

(2012) 08 DEL CK 0111

In the Delhi High Court

Case No : LPA No. 943 of 2011 and W.P. (C) No. 3728 of 2011

Container Corporation of India Ltd.

APPELLANT

Vs

Sh. Sanjeev Kumar
 Sh. Sanjeev Kumar Vs Union of
India and Others

RESPONDENT

Date of Decision : 21-08-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10, 10(1), 2(k), 22(1), 33

Citation : (2013) 1 LLJ 106

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Vinay Bhasin with Mr. Manoj K. Singh, in LPA No. 943/2011, Mr. Atul T.N., in W.P. C No. 3728/2011 and Mr. Sanjay Ghose and Mr. K.A. Raj, in W.P. C No. 3974/2011, for the Appellant; Atul T.N. in LPA No. 943/2011, Mr. Vinay Bhasin, with Mr. Manoj K. Singh, Concor / R-2. Mr. J.K. Sharma, for R - 3 and 4 in W.P. (C) No. 3728 and 3974/2011 and Mr. Subhash C. Sharma, for R-1/UOI in W.P. (C) No. 3974/2011, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The intra-court appeal being LPA No. 943/2011 impugns the judgment dated 10.10.2011 of the learned Single Judge dismissing W.P.(C) No. 7387/2011 preferred by the appellant Container Corporation of India Ltd. (CCIL). The said writ petition was preferred by CCIL against the order dated 27.07.2011 of the Industrial Adjudicator allowing the complaint u/s 33A of the Industrial Disputes Act, 1947 filed by the respondent Sh. Sanjeev Kumar and declaring the order dated 26.03.2004 of the Disciplinary Authority of CCIL removing Sh. Sanjeev Kumar from service to be null and void and directing CCIL to pay all dues of Sh. Sanjeev Kumar deeming him to have continued in the service of CCIL. LPA No. 943/2011 came before this Bench first on 16.11.2011 when after hearing the counsels for sometime, the file of W.P.(C) No. 3728/2011 was sent for. On the next date i.e. 17.11.2011, notice of the appeal was issued

and the counsel for Sh. Sanjeev Kumar gave a statement that Sh. Sanjeev Kumar shall not proceed with the execution. On the same date, it was also informed that W.P.(C) No. 3974/2011 also challenges the same award as under challenge in W.P.(C) No. 3728/2011. Both the said writ petitions were also directed to be listed along with LPA No. 943/2011. Subsequently on request of counsels, W.P.(C) No. 3728/2011 and W.P.(C) No. 3974/2011 which were pending before the Single Judge Benches of this Court were also tagged for hearing along with LPA No. 943/2011.

2. Sh. Sanjeev Kumar joined the employment of CCIL in the year 1996 and was posted at Inland Container Depot (ICD) at Tuglakabad. On complaint of State Bank of India, Parliament Street branch, Sh. Sanjeev Kumar was arrested on 18.08.1998 and remained in judicial custody till 05.09.1998; obviously he remained absent from duty with CCIL. On 29.09.1998 Sh. Sanjeev Kumar submitted an application for grant of earned leave from 19.08.1998 to 09.09.1998. The Station House Officer of Police Station Parliament Street, vide letter dated 24.12.1998 informed CCIL of the arrest of its workman Sh. Sanjeev Kumar and of his having remained in police custody for two days and in judicial custody for seventeen days. It was also mentioned in the FIR that the said Sh. Sanjeev Kumar was in part time employment elsewhere besides in full time employment of CCIL.

3. CCIL placed Sh. Sanjeev Kumar under suspension on 13.01.1999 and charged him with having absconded from duty, suppressing the factum of his arrest as well as of engaging in a part time job with another employer. Domestic inquiry was held which found him guilty. The Disciplinary Authority of CCIL vide order dated 12.07.2000 removed Sh. Sanjeev Kumar from service. However in the departmental appeal preferred, direction for holding de novo inquiry was issued twice (we are not concerned here with its details) and ultimately the charges of unauthorized absence and concealment of arrest by misrepresentation were held proved. Ultimately vide order dated 26.03.2004, punishment of removal from service was imposed. The departmental appeal was dismissed on 29.06.2004.

4. As on 26.03.2004, three industrial disputes involving CCIL and its workmen were pending. These were:

(i) ID No. 160/1999 in which the dispute referred to Industrial Adjudicator for adjudication was:

Whether the action of the management of Container Corporation of India Ltd., Ashoka Road, New Delhi in not giving to its Employees any incentives for family planning for promotion small family norms of the Govt. is justified? If not to what relief and benefits the employees are entitled to?

(ii) ID No. 22/2002, espoused by 74 named workmen, in which the dispute referred to the Industrial Adjudicator for adjudication was:

Whether the workmen shown in Annexure-A are entitled for ex-gratia payment of

Rs.6,000/- and if so, what directions are necessary in this respect.

(iii) ID No. 23/2002 again involving certain named workmen in which the dispute referred for adjudication was:

Whether the workmen whose names appear in Annexure A were on strike during the period from 07.12.1998 to 15.12.1998 or the management has restored to lock out and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws / government notifications and to what other relief are they entitled and what directions are necessary in this respect?

5. It is the plea of CCIL that since Sh. Sanjeev Kumar had not applied for availing incentive for family planning and did not claim to fulfill the eligibility criteria therefor, he was considered to be not a concerned workman in I.D. No. 160/1999 and therefore need was not felt to take approval u/s 33 of the Act, of the Industrial Adjudicator in ID No. 160/1999 before removing Sh. Sanjeev Kumar from service. According to CCIL, Sh. Sanjeev Kumar was a concerned workman only for the purpose of ID No. 22/2002; accordingly CCIL on 26.03.2004 paid to Sh. Sanjeev Kumar one month's salary in terms of Section 33(2)(b) of the Act and filed an application u/s 33(2)(b) of the Act in ID No. 22/2002 seeking approval for removing Sh. Sanjeev Kumar from service. Though there is a chequered history to the said application u/s 33(2)(b) of the Act also but since we, in these proceedings, are not concerned therewith, it is suffice to state that the same was ultimately dismissed on 02.03.2006 on the ground that Sh. Sanjeev Kumar was not the workman concerned in ID No. 22/2002. The said order has attained finality.

