

(1981) 12 RAJ CK 0014
In the Rajasthan High Court

Dinesh Khare

APPELLANT

Vs

Industrial Tribunal and Others

RESPONDENT

Date of Decision : 01-12-1981

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 10, 2, 31, 33, 33A
PROVIDENT FUNDS ACT, 1925 — Section 2, 6

Citation : (1982) 2 LLJ 17 : (1982) RLW 145 : (1981) WLN 678

Hon'ble Judges : S.C. Agarwal, J

Bench : Single Bench

Judgement

S.C. Agarwal, J.—This writ petition filed under Articles 226 and 227 of the Constitution of India is directed against the order dated 14th Dec. 1971, passed by the Industrial Tribunal, Rajasthan, Jaipur thereafter referred to as "the Tribunal") u/s 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"), whereby the Tribunal gave its approval to the action of the management of the " Daily Rashtrdoot " (hereinafter referred to as "the management'") dismissing the petitioner from service.

2. "Rashtrdoot", is a daily Hindi news- paper published from Jaipur. The petitioner, Dinesh Khare, joined "Rashtrdoot" in September, 1951, and he was appointed as Editor of the said newspaper in May, 1952. When he was employed as editor of the "Rashtrdoot" the petitioner was served with a charge-sheet dated 27th January, 1967 containing charges of misconduct and he was required to submit his explanation to the said charges. The petitioner submitted his explanation dated Feb. 2, 1967, to the aforesaid charges. But the management was not satisfied with the same and the services of the petitioner were terminated by order dated Feb. 18, 1967. The aforesaid termination of the services of the petitioner gave rise to an industrial dispute which was referred for adjudication by the State Government to the Labour Court, Rajasthan, Jaipur hereinafter referred to as "the Labour Court";. The Labour Court, by its award dated October 7, 1968. declared that the petitioner was a working journalist

governed by the provisions of the Working Journalists (Condition of Service and Miscellaneous Provisions) Act, 1955, (hereinafter referred to as the "Working Journalists Act") and that the termination of the service of the petitioner was in reality a dismissal for misconduct and, since no domestic enquiry was held into the charges levelled against the petitioner, the termination of the services of the petitioner was wrongful. The Labour Court, therefore, ordered reinstatement of the petitioner with full back wages. The appeal filed by the management against the said award of the Labour Court was dismissed by the Supreme Court on September 22, 1969.

3. Thereafter, the management served a charge-sheet dated October 18, 1969 containing fourteen charges, on the petitioner. The aforesaid charge-sheet dated 18th October, 1969 contained the charges which were the subject-matter of the earlier charge-sheet dated January 27, 1967, but it also contained certain additional charges. In his reply dated November 22, 1969, the petitioner denied the charges levelled against him in the charge-sheet dated October 18, 1969, Shri D.P. Sharma was appointed as the enquiry officer, by the management, to hold an enquiry into the said charges. The enquiry officer, after holding the enquiry into charges contained in the charge - sheet dated October 18, 1969 submitted his report dated September 29, 1970 wherein, he found that the charges Nos. 1, 2, 3, 4, 5 and 8 had been proved against the petitioner. The said enquiry report was considered by respondent No. 5, Shri Hazari Lal Sharma, the proprietor of the "Rashtradoot" and he agreed with the findings recorded by the enquiry officer in respect of charges Nos. 1, 2, 3, 4, 5 and 8, but he held that charge No. 3 related to an incident of the year 1964 and that no action was called for against the petitioner in respect of the said charge. Respondent No. 5 was, however, of the view that action should be taken against the petitioner with regard to charges Nos. 1, 2, 4, 5 and 8 and he, therefore, imposed the punishment of removal from service on the petitioner for charges Nos. 1, 2 and 4 collectively and charges Nos. 5 and 8 separately, and by his order dated November 23, 1970, he ordered that the petitioner be removed from service with effect from November 30, 1970. In the order aforesaid, it was stated that the petitioner had been offered one month's notice pay as required u/s 33(2)(b) of the Act and that he should collect the same from the office between 11-00 A.M. and 4-00 P.M. on any day after November 27, 1970. By the order aforesaid, the petitioner was also informed that an application u/s 33(2)(b) of the Act was being moved before the Tribunal for approval of the order of dismissal.

4. On November 26, 1970, the management moved an application before the Tribunal u/s 33(2)(b) of the Act for grant of approval to the act of the management in dismissing the petitioner from service with effect from November 30, 1970. A sum of Rs. 524.60 was also remitted to the petitioner by money order towards one month's wages, as referred to in the order of dismissal dated November 23, 1970. The aforesaid application for approval that was submitted by the management before the Tribunal, was contested by the petitioner, and in his reply, dated December 24, 1970, the petitioner submitted that the petitioner

could not be punished for the charges which were the subject-matter of the earlier charge-sheet leading to the order dated February 18, 1967, whereby the services of the petitioner were terminated, and that, a subsequent enquiry into the said charges was barred by the principle of *res judicata*. In the said reply, the petitioner had also submitted that the domestic enquiry that was conducted by the enquiry officer, was not fair and that the petitioner had not been afforded full opportunity to defend himself. In the said reply, the petitioner further submitted that he had been victimised for trade union activities and for supporting the demand of the employees of the "Rashtradoot" for getting interim relief as recommended by the Wage-Board for Working Journalists. In the said reply, the petitioner also submitted that the charges on the basis of which the order dated November 23, 1970, terminating the services of the petitioner had been passed, were vague and did not disclose any misconduct as defined in the standing orders, and that, moreover, the said charges had not been established from the evidence on record. The petitioner also submitted that under the standing orders, the managing editor alone had the right to take disciplinary action against the petitioner and that the proprietor had no right to take any disciplinary action against the petitioner. The petitioner also submitted that he had not been paid one month's wages at the time of the passing of the order of termination as required by the proviso to Clause (b) of Sub-section (2) of Section 33 of the Act.

