
(2008) 07 RAJ CK 0037
In the Rajasthan High Court

Babu Lal Vaishnav

APPELLANT

Vs

Industrial Tribunal and Others

RESPONDENT

Date of Decision : 11-07-2008

Acts Referred:

Constitution of India, 1950 — Article 227

Industrial Disputes Act, 1947 — Section 32, 33, 33A, 9A

Citation : (2009) 1 RLW 414

Hon'ble Judges : M.N. Bhandari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.N. Bhandari, J.—This writ petition is directed against the order passed by the Industrial Tribunal, Jaipur (for short "the learned Tribunal") on an application moved by the petitioner under the provisions of Section 33-A of the Industrial Disputes Act, 1947 (for short "the Act of 1947"). By the impugned order dated 16.2.1999, learned Tribunal dismissed application of the petitioner.

2. The petitioner-employee moved an application before the learned Tribunal under the provisions of Section 33-A of the Act of 1947. The application was maintained on the ground that petitioner's services were terminated without seeking approval under the provisions of Section 33(2)(b) of the Act of 1947. The facts relevant to the matter as stated before the teamed Tribunal are otherwise referred hereunder for convenience.

3. The petitioner stated that pursuant to the selection, he was appointed on the post of Conductor vide order dated 6.5.1987. The order of appointment was containing certain terms and conditions and it was otherwise an appointment on daily wages basis. When the petitioner was discharging his duties on 4.9.1987. On checking of bus, it was found that certain passengers were travelling without ticket and accordingly remark was made in the Way-bill. The services of the petitioner thereafter terminated vide order dated 7.9.1987 (Anhexure-3). Challenge to the terminated order was made by moving an application under

Section 33-A of the Act of 1947. It was stated that though the language of the order of termination shows it to be a case of termination simpliciter but order of termination is otherwise punitive in nature as foundation of the order is based on checking of bus on 4.9.1987. The order of termination was passed without holding an enquiry contrary to the standing order, and order of termination is to be treated as order of dismissal looking to the allegation but passed without holding an enquiry for providing an opportunity of hearing to the petitioner. According to the petitioner, foundation of the order of termination being a misconduct, thus in view of the provisions of Section 33(2)(b) of the Act of 1947, approval of the learned Tribunal was required to be, taken as petitioner was a concerned workman to a pending industrial dispute before the learned Tribunal. Since the order of termination was passed on the ground not connected with the aforesaid dispute, hence the provisions of Section 33(2)(b) of the Act of 1947 was attracted. However, learned Tribunal vide its impugned order held that it is a case of termination simpliciter, thus application u/s 33-A of the Act of 1947 is not maintainable and accordingly petitioner's application u/s 33-A of the Act of 1947 was rejected.

4. Learned Counsel for the petitioner submits that the learned Tribunal failed to consider that when a termination order proceeds after checking of bus, finding passengers without ticket, then termination cannot be held to be termination simpliciter. It is contended that foundation of the order of termination was based on alleged misconduct, therefore, without seeking approval under the provisions of Section 33(2)(b) of the Act of 1947, the order of termination affected against the petitioner is not legally sustainable. It was urged that since there was violation of provisions of Section 32(2)(b) of the Act of 1947, thus petitioner was entitled to maintain application u/s 33-A of the Act of 1947, but the said application was erroneously rejected by the learned Tribunal concerned.

5. Learned Counsel for the petitioner firstly placed reliance on the judgment of this Court in the case of Anoop Singh Vs. The Judge, Industrial Tribunal and Others, . Referring to the aforesaid judgment, it was submitted that if an order of termination is not held to be punitive as it was not stigmatic, then also there is a change in the service condition, hence, application u/s 33-A of the Act of 1947 was maintainable and accordingly, the case was remanded to the learned Court below. Reliance was also placed on a judgment of the Hon'ble Apex Court in the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, . In the aforesaid case, the Hon'ble Apex Court considered the fact that in what circumstances, an order of discharge can be considered to be simpliciter or punitive. After taking into consideration the facts of the aforesaid case, the Hon'ble Apex Court came to the conclusion that the order of termination was punitive as it was held that the language of termination order alone is not conclusive, to hold that termination is simpliciter and not punitive in nature. It was held that if, on lifting the veil, it comes that the foundation of the order is a misconduct, then it has to be held to be a case of punitive order.

