
(2002) 05 DEL CK 0083

In the Delhi High Court

Case No : LPA 590 of 2000

Shri Rajender Singh

APPELLANT

Vs

Delhi Transport Corporation and Another

RESPONDENT

Date of Decision : 14-05-2002

Acts Referred:

Constitution of India, 1950 — Article 226

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

Citation : (2002) 98 DLT 706 : (2002) 95 FLR 29 : (2002) 3 LLJ 378

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : Rasmeet K. Charya, for the Appellant; Vinay Sabharwal, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—This Letters Patent Appeal arises out of an order dated 23rd May 2000 passed by a learned Single Judge of this court whereby and whereunder the writ petition filed by the appellant herein was dismissed summarily on the ground that he had an alternative remedy under the industrial Disputes Act, 1947 (hereinafter called "the Act" for short).

2. The admitted fact of the matter is as under:

The appellant was served with a charge-sheet on 15th December 1992. A departmental enquiry was held there into leading to his termination from service.

An application u/s 33(2)(b) of the Act was filed by the respondent which was marked as OP No. 135/93 and by an order dated 27th May 1999, the learned tribunal dismissed the said application holding:

"I have heard Sh. I.S. Mehra, AR of DTC and Sh. M.S. Kapoor AR of the workman/respondent. Although the Enquiry Officer conducted the enquiry and the respondent participated in it but the finding is perverse. As AW1 admitted in the cross examination that the entire period of absence of the respondent as

mentioned in the charge-sheet has been treated by the management as Leave Without Pay. On the one hand the management/petitioner has treated the period of absence of the respondent as Leave Without Pay but on the other hand it seeks approval of the termination of his service on the basis of the above said period of absence from duty. Both the stands are contradictory. Once the management has treated the period of absence as Leave Without Pay then it amounts that management itself has absolved the respondent/his employee from the alleged misconduct, the basis of his termination of service. Consequently, the enquiry report is perverse and it has not helped the petitioner. The issue is decided against the petitioner.

Since the period of absence of the respondent has been treated by the management as Leave Without Pay, Therefore, its AR does not press for opportunity to the petitioner to establish the misconduct of the respondent before the Tribunal. In view of the circumstances, the petition has got no merit and the same is dismissed."

3. It stand admitted that despite the said order the appellant was not reinstated in service not was he paid his back wages.

He thereafter filed the afore-mentioned writ petition. In the said writ petition, a contention was raised on behalf of the respondent that the appellant has a remedy by filing a complaint petition u/s 33(a) of the Act.

4. Ms. Rasmeet K. Charya, the learned counsel appearing on behalf of the appellant would submit that the effect of non-grant of approval by the Tribunal u/s 33(2)(b) would be that the order of dismissal is void ab initio and as such, he should be treated in service for all intent and purport and thus would also be entitled to the salary during in intervening period.

5. Mr. Vinjay Sabharwal, the learned counsel appearing on behalf of the respondents, on the other hand, would submit that although the appellant, having regard to the afore-mentioned order of the learned Tribunal, would be deemed to be in service, he has to take recourse to the proceedings under the Industrial Disputes Act 1947 inasmuch as during the said period, he might have been serving somewhere else. Furthermore, the learned counsel would contend that by non-grant of approval, the entire departmental proceedings cannot be said to have become non-est and as such, it is open to an employer to start a departmental enquiry afresh.

6. Section 33(2)(b) of the Industrial Disputes Act reads thus:

"33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.--

(1)

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to

a workman concerned in such dispute, or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman,

(a)

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman;

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

7. The question as to what would be the effect of non-grant of such an approval by the Tribunal is no longer rest integra in view of several decisions of different High Courts and the Apex Court.

