

(1980) 04 MAD CK 0029
In the Madras High Court
Case No : Writ Petition No. 3725 of 1977

M.S. Manickam

APPELLANT

Vs

Cheran Transport Corporation

RESPONDENT

Date of Decision : 17-04-1980

Acts Referred:

Industrial Disputes Act, 1947 — Section 11A, 12(5), 33, 33(2), 33(A)

Citation : (1981) 1 LLJ 396

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Judgement

1. The writ petition arises in the following circumstances : The petitioner was employed as a storekeeper, Central Unit Assembly in Cheran

Transport, Pollachi. As a result of certain disciplinary proceedings he was reverted to the post of a junior assistant by the order, dated 31st

October, 1974. He was directed to join duty from 1st November, 1974. He wanted time till 4th November, 1974. On 5th November, 1974 he

applied for leave on medical grounds for one month with a medical certificate from a Government Medical Officer. Thereafter, he produced the

certificate from the E.S.I. doctor. The leave was granted upto 30th January, 1975. He was again granted leave on medical ground upto 3rd

January, 1975 to 11th March, 1975. On 18th March, 1975 the petitioner again applied for leave from 11th March, 1975. He did not produce any

medical certificate. He was continuously absent for more than 8 days without proper leave. The management called for the explanation of the

petitioner on 24th March, 1975. The petitioner submitted his explanation on 27th March, 1975. The management did not accept the explanation.

The management terminated the petitioner's service in terms of clause 6A of the

Standing Order of the first respondent Cheran Transport

Corporation. The petitioner then moved the Labour Officer for conciliation proceeding which failed. Thereafter, the Government passed an order

on 21st April, 1976 refusing to refer the issue of non-employment of the petitioner for adjudication before the Labour Court. It is, in these

circumstances, the writ petition has been filed by the petitioner for the issue of a writ of mandamus directing the Government to reconsider the

question of reference of the issue regarding non-employment for adjudication to the Labour Court on the ground that the order dated 21st April,

1976 passed by the Government is vitiated by a failure to take into consideration relevant materials.

2. Mr. Ramalingam, the learned counsel for the petitioner raised the following contentions : (1) At the time the order of termination of service was

passed by the management an Industrial Dispute was pending. However, the management did not get the approval of the Industrial Tribunal under

S. 33(2)(b) of the Industrial Disputes Act (hereinafter called the Act). In the circumstances, the termination of the petitioner's services was

wrongful. But the Government did not take into consideration the fact that an Industrial Dispute was pending at the time of termination of the

petitioner's services and the management had not obtained the approval of the Industrial Tribunal as required by S. 33(2)(b) of the Act. (2) The

Government had not considered the question whether the punishment of termination of service was proportionate to the charge levelled against the

petitioner that he had absented himself for eighty days without leave. According to Mr. Ramalingam under S. 11A of the Act the Labour Court has

got the power to alter the punishment imposed on a worker by the management if it found that the punishment was disproportionate to the gravity

of the offence. In the circumstances, the Government was obliged to consider whether the termination of services of the petitioner for the offence

charged against him was justified.

3. It is now settled law that the order of the State Government under S. 12(5) of the Act referring or refusing to refer a dispute to the Labour

Court for adjudication is an administrative order. It is not equally settled that Courts have no power in exercise of their power of judicial review to

sit in appeal over the order of the Government passed under S. 12(5) of the Act.

Nor is it possible for Courts to question the reasons given by the Government for refusing to refer a dispute under S. 12(5) of the Act, if the reasons are germane and relevant to the question of references. The Court will be justified in issuing a writ of mandamus only if it is satisfied that the action of the Government in not making a reference was not bona fide or that the Government had taken into account totally irrelevant and extraneous considerations or that the Government had misdirected itself in law in wholly omitting to take into account relevant consideration.

4. The contention of Mr. Ramalingam, the learned counsel for the petitioner is that Government failed to take into account that at the relevant time an Industrial Dispute was pending with regard to the management and that the Government failed to take into account the fact that the respondent-management had not obtained the approval of the Industrial Tribunal as required by S. 33(2)(b) of the Act. Secondly, the Government did not apply its mind to the question whether the termination of service of the petitioner was commensurate with the offence charged against him. This the Government was obliged to do since under S. 11A of the Act the Labour Court has got power to alter the punishment if it found that the punishment imposed by the management was disproportionate to the gravity of the offence. Therefore, Mr. Ramalingam submitted that the order of the Government in refusing to refer the dispute regarding the non-employment of the petitioner for adjudication before the Labour Court is vitiated by non-consideration of relevant materials.

