
(1986) 08 KAR CK 0036
In the Karnataka High Court
Case No : Writ Petition No. 6607 of 1985

Ramakrishnappa

APPELLANT

Vs

Presiding Officer

RESPONDENT

Date of Decision : 28-08-1986

Acts Referred:

Industrial Disputes Act, 1947 — Section 25 C, 25 F, 33 (2) (b)

Citation : (1987) ILR (Kar) 378

Hon'ble Judges : Rama Jois, J

Bench : Single Bench

Advocate : T.B. Kirankumar, for the Appellant; S.S. Ramdas, for R-2, for the Respondent

Judgement

Rama Jois, J.—The petitioner, an ex-employee of M/s. Bharat Earth Movers Limited, has presented this petition questioning the legality of the order made by the Industrial Tribunal, Bangalore, granting the application made by the second respondent to the order of dismissal from service of the petitioner u/s 33(2)(b) of the Industrial Disputes Act, 1947, ("the Act" for short).

2. The facts of the case, in brief, are as under : The petitioner and two others were employees of the second respondent-industry. Disciplinary proceedings were initiated against them by the charge-sheet dated 30-11-1979 (Annexure-C). An Inquiry Committee consisting of three persons was appointed. The Committee held an inquiry against the petitioner and three other persons. The petitioner was found guilty of the charges. Thereafter, by an order dated 8th June, 1982 (Annexure-H), the petitioner was dismissed from service. As disputes, which attracted the provisions of Section 33(2)(b) of the Act, were pending before the Industrial Tribunal simultaneously, the second respondent made an application before, the Industrial Tribunal u/s 33(2)(b) of the Act. In the application the petitioner raised a preliminary objection regarding the maintainability of the application on the ground that the second respondent had not complied with one of the mandatory requirements of Section 33(2)(b) of the

Act, namely, payment of one month's wages. That application was heard and an order was passed on 25th February, 1984, holding that the objection was untenable, vide Annexure-B. Thereafter, the petitioner conceded the validity of the domestic inquiry, but contended that the finding recorded in the domestic inquiry against him was perverse. After considering the evidence on record, the Tribunal was of the view that the plea that the finding recorded in the domestic inquiry was perverse, was untenable. In view of the said conclusion, the Tribunal granted the application. Aggrieved by the said order of the Tribunal, the petitioner has presented this Writ Petition.

3. Learned Counsel for the petitioner urged the following contentions :

(1) The finding recorded in the domestic inquiry was perverse and the Industrial Tribunal erred in holding that it was not so.

(2) The order of dismissal was invalid as the second respondent-Management had not complied with one of the mandatory pre-conditions imposed by Section 33(2)(b) of the Act, in that, one month's full wages was not paid before dismissing the petitioner from service and that the Tribunal wrongly held that certain allowances not included in computing the wages for one month were not wages payable, in terms of Section 33(2)(b) of the Act.

4. With regard to the first contention, the learned Counsel for the petitioner submitted that the finding of guilt recorded in the domestic inquiry against the petitioner on the charges levelled against him, was perverse, and that the Tribunal erred in holding that it was not. He also submitted that in imposing the penalty of dismissal from service against the petitioner, the Management had victimised him and this was evident from the fact that in respect of two others, against whom inquiries were held on similar charges, lesser punishment was imposed. The Counsel for the second respondent-Management, however, submitted that the domestic inquiry had been held in accordance with the Standing Orders and in compliance with the rules of natural justice. In this behalf, he submitted that the petitioner himself did not contend before the Tribunal that the domestic inquiry held was not proper or there had been any violation of provisions of the Standing Orders or the rules of natural justice. He also submitted that the finding recorded was based on evidence and was rightly upheld by the Industrial Tribunal.

5. In the order of the Tribunal, the Tribunal has set out the contents of the charges levelled against the petitioner. It reads :

"2. The facts briefly stated are that the Opposite Party was working as a Watch & Ward Guard bearing Staff No. B 3510-6681. On 21-11-1979 on or about 10:30 am due to non-supply of coffee the Opposite party abandoned his duty at Tower No. 1 and started proceeding toward the Main Gate to make a complaint to his Department Head called EX and on his way by intimidating he took along Guard P. Amaresan and another guard Gangadharan who were also charge-sheeted delinquents along with the Opposite Party and all these three guards went and

intimidated other watch and ward guards, due to this intimidation the other guards are forced to close the gates where they have been posted and due to this act the management have framed charges against the opposite party, Amaresan and Gangadharan for grave misconduct under Clauses 21.24, 21.25, 21.37, 21.3, 21.28 and 21.5 under the relevant standing orders viz., loitering while on duty and absence without permission from appointed place of work ; "Negligence, neglect of duty, malingering and inefficiency"; "carrying lethal weapons while at work, riotous, disorderly behaviour on the factory premises, threatening, intimidating co-employee of the company within the factory premises and other acts subversive of discipline"; "striking work and inciting others to strike work in contravention of the provisions of any law and rules having the force of law"; "breach of standing orders, rules and any law applicable to the establishment" and "Picketing and making demonstration within the factory premises.""

