

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

Date of Decision: 21st August, 2015

+ W.P.(C) 21069/2005 & CM 16829/2014

DELHI JAL BOARD

..... Petitioner

Through: Ms. Biji Rajesh, Adv.
versus

INDUSTRIAL TRIBUNAL II & ORS.

..... Respondent

Through: Mr Rajiv Agarwal and Mr Sachin Kumar,
Advs.

**CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA**

J U D G M E N T

: SUNITA GUPTA, J.

1. By this writ petition under Article 226/227 of the Constitution of India, the petitioner seeks issuance of a writ of certiorari for quashing of the impugned award dated 21.04.2004 passed by Ld. Industrial Tribunal – II, Karkardooma Courts, Delhi in Complaint No. 49 of 1996 in ID No. 28/1993 wherein the Tribunal had ordered reinstatement of the respondent with full back-wages.

2. The factual matrix of the case as disclosed in the writ petition, succinctly stated, are as follows:

The respondent – workman worked with the petitioner since 1982 and was being paid wages for the casual work performed as per Minimum Wages Act, 1948 and subsequently regularized to the post of Beldar vide office order No.229 with effect from 01.04.1989. The appointment was subject to terms and conditions such as verification of character, past antecedents and subject to verification of requisite educational qualification certificate. Apart from the necessary educational qualification for appointment to the post of Beldar the recruitment rules prescribed the age limit for the post of Beldar to be between 18 – 25 years. A written complaint dated 09.02.1987 was received by the petitioner management alleging therein that the school certificate

possessed by the respondent – workman is a fabricated document. Pursuant to the written complaint, a departmental inquiry was ordered to be conducted to investigate the charges levelled against the respondent – workman.

3. Vide letter dated 23.04.1987, the Junior Engineer employed with the petitioner informed the petitioner that a copy of school leaving certificate of the respondent will be collected from the respondent to verify the age and educational qualification of the respondent workman. On 12.11.1997, a self-attested photocopy of the school leaving certificate was furnished by the respondent workman wherein his date of birth was mentioned as 03.12.1962. The school leaving certificate filed by the respondent – workman in the year 1987 indicated his date of birth to be 03.12.1962. The said certificate was issued by Navjeevan Inter College, Farukh Nagar, Ghaziabad. In order to verify the contents of the School Leaving Certificate indicating his date of birth as 03.12.1962, a letter was written to the Principal of the school to verify the contents of the certificate submitted by the respondent. The petitioner received a letter dated 09.12.1987 from the said school stating that the said date of birth of respondent was 03.12.1958.

4. The respondent - workman manipulated his date of birth in his school leaving certificate from 03.12.1958 to 03.12.1962 knowing it fully well that the recruitment rules and regulations of the petitioner management stipulated the condition with respect to the age limit for appointment to the post of Beldar to be between 18 to 25 years and in order to make himself eligible for recruitment to the post of Beldar, he manipulated his date of birth. In view of the same, the petitioner management vide order no.117 dated 18.04.1991 suspended the respondent – workman from services. He was issued a charge-sheet. The respondent – workman challenged the suspension order and accordingly conciliation proceedings were initiated. An Enquiry Officer was appointed and the departmental inquiry was conducted wherein the charges against the respondent workman were proved. Accordingly, a memo dated 03.08.1992 containing the proposal for dismissal of service was delivered to the respondent – workman. In the meanwhile, the conciliation proceedings failed and the Secretary, Govt. of NCT of Delhi referred the dispute for adjudication to the Industrial Tribunal. The petitioner, after examining the charge-sheet, findings of the Enquiry Officer, representation made by the respondent – workman to the

memo issued to him, concluded that the respondent was unfit to continue in the services of the petitioner management and hence imposed the penalty of dismissal from service vide order dated 12.01.1993. On January 30, 1996, the respondent – workman filed a complaint no. 49 of 1993 in ID No.28 of 1993 wherein it was alleged by him that the petitioner-management had contravened Section 33-A of the Industrial Disputes Act praying for an award for setting aside the dismissal order dated 12.01.1993. During the pendency of those proceedings an award dated 12.11.2003 was passed by the Industrial Tribunal in I.D.No.28/1993 wherein it was held that the respondent had failed to establish that the suspension order passed by the petitioner was mala fide. The petitioner was well within its right to terminate the services of the respondent – workman. Despite that, the Industrial Tribunal passed the impugned order dated 21.04.2004 observing that the petitioner management had contravened the provisions of Section 33A of Industrial Disputes Act while terminating the services of the respondent– workman without approval from the Court when the dispute was pending adjudication and ordered reinstatement of respondent with full back wages and continuity of service.

