

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**C.W.P. No. 21437 of 2011
Reserved on : December 17, 2016**

Date of Decision: December 22, 2016

Haryana Engineering College, Jagadhri

... Petitioner

Versus

Presiding Officer, Labour Court, Ambala and another

... Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. V.K. Sachdeva, Advocate,
for the petitioner.

Mr. J.S. Bedi, Advocate,
for respondent No.2.

P.B. Bajanthri, J.

1. In the instant writ petition, petitioner has questioned the validity of order dated 04.10.2011 passed by the Labour Court, Ambala (Annexure P/1).

2. Rama Shankar Tiwari – respondent no.2 was appointed as a Security Guard in the Haryana Engineering College (for short 'College') on 29.04.2000. On 09.01.2002, he had abandoned the service and it was settled by means of a compromise before the Deputy Labour Commissioner on 22.04.2002. Thus, respondent no.2 reported back to service on 23.04.2002. Once again, on 08.05.2002, he had abandoned the service. Therefore, in the year 2003, he raised an industrial dispute reference No. 46 of 2003 and the same was decided by the Labour Court on 28.07.2005, while setting aside order dated 08.05.2002, the petitioner was directed to reinstate the

respondent-workman in service along with all other benefits including continuity of service and full back wages. This is an ex-parte award. The petitioner aggrieved by the award dated 28.07.2005 preferred a civil writ petition No. 1010 of 2006 before this Court. During the pendency of said writ petition, respondent no.2 was reinstated and he had reported the duty on 25.05.2006. In the meanwhile, wages were calculated and paid. On 10.01.2008, writ petition filed by the petitioner got dismissed. Further, the petitioner preferred a Special Leave Petition No. 10958 of 2008 and suffered an order before the Supreme Court. Respondent No.2 had also filed an application under Section 33C(2) of the Industrial Disputes Act, 1947 (for short 'Act') relating to payment of dues from 08.01.2002 to 24.05.2006 seeking benefits like Provident Fund, Leave Encashment, Bonus, etc. to the tune of Rs.3,06,737/-. On 15.12.2007, an ex-parte award was passed. The petitioner granted the monetary benefits along with interest to the tune of Rs.3,34,343/- on 02.09.2009.

3. In this background, respondent no.2 filed one more application under Section 33C(2) of the Act in the month of November, 2009 claiming the relief of salary for the period from 25.05.2006 to 31.10.2009 to the tune of Rs. 2,96,351-54.

4. Before the Labour Court the petitioner has submitted written statement. In the written statement, the petitioner has raised preliminary objections regarding maintainability of application filed by respondent no.2 under Section 33C(2) of the Act. The Labour Court issued an award in favour of respondent-workman on 04.10.2011. The petitioner is feeling aggrieved by the award passed by the Labour Court vide Annexure P/1, filed present writ petition.

5. Learned counsel for the petitioner submitted that application under Section 33C(2) of the Act filed by respondent no.2 is not maintainable. It was contended that grievance of the respondent-workman is relating to payment of salary for the period from 25.05.2006 to 31.10.2009. Since the respondent joined the service on 25.05.2006 and abandoned the service, therefore, he is not entitled for the claim made by him before the Labour Court. No right is existing in favour of the respondent as he is not in service so as to claim salary for the period from 25.05.2006 to 31.10.2009. It was further contended that Labour Court did not appreciate the maintainability of the application filed by the respondent-workman when he abandoned the service without challenging to the termination order. It was further contended that Labour Court erred in accepting the calculations made by the respondent-workman in so far as the salary is concerned. The petitioner - College is not paying leave encashment any of its employees, therefore, question of extending benefit of leave encashment is also impermissible. The Labour Court proceeded to pass orders as if respondent-workman has questioned the validity of the termination order so as to hold that termination is illegal and further Labour Court proceeded to consider the application of the respondent as if it was under Section 33C(1) of the Act, ignoring the fact that respondent's application is under Section 33C(2) of the Act.

