

(2015) 02 MAD CK 0073

In the Madras High Court

Case No : W.A. Nos. 1759, 1760 of 2014, M.P. Nos. 1, 1 and 2 of 2014

Manager, Atomic Energy Employees Consumer Cooperative
Stores Ltd.

APPELLANT

Vs

A.L. Chidambaram and Others

RESPONDENT

Date of Decision : 10-02-2015

Acts Referred:

Industrial Disputes Act, 1947 — Section 33-A, 33-C, 33-C(1), 33-C(2)

Tamil Nadu Shops and Establishments Act, 1947 — Section 10, 18(2), 19(2), 41(2)

Citation : (2015) 1 LLJ 538 : (2015) WritLR 297

Hon'ble Judges : M. Venugopal, J.; Satish K. Agnihotri, J.

Bench : Division Bench

Advocate : P. Anbarasan, for the Appellant; K.V. Ananthakrishnan, Advocates for the Respondent

Judgement

Satish K. Agnihotri, J.

1. Questioning the legality and validity of the common order dated 24.1.2011 passed in W.P.No. 22818 and 22819 of 2008, the instant intra-court appeals have been preferred by the Management of Atomic Energy Employees Consumer Cooperative Stores Ltd.

2. The facts leading to filing of these appeals, which arise from the same dispute, are :

The first respondent (hereinafter referred to as "employee"), while working as Assistant Manager, was terminated from service vide order dated 6.7.1991. There against, the employee preferred an appeal under Section 41(2) of the Tamil Nadu Shops and Establishment Act, 1947 (hereinafter referred to as "Shops Act"). The appellate authority, having noted the fact that the employer has failed to establish charges by evidence recorded at enquiry, has set aside the order of termination, without there being an order of reinstatement or grant of any consequential benefits. There against, a Writ petition was preferred by the

Management in W.P.No. 2050 of 1994, which was dismissed by the learned Single Judge on 18.8.2000. There against, an appeal being W.A.No. 871 of 2001 was preferred. A Division Bench of this court by judgment dated 6.11.2007, dismissed the appeal, observing as under :

"7. When a reference is made to an Industrial the management had not taken any plea before the appellate authority or before learned single Judge that the respondent is not entitled for back wages, being in job in some other organisation during the intervening period. No such plea having been taken before the appellate authority or before the learned single Judge, or before this Court, we are not inclined to give any finding in this regard."

3. It appears, in the meantime, that a petition under Section 33-C(2) of the Industrial Disputes Act, 1947 claiming computation of monetary benefits arising from the setting aside the order of termination for the period from 1990 to January, 1994, was filed on the file of the Principal Labour Court, Chennai, being Claim Petition No. 190 of 1994. Similarly, the employee has also filed a claim petition in C.P.No. 525 of 2001 seeking similar relief for the period from February, 1994 to August, 2001. Both claim petitions were dismissed by the Principal Labour Court by two separate orders dated 16.5.2006 observing as under :

".....In the absence of specific direction, computation of money cannot be possible, since this court has to function as a executing court pursuant to the award or settlement. Hence, there is force in the argument of the counsel for the respondent that it is for the petitioner to establish the entitlement to claim back wages. The mere fact that the order of termination was set aside cannot be a ground to claim monetary benefits of back wages and other benefits of bonus, ex gratia and other service benefits. Hence, the petitioner failed to establish the entitlement of benefits as claimed in the petition and the point is answered against the petitioner."

4. Being aggrieved, the employee has come up with the instant writ petitions being W.P.Nos. 22818 and 22819 of 2008, questioning the validity and legality of the orders dated 16.5.2006 passed by the Principal Labour Court, Chennai in C.P.Nos. 190 of 1994 and 525 of 2001 respectively and the consequential direction to the employer to effect payment as per the claim petitions.

5. The learned Single Judge examined the case of the employee as well as the management and set aside both the orders and remitted back the matter to the learned Labour Court to commute the wages payable to the employee, holding that the employee has pre-existing right to invoke the provisions of Section 33-C(2) of the Industrial Disputes Act for grant of all benefits.

