

(2006) 02 AHC CK 0046

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 21679 of 1999

Metal Technology Corporation

APPELLANT

Vs

Labour Court and Others

RESPONDENT

Date of Decision : 28-02-2006

Acts Referred:

Industrial Disputes Act, 1947 — Section 25FFF, 33C(2)

Payment of Bonus Act, 1965 — Section 21, 22

Uttar Pradesh Industrial Disputes Act, 1947 — Section 10, 10(1), 10(2), 15, 2

Citation : (2006) 3 UPLBEC 2089

Hon'ble Judges : Shishir Kumar, J

Bench : Single Bench

Advocate : S.K. Garg, M.B. Saxena and S.S. Nigam, for the Appellant; P.C. Jhingan and D.D. Gupta and S.C., for the Respondent

Final Decision : Allowed

Judgement

Shishir Kumar, J.—The present writ petition has been filed for quashing the recovery certificate dated 14.2.2000 and the Office Order dated 26.6.2000 and the order dated 29.4.1999 passed u/s 33C(2) of the Industrial Disputes Act before respondent No. 2 against the petitioners' partner to get the closure compensation, encashment of earned leave and bonus for the year 1996-97 and 1997-98 through their representative Sri Kamalapati Tripathi copy of the said application has been filed as Annexure-1 to the writ petition. After issuance of the notice, a written statement was filed on behalf of the petitioner stating therein that the amount mentioned in the said application is disputed as the petitioners' establishment being registered under the Factories Act was closed w.e.f. 25.3.1998 and prior to closure, there were illegal strikes by the workers on three occasions namely from 20.3.90 to 20.4.90, from 20.8.96 to 24.8.96 and from 22.11.97 to 6.12.1997. Thus the services of the workers were interrupted for the period of illegal strikes hence, closure compensation due to the strike could not be computed. It was further stated that vide Section 25FFF of the Industrial Disputes Act, closure compensation is payable to those workers who

are in continuous service for not less than one year. Further Section 2(g) of the U.P. Industrial Disputes Act excludes the period of illegal strike from continuous service and the legality and illegality of the strike could only be decided on a reference u/s 4(k) of the U.P. Industrial Disputes Act. As such the workers are not entitled for the relief claimed regarding bonus. Further submission was made that proceeding u/s 33C(2) is not a forum for the same is provided u/s 21 of the Bonus Act, which is a complete procedure for recovery of bonus and Section 22 directs that if there is any dispute, the same would be deemed to be industrial dispute and could be referred to under the Industrial Disputes Act. Neither the respondents file any paper in support of their claim nor any witness was examined in support thereof. On the other hand, on an application moved by the employer, a file was summoned from the office of the Deputy Labour Commissioner, which clearly indicated the documents regarding the illegal strike available on the aforesaid file, which clearly corroborates the case of the petitioners.

2. Respondent No. 2 vide its order dated 29.10.1997 repelled the objection raised on behalf of the petitioner about the maintainability of the application and other legal aspect and directed the petitioner to pay the bonus claimed for the year 1997 with interest to the tune of 15%, closure compensation, encashment of earned leave and the amount in lieu of closure notice with 15% interest from the date of closure to the date of payment.

3. It has been submitted on behalf of the petitioner that the respondents have not submitted any supporting evidence to claim the aforesaid benefits. It is well settled in law now that the proceedings u/s 33C(2) of the Industrial Disputes Act is in the nature of execution proceeding when it is based on undisputed and existing right could only be decided. The legality and illegality of the strike being item No. 4 in the second schedule in the Industrial Disputes Act, the question could only be decided in the reference by the proper government either u/s 10 or u/s 4-K of the U.P. Industrial Disputes Act. Therefore, the application u/s 33C(2) was not maintainable. The further submission has been made on behalf of the petitioner that in view of the proviso of Section 2 (g) continuous service has been defined, which clearly excludes the period of illegal strike; therefore, the order of payment of closure compensation, which includes the period of strike, is not maintainable. Unless a reference for determination of period of strike as legal or illegal is made by the appropriate government and adjudicated by the labour court, there cannot be any presumption that the strike was legal and benefit be given to the workers. It is admitted case of the parties that no reference to adjudicate the legality and illegality of the strike was made by the State Government. It has further been submitted on behalf of the petitioner that the Apex Court has held that interruption by illegal strike by itself interrupted the continuity of service and there was no further necessity to terminate the services by way of dismissal. However, the respondent No. 2 has erred in accepting the strike to be legal and has given the benefit to the workers. The onus was on the workers to prove the legality or illegality of the strike u/s 33C(2).

