

(2007) 09 CAL CK 0017

In the Calcutta High Court

Case No : Writ Petition No. 18341 (W) 2005 and C.A.N. No. 5252 of 2007 and
W.P. No. 2315 of 2005 and G.A. No. 2319 of 2006

Dilip Kumar Mukherjee (D) by his Heirs and L.R.s. (Smt.)
Subhra Mukherjee and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 05-09-2007

Acts Referred:

Constitution of India, 1950 — Article 12

Industrial Disputes Act, 1947 — Section 10, 31(1), 33, 33(2), 33A

Citation : (2008) 117 FLR 940

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Balai Chandra Paul and Sreeradha Sen, for the Appellant; Bhaskar Mitra and Dibyendu Sengupta, for the Respondent

Judgement

Jayanta Kumar Biswas, J.—W.P. No. 18341 (W) of 2005 was taken out by the deceased workman for enforcing an order of the Third Industrial Tribunal, West Bengal dated May 20th, 2005: In the course of hearing thereof, W.P. No. 2315 of 2005 filed on the original side of this Court by the employer, partly questioning that order of the tribunal, has been assigned to me. Hence I have heard both the writ petitions together, and they are being disposed of by this common judgment.

2. Since the writ petition itself is being finally disposed of no separate order in CAN No. 5252 of 2007 is necessary, and hence it shall be deemed to be disposed of. The application for substitution taken out by the petitioners in W.P. No. 2315 of 2005. It is submitted that it is in form and within time, is hereby allowed and the department concerned of this Court is directed to amend the cause papers within a fortnight from the date records of the case are sent down from the Court.

3. The workman was working in the West Bengal State Electricity Board as an Assistant (Cash). Disciplinary proceedings were initiated against him by issuing a charge-sheet dated May 31st, 1997. It was alleged that he had defalcated a sum

of Rs. 60,000/- from the cash collection. An inquiry was conducted by the inquiry officer appointed by the disciplinary authority. Before the inquiry officer the workman allegedly confessed that he had defalcated a sum of Rs. 60,000/- as alleged in the charge-sheet. After considering the report of the inquiry officer and giving the workman an opportunity of making representation against the proposed punishment, the disciplinary authority made the final order dated April 11th, 2000 dismissing him from service and ordering recovery of Rs. 60,000/- from his terminal benefits. In the order the disciplinary authority, however, recorded that since an industrial dispute in which the workman was concerned was pending before the Third Industrial Tribunal, Kolkata, an application had been filed seeking approval in terms of the provisions in Section 33(2)(b) of the Industrial Disputes Act, 1947. Such application was filed also on April 11th, 2000; needless to say that one month's wages had been duly paid to the workman. By an order dated May 11th, 2001 the tribunal held that the domestic inquiry conducted by the employer was not valid. Feeling aggrieved, the employer moved this Court by filing a writ petition, and during its pendency, on September 16th, 2002, it filed an application before the tribunal seeking leave to withdraw the Section 33(2)(b) application. By an order dated September 27th, 2002 the writ petition was dismissed. On October 3rd, 2002 the tribunal made an order permitting the employer to withdraw the Section 33(2)(b) application. Then by a letter dated October 5th, 2002 the workman called upon the employer to reinstate him with full back wages. Since the employer rejected his request by a letter dated March 3rd, 2003, he moved this Court by filing a writ petition, which was disposed of by an order dated September 22nd, 2004 setting aside the order of the tribunal dated October 3rd, 2002 and directing it to hear the withdrawal application once again. The tribunal then heard the parties, recorded evidence, and made the order dated May 20th, 2005.

4. The workman took out his writ petition for a mandamus directing his employer to reinstate him with full back wages. He contended that once the Section 33(2) (b) supplication was withdrawn by his employer, he was to be deemed to be in continuous service, since the termination order dated April 11th, 2000 was to be treated as void and inoperative. His employer took out its writ petition feeling aggrieved by the order of the tribunal directing it to pay compensation at the rate of last drawn salary from April 11th, 2000 to May 20th, 2005.