6. Feeling aggrieved, the Management has come up with these two writ appeals.

7. Mr.P.Anbarasan, learned counsel appearing for the appellant/management would submit that the grant of back wages is not automatic and as such, if there is no order to grant back wages, it amounts to implied rejection of the claim of

back wages.

8. It was further contended that after holding that the employee has pre-existing right in respect of back wages, remitting back the matter to commute the back wages is contrary to the well settled principles of law laid down by the Supreme Court of India in *State Bank of India Vs. Ram Chandra Dubey and Others*, , *Rajasthan State Road Transport Corporation and Others Vs. Shyam Bihari Lal Gupta*, , and *State of Uttar Pradesh and Another Vs. Brijpal Singh*, .

9. Per contra, Mr.K.V.Ananthakrishnan, learned counsel for the employee would submit that once the appellate authority exercising power under Section 41(2) of the Shops Act gives declaration that the order of termination is set aside, the employee is entitled to all consequential benefits on the basis that there was no order of termination at all. The issue before the appellate authority was the termination order, not adjudication on the issue as to whether the employee was entitled to back wages or not and as such, for want of involvement of the issue of back wages in the proceedings before the appellate authority under the Shops Act, it cannot be held that the issue of back wages was considered and rejected impliedly. Once the order of termination is set aside, the natural consequences would be the grant of all consequential relief.

10. In support of his contention, the learned counsel for the employee relies on the decisions of the Supreme Court and this Court in *The Central Bank of India Ltd. Vs. P.S. Rajagopalan etc.*, , *National Building Construction Corporation Vs. Pritam Singh Gill and Others*, , *The Management of Safire Theatre, Madras Vs. The Additional Commissioner for Workmen's Compensation, Madras and Others*, , *Madras, Express News Papers Ltd. Vs Presiding Officer, Additional Labour Court and another* (1980) TLNJ 283 and *E. Senthilkumar and others Vs. The Registrar of Co-operative Societies and another*, .

11. We have heard the learned counsel for the parties, perused the pleadings and documents appended thereto.

12. The question that arises for our consideration is firstly, as to whether the employee is entitled to back wages when the appellate authority has set aside the termination order without making any reference to the grant of back wages and the consequential effects. Secondly, if there is no order to grant back wages, whether the Labour Court exercising power under Section 33-C(2) of the I.D. Act is competent to compute back wages and award the same.

13. To appreciate the legal issue, it would be profitable to refer to certain judicial pronouncements.

14. A Constitutional Bench of the Supreme Court in *The Central Bank of India Ltd. Vs. P.S. Rajagopalan etc.*, and others examined the provisions of Section 33-C(1) and 33-C(2) of the I.D. Act and it was held as under :

"We must accordingly hold that Section 33-C(2) takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be

computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers. Incidentally, it may be relevant to add that it would be somewhat odd that under sub-section (3), the Labour Court should have been authorised to delegate the work of computing the money value of the benefit to the Commissioner if the determination of the said question was the only task assigned to the Labour Court under sub-section (2). On the other hand, sub-section 3 becomes intelligible if it is held that what can be assigned to the Commissioner includes only a part of the assignment of the Labour Court under sub-section (2).

