
(2019) 05 CAL CK 0043
In the Calcutta High Court
Case No : Writ Petitions No. 24575 Of 2012

Bishnupada Acharjee Vs State Of West Bengal & Ors?

Date of Decision : 16-05-2019

Acts Referred:

Industrial Dispute Act, 1947 — Section 2A, 10, 10(1) , 33C(1), 33C(2), 33C(2)(2)
Constitution Of India, 1950 — Article 32

Citation : (2019) 05 CAL CK 0043

Hon'ble Judges : Shampa Sarkar, J

Bench : Single Bench

Advocate : Kalyan Bandopadhyay, Partha Bhanja Chowdhury, Anant Shaw, Ravi Kumar Dubey, Arunava Ghosh, Soumya Majumdar, Arindam Guha, Richa Goyal

Final Decision : Dismissed

Judgement

Shampa Sarkar, J

In this writ petition the workman has challenged an order dated May 18, 2012 passed by the learned judge, First Labour Court, West Bengal, in Case No.Comp.35 of 2004, rejecting his claim under Section 33-C(2) of the Industrial Dispute Act, 1947 (hereinafter referred to as the said Act).

2. The petitioner's case is that on September 20, 2004 the petitioner filed an application under Section 33-C (2) of the said Act, claiming salary and other benefits to be computed and determined by the learned Labour Court under the following heads:-

- a) Medical with leave from December, 1996 to April, 1998;
- b) Salary from May, 1998 to December, 2003;
- c) Arrear Bonus of 1994 to 1995;
- d) LTC encashment from 1995 to 2004;
- e) Authorized Leave encashment from 1996 to January, 2004.

3. The statement of dues was stated in details in the application before the

learned Labour Court as annexure A. The total amount claimed was Rs. 7,63,705.25/-. The petitioner stated in his application that at the relevant point of time he was deputed to the Digital Division/Radio/MUX production of the respondent No.2, company, where circuit boards of electrical items were manufactured. While performing his duties, he fell ill on October 9, 1996 and his superior asked him to go home. Thereafter he consulted a cardiologist who advised him to take complete rest. He then requested the company to grant him leave upto March 7, 1997. The salaries for the month of October and November, 1996 were duly paid to him but the Leave Travel Concession (LTC) encashment and arrear bonus were not released deliberately by the company. He sent series of letters dated March 10, 1997, July 9, 1997, November 10, 1997, March 9, 1998 and May 4, 1998 to the company along with original medical certificates with a request for extension/grant of leave. The company issued a charge sheet on April 17, 1998 signed by the Chief Executive of the company alleging unauthorized absence. The petitioner was charged with absence without leave, neglect of work, commission of acts of indiscipline, bad behaviour and acting in a manner prejudicial to the interest of the company. He replied to the charge sheet by filing his written statement of defence dated May 8, 1998. He denied the charges and expressed his willingness to work. By a letter dated July 26, 1998 he intimated the Chief Executive of the Company that he had expressed his desire to join the company but was prevented. He reiterated his request to be allowed to join his duties. By a letter dated August 5, 1998, the company informed him that the question of resumption of duty would be reviewed after satisfaction and proper examination of the medical certificates by the company and further examination by a Medical Board to be constituted by the company to determine the physical condition of the petitioner. The disciplinary proceeding initiated on April 17, 1998, concluded with the imposition of the punishment of dismissal from service which was communicated to the petitioner by a letter dated December 26, 2003. Thereafter, the petitioner filed the application under Section 33-C(2) of the said Act claiming salary and other dues before the learned First Labour Court, West Bengal which was registered as Case No. COMP 35 of 2004. The order of dismissal was challenged in a reference proceeding under Section 10(1) of the Industrial Dispute Act, 1947. The petitioner prayed for reinstatement with full back wages and other consequential reliefs. By an order dated May 25, 2016 the order of dismissal was upheld by the Learned Fourth Industrial Tribunal, West Bengal in Case No.VIII-124 of 2005. Aggrieved by the aforementioned award the petitioner filed a writ petition being W.P.No.25658 (w) of 2016 before this court which is pending disposal.

4. The company contested the said proceedings before the First Labour Court by filing their written statement and denied the allegations made by the petitioner especially with regard to the right of the petitioner to receive the salary and other benefits for the period between December 1996 to December 2003. The company further stated in the written statement that the absence of the petitioner was adjusted with his medical leave upto October 15, 1996 with full

pay and then his absence up to November 8, 1996 was adjusted with privilege leave with pay. Thereafter, considering the prayers made by the petitioner for leave on medical ground, the company, as a special case granted leave upto March 10, 1997 but, the period between November 9, 1997 to March 10, 1997 was treated as leave without pay. The company stated that since March 10, 1997 the petitioner stopped all communication with the company and did not join. As the petitioner had deliberately stayed away from work, he had committed acts of indiscipline and misconduct, and acted in a manner pre-judicial to the interest of the company. Accordingly, a charge sheet dated April 17, 1998 was issued under the company's Conduct Discipline and Appeal Rules on the allegation of misconduct for unauthorized absence. The company also stated that the petitioner had filed a civil suit before the learned City Civil Court, Kolkata being Title Suit no.274 of 2000. The suit was filed during the pendency of the disciplinary proceeding and at the stage of issuance of the second show cause notice. The petitioner along with the plaint filed an application for temporary injunction with a prayer for injunction restraining the employer from terminating the petitioner. The prayer for injunction against the company was refused by the learned Judge, Third Bench, City Civil Court.

