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**(1991) 09 PAT CK 0001**  
**In the Patna High Court**  
**Case No : C.W.J.C. No. 1133/1987 (R)**

Bajrang Mica Co. Pvt. Ltd.

APPELLANT

Vs

Presiding Officer, Labour Court and Another

RESPONDENT

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**Date of Decision :** 24-09-1991

**Acts Referred:**

**Citation :** (1991) 09 PAT CK 0001

**Final Decision :** Allowed

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## Judgement

S.B. Sinha, J.—This application is directed against an order, dated June 23, 1987 passed by the respondent No. 1 in Misc. Case No. 22 of 1984 refusing to approve the order of dismissal, dated October 29, 1984 whereby and whereunder the petitioner terminated the services of the respondent No. 2 with effect from October 30, 1984 as contained in Annexure-5 to the writ application.

2. The fact of the matter lies in a very narrow compass.

3. At all material times the respondent No. 2 was employed as an unskilled worker in the petitioner's factory. A charge-sheet was issued as against him by the petitioner alleging inter alia therein that on July 31, 1984 while he was on duty of feeding the mixer with materials, it was found by the Supervisor that the concerned workman added less materials and when he was called upon to explain his conduct he indulged in abusing the said Supervisor in presence of other workmen and also hurled a shoe with an intention to hit him.

4. Upon receipt of the said charge-sheet, the respondent No. 2 submitted an explanation which is contained in Annexure-1 to the writ application wherein he inter alia denied that he was guilty of feeding the mixer with less materials and he hurled a shoe at his Supervisor, but he admitted that some altercations took place by and between him and the said Supervisor and some abusive language was used by him in reply to filthy languages used by the said Supervisor.

5. A domestic enquiry was held wherein the respondent No. 2 was found guilty. The petitioner relied upon the said report and terminated the services of the

respondent No. 2 on October 29, 1984 with effect from October 30, 1984.

6. On October 29, 1984, an application u/s 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") was filed before the respondent No. 1 which was registered as Misc. Case No. 22 of 1984. The petitioner alleged that as the respondent No. 2 refused to accept the termination letter as also one month's wages tendered to him, the letter of termination was sent by a registered post and one month's wages were sent by postal money order and both of which were refused by the respondent No. 2

7. The respondent No. 2 filed a reply in the aforementioned Misc. Case No. 22 of 1984 on January 12, 1985 which is contained in Annexure-3 to the writ application.

8. The petitioner filed a rejoinder to the said reply on January 30, 1985 which is contained in Annexure-4 to the writ application. The petitioner allegedly filed an application on June 12, 1985 praying therein that the legality, validity or fairness of the domestic enquiry be decided as a preliminary issue but the same was rejected. Before the respondent No. 2 both the petitioner and the respondent No. 2 examined three witnesses each.

9. By reason of the impugned order as contained in Annexure-5 to the writ application, the respondent No. 1 inter alia held that the Management has failed to prove the first and the third charge as against the petitioner but he has been able to prove that he used abusive language as against the Supervisor. The respondent No. 1 further held that the said charge being not of grievous in nature, the punishment of dismissal was unjustified. It was further held that the action on the part of the Management is not free from victimisation as against the workman for his union activities. It was further held that the action of the management is bad for non-service of letter of dismissal upon the workman.

10. On the aforementioned grounds, the respondent No. 1 rejected the application filed by the petitioner u/s 33(2)(b) of the said Act.

11. Mr. Tapen Sen, the learned counsel appearing on behalf of the petitioner, took me through the impugned order as contained in Annexure-5 to the writ application and submitted that the respondent No. 1 misdirected himself in passing the impugned order in so far as he failed to take into consideration the scope of an enquiry u/s 33(2)(b) of the said Act.

The learned Counsel, in this connection, has relied upon a decision in *The Lord Krishna Textile Mills Vs. Its Workmen*, and in *Dinesh Khare Vs. Industrial Tribunal and Others*, .