5. The objections with regard to *res judicata* and the fairness of the domestic enquiry raised by the petitioner were disposed of by the Tribunal by its order dated July 26, 1971. By its order aforesaid, the Tribunal rejected the contention of the petitioner that the enquiry into the charges contained in the charge-sheet dated October 18, 1969 was barred by constructive *res judicata* on account of the fact that eight of the charges contained in the charge-sheet dated January 27, 1967 were repeated in the charge-sheet dated October 18, 1969. The Tribunal held that in the previous adjudication, the Labour Court had not gone into the merits of the charges contained in the charge - sheet dated January 27, 1967, and that the Labour Court had set aside the order of termination passed by the management for the reason that the petitioner was a working journalist and that no enquiry was held into the charges contained in the charge-sheet dated January 27, 1967 before the passing of the order of termination. The Tribunal, by its order aforesaid, upheld the contention of the petitioner that he had been denied full and fair opportunity to defend himself during the course of the domestic enquiry and that the enquiry and findings of the enquiry officer, was, therefore, vitiated. But, instead of passing an order for a fresh enquiry, the Tribunal directed that the enquiry be reopened for the cross-examination of the management's witness, namely, Lal Mohammad Gajdar and Hanuman Sahai Sharma and the examination of the defence witnesses named in the application dated 28th and 29th July, 1970, submitted by the petitioner before the enquiry officer.

6. Thereafter, the Tribunal re-opened the enquiry in accordance with order dated July 26, 1971, and the petitioner was allowed to cross-examine Lal Mohammad

Gajdar and Hanuman Sahai Sharma. The petitioner was also afforded an opportunity to produce the four witnesses whom he wanted to examine in his defence, but the petitioner did not avail the said opportunity.

7. The Tribunal, thereupon, passed the order dated December 14, 1971, whereby, the Tribunal gave its approval to the action of the management in terminating the services of the petitioner. In its order aforesaid, the Tribunal reiterated the view expressed by it in its previous order dated July 26, 1971 that in the previous adjudication, the Labour Court, in its award dated October 7, 1968, had not gone into the merits of the charges contained in the charge-sheet dated January 27, 1967 and the Labour Court had decided the matter in favour of the petitioner on the view that the petitioner was a working journalist and that he could not be dismissed without holding an enquiry into the charges levelled against him and that such an enquiry had not been held. The Tribunal, after going into the merits of the charges on the basis of which, the action was taken against the petitioner, found that charges Nos. 1, 2- 4, 5 and 8, were made out against the petitioner and his dismissal on charges Nos. 1, 2, and 4 collectively and for 5 and 8 separately cannot be questioned. The Tribunal rejected the contention urged by the petitioner that he had been victimised for his trade union activities. The Tribunal also rejected the contention urged by the petitioner that the proprietor was not entitled to dismiss the petitioner. As regards the objection raised by the petitioner that he had not been given one month's wages at the time of dismissal the Tribunal held that the question as to the wages of the petitioner, was subjudice at the time of the passing of the order of dismissal and that the petitioner had been last paid his salary at the rate of Rs. 570 per month and that after deducting Rs. 45 towards Provident Fund contribution, the petitioner had been paid one month's wages.

8. Being aggrieved by the orders of the Tribunal dated July 26th, 1971 and December 14, 1971, the petitioner has filed this writ petition.

9. I have heard Shri B.L. Sharma, the learned Counsel for the petitioner and Shri P.C. Jain, the learned Counsel for the management.

10. Shri Sharma has urged the following contentions to assail the orders, passed by the Tribunal :

(1) There has been non-compliance with the mandatory provisions of the proviso to Clause (b) of Sub-section (2) of Section 33 of the Act, in as much as the management have failed to pay the petitioner one month's wages in lieu of notice at the time of the passing of the order of termination, and that in view of the contravention of the mandatory provisions contained in the said proviso, the application filed by the management for approval of the action taken by the management in terminating the services of the petitioner ought to have been rejected.

(2) The termination of services of the petitioner under the order dated 23rd November, 1970, was in contravention of the provisions of the Standing Orders in

as much as;

(a) the charges on the basis of which the petitioner's services have been terminated, do not constitute misconduct under Clause 15 of the standing orders;

(b) the punishment was imposed on the petitioner without taking into consideration the previous record of the petitioner as required by Clause 16(5) of the Standing Order; and

(c) the proprietor of the "Rashtradoot" is not empowered under the standing orders to take disciplinary action against the petitioner.

(3) The charges on the basis of which, action has been taken against the petitioner, are vague and as a result thereof, the petitioner was denied a fair opportunity to defend himself.

(4) The domestic enquiry conducted by the management was not fair and the Tribunal, having arrived at the conclusion that the petitioner had been denied full and fair opportunity to defend himself during the course of the enquiry, ought to have ignored the said enquiry. The Tribunal erred in permitting the management to adduce evidence before it and thereby supplement the adduced in the said enquiry and thus make good the defects in the said enquiry, which was not permissible.

(5) The findings recorded by the Tribunal that the charges Nos. 1, 2, 4 and 8 are established against the petitioner, is perverse and is based on no evidence.

(6) The action of the management in terminating the service of the petitioner was an unfair labour practice and it amounts to victimisation.

(7) The Tribunal was biased in favour of the management and the orders passed by the Tribunal are vitiated by the said bias.

11. In support of the first contention, Shri Sharma has submitted that under the proviso to Clause (b) of Sub-section (2) of Section 33 of the Act, it was incumbent upon the management to have paid to the petitioner one month's wages at the time of the passing of the order of termination. According to Shri Sharma on the date of the passing of the order of termination the wages of the petitioner, as determined in various adjudications, were Rs. 661.50 per month and that the petitioner was not paid the aforesaid amount of wages which was payable to him. The submission of Shri Sharma was further that even if the contention of the management that the monthly wages of the petitioner were Rs. 570 is accepted, the petitioner was admittedly not been paid Rs. 570. Shri Sharma has submitted that it was not permissible for the management to deduct Rs. 45 on account of Provident Fund Contribution out of the wages for one month that were payable to the petitioner under the proviso to Clause (b) of Sub-section (2) of Section 33 of the Act.

12. Shri Jain on the other hand, has submitted that on the date of the passing of the order dated 23rd November, 1970, the question with regard to the quantum

of wages payable to the petitioner was sub-judice and that in the circumstances, the management had paid the petitioner the wages at the rate of Rs. 570 per month which were the wages last paid to the petitioner. Shri Jain has also submitted that the management was entitled to deduct the provident fund contribution which was payable by the petitioner under the provisions of the Employees Provident Fund Act, out of one month's wages which were payable to the petitioner under the proviso to Clause (b) to Sub-section (2) of Section 33 and that the amount of Rs. 524.50 which was remitted to the petitioner after deducting Rs. 45-50 as Provident Fund contribution from Rs. 570, was fully in compliance with the provisions contained in the aforesaid proviso Shri Jain has further submitted that even if it be assumed that the management has failed to comply with the provisions contained in the aforesaid proviso, the said breach is only a technical breach which does not vitiate the action of the management, and that the application submitted by the management u/s 33(2)(b) was not liable to be dismissed on account of contravention of the provisions of the proviso to Clause (b) of Sub-section (2) of Section 33.