5. The company further stated that aggrieved by the order of refusal of injunction dated March 12, 2001, the petitioner preferred a first miscellaneous appeal before this High Court being FMA No.10 of 2002. The said appeal was dismissed granting liberty to the petitioner to pray for damages by amending the plaint and the order dated March 12, 2001 passed by learned Judge, Third Bench, City Civil Court was upheld by the Hon'ble Division Bench of this court by an order dated November 7, 2003. Thereafter, the petitioner withdrew the suit and made a representation dated April 26, 2004 before the Assistant Labour Commissioner, and raised an industrial dispute challenging the order of dismissal and prayed for reinstatement with full back wages and all consequential benefits. According to the company, as the disciplinary proceedings had already been initiated the medical board was not constituted but the entire salary payable to the petitioner as per the rules had been disbursed by the company and the petitioner was only entitled to Rs. 42931.91/- as bonus which the petitioner failed to receive, although offered. The company denied that an assurance was given to the petitioner to the effect that he would be allowed to resume his duties after examination by a medical board and consideration of the report. The company denied that there was any scope for determination of monetary dues payable by the company to the petitioner for the period when there was no salary due to his credit and he was unauthorizedly absent and for such subsequent period when disciplinary proceeding was going on.

6. Both parties adduced oral and documentary evidence before the learned Judge and upon hearing the matter, the learned First Labour Court rejected the application of the petitioner under Section 33-C (2) of the said Act, inter alia, holding that the petitioner did not have any pre-existing right to claim salary and other benefits for the period when he neither worked in the company nor had

any sanctioned leave.

7. Mr. Kalyan Bondopadhyay, learned Senior Advocate appearing on behalf of the petitioner submitted that the petitioner was willing to join the company and expressed such willingness by a letter dated July 26, 1998 and in reply thereto, by a letter dated August 5, 1998 the company informed the petitioner that he would be allowed to resume his duties after a medical board was constituted and a report about the petitioner's fitness was received from the medical board. According to Mr. Bandopadhyay, such positive assertion by the company implied that the company was not unwilling to allow the petitioner to resume his duties and treated the petitioner as an employee, which made the petitioner eligible for the monetary dues for the entire period as claimed in the application before the learned Labour Court. He further submitted that as the company continued the disciplinary proceedings against the petitioner without suspending him, and also did not constitute the medical board the petitioner's status vis-a-vis the company was that of a workman and in the absence of any suspension during the continuation of the disciplinary proceeding, the petitioner would be entitled to full salary. Mr. Bandopadhyay assailed the order impugned to the writ petition on three grounds. First, that the learned Judge, First Labour Court by taking into account extraneous considerations which led to the disciplinary proceeding and imposition of the punishment of dismissal wrongly rejected the application whereas, in exercise of power under section 33-C (2), the learned Judge ought to have restricted himself to the determination of the pre-existing right of the petitioner to receive the salary and other benefits and to the computation of the monetary amount due to the petitioner for the period December 1996 to December 2003 that is, upto the date of termination. Secondly, that the learned Judge erred in holding that the said Court was not competent to compute the amount payable in terms of money, without there being a prior determination and/or adjudication of the right of the petitioner. According to him, the learned Labour Court failed to appreciate that the petitioner was ready to join his duty but was prevented by the employer and thus, the right to get the salary and other benefits was a pre-existing right and ought to have been decided in an application under Section 33-C (2). Thirdly, Mr. Bandopadhyay contended that the learned Judge misinterpreted the provisions of Section 33-C (2) by confusing the said provision with Section 33-C (1) and coming to the conclusion that it was incumbent on the petitioner to show his pre-existing right in the said proceedings. He relied on the decisions of *Central Bank of India Ltd vs. P.S. Rajagopalan* reported in AIR 1964 SC 743, *Municipal Employees Union (Regd.) Sirhind & Ors. vs. State of Punjab & Ors.* reported in (2000) 9 SCC 432, *Shiv Nandan Mahto vs. State of Bihar & Ors* reported in (2013) 11 SCC 626, *A. Satyanarayana Reddy & Ors. vs. Presiding Officer, Labour Court & Ors.* reported in (2016) 9 SCC 462.

8. Mr. Arunavo Ghosh, learned Senior Advocate appearing on behalf of the respondent No.2, company, supported the order impugned to this writ petition and submitted that prior to the computation of the amount in terms of money by