8. We may, however, notice only to recent decisions of the apex court.

9. In M.D., Tamil Nadu State Transport Corporation Vs. Neethivilangan Kumbakonam, , a Division Bench of the Apex Court upon taking into consideration various decisions including the its earlier decision in Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, and Tata Iron and Steel Co. Ltd. Vs. S.N. Modak, , held:

"16. From the conspectus of the views taken in the decisions referred to above the position is manifest that while the employer has the discretion to initiate a departmental inquiry and pass an order of dismissal or discharge against the workman the order remains in an inchoate state till the employer obtains order of approval from the Tribunal. By passing the order of discharge or dismissal de facto relationship of employer and employee may be ended but not the de jure relationship for that could happen only when the Tribunal accords its approval. The relationship of employer and employee is not legally terminated till approval of discharge or dismissal is given by the Tribunal. In a case where the Tribunal refused to accord approval to the action taken by the employer and rejects the petition filed u/s 33(2)(b) of the Act on merit the employer is bound to treat the employee as continuing in service and give him all the consequential benefits. If the employer refuses to grant the benefits to the employee the later is entitled to have his right enforced by filing a petition under Article 226 of the Constitution. There is no rational basis for holding that even after the order of dismissal or discharge has been rendered invalid on the Tribunal's rejection of the prayer for approval the workman should suffer the consequences of such invalid order of dismissal or discharge till the matter is decided by the Tribunal again in an industrial dispute. Accepting this contention would render the bar contained in Section 33(1) irrelevant. In the present case as noted earlier the Tribunal on consideration of the matter held that the employer had failed to establish a prima facie case for dismissal/discharge of the workman, and Therefore, dismissed the

application filed by the employer on merit. The inevitable consequence of this would be that the employer was duty bound to treat the employee as continuing the service and pay him his wages for the period, even though he may be consequently placed under suspension and an enquiry initiated against him."

10. Yet again, the question came up for consideration before the Constitution Bench of the Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, wherein Patil, J. speaking for the Constitution Bench held as follows:

"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 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. 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 33A challenging the order granting approval on any of the grounds available to him. Section 33A 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 33A 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 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 33A 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."

11. Keeping in view the afore-mentioned decisions of the apex court, there cannot be any doubt whatsoever that learned single Judge erred in dismissing the writ petition in limine. Apart from the fact that in *M.D. Tamil Nadu State Transport Corporation (supra)*, a writ petition under Article 226 of the Constitution of India has clearly been held to be maintainable, as the order of termination passed against the appellant is void ab initio, the respondent being a State within the meaning of Article 12 of the Constitution of India, had no other option but to pass an order of reinstatement. The appellant is also entitled to his back-wages wherefor, he has not required to take recourse to any other proceeding.

12. The respondent in the event of its being aggrieved by the order of the Tribunal could take recourse to such remedies which were available to it in law. It neither raised an industrial dispute nor questioned the legality or validity of the said order before an appropriate forum. It, Therefore, was bound to implement the said order of the Tribunal. Non-implementation of a valid order of the Tribunal and keeping an employee unemployed was an arbitrary act on the part of the respondent.

13. Keeping in view the expanded definition of "life" as enshrined under Article 21 of the Constitution of India which would include livelihood, the appellant herein, in our opinion, could not have been refused to be reinstated nor his back wages without any valid or justifiable reason, could be withheld.

14. Such deliberate inaction on the part of the respondent attracted the writ jurisdiction of the court and the appellant was entitled to a writ of *habeas corpus* in the nature of *mandamus*, as was prayed for.

15. It is one thing to say that the respondent had not accepted the order of the Tribunal and questioned its correctness before an appropriate forum, but it is another thing to say that although it accepted the same, it would not give effect thereto. Such a stand on the part of the statutory authority which is a State within the meaning of Article 12 of the Constitution of India cannot be countenanced.

17. For the reasons afore-mentioned, this appeal is allowed. The judgment and order passed by the learned single Judge is set aside and the respondents are hereby directed to reinstate the petitioner and grant him all consequential benefits, if available in law. He shall also be entitled to costs, which is quantified at Rs. 2000/-.