Thereafter, at paragraphs 8 to 17, the Tribunal has referred to the evidence adduced in support of the charges. On a proper consideration of the evidence on record, the Tribunal recorded its findings as follows :

"13. Though this Court cannot reappreciate the evidence to arrive at a conclusion other than what arrived at by the Enquiry Officer, still as a matter of fact, to find out the perversity in the report of the Enquiry Officer on the available evidence on record has gone through the evidence which clearly shows that any reasonable man can come to a conclusion of what arrived at by the Enquiry Officer on the available evidence. Hence, I do not find any perversity in the report of the Enquiry Committee on the available materials.

19. The Learned Counsel for the opposite party has next contended that the act of exonerating the other two charge-sheeted employees and punishing his client amounts to victimisation and no reason was given for exonerating those two persons and punishing the opposite party.

20. On a scrutiny of the evidence it is crystal clear that these two guards have accompanied the opposite party on his instigation and incitement and the other guards also forced to close the gates due to the threats shown by the opposite party. With regard to the victimisation, there is absolutely no material on record to show that the opposite party has indulged in trade union activities which appealed to the management to remove him from service. There is also no independent evidence placed before this Tribunal on this point for purpose of appreciating the stand taken by the opposite party. On the available material, it is very difficult for this Tribunal to come to a contrary view other than what the Enquiry Committee has found and hence I am compelled to hold this point in the affirmative."

As is evident from the order of the Tribunal, the petitioner himself did not question the validity of the domestic inquiry. As far as the finding recorded by the Tribunal is concerned, it is seen from the order of the Tribunal that it had

referred to every piece of evidence which was adduced in the domestic inquiry in support of the charges levelled against the petitioner and it was of the view that on the basis of the evidence any reasonable person would come to a conclusion that the charges levelled against the petitioner were proved. I find no substance in the first contention urged for the petitioner.

6. Elaborating the second contention, the learned Counsel for the petitioner submitted as follows : One of the mandatory conditions required to be complied with u/s 33(2)(b) of the Act was that the Management had to pay wages for one month. In fact, there is no dispute that payment of wages for one month is a mandatory condition precedent for the validity of the order of dismissal, to which provisions of Section 33(2)(b) of the Act are attracted. But the dispute between the petitioner and the Management has been as to, what constitutes wages for one month? Learned Counsel for the petitioner submitted that having regard to the definition of the word "Wages", the Management was liable to pay the Basic salary for one month which the petitioner was drawing in the preceding month and also all allowances to which he would have been entitled to, had he worked for one month. He submitted that while some of the allowances were included while computing the one month's wages paid to the petitioner, some of the allowances were not included and therefore the application for approval presented by the Management ought to have been dismissed by the Tribunal for non-compliance with the mandatory conditions prescribed u/s 33(2)(b) of the Act.

7. In order to appreciate the contention, it is necessary to set out what was paid to the petitioner and what, according to the petitioner, should have been paid by the Management. They are as below :

I. What was paid. i. Basic pay Rs. 502-00 ii. P.P. Rs. 5-00 iii. Adhoc allowance Rs. 25-00 iv. D.A. as in the month of Rs. 295-00 July 1982 v. H.R.A. Rs. 30-00
Total : Rs. 857-00
II. What should have been paid in addition according to the petitioner : i. Incentive Bonus Rs. 120-98 ii. Night shift allowance Rs. 10-50 iii. Conveyance allowance Rs. 17-10 iv. Turnout allowance Rs. 10-00

8. Learned Counsel for the petitioner submitted that the above allowances also should have been added while computing one month's wages paid along with the order imposing the penalty of dismissal from service. In support of this submission, he relied on the definition of the word "wages" contained in Section 2(rr) of the Act. It reads :

"2(rr) "Wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes --

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to ;

(ii) the value of any house accommodation or of supply of light, water, medical

attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles ;

(iii) any travelling concession ; but does not include

(a) any bonus ;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force.

(c) any gratuity payable on the termination of his service."

