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

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Judgment delivered on: February 5, 2015

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W.P.(C) No. 2239/2013

RAJ KARAN (DECEASED) THROUGH: LRS

SH. GANGA RAM

..... Petitioner

Represented by: Ms. Deepali Gupta, Advocate.

Versus

M/S. ALL INDIA WOMENS CONFERENCE

..... Respondent

Represented by: Mrs. C.M. Chopra, Sr. Advocate

with Mr. Sunil Mittal, Advocate.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. The present petition is directed against the award dated 24.03.2012, wherein the learned Tribunal had recorded that by leading cogent and trustworthy evidence, the respondent Management has proved the absenteeism and misconduct of the petitioner/workman deceased Raj Karan for a long period. Accordingly, the learned Tribunal held that order of dismissal from service dated 16.04.1999 of the petitioner/workman was justified and legal.

2. The present petition has been filed through legal heir of deceased Raj Karan, who was a protected workman, filed I.D. No. 483/1998 later renumbered as I.D. No. 319/06/98, which was pending adjudication before the Labour Court vide reference under Section 36A

of the Industrial Disputes Act, 1947 (hereinafter to be referred as 'the Act'), with respect to service benefits of workmen being the General Secretary of the Workmen Union. Due to which the Management became annoyed and terminated his services in 1998 alleging abandonment of service. Though the said order was recalled, but a chargesheet dated 22.10.1998 (in Hindi) alleging unauthorized absence from duty w.e.f. 05.06.1998 till 09.08.1998 was issued against the deceased workman. Thereafter, the inquiry was concluded vide order dated 16.04.1999 and the major punishment of dismissal from service was imposed upon the workman after 26 years of unblemished service.

3. Being aggrieved, the workman raised an industrial dispute being I.D. No. 289/99 and vide award dated 12.01.2004, the learned Tribunal held that termination of services of the workman was illegal as the Management did not take approval under Section 33(2)(b) of the Act, accordingly, held that the workman shall be deemed to be continued in service and entitled to all wages from date of dismissal.

4. The Management, being aggrieved, challenged the said award in W.P.(C) No. 15211/2004 raising the question whether provisions of Section 33 of the Act apply to proceedings under Section 36A of the Act and thereby sought quashing of the award. Vide order dated 05.04.2010, this Court while holding that provisions of Section 33 of the Act are applicable to the proceedings under Section 36A of the Act, disposed of the writ petition by remanding the matter to the Labour

Court to answer the reference on merits with liberty to the Management to apply for approval under Section 33(2)(b) of the Act.

5. It is pertinent to note that during the pendency of the aforementioned writ petition filed by the Management, workman Sh. Raj Karan died on 19.10.2005, accordingly, his legal heir was substituted.

6. Pursuant to order dated 05.04.2010 of this Court, the matter was again taken up by the Labour Court. The Management moved an application under Section 33(2)(b) of the Act on 20.07.2010 for approval of action of dismissal dated 16.04.1999 of workman. The same was dismissed by the learned Tribunal vide its order dated 06.01.2011, whereby recorded as under:-

“6. As regards the following of the principles of natural justice by the Enquiry Officer, and giving sufficient opportunity to the workman to defend himself in the proceedings, the material on record speaks to the contrary. For instance, Enquiry Officer Mr. L.K. Singh has conducted domestic enquiry simultaneously against the workman as well as a coworkman Jagat Singh for similar charges and both matters being taken up together on the same dates for conducting enquiries. On 05.01.1999, workman Raj Karan had filed an application signed by coworkman Jagat Singh, who was also facing the domestic enquiry and was representing workman Raj Karan in the proceedings, stating that he was unwell. Proceedings were adjourned to 08.01.1999. On 08.01.1999, the workman again requested for adjournment on the ground that coworkman Jagat

