
(2012) 11 MAD CK 0123

In the Madras High Court

Case No : Writ Petition No's. 86 and 25833 of 2012

P.S. Karikalan and Another

APPELLANT

Vs

Management of the Tamil Nadu Cooperative Textile
Processing Mills Ltd. and Another

RESPONDENT

Date of Decision : 02-11-2012

Acts Referred:

Industrial Disputes Act, 1947 — Section 3, 3(1), 3(2), 33(2)(b), 33A

Citation : (2012) 8 MLJ 747

Hon'ble Judges : D. Hariparanthaman, J

Bench : Single Bench

Advocate : S. Anbazhagan in WP No. 86/2012, Sai Prasad and Sai Raaj Associates in WP No. 2583/2012, for the Appellant; S. Anbazhagan in WP No. 25833, Sai Prasad and Sai Raaj Associates in WP No. 86/2012, for the Respondent

Final Decision : Dismissed

Judgement

D. Hariparanthaman, J.—Since both the writ petitions are directed against a single order, both the writ petitions are taken up together and decided by a common order. The petitioner in W.P. No. 86 of 2012 is a workman employed by the first respondent, viz., Tamil Nadu Cooperative Textile Processing Mills Ltd., a cooperative processing mill, under the supervision and control of the Director of Handlooms and Textiles, Government of Tamil Nadu.

2. The workman was dismissed from service by order dated 13.10.2005 based on certain allegations. The Management sought approval for the dismissal from the Industrial Tribunal, Chennai, ("The Tribunal" for short) u/s 33(2)(b) of the Industrial Disputes Act, 1947, since industrial dispute is pending adjudication before the Tribunal.

3. The Approval Petition was taken on file by the Tribunal as Approval Petition No. 32 of 2005 and the Tribunal passed an order dated 18.10.2011, rejecting the approval petition. While rejecting the Approval Petition, the Tribunal also directed

the Management to adduce oral and documentary evidence before it to substantiate the charges levelled against the workman.

4. The Approval Petition was rejected on the following grounds:

(i) the workman was dismissed in a discriminatory manner and the act of the Management in dismissing the workman is a clear case of victimisation.

(ii) the dismissal of the workman is opposed to the judgment of the Apex Court *Colour-Chem Limited Vs. A.L. Alaspurkar and Others*,

5. Aggrieved by the above said order, while the workman filed W.P. No. 86 of 2012 to quash the said order of the Tribunal in Approval Petition No. 32 of 2005 insofar as directing the Management to adduce fresh evidence to prove the charges, the Management filed W.P. No. 25833 of 2012 insofar as dismissal of the Approval Petition by the Tribunal and sought a direction to the Tribunal to decide the matter afresh based on the fresh evidence to be let in by the Management, ignoring the findings as to victimisation and disproportionality of punishment.

6. The facts leading to the filing of the writ petitions are as follows:

6.1. The workman is the President of Coimbatore District Textile Workers' Union which is affiliated to the Hindu Mazdoor Sabha Union. He complained to the Hon'ble Chief Minister of Tamil Nadu in his letter dated 26.11.2003 that the Executives of the Management indulged in various corrupt practices. He pointed out, inter alia, that firewood was purchased by the Management at the rate of Rs. 1,740/- per tonne while the same is available in the price range of Rs. 1,000/- to Rs. 1,200/- per tonne.

6.2. According to the workman, since he complained to the Hon'ble Chief Minister about the corrupt practices of the higher authorities in the Management, he was dismissed from service; as such, it is a clear case of victimization.

6.3. The further case of the workman is that he was also proceeded against departmentally by issuing charge sheet dated 2.3.2004 for making complaint in his letter dated 26.11.2003, bringing to light, the corrupt practices of the Executives in the Management; though an enquiry was held and a second show cause notice dated 28.5.2005 was issued asking him to show cause as to why he should not be dismissed from service, no final order was issued.

6.4. While so, two charge memos dated 24.12.2004 and 4.3.2005 were issued against the workman based on the complaint dated 17.12.2004 and the complaint dated 9.2.2005 respectively.

6.5. The allegation made in the charge memo dated 24.12.2004 is that on 17.12.2004, during his duty-time, the workman was not available at the work spot and rather, he was available at some other place.

