
(2011) 03 OHC CK 0055
In the Orissa High Court
Case No : Writ Petition (C) No. 22852 of 2010

Sankar Das

APPELLANT

Vs

P.O., Industrial Tribunal, BBSR and Another

RESPONDENT

Date of Decision : 04-03-2011

Acts Referred:

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

Citation : (2011) 03 OHC CK 0055

Hon'ble Judges : R.N. Biswal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.N. Biswal, J.—The petitioner has assailed the order dated 18.9.2010 passed by the learned Presiding Officer, Labor Court, Bhubaneswar dismissing the Misc. Case No.58 of 2008 as not maintainable.

2. As per the case of petitioner, he was working as a Junior Accountant under the Opp. party-Management. While continuing as such, he applied for casual leave for one day, i.e., 8.2.2006 and it was sanctioned. Due to his illness, he extended his leave from time to time. However, a departmental proceeding was initiated against him on the ground that he remained absent unauthorized from 5.3.2006 to 4.3.2006 and on some other grounds. The enquiry was conducted ex parte, wherein it was held that the charges were proved against the petitioner. The disciplinary authority terminated his service with effect from 24.4.2006 without supplying him the copy of enquiry report. The petitioner was served with the order of dismissal on 21.8.2006. As the petitioner was a concerned work man in a pending I.D. Case the Management filed a petition u/s 33 (2) (b) of the I.D. Act before the Presiding Officer, Industrial Tribunal, Bhubaneswar for approval of the order of dismissal. The said petition was registered as I.D. Misc. Case No.1 of 2006. The Tribunal, vide order dated 8.4.2008 dismissed the said I.D. Misc. Case and did not approve the action of the Management. Being aggrieved with the said order, the Management preferred W.P. (C) No.6715 of 2008 before this

Court, wherein a single judge of this Court vide order dated 9.5.2008, dismissed the writ petition and upheld the order of the Industrial Tribunal. Challenging the said order, the Management preferred Writ Appeal No.97 of 2008 before this Court, wherein it was held as follows:

There is no occasion for us to interfere with the finding of fact recorded by the courts below. However, it is the settled legal proposition that in such fact situation the enquiry can be restarted from the point it stood vitiated. Learned counsel for the respondent does not dispute the said legal proposition.

In view of the above, it shall be open to the employer to take up the enquiry from the point it stood vitiated and complete the same expeditiously, preferably within a period of two months in accordance with law.

3. On 31.7.2008, the petitioner, filed a petition u/s 33-C (2) of the I.D. Act claiming his wages from 21.8.2006 to 31.7.2008, before the Presiding Officer, Labor Court, Bhubaneswar, which was registered as I.D. Misc. Case No.58 of 2008. Notice was issued to the Management to show

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cause. In their show cause they contended that the application was not maintainable, particularly since there was no predetermined right in favor of the petitioner; that neither the Industrial Tribunal u/s 33 (2) (b) proceeding nor this Court ordered for reinstatement of the petitioner and that the order of learned Presiding Officer, Industrial Tribunal passed u/s 33 (2) (b) of the I.D. Act was rendered infructuous in view of the order passed on 17.3.2009 by this Court in Writ Appeal No.97 of 2008.

To substantiate his case, the petitioner-workmen examined himself as A.W. 1 before the Presiding officer, Labor Court, Bhubneswar in I.D. Misc. Case No. 58 of Presiding Officer, Labor Court, Bhubaneswar in I.D. Misc. Case No. 58 of 2008. The Management did not prefer to examine any witness. On assessing the evidence and hearing the counsel for the parties, the learned Labor Court, Bhubaneswar vide order dated 18.9.2010 dismissed the Misc. Case holding that in view of the order passed in the Writ Appeal, there was no force in the order passed by the Industrial Tribunal, Bhubaneswar in I.D. Misc. Case No.1 of 2006 and that the Labor Court cannot determine the dispute of entitlement or the basis of claim in absence of prior adjudication or recognition by the employer. As stated earlier, being aggrieved with the said order, the workman has preferred the present writ petition.

4. Learned counsel for the petitioner submitted that in the writ appeal this court did not interfere with the finding of facts recorded by the courts below, albeit it ordered that it would be open to the employer to take up the enquiry from the point it stood vitiated. In I.D. Misc. Case No.1 of 2006 the Industrial Tribunal vide order dated 8.4.2008 did not approve the order of termination of the service of the petitioner since the enquiry report was not supplied to him before passing

the order of dismissal and the said order was confirmed by the single judge of this Court in W.P.(C) No.6715 of 2008. So, the order of dismissal passed against the petitioner-workman became ineffective, when the said order was not approved. The workman is entitled to get his wages from the date of his dismissal till the date he filed the petition u/s 33-C(2) of the I.D.Act. In support of his submission, learned counsel for the petitioner relied on the decision Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, . He further submitted that, admittedly in a petition u/s 33-C(2) of the I.D.Act the Presiding Officer, Labor Court cannot determine a dispute with regard to entitlement of a workman. Unless there is an existing right in favor of the workman, the petition u/s 33-C(2) is not maintainable. But in the case at hand, since the order of dismissal dated 21.8.2006 passed by the Management against the petitioner was not approved, it would be deemed that no order of dismissal ever had been passed. In other words, the workman deemed to have been continuing

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in service entitling him to all the benefits available. So question of determining the entitlement of the petitioner does not arise.

