
(2014) 01 KAR CK 0271

In the Karnataka High Court

Case No : Writ Petition No. 11191 of 2013 (L-TER)

M/s. B.E.M.L. Limited

APPELLANT

Vs

Shri S. Naveen

RESPONDENT

Date of Decision : 29-01-2014

Acts Referred:

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

Citation : (2014) 2 AKR 399 : (2014) 141 FLR 721 : (2014) ILR 971 : (2014) 2 LLJ 132 : (2014) 2 LLN 462 : (2014) LLR 543

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : Pradeep Sawkar, for the Appellant; K.B. Narayanaswamy, for the Respondent

Final Decision : Allowed

Judgement

Ram Mohan Reddy, J.—Since common questions of law and that of facts arise for decision making, with the consent of learned counsel for parties, petitions are clubbed together, heard finally and disposed of by this common order. W.P. No. 11191/2013 and W.P. No. 11192/2013 are filed by the management of B.E.M.L. calling in question the orders of even date 29th September 2012 of the Industrial Tribunal, Bangalore, dismissing Serial Application No. 22/2009 and Serial Application No. 21/2009 respectively, filed u/s 33(2)(b) of the Industrial Disputes Act, 1947 ("the Act" for short), for approval of the orders of even date 29.05.2009 dismissing the workman from service.

2. Facts briefly stated are: Respondent in each of these petitions, while discharging duties in the petitioner establishment, allegedly, fraudulently drew 1,73,848 number of cholesterol control tablets of the value Rs. 16,10,853/- from the stock control stores leading to disciplinary proceeding, appointment of an enquiry officer, who extended reasonable opportunity of hearing to the workman, and submitted a report holding the charge proved, where afterwards, the disciplinary authority by separate orders of even date 29.05.2009 dismissed the

workman for proved misconduct by tendering one month's wage at the end of the shift and filed separate applications on 30.05.2009 in form-"K" under Rule 60(2) of the Industrial Disputes Karnataka Rules invoking Section 33(2)(b) of the Act for approval of the action of dismissal, registered as Serial Application Nos. 22/2009 and 21/2009. The said applications were opposed by filing statement of objections of the respondents-workmen, inter-alia, denying the allegation of misconduct, and that there was no proof of committing the misconduct, while dismissal from service was not justified; in addition to the contention that the serial applications filed a day after the order dated 29.05.2009 of dismissal was not in compliance with the proviso to Section 33(2)(b) of the Act.

3. Before the Industrial Tribunal, the enquiry officer was examined as M.W. 1 on the issue over validity of domestic enquiry whence documents Exs.A. 1 to A. 12 were marked, while the respondent/workmen were examined as O.W. 1 in each application and documents Exs.0.1 to 0.5 marked.

4. The Industrial Tribunal returned a finding on the issue of validity of the domestic enquiry holding it to be fair and proper. There afterwards, the Industrial Tribunal by the orders impugned, held that filing of application on 30.05.2009 was a day after 29.05.2009 the date of the orders of dismissal hence not being a part of the same transaction was not proviso compliant. At paragraph 31 it, however, held that the two requirements of passing the order of dismissal and tendering one month's wage to the workmen was complied. In addition, the Industrial Tribunal accepted the findings of the enquiry officer and the disciplinary authority that the charges against the workmen were proved.

5. Sri Pradeep Sawkar, learned counsel for petitioner submits that filing of application on 30.05.2009 though the order of dismissal was passed on 29.05.2009 on which day one month's wage was tendered, nevertheless, constitutes one transaction and seeks support from the observations of the Apex Court in-

- (i) Strawboard Manufacturing Co. Vs. Gobind, ,
- (ii) P.H. Kalyani Vs. Air France Calcutta, ,
- (iii) Filmistan (P) Ltd. Vs. Balkrishna Bhiwa and Another, ,
- (iv) Calcutta State Transport Corporation Vs. Md. Noor Alam, ,
- (v) Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another, ,
- (vi) Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, .

6. Sri K.B. Narayanaswamy, learned counsel for respondents/workmen seeks to support the orders impugned as being well merited, fully justified and not calling for interference. Learned counsel points to the observation of the Apex Court in Straw Board's case as also P.H. Kalyani's case to submit that dates of the order of dismissal, tendering of one month's wage and filing of the application,

constituting one transaction must be done on the same day, i.e., simultaneously.

7. Having heard the learned counsel for the parties, the only question for decision making is,

Whether in the facts and circumstances of the case, the orders of dismissal of the workmen passed on 29.05.2009 effective from the end of the shift, the tendering of one month's wage, and the filing of applications u/s 33(2)(b) of the Act on 30.05.2009 constitute the same transaction in compliance with the proviso thereunder?