13. In view of the submissions aforesaid it is necessary to first deal with the question as to the effect of contravention of the proviso to Clause (b) of Sub-section (2) of Section 33 of the Act, because, if the contention of Shri Jain that the contravention of the aforesaid proviso does not invalidate the action of the management and that the application for approval u/s 33(2)(b) was not liable to be dismissed on account of the aforesaid contravention, is accepted, then it would not be necessary to examine the submissions of Shri Sharma with regard to the contravention of the aforesaid proviso.

14. For the purpose of deciding the aforesaid question, it would be necessary to take into account the legislative history of Section 33 of the Act. Section 33 of the Act, as originally enacted, provided as under:

No employer shall, during the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial 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 proceedings, nor, save with the express permission in writing of the conciliation officer, Board or Tribunal, as the case may be, shall he, during the pendency of such proceedings, discharge, dismiss, or otherwise punish any such workmen, except for misconduct not connected with the dispute.

15. Under the aforesaid provisions there was an absolute ban on the employer, altering to the prejudice of the workmen, the conditions of service applicable to them, during the pendency of conciliation proceedings or proceedings before a Tribunal but the employer could discharge, dismiss or otherwise punish the workmen after obtaining the permission of the authority before whom the proceedings were pending. Such a permission was, however, not required in cases where the discharge, dismissal or other punishment was imposed for misconduct not connected with the dispute. At that time, the only deterrent for

the contravention of the provisions of Section 33, was prosecution of the employer u/s 31 of the Act.

16. By the Industrial Disputes (Appellate Tribunal) Act, 1950 (Act No. 48 of 1950) Section 33 was substituted by the following provision:

33. Conditions of service, etc., to remain unchanged during pendency of proceedings. During the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute no employer shall-

(a) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(b) discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the conciliation officer, Board or Tribunal, as the case may be."

17. As a result of the aforesaid amendment obtaining of permission of the authority before whom the proceedings were pending was made a condition precedent for altering the conditions of services as well as for discharging or punishing whether by dismissal or otherwise, a workman and no exception was made for misconduct not connected with the dispute, By Act 48 of 1950 Section 33A was also inserted in the Act, and by Section 33A a right has been conferred on the workman to make a complaint before the Labour Court or Tribunal, in writing, in cases where the employer contravenes the provisions of Section 33 during the pendency of proceedings before the Labour Court or Tribunal and the Labour Court or Tribunal has been enjoined to decide the said complaint as if it were a dispute referred to or pending before it in accordance with the provisions of the Act and to submit its award to the appropriate Government and that the provisions of the Act shall apply to the said award.

18. By Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 (Act No. 36 of 1956), the Section was again substituted, Certain amendments were introduced in Section 33, as substituted by Act No. 36 of 1956, by the Industrial Disputes (Amendment) Act, 1964 (Act No. 36 of 1964) and the Industrial Disputes (Amendment; Act, 1971 (Act No. 45 of 1971). Section 33, amended reads as under :

33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings :

(1) During the pendency of any conciliation proceedings 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 workman 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.

Explanation-For the purposes of this Sub-section a "protected workman", in relation of 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 purpose of Sub-section (3) shall be one per cent of the total number of workmen employed there in 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 union , 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 make 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, as expeditiously as possible, such order in relation thereto as it deems fit.

19. In the present case we are concerned with the provisions of Section 33 as they stood on 23rd November, 1970, i.e., prior to the enactment Act No. 45 of 1971. The only amendment that was introduced by Act No. 45 of 1971 was the substitution of the words "an officer" by the words "a member of the executive or other office bearer" in the explanation to Sub-section (3). The said amendment is of no significance to the present case.

20. Section makes a broad distinction between an action proposed to be taken by the employer to the prejudice of the workman in regard to any matter connected with the dispute which is pending before the authorities referred to therein and action proposed to be taken to the prejudice of the workman in regard to a matter not connected with the dispute pending before the said authorities. Sub-section (1) of Section 33 deals with such actions proposed to be taken with regard to the matter connected with the dispute and imposes a condition that such action can only be taken with the previous permission of the authority before whom the dispute is pending. Sub-section (2) of Section 33 deals with such actions proposed to be taken in regard to matters not connected with the dispute and in such cases, it is necessary to obtain the approval of the authority concerned for the action that is taken. Cases of protected workmen have, however, been placed on a higher footing and under Sub-section (3) previous permission in writing of the authority before which the proceedings are pending is required for any action taken against any protected workman concerned with any such dispute for the purpose or altering, to the prejudice of such protected workmen, conditions of services applicable to them immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workmen. Sub-section (4) provides for the recognition of protected workmen and limits their number as therein indicated Sub-section(5) requires that where an employer has made an application under the proviso to Sub-section (2) the authority concerned shall, without delay, hear such application and pass, as expeditiously as possible, such orders in relation thereto as it deems fit. It brings out the legislative intention that, though no express permission in writing is required in cases falling u/s 33(2)(b) it is desirable that there should not be any time lag between the action taken by the employer and the order passed by the appropriate authority in an enquiry under the proviso to Section 33(2)(b).

21. As observed by the Supreme Court in Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another,

The object of the Legislature in enacting this section clearly appears to be to protect the workman concerned in the dispute which forms the subject - matter of pending conciliation or adjudication proceedings, against victimisation by the

employer on account of his having raised the industrial dispute or his continuing the pending proceedings and to ensure that the pending proceedings are brought to an expeditious termination in a peaceful atmosphere, undisturbed by any subsequent cause tending to further exacerbate the already strained relations between the employer and the workmen. But at the same time it recognises that occasions may arise when the employer may be justified in discharging or punishing by dismissal his employee and so it allows the employer to take such action subject to the condition that in the one case before doing so, he must obtain the express permission in writing of the Tribunal before which the proceeding is pending and in the other, he must immediately apply to the Tribunal for approval of the action taken by him.

In the present case, we are primarily concerned with the proviso to Sub-section (2). The I aforesaid proviso has been considered by the Supreme Court in *Strawboard Manufacturing Co. Vs. Gobind*, wherein, it has been observed as under:

The proviso lays down that no workman shall be discharged or dismissed unless he had 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. It will be clear that two kinds of punishment are subject to the conditions of the proviso, namely, discharge or dismissal. Any other kind of punishment is not within the proviso. Further the proviso lays down two conditions, namely, (i) payment of wages for one month and (ii) making of an application by the employer to the authority before which the proceeding is pending, for approval of the action taken.

