

The Management Vs. the Joint Commissioner of Labour and anr.

The Management Vs. the Joint Commissioner of Labour and anr.

SooperKanoon Citation : sooperkanoon.com/923293

Court : Chennai

Decided On : Jan-05-2012

Judge : K.Chandru, J.

Acts : Industrial Disputes Act - Sections 17-B, 2-A (2), 33(2)(b)

Appeal No. : W.P.Nos.9147 of 2007 and 44559 of 2006 & M.P.Nos.1 of 2007 and 1 of 2007

Appellant : The Management

Respondent : The Joint Commissioner of Labour and anr.

Advocate for Def. : Ms.C.K.Vishnu Priya, Adv.

Advocate for Pet/Ap. : Mr.M.Ravi Bharthi, Adv.

Judgement :

Both the Writ Petitions were filed by the State owned Transport Corporation having its headquarters at Dharmapuri. In the 1st Writ Petition, the challenge is to the order passed by the Joint Commissioner of Labour (Conciliation), Chennai made in Approval Petition No.252 of 2003 dated 16.2.2006. By the said impugned order, the said authority refused to grant approval for dismissing the contestant 2nd respondent (J.Sengolan) from the service of the Corporation. That Writ Petition was admitted on 13.3.2007. Pending the Writ Petition, an interim stay was granted. Subsequently, the matter was referred for resolution of the dispute by the

Lock Adalat and the matter, as could not be resolved, came back from the Lok Adalat with an endorsement to that effect and thus taken up for final hearing.

2. After perusing the records, it is found that the same petitioner has filed another Writ Petition earlier being W.P.No.44559 of 2006 challenging the award made by the Labour Court, Salem in I.D.No.77 of 2004 dated 8.3.2005. By the aforesaid award, the Labour Court directed reinstatement of the workman J.Sengolan, the 2nd respondent in the earlier Writ Petition as well as in the present Writ Petition without backages but with continuity of service and other attendant benefits. That Writ Petition was admitted on 20.11.2006. Pending the Writ Petition, an interim stay was granted with the condition that the management should comply with the provisions of Section 17-B of the Industrial Disputes Act. It is stated by the learned counsel for the petitioner Mr.M.Ravi Bharathi that the said order has been complied with and he also produced a covering letter dated 31.8.2007. It was also informed to the 2nd respondent that he should forward a copy of the affidavit for his non-employment which is a requirement under Section 17-B of the Industrial Disputes Act.

3. It is seen from the records that the 2nd respondent was working as a Junior Engineer. According to the petitioner Corporation, he had unauthorisedly absented himself from 6.11.2002 as it was a misconduct under the Moral Standing Order and charge sheet dated 8.12.2002 was given to him. According to the petitioner Corporation, the 2nd respondent did not give any explanation. Therefore, an enquiry was directed to be held against him. The enquiry notification was also advertised in a Newspaper. Subsequently, the enquiry report was given by the enquiry officer dated 4.1.2003 holding that the 2nd respondent was guilty of the misconduct. Thereafter, a second show cause notice 2.3.2003 proposing to dismiss him from service was issued. The 2nd respondent gave a reply on 19.4.2003. Not satisfied with the reply, by an order dated 29.5.2003 the 2nd respondent was dismissed from service.

4. As at the relevant time, as a conciliation proceeding was pending with reference to the charter of demands submitted by the workmen and as per the legal requirement, the petitioner Corporation filed u/s 33(2)(b) of the I.D.Act an Approval

Petition seeking approval of the dismissal of the 2nd respondent with the Joint Commissioner (Conciliation). Along with the dismissal order, a cheque for Rs.6,923/- drawn in favour of the State Bank of India was forwarded. But, however, approval petition was sent for the permission of the approving authority after a delay of 40 days. While the order of dismissal was dated 29.5.2003, the approval petition was sent on 9.7.2003. The delay was not explained before the authority. The authority took up the Petition as Approval Petition No.252 of 2003 and issued Notice to the 2nd respondent workman.