5. On the other hand, Mr. Sanjay Mohan, the learned counsel for the first respondent contended that in this particular case the petitioner has not been discharged or punished for any misconduct and consequently S. 33(2)(b) of the Act would not be attracted. In the submission of Mr. Sanjay Mohan under the Standing Order 6A, if a workman remains absent for more than eight consecutive days without leave he shall be deemed to have left the employment of the Corporation unless he gives a satisfactory explanation to the management for his absence. In this particular case, the management has invoked the power conferred on it under Standing Order 6A and deemed that the petitioner has left the services of the Corporation since he remained absent for more than eight days. Therefore, according to the learned counsel neither S. 33(2)(b) of the Act is

attracted nor the question of punishment being disproportionate to the gravity of the offence will arise.

6. Let me first take up for consideration whether S. 33(2)(b) of the Act is attracted or not. Section 33(2)(b) of the Act reads as follows :

During the pendency of any such proceedings in respect of an Industrial Dispute, the employer may, in accordance with the standing orders

applicable to a workman concerned in such dispute, or where there are no such standing orders in accordance with the terms of the contract,

whether express or implied between him and the workman, for any misconduct for 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.

Clause (b) of sub-s. (2) of S. 33 permits an employer to discharge or punish a workman by way of dismissal or otherwise for any act of

misconduct not connected with the dispute pending before the authority, in accordance with the Standing Orders in accordance with the terms of

the contract whether express or implied. But the proviso to this clause requires the employer in cases of discharge or punishment by way of

dismissal or otherwise to pay to the workman concerned wages for one month and to make an application to the authority before which the

proceeding is pending for ""approval"" of the decision taken. Thus, for attracting S. 33(2)(b) of the Act the discharge must be fore ""any act of

misconduct"". Termination if simpliciter or automatic termination of service under the conditions of service or under the standing orders is outside the

scope of S. 33 of the Act. It is equally well established that when the service of a workman stands terminated under the standing orders, the

Government is not bound to refer the dispute arising out of such termination of service for adjudication as the claim will be inconsistency with the

agreement between the parties.

7. In National Engineering Industries Ltd. Vs. Hanuman, , the workman overstayed his leave for more than eight days. The management relying on

the relevant provision in the standing orders treated his services as having been

automatically terminated. The workman made an application under S. 33A of the Act before the Labour Court. The Labour Court accepted the workman's version that he had asked for extension of leave on medical grounds and had sent an application through another workman. On the circumstances, the Labour Court held that there was no automatic termination of the workman's service. The Supreme Court on appeal by the management held that the workman had been totally unable by evidence produced by him to establish that his absence beyond the period of leave originally granted was due to continued illness and therefore the finding of the Labour Court in his favour in this respect was perverse. Having set aside that finding, the Supreme Court considered the effect of the Standing Order which stated that if a workman does not report for duty within eight days of the expiry of his leave he loses his lien on the appointment. The Supreme Court took the view that where a workman's service terminates automatically under the standing order, S. 33 would not apply and so an application under S. 33A would not be maintainable, as there is no question in such a case of the contravention of S. 33 of the Act. In this connection, the Supreme Court approved of the decisions in *Chandri Bai Uma v. The Elephant Oil Mills Ltd.*, 1961 I L.L.J.370 and *Sahajan v. A. Firpo Company Limited*, 1953 II L.L.J.686. The Supreme Court also followed its earlier decision in *The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another*, .

8. In *Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others*, , it has been observed as follows :

We have no doubt in our mind that S. 33(2)(b) makes it obligatory upon the employer to make an application to the Tribunal under the proviso only when he discharges or dismissed a workman for misconduct Termination simpliciter or automatic termination of service under the conditions of service or under the standing orders is outside the scope of S. 33 of the Act.

Of course, it may be mentioned that on the facts of that case the Supreme Court found that the order of dismissal was really in the nature of a punishment.

9. In *K.N. Vellayan Vs. Government of Tamil Nadu and Another*, , the appellants were employees of the second respondent. The appellants had

been arrested in August, 1970 and detained in prison as they were involved in the land grab agitation organised by the Communist Party of India of Tamil Nadu. While they were in prison they had sent leave letter to the second respondent praying for leave till they released and were in a position to report for duty. The second respondent did not grant the leave applied for by the appellants, but on 1st September, 1970, sent a communication to the appellant stating that in view of their absence, as per the relevant standing orders, they should be taken to have abandoned their employment. After their release, the appellants wanted to report for duty but the second respondent did not allow them to join duty on the ground that they have already ceased to be in employment. The appellants in the first instance filed an application before the Industrial Tribunal, Madras, under S. 33A of the Act since an industrial dispute concerning the second respondent was then pending before it. The Industrial Tribunal, however, dismissed the petition holding that it had no jurisdiction to entertain the same as there was no dismissal or discharge of the appellants by the second respondent. Thereafter, the appellants sought to raise an industrial dispute and approached the Government for referring the matter for adjudication, but the Government refused to refer the dispute on the ground that the services had been terminated in accordance with the standing orders of the second respondent. Consequently, the appellants moved this Court for the issue of a writ of mandamus directing the Government to reconsider the question of making a reference of the dispute relating to the non-employment of the appellants. Ramanujam, J., speaking for the Bench observed as follows :

It is well-established that when the service of a workman stands terminated under the standing orders, the Government is not bound to refer the dispute arising out of such termination of service for adjudication as the claim will be inconsistent with the agreement between the parties.