As we read the proviso, we are of opinion that it contemplates the three things mentioned therein, namely, (i) dismissal or discharge, (ii) payment of wages and (iii) making of an application for approval, to be simultaneous and to be part of the same transaction, so that the employer when he takes the action u/s 33(2) by dismissing or discharging an employee should immediately pay him or offer to pay him wages for one month and also make an application to the Tribunal for approval at the same time. When however we say that the employer must take action simultaneously or immediately we do not mean that literally, for when three things are to be done they cannot be done one after the other. What we mean is that the employer's conduct should show that the three things contemplated under the proviso, namely, (i) dismissal or discharge, (ii) payment of the wages, and (iii) making of the application, are parts of the same transaction.

Similarly, in *Tata Iron and Steel Co. Ltd. Vs. S.N. Modak*, it has been laid down :

The proviso to Section 33(2) is important for our purpose. This proviso shows that where action is intended to be taken by an employer against any of his employees which falls within the scope of Clause (b), he can do so, subject to the requirements of the proviso. If the employee is intended to be discharged or

dismissed, an order can be passed by the employer against him, provided he has paid such employee the wages for one month, and he has made an application to the authority before which the proceeding is pending for approval of the action taken by him. The requirements of the proviso have been frequently considered by Industrial Tribunals and have been the subject-matter of decisions of this Court as well. It is now well-settled that the requirements of the proviso have to be satisfied by the employer on the basis that they form part of the same transaction; and stated generally, the employer must either pay or offer the salary for one month to the employee before passing an order of his discharge or dismissal, and must apply to the specified authority for approval of his action at the same time, or within such reasonably short time thereafter as to form part of the same transaction.

22. In *The Lord Krishna Textile Mills Vs. Its Workmen*, the Supreme Court has defined the scope of enquiry of an application for approval u/s 33(2) in the following words:

In view of the limited nature and extent of the enquiry permissible u/s 33(2)(b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by Section 33(2)(b) and the proviso are satisfied or not. Do the standing orders justify the order of dismissal? Has an enquiry been held as provided by the standing order. Have the wages for the month been paid as required by the proviso; and, has an application been made as prescribed by the proviso?

The aforesaid observations have been reiterated by the Supreme Court in *Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another*, wherein, the Supreme Court has observed.

In proceedings u/s 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/ Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the Domestic Tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the position settled by the decisions of this Court in *Bengal Bhatdee Coal Co. Vs. Ram Prabesh Singh and Others*, *Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar* 1961 I L.L.J. 511, *Hind Construction and Engineering Co. Ltd. Vs. Their Workmen*, *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, and *Management of Eastern Electric and Trading Co. Vs. Baldev Lal*, that though generally speaking the award of punishment of misconduct under the

Standing Orders is a matter for the managements to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable, or shockingly disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee at. (v) whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

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

23. As to the consequences of dismissal of an application for approval moved under the proviso to Section 33(2)(b) it may be observed that a distinction has to be made between an order granting approval to the action of the employer and an order refusing approval to such action. An order giving approval to the action of the employer under the proviso to Section 33(2)(b) does not conclude the matter and it is open to the workmen to raise a dispute which can be referred for adjudication u/s 10 of the Act. But, in cases where the appropriate authority refuses to give approval to the action of the employer the said action of the employer is rendered void and in co-operative. In Strawboard Manufacturing Co. Vs. Gobind, the Supreme Court has laid down that:

If the Tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fall and thereupon the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer. In such a case no specific proviso as to reinstatement is necessary and by the very fact of the Tribunal not approving the

action of the employer, the dismissal or discharge of the workman would be of no effect and the workman concerned would continue to be in service as if there never was any dismissal or discharge by the employer. In that sense the order of discharge or dismissal passed by the employer does not become final and conclusive until it is approved by the Tribunal u/s 33(2)(b).

Similarly, in *Tata Iron and Steel Co. Ltd. Vs. S.N. Modak*, it has been observed:

If the approval is not granted, the order of dismissal or discharge passed by the employer is wholly invalid or inoperative, and the employee be legitimately claim to continue to be in the employment of the employer notwithstanding the order passed by him dismissing or discharging him. In other words, approval by the prescribed authority makes the order of discharge or dismissal effective; in the absence of approval such an order is invalid and inoperative in law.

24. Reference may now be made to the decisions on which reliance has been placed by Shri Jain, in support of his submission that non-compliance with the proviso to Section 33(2)(b) is merely a technical breach, and it does not oblige the Tribunal to dismiss an application for approval.

25. In *The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others*, the Supreme Court was dealing with a case where during the pendency of an appeal before the Labour Appellate Tribunal, the employer wanted to retrench some of the workmen and had moved an application before the Labour Appellate Tribunal u/s 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950 for permission to retrench the workmen. The provisions of Sections 22 and 23 of the Industrial Disputes (Appellate Tribunal) Act, 1950 were in pari materia with the provisions of Sections 33 and 33-A of the Act. The Labour Appellate Tribunal, while giving permission to retrench the said workmen, imposed certain conditions and the question which arose for consideration before the Supreme Court was whether such conditions could be imposed the Labour Appellate Tribunal while giving its approval to the proposed action of the employer. The Supreme Court held that the Labour Appellate Tribunal could not impose conditions as a prerequisite for granting permission to the employer to retrench its workmen. In that case, the Supreme Court examined the provisions of Sections 33 and 33A of the Act as they stood prior to the enactment of the Act No. 36 of 1956. With reference to the provisions of S- 33 the Supreme Court has observed that the said Section only imposed a ban on the right of the employer and the only thing that the authority is called upon to do is to grant or withhold the permission, i e., to lift or maintain the ban. With reference to the jurisdiction exercised by the Tribunal on a complaint u/s 33A of the Act, the Supreme Court has observed that the authority to whom a complaint is made, is to decide two issues, namely (i) the fact of contravention and (ii) the merits of the act or order of the employer. The Supreme Court rejected the contention that on finding that there has been a contravention of the provisions of Section 33 of the Act, the Tribunal's duty is only to make a declaration to that effect leaving the workmen to take such steps under the Act as they may be entitled to do. The Supreme Court has pointed out

that the scope and ambit of the jurisdiction conferred on the authority named in Section 33A of the Act and Section 23 of the Industrial Disputes (Appellate Tribunal) Act, 1950 was wider than that conferred on the Criminal Court by Section 31 of the Act and Section 29 of the Industrial Disputes (Appellate Tribunal) Act, 1950 and that the authority referred to in Section 33A of the Act has jurisdiction to do complete justice between the parties relating to the matters in dispute and must have power to give such relief as the nature of the case may require. In other words, in the said case, the Supreme Court, has examined the scope and ambit of the jurisdiction that has to be exercised by the authority u/s 33A of the Act on the basis of a complaint and has observed that the said jurisdiction extends to going into the merits of the act or order of the employer even when the employer has contravened the provisions of Section 33 of the Act.