12. The learned Counsel further submitted that, it was also obligatory on the part of the respondent No. 1 to complete the enquiry within the period prescribed under Sub-section (5) of Section 33 of the said Act and he having not done so, the impugned order is vitiated in law,

It was further submitted that in view of the settled principles of law that the Management in a proceeding u/s 33(2)(b) of the said Act, is entitled to make a prayer before the respondent No. 1 that the legality or validity of domestic enquiry be decided as a preliminary issue and thus he had no jurisdiction to reject the said prayer of the petitioner.

13. Mr. V.P. Singh, the learned counsel appearing on behalf of the respondent No. 2, on the other hand, submitted that although the scope of an enquiry u/s 33(2)(b) of the Act is a limited one, it was permissible for the respondent to consider the plea of victimisation

The learned Counsel, in this connection, has relied upon a decision in Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others, .

14. The learned counsel further submitted that as one month's wages were not tendered along with the letter of termination, the petitioner having not complied with the mandatory requirement of Section 33(2)(b) of the said Act; the order of termination became vitiated in law.

The learned counsel, in this connection, has relied upon a decision in Podar Mills Ltd. Vs. Bhagwan Singh and Another, .

15. It was further submitted that it is permissible for the respondent No. 1 to consider as to whether there are sufficient materials brought on records for holding the workman guilty of misconduct and thus the findings of the respondent No. 1 to the effect that the petitioner has not been able to prove the charges, cannot be said to be vitiated in law.

16. It was further submitted that in any event, as the petitioner has failed to show that the respondent No. 2 refused to accept the order of termination, the application u/s 33(2)(b) of the said Act was not maintainable.

It was further submitted that the respondent No. 1 refused to decide the issue of legality or validity of the domestic enquiry as a preliminary issue as the said application was filed after evidence, on merits, began to be adduced.

17. In the instant case, the respondent No. 1 in my opinion, has rightly did not allow the prayer for trying the issue of legality and validity of the domestic enquiry as a preliminary issue inasmuch as the petitioner did not make such a prayer at the earlier opportunity.

It is further evident that as it was not held that the domestic enquiry held by the Management as against the respondent No. 2 was not bad in law, the respondent No. 1 could not have allowed the parties to lead evidence on merits of the case, as would appear from the discussions made hereinbefore.

18. Section 33(2)(b) of the said Act reads as follows:-

"(2) During the pendency of any such proceeding in respect of any 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-

(b) for any misconduct 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."

19. In Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others, , it was held:

"From the provision of Section 33 it is manifest that punitive action by the employer in whatever form it may be passed is permissible against an ordinary workman, as distinguished from a protected workman, even during the pendency of proceedings before the Tribunal provided that the employer pays one month's wages and also applies to the concerned Tribunal for approval of his action. Since the action is punitive, namely, dismissal or discharge for misconduct, the Tribunal has to oversee the action to guarantee that no unfair labour practice or victimisation has been practised thereby. If the procedure of fair hearing has been observed the Tribunal has to find in an application u/s 33 that a prima facie case is made out for dismissal. If, on the other hand, there is violation of the principles of natural justice in the enquiry, the Tribunal can go into the whole question relating to the misconduct and come to its own conclusion whether the same is established."

20. It is, therefore clear that object behind legislating Section 33(2)(b) of the said Act was to enable the Tribunal to oversee that no unfair labour practice or victimisation has been practised by the management.

21. There cannot, therefore, be any doubt that in an application u/s 33(2)(b), the Tribunal may come to the conclusion that an unfair labour practice or victimisation has been resorted to by the employer in issuing the order of termination.

22. In Atherton West and Co. Ltd. Vs. Suti Mill Mazdoor Union and Others, the Supreme Court laid down a two-fold test for the guidance of the authorities in dealing with a "permission application" i.e., that the employer had made out a prima facie case for the proposed action and was acting bona fide.

