
(2011) 08 KL CK 0007
In the High Court Of Kerala
Case No : O.P. No. 5473 of 2001

P. Balakrishnan

APPELLANT

Vs

Labour Court, Ernakulam and Another

RESPONDENT

Date of Decision : 24-08-2011

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 11A, 33, 33(2)(b), 33(3)

Citation : (2011) 131 FLR 990 : (2011) 4 KLJ 449 : (2011) 4 KLT 346 : (2012) 2 LLJ 604

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : P. Ramakrishnan, for the Appellant; A.V. Xavier, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramchandra Menon, J.—Termination of service of the petitioner in 1992, on proven misconduct, upheld by the first respondent/Labour Court in Ext. P1 Award in I.D. No. 191 of 1993, is the subject matter involved in this case. Whether non-compliance of the statutory prescription u/s 33(3) of the Industrial Disputes Act, (hereinafter referred to as the "Act") without obtaining "prior permission" of the Industrial Tribunal/Labour Court for awarding punishment in respect of a "protected workman" during the pendency of any proceeding before the Industrial Tribunal/Labour Court will result in automatic reinstatement and whether the intimation given by the Trade Union, furnishing the list of "protected workmen" to the Management will enable the concerned workman to be recognised as a "protected workman" by the Management, without any positive act of such declaration, are the legal questions" involved. Whether the petitioner workman is a "protected workman" and whether "typing work" was part of the duty attached to the post of "Commercial Assistant" held by the petitioner at the time of termination of service are the "factual disputes".

2. The petitioner joined service of the second respondent as a "Typist - Clerk" in the year 1975. Later, he was provisionally promoted as "Commercial Assistant"

in the year 1982 and was confirmed in the said post. The case of the petitioner is that he was an office bearer of the Trade Union in the second respondent Company and was actively taking part in such activities. In connection with the service conditions of the employees, a charter of demands was submitted before the Management in 1988. But the negotiations failed and the rift between the Managements and the Union/workers got widened. The dispute raised on the said issue was finally referred for adjudication to the Industrial Tribunal, Alappuzha, where it was numbered as I.D. 201 of 1990 and was pending.

3. In the meanwhile, the second respondent transferred the petitioner to another Unit on 13.06.1989, also referring to the "typing work" he had to perform while holding the post of "Commercial Assistant" in the new Unit. The said order was accepted by the petitioner, who joined duty at the destination, as the transfer was not under challenge. However, nearly one month after the transfer, the Union representing the petitioner raised the "dispute", stating that the job of "typing" was not part of the duty attached to the post of "Commercial Assistant" and hence that the petitioner was not liable to discharge the said function. It appears that the said course was pursued when the Management alerted the petitioner to carry out the instructions as to the typing works, which was not acceded to by the petitioner, who chose to contend that it was not part of his job and that he was never doing the same from 1982, on promotion as "Commercial Assistant".

4. In view of the insubordination and non-discharging of the duty in respect of the "typing work", the Management observed that there was clear misconduct on the part of the worker, which accordingly was ordered to be enquired into. An advocate was appointed as Enquiry Officer. Witnesses were examined on either side and documents were produced, adducing evidence to sustain the rival stand. On conclusion of the enquiry, the Enquiry Officer arrived at a finding that the charges leveled against the delinquent employee were proved, based on which, the Management issued a show-cause notice, proposing the punishment of "termination" from the service. The petitioner submitted a reply, mainly pointing out that the enquiry findings were wrong and perverse and that "typing work" was not part of the duty of the "Commercial Assistant" and he was not liable to do the same. Since the explanation was not satisfactory, the Management considered the matter and on arriving at a finding that the enquiry was conducted in accordance with law and the materials on record justified the finding and reasoning of the Enquiry Officer, the petitioner was served with the order dated 16.07.1992, putting an end to the service; of course, after obtaining approval of the Industrial Tribunal, Alappuzha for inflicting the punishment by filing a petition u/s 33(2)(b) of the I.D. Act, in view of an industrial dispute already pending there (as I.D. No. 201/90).

