
(2013) 02 MAD CK 0180

In the Madras High Court

Case No : Writ Petition (MD) No. 729 of 2006

Sri Uma Parameswari Mills Ltd.

APPELLANT

Vs

Presiding Officer and Others

RESPONDENT

Date of Decision : 11-02-2013

Acts Referred:

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

Citation : (2013) 2 LLJ 742

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Advocate : K. Jayaraman, for the Appellant; R. Vijayalakshmi Amicus Curie
Assisted by S. Arunachalam, for the Respondent

Judgement

T.S. Sivagnanam, J.—The prayer in the writ petition is for issuance of a writ of certiorari, to quash the order passed by the Labour Court, Tiruchirappalli, in C.P. No. 150 of 2003, dated 29.6.2004. The petitioner is the Management of Sri Uma Parameswari Mills Ltd. and the petitioner has challenged the order of the Labour Court computing the wages payable to the respondent/workmen.

2. The facts, which led to the filing of the claim petition, are that the respondents/workmen 2 to 10 were employed by the petitioner Management in various capacities and were dismissed from service, by order dated 15.7.2003 for the charge of assaulting the Deputy General Manager and dragging him for a distance of about 750 feet upto the time office, threatening the managerial persons, abusing them in filthy language and attacking them with chappals and hitting them. The respondent/workmen aggrieved by the order of dismissal, raised an industrial dispute u/s 2-A of the Industrial Disputes Act (I.D. Act), on 4.8.2003. The petitioner Management submitted their report and the matter was pending before the Assistant Commissioner of Labour (Conciliation), Tiruchirappalli. While so, the respondents/workmen filed a petition before the Labour Court u/s 33C(2) read with Section 33(c)(5) of the I.D. Act by presenting a petition on 2.9.2003, and the same was taken on file as C.P. No. 150 of 2003.

It was contended by the respondent/workmen that if an industrial dispute is pending at the time of dismissal i.e., on 15.7.2003, the petitioner Management is required to obtain approval of such dismissal as contemplated u/s 33(2)(b) of the I.D. Act and such approval having not been obtained, the order of dismissal was non est and the respondent/workmen are deemed to be in service and accordingly, they prayed for wages for the period from 15.7.2003 to 31.8.2003.

3. The petitioner Management resisted the claim petition on several grounds including the ground that there was no industrial dispute pending as contemplated u/s 33 and there is no violation of the said provision and prayed for rejection of the claim petition. The Labour Court rejected the stand taken by the petitioner Management and computed the wages payable by order dated 29.6.2004, which is impugned in this writ petition.

4. Mr. K. Jayaraman, learned counsel appearing for the petitioner Management submitted that the Labour Court erroneously held that the industrial dispute in I.D. No. 1 of 2002, was pending before the Special Industrial Tribunal, Chennai referred for adjudication by G.O. (D). No. 688, dated 13.9.2001, between the Management mentioned in the annexure to the said G.O. and the workmen in respect of matters mentioned in annexure I is an industrial dispute relating to the petitioner Management also, without taking note of the fact that the order of reference was u/s 10(5) of the I.D. Act and merely because, the petitioner Management was added as a party, it does not mean that an industrial dispute exists in the petitioner establishment and the respondent/workmen were concerned in such dispute. It is further submitted that the jurisdiction of the first respondent u/s 33-C(2) is limited and analogous only to the execution proceedings and in the absence of any pre-existing right for the respondent/workmen, the Labour Court has no jurisdiction to conduct an enquiry u/s 33C(2) of the I.D. Act. It is further submitted that even assuming that an industrial dispute exists, the same ceases to exist the moment, a settlement was arrived at and in the instant case, subsequent to the reference in G.O. (D) No. 688, dated 13.9.2001, a settlement u/s 18(1) of the I.D. Act was arrived at on 16.10.2001, between the petitioner Management and its workmen represented by its Trade Union including the Union, in which the respondent/workmen were members. Therefore, it is submitted that there is no violation of Section 33 and petition filed by the respondent/workmen u/s 33C(2) was not maintainable. Further, it is contended that the respondent/workmen having challenged the order of dismissal, by raising dispute u/s 2A of the I.D. Act are estopped from claiming similar relief u/s 33-C(2) of the I.D. Act. Further, it is contended that even assuming an industrial dispute exists awarding of back wages is not a matter of course and in the absence of any evidence, the direction to pay back wages is not sustainable. In support of his contention, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in *State of Uttar Pradesh and Another Vs. Brijpal Singh*,

