

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

% *Judgment Reserved on: 07.09.2018*
Date of Judgment: 25.10.2018

+ **WP (C) 6200/2002**

VED PRAKASH Petitioner

Through: Mr. Vinay Sabharwal,
Advocate.

versus

D.T.C. ...Respondent

Through: Mr. Uday N.Tiwari and
Ms.Nishtha Girotra, Advs.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. The petitioner/workman by this writ petition under Article 226 of the Constitution of India on the basis of the order dated 27th March, 2002 seeks for a direction to the management to allow him to join duty and pay him back wages from the date of his illegal termination. The respondent filed WP(C) No.7536/2002 challenging this order dated 27.03.2002 by which the Industrial Tribunal (Tribunal) had rejected its approval application under Section 33 (2) (b) of Industrial Disputes Act, 1947 (ID Act) for termination of service of the petitioner. By a separate judgment of even date, WP(C) No.7536/2002 has been dismissed by this Court.

2. In its counter affidavit, it is, *inter alia*, pleaded by the management that they have removed the petitioner/workman based on the report of the Inquiry Officer and in adherence to the principles of natural justice and assailed the order dated 27.03.2002 in WP (C) No.7536/2002.

3. In its separate counter affidavit filed by the Deputy Labour Commissioner on behalf of the NCT of Delhi it has been, *inter alia*, pleaded that the petitioner is entitled to claim his remedy under Section 33A of ID Act by lodging a complaint.

4. A similar question came up for consideration in **T.N. State Transport Corporation Vs. Neethivilangan, Kumbakonam, 2001 (9) SCC 99** wherein the Hon'ble Supreme Court held that "*in a case where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition filed under Section 33(2)(b) of the Act on merits the employer is bound to treat the employee as continuing in service and give him all the consequential benefits. If the employer refuses to grant the benefits to the employee the latter is entitled to have his right enforced by filing a petition under Article 226 of the Constitution.*"

5. Learned counsel for the management Mr. Tiwari has pointed out that by an order dated 5th May, 2010, this Court under Section 17B of the ID Act directed the management to pay to the workman an amount calculated at the rate of last drawn wages or minimum wages,

whichever is higher w.e.f. 1st January, 2009 till 30th April, 2010 within six weeks. Further, it directed the management to continue to pay such amount to the workman w.e.f. 1st May, 2010 month by month i.e. by the 15th day of the succeeding month. The workman was directed to report for work on 10th May, 2010 at Rohini (II) Depot failing which it shall be presumed that he is employed elsewhere and the order under Section 17B shall be suspended. By an order dated 28th January, 2011, the management was directed to pay the difference between the amount of pay and the amount to which the workman was entitled to in accordance with the judgment in **Delhi Transport Corporation Vs. Phool Singh 2010 (4) AD (Delhi) 233** for the period for which the management has taken work from the workman. It was clarified that it will not be necessary for the workman to report for duty for which the petitioner is entitled to under Section 17B of ID Act. It was further directed that if the workman so reports and the management takes work from him, the management shall be liable for the payment of wages in accordance with the judgment in **Phool Singh (supra)**.

6. It is noticed that on 23.02.2005 this Court has directed in WP(C) No.7536/2002 that *“while there may be some substance in what the learned counsel for the petitioner says, after examining the entire merits of the case, I am satisfied that the petitioner/DTC should now be directed to deposit the amount covered by the Tribunal’s order dated 27th March, 2002 in modification of the order dated 9th April, 2003: 16th September, 2004: 26th October, 2004 and 7th February, 2005. The said deposit be made in this Court within a period of eight*

weeks from today which shall be kept by the registry in a short term FDR as per the practice directions issued by the Court in 17th February, 2005 in W.P. (C) 5483/2004 titled as 'M/S. N.M. SOFT DRINKS P. LTD. Vs. Govt. of NCT of Delhi & Others.'

7. Pursuant to this order, the respondent deposited Rs.6,03,487/- with the Registry of the Court on 1st July, 2005. The workman, admittedly, retired on attaining the age of superannuation on 31st January, 2013.

8. Learned counsel for the management Sh. Tiwari has relied upon a judgment of Hon'ble Supreme in **United Bank of India Vs. Sidhartha Chakraborty 2007 (7) SCC 670** to plead that the Hon'ble Supreme Court after considering its earlier judgment in **P.G.I of Medical Education and Research v. Raj Kumar 2001 (2) SCC 54** and **Indian Rly. Construction Co. Ltd. Vs. Ajay Kumar 2003 (4) SCC 579** awarded a lumpsum amount of Rs.2 lacs to the workman in a case under Section 33 (2) (b) of the ID Act. In this case the employee was dismissed from service on 20th December, 1985. An application was filed by the management Bank under Section 33 (2) (b) for approval of its action. The management bank in its writ petition before the Single Judge (SJ) of the High Court pleaded that the principles of the doctrine of prospective overruling would be applicable as the decision in **Punjab Beverages case'** (supra) still held field. This plea was declined by the Ld. SJ and was upheld by the Division Bench (DB). The Hon'ble Supreme Court while taking note of para No.13 of its judgment in **Jaipur Zila Sahakari Bhoomi Vikas**

Bank Ltd. v. Ram Gopal Sharma 2002 (2) SCC 244 and of the protections afforded to the workman under Section 33 (2) (b) of the ID Act found that the order of the SJ affirmed by DB, does not suffer from any infirmity. However, the Hon'ble Supreme Court found that SJ and DB were not justified in directing payment of full back wages and after considering the judgment of **PGI of Medical Education and Research (supra)** awarded Rs.2 lacs as lumpsum compensation to the workman.