26. In *Equitable Coal Co. Ltd. v. Algu Singh* 1958 I L.L.J. 793, the employer had dismissed its workman from service during the pendency of the proceedings before the Labour Appellate Tribunal without obtaining previous permission in writing of the Labour Appellate Tribunal as required u/s 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950 and a complaint had been made by the workmen u/s 23 of the Industrial Disputes (Appellate Tribunal) Act, 1950. The Labour Appellate Tribunal held that since the management had not obtained the requisite permission of the Appellate Tribunal u/s 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950, the respondent-workmen were entitled to compensation. The Supreme Court reversed the said decision of the Labour Appellate Tribunal on the view that the breach committed by the management in not obtaining the permission of the Labour Appellate Tribunal before taking action against the workmen, was only a technical breach which may not, unless there are compelling facts in favour of the employee, justify any substantial order of compensation in favour of the employee. In the aforesaid decision also the Supreme Court has considered the ambit of the jurisdiction that is exercised on a complaint u/s 23 of the Industrial Disputes (Appellate Tribunal) Act, 1950 and Section 33A of the Act and the Supreme Court has reiterated the law laid down in the *Automobiles Products of India Ltd. v. Rukmaji Bala* (supra).

27. In *The Punjab National Bank Ltd. Vs. Its Workmen*, the Supreme Court was dealing with a case governed by the provisions of Section 33 of the Act as it stood prior to the enactment of Act No. 36 of 1956, and in that case, during the pendency of the industrial dispute before the arbitrator, the employer had dismissed certain workmen without obtaining the permission of the arbitrator and there was contravention of the provisions of Section 33 of the Act. The dispute arising out of the aforesaid dismissal was referred for Adjudication, u/s 10 of the Act, and in that case, the Supreme Court has placed reliance on its earlier decisions in the *Automobiles products of India Ltd. v Rukmaji Bala* (supra) and *Equitable Coal Co. Ltd. v. Algu Singh* (supra), given with reference to the provisions of Section 33A of the Act and has held that the same principles were applicable to a case where a reference had been made u/s 10 of the Act. The

Supreme Court has laid down that in a reference u/s 10 of the Act the Tribunal, after finding that the provisions of Section 33 of the Act have been contravened, has to consider whether the impugned action is otherwise justified.

28. To the same effect, is the decision of the Supreme Court in *The Hindusthan General Electrical Corporation Ltd. Vs. Bishwanath Prasad and Another*, which was also a case arising out of a reference u/s 10 of the Act and the Supreme Court, applying the law laid down in *Punjab National Bank Ltd. v All India Punjab National Bank Employees' Federation* (Supra) held that in spite of the contravention of the provisions of Section 33 the Tribunal could examine the merits of the action taken by the employer.

29. In *Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another*, the employer had passed an order dismissing a workman from service during the pendency of a dispute before the Industrial Tribunal and had moved an application before the Industrial Tribunal u/s 33(2)(b) of the Act for approval of the action taken by it. The said application for approval was, however, subsequently, withdrawn by the employer, and it was dismissed a withdrawn by the Industrial Tribunal. Thereafter, the dismissed workman moved an application before the Labour Court u/s 33C(2) of the Act for determination of the amount of wages due to him, on the ground that the order of dismissal passed by the management was void and he continued to be in service, The Supreme Court held that the application submitted by the workman u/s 33C(2) of the Act was not maintainable inasmuch as the order of dismissal that was passed, could not be held to be void and that the failure to obtain approval for an order of discharge or dismissal u/s 33(2)(b) of the Act does not render the order of discharge or dismissal void or of no effect. In that case, the Supreme Court has placed reliance on its earlier decisions in *Automobilee Products of India Ltd. v. Rukmaji Bala*, (supra) *Equitable Coal Co. Ltd. v. Algu Singh* (supra) and *Punjab National Bank Ltd. v. All India Punjab National Bank Employees Federation* (supra). It may, however, be pointed out that in the *Punjab Beverages* case (supra), the Supreme Court, has drawn a distinction between a case where the employer moves an application for approval u/s 33(2)(b) and the said application is rejected, and a case where the employer does not move an application u/s 33(2)(b) at all and the Supreme Court has observed that in case where the employer has moved an application for approval u/s 33(2)(b) and the same has been rejected, the result would be that the dismissal of the workman would be void and inoperative, but in a case, where an application for approval has been moved, and has been withdrawn by the employer and there is no decision on merits, it could not be said that the approval had been refused by the Tribunal and that the withdrawal of the application for approval stands on the same footing as if no application u/s 33(2)(b) had been filed.

30. The decisions of the Supreme Court, referred to above thus, show that in a case where the employer take action against a workman, in contravention of the provisions of Section 33(2)(b) and does not seek approval for that action in

accordance with the provisions of Section 33(2)(b) of the Act and the workman concerned makes a complaint u/s 33A of the Act or raises an industrial dispute which is referred for adjudication u/s 10 of the Act, the Industrial Tribunal, while examining the said complaint u/s 33A of the Act while dealing with the reference u/s 10 of the Act, would be required to go into the merits of the action that has been taken by the employer in spite of the fact that the employer has contravened the provisions of Section 33(2)(b) of the Act and the fact of such contravention, by itself, would not entitle the workman concerned to any relief. But, if the employer chooses to make an application u/s 33(2)(b) of the Act for approval of the action taken by it, and the said application is dismissed by the appropriate authority and the approval is refused, the action taken by employer against the workman would be void and inoperative. The aforesaid decisions thus do not detract from the law laid down by the Supreme Court in *Lord Krishna Textile Mills v. Its Workmen* (supra); *Strawboard Mfg. Co. Ltd. v. Govind* (supra); *Tata Iron and Steel Co. v. S.N. Modak* (supra) ; *Lalla Ram v. Management of D.C.M. Chemical Works Ltd.* (supra; ; and *M/s Podar Mills Ltd. v. Bhagwan Singh* (supra); that on an application for approval u/s 33(2)(b) of the Act, the appropriate authority is required to examine as to whether the provisions contained in the proviso to Section 33(2)(b) have been complied with and if the authority finds that the said provisions have not been complied with, it may refuse approval and the effect of such refusal would be that the action taken by the employer would be void and inoperative.