6. In the meanwhile ID No. 160/1999 was disposed of by the Industrial Adjudicator on 04.01.2006 by a "No Dispute Award" after recording the statement of a person claiming to be the President of the Employees Union to the effect that the Scheme with regard to incentive on small family norms was already in existence and being implemented and the workmen were satisfied with the existence and implementation of the said Scheme and thus the workmen were not pressing for an award.

7. It is worth mentioning that it was the plea of Sh. Sanjeev Kumar in the application u/s 33(2)(b) of the Act filed by CCIL in ID No. 22/2002 that though he was not a concerned workman in I.D. No. 22/2002 but he was a concerned workman in ID No. 160/1999 in which no approval u/s 33(2)(b) of the Act had been sought.

8. Upon CCIL, notwithstanding dismissal on 02.03.2006 of application u/s 33(2)(b) of the I.D. Act filed in ID No. 22/2002, not taking back Sh. Sanjeev Kumar into service, he filed W.P.(C) No. 5316/2006 in this Court for a direction to CCIL to take him back in service. Though this writ petition was dismissed but in an appeal preferred there against, it was observed that Sh. Sanjeev Kumar could avail of the remedies under the Act.

9. It is thereafter that Sh. Sanjeev Kumar filed the complaint aforesaid u/s 33A of the Act (from which LPA No. 943/2011 has arisen) of the refusal / failure of CCIL to seek approval of the Industrial Adjudicator in I.D. No. 160/1999 (inspite of his being a concerned workman therein) of the punishment aforesaid of removal from service meted out to him. Naturally, CCIL contested the said application.

10. The Industrial Adjudicator, vide order dated 27.07.2011 held Sh. Sanjeev Kumar to be a concerned workman in ID No. 160/1999 since an award in the said dispute was capable of affecting him. Since no approval u/s 33(2)(b) in the said ID No. 160/1999 had been taken, the action dated 26.03.2004 of CCIL of removing Sh. Sanjeev Kumar from service, without obtaining such approval was held to be bad. Axiomatically, it was directed that Sh. Sanjeev Kumar should be deemed to be in service, entitling him to all consequential benefits.

11. It was the argument of CCIL in W.P.(C) No. 7387/2011 impugning the said order dated 27.07.2011 of Industrial Adjudicator and from which writ petition this LPA No. 943/2011 arises, that Sh. Sanjeev Kumar was not a concerned workman in ID No. 160/1999 and that the only effect of CCIL not taking approval u/s 33(2)(b) in ID No. 160/1999 was that Sh. Sanjeev Kumar was to be deemed to have continued in service till 04.01.2006 when ID No. 160/1999 came to an end with the "No Dispute Award" and thus the liability of CCIL could only be for emoluments of Sh. Sanjeev Kumar from 26.03.2004 to 04.01.2006 and no more. Succinctly put, the argument was that even if approval required to be taken u/s 33(2)(b) of the Act is not taken, the only effect thereof is that the order of removal from service remains suspended till the dispute in which the approval is to be taken comes to an end; that the order of removal, by not taking approval, does not become null and void.

12. The learned Single Judge has negatived both the aforesaid contentions and held Sh. Sanjeev Kumar to be a concerned workman in ID No. 160/1999 and further held that approval u/s 33(2)(b) of the Act being mandatory, the employer cannot avoid taking the same and cannot be permitted to contend that the order of removal from service should be given effect to after the dispute comes to an end.

13. However before us, the senior counsel for CCIL has argued the matter differently. It is contended that the need for taking approval u/s 33(2)(b) of the Act arises only during the pendency of a "dispute"; however the plea of CCIL throughout in ID No. 160/1999 has been that there was no "dispute" because CCIL, since prior to the reference leading to ID No. 160/1999 had implemented the Scheme providing incentive to its employees for following the small family norms; this position was ultimately also accepted by the employees who agreed that the Scheme was in force in CCIL and owing whereunto a "No Dispute Award" was returned. It is argued that once ID No. 160/1999 had ended in a "No Dispute Award", CCIL could not be held guilty u/s 33A of the Act for not obtaining approval u/s 33(2)(b) of the Act in ID No. 160/1999.

14. Reliance in this regard is placed on Taj Services Ltd. Vs. Industrial Tribunal-I Delhi 2011 7 AD (Del) 37. In that case, the plea of the employer that the industrial dispute raised was not maintainable in the face of a binding settlement was ultimately accepted; in these circumstances, it was held that since the reference had been found to be bad in law, the consequence is that no application u/s 33A of the Act could have been filed complaining of violation of Section 33(2)(b) of the Act. The said judgment of the same learned Single Judge who has penned the judgment impugned in this LPA also was upheld by this very Bench on 20.10.2011 in LPA Nos. 873-874/2011. We held that once the settlement was found to be binding on the workmen who had raised the dispute, it would lead to the conclusion that there was no dispute between the parties which could have been referred for adjudication and once the reference was found to be bad there could be no question of violation of Section 33(2)(b) of the Act and the only remedy of the workman was to raise a dispute u/s 10 of the Act.

