

(2018) 04 JH CK 0079
In the Jharkhand High Court
Case No : L.P.A. No. 386 of 2010

CENTRAL TASAR RESEARCH AND TRAINING INSTITUTE,
HEHAL, RANCHI

APPELLANT

Vs

GANGO ORAIN, D/O LATE BANDHANA ORAON R/O VILLAGE
HIRHI, DOMARTOLI P.O. PISKA NAGRI P.S. RATU DISTRICT
RANCHI

RESPONDENT

Date of Decision : 05-04-2018

Acts Referred:

Industrial Disputes Act, 1947 — Section 33, 33A, (33C)(2)

Citation : (2018) 04 JH CK 0079

Hon'ble Judges : APARESH KUMAR SINGH, J; RATNAKER BHENGRA, J

Bench : Division Bench

Advocate : Sachinandan Das,

Final Decision : Dismissed

Judgement

1. Heard the learned counsel for the appellant. Â
2. Learned Single Judge by impugned order dated 04.08.2010 passed in WP(L) No. 7345 of 2006 has been pleased to uphold the order dated 08.09.2006 passed in M.J. Case No. 11 of 2004 by learned Presiding Officer, Labour Court, Ranchi filed under section 33(C) (2) of the Industrial Disputes Act, 1947.
3. The application under section 33(C)(2) of the Industrial Disputes Act was filed by Gango Orain, one of the legal heirs of Bandhana Oraon, an employee of the appellant-institute who was dismissed from service on 25.6.1984 during pendency of a Reference Case No. 6 of 1983 pending before the Industrial Tribunal, Ranchi. Apart from him, three other persons, namely, Karma Sahu, Albis Munda and Allauddin Ansari were also dismissed on

charges of serious misconduct initiated vide charge sheet dated 5/7.11.1983.

4. The employer realizing the requirement of seeking approval of the action taken by him in terms of Section 33 (2)(b) of the Industrial Disputes Act,

made an application before the learned Labour Tribunal which was instituted as Miscellaneous Case No. 1 of 1984. During pendency of the said

miscellaneous case, the workman Bandhana Oraon died on 17.7.1991. The workman had also filed Miscellaneous Case no. 7 of 1988 invoking section

33-A of the Industrial Disputes Act, challenging the order of his dismissal.

5. On the death of the workman, an informatory petition was filed by his widow Sukho Orain but though the workman was substituted in

Miscellaneous Case No. 7 of 1988 by his widow, the employer chose to get his name expunged in the Miscellaneous Case No. 1 of 1984.

Subsequently, by order dated 11.06.1996 approval was granted in respect of the decision of dismissal of other three employees by the learned Labour

Tribunal, which is at Annexure- 3 to the memo of appeal. On the death of the widow, Sukho Orain in the year 2003, Miscellaneous Case No. 7 of

1988 stood abated. The present applicant, Gango Orain, daughter of late Bandhana Oraon sought payment of wages of the deceased workman for the

period 25.6.1984 till his death on 17.7.1991 through an application made under section 33(C) (2) of the Industrial Disputes Act being M.J. Case No. 11

of 2004. The management contested the case by filing written statement. Both the parties also adduced evidence in support of their case. The learned

Presiding Officer, Labour Court, Ranchi by order dated 8.09.2006 (Annexure-9), impugned in the writ petition, allowed the claim, computed at Rs.

27,000/- to be paid to her within a period of 60 days from the date of the order. The management, being aggrieved, approached the writ court in

WP(L) No. 7345 of 2006 which stood dismissed by order dated 04.08.2010 under challenge in the present appeal.

6. We have considered at length the submissions of learned counsel for the appellant. The respondent has not appeared despite valid service of notice.

We have also gone through the material pleadings, materials available on record and perused the impugned judgment. The issue in controversy is

rather simple. Provisions of section 33 of the Industrial Disputes Act 1947 are quoted hereunder for better appreciation:-

â??[33. Conditions of service, etc., to remain unchanged under certain

circumstances during pendency of proceedings.- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding ; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

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

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

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

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the

authority before which the proceeding is pending.

Â Explanation.- For the purposes of this sub-section, a â??protected workmanâ? ,in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one per cent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a] Labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit :]

Â [Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing , extend such period by such further period as it may think fit:

Â Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed].â??

Â 7. Reference may be made to the specific provision of section 33 (2)(b) and Sub Section 5 thereof which are of relevance to the present issue in controversy. Apparently, on perusal thereof, it is clear that the employer has a liberty to proceed against a workman for any misconduct not connected with the industrial dispute pending in such proceeding before a Labour Tribunal and take a decision to discharge or punish him. But 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 before the Labour

Tribunal for approval of the action taken by him. Proviso to Sub Section 2 (b) is couched in a negative language. The decision to discharge or punish a

workman in connection with a misconduct not connected with the dispute, whether by dismissal or otherwise is open for the employer to be taken but

it is subject to approval by the Labour Tribunal where the industrial dispute is pending. In case the Labour Tribunal does not grant approval

subsequently, any action taken on the basis of the decision of the employer would be invalid. One may profitably refer to the ratio rendered by the

Hon'ble Apex Court on the meaning of the expression "approval", "prior approval" and "permission" rendered in the case of Ashok

Kumar Das and others Vs. University of Burdwan and others reported in (2010) 3 SCC 616 paragraph 15 thereof quoted hereunder:

"15. The words used in Section 21(xiii) are not "with the permission of the State Government" nor "with the prior approval of the State

Government", but "with the approval of the State Government". If the words used were "with the permission of the State Government",

then without the permission of the State Government the Executive Council of the University could not determine the terms and conditions of service

of the non-teaching staff. Similarly if the words used were "with the prior approval of the State Government", the Executive Council of the

University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State

Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could

determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the

State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would

be invalid and not otherwise."

