

(2012) 11 GAU CK 0025
In the Gauhati High Court
Case No : Writ Petition (C) No. 6489 of 2010

Ashok Bhattacharjee

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 08-11-2012

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 31, 31(1), 33, 33(2)(b)

Citation : (2013) 137 FLR 600 : (2013) 1 GLD 620 : (2013) 1 GLT 400

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : S. Chakraborty, for the Appellant; B. Chakraborty, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—By means of this writ petition, the petitioner has challenged the award dated 27.07.2010 passed by the learned Labour Court at Guwahati in Misc. Case No. 10.2007 by which the application filed by the petitioner u/s 33A of the Industrial Disputes Act, 1947, has been dismissed. The petitioner has also challenged the order dated 3.10.2006 by which the respondent Bank has dismissed him from service. He has also challenged the decision of the appellate authority as contained in Annexure-E order dated 03.09.2007 dismissing the appeal preferred by him against the said order of dismissal. The petitioner was an employee of the respondent Bank. He was also the Vice President of the Employees' Union registered under Trade Union Act, 1926. He was initially appointed in the year 1972 and on 16.1.1993 he was promoted to the post of Junior Officer Grade-II. According to the petitioner, he was deprived of his promotion to Junior Officer Grade-I while his juniors were allowed to supersede him. Raising the grievance against the same, the Employees' Union had raised a industrial dispute before the Assistant Labour Commissioner (ALC), Guwahati by filing an application on 11.04.2006 alleging illegal promotion of the persons by the Bank Management depriving the senior employees in violation of the existing promotion policy and guidelines. On receipt of the said application, the ALC

issued notice to the Bank Management on 11.04.2006 and accordingly the Management filed their written statement on 15.05.2006 in which it was contended amongst others that, due to pendency of the departmental proceeding against the petitioner, his case for promotion was not considered by the selection committee.

3. The ALC issued notice of conciliation on 21.09.2006 fixing the matter on 18.10.2006 for conciliation on the industrial dispute raised by the Union in respect of the aforesaid alleged illegal promotion. The conciliation proceeding came to an end on 02.04.2007 by submitting the failure report. During pendency of the proceeding, the Bank Management vide order dated 03.10.2006 dismissed the petitioner from service on the allegation of misconduct drawn by charge sheet dated 17.02.2006. Being aggrieved, the petitioner preferred an appeal on 07.10.2006 before the appellate authority under Rule 46 of the Industrial Corporation Bank Ltd. Employees' Services Rules. However, the appellate authority dismissed the appeal vide order dated 03.09.2007 which was communicated to the petitioner by letter dated 05.09.2007.

3. Amidst the aforesaid developments, the Govt. of Assam exercising its power u/s 10 of the Industrial Dispute Act, 1947 referred for adjudication the industrial dispute raised by the Union with regard to the promotion of the employees junior to the petitioner vide notification dated 07.08.2007. Accordingly, a case being Reference Case No. 13/2007 was registered in the learned Labour Court at Guwahati. The terms of reference are as follows:

(i) Whether the management of the Industrial Co-operative Bank Ltd. S.S. Road, Lakhtokia, Guwahati-1 are justified in promotion Smt. Renu Lahkar, Shri Raben Kalita and Shri Dinesh Ch. Deka by superseding many seniors?

(ii) If not, what relief the union is entitled to?

4. In reference case also the Management of the respondent Bank contested the proceeding by filing written statement stating inter alia that the petitioner although was senior to the promotee, Smt. Renu Lahkar, but was not considered for such promotion as he was facing departmental enquiry on account of misconduct and gross negligence. During the pendency of the proceeding, the Management filed an application being Petition No. 154/2008 stating therein that the General Secretary of the Union had expired on 07.11.2007 and the President of the Union took voluntary retirement from the service on 01.12.2007 and another original member had also resigned from the Union and joined another Trade Union and as a result, total membership of the Union reduced to only four. It was also stated in the said petition that the Management had preferred an application before the Registrar, Trade Union on 23.11.2007 for cancellation of the said Union and the Registrar after due enquiry cancelled the registration by his order dated 11.04.2008.