Singh, who was assisting him in the proceedings, was not well and he was not able to defend himself in the proceedings in absence of his authorized representative. Request was declined by the Enquiry Officer stating that no medical certificate of coworkman Jagat Singh was being produced. It was well within the knowledge of the Enquiry Officer as per the records of the enquiry proceedings filed in case ID No.271/99/2010, wherein the coworkman Jagat Singh was facing the domestic enquiry, that said Jagat Singh was not well, was on leave and intimation to that effect has been given by the Accounts Officer of the Management to the Enquiry Officer, conducting the proceedings. Despite all these, Enquiry Officer proceeded to record the deposition of Management witness, which was recorded partly on 08.01.1999 and then concluded on 11.01.1999, on which date also, the coworkman Jagat Singh, who was representing the workman in the enquiry proceedings, was absent, being on leave and this fact was brought to the notice of the Enquiry Officer, by none other than the Accounts Officer of the Management. Enquiry Officer acted in the same manner on 30.01.1999, when he concluded the proceedings and after closing the evidence of the Management, also closed the evidence of the workman despite being informed that coworkman Jagat Singh, who was assisting the workman in the enquiry proceedings, was not well, on the flimsy grounds that medical certificate was not being produced by the workman. Coworkman Jagat Singh had been intimating his absence from duties on ground of illness and this was known to the Enquiry Officer. It was also one of the issue framed in the matter as regards the fairness of enquiry conducted by the Management and while passing the award dated 12.01.2004, it was

decided in favour of the workman and also during the proceedings, it was agreed by Counsels for both the parties that the procedure adopted by the Enquiry Officer, in not adjourning the proceedings, because of absence of representative of the workman, was arbitrary and illegal.

7. It was argued on behalf of the Management that five conditions need to be met for granting approval of the action of the Management, which are (1) proper domestic enquiry, (2) prima facie case, (3) bonafide case, (4) one month wages and (5) application of the approval having being moved by the Management. It is clear, that one of the conditions, needed to be met, as per the contentions of the Ld. Counsel of the Management, as regard the proper domestic enquiry, has not been fulfilled, and so, approval of the action of the Management is not justified in the circumstances and so, the application u/s 33(2)(b) of the Industrial Disputes Act of the Management, for approval of the action of the Management dated 16.04.1999 in terminating the services of the workman, is dismissed.”

7. Thereafter, the learned Tribunal adjourned the matter for Management evidence. Accordingly, the Management filed its evidence by way of affidavit. In the cross-examination, MW1, Mrs. Anita Wasan, Executive Secretary, deposed that all leaves were sanctioned to the workman by the Management and the overtime duties performed by the workman were adjusted against the period of leave.

8. Ms. Deepali Gupta, learned counsel appearing on behalf of the petitioner submitted that since the workman had already expired and his legal heirs were not having the personal knowledge, therefore, they

were unable to lead any evidence thereon. However, vide award dated 24.03.2012, the learned Tribunal held that the Management has proved the misconduct of the workman and hence, the order of his dismissal from service dated 16.04.1999 was justified and legal.

9. Learned counsel for the petitioner further submitted that action of the Management in terminating services of deceased workman in the year 1999 alleging abandonment of service, thereafter recalling the said order and issuing chargesheet dated 22.10.1998 and concluding the inquiry vide order dated 16.04.1999 imposing major penalty of punishment of dismissal from service after 26 years of unblemished service was a clear case of victimization and unfair labour practice.

10. To strengthen her arguments, learned counsel for the petitioner has relied upon the case of ***Jaipur Zila Sahakari Bhoomi Bank Ltd. Vikas Vs. Shri Ram Gopal Sharma & Ors., JT 2002 (1) SC 182***, wherein the Apex Court held that:-

“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.”

11. Learned counsel submitted that in the aforesaid case, the Apex Court while discussing the law with respect to interpretation of Section 33(2)(b) of the Act held that where an application is made under Section 33(2)(b) of the Act and the authority refuses to grant approval, it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. Consequently, the employee is deemed to continue in service entitling him all the benefits available.