the learned Judge, First Labour Court under Section 33-C (2), the question as to whether the employer had illegally and deliberately prevented the petitioner from joining his duty had to be adjudicated first in an appropriate proceeding. Only if, the refusal on the part of the company to allow the petitioner to work was found to be illegal, would the learned Labour Court have the jurisdiction to determine the amount payable to the petitioner. He further stated that Section 2A of the said Act (W. B Amendment) enabled an individual to raise an industrial dispute over the issue of refusal of employment. According to Mr. Ghosh, the petitioner ought to have raised a dispute when the company refused to allow him to join and also did not constitute the medical board pursuant to the communication dated August 5, 1998. Mr. Ghosh further submitted that the learned Judge, First Labour Court rightly considered the question of non-existence of a pre-existing right of the petitioner to claim the salary and other dues. He submitted that the learned Judge, First Labour Court rightly held that the said Court could not adjudicate the right of the petitioner to claim salary and other benefits for the period which the employer treated as unauthorized absence and when the petitioner had neither worked for the company nor was any medical leave sanctioned in his favour. Mr. Ghosh relied on the decision of *Municipal Corporation of Delhi vs. Ganesh Razak & Anr.*, reported in (1995) 1 SCC 235. Mr. Ghosh further stated that in the disciplinary proceedings the charge of unauthorized absence amounting to misconduct was proved and as such the claim of the petitioner for salary or benefit for the period which was treated as unauthorized absence and for the period subsequent to unauthorized absence when the disciplinary proceeding had been continuing, upto the date of dismissal could not be decided in an application under Section 33-C(2) of the said Act, by the learned Labour Court.

9. The point which falls for decision before this court is whether the learned Judge, First Labour Court committed an error in rejecting the application of the petitioner/workman under Section 33-C (2) of the said Act, inter alia, holding that the petitioner had failed to show a pre existing right to get the entire salary and benefits for the periods stated in the application when the petitioner had not worked at all. According to the learned Judge the said court did not have any jurisdiction to adjudicate upon the claim of the petitioner as stated in the application before it and compute the amount payable to the petitioner. Before answering the above mentioned question the scope and ambit of Section 33-C of the said Act requires consideration. The said Section is quoted below:-

"33-C.Recovery of money due from an employer.- (1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of [Chapter V-A or Chapter V-B], the workman himself or any other person authorized by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who

shall proceed to recover the same in the same manner as an arrear of land revenue"

Provided that every such application shall be made within one year from the date on which the money became due to the workman from the employer:

Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government [within a period not exceeding three months:]

[Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit]

(3) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case.

(4) The decision of the Labour Court shall be forwarded by it to the appropriate Government and any amount found due by the Labour may be recovered in the manner provided for in sub-section (1).

(5) Where workmen employed under the same employer under the same employer are entitled to receive from him any money or any benefit capable of being computed in terms of money, then, subject to such rules as may be made in this behalf, a single application for the recovery of the amount due may be made on behalf of or in respect of any number of such workmen.

Explanation.- In this section "Labour Court" includes any Court constituted under any law relating to investigation and settlement of industrial disputes in force in any State."

10. Section 33-C (2) has been considered to be the provision containing a legislative recognition of the right of an individual workman to a speedy remedy to enforce his existing individual right without having to seek recourse to a time consuming process under Section 10 of the Industrial Dispute Act or without having to depend on the trade union to espouse his cause. The special beneficial object of this provision was that any benefit arising on the basis of an existing

right - factual or legal - could be computed by the labour court. If, while computing such benefit any incidental query or questions arose, then an enquiry would be inevitable to answer such queries or for clarification. Thus, the jurisdiction under Section 33-C (2) was not merely confined to simple arithmetical calculation. There are a host of decisions on the point. In the case of Central Bank of India (supra) it was held that the claim under Section 33-C (2) clearly postulated that the determination of the question of computing the benefits in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which had been assigned to the Labour Court by sub-section (2). It was further observed, that Section 33-C (2) dealt with cases of implementation of individual rights of workmen falling under its provisions.

11. The Apex Court in the decision of Namer Ali Choudhury and Others vs The Central Inland Water Transport Corporation Ltd. and Another, reported in (1977) 4 SCC 575 held that Section 33-C (2) of the said Act had two parts. The first part was concerned with the money claim simpliciter and the second part provided for computation in terms of money of any benefit to which the workman was entitled. The Apex Court held, that if it was found that any workman was entitled to receive from the employer any amount of money due, and if any question arose as to the amount of money due then the question could be decided by the Labour Court. The Apex Court categorized the money due under certain heads. The relevant paragraph of the said judgment is quoted below:-

"4. In our judgment the High Court has committed an error in so narrowly interpreting section 33C(2) of the Act. The said provision runs as follows-

Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if, any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government.

There are two parts of the sub-section as it stands after its amendment by Act 36 of 1964. The first part is concerned with the money claim simpliciter and the second part speaks about computation in terms of money of any benefit to which the workman is entitled. Although for appreciation of the point at issue there is no substantial difference between the two, we shall confine our discussion to the money claim only pure and simple. On a plain reading of the wordings of the Statute it would be found that where any workman is entitled to receive from employer any money and if any question arises as to the amount of money due, then the question may be decided by the Labour Court. The expression "If any question arises as to the amount of money due" embraces within its ambit any one or more of the following kinds of, disputes:- (1) Whether there is any settlement or award as alleged?

(2) Whether any workman is entitled to receive from the employer any money at all under any settlement or an award etc?

(3) If so,, what will be the rate or quantum of such amount?

(4) Whether the amount claimed is due or not?

Broadly speaking, these will be the disputes which will be referable to the question as to the amount of money due. If the right to get the money on the basis of the settlement or the award is not established, no amount of money will be due. If it is established, then it has to be found out, albeit, it may be by mere calculation, as to what is the amount due. For finding it out, is not necessary that there should be a dispute as to the amount of money due also. The fourth kind of dispute which we have indicated above obviously and literally will be covered by the phrase "amount of money due." A dispute as to all such questions or any of them would attract the provisions of section 33C(2) of the Act and make the remedy available to the workman concerned.