6. Reference of the judgment of the Hon'ble Supreme Court in the case of V.P. Ahuja Vs. State of Punjab and Others, has also been made. In the aforesaid case, the Hon'ble Supreme Court had taken note of the fact that the order of termination itself was casting a stigma on the employee, hence, it was held that the termination is punitive in nature. In the case of Dipti Prakash Banerjee Vs. Satendra Nath Bose National center for Basic Sciences, Calcutta and Others, , it was held that termination is simpliciter or punitive, depends on whether allegations form is foundation for motive of the order. Taking note of the facts of the case wherein not only there were allegations even in the order of termination apart from a clear adverse findings by Director as well as by informal inquiry Committee in a departmental inquiry, it was not considered to be a case of termination simpliciter.

7. In the light of the aforesaid judgments, the contentions of learned Counsel for the petitioner are many folds. Firstly, that order of termination in the present matter is punitive in nature, thus without holding an enquiry, if any, order of termination is passed, it has to be considered as illegal. The second contention is that treating the order of termination to be punitive, learned Tribunal should have entertained the application under the provisions of Section 33-A of the Act of 1947 as approval under the provisions of Section 33(2)(b) of the Act of 1947 was not taken by the respondent Corporation, thus the order of termination should have been declared as void by accepting the application u/s 33-A of the Act of 1947. The application was otherwise also maintainable looking to change in condition of service. No other argument was raised by learned Counsel for the petitioner during the course of arguments.

8. Learned Counsel for the respondents, on the other hand, submits that two contentions raised by learned Counsel for the petitioner were well considered by learned Tribunal and a finding of fact was also recorded holding that the order of termination in the present case was not punitive but it was order of simpliciter and therefore, it being a case of termination simpliciter, the provisions of Section 33(2)(b) of the Act of 1947 are not applicable, hence, the application so moved by the petitioner u/s 33-A of the Act of 1947 was rightly been held to be not maintainable, thus learned Counsel for the respondents supports the order of the learned Tribunal.

9. I have considered the rival submissions of the parties and scanned the matter carefully.

10. The first contention raised by learned Counsel for the petitioner is that order of termination is punitive in nature. Thus finding of the learned Tribunal holding it to be a case of termination simpliciter, is not proper. Considering the facts of this case that the petitioner herein was engaged on daily wages basis vide order dated 6.5.1987 on certain terms and conditions was then terminated vide order dated 7.9.1987 i.e. after a period of four months of employment. The perusal of the order of termination at Annexure-3 reveals that no stigma is casted therein against the petitioner. The language of the order of termination shows that

services of the petitioner were terminated pursuant to the condition No. 7 of the order of appointment. The order of appointment has not been placed on record, however, it is stated by learned Counsel for the petitioner that condition No. 7 of the order of appointment postulates a condition that services of the daily wages employee is terminable by the employer at any point of time without assigning any reason. The issue now remains is as to whether the order of termination is based on some misconduct of the employee or not. If the background as stated by learned Counsel for the petitioner is taken note of, then it reveals that prior to the termination, when bus was checked by checking party, then certain passengers were found without ticket and according to the petitioner himself, the incident of 4.9.1987 was the foundation of the order of termination. Referring to the reply filed by the respondent Corporation before the learned Tribunal, it is stated that even therein the respondent Corporation has admitted that when the bus was checked on 4.9.1987, 21 & half passengers were found without ticket and in the same way, when the bus was again checked even on 1.9.1987, two passengers were found without ticket. Thus, according to the learned Counsel for the petitioner, it is a case of punitive action against him without holding an enquiry. According to learned Counsel for the respondents, petitioner being a daily wages employee employed on certain terms and conditions, was not having definite right to continue in service and his service was to be extended from time to time and accordingly, when there was a condition of termination of service without assigning any reason in the appointment order itself and the order of termination passed on incidents of 1.9.1987 and 4.9.1987, thus it was the case of termination simpliciter. Learned Tribunal had considered this factual aspect of the matter and came to the conclusion that the incidents of 1.9.1987 and 4.9.1987 may be motive for passing the order of termination simpliciter, but it was not the foundation, therefore, learned Tribunal came to the conclusion that it was a case of termination simpliciter. This Court while exercising the jurisdiction under Article 227 of the Constitution of India should not interfere in the finding of fact generally unless it is shown that the order has not been passed by the Court below within the settled parameters.