6.6. The allegation in the charge memo dated 4.3.2005 is that on 9.2.2005, the

workman was found asleep at 1. a.m. when the Security Officer visited the work-spot.

6.7. According to the workman, the complaint dated 17.12.2004 based on which the charge memo dated 24.12.2004 was issued, complained that (i) the workman, (ii) Thiru. Dharmalingam and (iii) P. Balasubramaniam, were not found in the place of their work and all of them were loitering at ETP area; the complaint dated 9.2.2005, based on which the charge memo dated 4.3.2005 was issued, complained that the 20 workmen and technicians, including the petitioner were found asleep at about 1.15 a.m. on 9.2.2005.

6.8. The further case of the workman is that he alone was singled out and the punishment of dismissal was imposed as penalty, while the others mentioned in the complaint dated 17.12.2004 and 9.2.2005 were not proceeded against and no punishment was imposed against them; thus, the Management acted in a discriminatory manner and the action of the Management in dismissing him from service amounts to not only unfair labour practice but also victimisation.

6.9. After conducting an enquiry on the charge memos dated 24.12.2004 and 4.3.2005, the workman was dismissed from service by order dated 13.10.2005. The Management sought approval for the dismissal order by filing Approval Petition No. 32 of 2005 u/s 33(2)(b) of the Industrial Disputes Act, 1947 before the Tribunal.

6.10. Before the Tribunal, the workman contested the case on the ground that the enquiry leading to his dismissal was not conducted fairly and properly and the same was conducted in violation of principles of natural justice. He also contended that the dismissal order was passed in a discriminatory manner and the dismissal amounts to victimisation and unfair labour practice. Contending thus, the workman sought dismissal of the Approval Petition.

6.11. The Management sought permission before the Industrial Tribunal to lead evidence, if the Industrial Tribunal comes to the conclusion that the domestic enquiry conducted against the workman was not fair and proper. The Management also sought approval for dismissal and according to the Management, since the workman was dismissed based on commission of misconduct, no question of victimisation would arise.

6.12. Before the Tribunal, the Management examined one witness and the workman got examined himself as lone witness. On the side of the Management, Exhibits M-1 to M-41 were marked and on the side of the workman, Exhibits W-1 to W-13 were marked.

6.13. After hearing both sides, the Tribunal recorded a finding that the Management dismissed the workman as a measure of victimisation and that the workman was dismissed from service in a discriminatory manner. The Tribunal also held that the dismissal is opposed to the decision of the Apex Court in *Colour-Chem Ltd. v. A.L. Alaspurkar and Others* (supra). The Tribunal further

went on to hold that the enquiry leading to dismissal of the workman was not conducted in a fair and proper manner. In view of the finding as to victimisation and discrimination on the part of the Management, the Tribunal rejected the Approval Petition filed by the Management.

6.14. As stated above, as the Management sought opportunity to lead evidence, in the event of the Tribunal coming to the conclusion that the domestic enquiry was not conducted in a fair and proper manner, they should be given an opportunity, the Tribunal directed the Management to lead evidence before it to substantiate the charges levelled against the workman.

6.15. The order passed by the Tribunal in the Approval Petition is challenged by both the workman and the Management in these writ petitions.

7. The learned counsel for the workman submitted that both the parties argued comprehensively, both on the validity of the enquiry as well as on the merits of the matter, i.e., according to him, the issue as to discrimination, unfair labour practice and victimisation was canvassed by the workman and the same was refuted by the Management during the course of arguments; both the parties requested the Tribunal to decide the matter comprehensively; since the Tribunal came to the conclusion that the Management is guilty of victimisation and unfair labour practice, besides practising discrimination in dismissing the workman from service, the Tribunal should not have directed the Management to lead evidence to substantiate the charges levelled against the workman and the Tribunal should have stopped with rejecting the Approval Petition; in view of its finding on victimisation, unfair labour practice and discrimination, no useful purpose would be served if the Tribunal records evidence relating to the charges made in the charge memos dated 24.12.2004 and 4.3.2005.

8. The learned counsel for the workman further submitted that having advanced arguments before the Tribunal, on the entire issues, the Management, now, cannot find fault with the Tribunal for recording a finding on victimisation and discrimination.

9. According to the learned counsel for the workman, the writ petition filed by the workman has to be allowed, while the writ petition filed by the Management, seeking to quash that portion of the order of the Tribunal on the finding relating to victimisation and discrimination, is liable to be dismissed.