4. It has further been argued on behalf of the petitioners that directions for payment of bonus cannot be decided or the same cannot be directed to be paid in the proceeding u/s 33C(2). Payment of Bonus Act clearly says that the dispute would be industrial dispute and item No. 4 of the 2 schedule of the U.P. Industrial Disputes Act and item No. 5 in schedule 3 of the Industrial Disputes Act includes the question regarding the dispute of bonus to the industrial dispute. Hence u/s 33C(2) the issue regarding the bonus could not have been decided. Once the claim was made and contested by the employer, no decision u/s 33C(2) of the Industrial Court could have been taken. The competent authority can only decide it after reference u/s 4-K. But the respondents No. 2 has not accepted the contention on behalf of the petitioner and allowed the claim of the contesting respondent vide its order-dated 29.4.1999, Annexure-3 to the writ petition. Against the aforesaid order, Writ Petition No. 21679 of 1999 was filed and interim order has been granted. Reliance has been placed by the petitioner on Municipal Corporation of Delhi Vs. Ganesh Razak and Another, and has referred to para and 12 of the said judgment. The same is reproduced below:

12. The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workmen to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding u/s 33C(2) of the Act. The Labour court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power u/s 33C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognized by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power u/s 33C(2) like that of the Executing court's power to interpret the decree for the purpose of its execution.

Another judgment relied upon by the counsel for the petitioner is Modi Industries Ltd. Vs. State of Uttar Pradesh and others, and he has placed reliance upon para 4 of the said judgment. The same is reproduced below:

4. On the facts of the present case, we are more than satisfied that there did exist a genuine dispute between the parties as to whose acts of omission or commission were responsible for the halting of the production in the factory for the period in question. This was put into issue before the Labour Commission by the appellant- Company. The Labour Commissioner, in the circumstances, could not have proceeded to issue the certificate. He ought to have referred the parties to industrial adjudication which was the proper forum for the purpose. Under the circumstances, we set aside the impugned certificate dated April 29, 1991 issued by the Labour Commissioner.

Another judgment relied upon is 2005 SCC 963 Bank of Baroda v. Ghemarbhai

Harjibhai Rabari and reliance has been placed on paras 8 and 10 of the said judgment which are reproduced below;

8. While there is no doubt in law that the burden of proof that a claimant was in the employment of a management, primarily lies on the workman who claims to be a workman, the degree of such proof so required, would vary from case to case. In the instant case, the workman has established the fact which, of course, has not been denied by the Bank, that he did work as a driver of the car belonging to the bank during the relevant period which comes to more than 240 days of work. He has produced 3 vouchers which showed that he had been paid certain sums of money towards his wages and the said amount has been debited to the account of the Bank. As against this, as found by the for a below, no evidence whatsoever has been adduced by the bank to rebut even this piece of evidence produced by the workman. It remained contented by filing a written statement wherein it denied the claim of the workman and took up a plea that the employment of such drivers was under a scheme by which they are, in reality, the employee of the executive concerned and not that of the Bank; none was examined to prove the scheme. No evidence was led to establish that the vouchers produced by the workman were either not genuine or did not pertain to the wages paid to the workman. No explanation by way of evidence was produced to show for what purpose the workman's signatures were taken in the register maintained by the Bank. In this factual background, the question of the workman further proving his case does not arise because there was no challenge at all to his evidence by way of rebuttal by the Bank.

10. For the reasons stated above, we are of the considered opinion that the respondent workman in this case has established his claim as held by the Tribunal, and we find no reason whatsoever to interfere with the impugned order. The appeal fails and the same is dismissed with costs.

Another judgment placed reliance upon by the learned Counsel for the petitioner is 1969 LLJ 762 Payment of Wages Inspector, Ujjain v. Surajmal Mehta, Director, Barnagar Electric Supply and Industrial Company, Ltd. and Anr. and has referred to the following relevant portion which are reproduced below.