8. From the provisions of Sub-Section 5 also it is apparent that an order has to be passed by the Labour Court or Tribunal concerned on such

application within a time specified or within an extended time and that proceeding would not lapse merely on the ground that no order could be passed

within the period specified in that Sub-section. Therefore, grant of approval on such an application by the Labour Tribunal is a mandatory requirement

to sanctify the decision taken by the employer against the workman for any misconduct which may not be connected with the main industrial dispute

pending before the learned Labour Tribunal. It is apparent from the material facts noted above that the management chose not to substitute the

deceased workman by his widow despite informatory petition given on his death and got him expunged from the proceeding of Miscellaneous case no.

1 of 1984. Though the learned tribunal at the culmination of the proceedings in Miscellaneous case no. 1 of 1984 did grant approval to the order of

dismissal of the remaining alive workmen but since the name of the present workman Bandhana Oraon was expunged from the records, no approval

was obtained by the employer, in his wisdom. In such an event, the decision to dismiss the employee was not approved by the Labour Tribunal, it was

therefore, invalid in the eye of law. Since the order of dismissal carried a stigma, the legal heirs of the deceased workman were required to be

substituted in his place to defend the deceased workman. The opinion of the Constitution Bench of the Apex Court rendered in the case of Jaipur Zila

Sahakari Bhoomi Vikas Bank Ltd. Vs. Kam Gopal Sharma and others reported in (2002)2 SCC 244 on the import of the provisions of Section 33 (2)

(b) and Section 33-A of the I.D. Act at paragraph Nos. 14,15 and 16 are quoted hereunder.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action

taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour

practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refuses to grant approval obviously it follows

that the employee continues to be in service as if the order of discharge or dismissal never had been passed. The order of dismissal or discharge

passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of

his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision.

In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to

be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the

employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of the statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in

the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed

by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any

order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the

contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceedings by making a complaint under Section 33-

A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and

expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of

industrial dispute so that an employee can be saved from hardship of unemployment.

16. Section 31 speaks of penalty in respect of the offences stated therein. This provision is not intended to give any remedy to an aggrieved employee.

It is only to punish the offender. The argument that Section 31 provides a remedy to an employee for contravention of Section 33 is unacceptable.

Merely because penal provision is available or a workman has a further remedy under Section 33-A to challenge the approval granted, it cannot be

said that the order of discharge or dismissal does not become inoperative or invalid unless set aside under Section 33-A. There is nothing in Sections

31, 33 and 33-A to suggest otherwise even reading them together in the context. These sections are intended to serve different purposes.â??

9. We are not convinced by the submission of learned counsel for the appellant that since the proceeding initiated by the workman u/s 33A challenging

the dismissal order being Miscellaneous Case No. 7 of 1988 also ended up as abated after death of his widow without any adjudication on the order of

his dismissal therefore the order of dismissal remained intact. Irrespective of any independent proceeding initiated by the workman challenging such an

order of dismissal, law required the employer to obtain approval of the decision taken to dismiss the employee as per Section 33 (2) (b) proviso. The

same having not been done, the dismissal order had no sanctity in the eye of law. The legal heir of the deceased workman had sought the wages for

the period from the date of his dismissal i.e. 25.6.1984 till the date of his death i.e. 17th July, 1991 at the same rate i.e. Rs. 315/-per month which the

workman was getting at the time of his dismissal. There was no adjudication required to be made on the claim of wages for the said period as there is

no dispute about the quantum of wages that the employee was getting at the time of his dismissal. Thus, we are also not convinced that proceeding u/s

33 (C) (2) initiated by the legal heirs of workman for the amount of wages to which he was entitled from the period of his dismissal till his death were

not maintainable and that the issue or claim required an adjudication on merit in a reference made u/s 10 of the Industrial Disputes Act. Learned

counsel for the appellant has relied upon the judgment rendered by the Hon'ble Apex Court in the case of State of U.P. and Another v. Brijpal Singh

reported in (2005) 8 SCC 58 in support of his submissions. However, we find that in the undisputed state of facts relating to the entitlement of the

wages at an admitted rate to the deceased workman, proceedings initiated u/s 33 (C) (2) were maintainable. Therefore, no adjudication of the claim,

by way of an award by the Industrial court on a reference was required to be made. The total amount quantified for payment to the applicant

respondent herein was Rs. 27,000/- only.

10. On the totality of facts and circumstances discussed above and for the reasons recorded, we do not find any ground to interfere in the order

passed by the learned Single Judge and the learned Industrial Labour Tribunal. The appellant is required to pay the amount along with interest at the

rate of 6% per annum from the date of the award i.e. 8th September, 2006 till it is actually paid. Interim order dated 14.2. 2011 stands vacated.

11. The appeal is accordingly dismissed.Â Â