
(2017) 09 P&H CK 0033
In the Punjab And Haryana At Chandigarh
Case No : 3590 of 2014 (O&M)

Pawan Kumar

APPELLANT

Vs

Labour Commissioner, Haryana and another

RESPONDENT

Date of Decision : 06-09-2017

Acts Referred:

Industrial Disputes Act, 1947, Section 33(2) (b) - Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings

Citation : (2017) 09 P&H CK 0033

Hon'ble Judges : P.B. Bajanthri

Bench : SINGLE BENCH

Advocate : Pankaj Jain, J.S. Bedi, Hemant Bassi

Final Decision : Allowed

Judgement

1. In the instant writ petition, petitioner has prayed for the following relief:-

"(i) issue a writ in the nature of certiorari or any other appropriate writ, order or direction quashing the impugned order dated 08.01.2013 passed by respondent no.1 (Annexure P-4) whereby onus to prove Issue No.1 i.e. issue regarding fairness of enquiry has been placed on the petitioner-workman and for quashing the impugned order dated 27.08.2013 (Annexure P-8) passed by respondent no.1 whereby application filed by the petitioner seeking shifting of onus to prove Issue No.1 on the management and order dated 08.01.2014 (Annexure P-9) seeking review of Annexure P-8 has been dismissed,

being illegal and against the established principles of law.

(ii) to (vii) xxx xxx xxx xxx"

2. Petitioner joined respondent no.2 - Company as an operator

on 13.12.2004. Petitioner and co-employees formed an union under the

name of Hero Honda Mazdoor Sangathan and applied its registration on 16.07.2008. Petitioner was subjected to domestic enquiry on certain allegations and respondent-management proceeded to pass order of termination and moved an application under Section 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as " ID Act ") before the Labour Commissioner for approval. In the application, respondent-management have sought for the following relief:-

"It is, therefore, prayed that the application be allowed and it be held that the services of the respondent are being dispensed with after holding fair and proper enquiry in compliance to the requirement of the Act and the applicant has tendered one month's notice pay along with the order of dismissal and accordingly, due compliance of Section 33(2)(b) has been affected and it be held that it is a fit case for granting the approval accordingly. The documents pertaining to compliance are enclosed to this application."

The Labour Commissioner framed the following issues on 08.01.2013:-

"1. Whether the enquiry conducted by the management is fair and proper" If not, to what effect" OPR 2. Whether the management has complied with the requirement of the provisions of Section 33(2)(b) and the application for approval deserves to be allowed or not" If not to what effect" OPA 3. Whether there is any short payment as claimed by the workman" If so, to what effect" OPR 4. Relief."

Petitioner feeling aggrieved by order of framing of issues dated 08.01.2013 filed a writ petition before this Court which was numbered as CWP No. 12678 of 2013 and it was disposed of on 31.05.2013 with the following direction:-

"that in case an application is made by the workman to shift the onus of issue No.1 on the management, the same would be considered and decided by the Labour Court before proceeding further in the matter."

Pursuant to above direction, on 06.06.2013 petitioner-workman submitted an application for change of onus on enquiry issue stating that it is for management to prove that enquiry conducted against workman is fair and proper. Respondent-management filed their reply on 25.07.2013. The Labour Commissioner passed following order on 27.08.2013:-

"onus has rightly been put on the respondent-workman by my predecessor on

8.1.2013 to lead evidence at the first instance to prove his allegations against the vires of inquiry and the onus has rightly been placed upon the respondent."

The petitioner-workman filed a review application before the Labour Commissioner. The same was rejected vide order dated 08.01.2014 (Annexure P/9). Hence, present writ petition.

3. Learned counsel for the petitioner submitted that insofar as first issue i.e. "Whether the enquiry conducted by the management is fair and proper" If not, to what effect" OPR" is concerned, the same is required to be proved and onus would be on the management for the reasons that respondent-management have filed application under Section 33(2)(b) of ID Act for approval of termination order. Therefore, onus lies on the respondent-management and not on the petitioner-workman. Thus, portion of order dated 08.01.2013 to the extent of 1st issue, order dated 27.08.2013 and order dated 08.01.2014 are liable to be set aside. In support of his contention, learned counsel for the petitioner relied on the following decisions:-

