

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6699 OF 2000

M/s. Carbon Everflow Limited	]	Petitioner
Vs.		
Arun Ramdas Mahajan	]	Respondent

WITH

WRIT PETITION NO. 6700 OF 2000

M/s. Carbon Everflow Limited	]	Petitioner
Vs.		
Gurudas Vasantrao Kulkarni	]	Respondent

WITH

WRIT PETITION NO. 6705 OF 2000

M/s. Carbon Everflow Limited	]	Petitioner
Vs.		
Sahebrao Tukaram Baviskar	]	Respondent

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Mr. Atul Damle i/b Ms. Leena Patil, for petitioner in all Writ Petitions.

Mr. Susheel Mahadeshwar, for respondents in all Writ Petitions.

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CORAM : R.G. KETKAR, J.

DATE : 22ND JUNE, 2017.

JUDGMENT:

Heard Mr. Damle, learned Senior Counsel for the petitioner and Mr. Mahadeshwar, learned Counsel for the respondents at length.

2. These Writ Petitions filed under Article 227 of the Constitution of India take exception to the judgment and Award dated 20th July, 2000 made by the learned Presiding Officer, Labour Court, Nashik [for short 'Labour Court']. By that order, Labour Court held that Arun Ramdas Mahajan, Gurudas Vasantrao Kulkarni and Sahebrao Tukaram Baviskar respondents, hereinafter referred to 'second party workmen' are entitled to be reinstated in their original position posts with continuity of service with effect from 4th September, 1988. Labour Court declined to award any back wages to the second party workmen. The relevant and material facts giving rise to filing of these Petitions, briefly stated, are as under.

3. Second party workmen were working as 'Machinist Operator' [Writ Petition No. 6699 of 2000], 'Operator' [Writ Petition No. 6700 of 2000] and 'Machine Operator' [Writ Petition No. 6705 of 2000] since 1984. It is the contention of the petitioner that on 24th May, 1987, it had displayed notice intimating all the workmen that 25th May, 1987 would be observed as a weekly off. Second party workmen and one Mr. Deshmukh came to the gate of the factory at about 7.00 a.m on 25.05.1987 in order to sabotage

activities of the Company and opened 1" valve of the autoclave whereby 600 kgs of resin amounting to Rs. 42,000/- was completely drained out and was spoiled.

4. The petitioner-Company, therefore, issued charge-sheets, inter alia, on following charges.

(I) Disobedience of any lawful and reasonable order of the superior.

(ii) Dishonesty in connection with the employer's property within the premises of the establishment;

(iii) Wilful damage to the property of the establishment.

(iv) Commission of an act subversive of discipline;

(v) Committing an act prejudicial to the interest of the company.

(vi) Aiotous, disorderly or indecent behaviour in the premises of the establishment;

(vii) Committing an act prejudicial to the company.

5. In pursuance of the charge-sheet, enquiry was held

against the second party workmen. Enquiry Officer held that charges levelled against the second party were established. After considering the report submitted by the Enquiry Officer, petitioner dismissed the second party workmen from the service of the Company. Deputy Commissioner of Labour Nashik Division, Nashik made three references for adjudication of industrial disputes between the petitioner-Company and three workmen. At the request of the parties, common evidence was recorded and references were heard together and were disposed of by common Award. After considering the evidence on record, Labour Court held that findings of the Enquiry Officer are justified and that action of termination of services is not by way of victimization. Labour Court held that action of termination is illegal mainly on two grounds. One under Section 11-A and on the ground namely violation of Section 33 (2) (b) of the Industrial Disputes Act, 1947 [for short 'Act']. Labour Court observed in para 29 that guilt of the second party workmen has been proved. The acts committed by the second party workman were objectionable and amounted to misconduct and at the most in the nature of mischief. There was no concrete evidence to show that the loss of resin was to the tune of Rs. 42,000/- though some loss bound to have been caused.