5.It is not necessary to elaborately discuss the various authorities of this Court on the point. To our mind the view we have expressed above is plainly and squarely covered by the principles of law enunciated by this Court in several decisions; to wit, *The Central Bank of India Ltd. v. P. S. Rajagopalan etc.*(1). *R. B. Bansilal Abirchand Mills Co. Ltd. v. Labour Court Nagpur & Ors.*(2) and *Sahu Minerals and Properties Ltd. v. Presiding Officer, Labour Court.*"

12. Thus, the Apex Court was of the view that the labour court was empowered under the said section and also had a duty cast upon it to enquire as to whether an amount claimed was due or not, in order to satisfy itself as to the basis of the claim in the facts of a case. In the decision of *Municipal Corporation of Delhi (Supra)*, there had not been any earlier adjudication by any forum with regard to the claim of the daily rated workmen to be paid wages at the same rate as the regular workmen who were being engaged in the same establishment and there was no award or settlement to that effect. The Apex Court held that without prior adjudication or recognition of the disputed claim of the workmen to be paid the same rate as regular workmen, the proceeding for computation of the arrear wages claimed by them on that basis was not maintainable under Section 33-C (2) of the said Act. The Apex Court held that the labour court could not arrogate to itself the functions of an Industrial Tribunal, which alone was entitled to make adjudication in the nature of determination, and the labour court could not proceed to compute the benefit by dubbing the former act of determination as 'incidental' to its main business of computation. The Apex Court held that the computation was consequential upon and subsidiary to the determination of the workman's right to relief and corresponding liability of the employer to pay the amount claimed. The Apex Court set aside the award passed by the labour court allowing the application of the workmen under Section 33-C (2) on the ground that the application was not maintainable before the labour court, without a prior adjudication as to whether the workmen were entitled to equal pay for equal

work. The relevant portions of the said decision are set out hereunder:-

"12.The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workmen to a certain benefit is disputed, there being, no earlier adjudication or recognition 5 (1968) 1 LLJ 589 : 38 Comp Cas 400 (SC) thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under Section 33- C(2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33-C (2) of the Act. It is only when the entitlement has been earlier adjudicated or recognised by tile employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33- C(2) like that of the Executing Court's power to interpret the decree for the purpose of its execution.

13.In these matters, the claim of the respondent-workmen who were all daily-rated/casual workers, to be paid wages at the same rate as the regular workers, had not been earlier settled by adjudication or recognition by the employer without which the stage for computation of that benefit could not reach. The workmen's claim of doing the same kind of work and their entitlement to be paid wages at the same rate as the regular workmen on the principle of "equal pay for equal work" being disputed, without an adjudication of their dispute resulting in acceptance of their claim to this effect, there could be no occasion for computation of the benefit on that basis to attract Section 33-C (2). The mere fact that some other workmen are alleged to have made a similar claim by filing writ petitions under Article 32 of the Constitution is indicative of the need for adjudication of the claim of entitlement to the benefit before computation of such a benefit could be sought. Respondents' claim is not based on a prior adjudication made in the writ petitions filed by some other workmen upholding a similar claim which could be relied on as an adjudication ensuring to the benefit of these respondents as well. The writ petitions by some other workmen to which some reference was casually made, particulars of which are not available in these matters, have, therefore, no relevance for the present purpose. It must, therefore, be held that the Labour Court as well as the High Court were in error in treating as maintainable the applications made Linder Section 33-C(2) of the Act by these respondents."

13. It is now well settled that when the very basis of the claim or the entitlement of the workman to money or certain benefit capable of being computed in terms of money was disputed, and there was no earlier adjudication in an appropriate proceeding or recognition of the said claim by the employer, adjudication or pre-determination of the dispute relating to the entitlement could not be treated as incidental to the benefit claimed and therefore, such claim would be clearly

outside the purview of Section 33-C (2) of the said Act. The learned Labour Court in exercise of its powers under Section 33-C (2) of the Act, did not have the jurisdiction to decide the entitlement of the workman first and then proceed to compute the quantum of money payable pursuant to such adjudication of the right of the workman to receive the money or benefit.

14. In *State of U.P. & Anr. Vs. Brijpal Singh* reported in (2005) 8 SCC 58 also the Hon'ble Apex Court held that a proceeding under Section 33-C (2) was in the nature of an execution proceeding, in which the Labour Court calculated the amount of money due to a workman from the employer, on the basis of a pre-existing right and in doing so, could make an enquiry into the entitlement. The right to the money which was sought to be calculated or the benefit which was sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must have arisen in the course of master servant relationship between the industrial workman and his employer. The Labour Court thus, acted as an executing court under the said section enabling individual workmen to get an award or settlement implemented or executed. It was also open for the Labour Court to interpret the right accruing from the award or settlement or enquire into the basis of the claim on the fact situation leading to the claim of the individual workman, before computing the benefit in terms of money. While a correct interpretation of Section 33-C (1), of the said Act would be limited to claims referable to a settlement or award of the said Act or under Chapter V-A, these words of limitation were however not found in Section 33-C (2), and to that extent, the scope of Section 33-C (2) was wider and the labour court was thus empowered to embark upon an enquiry into the claim of the workmen and not restrict itself to the function of only making the arithmetical calculation in respect of claims which were covered under Section 33-C(1) of the said Act. An enquiry into the claim by the labour court has been recognized under the law and by judicial pronouncements. Upon satisfaction of the pre-existing right, the labour court would compute the amount in terms of money. The relevant question in this case is whether the learned First Labour Court while making such enquiry or while determining such claim of the petitioner could adjudicate his right to the money claimed or simply examine the basis of his right.

