
(2013) 09 DEL CK 0408
In the Delhi High Court
Case No : LPA 441 of 2013

Yogesh Kumar Swain

APPELLANT

Vs

The Management of M/s. Birla Textile Mills and Another

RESPONDENT

Date of Decision : 17-09-2013

Acts Referred:

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

Citation : (2013) 09 DEL CK 0408

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Sanjay Kumar Tyagi, for the Appellant; M.Y. Khan, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The present appeal is directed against an order of the learned Single Judge dated 18th April, 2013 by which the award of the Industrial Tribunal dated 25th July, 2002 was set aside. The brief facts of the case are that the appellant (referred to hereinafter as "the workman") was appointed as a driver in the Birla Textile Mills, (referred to as the "Management"). He was regularized in 1980. The Management in February-March, 1994 chargesheeted the workman for alleged dereliction of duty. His services were later terminated on 12th August, 1994. The Management at the same time moved an approval petition u/s 33(2)(b) of the Industrial Disputes Act (hereinafter referred to as "the Act") since an unconnected industrial dispute was pending. Simultaneously, it appears that the workman raised an industrial dispute and filed his claim for conciliation; it was referred by the Government of NCT of Delhi on 13th February, 1996 and registered as ID No. 7/994 by the Industrial Tribunal ("Tribunal").

2. On 10th December, 1998, the Industrial Tribunal recorded a consent order permitting the management to withdraw the petition seeking approval u/s as that 33(2)(b). The Industrial Tribunal on 13th February, 1996, thereafter framed an issue as to the fairness and correctness of the domestic inquiry. In terms of a joint statement, the application u/s 33(2)(b) was allowed to be withdrawn and

disposed off.

3. The said order to the extent it is relevant reads as follows:-

The case proceeded on trial and was fixed before this Court for today. However, the parties have made the following statement recorded by me separately today:-

Statement of Sh. M.Y. Khan, AR for the Management Sh. B.P. Jain, AR for the workman; both

On SA:

On ID case is pending disposal before I.T. No. II and the same is near the final stage. The parties submit that without prejudice to their rights, as they shall be bound by the decision in the ID case; the above approval petition may be dismissed as withdrawn. This withdrawal shall be without prejudice to the rights of the parties in the I.T. case stated above.

Sd/-

R.O. & A.C.

I.T.-III/10.12.1998

4. In view of the both joint statement of the parties; considering the circumstances of the present case; I hereby dismiss the above approval petition as withdrawn without prejudice to the rights and pleadings of the parties.

File be consigned to record room.

Announced in the Open Court on 10.12.1998

(R.K. TEWARI)

Addl. Distt. & Sessions Judge

Presiding Officer, Industrial Tribunal III, Tis Hazari, Delhi."

5. In the meanwhile, the Industrial Tribunal which had been approached by the workman under I.D. No. 7/1994 permitted the parties to lead evidence. It is not in dispute that the Management tried to justify its action and also led evidence with regard to the fairness of its proceedings in dismissing the workman. On 25th July, 2002, the learned Industrial Tribunal made its award, after being apprised of the Constitution Bench Judgment in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, . On its understanding of the said authority, the Industrial Tribunal in the award held as follows:-

5. Today i.e. 25.07.2002, none appeared on behalf of the management Sh. B.P. Jain, AR of the workman appeared. During the course of argument, the AR of workman has submitted that the management has taken the objection that application u/s. 33(2)(b) of I.D. Act for the approval of the dismissal of workman was pending for adjudication and filed the copy of judgment of Hon''ble Supreme

Court.

6. The workman has filed the copy of order of Hon''ble Supreme Court as Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, titled Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Shri Ram Gopal Sharma & Others. So it is established on the record that the approval application of the management bearing No. OP 27/94 in Industrial Tribunal-II has already been dismissed vide order dated 10.12.1998. The Hon''ble Supreme Court has held in its judgment that in the absence of the approval U/S. 33(2)(b), the order of dismissal removal is non-est and inoperative.

7. In the absence of the approval U/S. 33(2)(b) of Industrial Disputes Act and judgment of Hon''ble Supreme Court, the dismissal order is non-est and inoperative. No Findings are required to hold as non-est and inoperative award is illegal and void. Consequently, the decision on the issue whether enquiry conducted was illegal and invalid and dismissal order is illegal and invalid becomes retendent. Award is passed accordingly. File be consigned to record room.

6. The Management approached this Court by filing a writ petition, i.e. 8153/2002, which was ultimately allowed by the impugned order. After considering all the submissions and the records, the learned Single Judge recorded as follows:-

Pertinently, the real issue between the parties, i.e., with regard to the legality and validity of the departmental inquiry as also justifiability of the punishment imposed against the respondent workman has remained unresolved in either of the proceedings. The withdrawal of the I.D. No. 7/96 was not unconditional. It was conditional, as aforesaid, and the order dated 10.12.1998 is a consent order. The aforesaid consent order having been misunderstood by the Industrial Tribunal while passing the impugned award dated 25.07.2002, the same is liable to be set aside.

In view of the aforesaid position, learned counsel for the respondent fairly states that the impugned award may be set aside and the matter may be remanded back to the Industrial Tribunal-II for fresh decision.

Accordingly, the impugned award is set aside and the matter is remanded back to the Industrial Tribunal-II for fresh decision.

7. Counsel for the appellant relied upon Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra), especially the observations in para 12 and 15 to say that once the withdrawal of the application u/s 33(2)(b) is rendered, the Management is defenceless and the logical corollary to this proposition, i.e. award must be in favour of the workman.

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 33A, 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 proviso 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 33A notwithstanding the contravention of Section 33(2)(b), proviso, driving the employee to have recourse to one or more proceeding by making a complaint u/s 33A 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 from hardship of unemployment.

8. The rationale for the decision in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra) was on account of a perceived conflict of views in the Supreme Court in two previous decisions, i.e. P.H. Kalyani Vs. Air France Calcutta, and Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, . In conclusion, the Court preferred the view taken earlier, although another Bench of three learned Judges in Punjab Beverages Pvt. Ltd., Chandigarh (supra) had expressed the contrary view.

9. The facts of this case are somewhat unusual in the sense that even when the validity of the enquiry and legality of the dismissal were pending consideration u/s 33(2)(b) proceedings, an independent reference on the same question-in the form of a substantive proceeding on account of a demand made by the workman u/s 10 was made. In view of the existence of the parallel proceedings, the Management and the Workman agreed that the question of fairness, inquiry and legality of the dismissal in that regard ought not to be subjected to multiple proceedings. Both parties were conscious that the reference in any event had to deal with the very same issue. As a result by consent, the application u/s 33(2)(b) was withdrawn. Here, it is important to note that the judgment in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra), is not premised upon any such existence of such parallel proceedings nor does it bar an agreement to avoid multifariousness and speedy resolution of the rule and substantial dispute between the parties in one or the other proceedings could be preferred.

10. Having regard to these circumstances in the fact of this case, the reliance

placed upon Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra) by the Industrial Tribunal especially after recording evidence on the issue of fairness of the inquiry and legality of the dismissal, was inapposite.

11. The Court does not find any infirmity in the order of the learned Single Judge, and a direction is consequently issued to the Industrial Tribunal to complete the proceedings within four months from the date fixed. The parties shall be present before the Industrial Tribunal. The appeal is dismissed.