Learned Counsel for the petitioner submitted that all the allowances set out earlier which have not been paid fall within the definition of the word "wages" and therefore nonpayment of those amounts rendered the application of the Management liable for dismissal by the Tribunal. The Learned Counsel pointed out that the Act made a clear distinction between wages payable for the purpose of Section 33(2)(b) of the Act and other provisions of the Act. In particular, he relied on Section 25-C of the Act in respect of lay off compensation which provides that the lay-off compensation payable to a workman laid off shall be equal to 50 per cent of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid off. Learned Counsel pointed out that for the purpose of Section 25-C of the Act, certainly the four types of allowance, referred to above, were not required to be taken into account. He also referred to Section 25-F of the Act which provides that as a condition precedent for retrenchment of a workman, he should be paid compensation equivalent to 15 days "average pay", and the words "average pay", had been defined u/s 2(aaa) of the Act, according to which the average pay had to be calculated as average of the wages payable to a workman during the period he actually worked for a period of three calendar months.

9. In support of his submission, the Learned Counsel relied on the following decisions :

(i) Bennet Coleman and Co. v. Punya Priya Das Gupta. AIR 1970 SC 427 at 435, paragraph 11 Though this case arose in the context of amount of Gratuity payable to a retiring working journalist, the Supreme Court applied the definition of wages in Section 2(rr) of the Act and held that car allowance, benefit of free telephone and value of news papers constituted wages and therefore had to be taken into account in calculating the amount of Gratuity payable to the working Journalist concerned.

(ii) Shivaram Shetty v. Pharmed P. Ltd. 1983(2) KLJ 230 In this case the petitioner therein was held to be not a workman, on the basis that head-quarters allowance and out-station allowance payable to him were included in the term wages and if those items were included, his salary exceeded Rs. 750/- per month. 10. As against the above submission, Sri Ramadas, learned Counsel for the second respondent, submitted that neither the incentive bonus nor other

three types of allowances fell within the definition of the word "wages," for the purpose of Section 33(2)(b) of the Act. In support of the above submission, learned Counsel relied on the following decisions :

(i) Dilbagh Rai Jarry Vs. Union of India (UOI) and Others, In this case, the question considered by the Supreme Court was, whether in computing arrears of wages to a Railway Guard, who had been dismissed from service and subsequently reinstated into service consequent on the setting aside of the dismissal order, the "running allowance", which was payable only if the railway servant had gone on duty on a running train, should be included? The Supreme Court held that it was not, in view of the condition imposed for being eligible to draw that allowance.

(ii) Ahmed Ali Khan v. Union of India 1975 L.I.C. 52 In this case, the Andhra Pradesh High Court held that Cycle/Conveyance allowance did not form part of wages u/s 2(rr) of the Act.

11. There is no dispute that if a worker had actually worked for a month in accordance with the terms of contract, he would have drawn Night-shift allowance, Conveyance Allowance and Turnout Allowance and incentive bonus if he had earned it, as stated by the petitioner. This is also evident from the evidence given by Sri S.R. Prabhakar, Accounts Officer of the second respondent-Management. In the course of his cross-examination by the learned Counsel for the petitioner before the Industrial Tribunal on this aspect, he stated thus :

"In June 1982, his D.A. was Rs. 312/-. In June 1982, he has drawn incentive of Rs. 120-98 and H.R.A. of Rs. 30/- and Rs. 10-50 as Night Shift Allowance. He has also drawn Rs. 17-10 as conveyance allowance. He has also drawn turn-out allowance of Rs. 10/-."

In order to decide as to whether all or any of the wages mentioned above form part of wages u/s 2(rr) of the Act, it is necessary to refer to nature of the allowances. The Management has produced the orders which constituted the basis for the payment of these allowances. The scheme for the payment of incentive was formulated on 17-8-1979 (Annexure-3). A reading of the entire scheme would indicate that granting of incentive bonus depended upon the performance of the workman during the month. The scheme sets out the performance base and provides for payment of incentive bonus for an output above the base. The fact that the incentive bonus becomes payable only if the output by the workman concerned in a given month was above the base, was not controverted by Sri Kiran Kumar, learned Counsel for the petitioner. Therefore, it is clear that it was optional for the workman to increase his output and to earn the incentive bonus. Further, it is clear from the scheme that it is a bonus payable and therefore excepted from the wages u/s 2(rr) of the Act under Clause (iii)3(a) thereof. Therefore, the contention of the Management that while calculating wages for one month for the purpose of Section 33(2)(b) of the Act, they were not required to take into account the Incentive Bonus is well founded.