15. The senior counsel for CCIL thus contends that the matter is fully covered by the judgments supra. Additionally, he also invited our attention to the cross examination on 16.05.2011 of Sh. Sanjeev Kumar in proceedings u/s 33A of the Act before the Industrial Adjudicator wherein he stated "It is wrong to suggest that the Scheme "Incentives for adopting small family norms" was in vogue in the management since 1993. In fact, the Policy for launching the said Scheme was adopted in the year 1998 only. It is correct that till the date of my termination, I never applied for giving me the benefit of the Scheme which is also the subject matter of reference in ID No. 160/1999. My date of birth is 16.01.1970. The date of birth of my wife Smt. Anuradha is 22.06.1975."

It is argued by the senior counsel for CCIL that the aforesaid is an admission by Sh. Sanjeev Kumar of the purported dispute raised in ID No. 160/1999 in the year 1999 being no dispute.

16. The senior counsel for CCIL has also drawn support from Management, Essorpe Mills Ltd. Vs. Presiding Officer, Labour Court and Others, where the finding of the High Court of non compliance with Section 33(2)(b) of the Act was set aside for the reason of the strike notice being not in terms of Section 22(1) of the Act and for the reason thereof there being no commencement of conciliation proceedings as a result of a defective notice in the eyes of law.

17. We had on 13.03.2012, passed the following order in these proceedings:

1. We have heard the matter at length. The issue which needs to be determined would depend upon the fact as to whether the Container Corporation of India (CCI) had prior to the year 1999 implemented the "Policy on Incentives for Adopting Small Family Norms". It is the contention of the CCI that it had introduced and implemented the said Policy in 1993; even the respondent in LPA 943/2011 admitted in his cross-examination that the Scheme was introduced in the year 1998. On this basis, it is argued that the dispute referred was clearly non-existent dispute and no such reference could have been made and on that

basis the Industrial Tribunal rightly passed "no dispute" award. The contention of the respondent in LPA 943/2011 and of the petitioner in Writ Petition No. 3974/2011 is that CCI has till date not produced on record any document to show that such Policy was prevalent in the company and the Industrial Tribunal did not apply its mind on the existence of the Policy before passing "no dispute" award.

2. Having regard to the aforesaid controversy, we direct the appellant to file an affidavit about the prevalence of the Policy. This affidavit should be supported by a copy of the said Policy and also by the documents evidencing implementation thereof and payments made thereunder.

3. The affidavits be filed within one week with advance copy.

4. Renotify on 22nd March, 2012.

18. In compliance of our aforesaid order, the GGM(HR) of CCIL has filed an affidavit dated 20.03.2012 stating that though CCIL was incorporated on 10.03.1988 but became operational only after acquiring the Container Terminals from the Indian Railways; that CCIL started recruiting its own employees only from the year 1992; that in the year 1993 CCIL formulated and adopted the Policy on Incentive for Adopting Small Family Norms and the said Policy became operational in the year 1993 though was revised with effect from 10.02.1998; that the copies of the said Policy were filed before the Industrial Adjudicator in ID No. 160/1999; that according to the Policy, all regular employees who / whose spouses had undergone sterilization operation were considered for grant of incentive under the Scheme subject to fulfillment of certain criteria as laid down in the Scheme. CCIL, along with the said affidavit has filed copies of the Scheme / Policy on Incentive for Adopting Small Family Norms as well as the list of employees who availed the benefit of the Policy between the years 1993- 1998 and thereafter also; certain pay slips to demonstrate the same are also filed with the affidavit. CCIL, at the time of hearing also produced in the Court its records to show that the Scheme / Policy on Incentive for Adopting Small Family Norms was in force since prior to the reference in ID No. 160/1999 and on perusal of the said records, we are satisfied of the said position.

19. That brings us to W.P.(C) No. 3728/2011 and W.P.(C) No. 3974/2011 which have been clubbed with the LPA.

20. After ID No. 160/1999 was disposed of with a "No Dispute Award" on 04.01.2006 as aforesaid, one Sh. Suresh Kumar Ranga claiming to be General Secretary to the Employees Union of CCIL applied to the Industrial Adjudicator for recall of the order dated 04.01.2006 and for restoration of ID No. 160/1999. It was the case of the said Sh. Suresh Kumar Ranga that Sh. Binay Kumar Chaudhary who as President of the Workmen Union of CCIL appeared before the Industrial Adjudicator on 04.01.2006 and gave a statement which had resulted in a "No Dispute Award" was on that date not the President of the Union. It was thus pleaded that Sh. Binay Kumar Chaudhary was not authorized to make any

statement on behalf of the Workers Union.

21. The Industrial Adjudicator vide order dated 16.05.2011 dismissed the said application dated 21.02.2006 of Sh. Suresh Kumar Ranga holding that Sh. Binay Kumar Chaudhary at the time of making the statement had produced copy of the Minutes of the Executive Body Meeting held on 26.12.2005 of the CCIL Employees Union and that though the said Sh. Suresh Kumar Ranga had also filed a civil suit asserting himself to be the General Secretary of the Union but his application therein for interim relief had been dismissed and there was no document to show that he was authorized to act on behalf of the Union. The assertion of CCIL that the Policy on Incentive for Adopting Small Family Norms was in vogue even at the time when the dispute had been wrongly raised was also noticed.

22. Aggrieved from the aforesaid order dated 16.05.2011 Sh. Suresh Kumar Ranga aforesaid in the name of Container Corporation of India (CONCOR) Employees Union (Registration No. 4515) has filed W.P.(C) No. 3974/2011 seeking restoration of ID No. 160/1999 and setting aside of the "No Dispute Award" dated 04.01.2006.

23. W.P.(C) No. 3728/2011 has been preferred by Sh. Sanjeev Kumar aforesaid impugning the "No Dispute Award" dated 04.01.2006 and the order dated 16.05.2011 (supra) of the Industrial Adjudicator refusing restoration of ID No. 160/1999.

24. Needless to state that in both the writ petitions aforesaid, the authority of Sh. Binay Kumar Chaudhary on whose statement "No Dispute Award" dated 04.01.2006 was given is under challenge.