While considering the scope of jurisdiction of the authority u/s 15 of the Act it is relevant to bear in mind the fact that the right to compensation is conferred by the Industrial Disputes Act which itself provides a special tribunal for trying cases of individual workmen to whom compensation payable under Chap. V-A has not been paid. Section 33C of that act provides both a forum and the procedure for computing both monetary as well as non-monetary benefits in terms of money and further provides machinery for recovery of such claims. In Punjab National Bank Ltd. v. Kharbanda (K.L.) 1962 1 L.L.J. 2434 this Court held that while Sub-section (1) of Section 33C applied to cases where any money was due to a workman from an employer under a settlement, award or under the provisions of Chap. V-A and the amount was already computed or calculated or at any rate there could be no dispute about its calculation or computation. Sub-section (2)

applied to benefits including monetary benefits conferred on a workman under an award, settlement, etc., but which had not been calculated or computed and there was a dispute as to their calculation or computation. The Court rejected the contention that Sub-section (2) applied only to a non-monetary benefit which had to be converted in terms of money. The Court also observed that Section 33C was a provision in the nature of execution and where the amount to be executed was worked out or where it might be worked out without any dispute, Sub-section (1) would apply, but where such amount due to the workman was not stated or worked out and there was a dispute as to its calculation, Sub-section (2) would apply and the workman would be entitled to apply there under to have the amount computed provided he was entitled to a benefit, whether monetary or non-monetary, which was capable of being paid in terms of money. In *Central Bank of India, Ltd. v. Rajagopalan (P.S.) and Ors.* 1963 2 L.L.J. 89 this Court held that where the right of a workman was disputed by his employer the Labour court could go into the question as to whether he had a right to receive such a benefit. Sub-section (3) of Section 33C under which the Labour court can appoint a commissioner to take evidence for computing the benefit postulates that it has the jurisdiction to decide whether the workman claiming benefit was entitled to it where such right was disputed by the employer. In *Bombay Gas Company, Ltd. v. Gopal Bhiva and Ors.* 1963 2 L.L.J. 608 this Court held that the Labour court could in an application u/s 33C(2) go even into the question whether the award under which the workman had made a claim was a nullity. Being in the nature of an executing Court it could interpret the award and also, consider the plea that the award sought to be enforced was a nullity. It is thus clear that a workman whose claim, monetary or otherwise, is disputed by his employer can lodge such a claim before a specified Labour court u/s 33C and obtain an inexpensive and expeditious remedy. The question then is whether for such a claim the legislature intended to provide alternative remedies both under the Industrial disputes Act and the Payment of Wages Act. For deciding this question it is necessary to refer to some of the provisions of the scheme of the Payment of Wages Act.

Reliance has also been placed by the counsel for the petitioner on a full bench decision of Gujarat High Court reported in 1980 Labour and Industrial Cases page 397 *Nizamuddin Suleman Etc. v. The New Shorrock Spg. and Mfg. Mills. Co. Ltd. Nadiad and Anr.* and reliance has been placed on para 2 of the said judgment. The same is reproduced below:

2. Our task has been made easier by two recent decisions of the Supreme Court delivered after the order of reference was made by the Division Bench to a larger Bench. In *Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, Bhagwati J.*, speaking for the Supreme Court Bench of three Judges has explained the scope of Section 33C(2) in para 4 at p. 997 in these terms:-

It is now well-settled, as a result of several decisions of this Court that a proceeding u/s 33C(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 his 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. Km 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. Vide Chief Mining Engineer East India Coal Co. Ltd. Vs. Rameswar and Others, . It is not competent to the Labour Court exercising jurisdiction u/s 33C(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 u/s 10 of the Act. Vide State Bank of Bikaner v. R.L. Khandelwal (1968) 1 L.L.J 589 . That is why Gajendragadkar, J., pointed out in the The Central Bank of India Ltd. Vs. P.S. Rajagopalan etc., that 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 u/s 33C(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 preexisting contract cannot be made u/s 33C(2). The workman, who has been dismissed would no longer be in the service of the employer and though it is possible that on a reference to the Industrial Tribunal u/s 10 the Industrial Tribunal may find, on the material placed before it, that the dismissal was unjustified, yet until such adjudication is made, the workman cannot ask the Labour court in an application u/s 33C(2) to disregard his dismissal as wrongful and on that basis to compute his wages. The application u/s 33C(2) would be maintainable only if it can be shown by the workman that the order of dismissal passed against him was void ab initio.