5. Pursuant to reference of the dispute to the first respondent (Labour Court, Ernakulam), the petitioner was examined as W.W.1 and Exts.W1 to W5 were marked on the part of the Union. The Management adduced documentary

evidence by way of Exts. M1 series (3 Nos.) pertaining to the enquiry proceedings, including the deposition of the witnesses, documents and report of the Enquiry Officer. The contentions raised from the part of the Union as mentioned hereinbefore were reiterated before the Labour Court, also pointing out that the termination itself was null and void, for want of "prior approval" u/s 33 (3) of the I.D. Act., the petitioner being a "protected workman"". Violation of the principles of natural justice in conducting the enquiry, victimization and total lack of merits, as "typing" was never part of the duty attached to the post of "Commercial Assistant" as contended by the petitioner, were asserted before the Labour Court. The Management vehemently rebutted the same, referring to the relevant facts and figures, as discernible from the materials on record. After analysing the data/evidence on record, the Labour Court arrived at a finding that that enquiry was conducted adhering to the principles of natural justice and that the finding and reasoning were well based on the pleading and evidence and hence not perverse. The action on the part of the Management in discharging the petitioner from service was upheld. The proportionality of the punishment was also considered and answered in favour of the Management, which in turn is under challenge in this Original Petition.

6. Mr. P. Ramakrishnan, the learned Counsel appearing on behalf of the petitioner submitted that the petitioner was constrained to approach this Court directly, as the Trade Union who represented him earlier had become defunct. The sequence of events as to the factual aspects and as to the consequence of non-filing of any application for obtaining "prior sanction" u/s 33(3) of the I.D. Act were highlighted, also placing reliance on the decision rendered by the Gujarat High Court reported in R. Balasubramanian and Others Vs. Carborandum Universal Ltd., Okha, . The learned Counsel also pointed out that the Union furnished a list of "protected workmen" to the Management on 27.03.1992 and that the Management sought for some clarification on 05.05.1992, which was supplied on 08.05.1992 and it was thereafter, that the petitioner was sent out from the service on 16.07.1992 without getting any "prior approval" u/s 33(3) of the I.D. Act. The learned Counsel submitted further, that by virtue of the relevant rules (Rule 61 of the Central Rules and Rule 62 of the Kerala Rules), the Management had to act upon the list of "protected workmen" furnished by the Union within 15 days and since it was not done, the petitioner had obtained deemed status of a "protected workman" and hence no punishment could have been imposed without getting "prior approval" of the Industrial Tribunal, Alappuzha, where an industrial dispute was already pending; more so in view of the law laid down by the Gujarat High Court, cited supra.

7. Mr. A.V. Xavier, the learned Counsel for the respondents submits that the idea and understanding of the petitioner as to the scope of Section 33 (3) of the I.D. Act is quite wrong and misconceived. It is stated that the case of the petitioner is not correct with reference to the facts as well, that the Management had not recognised the petitioner as a "protected workman""; that no material was produced either before the Labour Court or even before this Court to arrive at

any such inference; that the Enquiry Report was submitted on 11.02.1992 and show-cause notice was issued proposing punishment on 27.04.1992, i.e. before seeking for clarification on the list of "protected workmen" submitted by the Union and further that the attempt of the petitioner/Union was only to overreach the consequences in view of the outcome of the Enquiry and the adamant stand taken by the worker that he will not perform the "typing" works. The learned Counsel also submits that the factual position as available in Balasubramanian's case (cited supra) is entirely different and not applicable to the case in hand. It is also stated that since the Management had not recognised the petitioner as a "protected workman" and in view of pendency of the dispute before imposing the order of punishment, approval of the Industrial Tribunal, Alappuzha was sought for by filing a petition u/s 33 (2)(b) of the I.D. Act. Even though the petitioner had filed objection to the same, by the time the matter was considered, termination of service of the petitioner had already been referred for adjudication. In the said circumstance, the petitioner filed a "memo" clearly conceding that approval could be given, without prejudice to the right of the petitioner to pursue the dispute on termination. It was accordingly, that the approval was granted. The Management had already paid one month's wages, as contemplated u/s 33(2)(b), and the same was accepted by the petitioner (which otherwise is not payable in the case of normal termination from service). This being the position, the petitioner cannot take a "U" turn contending that termination was bad for want of "prior approval u/s 33. It is also stated that, even if there was infringement of any statutory prescription as aforesaid, it will not result in automatic reinstatement in view of the law clearly laid down by the Apex Court as per the decision in Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, . The learned counsel further submits that the petitioner has already attained the age of superannuation (which earlier was "58", and subsequently was enhanced to "60") and as such, there cannot be any reinstatement, as sought for.