25. The counsel for Sh. Sanjeev Kumar has argued that Mr. Binay Kumar Chaudhary on whose statement the "No Dispute Award" dated 04.01.2006 was given, while making the statement had not produced the authorization in his favour; he has drawn attention to the copy of the Constitution of the Container Corporation of India (CCI) Employees Union filed in W.P.(C) No. 3728/2011 to contend that the circulars of the meeting are to be circulated before any final decision is reached. On the basis thereof, it is contended that the authorization now relied upon by Sh. Binay Kumar Chaudhary is of no avail. Attention is also invited to the statement made by the authorized representatives of the parties in the proceedings u/s 33A of the Act on 20.07.2011 to the effect that they would confine their arguments only to whether Sh. Sanjeev Kumar was the concerned workman or not in ID No. 160/1999 and would rely on pleadings and evidences pertaining to this issue only. On the basis thereof, it is argued that the cross examination in the said proceedings of Sh. Sanjeev Kumar admitting that the Policy on Incentive for Adopting Small Family Norms was in vogue in CCIL since the year 1998 cannot be relied on. Reliance is placed on Raja Kulkarni Vs. State of Bombay (1954) 1 LLJ 1SC to contend that the validity of proceedings is to be determined by the Court before which it is pending and not on the basis of

admissions. Reliance is also placed on M/s Desein Pvt. Ltd. Vs. Industrial Tribunal III, Delhi 109 (2004) DLT 18 where a learned Single Judge of this Court held that the statutory impact of Section 33 of the Act cannot be stalled merely by raising a plea that the reference of an industrial dispute is incompetent and therefore no industrial dispute exists. It was observed that this would amount to giving primacy to the plea of an interested party over the legislative intent expressed in Section 33 of the Act.

26. The counsel for Sh. Sanjeev Kumar has also referred to:

(i) Commissioner of Income Tax, Rajkot Vs. Shatrusailya Digvijaysingh Jadeja, laying down that when a Section contemplates pendency of an appeal, what is required for its application is that an appeal should be pending and there is no need to introduce the qualification that it should be valid or competent - the question whether the appeal is valid or competent is a question entirely for the Appellate Court before whom the appeal is filed to decide and from the mere fact that such an appeal is held to be not-maintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court.

(ii) Mr. S.B. Jain, I.T.O., Nagpur Vs. Mahandera, also in the context of income tax laws, laying down that where the requirement is of pendency of a proceeding, the question whether the proceedings were barred by limitation is irrelevant.

(iii) Prabhakar Shamrao Marathe Vs. The Maharashtra State Electricity Board, Bombay 1975 LAB. I.C. 697 where a Division Bench of the Bombay High Court has laid down that the proceedings referred to in Section 33 of the Act need not be pending at the time of complaint u/s 33A of the Act.

(iv) Tata Iron and Steel Co. Ltd. Vs. S.N. Modak, laying down that an application u/s 33(2)(b) of the Act does not come to an end on decision on the industrial dispute.

(v) Bharat Aluminium Company Limited and Others Vs. Sukumar Mukherjee and Others, where a Division Bench of the Calcutta High Court held that a complaint u/s 33A of the Act does not become infructuous even on a settlement being arrived at in the proceedings u/s 33 of the Act.

(vi) The Management of W.S. Industries (India) Ltd. Vs. K. Ramakrishnan and Others, where a Division Bench of the Madras High Court held that during the pendency of proceedings referred to in Section 33 of the Act, compliance with Section 33(2)(b) of the Act is necessary.

(vii) The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others, on the scope and spirit of Section 33 of the Act.

(viii) Indian Telephone Industries Ltd. and Another Vs. Prabhakar H. Manjare and Another, to contend that the provisions of Section 33(2)(b) of the Act are mandatory.

(ix) Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and

Others, laying down that non approval of order of dismissal or failure to make application u/s 33(2)(b) of the Act renders dismissal inoperative and the employee becomes entitled to wages from the date of dismissal onwards.

(x) D.T.C. Vs. Prem Chand Ex. Sweeper, where a Division Bench of this Court held that where there is no approval of the Industrial Adjudicator u/s 33(2)(b) of the Act, the order of dismissal is ab initio void.

(xi) Swan Mills Ltd. Vs. Union of India (UOI) and Others, relying on Raja Kulkarni Vs. State of Bombay (supra).

(xii) Urban Improvement Trust, Bikaner Vs. Mohan Lal, where the Supreme Court had expressed concern over frivolous and unjust litigations.

(xiii) Chander Vs. Union of India (UOI) and Another, on the aspect of interest on the arrears of wages due to Sh. Sanjeev Kumar.

27. The counsel for Sh. Sanjeev Kumar has also argued that ID No. 160/1999 was not listed before the Industrial Adjudicator on 04.01.2006 when it was disposed of with a "No Dispute Award" and the very fact that not only Sh. Binay Kumar Chaudhary on behalf of Workers Union but the authorized representative of the CCIL also appeared before the Industrial Adjudicator on that date shows the collusiveness of the proceedings on that date. It is also argued that the Industrial Adjudicator did not frame any issue before rendering a "No Dispute Award".

28. The counsel for Sh. Suresh Kumar Ranga, the petitioner in W.P.(C) No. 3974/2011 has argued that there is no finding that the dispute in ID No. 160/1999 was frivolous or non-est; that at best it ceases to be a dispute only on 04.01.2006; that no Tribunal has till now returned any finding about the existence of Policy on Incentive for Adopting Small Family Norms in CCIL since prior to the reference; that the Workers Union of CCIL had given a Charter of Demand; that the dispute was referred only after the failure of conciliation proceedings; that even before the Industrial Adjudicator several opportunities were given to the CCIL to produce documents evidencing the existence of such a Policy but none were produced. On inquiry it is informed that Sh. Binay Kumar Chaudhary aforesaid was President of the Union from the years 2002-2004; that the erstwhile undivided Union, in the year 2005 was split and since then the civil suit aforesaid between the two groups is pending. The counsel for Sh. Suresh Kumar Ranga has stated that Sh. Binay Kumar Chaudhary when he gave the statement on 04.01.2006 was not a union member and gave the statement leading to the "No Dispute Award" in collusion with the management of CCIL. It is argued that the principle of collective bargaining has been defeated and the writ petition should be allowed and ID No. 160/1999 should be restored.

