

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.12.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.44769 of 2016

and

W.M.P.No.38597 of 2016

Puthiya Jananayaga Vagana Ottunargal
and Techniciankal Sangam (Reg.No.3103/CNI),
R.M.K and R.M.D. Kalvi Niruvanangal Kilai,
Rep. by its Secretary,
No.110, N.S.K.Salai,
Kodambakkam, Chennai. .. Petitioner

Vs.

1. Government of Tamil Nadu,
Represented by its Secretary,
Labour and Employment Department,
Fort St.George, Chennai-600 009.
- 2.The Assistant Commissioner of Labour (Conciliation)-2,
Kuralagam, Chennai.
3. The Management,
R.M.K. Engineering College,
R.S.M.Nagar, Kavarapettai,
Gummidipoondi Taluk, Tiruvallur District.
4. The Management,
R.M.D. Engineering College,
R.M.K.Nagar, Kavarapettai,
Gummidipoondi Taluk, Tiruvallur District.
5. The Management,
R.M.K. College of Engineering and Technology,
R.M.K.Nagar, Puthuvayal,
Gummidipoondi Taluk,
Tiruvallur District.

6. The Management,
Sri Durgadevi Polytechnic,
R.S.M.Nagar, Kavarapettai,
Gummidipoondi Taluk,
Tiruvallur District.

7. The Management,
R.M.K.Padasala,
R.S.M.Nagar, Kavarapettai,
Gummidipoondi Taluk,
Tiruvallur District.

8. The Management,
R.M.K. Matric. Hr. Sec. School,
R.S.M.Nagar, Kavarapettai,
Gummidipoondi Taluk,
Tiruvallur District.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Mandamus to forbear the respondents 3 to 8 from altering the service conditions of the members of the petitioner-Union, (whose list of names are enclosed in the annexure to the Writ Petition), in any manner which will make result in non-employment to the members of the petitioner-Union, without getting prior permission under Section 33 of the Industrial Disputes Act, 1947, in the industrial dispute raised by the petitioner-Union, dated 16.01.2015 with regard to charter of demands which are pending conciliation before the second respondent and further direct the Conciliation Officer, viz., second respondent to conciliate and effect settlement under Section 12(3) and if no settlement is forthcoming, to submit failure report under Section 12(4) of the Industrial Disputes Act, 1947 and in turn, direct the first respondent to refer the dispute for adjudication before the competent adjudicator.

For petitioner : Mr.R.Sankarasubbu
for Mr.Suresh Sakthi Murugan
For respondents : Mr.P.Sanjay Gandhi,
Addl. G.P. for RR-1 & 2

ORDER

The prayer in this Writ Petition is for issuance of a Writ of Mandamus to forbear the respondents 3 to 8 from altering the service conditions of the members of the petitioner-Union, in any manner which will make result in non-employment to the members of the petitioner-Union, without getting prior permission under Section 33 of the Industrial Disputes Act,

1947, in the industrial dispute raised by the petitioner-Union, dated 16.01.2015 with regard to charter of demands which are pending conciliation before the second respondent and further direct the Conciliation Officer, viz., second respondent to conciliate and effect settlement under Section 12(3) and if no settlement is forthcoming, to submit failure report under Section 12(4) of the Industrial Disputes Act, 1947 and in turn, direct the first respondent to refer the dispute for adjudication before the competent adjudicator.

2. Heard the learned counsel appearing for the learned counsel on record, for the petitioner and the learned Additional Government Pleader appearing for the respondents 1 and 2. In view of the order that is being passed in this Writ Petition, it is not necessary to issue notice to the respondents 3 to 8.

3. From the narration of events, it appears that the petitioner-Union is alleged to have been registered under the Trade Union Act. The petitioner-Union has raised an industrial dispute. It appears that some of the members-employees have been suspended and they have also given a representation that they have not been provided with a job and that no wages have been paid them. From the records, it is clear that eight employees have been suspended and they have been getting wages initially without any work. After suspension of the employees, they have been charge-sheeted by the Management. According to the petitioner-Union, those employees have already given a reply immediately thereafter. An industrial dispute is also pending between the parties. The Writ Petition is being proceeded on the presumption that the Management is not going to comply with the provisions of the Industrial Disputes Act. Even assuming that the members of the petitioner-Union are "workmen" under various respondents-private management and even assuming that the Industrial Disputes Act is applicable to them, the petitioner-Union cannot seek the relief against the private management. Hence, the Writ Petition has got to be dismissed.