Again in para 13 at p. 1002, Bhagwati, J. has pointed out-

It is also significant to note that if the contravention of Section 33 were construed as having an 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 u/s 33C(2) for determination and payment of the wages due to him on the basis that he continues to be in service. If the workman files a complaint u/s 33A, he would not be entitled to succeed merely by showing that there is contravention of Section 33 and the question whether the order of discharge or dismissal is Justified on the merits would be gone into by the Tribunal and if, on the merits, it is found to be justified, it would be sustained as valid despite contravention of Section 33, but if, on the other hand, instead of proceeding u/s 33A(2), it would be enough for him to show contravention of Section 33 and he would then be entitled to claim wages on the basis that he continues in service. Another

consequence which would arise on this interpretation would be that if the workman files a complaint u/s 33A, the employer would have an opportunity of justifying the order of discharge or dismissal on merits, but if the workman proceeds u/s 33C(2), the employer would have no such opportunity. Whether the employer should be able to justify the order of discharge or dismissal on merits would depend upon what remedy is pursued by the workman whether u/s 33A or u/s 33C(2). Such a highly anomalous result could never have been intended by the legislature. If such an interpretation were accepted, no workman would file a complaint u/s 33A, but he would always proceed u/s 33C(2) and Section 33A would be reduced to futility. It is, therefore, impossible to accept the argument that the contravention of Section 33 renders the order of discharge or dismissal void and inoperative and if that be so the only remedy available to the workman for challenging the order of discharge or dismissal is that provided u/s 33A. apart of course from the remedy u/s 10 and he cannot maintain an application u/s 33C(2) for determination and payment of wages on basis that he continues to be in service. The workman can proceed u/s 33C(2) only after the Tribunal has adjudicated, on a complaint u/s 33A or on a reference u/s 10, that the order of discharge or dismissal passed by the employer was not justified and has set aside that order and reinstated the workman.

The law was thus also explained in *Namer Ali Choudhury and Others Vs. The Central Inland Water Transport Corporation Ltd. and Another*, . There the Supreme Court Bench consisting of Untwalia and Kailasam, JJ. Has considered the previous cases on the point and has summed up the legal position thus:-

Where the only dispute in the proceeding u/s 33C(2) between the management and a section of its workmen is whether those workmen are entitled to take advantage of a settlement and the quantum or rate of extra wages to which the workmen would be entitled under the settlement is not in dispute, the application u/s 33C(2) could not be rejected on ground that there is no dispute about the money due. The provisions of Section 33C(2) do not require that for conferring jurisdiction on a Labour Court not only that the workmen should be entitled to any money due but also that there should be a dispute about the amount of that money.

On a plain reading of the wordings of Section 33C(2) it would be found that where any workman is entitled to receive from employer any money and if any question arises as to the amount of money due, then the question may be decided by the Labour court. The expression if any question arises as to the amount of money due embraces within its ambit any one or more of the following kinds of disputes:-

- (1) Whether there is any settlement or award as alleged?
- (2) Whether any workman is entitled to receive from the employer any money at a under any settlement or an award etc. ?
- (3) If so, what will be the rate or quantum of such amount?

(4) Whether the amount claimed is due or not?

Broadly speaking these will be the disputes which will be referable to the question as to the amount of money due. If the right to get the money on the basis of the settlement or the award is not established, no amount of money will be due. If it is established, then it has to be found out, albeit it may be by mere calculation as to what is the amount due. For finding it out it is not necessary that there should be a dispute as to the amount of money due also. The four kinds of dispute obviously and literally will be covered by the phrase amount of money due. A dispute as to all such questions or any of them would attract the provisions of Section 33C(2) of the Act and make the remedy available to the workman concerned.