6. Learned counsel for the petitioner further submitted that Labour Court has no jurisdiction to decide the issue relating to termination of an employee in application under Section 33C(2) of the Act. Scope of Labour Court in the matter of deciding application under Section 33C(2) of the Act is only for determination with reference to pre-existing right of an

employee. Therefore, the Labour Court exceeded its jurisdiction in holding that order of termination is illegal/bad. Moreover, the Labour Court proceeded to extend the benefits to the respondent-workman without enquiry. Respondent-workman has not established his right to make an application under Section 33C(2) of the Act since he ceased to be an employee as on the date i.e. 25.05.2006. The Labour Court proceeded to pass an award as if the respondent's application is under Section 33C(1) of the Act for examination of termination order. Thus, the Labour Court erred in passing the award in favour of the respondent-workman. Learned counsel for the petitioner cited decision of this Court passed in ***General Manager, Punjab Roadways, Amritsar and another vs. Surjit Singh and another, reported 2011 INDLAW PNH, 458*** and another decision of the Apex Court passed in ***D. Krishnan and another vs. Special Officer, Vellore Coop. S.M. And another, reported 2008 INDLAW SC 968*** to contend that Labour Court exceeded its jurisdiction while deciding application under Section 33C(2) of the Act.

7. Per contra, learned counsel for respondent no.2 submitted that the respondent-workman has been terminated now and then initially on 09.01.2002 and it was compromised before the Deputy Labour Commissioner on 22.04.2002 and once again on 08.05.2002. In so far as 08.05.2002 is concerned was the subject matter before the Labour Court, this Court and Supreme Court wherein the petitioner had suffered orders and they have implemented the award for the namesake i.e. just permitting the respondent to report and thereafter, he was not allowed to work, whereas monetary benefits have been settled from 2002 to 2006. Having regard to the conduct of the petitioner, rightly the Labour Court examined the entire

facts and circumstances. Thus, an award has been passed that respondent-workman is entitled to salary for the period from 25.05.2006 to 31.10.2009. The Labour Court has power to examining the various factors leading to non-payment of salary to an employee. Thus, no infirmity is forthcoming in the Labour Court's award. The petitioner has not made out a case to interference in the award passed by the Labour Court. Learned counsel for the respondent cited a decision of the Apex Court in ***Chief Mining Engineer, M/s East India Coal Co., Ltd., Bararee Colliery Dhanbad vs. Rameshwar and others, 1968 AIR (SC) 218*** for the purpose of examination of scope of Sections 33C(2) and 33C(1) of the Act. Hence, present writ petition is liable to be dismissed.

8. Heard learned counsel for the parties.

9. For the purpose of deciding the present litigation, it is necessary to peruse relevant provisions of the Industrial Disputes Act, 1947. Section 33C (1) and (2) reads as under:-

“33C. Recovery of money due from an employer (1) *Where any money is due to a workman from an employer under a settlement or an award or under the provisions of [Chapter VA or Chapter VB], the workman himself or any other person authorised by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue:*

Provided that every such application shall be made within one year from the date on which the money became due to the workman from the employer;

Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government [within a period not exceeding three months]:

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit.”

10. The respondent-workman filed application under Section 33C (2) of the Act whereas Section 33C(2) of the Act is relating to any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due. In the present case, the respondent – workman, after first round of litigation, had reported to duty in the month of May 2006 and thereafter, once again he had abandoned the service. The respondent presumed that his services have been terminated and in the first round of litigation, he intends to claim benefit under Section 33C(1) of the Act and the Labour Court proceeded to pass orders as if the respondent's application is under Section 33C(1) of the Act. For the purpose of claiming anything under Section 33C(2) of the Act, an employee must have pre-existing right.

In the present case, grievance of the respondent-workman is relating to

grant of certain monetary benefits from 25.05.2006 to 31.10.2009 for which period he was not in service as he has abandoned the service or respondent's services were terminated. Therefore, application under Section 33C(2) of the Act submitted by the respondent-workman is not maintainable and it is liable to be rejected. The Labour Court while considering respondent's application under Section 33C(2) of the Act proceeded to examine the termination and held that termination of the respondent-workman is illegal. Thus, he is entitled to monetary benefits for the period from 25.05.2006 to 31.10.2009. The Labour Court merely accepted the calculations submitted by the respondent-workman without subjecting such calculations for the enquiry.