15. In this regard the relevant portions of the decision of *Central Inland Water Transport Corporation Limited vs. The Workmen and Ors.*, reported in (1974) 4 SCC 696 are quoted below:-

"12. It is now well-settled that a proceeding under Section 33(C)(2) is a proceeding, generally, in the nature of an execution proceeding wherein the Labour Court calculates the amount of money due to a workman from his employer, or if the workman is entitled to any benefit which is capable of being computed in terms of money, the Labour Court proceeds to compute the benefit in terms of money. This calculation or computation follows upon an existing right to the money or benefit, in view of its being previously adjudged, or, otherwise,

duly provided for. In *Chief Mining Engineer, East India Coal Co. Ltd. v. Rameshwar & ors.* MANU/SC/0214/1967:- (1968) 11 LLJ 658 it was reiterated that proceedings under section 33(C)(2) are analogous to execution proceedings and the Labour Court called upon to compute in terms of money the benefit claimed by workmen is in such cases in the Position of an executing court. It was also reiterated that the right to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer.

13. In a suit, a claim for relief made by the plaintiff against the defendant involves an investigation directed to the determination of (i) the plaintiff's right to relief; (ii) the corresponding liability of the defendant, including, whether the defendant is, at all, liable or not; and (iii) the extent of the defendant's liability, if any. The working out of such liability with a view to give relief is generally regarded as the function of an execution proceeding. Determination No. (iii) referred to above, that is to say, the extent of the defendant's liability may sometimes be left over for determination in execution proceedings. But that is not the case with the determinations under heads (i) and (ii). They are normally regarded as the functions of a suit and not an execution proceeding. Since a proceeding under section 33(C)(2) is in the nature of an execution proceeding it should follow that an investigation of the nature of determinations (i) and (ii) above is, normally, outside its scope. It is true that in a proceeding under section 33 (C) (2), as in an execution proceeding, it may be necessary to determine the identity of the person by whom or against whom the claim is made if there is a challenge on that score. But that is merely 'Incidental'. To call determinations (i) and (ii) 'Incidental' to an execution proceeding would be a perversion, because execution proceedings in which the extent of liability is worked out are just consequential upon the determinations (i) and (ii) and represent the last stage in a process leading to final relief. Therefore, when a claim is made before the Labour Court under Section 33(C)(2) that court must clearly understand the limitations under which it is to function. It cannot arrogate to itself the functions-- say of an Industrial Tribunal which alone is entitled to make adjudications in the nature of determinations (i) and (ii) referred to above, or proceed to compute the benefit by dubbing the former as 'Incidental' to its main business of computation. In such cases determinations (i) and (ii) are not 'Incidental' to the computation. The computation itself is consequential upon and subsidiary to determinations (i) and (ii) as the last stage in the process which commenced with a reference to the Industrial Tribunal. It was, therefore, held in *State Bank of Bikaner and Jaipur v. R. L. Khandelwal* MANU/SC/0372/1967 that a workman cannot put forward a claim in an application under Section 33(C)(2) in respect of a matter which is not based on an existing right and which can be appropriately the subject-matter of an industrial dispute which requires a reference under Section 10 of the Act.

14. The scope of Section 33(C)(2) was illustrated by this Court in *The Central*

Bank of India Ltd. v. P. S. Rajagopalan etc. MANU/SC/0149/1963: (1963) IILLJ 89 SC. Under the Shastri Award, Bank clerks operating the adding machine were declared to be entitled to a special allowance of Rs. 10/- per month. Four clerks made a claim for computation before the Labour Court. The Bank denied the claim that the clerks came within the category referred to in the award and further contended that the Labour Court under Section 33(C)(2) had no jurisdiction to determine whether the clerks came within that category or not. Rejecting the contention, this Court held that the enquiry as to whether the 4 clerks came within that category was purely 'incidental' and necessary to enable the Labour Court to give the relief asked for and, therefore, the Court had jurisdiction to enquire whether the clerks answered the description of the category mentioned in the Shastri Award, which not only declared the right but also the corresponding liability of the employer bank. This was purely a case of establishing the identity of the claimants as coming within a distinct category of clerks in default of which it would have been impossible to give relief to anybody falling in the category. When the Award mentioned the category it, as good as, named every one who was covered by the category and hence the enquiry, which was necessary, became limited only to the clerks' identity and did not extend either to a new investigation as to their rights or the Bank's liability to them. Both the latter had been declared and provided for in the Award and the Labour Court did not have to investigate the same. Essentially, therefore, the assay of the Labour Court was in the nature of a function of a court in execution proceedings and hence it was held that the Labour Court had jurisdiction to determine, by an incidental enquiry, whether the 4 clerks came in the category which was entitled to the special allowance."