23. In The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others, it was held (at 353):

"It will be noticed that u/s 33 of the 1947 Act the authority invested with the power of granting or withholding permission is the Conciliation Officer, Board or Tribunal. The Conciliation Officer or the Board normally has no power, under the

1947 Act, to decide any industrial dispute, but is only charged with the duty of bringing about a settlement of dispute. It is only the Tribunal which can by its award decide a dispute referred to it. Section 33 by the same language confers jurisdiction and power on all the three authorities. Power being thus conferred by one and the same section, it cannot mean one thing in relation to the Conciliation Officer or the Board and a different and larger thing in relation to the Tribunal. There is no reason to think that the Legislature, by a side wind, as it were, vested in the Conciliation Officer and the Board the jurisdiction and power of adjudicating upon disputes which they normally do not possess and which they may not be competent or qualified to exercise. Further, if the purpose of the section was to invest all the authorities named therein with power to decide industrial disputes one would have expected some provision enabling them to make and submit an award to which the provisions of the Act would apply such as is provided in Section 33A of the 1947 Act or Section 23 of the 1950 Act. There is no machinery provided in Section 33 of the 1947 Act or Section 23 of the 1950 Act for enforcing the decision of the authority named in those Sections. This also indicates that those Sections only impose a ban on the right of the employer and the only thing that the authority is called upon to do is to grant or withhold the permission i.e. to lift or maintain the ban."

24. In *T. Unni Paniker v. C.C. Automobiles Ltd.* reported in 1982 LIC 1212, a learned single Judge of the Kerala High Court observed that the first thing to which the authority has to address himself is whether a prima facie case is made out by holding an enquiry upon complying with the principles of natural justice and the impugned action is bona fide. In other words, where a workman sets up a case of violation of rules of natural justice, mala fides, unfair labour practice or victimisation, it is incumbent on the authority to go into these questions.

However, the jurisdiction u/s 33 is confined only to see whether the prima facie case has been made out and the authorities do not sit as a court of appeal, weighing or re-appreciating the evidence for itself but only examines the finding of the enquiry officer on the evidence in the domestic enquiry as it is, in order to find out either whether there is a prima facie case or if the findings are perverse. See *Bharat Iron Works v. Bhagubhai Balubhai Patel* reported in 1976 LIC 4.

. In *Lord Krishna Textile Mills v. Its Workmen*, (supra), it was held that if before dismissing an employee, the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by Section 33(2)(b) and the proviso are satisfied or not. The Supreme Court held ( *The Lord Krishna Textile Mills Vs. Its Workmen*, ):

"It is well-known that the question about the adequacy of evidence or its sufficiency or satisfactory character can be raised in a court of facts and may fall to be considered by an appellate court which is entitled to consider facts; but these considerations are irrelevant where the jurisdiction of the court is limited as u/s 33(2)(b). It is conceivable that even in holding an enquiry u/s 33(2)(b) if

the authority is satisfied that the finding recorded at the domestic enquiry is perverse in the sense that it is not justified by any legal evidence whatever, only in such a case it may be entitled to consider whether approval should be accorded to the employer or not; but it is essential to bear in mind the difference between a finding which is not supported by any legal evidence and a finding which may appear to be not supported by sufficient or adequate or satisfactory evidence."

26. In *Dinesh Khhare v. Industrial Tribunal, Rajasthan, Jaipur*, reported in 1982 LIC 517, a learned single Judge of the Rajasthan High Court upon following various decisions of the Supreme Court including *Lord Krishna Textile Mills's* (supra) held (1982-II-LLJ-17 at 26-27):