29. The senior counsel for CCIL in rejoinder has reiterated that the reference leading to ID No. 160/1999 was per se bad irrespective of "No Dispute Award". He has contended that once the Scheme / Policy on Incentive for Adopting Small

Family Norms was in existence, there could have been no reference.

30. Though the facts as aforesaid are long-winded, the controversy is in a narrow compass. As far as W.P.(C) No. 3728/2011 and W.P.(C) No. 3974/2011 are concerned, the only questions for consideration are:

- (i) whether closure of ID No. 160/1999 with a "No Dispute Award" on the statement of Sh. Binay Kumar Chaudhary was proper; and
- (ii) whether the refusal of the Industrial Adjudicator to re-open the same on the application of Sh. Suresh Kumar Ranga is improper and erroneous.

Though the first question aforesaid, of the authority of Sh. Binay Kumar Chaudhary raises disputed facts but we find the Industrial Adjudicator to have refused restoration of ID No. 160/1999 also on the ground that the reference itself had been wrongly made. We are of the view that if the said reason given by the Industrial Adjudicator is correct, then no purpose would be served in restoring ID No. 160/1999. This Court in exercise of powers under Article 226 of the Constitution of India is entitled to cut through the maze of legalese and is not inclined to restore ID No. 160/1999 if no purpose would be served therefrom. It was for this reason only that we had vide our order dated 13.03.2012 supra directed CCIL to file an affidavit in this regard. From the affidavit filed in pursuance to the said order we are satisfied of the existence since prior to the reference of ID No. 160/1999, of the Scheme / Policy on Incentives for Adopting Small Family Norms in CCIL, and which the counsels for the writ petitioners have not been able to controvert.

31. Once it is established that the Scheme/ Policy on Incentives for Adopting Small Family Norms was in existence in CCIL since prior to the reference in ID No. 160/1999, the closure of the said dispute with a "No Dispute Award" cannot be faulted with. When the management of CCIL was giving to its employees incentives for family planning and for promoting small family, the reference in ID No. 160/1999 was misconceived and no relief could be granted to the workman in the said reference.

32. In view of the aforesaid it is not necessary to decide whether Sh. Binay Kumar Chaudhary was on 04.01.2006 authorized to make the statement on behalf of the Workers Union or not.

33. As far as the LPA is concerned, the controversy therein boils down to-

- a. whether notwithstanding CCIL having since the year 1993 introduced the scheme/policy on incentive for adopting small family norms, the reference u/s 10 of ID Act in the year 1999, on the premise that CCIL had not implemented/made operational the said scheme/policy, still required CCIL to take approval u/s 33 of the Act;
- b. if the answer to the above is in the affirmative, what is the effect of CCIL having not taken approval u/s 33 of the Act.

34.. Since Shri Sanjeev Kumar contends that CCIL was so required to take approval because the reference had been made and the dispute was pending, even if the reference was wrongly made, we will first take up the aspect of the effect of not taking such approval.

35. The purpose of filing an application u/s 33(2)(b) of the Act is to ensure that the employer, owing to the pendency of the dispute, does not act vindictively against the employee. A detailed discussion in this regard is to be found in Delhi Transport Corporation Vs. Shyam Lal ILR (2010) 5 Del. 431 penned by one of us (Rajiv Sahai Endlaw, J.). It is not as if CCIL was shying away from applying u/s 33(2)(b) of the Act. Such an application was filed in ID No. 22/2002. CCIL, for whatsoever reason, took a decision that no such application was required to be filed in I.D. No. 160/1999. The question which arises is, whether, if at the time of taking action of dismissal or otherwise against a concerned workman, more than one dispute is pending, the employer is required to make applications u/s 33(2)(b) of the Act seeking approval in each of the said disputes. The answer has to be "no" inasmuch as the question for adjudication in all these applications would be the same i.e. whether the punishment of dismissal or otherwise was vindictive and inflicted by way of retaliation to the workman having raised the dispute. The conduct of CCIL in not moving the application u/s 33(2)(b) of the Act in ID No. 160/1999 cannot thus be said to be malafide. If the intent of CCIL had been to avoid scrutiny of its action of removing Sh. Sanjeev Kumar from service, it would not have filed application u/s 33(2)(b) of the Act in ID No. 22/2002 also. Unfortunately that application u/s 33(2)(b) of the Act came to be dismissed on 02.03.2006 for the reason of Sh. Sanjeev Kumar being not a concerned workman therein.

36.. A perusal of the order dated 2nd March, 2006 shows that the application u/s 33(2)(b) filed in ID 22/2002 was first dismissed on 7th July, 2004 for the reason of having been filed, without prejudice to the plea of CCIL that Shri Sanjiv Kumar was not a concerned workman therein. The petitioner filed W.P.(C) No. 12602/2004 in this Court challenging the said order. The said writ petition was allowed vide order dated 2nd December, 2004 holding that merely because CCIL had filed the application without prejudice to its rights, did not mean that the application was not maintainable. Notice was also taken of the plea of Shri Sanjiv Kumar that he was the concerned workman in ID 160/1999. The order dated 7th July, 2004 of Industrial Adjudicator was accordingly set aside and the application u/s 33(2)(b) directed to be decided afresh. However the Industrial Adjudicator again, on the plea of Shri Sanjiv Kumar that he was not a concerned workman in ID 22/2002, as aforesaid, on 2nd March, 2006 dismissed the said application. While doing so, the plea of Shri Sanjiv Kumar that he was a concerned workman in ID 160/1999 was noticed but it was observed that the application u/s 33(2)(b) filed in ID 22/2002 could not be treated as in ID 160/1999 because the application u/s 33(2)(b) is to be filed in the industrial dispute in which Shri Sanjiv Kumar was a concerned workman.