* * * * *

It is thus clear that claims made under Section 33-C(1), by itself can be only claims referable to the settlement, award, or the relevant provisions of Chapter V-A. These words of limitations are not to be found in Section 33-C(2) and to that extent, the scope of Section 33-C(2) is undoubtedly wider than that of Section 33-C(1). It is true that even in respect of the larger class of cases which fall under Section 33-C(2), after the determination is made by the Labour Court the execution goes back again to Section 33-C(1). That is why Section 33-C(2) expressly provides that the amount so determined may be recovered as provided for in sub-section (1). It is unnecessary in the present appeals either to state exhaustively or even to indicate broadly what other categories of claims can fall under Section 33-C(2). There is no doubt that the three categories of claims mentioned in Section 33-C(1) fall under Section 33-C(2) and in that sense, Section 33-C(2) can itself be deemed to be a kind of execution proceeding; but it is possible that claims not based on settlements, awards or made under the provisions of Chapter V-A, may also be competent under Section 33-C(2) and that may illustrate its wider scope. We would, however, like to indicate some of the claims which would not fall under Section 33-C(2), because they formed the subject-matter of the appeals which have been grouped together for our decision along with the appeals with which we are dealing at present. If an employee is dismissed or demoted and it is his case that the dismissal or demotion is wrongful, it would not be open to him to make a claim for the recovery of his salary or wages under Section 33-C(2). His demotion or dismissal may give rise to an industrial dispute which may be appropriately tried, but once it is shown that the employer has dismissed or demoted him, a claim that the dismissal or demotion is unlawful and, therefore, the employee continues to be the workman of the employer and is entitled to the benefits due to him under a pre-existing contract, cannot be made under Section 33-C(2). If a settlement has been duly reached between the employer and his employees and it falls under Section 18(2) or (3) of the Act and is governed by Section 19(2), it would not be open to an employee, notwithstanding the said settlement, to claim the benefit as though the said settlement had come to an end. If the settlement exists and continues to be operative, no claim can be made under Section 33-C(2) inconsistent with the said settlement. If the settlement is intended to be terminated, proper steps may have to be taken in that behalf and a dispute that may arise thereafter may

to be dealt with according to the other procedure prescribed by the Act. Thus, our conclusion is that the scope of Section 33-C(2) is wider than Section 33-C(1) and cannot be wholly assimilated with it, though for obvious reasons, we do not propose to decide or indicate what additional cases would fall under Section 33-C(2) which may not fall under Section 33-C(1).

15. Referring to this decision, in another case in *National Building Construction Corporation Vs. Pritam Singh Gill and Others*, , the three Hon"ble Judges Bench observed as under :

".....Keeping this in mind we may turn to the purpose and object of Section 33-C of the Act. This section was enacted for the purpose of enabling individual workman to implement, enforce or execute their existing individual rights against their employers without being compelled to have recourse to Section 10 by raising disputes and securing a reference which is obviously a lengthy process. Section 33-C of the Act has accordingly been described as a provision which clothes the Labour Court with the powers similar to those of an executing court so that the workman concerned receives speedy relief in respect of his existing individual rights. The primary purpose of the section being to provide the aggrieved workman with a forum similar to the executing courts, it calls for a broad and beneficial construction consistently with other provisions of the Act, which should serve to advance the remedy and to suppress the mischief. It may appropriately be pointed out that the mischief which Section 33-C was designed to suppress was the difficulties faced by individual workmen in getting relief in respect of their existing rights without having resort to Section 10 of the Act...."

16. The *The Management of Safire Theatre, Madras Vs. The Additional Commissioner for Workmen's Compensation, Madras and Others*, , Madras case cited by the learned counsel for the employee is not relevant to the facts involved herein.

17. In *E. Senthilkumar and others Vs. The Registrar of Co-operative Societies and another*, , a Division Bench of this Court held as under :

"No doubt, in the order of the Shop Act authority, there was no specific direction for reinstatement. But, whenever an order of dismissal is set aside, reinstatement is implicit in such an order of dismissal. In fact, the Supreme Court in *R.M. Ramaul Vs. State of Himachal Pradesh and Others*, , has held that though there was no specific direction to consider the case of the complainant for promotion with effect from 26.5.1982 such a relief was implicit in the reasoning of the order. Similarly, in the case of setting aside the order of dismissal, even in the absence of a specific direction, would be implicit in such an order that the dismissed employee should be reinstated and all the benefits that would accrue out of such reinstatement should be extended. That being so, the co-operative society in question was required to reinstate and grant all the consequential benefits without any efforts being made by the petitioners, no sooner an order was passed by the Shop Act Authority on 10.1.1990 or at any

rate, after 30th September, 1991, when the S.L.P. was dismissed by the Supreme Court. "