5. It is seen that notice was served on the respondent/workmen in March 2006,

however they did not engage any counsel and therefore, this Court by order dated 9.10.2012, nominated learned counsel Mr. S. Arunachalam, as the counsel to appear and defend the case of the respondent/workmen. This Court by order dated 5.2.2013, requested Ms. R. Vijayalakshmi, to assist the learned counsel nominated for the respondent/workmen.

6. Mr. S. Arunachalam, learned counsel for the respondent/workmen (Amicus Curie) contended that though the respondent/workmen had initially raised an industrial dispute u/s 2A of the I.D. Act, aggrieved by order of dismissal, they subsequently they came to know about the decision of the Hon"ble High Court, Madras reported in The Management of Sri Ganapathy Mills Company Ltd. Vs. The Presiding Officer, Labour Court and A. Asamathulla, , which was delivered following the Constitution Bench decision of the Hon"ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, wherein it was held that in case of non-compliance of the mandatory provisions of Section 33 of the I.D. Act, it would render the order of dismissal non est and the employee would be deemed to be in service, as if, the order of dismissal has never been passed. It is further contended that the respondent/workmen are concerned in the dispute in I.D. No. 1 of 2002, which was pending before the Special Industrial Tribunal and the petitioner Management having not taken approval, the order of dismissal is illegal and non est in the eye of law.

7. Further, the learned counsel for the respondent/workmen referred to Section 2(k) of the I.D. Act, which defines "industrial dispute" and submitted that it means any dispute or difference between the employers and the workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person and the definition is wide enough to include the dispute, which was pending before Special Industrial Tribunal, which concerns the term of employment and conditions of service and therefore, the petitioner Management ought to have obtained approval as required u/s 33(2) of the I.D. Act. In support of his contentions, the learned counsel referred to the decisions of the Hon"ble Supreme Court in Strawboard Manufacturing Co. Vs. Gobind, ; Tata Iron and Steel Co. Ltd. Vs. S.N. Modak, ; R.B. Bansilal Abirchand Mills Co. Ltd. Vs. The Labour Court, Nagpur and Others, ; Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another, S. Ganapathy and others Vs. Air India and another, , M.D., Tamil Nadu State Transport Corporation Vs. Neethivilangan Kumbakonam, and Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others,

8. Ms. R. Vijayalakshmi, learned counsel supplementing the arguments submitted that all the respondents workmen are permanent workmen having completed 3 to 15 years of service and when the industrial dispute in I.D. No. 1 of 2002, was pending before the Special Industrial Tribunal, the order of dismissal could not have been passed by the petitioner Management without approval. Further, in terms of Section 33(2)(b) of the I.D. Act, one month wages was not paid to the workmen. The learned counsel referred to the findings

rendered by the Labour Court in the impugned award and submitted that the Management having not complied with the provisions of the I.D. Act, the respondent/workmen are deemed to be in service and are entitled for wages, which was rightly computed by the Labour Court.

9. In reply, the learned counsel appearing for the petitioner Management referred to sub-section 5 of Section 10 of the I.D. Act and submitted that the reference made in G.O. (D). No. 688, dated 3.9.2001, was u/s 10(5) of the I.D. Act and the petitioner Management was impleaded on the ground that it may be likely to be interested or affected by such dispute and such disputes does not concern the petitioner Management and therefore, the petitioner management was not a party to the dispute pending before the Special Industrial Tribunal and a copy of the such proceedings was not marked before the Labour Court and the Labour Court presumed and proceeded to grant the relief, which is not sustainable in law.

10. I have elaborately heard the submissions of the learned counsels appearing for the parties and carefully perused the materials placed on record.