5. The 2nd respondent workman filed a counter statement disputing that his absence was unauthorised and he submitted that on 6.11.2002 he sent a letter through courier and that this leave letter was returned from the Branch with the endorsement refused to accept. Therefore, it was wrong on the part of the Corporation to state that his absence was unauthorised.

6. Even while the Approval Petition was pending, curiously the workman raised a dispute under Section 2-A (2) of the Industrial Disputes Act before the Labour Officer, Krishnagiri. It is not clear as to how such a dispute is maintainable especially when the Approval Petition was pending before the competent authority and only if approval was granted, a dismissal order can take effect.

7. Notwithstanding the same, the Conciliation Officer gave a failure report. On the strength of the failure report, the workman filed a claim statement before the Labour Court, Salem. The Labour Court, Salem registered the dispute as I.D.No.77 of 2004 and issued notice to the management and on receipt of the notice, the management filed a counter statement and in the counter statement, they had clearly stated in paragraph 8 that their application for approval is pending with the Joint Commissioner of Labour. Notwithstanding the same, the Labour Court took up the I.D.No.77 of 1994. Before the Labour Court, on behalf of the workman, 13 documents were filed and marked as Ex.M.1 to M.13. On the side of the management, 12 documents were filed relating to the enquiry proceedings and they were marked as Ex.M.1 to M.12. No oral evidence is let in by the parties.

8. The Labour Court after considering the materials on records and without deciding the question as to whether it had jurisdiction to decide the dispute

especially when a statutory Approval Petition was pending before the Conciliation Officer and no finality had reached, held that there was no scope to hold that the enquiry was unfair, as the workman himself had stated that he was not questioning the procedure adopted in the enquiry as well as the finding of the enquiry officer. Therefore, no preliminary issue was framed and decided by the Labour Court in this regard.

9. The Labour Court only went on the proportionality of the punishment. It held that the workman, as he was having ill-health, could not attend to duty. Though his contention was that he had intimated the management, but had not submitted any proof for the same. At the same time, since his absence was on account of medical illness, the Court interfered with the proportionality of the punishment. Considering that even on earlier occasions, the petitioner was imposed with minor punishments, yet the Labour Court decided that while the workman was eligible to get reinstatement, but not eligible to get backwages. It was in that view of the matter, it had directed reinstatement without backwages but with continuity of service and other attendant benefits.

10. It was rather unfortunate that both parties to the dispute never informed to the Labour Court about the pendency of the Approval Petition. At the time when the Labour Court gave its Award dated 8.3.2005, the Approval Petition was still being heard by the Conciliation Officer. Subsequently the authority under Section 33-2(b) by an order dated 16.2.2006 dismissed the Approval Petition. The fact that the Award was passed was also not intimated to the approving authority under Section 33(2)(b). Therefore, simultaneously proceedings were pursued by the management both before the approving authority as well as before the Labour Court.

11. This had resulted in two different orders being passed. one by the Labour Court its award directed the reinstatement but without backwages but with continuity of service. Another by the Joint Commissioner, who dismissed the Approval Petition holding that the order of dismissal was void and abinitio. Since the approving authority did not grant the approval, it would amount the dismissal order was never in existence. Therefore the workman was eligible to get full wages

and other service benefits as if there was no order of dismissal. Since both the matters have been now listed together, it has to be seen as to which was the correct order and which will be binding on the parties.

12. It must be noted that under Section 33(2)(b), if approval is refused by the authority, then the dismissal order becomes non-existent in the eye of law. The Supreme Court vide its judgment in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma*, reported in (2002) 2 SCC 244 has categorically held that the provisions under Section 33(2)(b) of the Industrial Disputes Act are mandatory and non-compliance with the provision will render an order of dismissal void ab initio. In such cases, it was not necessary for a workman to lodge a complaint before a Court and he can demand salaries to be paid as if there was no order of dismissal. Hence, it is necessary to refer to the paragraphs 13 to 15 of the said judgment and it reads as follows:

13.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 ease 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.

14. 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 straight away 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.