9. Mr. Tiwari has also relied upon a DB judgment of this Court in **Delhi Transport Corporation Vs. Sarjeevan Kumar MANU/DE/0245/2013** in which the application of the management under Section 33 (2) (b) of the ID Act was dismissed by the Tribunal by relying on **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)**. The Tribunal directed that the workman would be entitled to his reinstatement with full back wages and continuity of service. The Ld. SJ affirmed the award dated 4th June, 2011. DB found that in the formative years of the Labour Court jurisprudence in this country, the labour courts or the tribunals were awarding full backwages as a normal consequence in the case of illegal and unjustified discharge/dismissal/termination of workman. In later years, there has been a change in the law in the award of full backwages. DB has placed reliance upon **Hindustan Tin Works Pvt. Ltd. Vs. The Employees of M/s Hindustan Tin Works Pvt. Ltd. and Ors. 1979 (1) SCR 563** holding therein that there cannot be a straight-jacket formula for awarding relief of back wages and that full back wages

would be the normal rule and party objecting to it must establish the circumstances necessitating departure and at that stage the Tribunal shall exercise its discretion in a judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. DB also considered **PGI of Medical Education Research Chandigarh (supra)** wherein the Apex Court, after having regard to the peculiar facts of the matter, directed payment of 75% back wages only. DB also considered **Kendriya Vidyalaya Sangathan & Anr. Vs. S.C. Sharma 2005 (2) SCC 363** holding “16.....when the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.”

10. After considering many other judgments including **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)** the DB held that “*In our opinion, there cannot be any different approach as to the payment of backwages. Even when the order of dismissal is held to be unjustified by the Industrial Tribunal on merits or such dismissal becomes inoperative by virtue of contravention of Section 33(2)(b), payment of full backwages is not automatic as the same depends on facts of each case and the Industrial Tribunal should also consider the reasons for awarding full backwages or for that matter lesser backwages and give its own reasons*”. DB culled out the principles for awarding the back

wages “i) Payment of full backwages is not automatic on Labour Court/Tribunal granting reinstatement of workman; ii) The same principle is equally applicable in case an order of dismissal is set aside by the Labour Court/Tribunal on the ground of non-compliance of Section 25F of the I.D. Act; iii) The Labour Court/Tribunal shall give reasons for determining the specified quantum of backwages; iv) The burden is on the workman to show that he is entitled to full backwages or to a reasonable backwages and he is not gainfully employed during the period he was not in service of the management; v) Once materials are placed by workman on the above, the burden shifts on to the Management to disprove such claim and vi) in the event, the Labour Court/Tribunal fails to give any reason to quantify backwages, the High Court can go into the said issue and decide on quantum.”

11. While taking note of the fact that the workman was removed from service on 22.05.1993 and pursuant to award dated 04.06.2011, he was reinstated in service, DB took the view that in such cases the management cannot be mulcted with a direction for payment of full backwages and set aside the order of the Tribunal and the Ld. SJ, and allowed only 50% of the backwages to the workman.

12. Sh. Tiwari relied upon another DB judgment of this Court in **Vijay Kumar Tiwari Vs. Lt. Governor & Ors** passed in LPA No.394/2002 decided on 7th September, 2015, a case under Section 33 (2) (b) of the ID Act, wherein a lumpsum compensation of Rs.3 lacs was awarded to the workman.

13. He further relied upon a judgment of SJ in **Krishan Chander Vs. Delhi Transport Corporation and Anr. Review Petition 207/2005 in Writ Petition (Civil) 3379 of 2003** wherein the application of the management under Section 33 (2) (b) of ID Act was rejected by the Tribunal on 23.10.2002. The workman filed a writ petition for a direction to the management for his reinstatement with consequential benefits. The other writ petition was filed by the management challenging the order of the Tribunal dated 23.10.2002. This Court noticed that the workman had already been taken back into service and found that there was no pleading by the workman to the effect that he was not employed during the interregnum period of dismissal till the date of reinstatement and that he, being a driver capable of making his ends meet in the normal course of life and the judgment of the Supreme Court in **M.P. State Electricity Board v. Smt. Jarina Bee MANU/SC/0460/2003**, this Court awarded backwages to the workman to the extent of 25% for the interregnum period i.e. from the date of termination till the date of reinstatement. A review petition was filed by the workman on the ground that the Court has not taken into consideration the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)** while deciding the writ petition; however, the Court after referring to the decision of the Hon'ble Supreme Court in **M.P. State Electricity Board (supra)** and **PGI of Medical Education and Research, Chandigarh (supra)**, **Allahabad Jal Sansthan v. Daya Shankar Rai and Anr. 2005 (5) AD SC 224**

and Delhi Transport Corporation v. Virender Singh 116 (2005) DLT 26 dismissed the review petition.