5. On the strength of the Constitution Bench decision in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, , Mr. Paul has argued that since the Section 33(2)(b) application was withdrawn by the employer, the workman was to be deemed to be in continuous service even in the absence of a formal order of reinstatement, and hence he was entitled to get full back wages. His contention is that as was held by the constitution bench the effect of withdrawal of the Section 33(2)(b) application was that the termination order dated April 11th, 2000 automatically became inoperative. Relying on M.D., Tamil Nadu State Transport Corporation v. Neethivilangan Kumbakonam (sic), he has contended that since the employer is a state within the meaning of Article 12 of

the Constitution of India, the workman was entitled to take out the writ petition seeking a mandamus commanding it to reinstate him with full back wages. He has given me *Indian Telephone Industries Ltd. and Anr. v. Prabhakar H. Manjare and Anr.* (sic), to show that the constitution bench decision was interpreted to hold that once a Section 33(2)(b) application is withdrawn before any order is made therein, it will be a clear case of contravention of the provisions in Section 33(2)(b). His contention is that as was held by the constitution bench in such a case as this the workman need not avail of the remedies available under Sections 10 and 33A of the Industrial Disputes Act, 1947.

6. On the other hand, Mr. Mitra has contended that in all the cases cited by Mr. Paul to me the Apex Court proceeded on the basis that the employer concerned contravened the provisions of Section 33 of the Industrial Disputes Act, 1947, but that that is not the case here. According to him, since here it is nobody's case that the provisions of Section 33 were contravened by the employer, there is no scope to hold, by applying the authorities, that the termination order dated April 11th, 2000 stood inoperative and void the moment the tribunal made the impugned order permitting withdrawal of the Section 33(2)(b) application. In response to Mr. Paul's argument that the Tribunal directed the employer to pay compensation in terms of order of this Court dated September 22nd, 2004, he has argued that it is incorrect to say that by the order dated September 22nd, 2004 this Court directed the tribunal to make order for compensation. His further contention is that in any case, the Tribunal did not make the order directing payment of compensation on the ground that this Court by its order dated September 22nd, 2004 had directed it to do that. By referring me to the impugned order he has contended that the tribunal directed payment of compensation on the premise that the workman was entitled to be treated in continuous employment, since the permission to withdraw the Section 33(2)(b) application would make the termination order dated April 11th, 2000 inoperative and non-existent.

7. As to the question whether the punishment order dated April 11th, 2000 dismissing the workman from service stood inoperative and void, the moment the order dated May 20th, 2005 was passed by the Tribunal permitting withdrawal of his employer's Section 33(2)(b) application. I am of the view that the answer thereto is not available from the three authorities Mr. Paul has cited to me. In *Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd.* the Apex Court was considering the following question:

If the approval is not granted u/s 33(2)(b) of the Industrial Disputes Act 1947. Whether the, order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether "failure to make application u/s 33(2)(b) would not render the order of dismissal inoperative.

It is therefore apparent from that constitution bench decision that their Lordships were considering a case in which the employer was required to file an application

u/s 33(2)(b) of the Industrial Disputes Act, 1947. The Apex Court was considering two things: (i) from which date the order of dismissal would become ineffective, if the Tribunal refused to grant the approval after considering the application u/s 33(2)(b); and (ii) whether failure to make an application u/s 33(2)(b) would make the order of dismissal inoperative. For both the situations the Apex Court proceeded on the basis that it was necessary for the employer, to make an application, i.e. on failure to make the application the employer would contravene the provisions of Section 33.

In the Constitution Bench decision their Lordships said (in para. 15 of the report):

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 u/s 33A. cannot be accepted. In our view, not making an application u/s 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 employee who does not make an application u/s 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 u/s 33A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint u/s 33A or to raise another industrial dispute or to make a complaint u/s 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.