5. Ms Biji Rajesh, learned counsel appearing for the petitioner fairly conceded that there was violation of Section 33 of ID Act as industrial dispute was pending against the workman when he was suspended and no approval of the Industrial Tribunal / Labour Court was sought for terminating the services of workman. However, it is submitted by her that having held so, the Tribunal should not have gone into the adjudication of other issues, yet a finding was given holding that the management failed to prove the misconduct of the workman. This finding is perverse as the respondent was appointed as a casual labour on 01.07.1982. He was regularized on 01.04.1989 subject to certain terms and conditions. As per Clause 6 of the Recruitment Rules, the age limit for appointment of Beldar was 18 to 25 years. The respondent - workman manipulated the birth certificate showing his date of birth as 03.12.1962. After receiving the complaint, the birth certificate was got verified from Navjeevan Inter College, Ghaziabad and it transpired that the date of birth was 03.12.1958. Under the circumstances, the misconduct of the workman was duly proved and, therefore, he was rightly terminated from his service.

6. Rebutting the submissions of learned counsel for the petitioner, Mr Rajeev Aggarwal, learned counsel for the respondent at the outset refers to the powers of the writ court under Article 226 of the Constitution of India for interfering with the findings of the Tribunal by submitting that a writ in the nature of certiorari can be issued only if the order of the Tribunal suffers from an error of jurisdiction or from breach of principles of natural justice or is vitiated by the manifest or apparent error of law. In the instant case, the order does not suffer from any of such infirmities and therefore does not call any interference. Reliance in this regard was placed on *Harjinder Singh v. Punjab State Warehousing Corporation*, AIR 2010 SC 1116; *Bidi, Bidi Leaves' and Tobacco Merchants Association v. The State of Bombay*, AIR 1962 SC 486 and *Municipal Corporation of Delhi v. Asha Ram & Anr.* 117(2005) DLT 63.

7. It is further submitted that even on merits, the impugned award passed by the Tribunal does not call for any interference inasmuch as it was rightly conceded by learned counsel for the petitioner that there was violation of Section 33 of ID Act and, therefore, the order of termination passed by the petitioner management deserved to be set aside. Reliance in this regard was placed on *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. V. Ram Gopal Sharma & Ors.* AIR 2002 SC 643 followed by the Division Bench of this Court in *Top Security Ltd. V. Subhash Chander Jha*, 191 (2012) DLT 361. It is further submitted that there were two streams for appointment in Delhi Jal Board – one was by way of direct recruitment and the other was regularization of the casual labour. There is no material on record to establish that any forged date of birth certificate was handed over by the respondent – workman as for the purpose of appointment as casual labour neither there is any prescribed qualification nor the age limit. Even the recruitment rules relied upon by the petitioner pertains to the age limit criteria for “direct recruitment”. Moreover, there was no occasion for the respondent – workman to file a forged certificate since he was appointed on 01.07.1982 and, therefore, even as per the date of birth certificate showing his age as on 03.12.1958 he was very much eligible to be appointed as Beldar. As such, even this finding does not call for any interference. Lastly, it was submitted that the respondent – workman was reinstated in the year 2011 with the petitioner but the back-wages have not been paid till

date which be paid along with interest. Moreover, the cost of litigation be also awarded to the respondent – workman.

8. The position of law in respect of interference by a writ court under Article 226 of the Constitution of India was succinctly stated in *Asha Ram* (supra) as under:

"6. The position of law in respect of interference by Writ Court under Article 226 of the Constitution is well settled in view of the following:- (a) The Supreme Court in para 5 in *Sadhu Ram v. Delhi Transport Corporation*, AIR 1984 SC 1967 observed :

" nor we think that it was right for the High Court to interfere with the Award of the Labour Court under Article 226 on a mere technicality. Article 226 is a device to secure and advance justice and not otherwise. In the result, we allow the appeal, set-aside the judgment of the High Court and restore the Award of the Presiding Officer."

