(2001) 10 P&H CK 0162

In the Punjab And Haryana At Chandigarh

Case No : Letter Patent Appeal No. 644 of 1992

Ranjit Singh and Another APPELLANT

Vs

The Presiding Officer, Industrial Tribunal and Others RESPONDENT

Date of Decision : 10-10-2001

Acts Referred:
Industrial Disputes Act, 1947 — Section 33(1)

Citation : (2003) 96 FLR 854 : (2003) 1 LLJ 1100 : (2003) 133 PLR 247

Hon'ble Judges : M.M. Kumar, J;G.S. Singhviand, J

Bench : Division Bench

Advocate : Sarjit Singh and Anil Abrol, for the Appellant; M.K. Dogra, for the Respondent

Final Decision : Allowed

Judgement

M.M. Kumar, J.—This appeal is directed against judgment dated 23.1.1992 of the learned Single Judge vide which he dismissed C.W.P. No. 15602 of 1995 filed by the appellants against order dated 12.12.1989 passed by Industrial Tribunal, Punjab (for short, ''the Tribunal'') on an application filed by respondent No. 2 u/s 33(1) of the Industrial Disputes Act, 1947 (for short, ''the Act'').

2. The facts:

In the year 1975-76, the management of respondent No. 2 reduced the bonus payable to the employees. The workers union approached the management for restoration of the bonus but failed in its attempt. Consequently, all the employees up to the level of Foremen went on strike w.e.f. 11.8.1979. The strike was called off on 15.7.1979 in the wake of assurance given by the management. Thereafter, the management charge-sheeted 12 of the workers including the appellants who were office bearers of the union. The appellants and other workers controverted the charge that they had incited the workers to go on strike. The management of respondent No. 2 did not accept their reply and entrusted the enquiries to Shri S.K. Heeraji, Standing Counsel of the Company and his associate Shri B.K. Gupta, Advocate. The request made by the workmen for permission to seek assistance from the workman of another establishment was rejected by the management. Their prayer for holding a joint enquiry was also rejected. The Enquiry Officers submitted reports with the finding that the charge levelled against the workmen is proved. The management accepted the reports of enquiries and decided to dismiss the workmen. However, final order could not be passed due to pendency of industrial dispute between the workmen and the management concerning payment of bonus and statutory bar contained in Section 37(1) of the Act. In order to get over the legal obstacle, the management filed an application u/s 33(1) of the Act before the Tribunal for grant of permission to dismiss the appellants from service w.e.f. 17.9.1980. Simultaneously an order dated 17.9.1980 was passed placing the appellants under suspension with the rider that they will not be paid allowance for the period of suspension. The operative part of that order reads as under:

"As there is pendency of Reference No. 76 of 1979 relating to payment of bonus and Reference No. 22 of 1976 before the Industrial Tribunal, Punjab, Chandigarh, the Management has separately applied for permission as per requirements of Section 33 of the Industrial Disputes Act, 1947. Till such time, the permission for dismissal is granted or the application for permission is finally disposed of, you are suspended from duty with immediate effect. You shall not be paid any allowances for the period of suspension."

On being noticed by the Tribunal, the appellants filed reply to contest the application of the management and prayed for dismissal thereof by contending that the decision of the management not to pay subsistence allowance during the period of suspension was per se illegal and their cause would be adversely affected on that account. The management contested the plea of the appellants by asserting that the subsistence allowance was payable only during the pendency of the domestic enquiry and not during the pendency of application filed u/s 33(1-B) of the Act. In view of the rival pleadings, the Tribunal framed the following issues:

"1. Whether the respondent is entitled to get subsistence allowance with effect from 17.9.1980 onwards during the period of suspension? (O.P. on respondent.)

2. In case issue No. 1 is decided in favour of the management is this Tribunal competent to treat the application dated 25.11.1981 as being one u/s 33-C(2) of the Industrial Disputes Act, 1947? If so, what is its effect? (O.P. on respondent)."