1. Delhi Transport Corporation vs. Virender Singh reported in 2005 (4) S.C.T. 243. Para no. 12 reads as under:-

"12. For grant of judicial approval ingredients specified in law must be satisfied. The onus is on the management to show that the enquiry was conducted properly and fairly and that the employee had misconducted himself within the service rules. Such satisfaction is to be based upon reasoning. The order of the Tribunal should demonstrate this process of reasoning on the basis of the record produced before the Tribunal. The conclusions cannot be founded on assumptions in relation to a fact that domestic enquiry should be deemed to be proper and fair merely because photocopy of the enquiry proceedings was produced on the record of the Tribunal." 2. Amar Chakravarty and others vs. Maruti Suzuki India Ltd . reported in (2010) 14 SCC 471. Para no. 17 reads as under:- "17. In view of the aforesaid position in law, the inevitable conclusion is that when no enquiry is conducted before the service of a workman is terminated, the onus to prove that it was not possible to conduct the enquiry and that the termination was justified because of misconduct by the employee, lies on the management. It bears repetition that it is for the management to prove, by adducing evidence, that the workman is guilty of misconduct and that the action taken by it is proper. In the present case, the services of the appellants - workmen having been terminated on the ground of misconduct,

without holding a domestic enquiry, it would be for the management to adduce evidence to justify its action. It will be open to the appellants - workmen to adduce evidence in rebuttal. Therefore, the order passed by the Labour Court, shifting the burden to prove issue No.1 on the workmen is fallacious and the High Court should have quashed it." 3. A.B. Mitra vs. Presiding Officer, Third Industrial Tribunal, and others, reported in 1999 SCC OnLine Cal 259. Para no. 36 reads as under:- "36. The fact that burden is upon the employer to prove the domestic enquiry was held validly and properly in a proceeding under S. 33(3)(2) of the Industrial Disputes Act has also been accepted by Justice Sn Bhattacharya in the aforesaid case of Ganges Manufacturing Company Ltd. [1996 (2) L.L.N. 1031] (vide supra). But such burden, in my view, is also on the employer even when a reference is made by the appropriate Government under S. 10(1) of the Act of the dispute between the parties to the Tribunal for its adjudication."

4. Per contra, learned counsel for the respondent-management while resisting the petitioner's claim submitted that petitioner suffered an order in respect of challenge to framing of issue on 08.01.2013 in CWP No. 12678 of 2013. Therefore, petitioner's grievance relating to framing of issues vide order dated 08.01.2013 (Annexure P/4) cannot be interfered. It was further submitted that with reference to issue No.1 in order dated 08.01.2013 onus to prove whether enquiry conducted by the management is fair and proper lies on the respondent-workman. Thus, Labour Commissioner has rightly held that onus in respect of 1st issue is concerned, lies upon the petitioner-workman. Labour Commissioner relied on a decision passed in the case of Shanker Chakravarti vs. Britannia Biscuits reported in 1979(II) LLJ 194 (SC). In support of his contentions, learned counsel for respondent-management relied on the following decisions:-

1. Shankar Chakravarti vs. Britannia Biscuit Co. Ltd. and another reported in AIR 1979 Supreme Court 1652. Para Nos. 28 (extract) and 34 reads as under:-

"28. It was contended that this Court has in unambiguous and incontrovertible terms laid down that there is an obligatory duty in law fastened on the Labour Court or the Industrial Tribunal dealing with a case of punitive termination of service either under Section 10 or Section 33 of the Act, irrespective of the fact whether there is any such request to that effect or not, to raise a preliminary issue as to whether domestic enquiry alleged to have been held by the employer

is proper or defective and then record a formal finding on it and if the finding is in favour of the workman the employer should be called upon which must demonstrate on record, without waiting for any such request or demand or pleading from the employer, to adduce further evidence to sustain the charge of misconduct if it so chooses to do. We are afraid that much is being read into the observation of this Court which is not either expressly or by necessary implication stated. There is