"From the aforesaid observations of the Supreme Court, it is clear that the conditions laid down in the proviso to Section 33(2)(b) have to be satisfied before the appropriate authority can give its approval to the action taken by the employer and that while exercising its jurisdiction in the matter of dealing with an application for approval u/s 33(2)(b), the appropriate authority is required to examine as to whether the conditions laid down in the proviso, have been satisfied by the employer. In this context reference may also be made to the decision of the Supreme Court in *Podar Mills Ltd. Vs. Bhagwan Singh and Another*, . In that case the Industrial Tribunal had refused to give approval to the dismissal of the workmen concerned under the proviso to Section 33(2)(b) of the Act for the reason that there was considerable delay on the part of the employer in making the application for approval before the Tribunal. The Supreme Court found that the workmen concerned, had not been paid their one month's wages as required by the proviso to Section 33(2)(b). The Supreme Court, therefore, affirmed the order passed by the Tribunal refusing approval on the view that one of the essential requirements of the proviso to Section 33(2)(b) of the Act was not satisfied. The aforesaid decision shows that the conditions laid down in the proviso are mandatory in nature and if any of the said conditions has not been satisfied by the employer, the application for approval is liable to be dismissed."

27. Keeping in view the legal position aforementioned, it has to be seen as to whether the respondent No. 1 confined his jurisdiction within the limits of Section 33(2)(b) of the said Act as interpreted by the Supreme Court and High Court in the decision referred to hereinbefore.

28. At the outset, it may be stated that the respondent No. 1 misdirected himself in posing a wrong question of law in so far as he observed:

"The position is that we have to confine ourselves to ascertain as to whether before this court the management have been able to justify their action in dismissing the workman from the services of the company; in other words, we have to answer the question whether the management have been able to prove the charges levelled against the workman for which he has been dismissed."

29. The respondent No. 1 was, therefore, not justified in making an enquiry as to

whether the action of the Management was justified or not in view of the limited scope of an enquiry u/s 33(2)(b) of the said Act. The respondent No. 1 did not consider as to whether a prima facie case has been made out on the basis of the materials brought on records in the disciplinary proceeding or not; as it proceeded to consider the materials on records not for the purposes envisaged u/s 33 of the said Act but for appreciating the evidence of the parties. A "casual reference" has been made to the domestic enquiry papers which the management allegedly relied upon u/s 145 of the Evidence Act.

30. It is, therefore, clear that he did not consider the materials brought on records for the purpose of finding out a prima facie case as against the respondent No. 2 but merely referred to the same to see as to whether any corroboration or consideration can be found out in terms thereof in relation to the evidence adduced before him for the first time. Consideration of materials brought on records for such a purpose was wholly unwarranted.

31. The respondent No. 1, thereafter, proceeded to reappraise the evidence in their entirety and hence proceeded to consider the materials on records brought before him by the parties and on the basis thereof he held:

"As regards adding of less materials to the mixture by the workman, it be stated that the management have not led any evidence as to what quantity of materials was required to be added to the mixture and what actual quantity was added by the workman. They have not led any evidence to suggest that by mixing up less material to the mixture the said mixture was damaged and the company was put to loss, in fact the management have not placed on record any evidence to suggest that the management had actually not used the mixture prepared by the workman and it was wasted. So far hurling of shoe and it hitting one Jamiruddin Ansari is concerned, the management have no substantial evidence to prove this charge, it may be recalled that in the domestic enquiry said Jamiruddin Ansari had stated that he knew nothing about the occurrence, the management have not examined the said Jamirudding Ansari to say that a shoe was hurled by the workman and that it hit him. In that position it has to be stated that the story of throwing a shoe to assault the supervisor by the workman is a got-up story to make out the charge more serious, but it has no legs to stand."

32. The respondent No. 1 then in paragraph 8 of his order considered the evidence brought by the workman. In paragraph 9 of the impugned order the respondent No. 1 held:-

"Considering the evidence of the witnesses of the management, the documents of the management referred to u/s 145 of the Evidence Act and the suggestive evidence of the workman and his witnesses referred to above I find and hold that the charge of abusing Supervisor Musafa Ali, by the workman is proved by the management. The charge that he had thrown shoe to assault Musaraf Ali is not proved. Further charge that the workman had added less materials to the mixture in order to put the management to a loss is also not proved as there is

no material on record to substantiate this aspect of the charge."

