

(1996) 08 KAR CK 0064
In the Karnataka High Court
Case No : W.Ps. 6405 and 11124/89

Prabhakar H. Manjare

APPELLANT

Vs

Indian Telephone Industries Ltd. and Others

RESPONDENT

Date of Decision : 30-08-1996

Acts Referred:

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

Citation : (1996) ILR (Kar) 3533 : (1996) 7 KarLJ 591

Hon'ble Judges : V.P. Mohan Kumar, J

Bench : Single Bench

Advocate : M.C. Narasimhan, for the Appellant; Udaya Holla, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

V.P. Mohan Kumar, J.—The questions raised in these Writ Petitions are common. The petitioners herein are employees employed by the 1st respondent Company. They were charge-sheeted with respect to certain misconduct. Allegedly an enquiry was conducted. After enquiry, they were dismissed from service by an order dated 21.1.1986. Since certain industrial disputes were pending before the National Tribunal with respect to certain disputes, an application was moved u/s 33(2)(b) of the I.D. Act by the employer for approval of the dismissal. The same was numbered as Serial Application No. 5 of 1986. It was discovered that the employer had not complied with one of the mandatory requirements of Section 33(2)(b), namely, tendering of wages representing one month. This objection was raised by the workers. After adjudicating the objections raised by the workers, the Labour Court held that the order of dismissal is null and void. The operative portion of the order read as follows:

"The effect, therefore, is that one of the essential pre-conditions of the action of dismissal was not fully complied- with. Hence as rightly contended by the opposite party, the application for approval of such void action is not maintainable and it will have to be dismissed."

This order was pronounced by the National Tribunal on 1st September, 1987. This order has not been challenged and has become final.

2. Soon thereafter the Management issued another order dated 9th October, 1987:

"Sub: COMMUNICATION OF DISMISSAL. ORDER.

Please find enclosed dismissal order issued by the Deputy General Manager (P & T), vide reference ASP 10867-R dated 9.10.1987 along with a cheque bearing No. 762776 dated 9.10.1987 for Rs. 2,114-20 (Rupees Two Thousand one Hundred and Fourteen and paise twenty only) in lieu of one month's Notice Pay as per Section 33(2)(b) of the I.D.Act."

3. It is dear from what is stated above that the second order of termination dated 9th October, 1987, was issued on the basis of the alleged enquiry conducted with respect to the misconduct of the worker which was the subject-matter of the earlier proceedings u/s 33(2)(b) which termination order the National Tribunal had found to be void. When the application for approval was sought by the Management u/s 33(2)(b) with respect to the above said second order, the worker contended that this order having not been preceded with an enquiry is null and void and the approval cannot be granted. The question that then arose was as to the effect of the order of dismissal. The National Tribunal has taken the view that the earlier dismissal is of no effect and it is as if the application had been rejected for non-compliance of the requirement of Section 33(2)(b) and not because there was any inherent defect in the dismissal order. It, therefore, held that there is no defect in the second application made by it u/s 33(2)(b). On this footing it granted permission by the order impugned herein, namely, Annexure-A. The workers challenge this order in the present proceedings.

4. I have heard Mr. M.C. Narasimhan, learned Counsel for the petitioner, and Mr.Udaya Holla, Learned Counsel appearing for the Management.

5. The question that is raised, though appears to be simple, presents certain intrinsic difficulties. It is a case where the Management conducted a detailed enquiry with respect to certain misconduct committed by the worker. On the basis of the enquiry, a finding was arrived at that the worker is guilty of the charges. On the basis of this finding, disciplinary action was taken against him and he was ultimately dismissed from service. Simultaneously, an application was moved before the Tribunal u/s 33(2)(b) seeking approval of the dismissal order. It is mandatory u/s 33(2)(b) that at the time of termination, a notice pay representing wages for one month has to be tendered to the worker. It was alleged that this was not complied with. Therefore, that application was rejected by the Tribunal wherein, as stated above, it held that the dismissal order is void. In other words, the Tribunal did not grant approval to this dismissal order made by the Management. The Management has discharged its obligation and only thing that remained is securing the approval after making a proper application. The order having been declared to be void, that is to say that the order of

termination issued by the Management after conducting an enquiry was declared to be void by the Tribunal. In an allied situation, the Supreme Court in *S. Ganapathy and others Vs. Air India and another*, stated as under:

"12. In this extreme situation, the employee, in one sense, gets unemployed as he stands deprived of work with effect from the date of the application for approval, on which date his discharge or dismissal is factually effective. He stands paid his month's wage from such date and this is a wage conceptually for the month following, not double the wage for the month previous to the date of the application. This is the dicta of *Bharat Electronics Ltd., Bangalore Vs. Industrial Tribunal, Karnatak, Bangalore and another*, . In the other sense the order of discharge or dismissal is incomplete and inchoate, unless approved by the Tribunal and till approval is granted there is no effective break of the employer and employee relationship. This is the dictum of *Tata Iron and Steel Co. Ltd. Vs. S.N. Modak*, . So, if these two features are grasped, appreciated and blended, it would lead us to the understanding that by passing the order of discharge or dismissal de facto relationship of employer and employee is ended, but not de jure, for that could happen when the Tribunal accords its approval. The employee thus gets factually unemployed from the date of the approval application in the sense that he is not called to work and is paid only a month's wage representing the succeeding month of his unemployment. The relationship of employer and employee is legally not terminated till approval of discharge or dismissal is given by the Tribunal. And this state of affairs was required to be ended within a period of three months from the date of receipt of such application in terms of Sub-section (5) of Section 33, though the lapse of such period would not end the proceeding and such time was extendible by the Tribunal for reasons to be recorded in writing..."

It would mean that the Tribunal may not be strictly justified in stating that an order of termination, if not approved by the Tribunal, is a void order. It is the order which has de facto put an end to the relationship. The de jure termination is postponed till the approval being granted by the Tribunal. But the relationship takes a different picture altogether when the Management accepts the order and issues a fresh termination order. The earlier proceeding thus has wiped out the earlier order of termination. The said proceeding initiated was one u/s 33(2)(b) which was admittedly a competent proceeding. It cannot be urged by the Management that it is an incompetent proceeding. In a competent valid proceeding, the Tribunal adjudicated the respective contentions and held that the order of termination is void. If that be the position, it is as if there was no termination at all. Thereupon three eventualities would have resulted. Either the worker could have moved either u/s 33A or Section 10 challenging the illegal termination or he could have moved u/s 33-C(2) for wages or he could have resorted to Section 31 seeking prosecution for violation of Section 33(1) or 33(2) (b) of the Act. These contingencies are got over by the Management by issuing the second order of termination. Hence prior to 9.10.1987, the date of the order, if there was no termination at all, the status of the worker was as if he was in

service. Now what has transpired subsequent there to was that fresh order has been issued terminating his services with effect from 9th October, 1987. As noticed by the National Tribunal the worker is deemed to have been in service right thought out i.e., till the order dated 9th October, 1987.

6. Before proceeding further, we may notice the status of an adjudication of an application u/s 33(2)(b) of the Act. In *Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others*, , the Supreme Court has sketched the jurisdiction of the Tribunal in a proceeding u/s 33 of the Act in the following words;

"2. There is a two-fold approach to the problem and if lost sight of, it may result in some confusion. Firstly, in a case where there is no defect in procedure in the course of a domestic enquiry into the charges for misconduct against an employee, the Tribunal can interfere with an order of dismissal on one or other of the following conditions:

(1) If there is no legal evidence at all recorded in the domestic enquiry against the concerned employee with reference to the charge or if no reasonable person can arrive at a conclusion of guilt on the charge leveled against the employee on the evidence recorded against him in the domestic enquiry. This is what is known as a perverse finding.

(2) Even if there is some legal evidence in the domestic enquiry but there is no prima facie case of guilt made out against the person charged for the offence even on the basis that the evidence so recorded is reliable. Such a case may overlap to some extent with the second part of the condition No. 1 above. A prima facie case is not, as in a criminal case, a case proved to the hilt.

3. It must be made clear in following the above principles, one or the other, as may be applicable in a particular case, the Tribunal does not sit as a Court of appeal, weighing or reappreciating the evidence for itself but only examines the finding of the enquiry officer on the evidence in the domestic enquiry as it is in order to find out either whether there is a prima facie case or if the findings are perverse.

4. Secondly, in the same case i.e., where there is no failure of the principles of natural justice in the course of domestic enquiry, if the Tribunal finds that dismissal of an employee is by way of victimisation or unfair labour practice, it will then have complete jurisdiction to interfere with the order of dismissal passed in the domestic enquiry. In that event the fact that there is no violation of the principles of natural justice in the course of the domestic enquiry will absolutely lose its importance or efficacy."

The conditions that are to be taken note of while dealing with an application u/s 33(2)(b) is as laid down above. In a given case, if the Tribunal rejects the approval application, what is the status of the worker? An order of approval does not declare that the removal from service is legal; it only averts the befalling of the consequences made mention of Section 31 of the I.D. Act. As stated, the

Tribunal is not an Appellate Authority. It need examine whether there is a prima facie case made out against the worker. If prima facie evidence regarding the misconduct exists, then the approval sought for has to be granted. It is also open to the employer to lead evidence to sustain the charges. Ultimately, if it is found that there is no prima facie evidence regarding the misconduct alleged, the approval can be declined. But does a declining of the approval by the Tribunal ipso facto entitle the worker to be reinstated?. It is held by various Courts that when the termination order is not approved by the Tribunal, then the said order has to be treated as nonest. The legal position would be that after such rejection of the application, the employer would be bound to treat the worker to be in service and pay him full wages.