nothing to suggest that in Cooper Engineering Ltd. case this Court specifically overruled the decision in R.K.Jain's case where the Court in terms negated the contention of the employer that there is an obligatory duty in law on the Labour Court or the Industrial Tribunal to give an opportunity to the employer irrespective of the fact whether it is asked for or not to adduce additional evidence after recording a finding on the preliminary issue that either no domestic enquiry was held or the one held was defective. xx xxx xxxx" 34. Having given our most anxious consideration to the question raised before us, and minutely examining the decision in Cooper Engineering Ltd. case (supra) to ascertain the ratio as well as the question raised both on precedent and on principle, it is undeniable that there is no duty cast on the Industrial Tribunal or the Labour Court while adjudicating upon a penal termination of service of a workman either under Section 10 or under Section 33 to call upon the employer to adduce additional evidence to substantiate the charge of misconduct by giving some specific opportunity after decision on the preliminary issue whether the domestic enquiry was at all held, or if held, was defective, in favour of the workman. Cooper Engineering Ltd. case merely specifies the stage at which such opportunity is to be given, if sought. It is both the right and obligation of the employer, if it so chooses, to adduce additional evidence to substantiate the charges of misconduct. It is for the employer to avail of such opportunity by a specific pleading or by specific request. If such an opportunity is sought in the course of the proceeding the Industrial Tribunal or the Labour Court, as the case may be, should grant the opportunity to lead additional

evidence to substantiate the charges. But if no such opportunity is sought nor there is any pleading to that effect no duty is cast on the Labour Court or the Industrial Tribunal suo motu to call upon the employer to adduce additional evidence to substantiate the charges." 2. M/s Bharat Iron Works vs. Bhagubhai Balubhai Patel and others reported in (1976) 1 SCC 518. Para No.1 reads as under:- "1. In a long line of decisions of this Court the ambit of section 33, Industrial Disputes Act, 1947, is now well- established. There is also no difference in principle of the law applicable to a case under section 10, Industrial Disputes Act and that under section 33 . To put it clearly, it is this: When an application under section 33 whether for approval or for permission is made to a Tribunal it has initially a limited jurisdiction only to see whether a prima facie case is made out in respect of the misconduct charged. This is, however, the position only when the domestic enquiry preceding the order of dismissal is free from any defect, that is to say, free from the vice of violation of

the principles of natural justice. If on the other hand, there is violation of the principles of natural justice, the Tribunal will then give opportunity to the employer to produce evidence, if any, and also to the workman to rebut it if he so chooses. In the latter event the Tribunal will be entitled to arrive at its own conclusion on merits on the evidence produced before it with regard to the proof of the misconduct charged, and the Tribunal, then, will not be confined merely to consider whether a

prima facie case is established against the employee. In other words, in such an event, the employer's findings in the domestic enquiry will lapse and these will be substituted by the independent conclusions of the Tribunal on merits." 3. *Satpal Singh vs. Union of India*, reported in 2002(2) S.C.T., 179. Para no. 17 reads as under:- "17. In our opinion, the view expressed by the Hon'ble Supreme Court, far from advancing the cause of workman, would rather advance the case of the Management as it has been clearly held that when appointment is for a fixed period, unless there is finding that power under clause (bb) of Section 2(oo) was misused or vitiated by its mala fide exercise, it cannot be held that termination is illegal and further, it must be established in each case that the power was misused by the Management or appointment for a period was a colourable exercise of power. The misuse of power has to be established in each case, in our view, by the workman by at least pleading bare minimum facts. There is no question for the management to establish non-colourable exercise unless it is called upon to do so and surely it would be called upon to do so only if there is a charge to that effect against it. The burden of proof for such a charge shall always be upon the workman, which shall never change, even though onus may keep on shifting depending upon the facts and circumstances of the case." 4. *Punjab Tractors Limited vs. Presiding Officer, Labour Court* reported in (2008) 149 PLR 342. Para nos. 17 and 18 reads as under:- "17. Having perused various judgments cited at the Bar

and the principles laid down therein, two situations can be envisaged. One when there is no domestic enquiry held, but the order of punishment is passed. There could cases where the Management does not hold any domestic enquiry or the infraction of the Rules applicable to the establishment are apparent from record, but still an order of removal is passed against the workman. In such a situation, the Management is required to prove the misconduct against the workman on the basis of evidence to be led before the Labour Court itself. In all such cases, the burden of proof of misconduct shall be on the Management only as the order of the Management on the face of the record is against the principles of natural justice. 18. However, in case where the domestic enquiry is held, but it is alleged by the workman that such enquiry is defective for one or the other reasons, the onus of proof of such preliminary issue would be on the workman to prove such domestic enquiry as vitiated. What kind of evidence will be sufficient to prove such Issue is upon the judicial wisdom of the Labour Court. If finding on such preliminary Issue is returned against the Management and the Management has sought opportunity to adduce evidence to prove

misconduct before the Labour Court itself again, the learned Labour Court shall give an opportunity to adduce evidence to the Management in support of their allegations of misconduct. The onus of the proof of the preliminary Issue that the domestic enquiry is vitiated, shall lie on the person who has approached the Labour Court as the burden will lie on the person who would fail if no evidence is led."