11. The legal position as to the cases, where approval has not been granted for order of discharge or punishment during the pendency of the industrial dispute for alleged misconduct not connected with the dispute, has been settled by the Constitution Bench judgment of the Hon''ble Supreme Court in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and Others (supra). The matter was referred to the Constitution Bench to decide the question that if the approval is not granted u/s 33(2)(b) of the Industrial Disputes Act, 1947, whether the order of dismissal becomes ineffective from the date, it was passed or from the date of non-approval of the order of dismissal and whether failure to make application u/s 33(2)(b) would not render the order of dismissal inoperative. The Hon''ble Supreme Court after taking note of the legal position held thus:-

13. ...To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed u/s 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. ...

14....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.

15....In our view, not making an application u/s 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b).

16....Merely because penal provision is available or a workman has a further remedy u/s 33-A to challenge the approval granted, it cannot be said that the order of discharge or dismissal does not become inoperative or invalid unless set aside u/s 33-A. There is nothing in Sections 31, 33 and 33-A to suggest otherwise even reading them together in the context. These Sections are intended to serve different purposes.

12. With the above legal principle in mind, if the facts of the case are examined, it is seen that the respondent/workmen were dismissed from service on 15.7.2003 for misconduct. The workmen raised a dispute u/s 2A of the I.D. Act, before the Assistant Commissioner of Labour (Conciliation), Tiruchirappalli. While, the same was pending, they invoked the jurisdiction of the Labour Court by filing a petition u/s 33-C(2) of the I.D. Act on the ground that the Government by G.O. (D). No. 688, dated 13.9.2001, referred the dispute relating to the general charter of demands regarding the revision of wages and other terms of service of the employees to the Industrial Tribunal, Chennai. The matter was taken on file by the Industrial Tribunal as I.D. No. 43 of 2001 and subsequently, transferred to the Special Industrial Tribunal and renumbered as I.D. No. 1 of 2002. The Labour Court held that in view of the decision of the Hon'ble Supreme Court, non-compliance of the mandatory provisions of Section 33 of the I.D. Act would render the order of dismissal as non-est.

13. The Management would contend that the order of reference in G.O. (D). No. 688, was u/s 10(5) and notice was issued to the petitioner Management, as they are likely to be interested or affected by such dispute and they are not the parties to the dispute. Before the Labour Court, the copy of the Government order in G.O. (D). No. 688, has been filed. The petitioner Management has been shown as a party to the dispute in Serial No. 1159, and as many as 18 trade unions representing the workmen of all the Textile Mills were also parties.

14. Before the Labour Court, the 8th respondent herein was examined as PW 1 and four documents were marked as Exhibits P-1 to P-4; on the side of the Management one Mr. M. Neelamegam was examined as RW-1 and four documents were marked as M1 to M4. The Labour Court framed three points for consideration; Whether the petition is maintainable; Whether the dismissal of the workmen is non est due to non-compliance of Section 33 of the I.D. Act; and Whether the workmen are entitled for the wages claimed. The Labour Court after dismissing the case as projected by the parties, has proceeded to consider points 1 & 2 together and held the workmen are not estopped in filing the petition u/s 33(c)(2) of the Act, though earlier they raised a dispute under 2A of the I.D. Act

and the same was pending before the Conciliation Officer. The Labour Court further held that as it is not in dispute that I.D. No. 1 of 2002, was pending before the Special Industrial Tribunal and the Management being one of the party to the said proceedings and the result in the said dispute will be binding both on the Management and said respondent/workmen cannot be said to be not the "concerned workmen". Further, though a settlement is said to have been arrived at u/s 18(1) of the I.D. Act, the reference in I.D. No. 1 of 2002, before the Special Industrial Tribunal relates to several demands which are not covered u/s 18(1) Settlement and therefore, held that there is an industrial dispute pending and the Management ought to have obtained prior permission and by applying the judgment of the Hon"ble Supreme Court in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and Others (supra), held the order of dismissal is void and inoperative and the employees are deemed to continue in service and entitled to all benefits.