33. The respondent No. 1, however, held that the Management has proved charges that the respondent No. 2 abused his Supervisor but according to the respondent No. 1 the same was not so serious which would lead to pass an order of dismissal. From what has been seen hereinbefore, it is thus evident that the respondent No. 1 exceeded his jurisdiction u/s 33(2)(b) of the Act and purported to have decided the whole matter as if he was exercising his jurisdiction, as if a reference had been made by one appropriate Government u/s 10 of the said Act.

34. With regard to the Second Proviso to Section 33(2)(b) of the said Act, the respondent No. 1 disbelieves the evidence of the management (Ext. M-22 and Ext. M-23) in the following terms:-

"The management have, however, proved an endorsement marked as Ext. M-22 made by the Works Manager to the effect that the workman refused to accept the dismissal letter. The endorsement is Ext. M-23, the officer who made the said endorsement has not been examined. There is nothing on the record to suggest that actually the dismissal letter was tendered to the workman, no person who was deputed to serve the dismissal letter has been examined by the management. It has also been contended by the management that one copy of the dismissal letter was displayed on the notice board, no witness has been examined by the management to prove that the copy of dismissal letter was displayed on the notice board, there is no evidence on record as to who had pasted the dismissal letter on the notice board."

35. It further held that although the letter of dismissal was sent through registered post which was returned back to the postal department and an endorsement to refuse the same was not accepted on the ground that no attempt was made by the management to serve the dismissal letter upon the workman at his local address. The respondent No. 1, however, accepted that one month's wages was tendered by postal money order as evidenced by Ext. M- 25 and Ext. M-27.

36. From what has been noticed hereinbefore, it is evident that the respondent No. 1 misdirected himself in law in so far as he posed unto himself a wrong question and failed to take into consideration the relevant issues. The respondent No. 1 had no jurisdiction to re-appraise the evidences adduced in the domestic enquiry. He having not held that the domestic enquiry was improper or invalid in law or the same was not in consonance with the principles of natural justice, he should have tried to find out as to whether the employer has made out a prima facie case for passing an order of dismissal.

37. With regard to the fulfilment of the preconditions as laid down under the Proviso appended to Section 33(2)(b) of the Act, he took into consideration the provisions of the Evidence Act which are not attracted in the said proceeding. He should have, therefore, considered the question as to whether by reason of Ext. M-22 and Ext. M-23, the petitioner has been able to prove that the workman

refused to accept the termination letter. The respondent No. 1 ought to have considered the evidences as to whether the dismissal letter was, in fact, pasted on the notice board or not. The question as to who pasted the same on the notice-board was wholly irrelevant. The respondent No. 1 further did not assign any reason in support of the said finding. He further failed to draw a presumption of service of notice under registered cover inasmuch as, in law, a letter sent for service at the correct address of the addressee would be presumed to have been served upon him and in a case where such a letter is sent by registered post, the presumption becomes stronger.

38. Mr. V.P. Singh, the learned Counsel appearing on behalf of the respondent, could not show that one month's wages was not tendered simultaneously along with the application u/s 33(2)(b) of the said Act and/or the service of termination upon the workman. In such a situation, the decision of the Supreme Court in *Poddar Mills Ltd. v. Bhagwan Singh* (supra) is not attracted in the facts and circumstances of this case.

39. Taking, thus, all aspects of the matter into consideration, I am of the view that the impugned order as contained in Annexure-5 to the writ application cannot be sustained.

40. In the result, this application is allowed, the impugned order as contained in Annexure 5 to the writ application is quashed and the respondent No. 1 is hereby directed to consider the matter afresh and pass a fresh order in accordance with law. However, in the facts and circumstances of this case, there will be no order as to costs.