(b) The Supreme Court in *Harbans Lal v. Jag Mohan* (1985) 4 SCC 333:

"The limitations on the jurisdiction of the High Court under Article 226 of the Constitution are well settled. The Writ Petition before the High Court prayed for a Writ in the nature of certiorari, and it is well known that a Writ in the nature of certiorari may be issued only if the order of the inferior tribunal of subordinate court suffers from an error of jurisdiction, or from a breach of the principles of natural justice or is vitiated by a manifest or apparent error of law. There is no sanction enabling the High Court to reappraise the evidence without sufficient reason in law and reach finding of fact contrary to those rendered by an inferior court or subordinate court. When a High Court proceeds to do so, it acts plainly in excess of its power."

(c) The Supreme Court in *Calcutta Port Shramik Union v. Calcutta River Transport Association and Ors.*, 1988 (Supp.) SCC 768 in para 10 observed :

".....The object of enacting the Industrial Disputes Act, 1947 and of making provision therein to refer disputes to Tribunals for settlement is to bring about industrial peace. Whenever a reference is made by the Government to the Industrial Tribunal, it has to be presumed ordinarily that there is a genuine industrial

dispute between the parties which requires to be resolved by adjudication. In all such cases, an attempt should be made by Courts exercising powers of judicial review to sustain as far as possible the Awards made by the Industrial Tribunal instead of picking holes here and there in the Awards on rival points and ultimately frustrating the entire adjudication process before the Tribunals by striking down the Awards in hyper technical grounds. Unfortunately, the orders of the Single Judge and of the Division Bench have resulted in such frustration and have made the Award fruitless on an untenable basis."

(d) The Hon'ble Supreme Court in *Sudhoo v. M/s Haji Lal Mohd. Biri Works and Ors.* 1990 Lab. I.C. 1538 in para 8 ruled :

"8. We have gone through the statements of two witnesses produced by the appellant before the authority. The findings of the authority are based on appreciation of evidence produced by the parties before the authority. We do not agree with the High Court that the finding recorded by authority are based on no evidence. The High Court should not have interfered with the findings of the fact reached by the prescribed authority on appreciation of evidence."

Thus in accordance with the above position of law no interference in findings of facts recorded by the Tribunal is called for. In any event, the petitioner having died and the monetary benefits accruing under the award as per the above claim being confined limited up to the date of the death and payable to his widow, no interference is called for even otherwise under Article 226 of the Constitution."

9. In view of above legal position, it is to be seen whether the order of the Tribunal suffers from any error of jurisdiction or breach of principles of natural justice or vitiated by apparent error of law.

10. It is not in dispute that an industrial dispute between the workman and Delhi Jal Board was pending before the Industrial Tribunal. During pendency of industrial dispute, the petitioner management terminated the services of the respondent – workman vide order dated 12.01.1993. It is an admitted position that the provisions of Section 33(2)(b) of the ID Act had not been complied with by the employer and the employer had not made any application to the Industrial Tribunal before which the industrial dispute was

pending for approval of the action of termination taken by the employer. Therefore, the respondent – workman filed a complaint under Section 33A of the Industrial Disputes Act, 1947 before the Industrial Tribunal, Karkardooma Court, Delhi where the dispute was pending. The Tribunal came to the conclusion that the termination was in contravention of provisions of Section 33(2) (b) of the ID Act and, therefore, directed reinstatement of the respondent – workman with back-wages. This finding does not suffer from any infirmity. In *Jaipur Zilla Sahakari Bhoomi Vikas Bank*(supra), one of the questions for consideration before the Constitution Bench of Supreme Court was whether failure to make an application under Section 33(2)(b) would not render the order of dismissal inoperative? The Supreme Court has answered this question by holding that the failure to make an application under Section 33(2)(b) of the said Act would amount to non-compliance with the mandatory provisions of the said Act and that, by itself, would render the order of dismissal to be inoperative. In other words, if the mandatory conditions of Section 33(2)(b) of the said Act contravened, while passing the order of the dismissal, the same would have no effect in law.

