee is not entitled to the relief without examining firstly the question whether the act complained of is in contravention of Section 33 of

the Act will be one made as observed by this Court in Orissa Cement Ltd. case as obiter or as one made without fulfilling the condition precedent to exercise of power under Section 33A of the Act and, therefore, could not proceed to give a finding as to whether the termination of service of the workman is justified or not.”

24. Learned counsel submitted that the workman can file case under both the provisions, i.e., Sections 33A and Section 10 of the Act. Thus, this matter requires no interference.

25. I have heard learned Counsels for the parties.

26. The learned Tribunal held that expression ‘may’ in sub-Section (1) of Section 33B of the Act only makes it discretionary in so far as the Appropriate Government taking decision regarding the exercise of power vested in it. But, once a decision is taken to transfer a pending case, the requirement of giving reasons becomes mandatory.

27. In the present case, the Appropriate Government in corrigendum reference has neither given specific reasons of transfer nor any special direction to proceed either *de novo* or from the stage at which it has been transferred. Accordingly, the learned Tribunal opined that proceedings in the present case should be started *de novo* in the absence of any specific order from the Appropriate Government in corrigendum reference. Hence, the application of the Management for *de novo* proceedings was allowed.

28. On perusal of the order dated 06.09.2013, whereby while considering the application filed by the Management under Section 151 of the Code of Civil Procedure, 1908, for dismissal of the complaint,

the learned Tribunal recorded that as per Section 11(1) of the Act, a Court or a Tribunal shall follow such procedure as the Arbitrator or other Authority concern may think fit. Accordingly, the petitioners Management have taken the ground that since the learned Tribunal held that the case pending before the said Tribunal has been arisen from a fresh reference and matter be proceeded *de novo*, therefore, the said application was not maintainable being *infructuous*.

29. On the aforementioned issue, the learned Tribunal recorded that proceeding the matter *de novo*, as directed by the Tribunal vide its order dated 06.09.2012, did not have any effect on the maintainability of the complaint before it.

30. Other ground taken by the Management was that since from the date of dismissal, i.e., 01.04.2010, statement of claim was not filed; there could be no pendency of the dispute. The learned Tribunal opined that the pendency of an industrial dispute is considered from the date of reference and not from the date of filing of statement of claim. Accordingly, the pleas taken by the Management were rejected by the learned Tribunal.

31. Keeping in view the above discussion, I am not inclined to interfere with the order dated 06.09.2013 passed by the learned Tribunal.

32. Consequently, the petition is dismissed with no order as to costs.

CM No.16548/2013 (for stay)

With the dismissal of the present petition, the instant application has become *infructuous*. The same is accordingly dismissed.

**SURESH KAIT
(JUDGE)**

NOVEMBER 18, 2014
RS/sb/jg