31. Shri Jain has also placed reliance on the decision of Division Bench of this Court in *Associated Cement Companies Ltd. Lakheri v. A.N. Kaul* 1959 Raj LW 650. In that case, the employer had dismissed the concerned workman and thereafter, had moved an application for approval u/s 33(2)(b) of the Act, before the industrial Tribunal. The Industrial Tribunal dismissed the application summarily on the view that the employer had failed to comply with the provisions of the proviso to Section 33(2)(b) of the Act inasmuch as, wages for one month were not paid and the application for approval was not made within a reasonable time. This Court set aside the said order of the Industrial Tribunal, on the view that the contravention of the provisions of the proviso was in the nature of technical breach only and that in spite of the aforesaid breach, the Tribunal was obliged to deal with the application for approval on the merits. In that case, Bhandari, J. (as he then was) has observed that the Tribunal was not justified in determining the question as to whether the conditions laid down in the proviso to Sub-section (2) of Section 33 were fulfilled by the employer and that the remedy of the employee was either by way of taking action u/s 31 for the criminal prosecution of the employer or else by making a complaint in writing in the prescribed manner to the appropriate authority as laid down in Section 33A and that when such complaint is made, the appropriate Tribunal shall adjudicate upon the complaint in the manner laid down by the Supreme Court in *Automobile Products of India Ltd. v. Rukmaji Bala*, (supra); and *Equitable Coal Co. Ltd. v. Algu Singh* (supra). Similarly, Modi, J., in his concurring judgment held that the

Tribunal cannot lawfully dispose of an employer's application for approval of an order of dismissal by throwing out such an application merely on the ground that the conditions laid down in the proviso were not fulfilled, and it must further consider the question whether the dismissal was prima facie justified or not. For arriving at the aforesaid conclusion both the learned Judges have placed reliance on the decisions of the Supreme Court in *Automobile Product of India Ltd. v. Rukmaji Bala* (supra) and *Equitable Coal Co. Ltd. v. Algu Singh* (supra). As mentioned earlier in the aforesaid decisions the Supreme Court was considering the scope of the jurisdiction to be exercised by the Tribunal on a complaint u/s 33A of the Act and was not considering the scope of enquiry u/s 33(2)(b) of the Act. The scope of the enquiry u/s 33(2)(b) of the Act has been defined by the Supreme Court in its decisions in *Lord Krishna Textile Mills v. Its Workmen* (supra), *Lalla Ram v. Management of D.C.M. Chemical Works* (supra) and *M/s. Podar Mills Ltd. v. Bhagwan Singh* (supra). The law laid down in the decision of this Court in *Associate Cement Companies Ltd., Lakheri v. A.N. Kual* (supra), is thus not in consonance with the subsequent decisions of the Supreme Court in *Lord Krishna Textile Mills v. Its Workmen* (supra), *Lalla Ram v. Management of D.C.M Chemical Works* (supra); and *M/s. Podar Mills Ltd. v. Bhagwan Singh* (supra). In view of the aforesaid decisions, the Industrial Tribunal, while dealing with an application for approval u/s 33(2)(b) of the Act, is entitled to examine as to whether the conditions laid down in the proviso have been fulfilled, (sic) the said application would be liable to be dismissed.

32. I am, therefore, unable to accept the contention of Shri Jain that the failure to comply with the conditions laid down in the proviso to Section 33(2)(b), is of no consequence whatsoever and that in spite of the contravention of the provisions contained in the said proviso, the Tribunal, while considering an application for approval u/s 33(2)(b), can grant or refuse approval after considering whether the impugned action is justified or not. In my opinion, while dealing with an application for approval, the Tribunal is required to examine as to whether the conditions laid down in the proviso to Section 33(2)(b) have been fulfilled and if the Tribunal finds that the same have not been fulfilled, it would be open to it to dismiss the application and refuse to grant approval, and the effect of such refusal to grant approval would be that the action taken by the employer would be void and inoperative. It is, therefore, necessary to examine the contentions urged by Shri Sharma with regard to the contravention of the proviso to Section 33(2)(b) of the Act.

33. As noticed earlier, the argument of Shri Sharma with regard to the non-compliance with the proviso to Section 33(2)(b) of the Act is two fold, viz., (i) the management paid monthly wages @ Rs. 570.00 whereas monthly wages of the petitioner were Rs. 661.50; and (ii) the management was not entitled to deduct the provident fund contribution out of the monthly wages required to be paid under the proviso to Section 33(2)(b). In so far as the first part of the argument is concerned the question which primarily arises for consideration is whether the monthly wages payable to the petitioner on the date of the passing of order

terminating his services, i.e., on Nov. 23, 1970, were Rs. 570 00 as claimed by the management because if the management fails to establish that the monthly wages of the petitioner were Rs. 570.00 and if it is found that the monthly wages of the petitioner were more than Rs. 570.00 it will have to be held that the management had failed to comply with proviso to Section 33(2)(b) of the Act. For the purpose of deciding the aforesaid question it would be relevant to take note of the following facts and circumstances :

(i) After the award of the Labour Court dated Oct. 7, 1968 the petitioner filed an application before the Labour Court u/s 17 of the working Journalists Act for computation of his wages for the period from July 1, 1967 to Nov. 30. 1968 in terms of the award of the Second Wages Board for Working Journalists. In the said application (which was registered as L.C. No. 6 of 1968) the Labour Court by its order dated Jan. 3, 1969 computed the monthly wages of the petitioner at Rs. 661.50. The aforesaid order of the Labour Court was challenged by the management before this Court in S.B. Civil Writ No. 365 of 1969 which was pending on the date of the passing of the order dated Nov. 23, 1970. As the operation of the order of the Labour Court was not stayed by this Court the management paid to the petitioner the amount awarded by the Labour Court.

(ii) A sum of Rs 631.50 was paid by the management to the petitioner towards monthly wages for the month of December 1968. Being not satisfied with the aforesaid payment the petitioner moved an application (M.A. No. 11 of 1969) before the Labour Court for computation of his wages and in this case also the Labour Court computed the wages of the petitioner @ Rs. 661.50. Against the aforesaid order passed by the Labour Court the management filed a declaratory suit in the Court of Munsif Magistrate, Jaipur City East which was pending on the date of the passing of the order dated Nov.23, 1970. In the said suit an injunction had been issued restraining the recovery of the additional amount.