16. Admittedly the scope of Section 33-C (2) was wider than Section 33-C (1). In the decision of Jeet Lal Sharma vs. Presiding Officer, Labour Court - IV and Ors., reported in 2000 (5) SLR 9. The Delhi High Court explained the expression of entitlement to receive money as follow:-

"15. The point which is emphasised is that entitlement to receive money i.e. pre-existing right can be based on (1) adjudication (2) settlement (3) service conditions. If the right to get a particular benefit is there, the application u/s. 33-C (2) would be maintainable and jurisdiction of Labour Court will not be barred merely because employer has denied the same.

16. What is the meaning of the expression "entitlement to receive". No doubt it is referable to pre-existing right. However where the workman claims a benefit flowing from a pre-existing right and approaches the Labour Court u/s. 33-C (2) for computation of the right in term of money and the employer disputes the existences of the right, the Labour Court will have the jurisdiction to determine the question, whether the right exists and if the existence of right is established than to proceed to compute the benefit flowing therefrom in terms of money or on its decisions recovery proceedings can start (New Taj Mahal Cafe Private Limited versus Labour Court reported in 1970 (2) LLN 51 and East India Coal

Company Limited (supra). In deciding the maintainability of the application u/s. 33-C (2) what is to be looked at is the claims set up in the application and not what the other side contends in its reply. The fact that the employer by his plea raises some dispute, does not mean that jurisdiction of Labour Court to deal with the question is taken away.

17. Now let us apply the aforesaid principles in the present case. In this case, petitioner had claimed encashment of leave of 188 days, on his retirement. It cannot be disputed that it is one of the service conditions that petitioner on his retirement would be entitled to encash his leave if it is lying to his credit. This is one of the service conditions and this service condition is a pre-existing right which entitles workman to get this claim. What is disputed is that the leave of 188 days was not due to the petitioner and according to the respondents there was only four days leave to his credit. As mentioned above, if the entitlement is based on service conditions, one does not have to take recourse to reference u/s. 10 of the Act for adjudication of the matter. That situation would have become necessary only if there was a dispute about the entitlement to get the leave encashed. The dispute is not about the entitlement to get the leave uncashed but about the number of days to which the petitioner is entitled. Such a question could have been decided by the Labour Court in these proceedings. As mentioned above merely because employer disputes this aspect, is no ground to oust the jurisdiction of Labour Court u/s. 33-C (2). The matter is to be looked into on the basis of claim made by the petitioner in his application and not the reply filed by the management. Once it is accepted that this is one of the service conditions of the workman that he would be entitled to get the leave encashed upto a particular limit, claiming this leave encashment by filing application u/s. 33-C (2) would be admissible. If there is a dispute as to how much leave was to credit of petitioner which he could encash, such a dispute can be decided in these proceedings which is incidental to the main issue. Adjudication can be about the disentitlement and not when the claim is based on accepted service conditions. The matter was not examined by the Labour Court from this angle at all and therefore I hold that the order of the Labour Court is erroneous. The same is accordingly set aside. Rule is made absolute. It is held that application filed by the petitioner u/s. 33-C (2) of the Act is maintainable. The matter is accordingly remanded back to the Tribunal to decide the application of the petitioner on merits."

17. Thus, it could be safely concluded that when there was no earlier adjudication of the right or entitlement to the money due and payable, or the claim was not based on the service conditions of a workman as statutory dues, such a claim was outside the purview of Section 33-C (2) of the said Act. The labour court did not have any jurisdiction to first adjudicate the dispute relating to the workman's entitlement to a benefit or amount claimed, the corresponding liability of the employer to pay the amount and then proceed to compute the quantum thereof in terms of money. Only for the purpose of implementation or enforcement of the right, the labour court was empowered to enquire into the

nature of the pre-existing right, especially in cases of ambiguity or confusion while interpreting the award, settlement or the basis of the claim of the workman.

18. Now, coming to the facts of this case, it appears from the order impugned that the learned Labour Court upon consideration of the exhibits and the pleadings and submissions of the parties had come to the conclusion that the petitioner did not have a pre-existing right to the relief claimed under Section 33-C (2) of the said Act. It was found that medical leave was granted to the petitioner upto November 7, 1996, thereafter the petitioner was informed that there was no further medical leave due to his credit. The petitioner's leave was then adjusted with privilege leave and the subsequent period upto March 9, 1997, was treated as leave without pay. Then the petitioner was further repeatedly asked by the employer to meet the Deputy General Manager of the company (HR & M). The learned Judge observed that the petitioner could not produce any documents before the learned Judge to show that he had sent any further medical certificates with the advice of the doctor to take rest even after March 9, 1997. The learned Judge found that there was no leave due after March 9, 1997 and since the petitioner did not join the company after March 9, 1997, and no further leave was sanctioned in his favour, a charge sheet was issued to the petitioner. In the opinion of the said court, for the period between December 1996-April 1998, the petitioner was not entitled to any salary inasmuch as, the period from November 1996 to March 9, 1997, was treated as leave without pay and the period after March 9, 1997 was treated as unauthorized absence. Accordingly on April 17, 1998, a charge sheet was issued to the petitioner for unauthorized absence as per the service rules of the petitioner for commission of acts of indiscipline, neglect of work and for purposely staying away from employment without sufficient ground or proper and satisfactory explanation after March 9, 1997. These factual findings are based on the evidence on record.

19. The learned Judge enquired into the basis of the claim for the aforementioned period and had arrived at a decision that the workman did not have any pre-existing right to salary or benefit for the period when he was unauthorisedly absent and disciplinary proceedings had been initiated. The learned Judge also held that when an industrial dispute regarding his termination was pending before the Tribunal, the adjudication of the workman's entitlement could not be done for the other claims relating to such period.