37. However by that time, the I.D. No. 160/1999 already stood disposed of on 04.01.2006 with the "No Dispute Award" aforesaid. It was thus not possible for CCIL to then apply u/s 33(2)(b) in I.D. No. 160/1999.

38. It is also worth noticing that it is nowhere the case of Shri Sanjiv Kumar that he had applied to CCIL for any incentive for family planning for promotion of the small family norms or even that he was eligible to apply therefor, or that the same were denied to him for the reason of CCIL having not introduced the said Scheme/ Policy. CCIL was in any case pleading that the reference itself was bad as the Scheme/ Policy already existed and there was no dispute as referred. The decision of CCIL that Sh. Sanjeev Kumar was not a concerned workman in I.D. No. 160/1999, was thus a plausible one and cannot be tainted as mala fide or motivated to avoid scrutiny of its action of removing Sh. Sanjeev Kumar from service.

39. The question which arises is as to what was the recourse open to CCIL on dismissal as aforesaid on 02.03.2006 of the application u/s 33(2)(b) of the Act filed in I.D. No. 22/2002. By then I.D. No. 160/1999 in which Sh. Sanjeev Kumar was contending that such application should have been filed, was no longer pending. Had the same been pending, it could have been said that CCIL ought to have then filed an application u/s 33(2)(b) therein pleading that though it was required to be filed simultaneously with the taking of the action of removal from service but CCIL was bona fide pursuing the said application in another dispute where it was finally held to be not maintainable. Though an application u/s 33(2)(b) is required to be made by the employer simultaneously with the order of dismissal or discharge and with the payment of wages with all three forming a part of the same transaction but the Supreme Court in *Strawboard Manufacturing Co. Vs. Gobind*, has held that the question whether the application was made as part of the same transaction or at the same time when the action was taken would be a question of fact and will depend upon the circumstances of each case. In the facts and circumstances aforesaid of the present case, once the application u/s 33 (2) (b) in ID No. 22/2002 was moved on the same day, CCIL would have been entitled to move an application u/s 33 (2) (b) in ID No. 160/1999 after dismissal on 2nd March, 2006 of the said application in ID No. 22/2002, had ID No. 160/1999 been then still pending and it would have been treated as part of the same transaction of dismissal/discharge of Sh. Sanjeev Kumar.

40. However once the other dispute namely I.D. No. 160/1999, by then was not pending, CCIL did not have the option of applying u/s 33(2)(b) therein also.

41. The question which arises is, whether owing to the said circumstances, which can at best be said to be fortuitous and not attributable to CCIL alone, the disciplinary action of CCIL against Sh. Sanjeev Kumar is to be set at naught and given a go by. In our opinion, No.

42. Section 33A of the Act requires the Industrial Adjudicator to adjudicate a

complaint of contravention of Section 33 of the Act, as if it were a dispute and in accordance with the provisions of the Act. As far back as in *The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others*, it was held that the addition (with effect from 20.05.1950) of Section 33A was intended to fill up the lacuna in the Act which earlier provided only for punishment of the employer for contravention of Section 33 and which prosecution / punishment was hardly any consolation for the workman. It was further held that though contravention by the employer of Section 33 was the condition precedent for exercise of power u/s 33A but the Industrial Adjudicator u/s 33A has to decide not only whether Section 33 has been contravened but also on the merits of the disciplinary action of the employer and to grant appropriate relief. It was further held that the Industrial Adjudicator's duty u/s 33A is not limited to making a declaration that Section 33 has been violated but also extends to adjudicating or deciding the complaint as if it were a dispute. It was yet further held that the Industrial Adjudicator in exercise of powers u/s 33A has jurisdiction to do complete justice and determine the dispute. Similarly in *Equitable Coal Co. Ltd. Vs. Algu Singh and Another*, it was reiterated that the Industrial Adjudicator in an inquiry u/s 33A even after finding contravention by the employer of Section 33 of the Act is to further adjudicate whether the disciplinary action by the employer against the employee is justified on merits and only if finds in favour of the employee on both counts is the Industrial Adjudicator entitled to pass an order in favour of the employee; however if though contravention is found but the disciplinary action by the employer against the employee is found to be justified then the breach of Section 33 by the employer is to be regarded as a technical breach not justifying any order of compensation as in that case in favour of the employee.

43. That brings us to *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others*, which expressly overruled *Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another*, and which in turn had referred to *The Automobile Products of India Ltd. & Equitable Coal Co. Ltd.* (supra). In *Punjab Beverages* it was held that even if the employer is in contravention of Section 33, the employee could not treat himself to be in employment and claim wages u/s 33C(2) and the only remedy of the employee was to approach the Industrial Adjudicator u/s 33A and in which proceedings the question of contravention of Section 33 as well as of justifiability of the disciplinary action of the employer would be gone into. *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* did not interfere with the dicta in *The Automobile Products of India Ltd. & Equitable Coal Co. Ltd.* holding the inquiry u/s 33A to be two fold as aforesaid. The Constitution Bench however held that an employer in contravention of Section 33 could not be allowed to at the same time enjoy the benefit of its such action in contravention of law, compelling the workman to complain u/s 33A. That was a case where the employer though had applied u/s 33(2)(b) but had subsequently withdrawn the said application; the effect of withdrawal was held to be on the same footing as if no application u/s 33 (2)(b) had been made at all.