It was further held that -

It cannot be said that if there is a dispute as to any amount due, it is to be decided by the appropriate Government under Sub-section (1) of Section 33C and not by the Labour court under Sub-section (2)

These two decisions and particularly the observations of Bhagwati, J. in Punjab Beverages case clearly point out that so far as the workman is concerned, he must proceed on the footing of an existing right; the existing right maybe under the terms of the settlement or an award or the right may have been provided for either by custom or by law or by agreement but there must be an existing right and so long as there is that existing right which is claimed by the workman, he can apply to the Labour court u/s 33C(2) and the Labour court will have jurisdiction to deal with the application on merits. It must be pointed out that Section 10 of the Act which deals with reference to both Court of Inquiry, Labour Court or an Industrial Tribunal is wide enough to cover all industrial disputes including those which would fall u/s 33C(2). Thus whereas Section 10 deals with references of cases of Industrial Disputes of all kinds, Section 33C(2) provides a speedier remedy for the recovery of the dues of a workman against his employer in certain specified type of cases and the basis is that there must be an existing right. Section 33C(2) is obviously not meant for creation of any new rights or fresh rights. All that it deals with is an existing right which, as we have observed above, may arise because of an adjudication in an earlier proceeding or which has been provided for either by custom or by law or by agreement.

5. As regards the contention raised on behalf of the petitioner regarding Payment of Bonus which has been adjudicated by the authority u/s 33C(2) of the Act is concerned, the petitioner has placed reliance upon a judgment of this Court reported in 1996 Labour and Industrial Cases 1394 and reliance has been placed upon para 10 of the said judgment and has submitted that this Court has clearly held that Bonus Act is a complete code itself and the proceedings u/s 33C(2) are in nature of execution, therefore, this does not involve right of claimant to relief and the corresponding liability of the employer as to whether the employer is at all liable or not?

In such circumstances, the counsel for the petitioner has submitted that the order passed by the Tribunal is liable to be set aside and the writ petition be allowed.

6. I have heard the learned Counsel for the petitioner Sri S.S. Nigam and the counsel for the respondents.

7. A counter affidavit has been filed on behalf of the respondent-workman and it has been stated that no notice before the closure of the factory was ever given to the workman and in lieu thereof no compensation has been paid. Respondent No. 2 in the order-dated 30.4.1999 has recorded a finding that the alleged strike of the answering respondents was not declared illegal by the competent authority and the question of illegality of the strike cannot be looked into in the proceeding u/s 33C(2) of the Act. A finding to this effect has also been recorded that the petitioners have failed to prove the fact that after the strike, new appointment letters were issued to the workmen and further that it has also not been proved that there was an interruption in the services the workmen. In such a situation the respondent submits that the application filed by the claimants u/s 33C(2) of the Act was maintainable. Reliance has been placed upon the various judgments reported in R.B. Bansilal Abirchand Mills Co. Ltd. Vs. The Labour Court, Nagpur and Others, and has referred to para 23 of the said judgment. The same is reproduced below:

23. In substance the point urged by the appellants was that if a claim is made on the basis of a lay-off and the employer contends that there was no layoff but closure, it is not open to a labour court to entertain an application u/s 33C(2). The more so it was stated, when the dispute was not between a solitary workman on the one hand and the employer on the other but a whole body of workmen ranged against their employer who was faced with numerous applications before the Labour Court for computation of benefit in terms of money. As has been said already, the Labour Court must go into the matter and come to a decision as to whether there was really a closure or a lay-off. If it took the view that there was a lay-off without any closure of the business it would be acting within its jurisdiction. If it awarded compensation in terms of the provisions of Chapter V-A in our opinion the High Court's conclusion that

In fact the business of the Company was continuing. They in fact continued to employ several employees. Their notices say that some portions of the mills would continue to work" was unexceptionable. The notices which we have referred to can only lead to the above conclusion. The Labour Court's jurisdiction could not be ousted by a mere plea denying the workman's claim to the computation of the benefit in terms of money; the Labour Court had to go into the question and determine whether on the facts it had jurisdiction to make the computation. It could not however give itself jurisdiction by a wrong decision on the jurisdiction plea.

Another judgment cited by the counsel for the respondent is Fabril Gasosa Vs.