8. To answer the various points raised, particularly on the legal issues, it is necessary to examine the term "protected workman" and the rights and liabilities on declaration/recognition as a "protected workman". The term "protected workman" is defined in the "Explanation" to Section 33 (3)(b) of the I.D. Act, which is extracted below:

Explanation: For the purpose of this subsection, a "protected workman" in relation to an establishment, means a workman who, being a member of the executive or other office bearer of a registered trade union connected with the establishment is recognised as such in accordance with rules made in this behalf.

9. Rule 61 of the Central Rules stipulates the course and events to be pursued with regard to the rights and liberties of a "protected workman". As provided under sub rule (1) of the said Rule, every registered trade Union shall communicate to the employer before the 30th April every year, the names and address of such of the officers of the Union, who are employed in that

establishment and who, in the opinion of the Union, should be recognised as "protected workmen". Sub-rule (2) says that the employer shall recognise such workmen to be "protected workmen" and communicate to the Union, in writing (within 15 days of the receipt of names and addresses under sub-rule (1)) and the said list of workmen recognised as "protected workman", shall be in force for a period of 12 months from the date of such communication. As per the Rule, the maximum number of workers to be recognised by the Management is only "5", to be distributed among all the Registered Trade Unions. Sub-rule (4) of Rule 61 is more relevant in the given context, which stipulates that, when a dispute arises between an Employer and any Registered Trade Union, in any matter connected with the recognition of "protected workman" under the said Rule, the dispute shall be referred to the Regional Labour Commissioner (Central) or Assistant Labour Commissioner (Central) concerned, whose decision thereon shall be final.

10. The State of Kerala has formulated Rules, synonymous with the Central Rules. Rule 62 is almost similarly worded like Rule 61 of the Central Rules and the only difference is with regard to the Conciliation Officer, to whom the dispute, if any, is to be referred to, as given in sub rule (4).

11. The crux of the contentions raised by the petitioner is that, the Union having submitted the list of "protected workman" including the petitioner on 27.03.1992, also furnishing the clarification on 08.05.1992 in response to the notice issued by the Management on 05.05.1992, the petitioner was to be treated as a "protected workman" on expiry of 15 days, particularly in the light of the law declared by the Gujarat High Court in 1978(1) LLJ 432 (K. Balasubramanian and others v. Carborandum Universal Ltd., Okha).

12. On going through the rule position, as discussed herein before, it is seen that, on submitting the list of office bearers by the Trade Union to be recognised as "protected workmen", the Employer has to recognise the concerned workmen to the extent as prescribed, as "protected workmen" and shall communicate the list of such recognised workmen to the Registered Trade Union in writing within 15 days. This shows that the mere submission of a list of "protected workmen" by the Trade Union is not enough and a conscious act (to be pursued by the Employer giving effect to the concerned workmen as "protected workmen"), is specifically contemplated under the statute; followed by communication to be given by the Employer, in writing. In other words, the tenure of such "protected workmen" is for a period of 12 months from the date of communication of the list of recognised workmen by the Employer. This shows that it is not an automatic process as contended by the petitioner.

13. It is also relevant to note that the statute itself takes care of the situation, where no action is taken by the Employer to recognise the "protected workmen" within 15 days from the date of submission of the list by the registered Trade Union. This is provided under sub rule (4) of Rule 62 of the Kerala Rules (sub rule (4) of Rule 61 of the Central Rules), which reads as follows:

(4) When a dispute arises between an employer and any registered trade union whether a particular workmen should be recognised as a "protected workmen" or not the dispute shall be referred to the Conciliation Officer concerned whose decision thereon shall be final.

From the above, it is obvious that in case of dispute, either by inaction on the part of the Employer or on refusing to recognise the workers named by the Union as "protected workmen", the remedy of the Union is to approach the concerned Conciliation Officer, who is to consider the position and pass an order, which is to be final and binding. Admittedly, no such course has been pursued by the Union representing the petitioner in this case.

