

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

PRESENT:

HON'BLE MR. JUSTICE ABHIJIT GANGOPADHYAY

WPA 3817 of 2020

**M/s. Precious Carrying Corporation Ltd. & Anr.
-Versus-
The State of West Bengal & Ors.**

For the petitioners : **Mr. Partha Bhanja Chaudhuri
Ms. Rakhi Shroff
Mr. Ravi Kumar Dubey**

For the respondent No. 3 : **Mr. Soumya Majumdar
Mr. Victor Chatterjee**

Heard on : **14.12.2020 & 09.03.2021**

Judgment on : **30.04.2021**

Abhijit Gangopadhyay, J .:

- 1.** This writ application has been filed by an employer against an order dated 17.01.2020 passed by the Labour Court, Kolkata while deciding a recalling application filed by the employee dated 26th April, 2018 (wrongly mentioned in the impugned order as 27th April, 2018, as is found from the writ application containing copies of the records before me).

- 2.** The employee was dismissed from his service in the year 1998. Thereafter he raised an Industrial Dispute which was decided in his favour by an award directing the employer to reinstate the employee with 25% back wages.

Subsequently, the employee filed an application under Section 33C (2) of the Industrial Disputes Act, 1947 (ID Act, in short) for quantification of his monetary claim alleging that though he wanted to join service under the employer, the employer did not allow him to join. This case was numbered as CC 27/2007. In that case ultimately the employer under the direction of the Tribunal paid to the employee an amount of Rs. 3,53,125.00.

- 3.** Subsequently, after 9 (nine) years from the application No. CC 27/2007 the employee filed his second application for quantification of unpaid wages for the period from 01.05.2007 to 31.08.2016. The earlier application under Section 33C (2) was for the period from 01.01.1998 to 30.04.2007. In this second application under Section 33C (2) of the ID Act the claim of the employee is more than Rs. 23 Lakh. This claim was initially taken up for hearing by the tribunal when the employer raised vehement objection contending that the petitioner never tried to join his service and the earlier order under Section 33C(2) application was actually an ex-parte order. When this contention was not entertained by the Tribunal the employer filed a writ application being W.P. No. 70858 (W) of 2017. In this writ application this court granted liberty to the employer to raise the question of maintainability of the second Section 33C (2)

application as a preliminary issue and with the above direction that writ application was disposed of.

4. The employer being the present writ petitioner filed an application taking that point as preliminary issue and the learned Judge of the 2nd Labour Court held that the Section 33C (2) application under ID Act was not maintainable as the employee did not join his service. Thus the said second Section 33C (2) application was dismissed.
5. After such decision the employee filed one recalling application. That recalling application was heard in presence of the parties and the learned Judge of 1st Labour Court who heard the review /recalling application by giving one reasoned and specking order allowed the recalling/review application on 17.01.2020 whereby the dismissal order was recalled.
6. This order of 17.01.2020 has been challenged in the present writ application. After hearing parties and after going through the material annexed to the writ application including the impugned order I find that the order dated 17.01.2020 passed by the 1st Labour Court Kolkata is required to be interfered with.
7. The observation of the 2nd Labour Court made in the order dated 27.02.2018 that the employee wanted to be monetarily benefited without doing any work has some foundation.

The learned Judge of the 1st Labour Court while recalling the order held that:

“Whether the applicant had reported for duty or not is a pure question of fact and whether he had abandoned his right to seek reinstatement pursuant to the Award dated 12.10.2006 passed by the then Ld. 2nd Labour Court under section 10(1B) (d) of the Industrial Disputes Act, 1947 in Case No. 25 of 1998 is a mixed question of fact and law and these questions/controversy cannot be disposed of without oral evidence being led on merit. The said questions are to be tested by trial on evidence”.

8. But this observation becomes baseless as there is no pleading in the recalling application with reference to documents in support of the second Section 33C (2) application to the effect that the employer (the respondent No. 3 herein) ever made any effort to join service in this nine years period for which he was waiting for filing the second application under Section 33C (2) application of the ID Act.
9. After termination of service the respondent No. 3 challenged it and an award was passed by the Second Labour Court on 12.10.2006 holding the termination illegal and directed reinstatement along with 25% back wages from 01.01.1998 till the date of reinstatement.

The respondent No. 3, (i.e. the employee) filed a computation case under Section 33C (2) of the ID Act, 1947 and in that case

an order was passed on 11.02.2009 by the First Labour Court directing the petitioner herein to pay Rs. 3,53,125 which was paid by the petitioner on 16.02.2016.

- 10.** The award declaring the termination as illegal was passed on 12.10.2006 and the computation case was filed in the year 2007. The second computation case was filed in 2016 for the period from 01.05.2007 to 31.08.2016. It is to be noted that the first computation case was for the period from 01.01.1998 to 30.04.2007.
- 11.** The ground for the second computation case is also that the employer did not allow him i.e. the respondent No. 3 to be reinstated despite the award dated 12.10.2006. Therefore, after filing the first computation case in the year 2007 the second computation case was filed after 9 years i.e. in the year 2016.
- 12.** In the first computation case the employee got an amount of Rs. 3,53,125.00. In the second computation case under Section 33C (2) of the ID Act the claim is more than 23 Lakh. During this period i.e. from filing of the first computation case under Section 33C (2) and filing of the second computation case under Section 33C (2) both under ID Act, 1947, there is no reference of any document in the pleading of the recalling application (order whereon is impugned here) about the employee's endeavour to join service for this 9 years. Had the employee being the respondent No. 3 really wanted to join service and was not reinstated despite such effort a lot of documents could have come into existence wherefrom the employee could get benefit by showing that there was an honest effort on his part to

join service in these 9 years and there was resistance by the Company for not reinstating him.

- 13.** As because an award was in favour of the employee/respondent No. 3 declaring the termination illegal and declaring reinstatement with some percentage of back wages from a certain date it cannot be used by the employee time and again and by filing consecutive applications under Section 33C (2) [here, after 9 years from the first application under Section 33C (2)] without even referring to any document for any effort to join the service. No such thing is there in the pleading for recalling the order and the respondent No. 3 shall not be able to prove this also by any documentary evidence and the oral evidence of the parties in this regard will become a situation known as 'oath versus oath' and the preponderance of evidence will remain absent for absence of any document in support of the respondent No. 3 about which there is no whisper of reference of document in the pleading of recalling application. Not reinstating is definitely a continuous wrong on the part of the employer but there must be sincere effort on the part of the person on whom the wrong is being perpetrated to show that there was endeavour on his part while filing the consecutive applications under Section 33C (2) to register protest to the wrong. That the employee will lie low for years and will come after a long time with a computation case under Section 33C (2) of the ID Act cannot be allowed as that will defeat the spirit of framing of Section 33C (2) of the ID Act. The initial unsuccessful attempt to join service by the employee cannot be used as a ground for filing the second application after 9 (nine) years after the first application without existence of any

document which could have come into existence on the sincere subsequent effort to join the service and therefore, the impugned order for decision on evidence cannot be supported by this Court. We have to keep in mind that what has not been pleaded (here reference of document) cannot be proved, so taking evidence cannot be allowed.

- 14.** The employee/respondent No. 3 in the facts and circumstances of the case cannot be allowed to take advantage of consecutive applications under Section 33C (2) of the ID Act and theretofore, this writ application is allowed and the impugned order dated 17.01.2020 passed by the First Labour Court Kolkata is set aside.

No costs.

(Abhijit Gangopadhyay, J)