10. In support of his contentions, the learned counsel for the workman has relied on the following decisions:

Colour-Chem Ltd. v. A.L. Alaspurkar and Others (supra)

Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another,

Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, ; and

Pandian Roadways Corporation Ltd. Vs. Presiding Officer, Industrial Tribunal and

Others,

11. On the other hand, the learned counsel for the Management has submitted that the Tribunal, having held that the domestic enquiry conducted by the Management leading to dismissal was not fair and proper, was not justified in recording a finding relating to victimisation, discrimination and unfair labour practice; since the Management sought to lead evidence before the Tribunal, if the Tribunal records its finding on the issue relating to the validity of the enquiry against the Management, the Tribunal is perfectly correct in granting liberty to the Management to lead evidence in the impugned order; but, the Tribunal, while directing the Management to lead evidence on the charges against the workman, ought not to have recorded a finding as to victimisation, unfair labour practice and discrimination.

12. The learned counsel for the Management has relied on paragraph no. 62(3) of the judgment of the Apex Court in *Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh*, which reads as under:

When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management, are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case, it has to consider the evidence adduced before it by the Management and decide the matter on the basis of such evidence.

13. The learned counsel for the Management has fairly submitted that the Management, besides contending that the enquiry was conducted fairly and properly, also advanced arguments comprehensively, before the Tribunal, on all issues.

14. I have considered the submissions made by the respective learned counsel.

15. The workman made complaint dated 26.11.2003 to the Hon"ble Chief Minister complaining that the Executives in the Management indulged in corrupt practice. He made various allegations. One of such allegations is relating to the corrupt practice in the purchase of firewood. The allegation relating to purchase of firewood is as follows:

16. The Management initiated disciplinary action against the workman by issuing charge memo dated 2.3.2004 for making the aforesaid complaint.

17. According to the Management, the complaint was a false one. The Management held an enquiry. After the enquiry, a second show cause notice dated 28.5.2005 was issued to the workman proposing to dismiss him from

service. He was asked to show cause on the said proposal.

18. The workman filed W.P. No. 18537 of 2005, questioning the aforesaid show cause notice and obtained an interim order of stay of further proceedings in M.P. No. 20093 of 2005 in W.P. No. 18537 of 2005 on 22.6.2005. The interim order continued until the writ petition was disposed of on 22.8.2006, directing the Management to afford a reasonable opportunity to the workman after receiving further explanation from him and also to give an opportunity of personal hearing and to consider the grievance of the workman and dispose of the matter within six weeks. The last paragraph of the said order passed in the writ petition is extracted as under:

Considering the submissions made by the counsel on either side and in view of the discussion made above, this writ petition is disposed of with a direction to the second respondent to afford a reasonable opportunity to the petitioner after receiving further explanation from him and also to give an opportunity of personal hearing and consider the grievances and dispose of the matter pending before him within a period of six weeks from the date of receipt of a copy of this order...

19. In the said circumstances, the Management issued two charge memos dated 24.12.2004 and 4.3.2005 against the workman.

20. The allegation in the charge memo dated 24.12.2004 is that the workman was not found in the work-spot on 17.12.2004 and he was loitering in some other place during working hours.

21. Similarly, the allegation against the workman made in the charge memo dated 4.3.2005 is that on 9.2.2005, at 1. a.m., during night shift, he was found asleep while he was on duty.

22. The charge memo dated 24.12.2004 was issued based on the complaint dated 17.12.2004. The complaint dated 17.12.2004 made by the Security Guard Thiru. Palanichamy to the Management is as follows:

23. The charge memo dated 4.3.2005 is based on the complaint dated 9.2.2005 made by the Security Guard by name J. Manohar and the relevant portion of the complaint reads as follows:

24. By taking into account the aforesaid complaints dated 17.12.2004 and 9.2.2005 based on which charge memos were issued, the Tribunal recorded a finding that the action of the Management in dismissing the workman from service, is totally discriminatory.

25. It is an admitted fact that arguments were advanced before the Tribunal comprehensively, including the issue relating to discrimination.

26. Hence, I do not find any infirmity in the finding of the Tribunal that the Management dismissed the workman in a discriminatory manner.