12. Now coming to the Night-Shift Allowance, the provision is contained in the General Bulletin dated 12-12-1974. It reads :

xxx xxx xxx Employees working in Night Shifts (II and III Shifts) in the Factory Divisions at Bangalore and K.G.F. are being paid Night Shift Allowance at the rate of 0.25 paise per employee per shift worked, to meet out of pocket expenses.

2. Management is pleased to increase this allowance to 0-50 paise per employee per shift worked, with effect from 1st October, 1973. This allowance shall not be reckoned as wages for Provident Fund, Bonus, Overtime, etc."

It is not disputed that according to the contract of employment, night-shift was compulsory for every workman including the petitioner and that if in a given month the petitioner or any other workman was on duty, he was bound to work if posted, in the night shift for 15 days in a month, and that when he is so posted, he is entitled to the night shift allowance.

13. Regarding conveyance allowance, it is regulated by the order dated 4th October, 1978, vide Annexure-2. It reads :

xxx xxx xxx The management is under no obligation to provide any conveyance to the employees, as it is their responsibility to come to the place of work on their own.

2. Pursuant to the Memorandum of Settlement dated 31-8-1978, Management is pleased to announce payment of Conveyance Allowance as under :

All employees in wage Group-E and below who are not provided with subsidised Company Transport and residing beyond a radius of 5kms from the place of work will be paid Conveyance Allowance at the rate of 90 paise per day of attendance subject to a maximum of Rs. 23/- per month. This will be effective from 1-4-1978.

3. Employees in Wage Group-E and below may submit their declaration in the enclosed proforma (in duplicate) to the respective Personnel Department for further action.

4. This supersedes all previous Bulletins, Instructions, Circulars, etc., if any, issued by Headquarters and other Divisions, on this subject."

This allowance, according to the contents of the above order, itself has to be paid if the employee were to attend to his duties in accordance with the terms of contract for a month. As far as turnout allowance is concerned, there is no dispute that Watch and Ward Staff were entitled to a turnout allowance of Rs. 10/- per month on the certificate by the Chief of the Security Staff that the turnout of the workman was good during the month. Therefore, it is clear that the petitioner was entitled to get these three types of allowances, which in fact he got in the month preceding the month in which he was removed from service.

14. The definition of the word "wages" is clear. According to the said provision,

wages includes all types of allowances and has to be determined on the basis as to what the workman would have got in terms of contract of service. express or implied, if he had actually worked for one month. Therefore, the very basis of the calculation u/s 2(rr) of the Act is that the workman must be deemed to have attended to his duties for the whole month punctually and worked in terms of the contract of service. In other words, Section 33(2)(b) of the Act read with Section 2(rr) of the Act would indicate that the Act does not make any difference between wages, that is, basic wages and all other allowances payable to a workman who has actually worked for one month and one month's wages payable u/s 33(2)(b) of the Act, whereas, it does differentiate between basic wages and allowances vide Section 25-C of the Act. Therefore, I find it difficult to accede to the contention of the Management that Conveyance Allowance, Night Shift Allowance and Turnout Allowance were not wages as defined in Section 2(rr) of the Act and therefore they were not required to be included in computing the wages of the petitioner for one month. The decision of the Supreme Court in the case of Bennett Coleman And Co, though arose in the context of quantification of Gratuity, the view taken therein that the allowances given for purchase of newspapers, towards telephone and conveyance also should be calculated in computing one month's wages for the purpose of computing Gratuity, supports the construction placed on Section 2(rr) of the Act for the petitioner, for, the Supreme Court invoked the said definition as the word "wages" had not been defined in the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955. In the case of Jerry, on which the learned Counsel for the second respondent relied, the question decided was, whether wages payable to a Railway Guard for the period he was kept out of service consequent on his dismissal from service till he was reinstated included the amount of running allowance, which was under the rules payable only if the railway servant had gone on duty, and the Supreme Court held that it was not, in view of the condition. Section 2(rr) of the Act did not come up for consideration in that case and therefore not apposite to this case. From the decision of the Andhra Pradesh High Court in Ahmed Ali Khan, on which the learned Counsel for the second respondent relied, it is seen that the Counsel who argued the case sought to bring the Conveyance Allowance under Sub-clauses (ii) and (iii) of Section 2(rr) of the Act and the contention was repelled by the Court. The attention of the Court was not drawn to the main provision u/s 2(rr) of the Act which is the crucial part of the definition for determining as to whether any allowance falls within the definition of the word "wages" and therefore the Court has not interpreted the relevant part of the definition. Hence, I respectfully disagree with the said view.

