

(2022) 03 SHI CK 0060

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No.2695, 2696 Of 2021

Manager Operational Head

APPELLANT

Vs

108 Ambulance Sewa

RESPONDENT

Date of Decision : 21-03-2022

Acts Referred:

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

Citation : (2022) 03 SHI CK 0060

Hon'ble Judges : Sabina, J; Satyen Vaidya, J

Bench : Division Bench

Advocate : K.D. Shreedhar, Sameer Thakur, V.D. Khidtta

Final Decision : Dismissed

Judgement

Sabina, J

1. Vide this order, abovementioned two petitions would be disposed of as they have arisen out of a common order dated 31.03.2021.

2. Learned counsel for the petitioner has submitted that the petitioner was a registered society and was a pioneer in Emergency Management Services in India since the year 2005. Petitioner-society had been providing invaluable service of emergency response system through 108 National Ambulance Service and 102 Janani Express in the State of Himachal Pradesh. Due to consistent strikes called by the employees, the petitioner-society was facing lot of difficulty in conducting smooth operations of providing essential emergency services to the citizens of the State. In CWPI No.135/2017, suo moto cognizance was taken by this Court of the incessant strikes called by the employees and the employees were directed not to indulge in protests, strikes etc. in future. Affidavits were filed by the employees that they would not indulge in strikes etc. The employees, however, again went on strikes/protests and the situation worsened due to COVID-19 pandemic. In CWPI No.11/2020, this Court ordered that in case the employees resort to strikes or dharna, then the State could terminate the

services of such employees and they would also be liable to be punished for contempt under the Contempt of Courts Act, 1971. Employees had started sharing Whatapp/text messages and had stopped reporting about their movement. As a result, the patients suffered. Due to this reason, the services of the employees were terminated. The union approached the Industrial Tribunal-cum-Labour Court, Shimla and vide order/award dated 31.03.2021, the termination orders were set-aside. In fact, the services of the employees had been terminated in accordance with law and the award passed by the learned Labour Court was liable to be set-aside.

3. In support of his arguments, learned counsel for the petitioner has placed reliance on a judgment of the Hon'ble Supreme Court in Civil Appeal No.5897 of 2021, titled Sri Dorairaj Spintex Versus R. Chittibabu & Ors., decided on September 22, 2021.

4. Learned counsel for the respondent, on the other hand, has opposed the petitions and has submitted that the services of the workmen had been terminated in contravention to the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act'). Hence, the learned Labour Court had rightly quashed the termination orders passed by the petitioner-society.

5. In support of his arguments, learned counsel for the respondent has placed relied on the judgment of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Versus Ram Gopal Sharma and others, (2002) 2 Supreme Court cases 244, wherein it has been held as under:-

"12.The facts of the said case are: the workman was dismissed from service holding him guilty after inquiry by an order dated 23.12.1974. Since an industrial dispute was pending at that time, in view of the provisions contained in Section 33(2)(b), the employer approached the Industrial Tribunal at Chandigarh before which the industrial dispute was pending for approval of the action taken. However, that application was dismissed as withdrawn on 04.09.1976. Then the workman demanded full wages from the employer from the date of his suspension till the date of demand contending that the action of the employer dismissing him from service was not approved by the Tribunal; he continued to be in service and was entitled to all the emoluments. Since the employer did not respond, he made an application to the Labour Court under Section 33(C)(2) for determination and payment of the amount of wages due to him. The employer resisted the said application inter alia on the ground that the application under Section 33(2)(b) having been withdrawn, the effect of which was as if no application had been made at all; even though there was contravention of Section 33(2)(b) in not making an application seeking approval, it did not render the order of dismissal void ab initio and it was merely illegal and unless it is set aside in an appropriate proceeding taken by the employee under Section 33A or in a reference under Section 10, the Labour Court had no jurisdiction under Section 33 (C)(2) to direct payment of wages to the first respondent on the basis

as if he continued in service. The Labour Court rejected this contention and allowed the application of the workman filed under Section 33(C)(2). This Court, allowing the appeals by special leave, held that the employer contravened Section 33(2)(b) in dismissing the workman but such contravention did not have the effect of rendering the order of dismissal void or inoperative and hence the workman was not entitled to maintain the application under Section 33(C)(2). However, the amounts ordered to be paid by the Labour Court were treated as compensation instead of wages to meet the demands of social justice. The reasons recorded in taking such a view are:

(i) Section 33 in both its limbs undoubtedly uses mandatory language and Section 31(1) makes it penal for the employer to commit a breach of the provisions of Section 33 and, therefore, if Section 33 stood alone, it might lend itself to the construction that any action by way of discharge or dismissal taken against the workman would be void if it is in contravention of Section 33. But Section 33 cannot be read in isolation, for the intention of the Legislature has to be gathered not from the one provision but from the whole of the statute. If Sections 33 and 33A are read together, it is clear that legislative intent shall not invalidate an order of discharge or dismissal passed in contravention of Section 33 despite the mandatory language implied in the Section and the penal provision enacted in Section 31(1).

(ii) The mere contravention of Section 33 by the employer will not entitle the workman to an order of reinstatement because inquiry under Section 33A is not confined only to the determination as to the contravention of Section 33, but even if such contravention is proved, the Tribunal has to go further and deal also with the merits of the order of discharge or dismissal.

(iii) If the contravention of Section 33 were construed as having invalidating effect on the order of discharge or dismissal, Section 33A would be rendered meaningless and futile, because in that event the workman would invariably prefer to make an application straightaway under Section 33(C)(2) even before adjudication whether the order of discharge or dismissal is void and inoperative.

(iv) The contention of the workman that in the absence of approval for action taken under Section 33(2)(b), the order of dismissal was inoperative, was rejected on the ground that withdrawal of the application made for approval stood on the same footing as if no application under Section 33(2)(b) has been made at all; since there was no application made under Section 33(2)(b), the Tribunal had no occasion to apply its mind to consider whether the dismissal of workman amounted to victimization or unfair labour practice. Hence, it was difficult to say that the approval has been refused by the Tribunal.

13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any

employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing

more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section

31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

6. In the present case, the petitioner- society is running ambulance service. The services of the employees were terminated and they approached the Labour Court by moving applications that their services had been terminated in violation of the provisions of Section 33(2)(b) of the Act. It was the case of the employees that they had already filed applications under Sections 20 and 21 of the Minimum Wages Act, 1948, seeking minimum wages. A reference bearing No.65 of 2016 was also pending, wherein, the union had raised the grievance to the effect that general working conditions of the workers be improved. The employees should be registered with the Labour Department and should be extended the benefit of Employees Provident Fund and Employees’ State Insurance Scheme. Employees had also sought wages at par with the other government employees and had claimed that they should be given one holiday in a week.

7. Section 33 (2) of the Act, reads as under:-

“33. XXXXXXXXXXXX

(1) XXXXXXXXXXXX

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with 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) XXXXXXXXXXXX.”

8. A perusal of the above provision reveals that during the pendency of any proceeding in respect of an industrial dispute, the employer could take action for misconduct against the employee if it was not connected with the pending dispute. But a proviso has been added to the effect 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, where the

proceedings are pending, seeking approval of the action taken by the employer. So far as the provisions of Section 33(2)(b) of the Act are concerned, the same are mandatory in nature because in the proviso, the words used are 'unless' he has been paid wages for one month and an application has been moved for approval before the competent authority by the employer.

9. In the present case, learned counsel for the petitioner has failed to show that there had been due compliance of the provisions of Section 33(2)(b) of the Act. As per Section 33(2)(b) of the Act, the employer had a right to take action against an employee for misconduct not connected with the dispute already pending, but the employer was also required to comply with the mandatory provisions of the proviso added to Section 33(2)(b) of the Act.

10. The judgment relied upon by the learned counsel for the petitioner in Sri Dorairaj Spintex's case (supra), fails to advance the case of the petitioner as in the said case, there had been due compliance of Section 33(2)(b) of the Act.

11. In the facts and circumstances of the present case, learned Labour Court had rightly come to the conclusion that the termination orders were liable to be set-aside as the petitioner-society had violated the mandatory provisions of Section 33(2)(b) of the Act.

12. Hence, in view of the above discussion, there is no merit in the petitions and both the petitions are accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of.