After hearing the representatives of the parties, the Tribunal rejected the plea of the workmen vide order dated 8.12.1982. It held that the decision of the management not to pay subsistence allowance was in consonance with the law laid down by the Supreme Court in The Management of Ranipur Colliery Vs. Bhuban Singh and Others, and The Management of Hotel Imperial, New Delhi and Others Vs. Hotel Workers'' Union, , the Tribunal distinguished the judgment of the Supreme Court in Sasa Musa Sugar Works (P) Ltd. Vs. Shobrati Khan and

Others, by observing as under:

"In the present case, a regular enquiry was held against the respondent by the management into the allegations of misconduct made against the respondent which were mentioned in the charge-sheet served upon him. That being so, the observation of the Supreme Court made in that case that the management should pay the wages during the period of suspension of the employees till the award of the Industrial Tribunal was given is not attracted in the present case. Rather, the Supreme Court has given a definite finding in Ranipur Collery''s case (supra) that in the circumstances as are of the present case, the workman is not entitled to the payment of any wages which term includes subsistence allowance during the period of his suspension. The employer was justified in suspending the employee without pay after he had made up his mid on a proper enquiry to dismiss him and to apply to the Tribunal for that purpose. A similar view was taken by the Supreme Court in other case reported as The Management of Hotel Imperial, New Delhi and Others Vs. Hotel Workers'' Union, . It has been held in that case as under:

"Where, however there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder the suspension has the effect of temporarilly suspending the relation of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay."

In that very authority, it has been held as under:

"The undisputed common law right of the master to dismiss his servant for proper cause has been subjected by Section 33 to a ban and that in fairness must mean that pending the removal of the said statutory has, the master can after holding a proper enquiry temporarily terminate the relationship of master and servant by suspending his employee pending proceedings u/s 33. It follows therefore that if the Tribunal grants permission, the suspended contract would come to an end and there will be no further obligation to pay any wages after the date of suspension. If, on the other hand, the permission is refused, the suspension would be wrong and the workman would be entitled to all his wages from the date of suspension."

In view of the above discussion, it is abundantly clear that in the present cases, the respondent is not entitled to get subsistence allowance with effect from 17.9,1980 onwards during the period of his suspension. Thus the respondent has failed to prove this issue, which is decided against him."

Thereafter, the Tribunal framed the following issues on the application filed by the management of respondent No. 2:

"1. Whether the domestic enquiry held by the applicant against the respondent was fair and proper?

2. Whether the circumstances of the case warrant the grant of permission to the

action of the applicant for passing the sentence of dismissal of the respondent from service?

3. Whether the impugned action taken by the management against the respondents is an act of victimization and unfair labour practice? If so, what is its effect?" Both the parties were given opportunity to lead oral and documentary evidence in support of their respective cases and after examining the same, the Tribunal granted permission to the management of respondent No. 2 to dismiss the appellants w.e.f. 17.9.1980 and another workman, namely, Har Sarup Dewan w.e.f. 22.9,1980. The writ petition filed by the appellants was dismissed by the learned Single Judge.

3. Shri Sarjit Singh, Senior Advocate appearing for the appellants assailed the order of the learned Single Judge by arguing that the view taken by him on the question of payment of subsistence allowance to the workman during the pendency of application filed u/s 33(1) of the Act cannot be treated as correct in view of the law laid down by the Supreme Court in Fakirbhai Fulabhai Solanki Vs. Presiding Officer and Another, He argued that order dated 17.9.1980 passed by the management to suspend the appellants did not bring an end to the master-servant relationship and, therefore, the former was bound to pay subsistence allowance in accordance with Clause 31 read with Clause 32 of the Model Standing Orders. Shri Sarjit Singh further argued that the Tribunal and the learned Single Judge erred in relying upon the decisions of Ranipur Colliery''s case (supra) and Hotel Imperial''s case (supra) because the question relating to the workman''s entitlement to get subsistence allowance did not directly arise for consideration in those cases and in Fakirbhai Fulabhai Solanki''s case (supra), the question was categorically answered in favour of the workmen. Still further, he argued that the learned Single Judge erred in rejecting the appellants plea on the ground of delay and their failure to specifically challenge order dated 8.12.1982 passed by the Tribunal. Learned counsel submitted that order dated 8.12.1982 will be deemed to have merged in final order dated 12.12.1989 passed by the Tribunal granting permission to the management of respondent No. 2 and, therefore, the appellants failure to challenge the same could not be made a ground for denying relief to them- He then argued that the action of the management of punishing the office bearers of the union only amounted to unfair labour practice and victimisation and the Tribunal committed a serious illegality by rejecting the plea of the appellants. In support of this argument, Shri Sarjit Singh relied on the judgments of the Supreme Court in India General Navigation and Railway Co. Ltd. and Another Vs. Their Workmen, and Bharat Sugar Mills Ltd. Vs. Shri Jai Singh and Others, .

