

Muthiah Vs. the Management of Seethalakshmi Mills Rep. by Its Managing Director and the Special Industrial Tribunal

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Court : Chennai

Decided On : Oct-30-2003

Reported in : 2004(1)CTC310; (2004)IILLJ229Mad

Judge : D. Murugesan, J.

Acts : [Industrial Disputes Act, 1947](#) - Sections 33, 33(2) and 33A; Indian Penal Code (IPC) - Sections 109, 148 and 302

Appeal No. : W.P. No. 12812 of 1996

Appellant : Muthiah

Respondent : The Management of Seethalakshmi Mills Rep. by Its Managing Director and the Special Industrial Tribu

Advocate for Def. : V. Ramajegadeesan, Adv. for R1 and R2-Court

Advocate for Pet/Ap. : N.G.R. Prasad, Adv. for Row & Reddy

Judgement :

ORDER

D. Murugesan, J.

1. The petitioner has questioned the award of the Special Industrial Tribunal, Madras dated 13.12.95 in dismissing the complaint made in Complaint No. 3 of 1994.

2. The petitioner joined the services of the first respondent-Management (hereinafter referred to as the 'Management') as a Sider in the Spinning Department on 13.2.84. Since he had to proceed to his relative's place at Vathalagundu urgently after the night shift was over on 16.9.93, the petitioner left to Vathlagundu on 17.9.93, where he fell sick. He therefore sent a telegram on 20.9.93 to the Management about his absence. On coming to know that he was implicated in a murder case, he surrendered before the Court on 27.9.93 and was kept in prison. On 11.10.93 the petitioner sent his requisition for leave from 17.9.93 till he was released from jail. He also sent another letter on 17.10.93. However, the Management refused to grant leave in their communication dated 22.11.93. A charge memo dated 6.12.93 was communicated to the petitioner containing two charges. The first charge related to unauthorised absence and failure to report for duty and the second charge was that the Management had lost confidence on the petitioner. The petitioner was thereafter granted bail with condition. Hence, he made a request on 3.1.94 to grant time to reply to the charge memo dated 6.12.93 after the condition imposed in the bail order was relaxed. In fact the condition was relaxed on 13.1.94 and the petitioner therefore, by his letter dated 17.1.94 requested the assistance of a lawyer which was rejected. An ex parte enquiry was conducted and on the basis of the report holding the charges proved, the petitioner was issued with the second show cause notice dated 31.1.94, on which date he was also placed under suspension. Though the petitioner requested fifteen days time to submit his reply, his request was rejected and he was dismissed from service on 5.2.94. Since a dispute in I.D. Nos. 1, 2 and 3 of 1993 were pending on the date when the petitioner was dismissed from service, before the order of dismissal, the Management ought to have obtained prior permission under Section 33(2)(b) of the Industrial Disputes Act (hereinafter referred to as the 'Act'). Since no such permission was obtained, the petitioner filed a complaint under Section 33-A of the Act. The said complaint was taken on file as Complaint No. 3 of 1994 and the Special Industrial Tribunal adjudicated the same and by the impugned award dated 13.12.95 dismissed the said complaint.

Hence, the writ petition.

3. Mr. N.G.R. Prasad, learned counsel for the petitioner would firstly contend that in view of the judgment of the Apex Court in 'JAIPUR ZILA SAHAKARI BHOOMI VIKAS BANK LTD. v. RAM GOPAL SHARMA AND OTHERS : (2002)ILLJ834SC ', failure to obtain permission under Section 33(2)(b) would render the order of dismissal itself invalid and inoperative. If that be so, the Tribunal ought to have found that the dismissal is invalid and consequently should have directed the petitioner to be reinstated into service with backwages and other attendant benefits. Secondly, on merits, the learned counsel submitted that the charge is one of unauthorised absence and failure to report for duty, during which period, admittedly, the petitioner was in custody and he applied for leave on that ground. The said request for grant of leave was unjustly refused on one side and on the other side the Management issued the charge memo for unauthorised absence and failure to report for duty. On the facts of this case, when the petitioner had applied for leave on the ground that he was imprisoned, the charge itself cannot be sustained, as the absence cannot be considered as unauthorised and for the reasons mentioned in the requisition for grant of leave. In the circumstances, the Tribunal also found force in the said submission, but relying upon the judgment of the Apex Court in 'WORKMEN OF BURN AND COMPANY v. BURN AND COMPANY : (1957)ILLJ226SC ', when the Management has lost confidence, reinstatement cannot be ordered. Only in that view, the complaint was rejected. Finally, the learned counsel submitted that the plea of loss of confidence was for the purpose of denying the legitimate right of the petitioner for reinstatement.