27. It is a different matter if arguments were confined only with regard to preliminary issue relating to the validity of the enquiry and if the Tribunal exceeded its jurisdiction by recording its finding on discrimination. Further, the finding of the Tribunal on the aspect of discrimination is not perverse, since the complaint dated 17.12.2004 makes it clear that two other workmen were also found loitering along with the workman and all the three were not in the work-spot. But, disciplinary action was taken only against the workman. The same is not disputed. Hence, it is totally discriminatory to proceed against the workman alone, by leaving the other two scot-free. Such an action by a cooperative institution is highly deprecatory. Accordingly, the Tribunal also held that the Management is guilty in dismissing the workman in a discriminatory manner.

28. I do not find any infirmity in the finding of the Tribunal as to victimisation also. Taking into account, the entirety of the circumstances and more particularly, the letter dated 26.11.2003 written by the workman as the President of the Coimbatore District Textile Workers Union to the Central Bureau of Investigation, complaining about the serious corrupt practices, the Tribunal came to the conclusion that the action of the Management amounts to victimisation.

29. The Tribunal also held that the dismissal order, in the circumstances of the case, is shockingly disproportionate to the commission of mis-conduct and inference of unfair labour practice should be drawn as per the judgment in Colour-Chem Ltd. v. A.L. Alaspurkar and Others (supra). The relevant portion of the order passed by the Tribunal in this regard is extracted hereunder:

Hence, from the above said evidence of respondent, he had deposed that the said both charges were levelled against him to wreck vengeance against him due to victimisation. This Tribunal is of the view that the action against the respondent alone and leave other persons (two persons for the first charge and 20 persons for the second charge) is a clear case of victimisation, discrimination and similarly, the allegation of sleeping is only a minor in nature for which the dismissal from service is a shockingly disproportionate and hence, it is perverse. Reliance is taken from the judgment in Colour-Chem Limited Vs. A.L. Alaspurkar and Others,

30. The aforesaid case arose from Bombay. The appellant in the case before the Apex Court is a chemical company. The workman in that case was dismissed for having slept during night time while he was on duty. The Apex Court held that the dismissal of workman in that case amounts to unfair labour practice as defined under the Bombay Act. The Apex Court further held that the provisions relating to unfair labour practice in Bombay Act was incorporated in the V Schedule of the Industrial Disputes Act, 1947. Clause 5 of the V Schedule of the Industrial Disputes Act, 1947, is extracted hereunder:

5. To discharge or dismiss workmen-

(a) by way of victimisation;

- (b) not in good faith, but in the colourable exercise of the employer's rights;
- (c) by falsely implicating a workman in a criminal case on false evidence or on concocted evidence;
- (d) for patently false reasons;
- (e) on untrue or trumped up allegation of absence without leave;
- (f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
- (g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past conduct or service of the workman, thereby leading to a disproportionate punishment;

31. In the *Colour-Chem Ltd. v. A.L. Alaspurkar and Others* (supra) case, the Apex Court held that the dismissal of the workman for having slept while he was on duty during working hours is too disproportionate a punishment, considering the misconduct and that victimisation could be inferred and that Clause 5(a) of the Industrial Disputes Act is attracted. (Similar clause in the Bombay Act is quoted).

32. In my considered view, the Clauses 5(a), 5(b) and 5(g) of the V Schedule of the Industrial Disputes Act, are attracted in the instant case.

33. Victimisation is not defined in any of the statutes concerning labour. The Apex Court, in *Colour-Chem Ltd. v. A.L. Alaspurkar and Others* (supra) case, for the word "victimisation", gave the meaning found in CONCISE OXFORD DICTIONARY, 7th Edition, which reads thus:

make a victim; cheat; make suffer by dismissal or other exceptional treatments

The Apex Court further held that unfairly treating a workman amounts to victimisation.

34. In the instant case, the workman was unfairly treated. Hence, I do not find any infirmity in the finding of the Tribunal that the Management is guilty of practising unfair labour practice.