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 under Section 33-A, cannot be accepted. In our view, not making an

application under Section 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 under Section 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 under Section 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 under Section 33-A or to raise another industrial dispute or to make a complaint under Section 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.

13. As a Constitution Bench of the Supreme Court has held that it was a mandatory provision, it is necessary that the Writ Petition No.9147 of 2007 shall be decided first. The outcome of that Writ Petition will decide the fate of the other Writ Petition.

14. In the present case, before the authority, the same enquiry proceedings were also filed. The authority found that the enquiry was held in consonance with the principles of natural justice and in accordance with the Standing Orders. The dismissal was made on the basis of legal evidence and there was lack of bona fide in the action initiated by the management. Even a one month pay was offered in accordance with the proviso to Section 33(2)(b) of the Industrial Disputes Act. However, the authority found that the application was not filed simultaneously seeking for approval and there was a delay of 40 days in filing the application.

Hence, he refused to accord approval.

15. In the penultimate paragraph of the impugned order, he had observed as follows:

The next issue to be decided is whether the Applicant has simultaneously or within such reasonably short time as to form part of the same transaction applied to this authority before which the main industrial dispute was pending for approval of the action taken by him. The Opposite party was dismissed by an order dated 29.5.2003. The application seeking approval was filed before this Authority on 9.7.2003. The time gap between the dismissal of the Opposite party and the filing of the application seeking approval is 40 days. The time gap is so large that the dismissal of the Opposite party and the filing of the application seeking approval could not be regarded to be part of the same transaction. Therefore, I hold that the Applicant had not complied with this mandatory condition of Section 33(2)(b) of the Industrial Disputes Act, 1947.

I refuse to accord approval for the dismissal of the Opposite Party Thiru J. Sengolan, Junior Engineer, Staff No. EJ 5037 as the Applicant has not simultaneously or within such reasonably short time as to form part of the same transaction applied to this Authority for approval of the dismissal of the Opposite Party.

16. As it involves an interpretation of Section 33(2) of the Industrial Disputes Act, 1947, it is necessary to extract the said provision of law.

Section 33 (2): During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute (or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman), (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding ; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman :

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for 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.

(emphasis added)

17. The Supreme Court vide its judgment in *Strawboard Manufacturing Company Vs. Gobind* reported in 1962 Vol (I) LLJ 420 = AIR 1962 SC 1500 had an occasion to consider the scope of Section 33(2)(b) of the Industrial Disputes Act, 1947. The Supreme Court had explained the proviso to Section 33 (2)(b) of the Act. In pages 425 and 426 of the Report it was observed as follows:- The next question is as to when should an application be made. In this connection, our attention was drawn to Section 33A of the Act which gives a right to the employer to apply for redress in case an employer contravenes the provision of S.33 and there is no doubt that the proviso to Section 33(2)(b) should be so interpreted as not to whittle down the protection provided by S.33A. As we read the proviso, we are of opinion that it contemplates the three things mentioned therein, namely, (i) dismissal or discharge ;

(ii) payment of wages ; and

(iii) making of an application for approval,

to be simultaneous and to be part of the same transaction, so that the employer when he takes action under Section 33(2) by dismissing or discharging an employee, should immediately pay him or offer to pay him wages for one month and also makes an application to the tribunal for approval at the same time. When, however, we say that the employer must take action simultaneously or immediately, we do not mean that literally, for when three things are to be done, they cannot be done simultaneously but can only be done one after the other. What we mean is that the employer's conduct should show that the three things

contemplated under the proviso, namely, (i) dismissal or discharge ;