Labour Court also recorded a finding that past record of the second party workmen was clean as also for non compliance of mandatory provisions of Section 33 (2) (b) held that dismissal is harsh punishment on higher side and unjustified. Labour Court, therefore, ordered reinstatement of these three workmen to their original post but declined to award back wages. It is against these Awards, petitioner has instituted above Petitions.

6. In support of these Petitions, Mr. Damle strenuously contended that Labour Court having held that findings recorded by the Enquiry Officer during enquiry are justified and borne out from the evidence on record as also action of termination of service of second party workmen was not by way of victimization was not justified in interfering with the order of dismissal. He submitted that once misconduct is proved, Labour Court has to sustain order of punishment unless it was harsh, indicating victimization. If a proper enquiry is conducted by employer and correct finding is recorded regarding misconduct, Labour Court even though it has power to differ from the conclusions arrived at by the Management will have to give very cogent reasons for not accepting the view of the employer.

7. Mr. Damle further submitted that Section 11-A of the Act cannot be considered as conferring an arbitrary power on the Tribunal or the Labour Court. The power under Section 11-A of the Act has to be exercised judiciously and the Industrial Tribunal or Labour Court is expected to interfere with the decision of a management under Section 11-A of the Act only when it is satisfied that the punishment imposed by the management is highly disproportionate to the degree of guilt of the workman concerned. The Industrial Tribunal or the Labour Court has to give reasons for its decision. In support of this proposition, he relied on a decision of the Apex Court in the case of **Bharat Heavy Electricals Ltd. Vs. Mr. Chandrashekhar Reddy and others, (2005) Supreme Court Cases 481.**

8. Mr. Damle further submitted that Labour Court also held that the petitioner violated provisions of Section 33 (2) (b) of the Act. He submitted that as provided under Section 31, workmen could have made complaint for contravention of Section 33. Workmen could have also invoked Section 33 (A) by making complaint in writing in the prescribed manner under clause (a) and clause (b). In the present case, second party workmen neither

made complaint under Section 31 nor under section 33(A). He, therefore, submitted that Labour Court committed serious error in holding that petitioner violated provisions of Section 33 (2) (b) of the Act. He, therefore, submitted that impugned Awards are liable to be set aside.

9. On the other hand, Mr. Mahadeshwar supported the Awards. He has relied on decision of the Constitution Bench of the Apex Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd Vs. Ram Gopal Sharma and others, (2002) 2 Supreme Court Cases, 244**. He submitted that Constitution Bench has considered provisions of Section 33 (2) (b) and held that said provisions are mandatory and the conditions laid down in Section 33 (2) (b) are required to be complied with. In the present case, the petitioner did not make any application seeking approval while terminating services of the second party workmen. He has taken me through the impugned Award and submitted that no case is made out for interfering with the impugned Awards.

10. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material

on record. A perusal of the impugned order shows that second party workmen are members of Sarva Shramik Seva Sangh . The said Sangh has raised general demands as also bonus. These two demands were separately admitted into conciliation. Conciliation failed and disputes were referred to Industrial Court, Nashik for adjudication. This position is an admitted position. Second party workmen had also produced copy of the reference order dated 3rd November, 1989 pertaining to general demands of the Sangh. A perusal of paragraph 26 of the impugned order further shows that it was an admitted fact that Sangh had raised demand for payment of bonus and the said demand was admitted in conciliation and proceedings were pending before the Conciliation Officer till 15th October, 1988. When failure report was submitted to the Company, the said report was annexed to the application for amendment Exhibit U-11 in Reference (I.D.A) No. 20 of 1989. In paragraph 27, Labour Court recorded that undisputed conciliation report dated 15th October, 1988 indicates that industrial dispute regarding bonus for the year 1986-1987 raised by Sangh was admitted in conciliation and the said conciliation proceedings were pending on the date of dismissal of second party workmen i.e on 14th September, 1988.