4. Mr. V. Ramajegadeesan, learned counsel for the Management, on the other hand, would contend that of course, the Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Bank case (supra) has held that the failure on the part of the Management to obtain prior permission under Section 33(2)(b) of the Act would vitiate the order of termination and the order would be invalid and inoperative. However, in the present case, Standing Order 17(p) relates to the misconduct on the part of an employee for 'failure to report for duty after refusal of leave by the employer' and 17(q) relates to 'habitual absence or absence without leave for more than ten consecutive days'. Unauthorised absence and failure to attend duty

by themselves would lead to automatic termination. In a case of automatic termination, question of application of Section 33-A does not arise. To support the said contention, the learned counsel relied upon the judgment of the Apex Court in 'NATIONAL ENGINEERING INDUSTRIES LTD., JAIPUR v. HANUMAN : (1967) ILLJ 883 SC '. In the absence of application of Section 33-A of the Act to the facts in dispute, question of obtaining prior permission under Section 33(2)(b) will not arise. In that event the order is valid and it relates back to the date of the order and hence the petitioner is not entitled to any relief. For the said submission, the learned counsel relied upon the judgments of the Apex Court in 'P.H. KALYANI v. M/S AIR FRANCE, CALCUTTA 1964 SCJ 566 ' and in 'R. THIRUVIRKOLAM v. THE PRESIDING OFFICER AND ANOTHER 1997 (1) LLJ 206 '. Insofar as the loss of confidence, the learned counsel submitted that the petitioner had involved himself in a case of murder of the Executive Director of the first respondent mill. The petitioner and four others were implicated in the offence which occurred on 17.9.93. After the involvement, the petitioner absconded and only on 20.9.93, he sent a telegram for leave for one day and that too on the ground of sickness. He kept quiet for nearly 20 days and thereafter made an application on 11.10.93 for leave from 17.9.93 and that too through union. He also made another application on 17.10.93. However, considering the fact that the petitioner initially submitted his application for leave through telegram only on the ground of sickness and that too for one day and also considering the fact that the petitioner was involved in a criminal case and that too murder of the Executive Director of the first respondent mill, his request was rejected on 22.11.93. The petitioner was convicted for the offence under Section 302 IPC by the trial Court, but on appeal before this Court, since overt act on the part of the petitioner (A5) was not proved, this Court modified the punishment into one of imprisonment for four years under Section 148 of IPC. Hence, the Management has lost its confidence. This submission of the Management was accepted by the Tribunal and therefore did not rightly order reinstatement.

5. Based on the above rival submissions, it is now to be considered as to whether the non compliance of Section 33(2)(b) would vitiate the order of dismissal. A five Judges Constitution Bench of the Apex Court in the recent judgment in Jaipur Zila Sahakari Bhoomi Vikas Bank case (supra) had considered the scope of Section

33(2)(b) of the Act and has framed the question in the following manner:-

'If the approval is not granted under Section 33(2)(b) of the [Industrial Disputes Act, 1947](#), whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under Section 33(2)(b) would not render the order of dismissal inoperative?'

While considering the above question, the Apex Court held as follows:-

'The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further, any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 1000 or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section

33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to east out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if the order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the

very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of the statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.'

