
(2016) 07 GUJ CK 0081

In the Gujarat High Court

Case No : Special Civil Application No. 10641 Of 2016

Ahmedabad Municipal Transport Service

APPELLANT

Vs

Vinodkumar Udalsinh Chauhan

RESPONDENT

Date of Decision : 26-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 227
Industrial Disputes Act, 1947 — Section 33(2)(b)

Citation : (2017) 2 CLR 143

Hon'ble Judges : Mr. C.L. Soni, J.

Bench : Single Bench

Advocate : Mr H.S. Munshaw, Advocate, for the Petitioner No. 1; Mr Yogen N Pandya, Caveator, for the Respondent No. 1

Final Decision : Dismissed

Judgement

C.L. Soni, J. (Oral)—Petitioner-Ahmedabad Municipal Transport Service has come with the present petition filed under Articles 226 and 227 of the Constitution of India challenging the order dated 23.10.2015 passed by the Industrial Tribunal ("the Tribunal") in Complaint (IT) No.62 of 2008 whereby the Tribunal has accepted the complaint and ordered the petitioner to reinstate respondent No.1 to his original post with full back wages and all consequential benefits by treating his service as continuous service.

2. Learned advocate Mr. Munshaw for the petitioner submitted that for the serious charge of collecting amount of fare and not issuing ticket, respondent No.1 was departmentally proceeded and on finding him guilty, he was dismissed from service. Mr. Munshaw submitted that no flaw in decision making process in the departmental inquiry was pointed out by respondent No.1. However, only on the count that his other reference was pending wherein no approval to the order of dismissal was taken, Labour Court awarded him reinstatement with full back wages in the complaint filed by him. Mr. Munshaw submitted that even if Labour Court was of the view that there was no approval to the action taken by the

petitioner of dismissing the respondent No.1 from service, the facts and circumstances of the case did not warrant grant of full back wages to respondent No.1 especially when benefits of full back wages will be required to be given from public money.

3. Learned advocate Mr. Pandya appearing for respondent No.1 on the other submitted that there is no dispute that though reference in connection with the demand of respondent No.1 was pending, no approval was taken from the Tribunal as required by Section 33(2)(b) of the Industrial Disputes Act, 1947 ("the Act") to the order of dismissal passed by the petitioner against respondent No.1. Mr. Pandya submitted that in absence of the approval from the Tribunal before which the reference was pending, respondent No.1 could be said to have been in continuous service and that is what it is so found by the Labour Court and thus as rightly held by Labour Court, respondent No.1 was entitled to full back wages with other consequential benefits by treating his service as continuous service. Mr. Pandya submitted that unlike, the reference under Section 10 of the Act for reinstatement in the complaint for breach of provisions of Section 33(2)(b) of the Act, workman is to be made entitled to full back wages as held by Hon'ble Supreme Court in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and others reported in (2002)2 SCC 244 and as submitted by Mr. Pandya that is so mandated by the provisions of Section 33(2)(b) of the Act.

4. Having heard learned advocates for the petitioner and respondent No.1, it appears that the petitioner was served with charge-sheet dated 19.1.2007 for holding departmental inquiry against him. However, it is not in dispute that when the petitioner was served with charge-sheet, one reference through Union for demand of respondent No.1 to get due wages for the period from 1.3.2002 to 31.1.2006 was pending, being Reference (IT) No.149 of 2007. Pending such reference, the petitioner passed order dated 12.6.2008 on conclusion of the departmental inquiry dismissing the respondent No.1 from service. It is not in dispute that no approval was taken by the petitioner under Section 33(2)(b) of the Act. Section 33(2)(b) of the Act reads as under:-

33(2)(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.

5. As mandated by Section 33(2)(b) of the Act, the petitioner was required to take approval from the Tribunal before which above-said reference was pending and effect of not getting approval to the said action was that respondent No.1 could not be said to have been discharged or dismissed from services or his services in other manner could be said to have been uninterrupted and not

affected by the order of dismissal passed by the petitioner on conclusion of the departmental inquiry. In absence of approval taken by the petitioner to the order of dismissal passed by it, respondent No.1 would be entitled to all benefits flowing from his continuous service as if he was never dismissed from service and such benefits would include back wages and other consequential benefits. Hon"ble Supreme Court in the case of Jaipur Zila (supra), has held and observed in para 6,7,13 to 15 as under:-

6. Answer to the question on which conflicting decisions are rendered, as noticed above, depends on a fair reading and proper interpretation of Section 33(2)(b) of the Act. Prior to the amendment of 1956, provision contained in Section 33 corresponded to the present Section 33(1) only. The object behind enacting Section 33, as it stood before it was amended in 1956, was to allow continuance of industrial proceedings pending before any authority/court/tribunal prescribed by the Act in a peaceful atmosphere undisturbed by any other industrial dispute. In course of time, it was felt that unamended Section 33 was too stringent for it placed a total ban on the right of the employer to make any alteration in conditions of service or to make any order of discharge or dismissal even in cases where such alteration in conditions of service or passing of an order of dismissal or discharge, was not in any manner connected with the dispute pending before an industrial authority. It appears, therefore, that Section 33 was amended in 1956 permitting the employer to make changes in conditions of service or to discharge or dismiss an employee in relation to matters not connected with the pending industrial dispute. At the same time, it seems to have been felt that there was need to provide some safeguards for a workman who may be discharged or dismissed during the pendency of a dispute on account of some matter unconnected with the dispute. This position is clear by reading re-drafted expanded Section 33 in 1956 containing five sub-sections. For the present purpose, we are concerned with the proviso to Section 33(2)(b). The material and relevant portion of Section 33 reads:-

""Conditions of service, etc. to remain unchanged under certain circumstances during pendency of proceedings.

(1).....

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute or, where there are no such standing order, in accordance with the terms of the contract, whether express or implied, between him and the workman -

(a)

(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."

7. The proviso expressly and specifically states that no 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. It is clear from the proviso to Section 33(2)(b) that the employer may pass an order of dismissal or discharge and at the same time make an application for approval of the action taken by him. In the *Strawboard* case (*supra*) dealing with the contention that if the employer dismisses or discharges a workman and then applies for approval of the action taken and the tribunal refuses to approve the action, the workman would be left with no remedy as there is no provision for reinstatement in Section 33(2), it is held that:

"if the tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fall and thereupon the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer".

13. 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 other 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 practise by the employer during the pendency of industrial dispute when the relationship between them are 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 practise; 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 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 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 33A challenging the order granting approval on any of the grounds available to him. Section 33A 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 33A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that till such time he should suffer misery of unemployment in spite of 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 33A

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 33A, 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 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 under Section 33A 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 practise or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.

6. In light of above, there is no escape from conclusion that once it was found that no approval was taken by the petitioner to the action of dismissal of the respondent No.1 pending the reference before the Tribunal, the respondent No.1 was entitled to full benefits. Labour Court, therefore, committed no error in accepting the complaint of respondent No.1 and awarding him full back wages and other consequential benefits by treating his service as continuous service. The Court therefore, finds that no interference is required in the impugned order in exercise of the powers under Articles 226 and 227 of the Constitution of India. The petition is therefore, rejected.