15. On a true construction of Section 2(rr) of the Act, bearing in mind the distinction made by the Legislature u/s 25-C, 25-F and 33(2)(b) of the Act, I am of the opinion that the contention urged for the learned Counsel for the petitioner that the three allowances, namely, the Conveyance Allowance, Night Shift Allowance, and Turnout Allowance were such as the petitioner would have been

entitled to get had he worked for one month according to the terms of contract and therefore ought to have been paid in terms of Section 33(2)(b) of the Act, is well founded. As pointed out earlier, Section 33(2)(b) of the Act read with Section 2(rr) of the Act does not make any distinction between the amount of wages payable to a workman when he has actually worked in accordance with the terms of contract of employment for one month and wages for one month payable along with an order of dismissal u/s 33(2)(b) of the Act. Admittedly the three allowances were not included when one month's wages were paid to the petitioner. There is no dispute that payment of one month's wages is a condition precedent to the passing of an order of dismissal against a workman u/s 33(2)(b) of the Act and its non-payment or short payment would be fatal to the order of dismissal made by the Management (See *Strawboard Manufacturing Co. Vs. Gobind, Muzaffarpur Electric Supply Co. Ltd. Vs. S.K. Dutta and Another*, and *Karnataka Agro Industries Corporation Ltd. v. Presiding Officer, Industrial Tribunal (Kar) (1984) L.I.C. 1358*) Therefore, the second contention urged for the petitioner has to prevail.

16. Learned Counsel for the second respondent, however, contended that the preliminary objection on the ground of short payment of wages raised by the petitioner was rejected by an earlier order of the Tribunal dated 25-2-1984 and the petitioner accepted its correctness by not challenging its validity and asking the Tribunal to decide the validity of the order on merits, and, therefore, he should not be permitted to challenge the validity of the earlier order after the finding that he was guilty of the charges had been upheld by the Tribunal. It is no doubt true that it was open to the petitioner to approach this Court against the earlier order, at that stage itself. But if he considered that he had a good case on merits and therefore did not approach this Court at that stage, ultimately when the order on merits went against him, he cannot be precluded from challenging the order rejecting the preliminary objection. Further as held by the Supreme Court in *D.P. Maheshwari v. Delhi Administration* AIR 1984 SC 153 normally Labour Courts should not decide the issues separately and this Court also should not entertain Petitions against orders on such issues as it would result in procrastination in the disposal of disputes. Therefore. I find no merit in the objection raised on behalf of the Management.

17. Having regard to the fact that the contention of the petitioner regarding non-compliance of one of the mandatory requirements prescribed u/s 33(2)(b) of the Act is correct and that at the same time on the merits of the case the finding on the serious charges levelled against the petitioner has been found to be good by the Tribunal and it has accorded approval to the dismissal of the petitioner, the question for consideration is as to what is the appropriate order that should be passed in this case.

18. As before passing the order of dismissal the Management had not complied with the mandatory requirements of Section 33(2)(b) of the Act, it appears to me that the order of dismissal could not be given effect to from the date on

which it was made. But at the same time having regard to the fact that the validity of the domestic inquiry had been conceded by the petitioner before the Tribunal and the finding on the charges recorded against the petitioner in the domestic inquiry was found to be valid by the Tribunal and further the plea of the petitioner that he had been victimised has also been rejected by the Tribunal, it appears to me that an order making the according of approval by the Tribunal subject to the payment of full salary upto the date of this order, would meet the ends of justice, particularly for the reason that even if the order of the Tribunal according approval is set aside, the Management can proceed to dismiss the petitioner immediately as the domestic inquiry held against him has been held valid and the finding recorded against him on the charges has been upheld. This is the intention of the Management, was clear from the submission made by the learned Counsel under instructions from the Management, when the matter came after it was adjourned with a suggestion that the petitioner might be reinstated into service if he were to give up the back wages, that as the petitioner was a member of the Security Staff, having regard to the nature of the charges proved, the Management considered that it was not in the interest of the service of the industry to reinstate him into service.

19. In the result, I make the following order :

- (i) The writ petition is partly allowed :
- (ii) The final order of the Tribunal dated 23-3-1985 according approval to the dismissal from service of the petitioner shall stand, subject to the condition that the second respondent shall pay salary and allowances payable to the appellant up to the date of this order, had he been in service till the said date ;
- (iii) The amount shall be paid to the petitioner within three months from to-day ;
- (iv) Post the case for Orders in the first week of December, 1986, for reporting payment.