The Apex Court was considering the earlier judgment in 'PUNJAB BEVERAGES (P) LTD., v. SURESH CHAND : (1978)11LLJ1SC ' taking a view that the order of dismissal of workman contravening the provisions of Section 33(2)(b) shall not be void and inoperative and hence the workman was not entitled to maintain the application for determination and payment of wages under Section 33-C(2) of the Act. Even after the said judgment, the five Judges Bench of the Apex Court has laid down the law as above in Jaipur Zila Sahakari Bhoomi Vikas Bank case (supra). The Apex Court held that it was not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of mandatory conditions contained in the proviso or where the approval is refused, the workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A. Mr. V. Ramajegadeesan, learned counsel for the Management, however, would rely upon the judgment of a five Judges Bench of the Apex Court in P.H. Kalyani case (supra). That was a case where the Apex Court was considering the proviso to Section 33(2)(b) of the Act with regard to non payment of wages for one month. The Apex Court found that once the aproval is accorded by the Labour Court it shall relate back to the date on which the management passed the order of dismissal. A similar view was taken in the subsequent judgment of the Apex Court

in R. Thiruvirkolam's case (supra) cited by Mr. V.Ramajegadeesan. These judgments relate to the Doctrine of 'relation back' on the question of effect of approval of the order of dismissal from the date when such order was passed. In my considered view, these judgments are not applicable to the facts of the present case, as admittedly, there is no application filed by the Management under Section 33(2)(b) of the Act. In the absence of such application and in the absence of any prior approval, the judgments of the Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Bank case (supra) shall alone be applied. In that view of the matter, I hold that the order of dismissal itself is invalid and inoperative from the date when it was passed.

6. In view of the above finding, the charge of unauthorised absence and failure to report for duty need not be gone into. However, for the purpose of consequential relief, the second charge relating to loss of confidence has to be taken into consideration. The charge memo was issued on the basis of the alleged involvement of the petitioner in a murder case that too, on the Executive Director of the first respondent mill. The second charge reads as under:-

nkYk; fle;j 17.9.93k; njjp ekJ Miyapd; , af;Feh; jpU.vk;.v];.rptehj; mth;fs; gLbfhiy bra;ag;gl;l tHf;fpy; ePUk; rk;ge;jg;gl;l xU Fw;wthsp vd brhy;yg;gLtjhy; eph;thfj;jpdUf;F ck;k PJ ek;gpf;ifapy;iy. (No confidence). nkYk; ck;ikj; bjhlh;e;J ntiyf;F itj;jhy; Miyapy; gzpg[hpa[k; bjhHpyhsh;fs; Ng;gh;itrh;fs; nky; mjpgfhpf; kndhjplk; (morale) ghjpf;fg;gLk; vd;W fUjg;gLfpwJ.'

Of course, the petitioner(A5) underwent the trial and received an order of conviction for the offence under Section 302 read with Section 34 of IPC along with the other accused (A1 to A4). But the said sentence was modified by this Court in C.A.No. 8 of 1996 holding that in the absence of any overt act on the part of the petitioner, the offence under Section 302 and Section 109 IPC were not made out. However, the Division Bench found that the petitioner was a member of unlawful assembly and damaged the windscreen of the car in which the deceased Executive Director was travelling and therefore sentenced the petitioner to undergo the period of four years. In the circumstances, the Management is justified in contending that the petitioner who was involved in a criminal case and

was convicted and sentenced for a period of four years cannot be taken back into service, as the Management has lost confidence. Of course, at the time when the charges were framed the petitioner was only facing investigation. But this Court for the purpose of sustaining the plea of loss of confidence can also take note of the subsequent event. In the circumstances, I am of the considered view that the plea of loss of confidence has to be accepted and the Management cannot be compelled to take back the petitioner into service. For the said reason, the petitioner is not entitled for an order of reinstatement .

7. In view of the above discussion, the submission of Mr. N.G.R. Prasad, learned counsel for the petitioner that the petitioner is entitled to reinstatement cannot be accepted. However, in lieu of reinstatement, the petitioner is entitled to the compensation. In that view of the matter and to meet the ends of justice, I hold that the petitioner is entitled to the backwages for the period from the date of dismissal viz., 5.2.94 till the date of the award viz., 13.12.95. The learned counsel for Management submitted that the award of compensation would amount to solatium on the criminal activity of the petitioner. I am unable to accept the said submission as the very order of dismissal is void, illegal and inoperative in view of the judgment of the Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Bank case (supra) and consequently the petitioner is entitled to reinstatement. Only in lieu of reinstatement and in view of loss of confidence, this Court is inclined to grant only compensation to the petitioner. Accordingly, the first respondent is directed to pay the full backwages to the petitioner from the date of dismissal viz., 5.2.94 till the date of the award viz., 13.12.95.

8. The writ petition is disposed of with the above direction. No costs.