4. Shri M.K. Dogra, counsel for respondent No. 2 argued that Clause 32 of the Model Standing Orders provides for payment of subsistence allowance during the pendency of domestic enquiry and not during the pendency of application u/s 33(1) of the Act and, therefore, the Tribunal and the learned Single Judge did not commit any error by rejecting the appellants plea for invalidation of the decision

of the management of respondent No. 2 to dismiss them from service only on the ground of non-payment of subsistence allowance. Shri Dogra relied on the judgments of the Supreme Court of Ranipur Colliery''s case (supra) and Hotel Imperial''s case (supra) and submitted that mere non-payment of subsistence allowance would not itself constitute a ground for setting aside the order of the Tribunal because no prejudice is shown to have been caused to the appellants on that account. He then argued that the appellants cannot now be taken back in service because the unit of respondent No. 2 has been closed and proceedings are pending before the Board for Industrial and Financial Reconstruction under Sick Industrial Companies (Special Provisions) Act, 1985.

5. We have given serious thought to the respective arguments and have carefully gone thought the judgments relied upon by the learned counsel. A reading of order dated 8.12.1982 shows that the appellants plea in the matter of non-payment of subsistence allowance during the pendency of application u/s 33(1) of the Act was rejected by the Tribunal solely on the basis of the judgments of the Supreme Court in Ranipur Colliery''s case (supra) and Hotel Imperials'' case (supra). The Tribunal accepted the contention of the management of respondent No. 2 that subsistence allowance was required to be paid only during the pendency of domestic enquiry and to during the pendency of application u/s 33(1-B) of the Act. The learned Single Judge not only approved the view taken by the Tribunal but also held that the appellants were not entitled to complain against the non-payment of subsistence allowance because they had not challenged order dated 8.12.1982. He distinguished the judgment of the Supreme Court in Fakirbhai Fulabhai Solanki''s case (supra) by observing that the workmen (appellants herein) had not pleaded that they were handicapped in challenging the proceedings before the Tribunal due to non-payment of subsistence allowance.

6. In our opinion, the reasons assigned by the learned Presiding Officer of the Tribunal and the learned Single Judge for rejecting the appellants prayer for dismissal of the application filed by the management of respondent No. 2 u/s 33(1) of the Act on the ground of non-payment of subsistence allowance are legally untenable and the impugned order is liable to be set aside. It is an admitted position that management of respondent No. 2 had not framed certified Standing Orders and the Model Standing Orders were treated applicable to the industry. Clause 31 of the Model Standing Orders empowers the employer to place the employee under suspension during the pendency of disciplinary proceedings for a major misconduct or criminal proceedings in respect of any offence involving moral turpitude. Clause 32 lays down that an employee who is placed under suspension shall be paid subsistence allowance during the period of suspension. Clause 32 no where speaks payment of subsistence allowance in the case of suspension during the pendency of enquiry of criminal proceedings only. Rather, a bare reading of the plain language of the said clause shows that it is general in nature and postulates payment of subsistence allowance during the period the workman is kept under suspension. In the present case, the