5. Consequent upon such developments, the learned Presiding Officer of Labour court held that the Reference Case No. 13/2007 was not maintainable in view of

cancellation of the registration of the employees" Union to which the petitioner was a member and was represented by him in the Reference Case.

6. The award was passed on 29.09.2009. During the pendency of the Reference Case No. 13/2007, the petitioner had approached the Labour Court at Guwahati by filing an application u/s 33A of the Act alleging illegal dismissal from service by the Management during pendency of conciliation proceeding without complying with the provision of Section 33(ii)(b) of the Act. The said application was registered as Misc. Case No. 10/2007 and two questions had been framed for determination vide order dated 24.04.2008. They are (1) whether the petitioner is workman in Reference Case No. 13/2007 and (2) whether the process of dismissing him from service was accomplished during pendency of the industrial dispute before the concerned authority and the court. It was at that stage, the Management of the respondent Bank approached this Court challenging maintainability of the case and the order dated 24.04.2008. The writ petition filed in this regard was registered and numbered as W.P. (C) No. 2338/2008. The writ petition was disposed of by order dated 19.06.2008 holding that the conciliation proceeding prima facie involving the workman/petitioner was pending on the date of his dismissal from service and hence it was obligatory on the part of the Management to obtain prior approval of the authority before whom the conciliation proceeding was pending and as such declined to interfere with the proceeding of the case.

7. After the aforesaid disposal of the writ petition, the Bank Management submitted its written statement in the proceeding u/s 33A of the Act wherein it was, inter alia, contended that the charge sheet dated 16/17.02.2006 was served upon the petitioner for committing gross misconduct and dereliction of duty in processing loan proposals against deposits relating to 22 numbers of loan cases for which the case of the petitioner was not considered for promotion while promoting his juniors. It was contended that since the subject matter of the Reference was no way connected with the grievance of the petitioner ventilated in Misc. Case No. 10/2007 and therefore, the provision of Section 33 of the Industrial Dispute Act was not attracted. It was admitted by the Management that the Union filed a compliant before the ALC, Guwahati on 11.04.2006 and the proceeding before the ALC was pending till 02.04.2007. It was further contended that as the petitioner had filed another application u/s 33A before the ALC, Guwahati, the petition before the Labour Court was not maintainable.

8. Both the sides adduced evidence in the case. The Bank Management examined its Managing Director. He in his examination in chief in the form of an affidavit admitted the fact that the petitioner was dismissed from service w.e.f. 04.10.2006 vide order dated 03.10.2006 during the pendency of the conciliation proceeding before the ALC, Guwahati. It was also admitted that the Management did not file any application before the conciliation Officer for approval of the dismissal order passed against the petitioner.

9. The learned Presiding Officer, Labour Court having passed the impugned

award dated 27.07.2007 dismissing the application filed by the petitioner, the petitioner has filed the instant writ petition.

10. I have heard Mr. S. Chakraborty, learned counsel for the petitioner and so also Mr. B. Chakraborty, learned counsel for the respondent Bank. My findings and conclusions are as follows.

11. Admittedly the petitioner was dismissed from service during the pendency of the conciliation proceeding, a fact which has been admitted by the learned Presiding Officer, Labour Court, Guwahati in his impugned award dated 27.07.2010 passed in Misc. Case No. 10/2007. In this connection, the following findings recorded by the Labour Court are worth mentioning.

7. Both sides another admitted fact is that during pendency of the conciliation proceeding before Assistant Labour Commissioner (Conciliation Officer) from 11.04.2006 to 02.04.2007, the management of the bank dismissed this applicant from service w.e.f. 04.10.2006 vide its order dated 03.10.2006 and the management had not filed any application before the conciliation officer u/s 33 for praying for approval of said dismissal order, and reversely, this applicant also did not file any application before him u/s 33A of the Industrial Dispute Act, 1947, but he filed me petition u/s 33A of the Act before this Court only on 14.12.2007, i.e. after 3 moths 20 days of sending the reference notification by the Government, but during pendency of Reference Case No. 13/2007 before this Court.