5. On the contrary, learned counsel appearing for the Management contended that pursuant to the final order passed in Writ Appeal No.97 of 2008 the Management took up the domestic enquiry from the stage it stood vitiated, put the petitioner under suspension on 16.4.2009 and dismissed him from service on 18.12.2009. It is specifically ordered in the order of dismissal that the petitioner is not entitled to any wages from 9.2.2006 to 26.3.2009 on the principle of "No work no pay". So in view of the said order, the petitioner is not entitled to get any wages. Learned counsel for the Opp. party-Management further contended that the proceeding u/s 33-C (2)of the I.D.Act is in the nature of an execution proceeding. It is not the function of the Labor Court to first decide any disputed fact, which pertains to be the basis of determination of money due and then to compute the same. In support of his submission, he relied on the decision Municipal Corporation of Delhi Vs. Ganesh Razak and Another, and Jeet Lal Sharma Vs. Presiding Officer, Labour Court - IV and Another, . He further submitted that a petition u/s 33(2)(b) of the I.D.Act, filed before the Industrial Tribunal for approval of the order of dismissal dated 18.12.2009 passed against the petitioner having been pending consideration before the Industrial Tribunal, the petition u/s 33-C(2)of the I.D.Act is not maintainable. In support of his submission, he relied on the decision of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., and State Bank of India Vs. Rama Chandra Dubey and others 2000 (7) SC 545.

6. Admittedly, the petitioner was dismissed from service with effect from 24.04.2006. The Management filed a petition u/s 33(2)(b)of the I.D. Act in I.D. Misc. Case No.1 of 2006 for approval of the order of dismissal before the Industrial Tribunal, but it was rejected on 8.4.2008. The said order was

challenged before this Court in W.P.(c) No 6715 of 2008 which was dismissed on 9.5.2008. Again, against the said order Writ Appeal No 97 of 2008 was filed, where this court loathed to interfere with the finding of facts recorded by the courts below and only ordered that it was open for the Management to take up the enquiry from the point it stood vitiated and complete the same expeditiously. The order of the Industrial Tribunal passed in I.D. Misc. Case No.1 of 2006 refusing to approve the order of dismissal by the Opp.party-Management against the petitioner was not interfered with. In the case of Jeypore Zilla Sahakari Bhumi Vikas Bank Limited (supra), the apex court held:

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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 labor 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 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 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.

7. In the present case, since the order of dismissal was not approved by the Industrial Tribunal, in view of the above decision, it would be deemed that no order of dismissal was passed against the petitioner. In other words, it is deemed that the petitioner continued in service entitling him to get all the service benefits. Even if the petitioner was dismissed from service by the Management from 18.12.2009 and it was- specifically ordered in the dismissal order that the petitioner was not entitled to get any back wages for the period from 9.2.2006 to 26.3.2009 and the said order would be approved by the Tribunal, still then it cannot debar the petitioner from getting his legitimate dues as claimed. The decisions cited by the Management would not be applicable in the present case. In the decision Managing Director, ECIL (supra) it has been held by the apex court that when an employee is dismissed from service by the disciplinary authority and the order of dismissal is set aside because of non-furnishing of the enquiry report to the delinquent, reinstatement with back wages in all cases cannot be passed mechanically. In other words, in appropriate cases, the order for payment

of back wages should not be passed. The fact in the above cited case is quite different from the fact and circumstance of the present case. In the case of State Bank of India (supra) the workman was dismissed from service. He challenged the order of dismissal. Conciliation having failed, the matter was referred to Industrial Tribunal, where it was ordered for reinstatement. But

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there was no order with regard to back wages. The workman filed a petition u/s 33-C(2) of the I.D. Act claiming back wages. There the apex court held that since there was no any pre-existing right or benefit in favor of the workman, the petition u/s 33-C(2) was not maintainable. The fact in the case at hand is quite different from the facts of the cited case. If the impugned order is not interfered with, it would lead to miscarriage of justice.

8. Accordingly, the writ petition is allowed, the impugned order dated 18.9.2010 passed by the learned Presiding Officer, Labor Court, Bhubaneswar is quashed and the Opp.party-Management is directed to pay the amount as claimed by the petitioner u/s 33-C(2) of the I.D. Act in I.D. Misc. Case no.1 of 2006. No Cost.