Labour Commissioner and Others, and has placed reliance upon para 19 of the said judgment. The same is reproduced below:

19. Section 33C is in the nature of execution proceedings designed to recover the dues to the workmen. Vide Sections 33C(1) and (2), the legislature has provided a speedy remedy to the workmen to have the benefits of a settlement or award which are due to them and are capable of being computed in terms of money, be recovered through the proceedings under those sub-sections. The distinction between Sub-section (1) and Sub-section (2) of Section 33C lies mainly in the procedural aspect and not with any substantive rights of workmen as conferred by these two sub-sections. Sub-section (1) comes into play when on the application of a workman himself or any other person assigned by him in writing in this behalf or his assignee or heirs in case of his death, the appropriate Government is satisfied that the amounts to claimed are due and payable to that workman. On that satisfaction being arrived at, the Government can initiate action under this sub-section for recovery of the amount provided the amount is a determined one and requires no "adjudication ". The appropriate Government does not have the power to determine the amount due to any workman under Sub-section (1) and that determination can only be done by the labour court under Sub-section (2) or in a reference u/s 10(1) of the Act. Even after the determination is made by the labour court under Sub-section (2) the amount so determined by the labour court, can be recovered through the summary and speedy procedure provided by Sub-section (1). Sub-section (1) does not control or affect the ambit and operation of Sub-section (2) which is wider in scope than Sub-section (1). Besides the rights conferred u/s 33C(2) exist in addition to any other mode of recovery which the workman has under the law. An analysis of the scheme of Sections 33C(1) and 33C(2) shows that the difference between the two sub-sections is quite obvious. While the former sub-section deals with cases where money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A or V-B, Sub-section (2) deals with cases where a workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money. Thus, where the amount due to the workmen, flowing for the obligations under a settlement, is predetermined and ascertained or can be arrived at by any arithmetical calculation or simpliciter verification and the only inquiry that is required to be made is whether it is due to the workmen or not, recourse to the summary proceedings u/s 33C(1) of the Act is not only appropriate but also desirable to prevent harassment to the workmen. Sub-section (1) of Section 33C entitles the workmen to apply to the appropriate Government for issuance of a certificate of recovery for any money due to them under an award or a settlement or under the provisos of Chapter V-A and the Government, if satisfied, that a specific sum is due to the workmen, is obliged to issue a certificate for the recovery of the amount due. After the requisite certificate is issued by the Government to the Collector, the collector is under a statutory duty to recover the amounts due under the certificate issued to him. The procedure is aimed at providing a

speedy, cheap and summary manner of recovery of the amount due, which the employer has wrongfully withheld. It, therefore, follows that where money due is on the basis of some amount predetermined like the VDA, the rate of which stands determined in terms of the settlement, an award or under Chapter-A or V-B, and the period for which the arrears are claimed is also known, the case would be covered by Sub-section (1) as only a calculation of the amount is required to be made.

Reliance has been placed on another judgment of Delhi High Court reported in 1996 Labour Industrial Cases 1363 Clifton electronics and Anr. v. Lt. Governor and Ors. and it has been submitted that failure to file an application for permission of closure of 90 days prior to intended closure results in deemed illegal closure and the workman can be entitled to wages. An application u/s 33C was maintainable. The other judgments relied upon by the counsel for the respondents are reported in 1999 LIC 2569 (Orissa High Court) Chief Mining Engineer East India Coal Co. Ltd. Vs. Rameswar and Others, Sita Ram Sah Vs. State of Bihar and Others,

8. Reliance has also been placed by the respondents on 2005 LIC 664 (Gujarat High Court) State of Gujarat v. Jivabhai Ishabhai and Ors.

9. Respondents have also brought to the notice of the Court the provisions of the Industrial Disputes Act. As regards the closing down the undertaking they have submitted that in view of Section 25O of the Act, there is certain requirement, which has to be followed by the employer. In view of Section 25FFF of the Act, which deals regarding the compensation to the workman in case of closing down the undertaking, it has been submitted that it has clearly been provided in the Act where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking before such closure, subject to the provisions of Section 2, be entitled to notice and compensation in accordance with the provisions of Section 25F of the Act. Further submission has been made on behalf of the respondents that as there was no application for permission under Sub-section 1 of Section 6W within a period specified there, the closing of the undertaking would be treated to be illegal.