14. Coming to the reliance sought to be placed in Balasubramanian's case (cited supra), it is to be noted that, it was a case where the list of "protected workmen" given by the registered Trade Union was accepted and recognised by the Employer for the previous year. In the concerned/subsequent year, the change was only with regard to one name among the total 5 persons to be recognised as "protected workmen" of the sole Registered Trade Union. But since the Management did not recognise them as "protected workmen" within the prescribed time, dispute was raised by the Union before the Conciliation Officer who passed an order recognising the workmen as "protected workmen". But the Management dismissed the concerned workers as per the order passed in the morning, on the same day. The action was sought to be justified by the Management contending that, at the time of dismissal, the workers were not recognised as "protected workmen". The said contention was repelled by the Division Bench of the Gujarat High Court, referring to the sequence of events. This, however does not apply to the case in hand, as no communication in writing has been given by the second respondent/Management recognising the petitioner as a "protected workman" and further that, no dispute under sub rule (4) of Rule 6 has ever been raised or got adjudicated by the Union in this regard, before passing the order of discharge from the service on 16.07.1992.

15. Incidentally, it has to be noted that the second respondent, by virtue of the pendency of I.D. No. 201/90 before the Industrial Tribunal, Alappuzha as to the charter of demands submitted by the Union, had filed a petition for approval u/s 33(2)(b) of the I.D. Act in respect of the punishment of termination from service imposed on the petitioner. Though the petitioner filed a statement of objections, a "memo" was filed later, conceding to grant approval without prejudice to his right to raise the contentions with regard to the challenge against the punishment, in the dispute already referred for adjudication by that time. It was accordingly, that an order was passed by the Tribunal on 16.12.1993, granting the approval as agreed, a copy of which was placed before this Court for perusal, during the course of hearing. The operative portion as contained in paragraph "2" of the said order is extracted below:

The opposite party entered appearance and filed objection statement. Then after the matter was posted at several times for evidence of the parties, on

02.12.1993 when this petition was called a memo was filed by the opposite party stating the issue of dismissal against him had already been referred for adjudication to the Labour Court, Ernakulam. In view of that, approval sought by the applicant might be granted without prejudice to his right to raise the contentions against dismissal in the industrial dispute now pending before the Labour Court. The content of the memo is recorded.

16. The question to be considered is whether the petitioner is now justified in pressing the contention with regard to the absence of "prior approval" u/s 33 (3) of the I.D. Act, even if he were a "protected workman". The 1st respondent/Labour Court has considered the matter and has clearly observed that the petitioner/Union had no case in the objection filed in response to the application filed u/s 33(2)(b), as to any lapse on the part of the Employer with respect to Section 33(3). To put it more clear, there was no challenge from the part of the petitioner/Union as to the validity of the proceedings, with reference to "prior approval" u/s 33(3). The petition for approval u/s 33(2)(b) was allowed by the Industrial Tribunal on 16.12.1993 as conceded by the petitioner/Union, who filed a "memo" to have it allowed without prejudice to the contentions against the punishment, raised in the Industrial Dispute referred to the Labour Court and pending there. This Court finds that the finding and reasoning given by the Labour Court in this regard are perfectly within the four walls of law.

17. Even otherwise, violation, if any, to comply with the requirements u/s 33(2) (b) or 33(3) will not make the punishment imposed "void ab initio", so as to enable the workman to claim the wages or such other benefits. This has been considered by the Apex Court as per the decision reported in Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, holding that, contravention of Sec. 33 does not render an order of discharge or dismissal as void or inoperative. The Apex Court has observed that the only remedy available to the workman for challenging the order of discharge or dismissal is, as provided u/s 33A, apart the course provided u/s 10 and that he cannot maintain an application u/s 33C (2) for determination and payment of wages on the basis that he continued to be in service. It was made clear that the workman can proceed u/s 33C(2), only if 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 is not justified and has set aside the order, reinstating the workman.

18. The remaining issue is only with regard to the factual dispute, as to whether there is any merit in the contention of the petitioner" that the typing work" was not part of the duty attached to the post of "Commercial Assistant" (by the petitioner at the time of discharge and whether the petitioner has suffered any "prejudice" for not considering the validity of the enquiry as a preliminary issue, but for considering the same only while passing the final Award (when there is a contention for the petitioner that he could not effectively substantiate the adequacy of the punishment and the scope of Section 11A of the Act).

19. Admittedly, the original appointment of the petitioner was as Typist cum

Clerk" in 1975 and thereafter, he was promoted as "Commercial Assistant", subject to some terms and conditions. Copies of the original appointment order dated 07.05.1975, the order dated 10.05.1982 granting provisional promotion and also the order dated 15.02.1983 confirming the petitioner in the post of "Commercial Assistant" were placed for consideration of this Court during the course of hearing.