11. So far as judgments referred to above by learned Counsel for the petitioner are concerned, in the case of Gujarat Steel Tubes Ltd. (supra), the Hon"ble Apex Court came to the conclusion that the misconduct was foundation of the order of punishment, thus it was considered to be a case of punitive termination in nature. Same way in the case of D.P. Banerjee (supra) shows that even the order of termination was containing background of allegation and even an enquiry was conducted, the Hon"ble Apex Court came to the conclusion that order is punitive in nature and almost similar is the position in the case of V.P. Ahuja (supra), when the order of termination was having certain allegations therein and, therefore, it was held to be a order of punitive in nature. The learned Tribunal has referred various judgments of the Hon"ble Apex Court on the said issue. First referring to the judgment of the Hon"ble Apex Court in the case of Radhey Shyam Gupta v. U.P. State Agro Industries Corporation reported in 1998 9 AD

(SC) 359 , it was held that if the termination of temporary servant is based on work assessment, then it cannot be said to be punitive. Same way other judgments on the issue have been referred which includes a judgment of Hon''ble Apex Court in the case of State of U.P. and another State of U.P. and another Vs. Km. Prem Lata Misra and others, . In the said case, termination of temporary employee on the ground of unsatisfactory work, unsuitability and inconvenience was not held to be punitive in nature and thereby requirement of departmental enquiry was not called for. Apart from the judgments referred above by learned Tribunal, referred of few other judgments are necessary. In the case of State of U.P. and Others Vs. Ashok Kumar, the hon''ble Apex Court considered the issue in reference at a great length. In the aforesaid judgment, it was held that If there is no enquiry resulting in termination, then even if, there is a complaint, it can be a motive for termination and it is not considered to be a foundation for passing the order of termination. It is further considered that if a complaint leading to enquiry resulting in termination, then complaint becomes foundation of termination. The Hon''ble Apex Court in the aforesaid case considered even earlier judgment on the issue and thereupon it came to the conclusion that order of termination based on complaint therein was only a motive to pass order of termination. In Para 6, the Hon''ble Apex Court held thus:

The order of termination simpliciter as referred above does not disclose any stigma. Whether a complaint is the motive leading to termination simpliciter or it is the foundation of the termination order has been considered by this Court and held consistently by this Court that when there is no inquiry resulting in the termination, the complaint is the motive of the order of termination, on the other hand where the complaint leads to the inquiry resulting in the termination order it is the foundation of the order of termination. This Court in a recent decision in State of Haryana v. Satyender Singh Rathore, after discussing the various decisions of this Court, held in para 9 of the judgment as under-

9. We find that the High Court did not consider the question of stigma or the effect of any enquiry held before the order of termination was passed. The question whether the enquiry purportedly held provided the motive or the foundation was required to be considered by the High Court in detail. That has not been done. The question whether the several cases e.g. Dhananjay v. Chief Executive Officer, Zila Parishad Jalna and Mathew P. Thomas v. Kerala State Civil Supply Corporation Ltd. An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences and Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences after survey of most of the earlier decisions touching the question observed as to when an order of termination can be treated as simpliciter and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during the period of probation. The learned Counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of

application of the principles stated there into the facts of the present case. In the case of Dipti Prakash Banerjee after referring to various decisions it was indicated as to when a simple order of termination is to be treated as "founded" on the allegations of misconduct and when complaints could be only as a motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained thus: (SCC PP 71-72).

21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no finding was arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

From a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a time the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorise or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service.

12 . In the case of State of Punjab and Ors. v. Rajesh Kumar reported in (2006) 12 SCC 418, the Hon'ble Supreme Court considered the same issue and thereupon it was held that if the order of termination is a simple order, then even if in the background, the services were found to be unsatisfactory due to absence from duty, it cannot be said to be punitive order.

13. Looking to the aforesaid judgments apart from the judgments referred to by learned Counsel for the petitioner, if the present matter is looked into, then it becomes clear that earlier incidents may be motive for passing the order of termination, but it cannot be said that those incidents were the foundation of the order of termination. Not only that, order of termination does not make a reference of those incidents and even no allegation or stigma exists in the order of termination. Even in the reply, the respondent Corporation has made a reference of the incidents, then it has been clarified that it was not the foundation of the order of termination and otherwise a finding of fact has already been recorded by learned Tribunal, which cannot be said to be against the parameters. Thus, in view of the reference to the judgments discussed above, it becomes clear that it is not a case where the order of termination can be said to be punitive and otherwise the finding recorded by learned Tribunal calls for no

interference in view of the judgment of the Hon'ble Apex Court in the case of Sadhana Lodh Vs. National Insurance Company Ltd. and Another, . Hence, so far as the first contention made by learned Counsel for the petitioner, is concerned, it is decided against the petitioner.

14. So far as the second contention is concerned, according to learned Counsel for the petitioner, after treating the order of termination to be punitive, it should be held that since there is a non-compliance of Section 33(2)(b) of the Act of 1947, thus order of termination should be treated as void. Learned Counsel for the petitioner, however, submitted that even if, it is to be treated a case of termination simpliciter, then also it is a change in condition and in that view of the matter, the application u/s 33-A of the Act of 1947 was maintainable and thereby learned Counsel for the petitioner has wrongly dismissed the application holding it to be not maintainable.