4. It is true that for statutory violation, the Writ Petition can be maintained, in view of the decision of a Full Bench of this Court reported in 2006 (4) C.T.C. 689 = 2006 (4) L.W. 495 (K.Marappan vs. The Deputy Registrar of Co-operative Societies, Namakkal & another). Further, learned counsel appearing for the petitioner also relied upon a judgment of this Court reported in 2002 (4) LLN 530 (A.N.E.Workers Union Vs. Planters' Assn. of T.N), wherein it was pointed out that a Writ Petition against a private management is maintainable for statutory violation.

5. In this case, the issue is a still-born-child. From the records, it appears that the Management in this case has

admittedly charge-sheeted the employees, which is pending, and the employees have been suspended due to the pendency of the charge-sheet. Learned counsel appearing for the petitioner-Union has also drawn the attention of this Court that in similar circumstances, this Court has issued interim orders not to alter the service conditions of the employees. This reliance on the interim order will not be helpful to the petitioner-Union to the facts and circumstances of the present case, and further, this Court is deciding the matter on merits and the Writ Petition is being disposed of finally. Admittedly, there is no alteration of service conditions, as it appears from the records placed before this Court. Merely because an industrial dispute is pending under the Industrial Disputes Act, the Act nowhere states that the Management should fold their hands and keep quiet and would not proceed further during the pendency of an industrial dispute against the employees and hence, the prayer sought for in the Writ Petition cannot be granted. It is alleged that there is violation of Section 33(1) of the I.D. Act. Apparently, as on date, there is no violation of Section 33 of the I.D. Act. If the Management is going to alter any of the service conditions as alleged by the petitioner-Union, then the petitioner may seek relief and that is absent in this case till date. The Management may seek orders under Section 33(2)(b) of the I.D. Act, as some of the employees have committed misconduct, and it is for the respondents-Management to proceed against those employees and take a final call. If the employee is a 'protected workman', the Management can take permission before passing the final orders, and if he is 'not a protected workman', then it is for the respondents-Management to pass any order of their choice and seek approval of their action under Section 33(2)(b) of the I.D. Act. The words mentioned in Section 33(2)(b) are very clear that the Management is entitled to proceed against the workmen and seek approval of their action and not prior permission. In any event, such a situation has not arisen till date.

6. In the decision of the Supreme Court reported in 2002 (2) SCC 244 (Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma), the Constitution Bench of the Supreme Court made it clear that the Management can proceed against the worker and pass final order. The only thing is that they have to comply with the mandatory provisions of Section 33(2)(b) of the I.D. Act. For better appreciation of the case, paragraphs 13 to 15 of the said decision of the Supreme Court are extracted hereunder:

"13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that

the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under S.31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000/- or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 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. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33 (2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them are already strained. An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal

passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 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 under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A 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 under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A 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 33-A 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.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 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). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33-A or to raise

another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment."

7. From the above observations of the Supreme Court, it is clear that if the Management fails to discharge the statutory obligation, then there is no need for an employee to knock at the Courts of justice to get a dismissal or discharge or any order set aside, as non-compliance of the statutory provisions would make the order non-est in the eye of law.