(ii) payment of wages ; and

(iii) making of the application

are parts of the same transaction. If that is done, there will be no occasion to fear that the employee's right under S.33A would be affected. 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. We may now refer to certain cases which have been relied upon by either side. The main case on which learned counsel for the respondents relies is Premier Automobiles Limited Vs. Ramachandra Bhimayya Polkam and another (1960-I LLJ 443). In that case, the Bombay High Court held that the application should be made before the action has been taken by the employer and that it was not correct to infer from the use of the word approval in the proviso that the legislature intended that such an application should be made after the action had been taken. The High Court has pointed out that there is apparent conflict between the first and last part of the proviso and the view it took was with the object of harmonizing the two parts. This view has been followed by the Gujarat High Court in Indian Extractions (Private) Limited Vs. A.V.Vyas, Conciliation Officer (AIR (1961) Guj.22) though with some hesitation. With respect we feel that it is not necessary to read the words action taken in the proviso as equal to action proposed to be taken as the Bombay High Court has done and that the apparent conflict between the two parts of the proviso can be harmonized, as we have indicated above, leaving it open to the employer to dismiss or discharge the employee and at the same time pay him the necessary wages and make an application to the authority concerned for approval of the action taken. The contrary view has been taken by the Calcutta High Court in Metal Press Works Limited Vs. Deb(N.R) and others (1962-I LLJ 75) where it has been held that payment of wages and the making of the application should be simultaneous with the order of discharge or dismissal. It has further been pointed out that : the word simultaneously must of course be taken reasonably and a motion of split-second timing should not be imported. It should be done at once and without delay.

and it will depend upon the facts of each case whether the application had been made at once or without delay. This, we think, is the correct view to take.

Let us, therefore, see what has happened in this case. The appellant concern is situate at Saharanpur while one tribunal was at Meerut and the other at Allahabad. What the appellant did was to pass an order of dismissal on 1 February 1960. On the same day, he sent two applications by post addressed to the two tribunals. The application at Meerut was received on 3 February and the application at Allahabad on 4 February 1960. In these circumstances, we are of opinion that the appellant had made the application to the tribunal simultaneously and without delay on its passing the order of dismissal and its action was, therefore, in accordance with the proviso. The view taken by the labour Court that the application must be made before dismissing the respondent, is not correct. The appellant in this case had complied with the proviso to Section 33(2)(b) when it dismissed the workman, paid him or offered to pay the necessary wages and at the same time sent the application by post to the tribunal concerned for approval of the action taken by it.

18. The Supreme Court, once again, considered the scope of proviso to Section 33(2)(b) of the Act in the judgment in Calcutta State Transport Corporation Vs. Md.Noor Alam reported in AIR 1973 Supreme Court 1404. In that case, the Court also referred to Strawboard Manufacturing Company Vs. Gobind reported in 1962 Vol I LLJ 420 and in paragraph 4, it was observed as follows:- 4.The employer's conduct should show that the three things contemplated under the proviso are parts of the same transaction. (See Strawboard Manufacuting Co. Vs. Goving (1962) Supp 3 SCC 618 (AIR 1962 Scheduled Caste 1500) In P.H.Kalyani Vs. M/s.Air France, Calcutta, (1964) 2 SCR 104 (AIR 1963 Scheduled Caste 1756) the order of dismissal was passed on May 28, 1960 and was communicated to the employee on May 30,1960. The wages were offered to him at the same time when the order was communicated. An application was made under S.33(2)(b) on the same day. It was held that the application was in accordance with the proviso to S.33(2)(b). This decision shows that similar action has to be taken in these matters but that does not mean that all the three things mentioned before should be done on the same day. It is the conduct of the employer that has to be considered from

the point of view of finding out whether the dismissal or discharge, payment of wages and making of the application for approval form a part of the same transaction. A difference of a day in doing one thing or the other may not be of materials consequence so long as it is clear that the employer meant to do all the three things as part of one and the same transaction. No hard and fast rule can be laid down in these matters. Each case must be decided on its own facts. (Emphasis added)

19. The Supreme Court in the judgments cited have considered as to what was meant by the same transaction and held it has to be seen in the facts and circumstances of each case. In the case of Calcutta State Transport Corporation Vs. Md.Noor Alam reported in AIR 1973 Supreme Court 1404, the Supreme Court held that a day's delay cannot be said to be material consequence so long as it was clear that the employer had meant to do all the three things as part of one and the same transaction. In the case of Strawboard Manufacturing Company Vs. Gobind reported in 1962 Vol I LLJ 420, the Supreme Court rejected the argument that approval should be obtained before dismissal. The Supreme Court had held that the word simultaneously must of course be taken reasonably and a motion of split-second timing should not be imported. It should be done at once and without delay. In the present case, the Authority had categorically held that 40 days delay was unexplained and therefore, it the time gap is too large.