11. Further, grant of leave encashment is concerned, the Labour Court failed to appreciate the fact that the petitioner-College have not adopted grant of leave encashment under the regulations and not even a single employee entitle for leave encashment or it has been disbursed to any of its employee. The Labour Court proceeded to grant leave encashment based on the earlier round of litigation where the petitioner remained ex-parte. Ex-parte award was subject matter of this Court and the Supreme Court in which petitioner suffered orders. Thus, the petitioner was compelled to implement the award. Even though there is no provision in the petitioner-College to extend the benefit of leave encashment. The respondent-workman has not made out a case for grant of leave encashment with reference to any regulations/orders. Thus, granting of leave encashment by the Labour Court is in the absence of any statutory provisions or orders. Scope of the respondent-workman application is limited to Section 33C(2) of the Act whereas the Labour Court exceeded its

jurisdiction to grant relief to the respondent-workman under Section 33C(1) of the Act. Earlier round of litigation whatever the award passed has been settled including monetary benefits. The respondent-workman has not questioned the action of the petitioner in terminating his services unless and until termination is challenged and it is set aside or held to be illegal. The respondent-workman has no right to seek monetary benefits for the period from 25.05.2006 to 31.10.2009 for which period he is out of service.

12. Learned counsel for the petitioner relied on decisions of this Court and the Supreme Court, particularly decision of Supreme Court in **D. Krishnan's case (supra)**. Para nos. 3, 5, 6 and 7 read as under:-

“3. Mr. Colin Gonsalves, the learned senior counsel for the workmen-appellants, has submitted that though proceedings under Section 33 C(2) of the Act were indeed in the nature of execution proceedings but this provision also visualized some enquiry, be it a casual one, and as the Labour Court and the learned Single Judge of the High Court had taken a particular view on the evidence, the Division Bench ought to have stayed its hands and not taken a different view. It has been pleaded that there was a difference between the terminology of Sections 33 C(1) and section 33 C(2) inasmuch as section 33 C(1) dealt with money due to a workman from an employer under a settlement or award etc., whereas section 33 C(2) was much wider in its application and visualized an entitlement with respect to money even if a pre-existing right was created by a Statute and as in the present case, [section 59](#) of the Factories Act, 1948 visualized payment of overtime wages, a simple enquiry under section 33 C(2) was fully justified. In this connection, the learned counsel has placed reliance on Chief Mining Engineer East India Coal Co.Ltd. vs. Rameshwar & Ors. 1967 Indlaw SC 244. He has also pleaded, that even assuming for a moment, that there was some evidence to raise a suspicion that the appellants were Managers and not

workmen, the dominant purpose of their employment had to be seen and the dominant purpose being that of workmen, even if they were delegated some minor managerial activities, would not change the nature of their appointment. It was also submitted that all the judgments cited by the Division Bench pertained to cases where the workmen claimed "equal pay for equal work" and which did involve the determination of a right, but in the present case, keeping in view the provisions of [Section 59](#) of the Factories Act, 1948, and the dominant purpose of the employment of the appellants, the aforesaid judgments were not applicable.

*5. We have considered the arguments advanced by the learned counsel for the parties. The fact that proceedings under Section 33 C(2) are in the nature of execution proceedings is in no doubt, and such proceedings presuppose some adjudication leading to the determination of a right, which has to be enforced. Concededly there has been no such adjudication in the present case. It will be seen that the reliance of the appellant-workmen is exclusively on documentary evidence placed on record which consisted primarily of the punch time cards and the representations that had been filed from time to time before the respondents. It is also true that the claim raised by the appellants had been hotly disputed by the respondents. The question that arises in this situation is whether reliance only on the documentary evidence was sufficient to prove the case. We are of the opinion that the reference to Municipal Corporation's case (*supra*) is completely misplaced as in that matter, the fact that different categories of workers were doing identical kind of work was virtually admitted but different scales of pay were nevertheless being paid to them. It is also relevant that oral evidence had been adduced by the workmen to supplement the documentary evidence and it was in that situation that the Court felt that an application under section 33 C(2) was maintainable. We find that the claim by the appellants herein has been disputed from*

the beginning and that the documents filed by the appellants themselves suggest that they were unsure of their own status. We have also perused the representations which have been filed as additional documents. A perusal of the letter dated 10th February 1996 from S.Karuthiah Pandian, Special Officer shows that the appellant D.Krishnan was being posted as a Canteen Manager. The subsequent letters dated 20th May 1996, 20th January 1997, 20th February 1997, 15th April 1998 and 6th August 1998 were all written by the appellant D.Krishnan identifying his post as that of Manager of the canteen and in the body of the last letter, a specific plea has been made that amongst the several duties entrusted to him, he had to instruct 4 workers to come in the morning, to prepare breakfast and a complaint that on one particular day, one C. Uttharakumar, a Clerk working under him had refused to follow his orders. We also find similar letters written by the second appellant, K. Shanmugam and they too are on the record as additional documents. We are, therefore, of the opinion that in the light of the categorical statements time and again in the very documents relied upon by the appellants in support of their case, that they were, prima- facie, Managers and it would, therefore, be beyond the jurisdiction of the Labour Court to determine their status in proceedings under Section 33 C(2) of the Act.