8. Further, the decision of this Court reported in 2011 Writ.L.R. 734 (M/s.Chidambaram Shipcare Pvt. Ltd. Vs. The Presiding Officer, Principal Labour Court, Chennai and others) is not applicable to the facts of the present case, as in that case, the Writ Petition was filed against an order passed in the approval petition, wherein, this Court has set aside the order on the ground of non-compliance of mandatory provisions of the Standing Orders and the learned Judge of this Court has observed in paragraphs 55 to 57 as follows:

"55. The Scheme of the Industrial Disputes Act provides utmost importance to the Trade Unions. In fact, it contemplates the industrial dispute under Section 2(K) of the Act, being the dispute raised by the body of workmen, namely Trade Union. The Act originally enacted did not provide for individual workman to raise an industrial dispute even in the case of non-employment of an individual workman. Section 2-A of the Industrial Disputes Act making dispute relating to dismissal/termination of individual as deeming industrial dispute, was introduced at a later point of time. The Act provides for resolving disputes by way of settlement or adjudication. In both the cases, Trade Unions assume the most important part. The Act recognizes the settlement being signed only by the Trade Union in the case of conditions of service of workman. The Act contemplates collective bargaining. In fact, Section 36 of the Act provides right of Trade Union to represent in the conciliation proceedings and before the Labour Courts/Industrial Tribunals. Whenever the employer proposes to bring change in the conditions of service, Section 9-A of the

Industrial Disputes Act read with the Rules framed thereunder contemplates providing of notice to the Union. Whenever the workmen go on strike, the Trade Union should issue notice as per the conditions of service and in the case of public utility service, it is a must for issuing notice on strike by the Unions. Section 33 of the Act provides protection to the office bearer of the Trade Union from being victimised by the employer, while disputes are pending adjudication or conciliation. Thus, the Scheme of the Act provides a pivotal role for Trade Unions.

56. In 1984, as stated above, unfair labour practice is defined and certain practices of the Trade Unions are now codified as unfair labour practices, while certain practices of employers are codified as unfair labour practices. The Act prohibits unfair labour practices being committed by employer or Trade Union. Thus, the Scheme of the Industrial Disputes Act and more particularly, after codification of unfair labour practices and in particular, clause 5(f) of Fifth Schedule of the Industrial Disputes Act, it is incumbent on the employer to provide the assistance of an office bearer of the Trade Union in the domestic enquiry to which the workman is a member. Therefore, the Central Government has made it as conditions of service by incorporating the same in rule 14(4)(ba) in the Model Standing Orders framed by them, as stated above. It is relevant that Section 3 of the Standing Orders Act read with Section 5 make it mandatory that when the employer submits draft Standing Orders for certification, the Certifying Officer shall forward a copy thereof to the Trade Unions and to hear the Trade Unions in the certification proceedings. Thus, the Trade Union is given a right to be heard, while framing the conditions of service of the workmen. While submitting draft standing orders, Section 3 of the Standing Orders Act contemplates that the draft standing orders shall be in conformity with the Model Standing Orders. Section 4 of the Act makes it clear that it is the duty of the Certifying Officer to adjudicate on reasonableness of the provisions of the Standing Orders. Hence, while certifying any standing orders, the Certifying Officer, taking into account the above principles, should ensure that the workman is given assistance by the

office bearer of the Trade Union in the domestic enquiry, to which the workman is a member.

57. Therefore, I am of the considered opinion that the Government of Tamil Nadu also should make a provision in the Model Standing Orders, as has been made by the Central Government in the Model Standing Orders framed by them in rule 14(4)(ba) of the Industrial Employment (Standing Orders) Central Rules 1946, taking into account the Scheme of the Industrial Disputes Act, the Trade Unions Act and the Standing Orders Act and more particularly, the codification of unfair labour practices in the year 1984 in the Industrial Disputes Act, as stated above."

9. As the matter between the Management/Union and the workers with regard to charter demand and misconduct in respect of certain employees are pending, unless and until, the employer commits any violation of the mandatory provision, the employees cannot seek redressal of their grievance before any Court, muchless this Court.

10. In view of the disputed question of fact, the remedy available to the workman is only before the Industrial Forum. Section 33(1) of the I.D. Act deals with the conditions of service that no employer shall in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings. Apart from that, it also clearly states that for any misconduct connected with the dispute, the employer shall not, without permission, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute.

11. Section 33(2) of the I.D. Act also contemplates that the employer during the pendency of the Industrial dispute may, in accordance with the standing orders or if there are no standing orders in terms of contract whether express or implied, alter the service conditions of the workman in regard to any other matter not connected with the dispute, immediately before the commencement of the proceedings. It also contemplates that for any misconduct not connected with the dispute, 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.