11. The scope of Section 33(2)(b) as well as Section 33A of the said Act has been discussed in detail by the Supreme Court in paragraph 14, 15 & 16. The same reads as under:-

“14. Where an application is made under Section 33(2)(b), Proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed.

Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is

set aside under Section 33A notwithstanding the contravention of Section 33(2)(b), proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

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

12. As such, the Supreme Court came to the conclusion that the non-compliance of the mandatory provisions of Section 33(2)(b) of the said Act would by itself amount to the order of dismissal being void or inoperative. If this happens, it is not at all necessary for an employee to file a complaint under Section 33A to have the order of dismissal/termination set-aside following an adjudication on merits.

13. 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. According to learned counsel for the petitioner after giving a finding on issue no. 1, viz. Whether respondent contravened the provisions of Section 33 of I.D Act, there was no need for the Tribunal to adjudicate upon all the issues and pass a full-fledged award. In **Top Security Ltd. (supra)**, a plea was taken by the management that once an application had been filed under Section 33 A of the ID Act, it had to be treated as an industrial dispute and the same had to be adjudicated as if it was a dispute referred to or pending before it in accordance with the provisions of the Act. The Division Bench observed that although the submissions of learned counsel for the appellant finds support from **Batuk K. Vyas v. Surat Borough Municipality** , 1952 11 LLJ 178; **Punjab National Bank v. All India Punjab National Bank Employees' Federation**, A.I.R. 1960 S. C. 160 and **Hindustan General Electricals Ltd. V. Vishvanath Prasad and Another**, 1971 (2) SCC 605. However, it went on stating that the issue stands closed by virtue of decision of Constitution Bench of the Hon'ble Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)** where the Supreme Court held that the failure to make an application under Section 33(2)(b) of the Act would amount to non-compliance with the mandatory provisions of the said Act and that, by itself, would render the orders of dismissal to be inoperative and the Tribunal is not required to go into the question of as to whether the dismissal was good or bad, on merits. 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 appropriate reliefs by way reinstatement with back-wages. Under the circumstances, even if the Tribunal had given a findings on other issues pertaining to the merits of the case, that was in consonance with the judgment given in **Batuk K. Vyas (supra)**, **Punjab National Bank (supra)** and **Hindustan General Electricals Ltd. (supra)**, but in view of the subsequent constitutional Bench decision in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)**, it was not necessary for the Tribunal to give any finding on merits.

15. Since the learned counsel for the petitioner assails the finding of the Tribunal on merits, a perusal of the judgment goes to show that even the other findings do not suffer

from any error apparent on the record as it was observed that the onus to prove the issue that the respondent workman had submitted and disclosed his wrong date of birth as 03.12.1958 instead of 03.12.1962 was upon the management. In order to prove this issue, the management produced MW2 – Mr R.K. Srivastava and during the course of his cross examination he admitted that the respondent workman had not submitted any document before him in the year 1982 and 1988. The case of the respondent workman was that his date of birth is 03.12.1958 and he never submitted the school leaving certificate showing his date of birth as 03.12.1962. Rather his consistent stand was that his date of birth is 03.12.1958. Moreover, it was observed that the respondent workman was recruited as daily wager Beldar on 01.07.1982 and he was within the prescribed age for appointment as Beldar at that time. Therefore, there was no occasion for him to give wrong date of birth to the management and accordingly it was held that the management has failed to prove the misconduct alleged against the complainant – workman. This finding does not suffer from any perversity and, therefore, does not call for interference.

16. The result of the aforesaid discussion is that no interference is called for in the findings of the Industrial Tribunal and the present writ petition is liable to be dismissed. It is ordered accordingly.

17. It is not in dispute that the respondent – workman has since been reinstated in the year 2011, however, the back-wages have not been paid to him up-till-now. As such the petitioner – Delhi Jal Board is directed to comply with the award dated 21.04.2004 passed by the Industrial Tribunal by paying full back-wages to the respondent workman within eight (8) weeks from pronouncement of this judgment.

The writ petition and pending applications, if any, stands disposed of accordingly.

No order as to costs.

Trial Court record be returned forthwith.

(SUNITA GUPTA)
JUDGE

AUGUST 21 2015/rd