8. Another admitted fact of both sides" is that while Smt. Renu Lahkar, Shri Raben Kalita and Shri Dinesh Chandra Deka were promoted by the management of the Bank, me present applicant was working as Jr. Officer Gr. II in tile said bank, and all three promotees were juniors to this applicant. It is also both sides admitted fact that the Employees" Union of the Bank raised the industrial dispute and was also representing all the employees of the bank in this court in the said reference case, and the main grievances of all employees is that Smt. Renu Lahkar, Shri Raben Kalita and Shri Dinesh Chandra Deka has been promoted illegally by the management superseding many seniors including this applicant Shri Ashok Bhattacharjee. Thus, it is clear that Shri Ashok Bhattacharjee is also a victim of said alleged illegal promotion, and so, if the said promotion order would had been declared by this Court illegal, then, this applicant would have been entitled to be promoted from Jr. Officer Gr. II to Jr. Officer Gr. I. Hence, it is established that, this applicant was also a connected workman of the reference case which was pending before this Court and so, he was also concerned workman of the reference Case No. 13/2007. Therefore, the plea of the opposite party side that his applicant is not connected of that reference case is not sustainable. Accordingly, I hold that the present petitioner was concerned workman of Ref. Case No. 13/2007.

9. It is already found that his applicant was also a concerned workman of me Reference Case No. 13/2007, which was pending before this Court, so, he must

be deemed as a concerned workman of the industrial dispute that was raised by the Employees' Union before the Assistant Labour Commissioner, vide their complaint dated 11.04.2006. It is already found that before the Assistant Labour Commissioner (Conciliation officer), that proceeding was pending from 11.04.2006 to 02.04.2007, but the management had not filed any petition before the Assistant Labour commissioner, Guwahati u/s 33(2)(b) of Industrial Dispute Act, 1947 seeking approval of the said dismissal order although they had dismissed the applicant during the pendency of the proceeding before him. It is also found that the management has also not filed similar type of petition before this Court although connecting to that industrial dispute, Reference Case No. 13/2007 has been pending before this Court. Thus, apparently, it is seen that the opposite party (management) of the said bank had dismissed the applicant without taking permission either from Assistant Labour Commissioner, Guwahati or from this Court, nor they had taken approval of the dismissal order either from Assistant Labour Commissioner, Guwahati or from this Court.

10. The charge framed against the petitioner is that he fraudulently, dishonestly and deliberately furnished wrong information as regards the deposits under daily deposit accounts and processed and forwarded loan proposals with an intention to provide wrongful gain to such persons and defraud the bank, and thereby committed gross negligence and dereliction of duties which attracts penalties under Rule 35 and 36 of the Staff Services Rules of the Bank. Whereas, the dispute in Reference Case No. 13/2007 is whether the management is justified in promotion Smt. Renu Lahkar, Shri Raben Kalita and Shri Dinesh Ch. Deka superseding many seniors. Thus, it is clear that the ground of dismissing the present petitioner from service is not connected with the dispute of Reference Case No. 13/2007. Hence, the present case will be governed by Section 33(2)(b) of Industrial Dispute Act, 1947. So as per that provision, the employer is required to file application for approval of dismissal order before the Court where the reference case is pending, which means that on the very day of termination, the employer is to pay one month's wage to the workman and to forward an application to the authority before which the main case is pending, for approval of that order. It is found that the management, in the instant case, neither applied for approval of dismissal order nor paid one month's wage to the workman. Thus, apparently, it is seen that the management/opposite party did not comply with the provision of Section 33(2)(b) of Industrial Dispute Act, 1947...

12. In spite of the aforesaid finding recorded by the learned Presiding Officer, Labour Court, it has been held that since the Reference Case No. 13/2007 had already been disposed of by holding the same to be not maintainable, the provision of section 33-A of the Act cannot be invoked and consequently the petitioner was not entitled to any relief. This finding has been recorded by the learned Labour Court being oblivious of the fact that the order of dismissal was passed during the pendency of the conciliation proceeding. If the order was bad at the very inception because of noncompliance of the provisions of Section 33(2)

