
(1998) 06 KAR CK 0036

In the Karnataka High Court

Case No : Writ Appeal No. 8826 of 1996 and 265 of 1997

Prabhakar H. Manjare and Another

APPELLANT

Vs

Indian Telephone Industries Limited, Bangalore and Another

RESPONDENT

Date of Decision : 15-06-1998

Acts Referred:

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

Citation : (1997) 75 FLR 686 : (1998) ILR (Kar) 2840 : (1998) 5 KarLJ 237 : (1999) 2 LLJ 643

Hon'ble Judges : R.P. Sethi, C.J;M.B. Vishwanath, J

Bench : Division Bench

Advocate : Sri M.C. Narasimhan, for the Appellant; Sri Rajanna and Sri Udaya Holla, for the Respondent

Judgement

R.P. Sethi, C.J.—The appellants while they were in the service of the first respondent as Assistant Security Supervisor in the Security Department of the Factory at Bangalore were issued charge sheets on 28th of July, 1984. They denied the allegations vide their reply dated 1-8-1984. The Deputy General Manager ordered an inquiry as a sequence of which the appellants were dismissed as per the order dated 21-1-1986. The 1st respondent-Management filed an application before the National Industrial Tribunal, Bombay (hereinafter called the Tribunal) u/s 33(2)(b) of the Industrial Disputes Act, 1947 (for short the Act) seeking approval for the action taken against the appellants. The application was rejected vide order dated 1-9-1987 on the ground that one month's back wages had not been tendered by the management as mandated under the provisions of the Act, the action was illegal. After the rejection of the application of the management, the appellants prayed for being taken back to duties, which was declined and they were told that effective orders would be passed and sent to them. On 9th of October, 1987 another order was passed dismissing the appellants from service. Another application was filed before the Tribunal seeking once again the approval in terms of the provisions of Section 33(2)(b) of the Act. Without recording any evidence, but on the basis of the

documents filed the Tribunal vide its order dated 2nd of March, 1989 (Annexure-A) allowed the application by according approval to the action of the management in dismissing the appellants from service. Aggrieved by the action of the Tribunal, the appellants filed writ petitions, which were dismissed vide the order impugned in these appeals. While dismissing the writ petitions, the learned Single Judge however observed that the findings of the Tribunal would not operate as *res judicata* in a proceeding which may be initiated by the workman either u/s 10 or Section 33-A of the Act.

2. It is contended on behalf of the appellants that the order under appeals was contrary to law and facts, as the learned Judge did not deal with all the contentions and objections raised in their petitions. The learned Single Judge is stated to have failed to notice that the rejection of the management's application seeking approval was a decision on merits and without taking the appellants back into service, the management could not have ventured to pass another order of dismissal seeking statutory approval. It is contended that without reinstating and allowing the appellants to work, the management continued to persist with the earlier order of dismissal passed against the appellants. It is contended that there could not be a second order of dismissal under the circumstances unless the appellants were taken back to work. It is further contended that despite the appellants having been kept under suspension from 4-5-1984 and without paying them full back wages, the management chose to terminate the service by paying them only one month's salary allegedly in terms of the provisions of Section 33(2)(b) of the Act. The action of the respondents have been termed to be a unfair labour practice. The learned Single Judge is stated to have erred in making a distinction between a case where the approval application had been rejected on *prima facie* examination and where it was rejected on the ground of non-compliance with the proviso to Section 33(2)(b) of the Act. It is further contended that it was not correct to hold that the management was entitled to pass an order on the basis of the inquiry held, because such a liberty had not been obtained by the employer at the time of dismissal of the first application on the ground of non-compliance of proviso to Section 33(2)(b) of the Act. It is further contended that the learned Judge was not justified to hold that there existed a *prima facie* case. In support of the order of dismissal of the appellants, a specific reliance is placed upon an earlier judgment of this Court in *Bangalore Printing and Publishing Company Limited v A.V. Venkatanarayan and Others* .

3. Section 33 of the Act provides that during the pendency of any conciliation proceeding before a Conciliation Officer or a Board or of any proceeding before an Arbitrator or a Labour Court or a Tribunal or National Tribunal in respect of an industrial dispute, the conditions of service with regard to any matter connected with the dispute shall remain unchanged under specified circumstances. However, the employer may under specified circumstances and in accordance with the standing orders applicable to a workman concerned alter the service condition or punish, whether by dismissal or otherwise for any misconduct not connected with the dispute. However, no workman can be discharged or

dismissed unless he had 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. The purpose of the conditions imposed by the section is that the prescribed limitations are designed to protect the workman concerned during the course of the conciliation proceedings before a Conciliation Officer, Board or Arbitrator and adjudication against the employer's harassment and victimisation on the ground of their having raised the industrial dispute and to maintain status quo by prescribing the management conduct during the pendency of the dispute. The object of putting the restrictions for removal or alteration of the service condition is admittedly to ensure that pending industrial disputes are brought to an expeditious determination in a peaceful atmosphere keeping in view the object of the industrial laws of maintenance of harmony with the employer and the workman. This section, however, does not take away the right of the employer to take necessary action under specified circumstances on justified grounds. While enacting the section the legislature is presumed to have kept in mind the maintenance of the industrial peace, restoration of amity and good will between the employer and his workman. Dealing with the object of this Section and Section 22 of the Act, the Supreme Court in *Automobile Products of India Limited and Others v Rukmaji Bala and Others*, held that:

The object of Section 22 of the 1950 Act like that of Section 33 of the 1947 Act as amended is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimisation by the employer on account of their having raised industrial disputes or their continuing the pending proceedings. It is further the object of the two sections to ensure that proceedings in connection with industrial disputes already pending should be brought to a determination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate the already strained relation between the employer and the workmen.

To achieve this object a ban has been imposed upon the ordinary right which the employer has under the ordinary law governing a contract of employment. Section 22 of the 1950 Act and Section 33 of the 1947 Act which impose the ban also provide for the removal of that ban by the granting of express permission in writing in appropriate cases by the authority mentioned therein. The purpose of these two sections being to determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under these sections is to accord or withhold permission. And so it has been held -- we think rightly -- by the Labour Appellate Tribunal in *Carlsbad Mineral Water Manufacturing Company Limited v Their Workmen*", which was a case u/s 33 of the 1947 Act. Even a cursory perusal of Section 33 of the 1947 Act will make it clear that the purpose of that section was not to confer any general power of adjudication of disputes".

The Apex Court again in *P.D. Sharma v State Bank of India* , held that by enacting Section 33, the legislature wanted to ensure a fair and satisfactory enquiry of an industrial dispute undisturbed by any action on the part of the employer which could create fresh cause for disharmony between him and his employees. The object of this Section was held to be the maintenance of status quo during the pendency of an industrial dispute. To the same effect is the judgment in *Punjab National Bank Limited v All India Punjab National Bank Employees' Federation and Another* .

4. The proviso to Section 33(2)(b) of the Act contemplates dismissal or discharge upon payment of one month wages and making of an application by the employer for approval of the action taken by the employer. All the three requirements are required to be resorted to simultaneously and to be made part of the same transaction. The proviso to sub-section (2) of Section 33 of the Act lays down that the discharge or dismissal shall not be effective unless the workman had been paid wages for one month and application has been made by the employer to the authority before which the dispute is pending for approval of the action taken by the employer.

5. The Supreme Court in *Calcutta State Transport Corporation v Md. Noor Alam*, held that:

"The proviso to Section 33(2)(b) contemplates three things: (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. The object is that when the employer takes action u/s 33(2)(b) by dismissing or discharging an employee he should immediately make payment to him or offer payment of wages for one month and also make an application to the Tribunal or the Labour Court, as the case may be, for approval.

The employer's conduct should show that the three things contemplated under the proviso are parts of the same transaction - *Strawboard Manufacturing Company v Govind and P.H. Kalyani v M/s. Air France, Calcutta*".

The Supreme Court in *Lord Krishna Textile Mills Limited v Its Workmen*, had held that before granting approval, the authority under the Act has to be satisfied that the Standing Orders justify the order of dismissal, the enquiry was held in terms of the Standing Orders applicable in the case and the conditions required by the proviso to sub-section (2) of Section 33 of the Act had been complied with. Without compliance of the conditions of the proviso no employer has the authority to take action and thereafter seek approval. The conditions prescribed under the proviso are mandatory, the non-compliance of which renders the application for approval liable to be dismissed. Payment of one month's salary or wages under the proviso is a mandatory requirement, which is required to be complied with at the time of taking action or within a reasonable time near or about. The onus to prove the same at the time of passing the order of dismissal the wages had been paid simultaneously is always upon the management. The

expression "wages or salary" as contemplated under the provision would signify the correct amount so payable to the workman.

6. In *Bharat Electronics Limited, Bangalore v Industrial Tribunal, Karnataka, Bangalore and Another*, (speaking for the Bench Justice Punchhi, as his Lordship then was) it was held:

It is, of course, risky for the management to raise it as to pay even a paisa less than the month's wages due u/s 33(2)(b), would be fatal to its permission sought. But at the same time it needs to be clarified that it is for the management to establish, when questioned, that the sum paid to the workman u/s 33(2)(b) represented full wages of the month following the date of discharge or dismissal, as conceived of in the provision and as interpreted by us in entwining the ratios in *Bennet Coleman's case*, supra, and *Dilbagh Rai Jarry's case*, supra, and adding something ourselves thereto".

7. Non-payment of the requisite wages, would therefore, make the order of dismissal void for which no approval can be granted u/s 33(2)(b) of the Act. It is settled position of law that, if approval is not granted, the order of dismissal or discharge cannot be operative and the employee concerned is required to be deemed to be in service. For this view we find support in the judgment of Bombay High Court in *G.K. Sengupta v Hindustan Construction Company Limited*.