6. *In this view of the matter, we find that the judgment reported in Municipal Corporation's case (supra) was clearly applicable to the facts of the present case. In this case, it was observed that:*

"In these matters, the claim of the respondent-workmen who were all daily- rated/causal workers, to be paid wages at the same rate as the regular workers, had not been earlier settled by adjudication or recognition by the employer without which the stage for computation of that benefit could not reach. The workmen's claim of doing the same kind

of work and their entitlement to be paid wages at the same rate as the regular workmen on the principle of "equal pay for equal work" being disputed, without an adjudication of their dispute resulting in acceptance of their claim to this effect, there could be no occasion for computation of the benefit on that basis to attract [Section 33-C\(2\)](#). The mere fact that some other workmen are alleged to have made a similar claim by filing writ petitions under [Article 32](#) of the Constitution is indicative of the need for adjudication of the claim of entitlement to the benefit before computation of such a benefit could be sought. Respondents' claim is not based on a prior adjudication made in the writ petitions filed by some other workmen upholding a similar claim which could be relied on as an adjudication enuring to the benefit of these respondents as well. The writ petitions by some other workmen to which some reference was casually made, particulars of which are not available in these matters, have, therefore, no relevance for the present purpose. It must, therefore, be held that the Labour Court as well as the High Court were in error in treating as maintainable the applications made under [Section 33-C\(2\)](#) of the Act by these respondents.

In Brijpal Singh's case (supra), this is what the Court had to say:

"It is well settled that the workman can proceed under [Section 33-C\(2\)](#) only after the Tribunal has adjudicated on a complaint under [Section 33-A](#) or on a reference under [Section 10](#) that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman. This Court in the case of [Punjab Beverages \(P\) Ltd. vs. Suresh Chand](#) held that a proceeding

under Section 33-C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. Proceeding further, this Court held that the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer."

7. *Mr. Gonsalves, has, however urged that a pre-existing right could also emanate from a statute, in this case from Section 59 of the Factories Act, which provided for the payment of overtime wages and in this view of the matter, all that the Labour Court was called upon to do was to make a calculation of the amounts due to the appellants. The facts of the case are, however, not as clear cut and dried, as has been contended. The Division Bench has observed that though section 59 of the Factories Act undoubtedly provided for extra payment as overtime wages, but according to Rule 78B of the Tamil Nadu Factories Rule, 1950, only an employee authorized to work overtime by an overtime slip would be entitled to claim an overtime allowance. The specific case of the respondent-Management, which has not been contested by the appellants even during the course of the arguments before us, is that no such slips had ever been issued. Additionally, we are of the opinion that in the absence of any supporting oral evidence by the workmen which would also result in their cross-examination, a mere reliance on the documents filed by them is insufficient for determining the factual basis of the issues involved, in proceedings under Section 33-C(2) of the*

Act. In this view of the matter, Mr. Gonsalves's argument based on Rameshwar's case (supra) or the scope and ambit of Section 33 C(1) vis-à-vis Section 33 C (2), is also unacceptable.”

13. Having regard to the above decisions wherein the Supreme Court has interpreted Section 33C(2) of the Act, scope of Labour Court. Whereas in the present case, the Labour Court exceeded its jurisdiction to grant relief under Section 33C(1) of the Act when respondent No.2's application is under Section 33C(2) of the Act. Thus, the Labour Court has erred in granting relief to the respondent – workman. In view of the provisions of Section 33C(2) of the Act and the fact that the respondent-workman is out of service for the period from 25.05.2006 to 31.10.2009, application of respondent-workman is not maintainable as no pre-existing right is available to him during the intervening period from 25.05.2006 to 31.10.2009. Therefore, the Labour Court erred in holding that the respondent-workman is entitled to monetary benefits for the above said period as the same is without authority of law. Hence, Labour Court award dated 04.10.2011 is set aside.

14. Writ petition stands allowed.

December 22, 2016
vkd

[P.B. Bajanthri]
Judge

Whether speaking/reasoned:-

Yes / No

Whether Reportable:-

Yes / No