18. In *State Bank of India Vs. Ram Chandra Dubey and Others*, , the Supreme Court held as under :

"7. When a reference is made to an Industrial Tribunal to adjudicate the question not only as to whether the termination of a workman is justified or not but to grant appropriate relief, it would consist of examination of the question whether the reinstatement should be with full or partial back wages or none. Such a question is one of fact depending upon the evidence to be produced before the Tribunal. If after the termination of the employment, the workman is gainfully employed elsewhere it is one of the factors to be considered in determining whether or not reinstatement should be with full back wages or with continuity of employment. Such questions can be appropriately examined only in a reference. When a reference is made under Section 10 of the Act, all incidental questions arising thereto can be determined by the Tribunal and in this particular case, a specific question has been referred to the Tribunal as to the nature of relief to be granted to the workmen."

8. The principles enunciated in the decisions referred by either side can be summed up as follows:

Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under Section 33-C(2) of the Act. The benefit sought to be enforced under Section 33-C(2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33-C(2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not granted necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made. To state that merely upon reinstatement, a workman would be entitled, under the terms of award, to all his arrears of pay and allowances would be incorrect because several factors will have to be considered, as stated earlier, to find out whether the workman is entitled to back wages at all and to what extent. Therefore, we are of the view that the High Court ought not to have presumed that the award of the Labour

Court for grant of back wages is implied in the relief of reinstatement or that the award of reinstatement itself conferred right for claim of back wages."

19. In *State of Uttar Pradesh and Another Vs. Brijpal Singh*, , the Supreme Court held as under :

10. It is well settled that the workman can proceed under Section 33-C(2) only after the Tribunal has adjudicated on a complaint under Section 33-A or on a reference under Section 10 that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman. This Court in the case of *Punjab Beverages (P) Ltd. v. Suresh Chand* held that a proceeding under Section 33-C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. Proceeding further, this Court held that the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer. This Court further held as follows: (SCC p. 150, para 4)

"It is not competent to the Labour Court exercising jurisdiction under Section 33-C(2) to arrogate to itself the functions of an Industrial Tribunal and entertain a claim which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under Section 10 of the Act."

"13. Thus, it is clear from the principle enunciated in the above decisions that the appropriate forum where question of back wages could be decided is only in a proceeding before a forum to whom a reference under Section 10 of the Act is made. Thereafter, the Labour Court, in the instant case, cannot arrogate to itself the functions of an Industrial Tribunal and entertain the claim made by the respondent herein which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under Section 10 of the ID Act. Therefore, the Labour Court had no jurisdiction to adjudicate the claim made by the respondent herein under Section 33-C(2) of the ID Act in an undetermined claim and until such adjudication is made by the appropriate forum, the respondent workman cannot ask the Labour Court in an application under Section 33-C(2) of the ID Act to disregard his dismissal as wrongful and on that basis to compute his wages. It is, therefore, impossible for us to accept the arguments of Mrs Shyamla Pappu that the respondent workman can file application under Section 33-C(2) for determination and payment of wages on the basis that he continues to be in service pursuant to the said order passed by the High Court in Writ Petition No. 15172 of 1987 dated 28-10-1987. The argument by the learned counsel for the workman has no force and is unacceptable. The Labour Court, in our opinion, has erred in allowing the

application filed under Section 33-C(2) of the ID Act and ordering payment of not only the salary but also bonus to the workman although he has not attended the office of the appellants after the stay order obtained by him. The Labour Court has committed a manifest error of law in passing the order in question which was rightly impugned before the High Court and erroneously dismissed by the High Court. The High Court has also equally committed a manifest error in not considering the scope of Section 33-C(2) of the ID Act. We, therefore, have no hesitation in setting aside the order passed by the Labour Court in Misc. Case No. 11 of 1993 dated 23-8-1995 and the order dated 9-1-2002 passed by the High Court in CMWP No. 36406 of 1995 as illegal and uncalled for. We do so accordingly."