(b) of the Industrial Dispute Act, 1947, any subsequent development in the Reference case could not have altered the said position. As per the requirement of Section 33(2)(b), during the pendency of any proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to workman concerned in such dispute or where there are no such standing orders, in accordance with the terms of the contract, whether expressed or implied between him and the workman for any misconduct not connected with dispute, discharge or punish, whether by dismissal or otherwise, that workman; provided that no such workman shall be discharged/dismissed unless he has been paid wage of one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

13. In the instant case, the petitioner was dismissed from service, admittedly without payment of one month's wage and also without filing an application to the authority for approval of the action taken by the employer, the fact which has been admitted by the Bank Management with the seal of approval of the learned Labour Court. In spite of the said position, the learned Labour Court has passed the impugned award dismissing the plea of the petitioner that the impugned order of dismissal was void ab initio on the ground that the very entity of the Union which had raised the dispute ceased to exist due to certain developments that took place after initiation of the proceeding unmindful of the fact that at the time of passing the impugned order of dismissal the Union was in existence requiring compliance of the provision of Section 33(2)(b) of the Industrial Dispute Act.

14. Mr. S. Chakraborty, learned counsel for the petitioner placing reliance on the two decisions reported in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, and United Bank of India Vs. Sidhartha Chakraborty, , submitted that the aforesaid provision being mandatory was applicable to the pending proceeding irrespective of the subsequent developments attributed to the reference. In Ram Gopal Sharma (supra), the constitution Bench of the Apex Court held that not making an application u/s 33(2)(b) seeking approval, is a clear case of contravention of the proviso of Section 33(2)(b). It has further been held that an employer who does not make an application u/s 33(2)(b) or withdraws the one made, cannot be rewarded of relieving him of the statutory obligation crated on him to make such an application.

15. In this connection, paragraph-15 of the judgment is reproduced below:

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 u/s 33-A, cannot be accepted. In our view, not making an application u/s 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 provision to Section 33(2)(b). An employer who does not make an application u/s 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 u/s 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceedings by making a complaint u/s 33-A or to raise another industrial dispute or to make a complaint u/s 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 hardship or unemployment.

16. Learned counsel for the respondent Bank argued that irrespective of whether any application was made u/s 33(2)(b) of the Act or not, the only conclusion that would follow is the penalty as envisaged u/s 31 of the Act. This submission has no merit inasmuch as merely because the provision is available, it cannot be said that the order of discharge or dismissal does not become inoperative or invalid unless set aside u/s 33A of the Act. This aspect of the matter has also been answered by the Apex Court in Ram Gopal Sharma (supra) holding that the said provision is intended to serve different purpose.

17. In Sidhartha Chakraborty (supra), the Division Bench of this Court placing reliance on Ram Gopal Sharma (supra) upheld the judgment of the learned Single Judge interfering with the dismissal from service without complying with the provision of Section 33(2)(b) of the Industrial Dispute Act, 1947.

18. As discussed above, if the impugned order of dismissal was invalid, illegal and or void ab initio at the very inception, any subsequent development relating to reference in question cannot alter the said position. In the instant case when the petitioner was dismissed, from service the conciliation proceeding was very much pending requiring approval of the authority as per the provision of Section 33(2)(b) of the Act. No such approval was sought for. That being the position, the impugned order of dismissal is void ab initio. In such a situation, irrespective of dropping of the particular reference due to non maintainability because of certain subsequent developments cannot relate back to the date on which the petitioner was dismissed from service.

19. For all the aforesaid reasons, I am inclined to accept the case of the petitioner. Accordingly the writ petition is allowed by setting and quashing the impugned award dated 27.07.2010 passed by the learned Presiding Officer, Labour Court in Misc. case No. 10/2007. Consequently the impugned orders dated 03.10.2006 dismissing the petitioner from service and the order dated

03.09.2007 passed by the learned appellate authority upholding the said order of dismissal also stand interfered with. However, having regard to the nature of the allegation made against the petitioner involving financial irregularities and also the fact that it is only on technical ground the impugned orders have been set aside, it is hereby provided that the petitioner upon reinstatement in service forthwith pursuant to setting aside and quashing of the impugned orders shall not be entitled to any back wages. However, his continuity in service shall be maintained. It will also be open for the Bank Management to take action in the matter in accordance with law. The writ petition is allowed to the extent indicated above, without, however, any order as to costs.