12. Ms. Gupta, learned counsel further submitted that the Management failed to comply with the mandatory provisions of Section 33(2)(b) of the Act as no approval was taken at the time of issuing the dismissal order of the workman despite pendency of dispute under Section 36A before the Labour Court. Since the matter was remanded by this Court with liberty to move the application seeking approval under Section 33(2)(b) of the Act, therefore, the Management moved the said application, however, the same was dismissed by the Labour Court. Hence, the workman was to be deemed to continue in service with all benefits as held by the Apex Court in the case of

Jaipur Zila Sahakari Bhoomi Bank Ltd. Vikas (*supra*). Thus, the Labour Court had no jurisdiction to further adjudicate the matter as dismissal of the application under Section 33(2)(b) of the Act was conclusive determination of the industrial dispute between the parties.

13. Learned counsel for the petitioner, without prejudice to the aforesaid contentions, argued that despite numerous opportunities granted earlier, the Management had failed to lead any evidence, however, award dated 12.01.2004 had been passed by the Tribunal. Moreover, in order dated 05.04.2010 passed in W.P.(C) No. 15211/2004, no permission to reopen the evidence or lead fresh evidence was granted by this Court. Thus, after dismissal of the application moved by the Management under Section 33(2)(b) of the Act, nothing further remained and learned Labour Court erred in permitting the Management to lead evidence *de novo*.

14. Learned counsel further submitted that even Section 11A of the Act lays down the jurisdiction of the Labour Court where an industrial dispute relating to discharge or dismissal of a workman has been referred for adjudication. The proviso to aforesaid Section specifically states “PROVIDED that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.”

15. While concluding her arguments, learned counsel for the petitioner submitted that issuance of chargesheet for unauthorized

absence to workmen after 26 years of unblemished service, despite the leaves had been duly sanctioned and regularized by the Management, was itself an action of victimization and unfair labour practice on the part of the Management. Accordingly, the award dated 24.03.2012 is unjustified, illegal and perverse having a patent illegality and is liable to be set aside.

16. On the other hand, Mrs. C.T.Chopra, learned senior counsel appearing on behalf of the respondent Management submitted that absence of the workman for 115 days had given a cause to the Management to proceed against him. The details of the absence are mentioned in para 16 of the award dated 24.03.2012, which read as under:-

“16. The factum of sanctioning leave for the absence of the deceased workman has not been disputed, whatsoever the leaves were sanctioned, same is being as recorded with the ocular and trustworthy documents as well as supported with testimony of MW1 Anita Wasan, Executive Secretary of management and the intimation of rejection of leave were communicated to the workman even though the workman was absentee from duty unauthorizedly without any sanctioned leave or intimation. The workman has not able to disprove these contentions. Therefore, the contentions alleged to have been taken by the management is unrebutted. For example the workman sought leave from 2.3.85 to 31.3.85 and it was sanctioned but did not report for duty on 1.4.85. The workman requested for sanctioning of leaves up to 15.4.85 but his request was declined. Therefore, was declared unauthorized leave from

1.4.85 which shows that workman was not serious for his work and conduct. The record of workman was been put forward to him during the course of inquiry for his unauthorized leaves for a number of days during the period from April, 88 to March, 96. The contentions of the ld. AR where chargesheet of unauthorized leave for different period from April, 88 to March, 96 which was issued in the year 1998 at the belated stage but this contention is not been supported by any law or any other circumstances to delay to file the chargesheet and the fact un-authorized absentee of nine years brought in the chargesheet on the ground of belated stage. Though, there is no period of limitation of issue of the chargesheet or conduct the domestic enquiry. The contentions of the workman does not supported with any authorities or substantiated with any ocular evidence.”

17. She further submitted that legal heirs of the deceased workman are only entitled to the dues, if any, to an employee before his death or any other amount lying in his credit and further any benefits which were available to deceased employee. The dismissal of the petitioner from service is misconduct on account of long absence from duty every year. The inquiry was conducted after giving proper and effective opportunities to the workman to represent his case and it is a matter of record that the deceased workman had participated in the inquiry. Since no fault could be found by the learned Tribunal in the inquiry proceedings, therefore, the inquiry report became the base of dismissal from service and accordingly, the order of dismissal is strictly valid, binding and in accordance with law. The allegations of *mala fide* are

baseless and without any foundation as no material was placed on record by the workman to establish the same on the part of the Management. The learned Tribunal has passed the award after giving opportunities to the workman and the Management. However, the workman has not produced any evidence in rebuttal. The Management sought approval of dismissal of the workman under Section 33(2)(b) of the Act, which was accepted by the learned Tribunal after leading evidence by the Management vide award dated 24.03.2012.