12. A conjoint reading of both the above said provisions makes it clear that it is independent of each other, which clearly stipulates that, in case, the employer violates the mandatory provisions, then the employee can seek the relief. The employees cannot presume that the employer is going to violate the provisions and seek for an injunction restraining the Management from proceeding further or a direction not to alter the service conditions or to direct the Management to comply with the provisions of the Act. If there is no compliance by the employer, the rights are protected not only in terms of the I.D. Act, but also in view of the Constitution Bench decision in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (cited supra).

13. Section 33(3) of the I.D. Act clearly states that no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute, by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such protected workman, with the express permission in writing of the authority before which the proceeding is pending.

14. Section 33(4) of the I.D. Act deals with number of workmen to be recognised as protected workmen in every establishment. In case, the employer violates the mandatory provisions of Section 33, the Supreme Court in the case of Punjab Beverages (P) Ltd. Vs. Suresh Chand (1978 (2) SCC 144) has categorically held that if an employer contravenes the provisions, the employee can approach the forum by filing a petition under Section 33-A, and the authority will take up the complaint under Section 33-A as if it is an industrial dispute, and pass a final award. But the Supreme Court has watered down the said judgment in the case of Punjab Beverages (P) Ltd. (cited supra) and held that it is bad in law after 25 years in the year 2002, in the case of Jaipur Zila Sahakari Boomi Vikas Bank Ltd. (cited supra), wherein, it has been held that if the employer violates the mandatory provisions and passes any order, the employee need not approach the Labour forum, to get an illegal order set aside to get the benefits, as there would be no such order passed by the employer in the eye of law. When such wide protection is given by the Apex Court, which is still a law of the land, the employees, cannot by-pass the remedy available under the Industrial Disputes Act and seek the present prayer and this Court cannot direct the Management to comply with the provisions of the Industrial Disputes Act. The rights of the employees are protected under Section 33 and if there are

any violations by an employer, it is open for the employees to approach the Industrial Forum.

15. As already observed, the issue in this case is a still-born-child. There is no guarantee about the nature of punishment that may be imposed, if the charges are established and it is also not sure as to whether the disciplinary action would be continued. If the employees commit serious misconduct, there is nothing wrong on the part of the employer showing the doors to those persons. But what is contemplated is that the Management shall comply with the provisions of the Industrial Disputes Act, which will come into operation at the final stage and that stage has not come as on date.

16. Apart from the fact that the Writ Petition is against the private Management, there is no iota of evidence that there is an imminent danger or the situation is monstrous, that there is violation of statutory provisions of the Act driving the petitioner-Union to invoke the Writ Jurisdiction of this Court under Article 226 of the Constitution of India.

17. The contention of the petitioner-Union is that the employees have not been given an opportunity to defend in the enquiry, and even though the said request of opportunity is raised, the members of the petitioner-Union have not been given a fair chance cannot be gone into in the present Writ Petition.

18. Also, the averment of the petitioner-Union that there has been unfair labour practice, cannot be accepted at this stage. An employer can allege that the employees have committed unfair labour practice, and similar allegation can also be made against the Management that the employer had committed unfair labour practice against the employees. Schedule V to the Industrial Disputes Act is clear with regard to the unfair labour practice committed by an employer against the employees or vice-versa. These are all disputed questions of fact, which cannot be gone into in the Writ Petition under Article 226 of the Constitution of India.

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19. Hence, for the reasons stated above, I find no merits in the Writ Petition and the same is liable to be dismissed. Accordingly, the Writ Petition is dismissed. Though it is a fit case for imposing costs of not less than Rs.25,000/- on the petitioner-Union, taking note of the fact that the employees are represented by the Union, this Court refrains from imposing costs. Consequently, connected W.M.P. is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

1. The Secretary,
Labour and Employment Department,
Fort St.George, Chennai-600 009.
2. The Assistant Commissioner of Labour (Conciliation)-2,
Kuralagam, Chennai.

+2cc to Mr.M. Suresh Sakthi Murugan, Advocate, S.R.No.77

SK(CO)
md(18/01/2017)

W.P.No.44769 of 2016

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