appellants were placed under suspension vide order dated 17.9.1980 passed after completion of enquiry. That order had the effect of suspending the relationship of master and servant between the appellants and the management of respondent No. 2. However, it did not have the effect of terminating that relationship between the parties and the appellants continued to be the employees of respondent No. 2, and, therefore, they were not entitled to subsistence allowance in terms of Clause 32 of the Model Standing Orders. As a necessary concomitant of this conclusion, it must be held that the decision of the management of respondent No. 2 to suspend the appellants w.e.f. 17.9.1980 with the rider that they will not be paid any allowance during the period of suspension was per se contrary to the Model Standing Orders and was liable to be invalidated. Unfortunately, this aspect has been completely over-looked by the learned Presiding Officer of the Tribunal and the learned Single Judge.

7. The question as to whether management can suspend an employee during the pendency of application u/s 33 of the Act without payment of any allowance was considered in Fakirbhai Fulabhai Solanki''s case (supra) and answered in the following words:

"The denial of payment of subsistence allowance to a workman placed under suspension, during the pendency of the proceeding u/s 33(3) amounts to violation of principles of natural justice. Since it is difficult to anticipate the result of the application made before the Tribunal it is reasonable to hold that the workman against whom the application is made should be paid some amount by way of subsistence allowance to enable him to maintain himself and members of his family and also to meet the expenses of the litigation before the Tribunal. And if no amount is paid during the pendency of such an application it has to be held that the workman concerned has been denied a reasonable opportunity to defend himself in the proceedings before the Tribunal. Such denial leads to violation of principles of natural justice and consequently vitiates the proceedings before the Tribunal under Sub-section (3) of Section 33 of the Act and any decision given in those proceedings against the workman concerned. There was also no material in this case to show that the appellant had sufficient means to defend himself before the Tribunal.

An unscrupulous management may be all possible means delay the proceedings so that the workman may be driven to accept its terms instead of defending himself in the proceedings u/s 33(3) of the Act. To expect an ordinary workman to wait for such a long time in these days is to expect something which is very unusual to happen. Denial of payment of at least a small amount by way of subsistence allowance would amount to gross unfairness.

It is likely that in some cases filed u/s 33(1) or Section 33(3) of the Act (which are permission clauses and not approval clauses) pending before any authority, the management may not be paying any subsistence allowance to the workman concerned. It may be clarified that in such cases it shall be open to the management to pay within a reasonable time to be fixed by the authority, the subsistence allowance for the period during which the workman is kept under suspension without wages and to continue the proceedings. Such subsistence allowance shall be the amount fixed under the Standing Orders, if any, which the management is liable to pay to the workman if he is kept under suspension during the pendency of such application or in the absence of any such Standing Order by the authority before which such application is pending. In a case where the proceedings are completed and the order of dismissal is successfully challenged on the ground of non-payment of subsistence allowance for the period of suspension u/s 33(1) or Section 33(3) of the Act it shall be open to the management to ask for the permission of the authority again u/s 33(1) or Section 33(3) of the Act after paying or offering to pay to the workman concerned within a reasonable time to be fixed by the authority concerned the arrears of subsistence allowance at the specified rate. But in the instant case, however, having regard to the circumstances of the case the Court did not grant any such opportunity to the management to apply for permission again u/s 33(3) of the Act." (Underlining is ours)

8. While dealing with the earlier judgments in Ranipur Colliery''s case (supra) and Hotel Imperial''s case (supra), which were relied upon by the counsel for the management, Supreme Court observed as under:-

"But in neither of the above two decisions the Court considered the question from the angle from which we have approached the problem. In neither of them the Court had the occasion to consider whether the denial of payment of subsistence allowance during the pendency of the proceedings u/s 33(3) of the Act would amount to violation of principles of natural justice. They approached the question from the angle of the common law right of a master to keep a workman under suspension either during the pendency of a domestic enquiry into an act of misconduct alleged to have been committed by a workman or during the pendency of an application u/s 33 of the Act. Those were perhaps halcyon days when such applications were being disposed of quickly. If the Court had realised that such applications would take nearly six years as it has happened in this case, their view would have been different. An unscrupulous management may by all possible means delay the proceedings so that the workman may be driven to accept its terms instead of defending himself in the proceedings u/s 33(3) of the Act. To expect an ordinary workman to wait for such a long time, in these days is to expect something which is very unusual to happen. Denial of payment of at least a small amount by way of subsistence allowance would amount to gross unfairness."