35. While considering the adjudication u/s 33(2)(b) of the Industrial Disputes Act, the Tribunal has the power to decide the issue relating to discrimination, victimisation and unfair labour practice. The judgments relied on by the learned counsel for the workman make it clear, in no uncertain terms, that the Tribunal has the power and jurisdiction u/s 33(2)(b) of the Industrial Disputes Act, to go into victimization, discrimination and unfair labour practice. The relevant passages from the above said judgments are extracted hereunder:

(i) *Lalla Ram v. Management of D.C.M. Chemical Works Ltd. and Another* (supra):

12. The position that emerges from the above quoted decisions of this Court may

be stated thus: In proceedings u/s 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*, *Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar*, *Hind Construction & Engineering Co. Ltd. v. Their Workmen*, *Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd. v. Management and Eastern Electric & Trading Co. v. Baldev Lal* 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 same 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.

(emphasis supplied)

(ii) *Colour-Chem Ltd. v. A.L. Alaspurkar and Others*:

13. The term "victimisation" is not defined by the present Act. Sub-section (18) of Section 3 of the Act which is the definition Section lays down that:

Words and expressions used in this Act and not defined therein, but defined in the Bombay Act, shall, in relation to any industry to which the provisions of the Bombay Act apply, have the meanings assigned to them by the Bombay Act; and in any other case, shall have the meanings assigned to them by the Central Act.

Bombay Act is the Bombay Industrial Relations Act, 1946 and the Central Act is the Industrial Disputes Act, 1947 as laid down by definition Sections 3(1) and

3(2) of the Act. The term "victimisation" is defined neither by the Central Act nor by the Bombay Act. Therefore, the term "victimisation" has to be given general dictionary meaning. In CONCISE OXFORD DICTIONARY, 7th Edn., the term "victimisation", is defined at p.1197 as follows;

make a victim; cheat; make suffer by dismissal or other exceptional treatments.

Thus if a person is made to suffer by some exceptional treatment it would amount to victimisation. There can be in addition legal victimisation and it is this type of victimisation which is contemplated by the decision of this Court in Hind Construction. It must, therefore, be held that if the punishment of dismissal or discharge is found shockingly disproportionate by the Court regard being had to the particular major misconduct and the past service record of the delinquent or is such as no reasonable employer could ever impose in like circumstances, it would be unfair labour practice by itself being an instance of victimisation in law or legal victimisation independent of factual victimisation, if any. Such an unfair labour practice is covered by the present Act by enactment of Clause (a) of Item 1 of Schedule IV of the Act as it would be an act of victimisation in law as clearly ruled by this Court in the aforesaid decision. On the same lines is a latter decision of this Court in the case of Bharat Iron Works v. Bhagubhai Balubhai Patel wherein a Bench of three learned Judges speaking through GOSWAMI, J. laid down the parameters of the term "victimisation" as understood in labour laws and as contemplated by industrial jurisprudence. It has been observed that ordinarily a person is victimised if he is made a victim or a scapegoat and is subjected to persecution, prosecution or punishment for no real fault or guilt of his own. If actual fault or guilt meriting punishment is established, such action will be rid of the taint of victimisation. The aforesaid observations obviously refer to factual victimisation. But then follows further elucidation of the term "victimisation" to the following effect:

Victimisation may partake of various types, as for example, pressurising an employee to leave the union or union activities, treating an employee in a discriminatory manner or inflicting a grossly monstrous punishment which no rational person would impose upon an employee and the like.

The aforesaid observation in this decision fall in line with the observation in the earlier decision of this Court in Hind Construction. Consequently it must be held that when looking to the nature of the charge of even major misconduct which is found proved if the punishment of dismissal or discharge as imposed is found to be grossly disproportionate in the light of the nature of the misconduct or the past record of the employee concerned ever impose in like circumstances, inflicting of such punishment itself could be treated as legal victimisation..

(iii) Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and Others (supra); and

14. Where an application is made u/s 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer

has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if the order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint u/s 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint u/s 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside u/s 33A and that till such time he should suffer misery of unemployment in spite of the statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

(emphasis supplied)

(iv) Pandian Roadways Corporation v. The Presiding Officer, Industrial Tribunal (supra):

15. It is therefore, a settled law that while an order of termination is sent for approval to the authorities concerned u/s 33(2)(b) of the Act, the authority concerned, before whom Industrial Dispute is pending at that time, is expected to (sic) afford protection to the workman to safeguard his interest and to shield against the victimisation and unfair labour practice by the employer during the

pendency of the Industrial Dispute, particularly when the relationship between them is already strained as intended by the Legislature or parliament u/s 33(2) (b) of the Act and therefore, the authority concerned shall necessarily examine whether the order of dismissal or discharge was bona fide whether it was by way of victimisation and unfair labour practice and whether the conditions contained in the proviso were complied with or not etc. In other words, the mere compliance of the conditions imposed under the provisions of Section 33(2)(b) of the Act is not suffice for grant of approval of the order of termination requested by the employer.