20. I agree with the view of the learned Judge First Labour Court inasmuch as, for the period between December 1996 to April 1998, the learned Judge First Labour Court rightly held that the petitioner was not entitled to any salary or benefit as the period after March 9, 1997, onwards till the date issuance of the charge sheet was the period when he was unauthorizedly absent and a disciplinary proceeding had been initiated for such absence. The disciplinary proceeding culminated in the imposition of the punishment of dismissal from service and an industrial dispute was pending adjudication. As such, there was no pre-determined or pre-existing right with regard to the monetary claim for

that period. With regard to the period prior to March 9, 1997, there is a clear finding by the learned Judge that the petitioner was paid his salary after due adjustment of all kinds of leave as per the rules which the petitioner had accepted. The period from December, 1996 to March 9, 1997, was treated as leave without pay by the employer and the petitioner accepted the same as rightly held by the learned First Labour Court. The learned Judge found that there was no pre-existing right of the petitioner to receive any salary or benefit during the period between December 1996 to April 1998.

21. Now the next contention of Mr. Bandopadhyay, that the petitioner was entitled to salary during the period when the disciplinary proceeding was continuing, that is, from April 1998, to the date of termination requires to be decided. While considering the evidence, and pleadings the learned Judge came to a specific finding that it was only after the charge sheet was issued, did the petitioner express his desire to resume his duty. Admittedly, the petitioner was not suspended. However, from the letter dated July 26, 1998, it appears that the petitioner had expressed his desire to join his duties after the disciplinary proceeding was initiated and from the letter dated August 5, 1998, it appears that the Deputy General Manager of the said company had informed the petitioner that the question of his resumption of duty would be reviewed only after examination of the medical certificates produced by the petitioner and upon getting satisfactory explanation for the long absence. It was further stated that a medical board would be constituted for the said purpose to ascertain the nature of illness and the treatment done to the petitioner and thereafter on the basis of the reports and on satisfaction of the employer, the request of the petitioner to allow him to re-join his duties would be decided. It appears from the said letter that it was a clear stand of the employer that unless the company was satisfied by the medical certificates and reasons for such long absence of the petitioner, the request for resumption of duty, made by the petitioner would not been accepted by the company. The disciplinary proceeding was initiated on April 17, 1998. The petitioner participated in the proceeding and thereafter by an order dated December 26, 2003 the petitioner was dismissed from the services of the company. Thus, the period between to May 1998 to December 2003 was the period, when the disciplinary proceeding was continuing against the petitioner. During the pendency of the disciplinary proceeding the petitioner had expressed his desire to join his duties. The company intimated to the petitioner that his resumption of duty would be subject to the satisfaction of the employer as to the genuineness of the medical certificates and further subject to the satisfactory explanation of the long absence. Thus, in my view there was no positive assertion that the petitioner would be allowed to join during the pendency of the disciplinary proceeding inasmuch as, the satisfactory explanation and review of the medical certificates were squarely dependent on the outcome of the disciplinary proceeding. The right of the petitioner to get salary during that period would also depend on the final outcome of the disciplinary proceeding. Ultimately, the employer was not satisfied with the explanation for absence on

medical ground and the petitioner was dismissed from service. Challenging the order of dismissal, the petitioner raised an industrial dispute before the conciliation officer under the provisions of the Industrial Dispute Act, 1947. The dispute was not settled at the conciliatory stage, and the Government of West Bengal referred the dispute over the issue of dismissal of the petitioner from the services of the company. The learned Fourth Industrial Tribunal, West Bengal by an award dated May 25, 2016 held that the petitioner was not entitled to any relief and the action taken by the employer was justified. The two issues framed by the Tribunal were as follows:-

"i) Whether the dismissal of Shri Bishnupada Acharjee from his service with effect from 26.12.2003 by the management is justified?

ii) What relief, if any, is the workman entitled to?"

22. Challenging the aforementioned award, the petitioner filed a writ petition before this court which was registered as W.P. No. 25658 (w) of 2016. The said writ petition is pending. The relief claimed by the petitioner for monetary dues for the period between April, 1998 to December, 2003, that is, when the disciplinary proceeding was going on, would be subject to the decision in the said writ petition. Whether the disciplinary proceeding under challenge was illegal and ought to be set aside or not and/or whether the petitioner was entitled to reinstatement and back wages were to be decided in the said proceeding and not by the learned First Labour Court. If it was ultimately found that the disciplinary proceeding was illegally initiated then the consequential orders of re-instatement and back wages and other consequential relief, as the case may be, would be decided by this Hon'ble Court in the writ proceedings. The writ court was also empowered to decide how the period during which the petitioner was absent after adjustment of leave and also the period when the disciplinary proceeding was going on, would be treated. Thus, the claims of the petitioner for salary and other dues for the period December 1996 to December 2003 were to be adjudicate in the pending W.P. No. 25658 (w) of 2016. With regard to the arrear bonus the petitioner was offered the amount by the company. With regard to the claims for LTC encashment and leave encashment, these amounts were essentially dependent on the final outcome of the writ petition.