8. It is undisputed that as the appellants were removed from the service from 21-1-1986 without payment of the requisite wages and that as the Tribunal had not granted the approval, they were deemed to be in service for all practical purposes. The non-payment of wages cannot be held to be a mere ritual or a formality and its non-compliance only technicality as has been argued before us on behalf of the management.

9. A Single Judge of this Court in *Bangalore Printing and Publishing Company Limited's case*, supra, had held:

"It is not correct to say that failure to pay the correct amount of wages under the proviso to Section 33(2)(b) of the Act is only a technical breach. Payment of a month's wages under that proviso is a mandatory requirement of that section and hence if it is not complied with, rejection of the application on the ground that there was a failure to comply with the mandatory requirement is a rejection on merits. Hence the 2nd application filed by the petitioner after revoking the earlier order of dismissal was not maintainable".

It was further held that it was not open to the Management to file a second application of approval when the first set of application had been dismissed on merits. We fully agree with the proposition of law settled by the learned Single Judge in that case.

Once it is held that the proviso to sub-section (2)(b) of Section 33 was mandatory, it cannot be held that its non-compliance was a technical defect. The

proviso itself mandates that no application shall be entertained and approval granted without the prior or simultaneous payment of the wages specified therein. The Tribunal was therefore not justified in allowing the second application by ignoring the dismissal of the earlier application of the management for non-compliance of the mandatory provisions of law, which we have held to be dismissal of the earlier application on merits.

10. We are further of the opinion that one month's wages referred to in the relevant provision are not restricted for the month following the date of the application only but would include all prior wages plus the wages for the next month, which under the normal service jurisprudence are known as wages in lieu of notice. Insisting for payment of wages for one month only would defeat the very purpose of the industrial law, as any clever employer may deprive a workman of his wages for years together and terminate his services u/s 33 only by paying one month's salary. Such a plea, if accepted, will not only make the mandate of law infructuous, but would also be against the public policy and jeopardise the concept of service jurisprudence. In the instant case also the employer was obliged to pay one month's salary in case of termination of service under the Standing Orders applicable in the case besides being obliged to pay such wages under the proviso to sub-section (2)(b) of Section 33 of the Act. It is not disputed that wages for the period from the date of the first dismissal order till the date of second dismissal order were not paid before or at the time of the passing of the second dismissal order as was also noticed by the Tribunal in para 13 of its order. The Tribunal was therefore not justified in holding that the nonpayment of the arrears of wages did not render the dismissal order void and inoperative or that the appellants could be directed to avail of the remedies provided u/s 33-A or Section 10 of the Act. The finding of the Tribunal that "more over proviso to Section 33(2)(b) does not contemplate that such payment must form part of the same transaction" is contrary to the law laid down by the Apex Court from time to time. The Tribunal was also not justified to hold that:

"As the rejection of the application for approval on the ground that proviso to Section 33(2)(b) was not complied with did not have the effect of rendering the dismissal order void and inoperative there was no question of allowing the workman to join duties immediately after the earlier application was dismissed. The refusal of the management to take him back after the earlier application was dismissed did not amount to fresh dismissal with effect from 3-9-1987 the date on which the earlier application was dismissed. It was therefore not necessary to file an application for approval on 3-9-1987. As mentioned above, the order setting aside the first dismissal order and the order dismissing the workman from service were passed simultaneously on 9-10-1987. As the application for approval was forwarded to the Tribunal on the same day, it cannot be said that it was not filed simultaneously with the dismissal order and deserved to be rejected as not maintainable".

Such finding is contrary to law laid down by the Bombay High Court in G.K.

Sengupta"s case, supra, with which we fully concur.

11. The whole of the conduct of the first respondent-management is a clear reflection of its vindictive attitude resulting in untold miseries and sufferings thrust upon the appellants spread over a period of about 12 years. For no fault of appellants they have been subjected to uncalled for litigation culminating in this judgment. We are of the opinion that the learned Single Judge was not justified in approving the order of the Tribunal by ignoring the mandate of law and various pronouncements of the Constitutional Courts. There was no justification for forcing the appellants herein to have resort to further litigation by raising a dispute u/s 10 or Section 33-A of the Act. The litigation was required to be put an end to in the light of the settled position of law.

12. Under the circumstances, the appeals are allowed and the orders impugned herein passed by the learned Single Judge dated 30th of August, 1996 and that of the Tribunal dated 1st September, 1987 are set aside. The applications of the 1st respondent-management filed u/s 33(2)(b) of the Act shall stand rejected. The appellants shall be deemed to be in continuous service of the first respondent-management and entitled to all consequential benefits. The costs of litigation are quantified at Rs. 5,000/- (Rupees Five Thousand) only to be paid by the 1st respondent-management.