9. In Ram Lakhan v. Presiding Office and Ors. 2000 (2) S.L.R. 177, the Supreme Court again considered the question relating to the worker''s right to get subsistence allowance during the pendency of application u/s 33 of the Act. The facts of that case were that the management of Swatantra Bharat Mill took action against the appellants and placed them under suspension during the pendency of application u/s 33(1) of the Act. The Industrial Tribunal dismissed the objection

raised by the workman against non-payment of subsistence allowance. The High Court of Delhi dismissed the writ petition. While doing so, it preferred the views expressed in Hotel Imperial ''s case (supra) as against the judgment of Fakirbhai Fulabhai''s case (supra) by observing that the earlier judgment was rendered by a three-Judges Bench. When the appeal was listed before the Division Bench of the Supreme Court, the matter was referred to a larger Bench. The three-Judges bench referred to the judgments of Hotel Imperial''s case (supra) and Fakirbhai Fulabhai''s case (supra) and large number of other precedents including Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. 1999 (2) S.L.R. 338 and held as under:

"Applying the principles laid down in the decisions referred to above to the facts of this case, it has to be conceded that if the management has held a departmental enquiry against an employee, it has the right to place that employee under suspension, if on the basis of the findings recorded at the departmental enquiry, the management is, prima facie, of the opinion that the employee, on account of the charges having been proved was liable to be dismissed from service, but the final order of dismissal could not be passed on account of a reference raised under the Industrial Disputes Act, 1947, which was already pending before the Tribunal. In such a situation, if the management makes an application u/s 33(1) of the Industrial Disputes Act for permission to the Tribunal to dismiss such employee from service, the Management can pending disposal of his application u/s 33(1), place that employee under suspension. Once the employee is placed under suspension, the Management cannot take any work from the suspended employee nor can the employee claim full salary from the Management. But the management has to pay the subsistence allowance to the employee so that he may sustain himself till the application u/s 33(1) is finally disposed of.

Read in the light of the above discussion, there will not be found any conflict of opinion between the decisions rendered by this Court in Hotel Imperials''s case (supra) and in Fakirbhai''s case (supra). While right to place an employee under suspension pending disposal of the application u/s 33(1) is to be conceded to the Management on the basis of the decision in Hotel Imperial''s case (supra), the right of the employee to receive subsistence allowance during the period of such suspension has to be conceded to the employee on the basis of the decision in Fadirbhai ''s case (supra) and other decisions of this Court referred to above wherein the employee has been held to be entitled to subsistence allowance during the period of suspension.

We are conscious of the observation made by this Court in Hotel Imperials''s case (supra) that the management has no control over the disposal of application u/s 33(1) filed before the Industrial Tribunal and, therefore, it has placed the employee under suspension, it will not be under any obligation to pay salary to the suspended employee for the period over which the application u/s 33(1) remains pending with the Tribunal. The Court further observed that if the application u/s 33(1) is allowed, the employee would be dismissed from service but if the application is rejected, the employee would be paid all the arrears of salary.

Just as the employer has not control over the disposal of the application u/s 33(1) of the Industrial Disputes Act, so also the employee has no control over the disposal of the application, whether the employee would be retained in service or removed would be dependent upon the fate of the application. While the Management can afford to wait for the disposal of that application, it would be impossible for an employee who survives only on his salary to wait for the disposal of that application for an indefinite period. It would not be possible for him to sustain himself. It is in this light that the right to receive reduced salary (subsistence allowance) for the period of suspension has to be read along with the right of the management to place the employee under suspension pending disposal of the application u/s 33(1) of the Industrial Disputes Act. Thus, the right of management to suspend and the right to the employee to receive subsistence allowance are interwined and both must survive together.''