10. In such a situation it has been submitted that the application filed on behalf of the workman was maintainable and the Labour Court has rightly allowed the application filed on behalf of the workman u/s 33C(2) of the Act.

11. I have considered the submissions made on behalf of the petitioner and the respondents and have considered the various judgments cited on behalf of the parties and have gone through the provisions of the Act. Admittedly before the Labour Court when the application u/s 33C(2) of the Act was filed, the employer petitioner has clearly disputed the claim on various grounds. One of the grounds taken in the written statement was that the closure was declared w.e.f. 25.3.98 as there was an illegal strike prior to the closure on 3 occasions i.e. 20.3.90 to

20.4.90, from 20.8.96 to 24.8.96 and from 22.11.97 to 6.12.1997 and thus the services of the workman who made an application was interrupted for the period of illegal strikes. As such, the closure compensation due to the strikes cannot be computed. Section 25 FFF provides that closure of compensation is only payable to those workers who are in continuous service for not less than one year. In view of the provisions of Section 2(6) of the Industrial Disputes Act, which excludes the period of illegal strikes from continuous service, as it has also been brought to the notice of the Labour Court by the petitioners that legality or illegality of the strike can only be decided in a reference u/s 4-K of the U.P. Industrial Disputes Act before the Labour Court, therefore, as the factum of claim was disputed by the employer, therefore, the application itself was not maintainable. From the perusal of the application as well as from the written statement filed on behalf of the petitioner it clearly appears that the employer has not accepted the claim of the workmen. It was to be decided whether the strike was illegal or not. Admittedly from the pleading it clearly goes to show that the unit was closed and unless and until the validity of the closure of the unit is decided whether it was in accordance with the provisions of the Act or not where any claim regarding payment of salary or other dues which are alleged to be due to the workmen be decided on an application u/s 33C(2) or not. The petitioners have come with a case before the Labour Court that there was illegal strikes on three occasions, therefore, there was a break in service. As such unless and until it is decided that whether the strike was genuine or not and whether it was illegal, the closure compensation cannot be computed because in view of Section 25 FFF of the Act the closure compensation is payable only to those employees or workmen who are in continuous service for not less than one year. If there was a break in service and it is held that the strike was illegal, then under such circumstances whether the Labour Court was justified in accepting the claim of the workman u/s 33C(2) of the Act.

12. It is now well settled that the proceedings u/s 33C(2) is in the nature of execution. Unless dispute has already been adjudicated by the Labour Court either u/s 10 or u/s 4-K of the Act, the proceeding u/s 33C(2) will not be maintainable. The accepted claim between the parties can be adjudicated u/s 33C(2). In *Modi Industries Ltd.* (Supra) the Apex Court while considering has clearly held that when the liability to pay the wages is in dispute which involves investigation of the question of fact and or law, it is not the function of the Labour Commissioner to adjudicate the same. In such cases he has to refer the parties to the appropriate forum. In case of *Municipal Corporation, Delhi* (Supra) the Apex Court has clearly held that it cannot adjudicate the dispute of entitlement or basis of claim of the workmen. It can only interpret the award or settlement on which the claim is based. Its jurisdiction is like that of executing court and has held that the proceeding u/s 33C(2) is not maintainable.

13. As regards the contention raised on behalf of the petitioner regarding payment of bonus on application filed by the workmen in view of *M/S Hindi Sahitya Sammelan* (Supra), this Court has clearly held that as regards the

entitlement of Bonus to its employees, if the same is disputed, now it is well established that it cannot be adjudicated in proceedings u/s 33C(2) as the aforesaid proceedings are in the nature of execution and, therefore, this does not involve right of claimant to relief and the corresponding liability of the employer as to whether the employer is at all liable or not. The workman cannot put forward a claim in the application u/s 33C(2) in respect of the matter not based on existing right. In such a situation, the application for claim of bonus was also not maintainable.

14. In view of the aforesaid fact, I am of opinion that the proceeding initiated by the respondent u/s 33C(2) itself was not maintainable.

15. In view of above, the writ petition is allowed, the order dated 29.4.1999 is hereby quashed and in pursuance of the order-dated 29.4.1999 subsequent recovery against the petitioner is also quashed. It is however open to the respondent -workmen to get their rights adjudicated before the proper forum as provided in law. No order as to costs.