8. In my reading and understanding, the legal positions that emerge from the three authorities given to me are these: (i) When on an application u/s 33(2)(b) approval is not granted]; the order of the employer imposing punishment becomes inoperative from the very moment it was made, and under the circumstances the workman concerned would be deemed to continue in employment even in the absence of any formal order of reinstatement; (ii) When no application u/s 33(2)(b) is filed, though for avoiding contravention of the provisions of Section 33 the employer was required to make such an application, his order punishing the workman would be considered inoperative from the very moment it was made, and the workman would be deemed to continue in employment without requiring the employer to make an order reinstating him;

(iii) When a Section 33(2)(b) application is filed, and then, though in the absence of the application his act punishing the workman would clearly amount to contravention of the provisions of Section 33, the employer decides to withdraw and is permitted to withdraw the application, his order punishing the workman would be treated as inoperative from the moment it was made, and the workman would be deemed to be in continuous employment without requiring his employer to make a formal order of reinstatement.

9. In my view, from the Constitution Bench decision and the latter decision in Indian Telephone Industries of the Apex Court the legal position does not go further. What I mean to say is that such a situation as has arisen in the present case is not covered by any of the propositions laid down by the Apex Court in those decisions. In those cases the Apex Court proceeded on the basis that in the absence of approval granted by the Tribunal after considering the employer's application u/s 33(2)(b), the act of the employer punishing his workman would clearly amount to contravention of the provisions in Section 33 and precisely for this reason the punishment order would be considered inoperative from the very moment it was made. In the present case the question that has arisen is what will happen to the order of the employer punishing his workman, when he withdraws his Section 33(2)(b) application which was never necessary for the reason that in the absence of approval granted by the Tribunal his act would not have contravened the provisions of Section 33.

10. Here the employer made an application on the ground that approval was necessary, since an industrial dispute in which the workman was concerned was pending at the date the punishment order was made. During pendency of the Section 33(2)(b) application the employer filed an application seeking leave to withdraw it on the ground that since in reality no dispute in which the workman was concerned was pending at the date the punishment order was made, the Section 33(2)(b) application was not necessary and approval of the Tribunal was not required. After examining the matter in detail the Tribunal found that there was no reason for the employer to file the Section 33(2)(b) application, since at the date the punishment order was made by it no industrial dispute in which the workman was concerned was pending before the Tribunal. The Tribunal accordingly permitted the employer to withdraw the Section 33(2)(b) application. It is therefore evident that withdrawal of the Section 33(2)(b) application did not put the employer into a situation of making the order dated April 11th, 2000 punishing the workman in contravention of the provisions of Section 33. The Tribunal's approval was never necessary, and the employer quite unnecessarily filed the application seeking approval which the Tribunal could not grant under any circumstances. This being the position, I have no hesitation in holding that the effect of withdrawal of the Section 33(2)(b) application was not that the punishment order dated April 11th, 2000 stood automatically inoperative or void. It remained in force, and the workman had no reason to make a complaint u/s 33A. His remedy was by Way of raising an industrial dispute questioning the validity of that order dated April 11th, 2000.

11. There should not be any dispute regarding the proposition that under the circumstances in which the punishment order becomes inoperative and void and the employer is amenable to the writ jurisdiction of High Court, the workman, unless his employer reinstates him of his own accord, is entitled to approach the Writ Court for appropriate relief, and for this M.D. Tamil Nadu State Transport Corporation cited to "me is the authority. But that is not the situation here. Here, as I have already said the order terminating the workman's service did not become inoperative once his employer was permitted to withdraw the unnecessary Section 33(2)(b) application on the ground that no approval of the Tribunal was required for making that order a valid Order. I therefore find that the workman was not entitled to get any relief from the Writ Court, though he was entitled to get relief from the forum established under the Industrial Disputes Act, 1947 before which he could question the validity of the punishment order dated April 11th, 2000.

12. The other question that has arisen in the writ petition filed by the employer is whether the Tribunal was justified in making an order for compensation at the rate of last pay drawn by the workman to be paid for the period from April 11th, 2000, when the punishment order was made, till May 20th, 2005, when the order was made by the Tribunal permitting his employer to withdraw its seditious 33(2)(b) application., I am unable to accept Mr. Paul's contention that by the order dated September 22nd, 2004 this Court directed the tribunal to make an order for compensation in such a manner as it has done. This Court rather gave the guidelines to be followed by the Tribunal and one of the guidelines was that if the Tribunal was to allow the application for withdrawal then it should consider the question of granting compensation to the workman at the rate of his last pay drawn for the period from the date he was dismissed till the date of allowing the application for withdrawal.