(iii) For the months of January to August, 1968 the petitioner submitted various applications before the Labour Court u/s 17 of the Working Journalists Act for computation for his wages for the said months. The said application relating to the months of January and April to August, 1969 were dismissed by the Labour Court and the application for computation of wages for the month of February and March 1962 were allowed by the Labour Court and the wages of the petitioner were computed at Rs. 661.50 per month. Against the aforesaid orders of the Labour Court relating to the months of February and March, 1969 the management filed declaratory suits in the Court of Munsif Magistrate, Jaipur City East and in the said suits, which were pending on the date of the passing of the order dated November 23, 1970, injunction orders had been passed staying the enforcement of the orders of the Labour Court.

(iv) For the months of January and April to August, 1969 the petitioner moved another application (M.A. 159 of 1969) u/s 33C(2) of the Act before the Labour Court for computation of his salary for the aforesaid months. The said application was allowed by the Labour Court and the salary of the petitioner was computed

at the rate of Rs. 661.50 per month. The aforesaid order of the Labour Court was challenged by the management before this Court in S.B. Civil writ No. 1982 of 1969 which was pending in this Court on the date of passing of the order dated Nov. 23, 1970. In the said writ petition this Court had earlier passed an order staying the execution of the order of the Labour Court but subsequently it modified the said order and the petitioner was paid the wages as computed by the Labour Court on his furnishing Bank guarantee to the lower Court-

(v) During the pendency of the present writ petition, the writ petition referred to above (C. W. No. 365 of 1969 and C. W. No. 1962 of 1969) were disposed of by this Court by order dated May 2, 1977, whereby the aforesaid writ petitions were allowed and the orders passed by the Labour Court were set aside and the matters were remanded to the Labour Court on the view that during the relevant period the petitioner was only entitled to receive Rs. 631 50 per month as total emoluments and not Rs. 661.50 as determined by the Labour Court.

34. Shri Sharma has submitted that in view of the aforesaid orders, passed by the Labour Court in the proceeding referred to above, wherein, the salary of the petitioner was computed at Rs. 661.50 the monthly wages of the petitions on the date of the passing of the order terminating the services of the petitioner i.e. on 23rd Nov. 1970, was Rs. 661-50, and that the management had admittedly not paid Rs 661.50, to the petitioner at the time of the passing of the order dated 23rd Nov., 1970. Shri Sharma has also submitted that even if the aforesaid ; determinations by the Labour Court are ignored, it was incombent, upon the Tribunal to have determined the wages payable to the petitioner on the date of the passing of the order dated 23rd November, 1970 and that without making such a determination, the Tribunal could not have held that the wages of the petitioner on the date of the passing of the order were Rs. 570 00 per month.

35. Shri Jain, on the other hand, has submitted that for the purpose of the proviso to Sub-section (2) to Section 33, all that is required to be seen is the amount of wages the employer had last paid to the workman and that the Tribunal was right in taking into account the fact that in the month of October, 1970, the petitioner had been paid wages at the rate of Rs 570.00 per month.

36. In my view, for the purpose of deciding whether the proviso to Section 33(2) (b) has been complied with the factual position the existed on the date of the passing of the order terminating the service of the workman has to be taken into account and if the parties are agreed with regard to the amount of wages then, that should form the basis for payment and in the event, of disagreement between the parties the Tribunal can take into account any previous < adjudication with regard to the amount of the wages payable to the workman concerned and if there is no such determination the Tribunal should not make such a determination. In the present case, on the date of the passing of the order dated 23rd Nov., 1970, there were orders passed by the Labour Court in proceedings u/s 17 of the Working Journalists Act as well as in proceedings u/s 33C(2) of the Act, wherein, the wages that had been paid to the petitioner were

Rs. 661.50. It is true that the aforesaid orders were under challenge in the writ petitions filed before this Court and in suits pending before the Court Munsiff Magistrate, Jaipur City East and that in some of these proceeding stay orders had been obtained. But, there is no dispute that against the order dated Jan. 3, 1969, passed by the Labour Court in the proceedings u/s 17 of the Working Journalists Act wherein the monthly wages of the petitioner for the period July 1, 1967 to Nov. 30, 1968 were computed @ Rs. 661.50; this Court in S.B. Civil Writ Petition No. 365 of 1969, had not passed any order staying the operation of the order of the Labour Court. It can, therefore, be said that on the date of the passing of the order dated 23rd Nov 1970, there was in existence an adjudication by the Labour Court with regard to the quantum of monthly wages payable to the petitioner and the said adjudication was operative on that date and that the management, while taking action against the petitioner, could not ignore the said adjudication. In other words, for the purpose of proviso to Section 33(2)(b), the management should have proceeded on the basis that the monthly wages payable to the petitioner were Rs. 661.50, as had been determined by the Labour Court, and that the management was not justified in proceeding on the basis that the wages payable to the petitioner, was Rs. 570 per month.

37. I am unable to accept the contention of Shri Jain that since Rs. 570.00 have been paid as wages for the month of October, 1970, the said amount has to be treated as the wages payable to the petitioner for the purpose of the proviso to Section 33(2)(b). The fact that the petitioner was claiming Rs 661.50 as wages payable to him prior to October, 1970, and that he had obtained orders from the Labour Court on that basis, shows that the petitioner was contesting the claim of the management that the petitioner was entitled to the payment of wages @ Rs. 570 00 per month. In this context it may be observed that the wages for the month of October, 1970 were paid to the petitioner vide order (Ext. M 7 before the Tribunal) dated November, 28, 1970. The said payment cannot afford the basis for holding that the monthly wages of the petitioner on the date of the passing of the order terminating his services were Rs 570.00. It may also be noticed that prior to that the management had itself paid to the petitioner Rs. 631.50 as wages for the month of December. 1968. It is not the case of the management that subsequent to December 1968 but prior to the passing of the order dated Nov. 23, 1970 the wages of the petitioner had been reduced to Rs. 570.00 per month. Even if the adjudications by the Labour Court are not taken into account for the reason that the said adjudications were the subject-matter of writ proceedings pending in this Court and civil suits pending in the Court of Munsif Magistrate. Jaipur City, East, there is a prior payment of Rs. 631 50 as salary for the month of December, 1968 which the management could not ignore while passing the order dated Nov. 23, 1970, and in the face of the aforesaid payment, the management could not proceed on the basis that the monthly wages of the petitioner on Nov. 23, 1970 were Rs. 570.00. In paying the monthly wages on the basis that on November 23, 1970, the wages of the petitioner were Rs. 570.00 per month the. management has contravened the provisions of the

proviso to Section 33(2)(b) of the Act.