7. But can we equate the same status to an order passed by the Tribunal which rejected the Application for approval for non-compliance of the requirement of proviso to "Section 33(2)(b)? The answer to this query should be in the negative. In such a situation, such punitive action became an action taken in contravention of Section 33, as referred to in Section 33A of the Act. When a domestic enquiry is conducted with regard to a misconduct and a finding is given, after due compliance of the principles of natural justice, that finding may be either correct or incorrect. Its validity is tested when as application is made to the Tribunal. It depends on various factors. Hence, if a dismissal is preceded by a finding at the domestic enquiry, one cannot ipso facto hold that there is violation of Section 33(2)(b). A violation of Section 33(2)(b) can be held to have been committed only when the authority who deals with the approval application holds that the dismissal order cannot be justified as it does not conform to the tests laid down in *BHARAT IRON WORKS v. BHAGUBHAI*, referred to supra. It would mean that the dismissal was not for any misconduct. If so, the refusal to grant permission would be for the reason that the worker was not guilty of any misconduct. In other words, the approval was declined not for the reason of the proviso, but because the requirement of Section 33(2)(b) itself was not satisfied. The reason for the refusal is for inherent reason. But, if the Management violates the requirement of the proviso to Section 33(2)(b) and the dismissal order does not accompany wages for one month as contemplated under the proviso to Section 33(2)(b), then without anything more, there is a violation of Section 33(2)(b). If so, as dismissal order without conforming to one of the requirements of the proviso to Section 33(2)(b) can be treated also as a dismissal in contravention of Section 33 of the I.D. Act contemplated u/s 33A of the Act. Section 33(2) states that the Management may take the proceedings contemplated under Sub-clauses (a) and (b) if the same is unconnected with the dispute pending referred to in Subsection (1). The only restriction is that is mentioned in the proviso for making an application for approval and tendering of wages for one month. Both are separate sets of pre-conditions. If any one of them is absent, then there is non-compliance of Section 33. Section 33(2)(b) does not debar the Management from dismissing an employee. It lays down the procedure to be followed. If that procedure is not followed, then the dismissal is in contravention of Section 33 of

the I.D. Act. As stated by the Supreme Court, if these requirements are not satisfied, there would be only a "de facto" dismissal; it does not ripen into a "de jure" dismissal.

8. This is precisely what has happened in this case. At the earlier stage, there was only the de facto dismissal; it did not mature into a de jure dismissal. It would mean that it was only a dismissal on paper. When the competent Tribunal declared the same to be non est and void, it lost all its validity. It became an order which had no force of law; it became an order unable in law to support itself for the purpose for which it was issued. Thus the earlier order of termination was still born meaning thereby it could not have any legal consequence. It would mean that no valid order was issued in pursuance to the earlier enquiry that preceded there to. If so, the Management was entitled to pass an order on the basis of the enquiry held. The said order in this case would be the order dated 9th October, 1987. There is some delay in passing the order after the completion of the enquiry. That delay by itself is not fatal. The order of termination dated 9th October, 1987 is still valid, The worker enjoyed the same status that he occupied the day prior to 21.1.1986, the earlier date on which the order of dismissal was issued. If we were to hold that a valid order had earlier been passed on 21.1.1986 on the basis of the enquiry report which was subject-matter of earlier proceedings, namely, Serial Application No. 5 of 1986 whereat it was pronounced as null and void, then we will be treating the termination order as valid order despite the competent Tribunal declaring the same to be null and void. This is impermissible. If so, the order dated 9th October, 1987 was preceded with an enquiry and the Tribunal is justified in proceeding so.

9. Now what survives for consideration is whether the Tribunal was justified in granting the approval sought for by the Management. A perusal of the order in question discloses that the Tribunal has addressed itself to the question whether there is material on record to show that there is prima facie case to find the misconduct. It has also examined whether the employer has conducted the enquiry conforming to the provisions of the Standing Orders and to the requirement of the principles of natural justice. The grounds urged to assail the finding are not sufficient to interfere with the award. As the enquiry conducted and the findings conform to the yardsticks laid down in *Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others*, , the same has been upheld by the Tribunal. That apart, the findings therein will not operate as *res judicata* in a proceeding either u/s 10 or Section 33A of the I.D. Act. As such, on a reappraisal of the contentions urged, I do not find any grounds to interfere with the award passed by the Tribunal. The Writ Petitions are hence dismissed.