13. The Tribunal, however, did not grant compensation on the basis that it had been directed by the High Court to grant it. It granted compensation rather holding that in view of the legal position leading to the conclusion that with the Withdrawal of the Section 33(2)(b) application the employer's order dated April 11th, 2000 would stand inoperative, the workman would be deemed to have continued in service entitling him to be reinstated With full back wages. This premise was evidently wrong. As I have already said with the withdrawal of the Section 33(2)(b) application of the employer the punishment order dated April 11th, 2000 was not to become automatically inoperative, rather it was to remain in force until set aside by the appropriate forum in appropriate proceedings. The question therefore is whether the order of the Tribunal directing the employer to compensate the workman was altogether bad.

14. In my view, Mr. Paul has rightly said that by filing the frivolous Section 33(2) (b) application the employer caused immense loss and, prejudice to the workman who unfortunately did not even survive the litigation he initiated; he died on March 24th, 2006. I am, however, unable to accept the contention that

he was victimized by his employer. After the order dated April 11th, 2000 was made by his employer, in my view, there was no scope for it to victimize him, or to indulge in any unfair labour practice. The Section 33(2)(b) proceedings initiated by his employer were pending before the Tribunal. They were carried up to this Court, and they are continuing, after a round trip to the Tribunal, even today before this Court. Simply because the proceedings initiated by the employer remained pending causing loss and prejudice to the workman, in my view, it cannot be held that the employer victimized, him or indulged in any unfair labour practice, and thus made itself liable to compensate him.

15. I am, however, of the view that the workman was entitled to be compensated for other reasons. Mr. Mitra has not, questioned the power of the Tribunal to make an order compensating the workman. Even if it were raised, I should hold that it has no merit. The employer seeking permission of the Tribunal to withdraw the Section 33(2)(b) application was not entitled to get the order as a matter of right, The Tribunal, in my view, possessed not only the power to make the order permitting withdrawal, but also to direct the employer to compensate the workman appropriately. I must put it on record that as to the justification for making an order for compensation in the present case, Mr. Mitra has found little to say. What he has said is the amount of compensation determined by the Tribunal is unreasonable.

16. I unhesitatingly say that here the employer initiated an utterly frivolous proceeding by filing the Section 33(2)(b) application. It did not care to make necessary inquiry for ascertaining whether any industrial dispute in which the workman was concerned was really pending decision. To make the matter worse it went on contesting the matter for years together, and when it found itself unsuccessful at the first-stage of the proceedings; it woke up find that it was never necessary to file an application u/s 33(2)(b). In the process it robbed a few precious years of the workman's life. Pendency of the frivolous proceedings initiated by the employer deprived, the workman of the opportunity of questioning the punishment order dated April 11th, 2000. In the absence of the proceedings, according to the existing law he could question it by initiating appropriate proceedings.

17. On these facts, I do not see any reason to say that the order directing the employer to compensate the workman was not called for. The Tribunal justifiably made the order for compensation, though on a wrong premise. I think the order for compensation should be sustained, but the quantum fixed by the Tribunal should be modified. In my view, in the facts and circumstances of the case, it will be just, fair and reasonable if the employer is directed to pay rupees two lakh on account of compensation for causing serious loss and prejudice to the deceased workman. Needless to say that the amount of compensation shall be paid by the employer in addition to any other payment to which the workman was entitled.

18. For these reasons, while I dismiss the workman's writ petition, I dispose of the employer's writ petition modifying the order of the Tribunal dated May 20th,

2005 to the effect that on account of compensation it shall pay a sum of rupees two lakh. All other admissible amounts shall also be paid; and all payment shall be made within a fortnight from the date of communication of this order. There shall be no order for costs. i

Urgent certified xerox copy of this order shall be supplied to the parties, if applied for, within three days from the date of receipt of the file by the Section concerned.