14. In his further venture, Sh. Tiwari has relied upon a SJ judgment of this court in **Sh. Aman Singh Vs. The Management of Delhi Transport Corporation MANU/DE/1359/2009**, again a case under Section 33 (2) (b) and after considering **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)** and **Delhi Transport Corporation Vs. Jagdish Chander 2005 V AD (Delhi) 217**, this Court has directed that the workman is deemed to be reinstated in service and was awarded only 25% of the back wages till actual resumption of his duty. Lastly, he relied upon a judgment of the Hon'ble Supreme Court in **General Secretary, Goal Washeries Workers Union, Dhanbad Vs. Employers in Relation to the Management of Dudga Coal Washery of M/s BCCL 2016 (16) 148** wherein instead of reinstatement, the workmen were granted Rs.1.5 lacs each as lumpsum compensation.

15. The Constitution Bench of the Hon'ble Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)** held that refusal of the Authority to grant approval on an application under Section 33 (2) (b) means that the employee continues to be in service as if the order of dismissal or discharge had never been passed, entitling him to all benefits available. The para No.14 of the judgment 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 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.”

16. In **Rajinder Kumar Vs. DTC & Ors. 2003 IV AD (Delhi) 332**, the learned SJ of this Court relied on a judgment of the Supreme Court in **M.D. Tamil Nadu State Transport Vs. Neethivilangan Kumbakonam (supra)**, wherein it was held that a case under Section 33 (2) (b), where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition under Section 32(2)(b) on merits, the employer is duty bound to treat the employee in continuity of service and give him all consequential benefits. The learned Single Judge in view of the judgment of the Hon’ble Supreme Court directed the management to reinstate the workman with continuity of service and full back wages and all other consequential benefits. In **Rajinder Singh Vs. DTC. 98 (2002) DLT 706 (DB)** an application under Section 33 (2) (b) of ID Act was rejected and taking note of the judgment in **M.D. Tamil Nadu State Transport (supra)** and **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd (supra)**, this

Court has held that workman shall be entitled to his reinstatement with full backwages and all consequential benefits.

17. Very recently in the case of **Management of Karur Vysya Bank Limited Vs. S. Balakrishnan 2016 (12) SCC 221** the services of the workman were terminated by the management after holding a domestic inquiry during the pendency of the Industrial reference and the management did not seek approval under Section 33 (2) (b) of the ID Act and the award was passed by the Tribunal on a petition of the workman under Section 33A of the ID Act directing his reinstatement by holding the order of dismissal dated 06.1.1992 to be illegal and unjustified. The High Court upheld the Award. The Supreme Court held that once the Tribunal has concluded that the domestic enquiry was held to be proper, no further scrutiny or investigation of the correctness of the findings recorded could have been made unless the said findings disclosed perversity and consequentially set aside the award and order of the High Court. The Hon'ble Supreme Court has noted that the workman had retired. During the course of the arguments, the learned counsel for the petitioner submitted to consider para No.14 of the decision in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)**, which was refused by the Supreme Court. The para No.12 of the judgment reads as under:-

12. Before parting, there are two other issues that need to be addressed. The first is with regard to the views expressed by the Constitution Bench of this Court in para 14 of the decision in *Jaipur Zila Sahakari Bhoomi*

Vikas Bank Ltd. v. Ram Gopal Sharma [Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma]. The views expressed by the Constitution Bench in para 14 of the aforesaid decision came up for consideration before this Court coincidentally and the issues dealt with in the said paragraph, we clarify, have nothing to do with what arose for decision in the present case. However, in this regard, our attention was drawn to certain published works in which a view seems to have been taken that the opinion of the Constitution Bench expressed in para 14 in the aforesaid decision needs reconsideration. Beyond recording what has been brought to our notice as stated above, we do not consider it necessary to deal with the matter any further.

18. Thus, in the eyes of this Court, the judgment of the Constitution Bench of the Supreme Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra)** still holds field and is binding on all the courts including this Court under Article 141 of the Constitution of India.

19. Here it is to be noticed that this Court vide order dated 05.05.2010, disposed of the application of the workman under Section 17B of the ID Act by observing that “*else, the petitioner DTC in its reply to the application has been unable to show that the respondent No.1 workman is employed elsewhere*”. This order has admittedly been complied with by the management.

20. In view of this discussion, the petitioner shall be entitled to full backwages and consequential benefits in such manner as the order of his dismissal from the service was never passed. Same be paid to the

workman within two months, failing which interest @ 12% p.a. shall be payable to the workman.

(VINOD GOEL)
JUDGE

OCTOBER 25th, 2018
“sandeep”

HIGH COURT OF DELHI



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