44. However the facts of the present case stand apart. The employer i.e. CCIL in

the present case not only applied u/s 33(2)(b) but also pursued the said application as aforesaid though in a wrong dispute. By the time it was so held, the dispute in which Sh. Sanjeev Kumar contends that the application should have been filed was no longer pending. It was thus not possible for CCIL to then apply u/s 33(2)(b) in that dispute. The conduct of CCIL in applying u/s 33(2)(b) in the dispute in which it was ultimately held to be not maintainable has been found by us to be bona fide. The judgment of the Constitution Bench in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. in entirely different set of facts cannot thus be blindly applied by us to the facts of the present case.

45. As far back as in *Herrington Vs. British Railways Board* 1972 (2) WLR 537 it was observed that there is always a peril in treating the words of a judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of facts in a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases and disposal of cases by blindly placing reliance on a decision is not proper. The Apex Court in *Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another*, cited Lord Denning with approval opining that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. It was further held that the temptation to decide cases by matching the colour of one case against the colour of another is to be avoided. Similarly in *Official Liquidator Vs. Dayanand and Others*, it was held that even one additional fact may make a lot of difference in the precedential value of a decision. The same sentiment was reiterated in *Sushil Suri Vs. C.B.I. and Another*, as well as in *U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others*, .

46. The Supreme Court in *B.P.L. Ltd. and Others Vs. R. Sudhakar and Others*, held that when the operation of the order of reference is stayed by the Court, the question of dispute pending before the Tribunal did not arise in as much as the reference order itself stood suspended. The contention that the order of stay did not amount to wiping out the order of reference and the dispute thus remained pending was negated by holding that when the order of reference itself is stayed, the Industrial Adjudicator did not have jurisdiction to pass any further order and as such the question of an employer making an application u/s 33(2) (b) or the Industrial Adjudicator passing any order thereon also did not arise. It would thus be seen that the pendency of dispute was not taken in literal or technical terms but in reality. It was further held that it is not as if the workmen in such a situation do not have a remedy - they can raise a dispute challenging the order of dismissal by initiating separate proceedings.

47. We are therefore of the view that the proper course of action in the facts of the present case, for the Industrial Adjudicator in Section 33A proceedings (supra), would have been to also adjudicate the validity of the action of CCIL of removal of Sh. Sanjeev Kumar from service and which the Industrial Adjudicator

did not do relying on Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. What has been laid down as law in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. for where "an employer by design" avoids making an application u/s 33(2)(b) after dismissing an employee and takes a position that such dismissal is not inoperative or void till it is set aside u/s 33A cannot be applied as law where the employer has in spite of best and bona fide efforts been unable to obtain approval u/s 33(2)(b). The learned Single Judge in the judgment impugned in the appeal has not considered the matter in this perspective and has proceeded on the premise of CCIL having designedly avoided scrutiny of its disciplinary action against Shri Sanjeev Kumar.

48. We therefore hold that the effect of CCIL in not obtaining approval u/s 33(2)(b), even if found to be required to take such approval in ID No. 160/1999 is not of ipso facto rendering the disciplinary action of removal of Sh. Sanjeev Kumar from service inoperative but the justifiability of such action ought to be determined in the proceedings u/s 33A.

49. That brings us to the question whether CCIL was required to take approval u/s 33(2)(b) in ID No. 160/1999. This entails determination of :

(i). the effect of the reference u/s 10 of the said dispute being faulty in as much as there was indeed no dispute and;

(ii). whether Shri Sanjeev Kumar was a concerned workman in the said dispute.

50. As far as the first of the aforesaid aspects is concerned we have already in Taj Services Ltd. (supra) taken a view that where the objection to the dispute goes to its root and to its very maintainability and merely because of the delay in decision of the said objection, the proceeding remains pending, would not make the provisions of Section 33 of the Act applicable so as to invite the consequences u/s 33A of the Act. Of course, the judgments in Desein Pvt. Ltd., Shatrusailya Digvijaysingh Jadeja & Mahandera (supra) suggesting to the contrary were not considered in Taj Services Ltd., neither by the learned Single Judge nor by us. The facts of the present case are far better than that of Taj Services Ltd. While in Taj Services Ltd. the issue of territorial jurisdiction and the binding nature of the settlement had to be adjudicated before holding whether a dispute entertainable by the Industrial Adjudicator at Delhi existed or not, in the present case all that was needed was to see whether the Scheme / Policy on Incentive for Adopting Small Family Norms had been implemented in CCIL or not.

51. In this regard it may be noticed that the remedies against a reference u/s 10, even if wrongfully made, are limited. A Single Judge of this Court in judgment dated 24.09.2008 in W.P.(C) No. 12602/2006 titled M/s Hongkong and Shanghai Banking Corporation Ltd. Vs. Govt. of India held that Courts cannot interfere with a reference u/s 10(1) of the I.D. Act because that order does not affect the rights of the parties and the writ petition lies only when the rights of the parties have been adversely affected. It was held that a mere reference u/s 10(1) of the Act does not affect anybody's right and hence no writ petition