15. The question whether a workman is "concerned" in the dispute under adjudication is a mixed question of law and fact and there can be no universal test or formula which could be laid down to determine the said question and it has to be decided on the facts of each case. Therefore, to determine such question, the Labour Court has to find out as to the nature of dispute, which is pending before the Tribunal for adjudication, the effect of the award that may be passed on the rest of the workmen and nature of representation of the workmen in the dispute. Therefore, the mere fact that the same union has taken up the cause of the workman or that by virtue of Section 18(3)(d) of the I.D. Act, all workman may be bound by the award in the earlier dispute was held to be not sufficient and there must also be some other common feature in the nature of two disputes, which would serve as a common link, thereby rendering workman in the later case also a workman "concerned" in dispute in the earlier case (See Tata Iron & Steel Co. Ltd. v. DR Singh 1965 II LLJ 22 (SC). Further, it has been held by the Hon"ble Division Bench of Orissa High Court in Khagendra Prasad Patra v. DTM, STS Koreput, (1976) Lab IC 1260 that mere fact that a workman was the member of the Union, which had taken up the pending dispute of another workman, will not make him a workman "concerned" in the dispute, as it is the dispute that the workman had to be "concerned" with and not only with the parties to the dispute and therefore, it is only after ascertaining the nature of the "pending dispute", that the Labour Court can reach the conclusion whether the workman is "concerned" with it or not.

16. Further, the question whether a particular workman is a "protected workman" or not is a question of fact. Merely because the workman is an office bearer of the Union will not automatically acquire the status of a protected workman, unless he has on an application made by the Union, been expressly recognized by the employer as such.

17. It is seen that before the Labour Court, the Government Order in G.O. Ms. No. 688, dated 13.9.2001, alone had been marked and the entire particulars

regarding the nature of reference and other particulars were not exhibited before the Labour Court. The said order of reference was passed by the Government in exercise of its powers u/s 10(1)(d) read with Section 10(5) of the I.D. Act. From the said Government Order, exhibit P1, it is seen that the respondent/workmen were not parties to the dispute nor it is the case of the workmen that their Union is a party to the dispute. Admittedly, the petitioner Management was not a party to the dispute and appear to have received notice of such dispute as the reference was made invoking Section 10(5) also. Though the language of sub-section (5) of Section 10 is very widely couched, it cannot be interpreted so as to bring in establishments in which a dispute cannot be raised on account of subsisting settlements.

18. As noticed above, the Labour Court in the impugned award held that when admittedly an industrial dispute, in which the Management is a party, the result of such dispute will be binding on both, therefore, it cannot be said that the respondents are not "concerned workmen". However, unless it is known as to what was the nature of dispute pending on the said reference, it would be impossible to decide whether the respondent/workmen are "concerned workmen" within the meaning of Section 33(2). Therefore, in order to be entitled to its protection, a workman must show that he is concerned in the pending dispute and the burden of proof is on such workman. This being a jurisdictional fact, the Labour Court was required to give a positive finding on the same on the workman proving the same to the satisfaction of the Labour Court. However, in the impugned award, the Labour Court has failed to undertake such exercise and proceeded merely on the basis that the petitioner Management was a respondent in the said dispute in I.D. No. 1 of 2002. Further, the Labour Court should have also taken note that the order of reference was also made u/s 10(5) of the I.D. Act. It is only after the Labour Court had examined these aspects, it could have applied the judgment of the Constitution Bench of the Hon'ble Supreme Court and granted the relief. Thus, there is error of law committed by the Labour Court, which is apparent on the face of the record and since the error pertains to the jurisdiction of the Labour Court, the matter requires reconsideration.

19. For all the above reasons, the writ petition is allowed and the impugned award is set aside and the matter is remanded to the Labour Court to consider the questions indicated above and take a fresh decision on merits and in accordance with law. No costs. This Court places on record the valuable assistance given by Mr. S. Arunachalam, learned counsel appearing for the respondents/workmen (Amicus Curie) and Ms. R. Vijayalakshmi, who assisted the learned counsel.