Therefore, contention of the petitioner is not sustainable and instant writ petition is liable to be rejected.

5. Having heard learned counsel for the parties.

6. Crux of the matter in the present lis is "whether enquiry conducted by the management is fair and proper and onus lies with the workman or management""

7. It is appropriate to reproduce Section 33(2) of the ID Act which reads as under:-

"33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings - (1) xx xx xx

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman] - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or (b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman; Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for

approval of the action taken by the employer."

8. Respondent's contention that petitioner had challenged

framing of 1st issue vide order dated 08.01.2013 in CWP No. 12678 of 2013 has attained finality, therefore, examination of the same issue is impermissible, incorrect for the reasons that this Court while disposing CWP directed petitioner to raise the issue before authority. Accordingly, petitioner filed application and reply was filed by management. Based on

the application, authority has passed the order on 27.08.2013.

9. Application under proviso to Section 33(2)(b) of the ID Act was filed by the respondent-management for the purpose of obtaining approval of order of termination of the petitioner-workman, therefore, respondent-management who has sought for approval of termination order before the authority - Labour Commissioner has to convince and satisfy that enquiry was conducted fair and proper and the Labour Commissioner was required to appreciate the management's version for the purpose of approving the order of termination. The decision cited by the Labour Commissioner may not hold good in view of later decision in the case of Amar Chakravarty (supra). No doubt, workman will have a say while approving the order of termination under Section 33(2)(b) of the ID Act proceedings before the competent authority at the same time it is the management's application. Therefore, they have to apprise that enquiry has been held in accordance with law. Hence, onus lies on the management since application and prayer before the Labour Commissioner for the purpose of obtaining approval of order of termination under Section 33(2)(b) of the ID Act is by the management.

10. Supreme Court in the case of Lalla Ram vs. D.C.M.

Chemical Works Ltd. and another reported in (1978) 3 SCC 1, held as under:-

"12. The position that emerges from the above quoted decisions of this Court may be stated thus : In proceedings under section 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimise the employee regard being had to the position settled by the decisions of this Court in Bengal Bhatdee Coal Co. v. Ram Prabesh Singh, AIR 1964 SC 486, Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar (1961) 1 LLJ 511, Hind Construction & Engineering Co. Ltd. v. their Workmen, AIR 1965 SC 917, Workmen of Messrs Firestone Tyre & Rubber

Company of India (P) Ltd. v. Management, (1973) 1 SCC 813, and Eastern Electric & Trading co. v. Baldev Lal, (1975) 4 SCC 684 that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly

disproportionate punishment; (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 game transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him. If these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him."

11. Perusal of citation cited by the respondent-management's

counsel like Shankar Chakravarti (supra) not related to Section 33(2)(b)

of ID Act. M/s Bharat Iron Works - Tribunal will give opportunity to the employer to adduce evidence, if any, and also to the workman to rebut it if he chooses. Satpal Singh's case not related to Section 33(2)(b) of ID Act.

Punjab Tractors Limited's case - The management is required to prove the misconduct against the workman on the basis of evidence to be led before the Labour Court itself. In all such cases, the burden of proof of misconduct shall be on the management only. The onus of the proof of the preliminary issue that domestic enquiry is vitiated, shall lie on the person who has approached the Labour Court as the burden will lie on the person.

12. In view of the facts and circumstances, orders dated

27.08.2013 and 08.01.2014 (Annexures P/8 and P/9) are set aside. Ist

respondent - authority is hereby directed to decide the 2nd respondent -

management's application under Section 33(2)(b) of ID Act afresh to the extent that onus to prove 1st issue lies on the 2nd respondent-management, within a period of four months from the date of receipt of certified copy of this order. Parties shall render co-operation for disposal of the application filed by 2nd respondent-management, within the stipulated period. In order to facilitate the early disposal of the application, both the parties are directed to appear before the 1st respondent - Labour Commissioner on 10.10.2017 either in person or through their respective advocates.

13. Instant writ petition stands allowed.