20. The learned Counsel for the petitioner submitted that typing work" was not specifically included in the "promotion order" given to the petitioner and as such, he was not liable to do the said work. It was also stated that, witnesses examined from the part of the worker before the Labour Court, had deposed that the petitioner was not doing any typing work after his promotion in 1982 and that the concerned witnesses were doing the said work, as given by the petitioner. It was stated that the evidence on record was not correctly looked into or properly analysed by the Labour Court while passing Ext.P1 Award. It was further pointed out that the promotion order of the petitioner was never produced before the Labour Court and the case of the Management/Employer was sought to be substantiated (to show that the typing work was also part of the work of the "Commercial Assistant") with reference to the promotion order stated as given to some other officer, which hence is not liable to be relied on in the case of the petitioner.

21. But, it is to be noted that the petitioner was originally appointed as Typist cum Clerk, who, was subsequently promoted as "Commercial Assistant", subject to the terms and conditions of appointment. Copies of the orders produced before this Court do not suggest that the petitioner was to perform some other work, alien to the works attached to the post in question, which according to the Management includes typing work as well. No such exclusion is given in the provisional promotion order issued in 1982 and so also, in the confirmation order issued in the year 1983. That apart, the promotion order issued to another employee holding the post of "Commercial Assistant" (by name Janardanan, who was examined as a witness from the side of the worker, in the enquiry) clearly stipulates that he had to discharge the "typing work" as well.

22. The crucial question is whether "typing" forms part of the work attached to the post of "Commercial Assistant". Going by the materials discussed by the Labour Court, there cannot be any dispute that "Commercial Assistant" is also supposed to do the "typing work". The contention of the petitioner is that the stipulation as contained in the promotion order given to another "Commercial Assistant" (the witness by name Janardanan) specifically referring to the "typing work", is absent in the promotion order given to the petitioner. The question is, not whether the petitioner was doing the typing work, but it is whether "typing work" is actually attached to the post of "Commercial Assistant". The mere fact that the petitioner was not required to do the typing work earlier, will not tilt the balance to hold that typing work is not part of the work attached to the post of "Commercial Assistant". So also, the evidence tendered by the witnesses

examined from the side of the worker that they were doing the typing works as given by the petitioner; that there was no objection for the Management in this regard or that no typewriter was allotted to the petitioner cannot improve the case of the petitioner, to hold that typing work did not form part of the job assigned to the petitioner. The very fact that the Union had not raised any dispute with regard to the typing work sought to be done by the witness by name Janardanan (holding the post of Commercial Assistant), as clearly given in his promotion order, issued in 1986 itself shows, that the Union cannot take a different stand with regard to the work to be carried out by a "Commercial Assistant", when it comes to the case of the petitioner. As such, this Court holds that the observation of the Labour Court that the typing work forms part of the work of Commercial Assistant is correct and sustainable and the finding does not warrant any interference.

23. Coming to proportionality of the punishment imposed and as to the alleged loss of opportunity to substantiate the power and scope of Section 11A of the I.D. Act (for having finalised the matter, without passing any "preliminary order" as to the validity of the enquiry), this Court finds that there is not much substance in the said contention as well. The case of the Management was always that the petitioner refused to do the typing work, which in turn was proceeded with, in view of the misconduct. The Labour Court has specifically referred to the course and conduct of the Management, who was ready to accommodate the petitioner by reducing the quantum of punishment, if the petitioner was ready to discharge the typing duties, once he was reinstated in service. But the stand of the petitioner was that, "typing" did not form part of the duty of the "Commercial Assistant" and hence he was not interested in having such a concession, he being an office bearer of the Union. This shows that the Management was not particular to have imposed the punishment of "discharge" from service. It was only on the basis of the finding of guilt and the stand taken by the petitioner, that he was never ready to do the typing work under any circumstance, that the Management was constrained to pass the order putting an end to the service, as there was no other alternative. This Court finds that no "prejudice" whatsoever has been caused to the petitioner in this regard and the challenge raised under this head also fails. In the above circumstance, this Court holds that the petitioner has failed to establish any tenable ground to interfere with the impugned Award passed by the Labour Court. The Award is sustained and the Original petition is dismissed.