10. The application filed for re-call of the aforesaid judgment was dismissed by a three-Judges Bench of the Supreme Court in Ram Lakhan Vs. Presiding Officer and Others, with the following observations:

"On a reading of the order dated 17.11.1999 it is clear that this very question has been considered and after a detailed discussion on the points referring to a number of reported cases starting from Hotel Imperial case to the case of Capt. M. Paul Anthony v. Bharat Gold Miles Ltd. this court came to the conclusion that during the period of pendency of the managements'' application for permission to dismiss the workmen before the Tribunal the relationship of master and servant between the parties subsists and it does not cease. This Court further held that while it is open to the employer (management) to receive work from the employees (workmen) or not and the option not to receive any work may be exercised by the former by placing the employees under suspension it has to pay the wages to the workmen at the usual rate or subsistence allowance at a reduced rate if there is a provision in the service rules or regulations or standing order applicable to the workmen concerned. This Court also distinguished the decision in Hotel Imperial case holding that the question which was considered in that case was whether during pendency of its application u/s 33(1) of the Act the management can legally suspend the employee, and the question whether an employee is entitled to subsistence allowance during the period of suspension, was not directly involved in the case."

11. In view of the decisions of Fakirbhai Fulabhai Solanki''s case (supra) and two cases of Ram Lakhan in which the judgments of the Supreme Court in Hotel Imperial''s case (supra) and Ranipur Colliery''s case (supra) have been explained, it must be held that the view taken by the Tribunal and the learned Single Judge that the management of respondent No. 2 was not bound to pay subsistence allowance to the appellants during the pendency of application filed u/s 33(1) is legally unsustainable and the impugned order is liable to be set aside.

12. Another reason which has influenced us for taking the view that subsistence allowance was payable to the appellants is that their suspension did not bring about an end to their relationship of servant and master with the management. In Khem Chand Vs. Union of India (UOI), , it has been authoritatively held that suspension does not severe the relationship of master and servant and, therefore, the employee remains entitled to subsistence allowance.

13. The additional reason assigned by the learned Single Judge, i.e., the appellants failure to challenge order dated 8.12.1982 vide which the Tribunal had rejected their prayer for dismissal of the application filed by the management on the ground of nonpayment of subsistence allowance is also legally unsustainable. That order was interlocutory in nature and will be deemed to have merged in the final order dated 12.12.1989 which was subject-matter of the writ petition. Therefore, the failure of the appellants to challenge the interim order could not be made a ground to deny relief to them. In this connection, we may refer to the decision of the Supreme Court in D.P. Maheshwari v. Delhi Admn. and Ors. AIR 1984 S.C. 153 in which their Lordships adversely commented upon the practice of entertaining writ petitions against interlocutory orders passed during the pendency of proceedings before the Tribunal/Labour Court.

14. In view of the above discussion, we hold that the decision of the management of respondent No. 2 not to pay subsistence allowance to the appellants during the pendency of application u/s 33(1) of the Act was illegal and violative of Clause 32 of the Model Standing Orders and the rules of natural justice and, therefore, the order passed by the Tribunal granting permission to the management of respondent No. 2 is liable to be quashed.

15. In view of the above conclusion, we do not consider it necessary to deal with other points argued by the learned counsel for the parties.

16. In the result the appeal is allowed. The order of the learned Single Judge is set aside. Order dated 12.12.1989 passed by the Tribunal is quashed. As a consequence, the appellant shall be entitled to reinstatement. However, they shall be entitled to back wages only on their furnishing a certificate to the satisfaction of respondent No. 2 that they were not gainfully employed during the intervening period. The management of respondent No. 2 shall also be entitled to invoke the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 to contest the proceedings, if any, launched by the appellants in case they are not paid back wages. It is also made clear that the management of respondent No. 2 shall be free to file fresh application for permission to dismiss the appellants from service.

Sd/- G.S. Singhvi, J.