16. The Tribunal thus necessarily has to go into the questions: (i) whether the order of dismissal or discharge was bona fide; (ii) whether it was by way of victimisation and unfair labour practice and (iii) whether the conditions contained in the proviso were complied with or not? In the instant case, the Industrial Tribunal, while going into the above question, came to the conclusion that the order of termination for which approval was sought by the employer lacks legal evidence, suffers perversity, also violates principles of natural justice and thereby attracts the victimisation and unfair labour practice, as rightly observed by the learned single Judge.

(emphasis supplied)

36. Paragraph no. 62(3) of the judgment in Delhi Cloth and General Mills Co. v. Ludh Budh Singh (supra), relied on by the learned counsel for the Management is of no use to the Management. As per paragraph no. 62(3) of the said judgment, once the Tribunal comes to the conclusion that the enquiry was not held properly, it cannot decide the matter on merits based on the evidence adduced on merits. It is not so in this case.

37. In this case, no finding was given on the merits of the charge memos dated 24.12.2004 and 4.3.2005. It is not the case of the Management that after recording a finding that the enquiry was not proper, the Tribunal held that the charges made in the charge memos dated 24.12.2004 and 4.3.2005 were not established in the enquiry that was set aside. Then, it is a different matter.

38. The finding of the Tribunal that is extracted above is regarding the very conduct of the Management in proceeding against the workman. In short, the action of the Management is held to be mala fide by the Tribunal.

39. In these circumstances, as rightly pointed out by the learned counsel for the workman, no useful purpose could be served even if the charges are proved, since the Management is guilty of mala fides in its action which goes to the root of the matter.

40. At this juncture, it is apposite to refer to the judgment of the Apex Court in Bhartiya Seva Samaj Trust Tr. Pres. and Another Vs. Yogeshbhai Ambalal Patel and Another,

41. In the above said case, a teacher did not have the requisite qualification. The

other teachers who also did not have the requisite qualification, were continued. But, the concerned teacher alone was removed from service. When the matter went to the Apex Court, the Apex Court held that the action of the school amounts to victimisation and therefore, it was not inclined to interfere with the order, though the teacher did not possess the requisite qualification. The relevant passages from the above said judgment is extracted hereunder:

3. Shri Percy Kavina, learned senior advocate appearing on behalf of the appellant, has submitted that the respondent No. 1 possesses the qualification of B.Sc.; B.Ed., but the required qualification for a Primary School Teacher is Primary Teachers Certificate (PTC) as provided in Clause (6) of Schedule F to the Act as applicable to all Primary Schools in the State of Gujarat. Thus, the respondent did not possess the qualification making him eligible for the post...

4. On the contrary, the respondent No. 1 appeared in person as a Caveator and has submitted that he had applied in pursuance of a advertisement wherein the eligibility i.e. qualification was shown as B.Sc.; B.Ed/B.A.; B.Ed. The vacancies had been advertised in local newspaper having wide circulation. Most of the teachers in the School run by the appellant had been appointed though they possessed the same qualification i.e., B.Sc.; B.Ed/B.A.; B.Ed. A large number of candidates had applied for the post along with respondent No. 1 possessing the same qualification and they had been selected. None of them has been removed. The respondent No. 1 had been given hostile discrimination as the teachers having the same qualification duly appointed along with respondent No. 1 are still working in the appellant's School...

22. Thus, it is evident that the appellant has acted with malice along with respondent and held that it was not merely a case of discrimination rather it is a clear case of victimisation of respondent no. 1 by School Management for raising his voice against exploitation.

23. After going through the material on record and considering the submissions made by the learned counsel for the appellant and the respondent no. 1-in-person, we do not find any cogent reason whatsoever to interfere with the aforesaid findings of fact.

In my considered view, the aforesaid judgment also squarely applies to the case in hand.

For all the aforesaid reasons, W.P. No. 86 of 2012 filed by the workman is allowed and W.P. No. 25833 of 2012 filed by the Management is dismissed. No costs. Connected Miscellaneous Petitions are closed.