The learned Judge followed the decision of Kailasam, J., in Coimbatore District Textile Mills Staff Union (by Secretary) Vs. State of Madras (by Secretary to Government, Industries, Labour and Co-operative Department) and Another, , the decision of the Supreme Court in The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, , the decision of Ismail, J. in The Mangement of Bhavani Mills Ltd. Vs. The

Presiding Officer, Labour Court and Another, and that of the Supreme Court in National Engineering Industries Ltd. Vs. Hanuman, .

10. The standing Order 6A of the first respondent-corporation reads as follows :

If a workman remains absent for more than eight consecutive days, without leave on proper grounds or prior permission, he shall be deemed to

have left employment of this Corporation unless he gives an explanation to the satisfaction of the management about his absence.

Applying the principle said down in the above cases, it will be clear that absence for eight consecutive days without leave will result in an automatic

termination of the services of the petitioner. Consequently, in the present case S. 33(2)(b) of the Act will not be attracted. Mr. Ramalingam,

contended that the present case is distinguishable from the facts of the case before Ramanujam, J. in view of the fact that Standing Order 6A

provided a workman being given an opportunity to submit his explanation. I am unable to see how the provision for an opportunity being given to

the workman to offer his Explanation will in any way alter the situation. Ramanujam, J., has referred to the judgment of the Supreme Court in The

Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, . In that case, Standing Order 8 (ii) provided as follows :

Any employee who absents himself for eight consecutive working days without leave shall be deemed to have left the company's service without

notice thereby terminating his contract of service. If he gives an explanation to the satisfaction of the management, the absence shall be converted

into leave without pay or dearness allowance.

It may be seen that this standing order also provided that if the workman gave an explanation to the satisfaction of the management, his absence

shall be converted into leave without pay or dearness allowances. Notwithstanding that clause, the Supreme Court held that once there was an

automatic termination of service by one's continued absence for the period provided in the standing order, then there was no question of the

management being forced to take up disciplinary proceedings under the other clauses of the standing order. Mr. Ramalingam then argued that in

this case the management itself has taken the stand that the termination of service of the petitioner was a matter of punishment for his over-staying

the leave and that consequently in substance the termination was not an

automatic termination but a dismissal of the petitioner for misconduct. I am not impressed with this contention of Mr. Ramalingam. The order passed by the management itself shows that the petitioner's services were being terminated under clause 6A of the standing order. Further if in a given case the management is entitled to invoke the automatic termination provided for under any of its standing orders and it is equally entitled to proceed against the workman for misconduct and dismiss his services, the management was free to resort to any one of the provisions, unless it is shown that the action of the management was due to mala fide. Support for this view can be found from National Engineering Industries Ltd. Vs. Hanuman, , where it is stated as follows :

It is however urged that some difference is made by the existence of another provision in the standing orders. In Appendix D of the standing orders one of the major misdemeanors is ""absence without permission exceeding ten consecutive days. That in our opinion is an alternative provision and the appellant in this case was free to resort to any one of the provisions, unless it is shown that resort to one particular provision, was due to mala fide.

The Government have also taken into account the relevant considerations and found that the management had invoked its power under clause 6A of the Standing Orders to terminate the services of the petitioner. Further, it is seen from the conciliation report that the workman had contended that the order of termination of his service was in violation of S. 33 of the Act. In the circumstances, when the Government stated that the management had invoked clause 6A of the Standing Order in terminating the services of the petitioner, the Government must be deemed to have been aware of the contention of the petitioner that the termination was in violation of the provisions of S. 33 of the Act. I therefore repel the contention of Mr. Ramalingam that the impugned order is liable to be quashed on the ground that the Government had failed to bear in mind the fact of the existence of an industrial dispute at the relevant time and the failure of the management to seek the approval of the Industrial Tribunal under S. 33 of the Act.

11. In view of my finding that the termination of the petitioner's services was automatic and no punishment for misconduct was involved, the

second contention of Mr. Ramalingam that the provisions of S. 11A as regards the punishment inflicted on the petitioner were not borne in mind by

the Government does not arise. Therefore, I repel this contention also.

12. In the result, the writ petition fails and is dismissed, but in the circumstances without costs.