38. Shri Sharma has further contended that even if the case of the management was accepted that the wages of the petitioner should be calculated at the rate of Rs. 570 per month, the petitioner was not paid one month's wages inasmuch as he was paid Rs. 524 50 only and not Rs. 570.00. According to Shri Sharma, the management was not justified in deducting Rs. 45.50 on account of provident fund contribution payable by the petitioner out of the amount of wages payable to the petitioner under the proviso to Section 33(2)(b) of the Act. Shri Sharma has submitted that Provident Fund contribution is not payable on one month's wages which are required to be paid under the proviso to Section 33(2)(b) of the Act. In support of his aforesaid submission, Shri Sharma has placed reliance on the decision of the Bombay High Court in *India United Mills Ltd. Vs. Regional Provident Fund Commissioner*,

39. Shri Jain, has submitted that the Provident Fund contribution was payable by the petitioner on one month's wages to which he was entitled by virtue of the proviso to Section 33(2)(b), and that the amount of Rs. 45.50 had been rightly deducted by the management, and therefore, it cannot be said that the management had failed to pay one month's wages to the petitioner.

40. For the purpose of determining as to whether Provident Fund Contribution was payable on one month's wages to which the petitioner was entitled under the proviso to Section 33(2)(b), it would be necessary to refer to the definition of wages contained in Section 2(rr) of the Act which reads as under;

"wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes-

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to:

(I) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;

(II) any travelling concession; but does not include-

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable On the termination of service;

According to the aforesaid definition, wages would include all remuneration capable of being expressed in terms of money, which would, if the term of

employment, express or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment and the allowances mentioned in Clauses (i), (ii) and (iii), but it would not include, bonus or any contribution paid or payable by the employer including gratuity. The question which arises for consideration is, whether Provident Fund contribution is payable by the employer on the one month's wages that are payable to the workman under the proviso to Section 33(2)(b). As the liability to pay Provident Fund Contribution arises by virtue of the provisions contained in the Employees' Provident Funds Act, 1952 (hereinafter referred to as the "Provident Fund Act"), it will be necessary to take note of the relevant provisions of the Provident Fund Act which impose liability for making a contribution to the Provident Fund by the employer as well as the employee. Section 6 of the Provident Funds Act which provides for contributions to the Provident Fund, reads as under:

Contributions and matters which may be provided for in schemes-The contributions which shall be paid by the employer to the fund shall be six and a quarter per cent of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees whether employed by him directly or by or through a contractor, and the employee's contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desired and if the scheme makes provision, therefore, be an amount not exceeding eight and one-third per cent of his basic wages, dearness allowance and retaining allowance (if any):

Provided that in its application to any establishment or class of establishments which the Central Government after making such enquiry as it deems fit, may by notification in the official Gazette specify, this section shall be subject to the modification that for the words six and a quarter per cent, the words eight per cent shall be substituted":

Provided further that where the amount of any contribution payable under this Act involves a fraction of rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or a quarter of a rupee.

Since Section 6 of the Act speaks of basic wages, it is necessary to refer to the definition of the expression "basic wages" which has been defined in Section 2(b) of the Provident Funds Act, as under :

"Basic wages" means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include-

- (i) the cash value of any food concession;
- (ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such

employment

(iii) any presents made by the employer;

41. In *India United Mills Ltd. v. Regional Provident Fund Commr., Bombay* (supra) the question which arose for consideration was, whether one month's wages in lieu of notice to which a workman was entitled under the standing orders, could be regarded as basic wages and provident fund contribution was payable on the same. The Bombay High Court has held that wages paid in lieu of notice for terminating the services of an employee, could not be regarded as basic wages u/s 2(b) of the Provident Fund Act inasmuch as the said payment could not be held to be a payment representing emoluments earned by an employee while on duty. In the said case, the Bombay High Court has observed as under.

The expression "emoluments which are earned by an employee while on duty" represents the amounts actually earned by an employee during the period of his employment while he is actually on duty. It is not a payment earned for duty done. It is a payment by way of consideration for terminating the contract of employment of a permanent employee without notice. The payments cannot in any sense be regarded as representing emoluments earned while on duty" and are not and do not constitute "basic wages" within the meaning of the definition given in the Employees' Provident Funds Act, 1952 and no percentage thereof is payable by way of provident fund contribution.

In *ray* view, one month's wages which are payable under the proviso to Section 33(2)(b) stand on the same footing as wages paid in lieu of notice for terminating the services of the employee under the Standing Orders. 2 One month's wages which are paid to the workman under the proviso to Section 33(2)(b), cannot therefore be regarded as representing emoluments earned by the workman concerned while on duty. The said payment 3 is to be made in view of the requirements of the proviso to Section 33(2)(b) and it relates to the period the workmen will not be in service, and therefore, will not be on duty. In my view, therefore, provident fund contribution was not payable on one month's wages to which a workman is entitled u/s 33(2)(b) and the management could not make the deduction for provident fund contribution from the one month's wages for the purpose of paying the same to the petitioner at the time of the passing of the order dated 23rd November, 1970.

42. It must, therefore, be concluded that the management has failed to pay to the petitioner, one month's wages as required by the proviso to Section 33(2)(b) and there has been non-compliance with the provisions of the proviso to Section 33(2)(b) of the Act and in view of the aforesaid contravention of the provisions of proviso, the application filed by the management for approval u/s 33(2)(b) was liable to be dismissed in view of the decision of the Supreme Court in *Podar Mills Ltd. v. Bhagwan Singh* (supra). The order of the Tribunal dated 14th Dec. 1971, according approval to the action of the management in terminating the 5 services of the petitioner, cannot, therefore, be upheld and must be quashed.

43. Since I am of the opinion that the first contention urged by Shri Sharma, merits acceptance and the order passed by the Tribunal, is liable to be quashed, for that reason alone. I do not think it necessary to deal with the other contentions urged by Shri Sharma.

44. In the result, the writ petition is allowed, and the order dated 14th December 1971, passed by the Industrial Tribunal, Rajasthan, Jaipur, in miscellaneous case No. I.T. 41 of 1970, is quashed. The matter is remanded to the Industrial Tribunal, Jaipur for passing an appropriate order on the application submitted by the management u/s 33(2)(b) of the Act, in the light of the observations made in this order. Since the matter has been pending since long, it is directed that the Industrial Tribunal shall pass the necessary orders within a period of two months. The record of the case may be sent back to the Tribunal immediately. Taking into consideration the facts and the circumstances of the case the parties are left to bear their own costs in this writ petition.