8. The facts of the case at the cost of repetition are that the orders of dismissal passed by the petitioner-management are dated 29.05.2009 effective at the end of the shift at 2.00 pm on the said day, while one month's wage tendered was received by the respondent/workmen on the same date at the end of the shift, however applications u/s 33(2)(b) dated 29.05.2009 were filed on 30.05.2009.

9. In Straw Board's case, the Apex Court having considered the effect of the proviso to Section 33(2)(b) of the Act posed a question as to when an application is to be made and observed thus:

9. The next question is as to when should an application be made. In this connection our attention was drawn to Section 33-A of the Act which gives a right to the employee to apply for redress in case an employer contravenes the provision of Section 33 and there is no doubt that the proviso to Section 33(2)(b) should be so interpreted as not to whittle down the protection provided by Section 33-A. 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 simultaneously but can only 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. If that is done, there will be no occasion to fear that the employee's right u/s 33-A would be affected. The question whether the application was made as part of the same transaction or at the same time when the action was taken would be a question of fact and will depend upon the circumstances of each case.

(emphasis supplied)

10. In Kalyani's case, facts that emanate are that the order of dismissal was passed by the regional representative on 28.05.1960 and was communicated to

the workman on 30.05.1960, while wages were offered to the workman at the same time when the order was communicated to him which he did not accept, and an application u/s 33(2)(b) was made to the Industrial Tribunal on the same day. In the said facts, the Apex Court held that the Labour Court was justified in holding that the application u/s 33(2)(b) was in accordance with the proviso to that section and was properly made, while following the decision in Straw Board's case.

11. In Filmistan's case, the facts were that on 19.04.1963 the workman was dismissed under a memo served on the workman on 24.04.1963 as he was not available till then, while 25.04.1963 was a holiday, the management entrusted papers on 26.04.1963 to the legal adviser who prepared the application u/s 33(2)(b) on 27.04.1963 and the next day being a Sunday, filed the same before the Industrial Tribunal, Maharashtra on 29.04.1963. The Apex Court following its earlier decision in Straw Board's case and Kalyani's case, held that the order of dismissal, the tendering of one month's wage and filing the application constituted one transaction.

12. In Lallaram's case, the facts were that the General Manager passed an order on 02.05.1968 dismissing the workman who was asked to take his final dues together with one month's pay in lieu of notice and made an application on the same day to the Industrial Tribunal, Delhi seeking approval of the order of dismissal u/s 33(2)(b) of the Act, which the Apex Court held constituted one transaction. At paragraph 12, the Apex Court observed thus:

12. xxxx

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(iv) Whether the employer has paid or offered to pay wages for one month to the employee and

(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.

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13. In Jaipur Zila case, the Apex Court extracted the observations in Tata Iron and Steel Co. Ltd. Vs. S.N. Modak, , which reads thus:

9. In the case of Tata Iron and Steel Co. (supra) it is reiterated and stated thus:-

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. It is also settled that if approval is granted, it takes effect from the date of the order passed by the employer for which approval was sought. If approval is not granted, the order of dismissal or discharge passed by the employer is wholly invalid or inoperative, and the employee can 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.

(emphasis supplied)

14. In Calcutta State Transport Corporation, the Apex Court while dealing with proviso to Section 33(2)(b) of the Act, extracted its observation in Straw Board's case and P.H. Kalyani's case, thus:

4. xxxx

It was held that the application was in accordance with the proviso to Section 33(2)(b). This decision shows that similar action has to be taken in these matters but that does not mean that all the three things mentioned before should be done on the same day.

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No hard and fast rule can be laid down in these matters. Each case must be decided on its own facts.

(emphasis supplied)

15. In the light of the aforesaid observations, there is no more doubt that the orders of dismissal of even date 29.05.2009 to be effective at the end of the shift on the same day, the tendering of one month's wage which the respondent-workmen accepted on the very same day and filing the applications involving Section 33(2)(b) of the Act on 30.05.2009 do constitute one transaction.

16. Although learned counsel for respondents submits that the Industrial Tribunal is located at a distance of less than a kilometer by road from the petitioner's office and in the absence of an explanation as to why the applications were not filed on the very same day, the transaction not being simultaneous, the Industrial Tribunal was justified in recording a finding that transaction was not simultaneous in the facts and circumstances noticed supra, cannot be countenanced.

17. The Industrial Tribunal, in my considered opinion, in the facts and circumstances, was not justified in recording a finding that three actions referred to supra i.e., the orders of dismissal, tendering of one month's wage and filing of

applications for approval ought to be on the very same day, since it is contrary to the observations of the Apex Court noticed supra. Hence the orders impugned call for interference. In the result, these petitions are allowed. The orders impugned in so far as it relates to rejection of the application for approval are quashed. Since the Tribunal has concurred with the findings of the enquiry officer, hence there is no necessity to remit the proceeding to the Industrial Tribunal for orders according approval of the applications. Serial Applications are accordingly allowed and approval accorded to the orders of dismissal u/s 33(2) (b) of the Act.