23. Thus, it is clear that the entitlement of the petitioner to salary or other benefits when he was unauthorizedly absent and also when he was allegedly prevented from joining duties could not be decided in an application under Section 33-C (2) of the said Act. Until the entire matter relating to the dismissal of the petitioner was finally decided in W.P. No.25658 (W) of 2016 and this Hon'ble Court held that the money was due from the employer. The learned Judge, First Labour Court was not empowered to adjudicate the claim for salary and other benefits of the petitioner and compute the same in terms of money. Under such circumstances, the learned First Labour Court rightly held after making an enquiry into the basis of claim of the petitioner, and upon considering the documentary and oral evidence of the parties, that the petitioner did not

have a pre-existing right, duly adjudicated by a competent forum to be granted the salary and other benefits as claimed. It should also be kept in mind that the petitioner could have raised an industrial dispute under Section 2A of the said Act (West Bengal Amendment). Section 2A of the said Act (West Bengal Amendment), enabled an individual to raise an industrial dispute over the issue of "Refusal of Employment". It was under the genre of deemed industrial dispute. If the petitioner was aggrieved by such alleged refusal of employment, he could have raised a dispute.

24. It also should be mentioned here that the petitioner filed a civil suit at the stage of issuance of the second show cause notice. In the suit he also prayed for an order of temporary injunction restraining the company from terminating him. The order of temporary injunction was refused and the petitioner preferred a First Miscellaneous Appeal before this court. The Hon'ble Division Bench dismissed the appeal but granted liberty to the petitioner to pray for damages in the suit by amending the plaint. The petitioner did not pursue the remedy before the civil court and withdrew the suit. In my opinion, the order impugned in this writ petition does not suffer from any infirmity or illegality and the learned Judge, First Labour Court upon making an enquiry came to a finding that the petitioner did not have a pre-existing right, duly adjudicated, entitling him to get the salary and other benefits computed in terms of money. From the award dated May 25, 2016 as annexed to the Affidavit-in-Opposition issued by the learned Fourth Industrial Tribunal, it appears that the Tribunal also adjudicated whether back wages should be paid to the petitioner and arrived at the conclusion that the petitioner was gainfully employed and he was not entitled to claim back wages for the period he was out of employment. The said award has been challenged in W.P.No.25658 (W) of 2016 and until the writ petition was disposed of there would be no adjudication in this regard insofar as, the claim for salary, LTC encashment and leave encashment were concerned.

25. In the decision of Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED) & Ors reported in (2013) 10 SCC 324, the termination of the workmen was quashed by the competent court and as such, the workmen had a preexisting right to get monetary benefits. In this case too, if the petitioner succeeded in the writ petition W.P. No.25658 (W) of 2016 and the entire disciplinary proceeding was set aside and consequential orders of reinstatement or back wages were passed or there was an adjudication as to how the period of unauthorized absence and the period when disciplinary proceedings were continuing, would be treated, then the learned Labour Court could have passed necessary orders in the application under Section 33-C (2) of the said Act.

26. I now proceed to deal with the judgments relied upon by Mr. Bandopadhyay. In Central Bank of India (supra) the workmen therein were claiming a special allowance declared under the Sastry Award. The adjudication was complete. The Tribunal had to determine as whether the clerks who applied for the allowance were covered under the said award. In the said decision the Apex Court held that

this determination was an enquiry incidental to the claim or pre-existing right and could be made by a Tribunal under Section 33-C (2). The Apex Court rejected the contentions of the respondents therein that an interpretation of the Sastry Award was not within the scope of Section 33-C (2). The case is distinguishable on facts.

27. In the decision of the Municipal Employees Union (REGD.) (Supra) the point for determination was whether the clerks and peons working at octroi check posts and barriers run by the respondent municipal Committees constituted and functioning under the Punjab Municipal Act, 1991 were entitled to be paid for each of the Saturdays on which they worked at the octroi check posts and barriers while their colleagues in the offices of the Municipal Committees concerned were permitted to enjoy those Saturdays as holidays. In the said case, the Apex Court came to the finding that the workmen had a right to enjoy Saturdays as holidays like their similarly situated counter parts and as such, the claim to wages for those Saturdays that they worked, should be computed in an application under Section 33-C (2). The case before me deals with the entitlement to salary and other benefits during the period when the workman was unauthorizedly absent and during the period he was undergoing disciplinary proceeding, which had culminated in his dismissal. The order of dismissal was upheld by the Industrial Tribunal and proceedings there from are pending adjudication before this Court in a writ petition. The pre-existing right of the petitioner would be finally adjudicated in the said proceeding.

28. In Shiv Nandan Mahto (supra) the employee was not allowed to work and had been kept away by mistake. Although, he was a clerk, he was shown in the rolls as a librarian and the post of librarian had not been approved. The Apex Court directed payment back of wages for keeping the employee away from work by mistake. The decision was rendered in an appeal arising out of a writ petition. In the facts of this case unless the entitlement and the claim of the petitioner for salary and benefits was adjudicated no orders could be passed in the application under Section 33-C (2).

29. In A. Satyanarayan Reddy (supra) the claim of the petitioner was with regard to subsistence allowance and lay off compensation which were statutory dues to which the petitioner therein was entitled prior to obtaining the VRS. Such a claim undoubtedly was covered under Section 33-C (2) as no adjudication was necessary.

30. For the aforesaid reasons, the writ petition is dismissed.

31. There shall be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for be given to the parties on priority basis.