15. For consideration of the aforesaid arguments, reference of Section 33(2) of the Act of 1947 is required to be given. The aforesaid provisions is quoted thus:

33(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 for, 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 proceedings; or

(b) for any misconduct not connected with the dispute, discharging 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.

16. Perusal of the aforesaid provisions reveals that it is divided in two parts i.e. (a) and (b). The question comes for consideration of this Court is as to whether even if it is a case of termination simpliciter, can it be considered to be change in condition of service so as to attract Clause (a) of Sub-section (2) of Section 33 of the Act of 1947. The composite reading of the provisions of Sub-section (2) shows that provisions of Sub-section (2) has been sub-divided in two parts for the reason that if there are change in condition of service, Clause (a) of Sub-section (2) of Section 33 of the Act of 1947 would be applicable. However, in the case of discharge or dismissal, Clause (b) of Sub-section (2) of Section 33 of the Act of 1947 would apply. If Clause (a) of Sub-section (2) of Section 33 of the Act of 1947 covers all cases of change of condition of service, which includes termination, then there was no reason for the Legislature to make a Sub-clause (b) to cover cases of discharge or dismissal based on misconduct to include only certain cases of termination and not all. It is settled law that the provisions of

Section 33 of the Act of 1947 was made with a particular object i.e. a rider has been imposed on the employer not to take an action of discharge or dismissal of the employee, when a dispute concerned to the employee is pending. Taking note of the object, if this matter is looked into, then it becomes clear that not only pending dispute was not having direct connection with the order of termination but further fact remains that the order of termination was not found to be punitive, it becomes clear that it not being a case of misconduct resulting discharge or dismissal. Clause (b) of Sub-section (2) of Section 33 of the Act of 1947 would not be applicable and so far as the change of condition of service is concerned, the order of termination cannot be considered to be a case of change of condition of service because for attracting Clause (a) of Sub-section (2) of Section 33 of the Act of 1947, employee remains in employment and while in employment, his conditions of service are changed. Section 9-A of the Act of 1947 speaks about certain restrictions regarding change of condition of service and Schedule-II appended In the Act of 1947 specifies condition of service for change for which no notice to be given. Termination has not been described as change of condition of service. Looking to the aforesaid provisions as well as provisions of Section 33(2)(b), it becomes clear that a case of termination cannot be said to be changed in condition of service applicable to that workman. The aforesaid issue came up for consideration before the Hon'ble Apex Court in the case of Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others, In the aforesaid case, it was categorically held that the cases of termination simpliciter will not attract the provisions of Section 33(2)(b) of the Act of 1947 and it has further been held that if that provision is not applicable. Application u/s 33-A is not maintained. In Para 21, 23 & 25, the aforesaid issue has been dealt with at length and the relevant paras are quoted thus:

21. We have no doubt in our mind that Section 33(2)(b) makes it obligatory upon the employer to make an application to the Tribunal under the proviso only when he discharges or dismisses a workman for misconduct.

23. Standing orders of a company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct which a workman may commit. Even though a given conduct may not come within the specific terms of misconduct described in the standing orders, it may still be a misconduct in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. Ordinarily, the standing orders may limit, the concept but not invariably so.

24. Termination simpliciter or automatic termination of service under the condition of service or under the standing orders is outside the scope of Section 33 of the Act. This does not mean that the employer has the last word about the termination of service of an employee and can get away with it by describing it to be a simple termination in his letter of discharge addressed to the employee. It is also not a correct proposition of law that in case of a complaint u/s 33A the Tribunal would be debarred from going into the question whether

notwithstanding the form of the order, in substance, it is an action of dismissal for misconduct and not termination simpliciter.

17. The aforesaid judgment is complete answer to the second issued and in view of the judgment of the Hon''ble Apex Court on the subject, the judgment of this Court in the case of Anoop Singh (supra) cannot be applied and in view of the judgment of the Hon''ble Apex Court, I respectfully disagree with the judgment in the case of Anoop Singh (supra). It is accordingly held that if it a case of termination simpliciter, the provisions of Section 33 of the Act of 1947 cannot be attracted or made applicable so as to maintain an application u/s 33-A of the Act of 1947, unless it is held that order of termination simpliciter is in substance, an action of dismissal. The Tribunal has recorded its finding and held to be a case of termination simpliciter.

18. In view of the above, I do not find any error in the order of the learned Tribunal to hold that it being a case of termination simpliciter, application u/s 33-A of the Act of 1947 is not maintainable.

19. In view of the discussion made above and as two issues raised by learned Counsel for the petitioner are answered against him, the writ petition deserves to be dismissed and accordingly, the same is dismissed with no order as to costs.