20. The case of A.P.S.R.T.C. and Another Vs. B.S. David Paul, arose from the fact that the Labour Court reinstated the appellants without an order of back wages. Subsequently, the respondents filed application before the Labour Court stating that they were entitled to back wages for the period they were out of employment and they were entitled to be paid back wages in terms of Section 33-C(2) of the Act. The Corporation resisted the claim on the ground that there was no direction for payment of back wages and, therefore, Section 33-C(2) had no application. The Labour Court awarded back wages and the High Court confirmed the same. A question arose before the Supreme Court that when the reinstatement is directed, whether grant of back wages was the natural consequence. It was held that the principle of law on point is no more res integra observing as under :

"This court in A.P.S.R.T.C. and Another Vs. S. Narsagoud, , succinctly crystallized the principle of law in Paragraph 9 of the judgment on Page SCC p. 215 :

"We find merit in the submission so made. There is a difference between an order of reinstatement accompanied by a simple direction for continuity of service and a direction where reinstatement is accompanied by a specific direction that the employee shall be entitled to all the consequential benefits, which necessarily flow from reinstatement or accompanied by a specific direction that the employee shall be entitled to the benefit of the increments earned during the period of absence. In our opinion, the employee after having been held guilty of unauthorized absence from duty cannot claim the benefit of increments notionally earned during the period of unauthorized absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with the benefit of continuity in service."

The said decision has been followed in Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) and Others Vs. Abdul Kareem, and in Rajasthan State Road Transport Corporation and Others Vs. Shyam Bihari Lal Gupta, .

21. With the development of law by judicial interpretations and judicial pronouncements, the traditional view that back wages and other benefits is

consequential to quashing of termination order as unlawful, has been metamorphosed in to the recent view that quashing / setting aside the termination order as unlawful does not lead to grant of back wages and other incidental back wages automatically.

22. As discussed hereinabove, the grant of back wages is dependent on several factors, i.e., gainful employment, duration of operation of the order of termination and other incidental factors. Hence, entitlement of back wages itself involves adjudication and the same cannot be granted automatically after termination order has been set aside as unlawful. In the case on hand, there was no order to grant back wages passed by the appellate authority in TSE No. 21 of 1992 dated 31.5.1993. The said order was taken upto the Division Bench of this Court in W.A.No. 871 of 2001. The Division Bench declined to record the finding in respect of entitlement of the employee to back wages. As a sequel, there was no adjudication on the issue of back wages and as such, there was no pre-existing right to invoke the jurisdiction of the Labour Court under Section 33-C(2) of the I.D. Act.

23. The Supreme Court in State Bank of India Vs. Ram Chandra Dubey and Others, had clearly laid down the principle that only for computation of pre-existing right in terms of money, the jurisdiction of the Labour Court under Section 33-C(2) of the I.D. Act is available and for computation in monetary terms on the basis of a right flowing from the pre-existing right, the jurisdiction of the Labour Court under this provision is not available. The right which flows from the existing right, i.e., on setting aside the termination order, has to be adjudicated in view of several principles, as discussed herein above, in other appropriate forum.

24. The decision of the Labour Court subsequently in pursuance of the impugned order dated 24.01.2011 passed in W.P.Nos. 22818 and 22819 of 2008, by computing wages, is not relevant or of any consequences to the question of law involved in these appeals.

25. The decision of the Division Bench of this Court in E. Senthilkumar and others Vs. The Registrar of Co-operative Societies and another, , to the effect that the relief of back wages is implicit in setting aside the dismissal order, stands overruled impliedly by several Supreme Court decisions. [See : Ram Ahsrey Singh and Another Vs. Ram Bux Singh and Others, General Manager, Haryana Roadways Vs. Rudhan Singh, , Senior Superintendent Telegraph (Traffic) Bhopal Vs. Santosh Kumar Seal and Others, and Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others, .

26. The question as to whether the employee, working in the supervisory and managerial capacity as Assistant Manager, can be held as workman to seek for computation of back wages under the provisions of Section 33-C(2) of the I.D. Act, has not been seriously contested.

27. Resultantly, the order of the learned Single Judge holding that the employee

has pre-existing right to back wages and as such remitting back the matter to the Labour Court for computation, is set aside. Accordingly, both writ appeals are allowed. No order as to costs. Consequently connected miscellaneous petitions are closed.