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

19. In the case of ***Jaipur Zila Sahakari Bhoomi Bank Ltd. Vikas*** (*supra*), the Apex Court has held that where an application is made under Section 33(2)(b), 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. As a consequence, 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. Once the application of the Management under Section 33(2)(b) of the Act was dismissed, that was conclusive determination of the industrial dispute between the parties.

Thereafter, the Labour Court is not required to direct the parties to lead evidence.

20. Moreover, Section 11A of the Act lays down the jurisdiction of Labour Court where an industrial dispute relating to discharge or dismissal of a workman has been referred for adjudication. The proviso to aforesaid Section specifically states that in any proceeding under this Section the Labor Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

21. Case of the respondent Management is that principles of natural justice have been complied with by the Enquiry Officer and accordingly, sufficient opportunities were given to the deceased workman to defend his case. Whereas Enquiry Officer, Sh. L.K.Singh, had conducted the domestic enquiry simultaneously against the deceased workman as well as a co-workman Jagat Singh for similar charges. On 19.12.1998, the deceased workman had filed a letter dated 17.12.1998 before the Enquiry Officer authorizing Jagat Singh to represent him in the enquiry proceedings. He was allowed to be represented by Jagat Singh on 19.12.1998 itself by the Enquiry Officer. On 05.01.1999, the deceased workman had filed an application before the Enquiry Officer stating that his Authorized Representative was unwell. Accordingly, proceedings were adjourned to 08.01.1999. On the said date, the deceased workman again requested for adjournment on the ground that above-named Authorized Representative Jagat

Singh was not well; however, the request was declined by the Enquiry Officer stating that no medical certificate of co-workman was produced. The fact of illness of said Authorized Representative and defence representative of the deceased workman was well within the knowledge of the Enquiry Officer. Despite, Enquiry Officer proceeded to record the deposition of Management witness, which was recorded partly on 08.01.1999 and concluded on 11.01.1999 in the absence of Authorized Representative, who was on leave. The fact of being on leave was brought to the notice of the Enquiry Officer by none other than the Accounts Officer of the Management. The Enquiry Officer acted in the same manner on 30.01.1999, when he concluded the proceedings and after closing the evidence of the Management, also closed the evidence of the workman despite being informed that AR Jagat Singh, who was assisting the deceased workman in the inquiry proceedings, was not well and was on leave. Thus, action of the Enquiry Officer was arbitrary and illegal.

22. In my considered view, if the Tribunal had recorded the above noted findings, then there was no occasion before the Tribunal to proceed further and allow the respondent management to lead evidence and pass the impugned award.

23. In view of the discussion above and settled law, the award dated 24.03.2012 is set aside being unjustified, illegal and passed without jurisdiction.

24. I note, the deceased workman had expired on 19.10.2005.

25. In view of the facts recorded above, services of the deceased workman deserve to be reinstated with full back wages and all other consequential benefits till the date of his death, i.e., 19.10.2005.

26. Accordingly, the respondent Management is directed to pay full pay and allowances from 16.04.1999 to 19.10.2005, i.e., the period to which the deceased workman would have been entitled had he not been terminated, subject to adjustment in respect of subsistence allowance and other allowances, if already paid, to the petitioner / legal heir of deceased workman within a period of two months from the date of receipt of this order. In default, the petitioner / legal heir shall be entitled to interest at the rate of 9% *per annum* on delayed payment.

27. The petition stands allowed on the above terms with no order as to costs.

**SURESH KAIT
(JUDGE)**

FEBRUARY 5, 2015
Sb/jg