should ordinarily be entertained against a mere reference and the writ petition is liable to be dismissed as premature. The intra-court appeal being LPA No. 684/2008 preferred there against was dismissed by the Division Bench of this Court on 11.11.2008. However, another Division Bench of this Court in *Moolchand Khairati Ram Hospital Karamchari Union Vs. Labour Commissioner* (1998) 3 LLJ 1 Del . held that the High Court can go into the validity of reference in certain situation, though it is not to sit an appeal over the order of the State Government and not entitled to consider the propriety or the satisfactory character of the reasons. However the said observations came to be made in the context of the reference not addressing the real dispute which had arisen between the workmen and the employer. The Supreme Court in appeal against the aforesaid judgment of the Division Bench, in judgment reported in *Moolchand Kharati Ram Hospital K. Union Vs. Labour Commissioner and Others*, also affirmed that in certain situations challenge to the reference itself is maintainable. Another Division Bench of this Court in *Eagle Fashions Vs. Secretary (Labour) and others*, also held the challenge to the reference to be maintainable where the reference did not address the real dispute. Yet another Division Bench of this Court in judgment dated 16.05.2011 in LPA No. 425/2011 titled *M/s Bata India Ltd. Vs. Union of India*, though qua reference u/s 7B of the Act held that there is no absolute bar for interference in exercise of power under Article 226 of the Constitution of India when a matter is referred by a government to an Industrial Tribunal if the reference suffers from jurisdictional error or no industrial dispute exists and on ancillary grounds. It was further held that if factual disputes are involved, it was advisable for the Industrial Tribunal to adjudicate the same and the Writ Court should not exercise the discretion and refrain from interfering with the order of reference.

52. Once a writ petition against a reference is held to be maintainable, the logical corollary thereof is that if the reference is quashed, it would be deemed to have ceased to exist from the date of making thereof. The question which arises is, whether a party who succeeds in having a reference quashed can be deprived of the benefits of such quashing. The delays in the Courts on account of the Courts being burdened with more dockets than they can handle are well known. Merely because some delay happens in such quashing cannot be allowed to burden the party which has been successful in having the reference quashed with the consequence of what has happened in the interregnum. The principle that the actions of the Court will hurt no one will apply. The Supreme Court in *BPL Ltd.* (supra) has also held that a dispute will not be treated as pending for the purposes of Section 33 during the period of interim stay in challenge to the reference.

53. In the present case CCIL did not approach the Court for quashing of the reference but it nevertheless succeeded in having its employees see the matter in the correct perspective and who agreed that the dispute which had been referred did not exist. It is immaterial whether the employee on whose statement "No Dispute Award" was referred was authorized or not inasmuch as

this Court as aforesaid has satisfied itself that there was no dispute and the reference was wrong.

54. The existence of a dispute is a sine qua non for a reference u/s 10. If there is no dispute, there does not arise any question of referring the same to the Industrial Adjudicator. Support can be drawn from *Ramesh Kumar and Another Vs. Furu Ram and Another etc.*, *Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority*, and *Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd.*, though in the context of Arbitration Act, holding to the same effect. The reference in ID No. 160/1999 was thus clearly a still born one and of no avail. Section 2(k) of the Act also defines an "industrial dispute" as meaning any dispute or difference between the employers and the workmen. The Black's Law Dictionary, 8th Edition also defines dispute as "conflict". It follows that when there is no "conflict" there can be no dispute. It has now been found as aforesaid that CCIL having implemented the Scheme / Policy on Incentives for Adopting Small Family Norms, the question as to whether non application by CCIL of the said Scheme was justified or not did not arise and was a non starter. When the right asserted by one party is conceded by the other, there could be no dispute. The Supreme Court in *Shambu Nath Goyal Vs. Bank of Baroda*, held that an industrial dispute connotes a real and substantial difference having some element of persistency and continuity till resolved and likely if not adjusted to endanger peace of the undertaking. Unfortunately this aspect has not been gone into, neither by the Industrial Adjudicator nor by the learned Single Judge, inspite of the learned Single Judge as well as the Division Bench in judgments dated 2nd November, 2006 and 4th April, 2006 dismissing W.P.(C) No. 5316/2006 and LPA No. 2261/2006 preferred by Sh. Sanjeev Kumar holding that the relief of reinstatement in writ jurisdiction could not be granted in writ jurisdiction because it was to be determined as to whether the Scheme/Policy of Incentives for Adopting Small Family Norms was already enforced in CCIL. Now that we have found that it was in force, it has to be axiomatically held that there was no dispute as referred to in ID No. 160/1999 pending on the date of disciplinary action by CCIL against Sh. Sanjeev Kumar so as to require CCIL to apply u/s 33(2)(b) of the Act. We are unable to agree with the observation of the learned Single Judge that the said question was not to be gone into in proceedings u/s 33A of the Act. As aforesaid the writ petition filed by Sh. Sanjeev Kumar for reinstatement was dismissed precisely for this reason of this question being required to be adjudicated.

55. However as far as the plea of CCIL of Sh. Sanjeev Kumar being not a concerned workman in ID No. 160/1999 (if it were to be a real and substantial dispute), we are unable to agree with the contention of CCIL that Sh. Sanjeev Kumar being not eligible and having not applied for/under the Scheme/Policy of Incentives for Adopting Small Family Norms was not a concerned workman and agree with the findings of the Industrial Adjudicator and the learned Single Judge in this regard.

56. Though we have earlier observed that the question of justifiability of the

disciplinary action was also required to be gone into in Section 33A proceedings but having now found that there was no dispute requiring any application u/s 33(2)(b), the complaint u/s 33A itself would be not maintainable. The question thus of the justifiability of the disciplinary action of removal from service being tested in Section 33A proceedings or the matter being required to be remanded for the said purpose does not arise. The remedy now of Sh. Sanjeev Kumar is only to raise a dispute qua his termination.

57. Before parting with the case we may sound a word of caution. When a dispute is pending even if the plea of the employer be that it has been wrongly referred or is no dispute and the occasion for obtaining approval u/s 33 arises, if the employer owing to its said plea chooses not to obtain such approval, it will do so at its own risk and upon failing in its plea of the reference being erroneous, if has not applied for approval, would suffer therefor. We therefore allow the appeal and set aside the judgment of the learned Single Judge. We allow the writ petition filed by the appellant and quash the order dated 27.07.2011 of the Industrial Adjudicator on the application of Sh. Sanjeev Kumar u/s 33A of the Act. Litigation costs having already been awarded to Sh. Sanjeev Kumar, no order of any further costs.