20. In the light of the principles enunciated in the above decisions of the Supreme Court holding that action should be taken at the same transaction, W.P.No.9147 of 2007 stands dismissed. Consequently, connected miscellaneous petition is closed.

21. When once it is held that the order of dismissal is not valid in the eye of law and when the approval order does not give any cause of action for the dispute, it cannot be said that the workman's dismissal is valid when the petitioner/Management applied for final order to be passed by the approving authority. In fact, the Management itself in the counter affidavit in I.D.77/2004 had mentioned (as noted already) in paragraph 8 as regards to the pendency of the approval petition. Since the approval petition was rejected due to the delay in filing the same, any subsequent Award cannot stand.

22. In this regard, it is necessary to refer to a judgment of the Supreme Court in *Engineering Laghu Udyog Employees' Union v. Judge, Labour Court and Industrial Tribunal*, reported in (2003) 12 SCC 1. In paragraphs 12 and 13, it was held as follows:

12. In *Gujarat Steel Tubes Ltd. case* Krishna Iyer, J. sought to make a distinction between an approval which is required to be made under Section 33 of the Act and a reference under Section 10 thereof stating: (SCC pp. 649-50, para 152)

152. Kalyani was cited to support the view of relation-back of the award to the date of the employer's termination orders. We do not agree that the ratio of Kalyani corroborates the proposition propounded. Jurisprudentially, approval is not creative but confirmatory and therefore relates back. A void dismissal is just void and does not exist. If the Tribunal, for the first time, passes an order recording a finding of misconduct and thus breathes life into the dead shell of the Management's order, predating of the nativity does not arise. The reference to *Sasa Musa* in Kalyani enlightens this position. The latter case of *D.C. Roy v. Presiding Officer, M.P. Industrial Court, Indore* specifically refers to Kalyani case and *Sasa Musa* case and holds that where the Management discharges a workman by an order which is void for want of an enquiry or for blatant violation of rules of natural justice, the relation-back doctrine cannot be invoked. The jurisprudential difference between a void order, which by a subsequent judicial resuscitation comes into being *de novo*, and an order, which may suffer from some defects but is not stillborn or void and all that is needed in the law to make it good is a subsequent approval by a tribunal which is granted, cannot be obfuscated. (emphasis in original)

13. When in terms of the proviso appended to clause (b) of sub-section (2) of Section 33 of the Act, an approval is sought for and is refused, the order of dismissal becomes void. If an approval is not obtained, still, the order of punishment cannot be given effect to. It is, therefore, not correct to contend that the Tribunal in a reference under Section 10 of the Act, when passes an order recording a finding of misconduct, brings life into the dead. Unfortunately, the Court did not take notice of the binding decisions in *Motipur Sugar Factory case*

and Firestone case.

23. Hence, this Court is inclined to set aside the Award as passed without jurisdiction. Therefore, W.P.No.44559 of 2006 filed by the Management is allowed not for the reason stated in the petition filed by the Management, but for the reason that the order of the Joint Commissioner of Labour (Conciliation), Chennai order was upheld by this Court in W.P.No.9147 of 2007.

24. In the light of the above, the petitioner/Management is directed to reinstate the second respondent/workman with all backwages and other emoluments and other attendant benefits as if there was no order of dismissal against the second respondent/workman. This order should be complied with by the petitioner/Management within a period of eight weeks from the date of receipt of a copy of this order.

25. In the result, W.P.NO.9147 of 2007 stands dismissed and W.P.NO.44559 of 2006 stands allowed to the extent indicated above. No costs. All the Miscellaneous Petitions are closed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com