11. Section 33 (2) (b) of the Act reads thus:

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

“(1).....

2(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”.

12. A perusal of Section 33(2) (b) of the Act shows that no workman shall be discharged or dismissed, unless approval is obtained for any misconduct not connected with the dispute, discharge or punish by way of dismissal or otherwise. This provision came for consideration before the Constitution Bench of the Apex Court in case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd Vs. Ram Gopal Sharma and others**, [supra].

13. In paragraph 3, Apex Court referred to the decision of three learned Judges in the cases of:

[1] **Strawboard Mfg. Co. v. Govind**, AIR 1962 SC 1500.

[2] **Tata Iron & Steel Co. Ltd. v. S.N. Modak**, AIR 1966 SC 380.

In these decisions, three learned Judges had taken a view that if the approval is not granted under Section 33(2) (b) of the Act, the order of dismissal becomes ineffective from the date it was passed. Another Bench of three learned Judges in the case of **Punjab Beverages (P) Ltd Vs. Suresh Chand**, (1978) 2 SC, 144 had expressed a contrary view that non approval of the order of dismissal or failure to make application under Section 33 (2) (b) would not render the order of dismissal inoperative; failure to apply for approval under Section 33(2) (b) would only render the employer liable to punishment under Section 31 of the Act and the remedy of the employee is either by way of a complaint under Section 33-A or by way of reference under Section 10 (1) (d) of the Act.

14. In paragraph 13 and 15, the Apex Court observed thus:

“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 Section 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 is 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.

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 proceedings by making a complaint under Section 33-A or to raise another industrial dispute or to make 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.

15. In paragraphs 18 and 19 Constitution Bench observed that they agree with and endorse the view taken in the case of **Strawboard and Tata Iron & Steel Co.**[supra] and held that the view expressed in **Punjab Beverages (P) Ltd** [supra] is not the correct view.

16. As noted earlier, Sangh has raised demand for payment of bonus and the said demand was admitted in conciliation and the proceedings were pending before the Conciliation Officer till 15.10.1988. In paragraph 27, Labour Court recorded that undisputed conciliation report dated 15.10.1988 indicates that industrial dispute regarding bonus for the year 1986-1987 raised by Sangh was admitted in conciliation and the said conciliation proceedings were pending on the date of dismissal of the second party i.e on 14.09.1988.

17. Applying the principles laid down by the Apex Court in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd** [supra]

to the facts of the present case as also having regard to the fact that petitioner did not make any application seeking approval under Section 33 (2) (b) of the Act, I do not find that Labour Court committed any error in passing the impugned Awards. While issuing reinstatement, Labour Court declined to award back wages though observed that about 12 years, second party workmen forced unemployment.

18. Mr. Damle relied upon paragraphs 23 and 24 of the decision in the case of **Bharat Heavy Electricals Ltd** [supra] dealing with Section 11-A of the Act. Said paragraphs read thus:

23. With reference to Section 11-A of the Act, in the case of *Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd*, this Court held:

Once the misconduct is proved, the Tribunal had to sustain the order of punishment unless it was harsh, indicating victimisation. [SCC pp. 828-29, Para 32 (9)]

“If a proper enquiry is conducted by an employer and a correct finding arrived at regarding the misconduct, the Tribunal, even though it has now power to differ from the conclusions arrived at by the management, will have to give very cogent reasons for not accepting the view of the employer”. (SCC p. 835, para 53)

24. In *CMC Hospital Employees' Union* this Court held: (SCC p. 708, para 14)

“Section 11-A... cannot be considered as conferring an arbitrary power on the Industrial Tribunal or the Labour Court. The power under Section 11-A of the Act has to be exercised judicially and the Industrial Tribunal or the Labour Court is expected to interfere with the decision of a management under Section 11-A of the Act only when it is satisfied that the punishment imposed by the management is highly disproportionate to the degree of guilt of the workman concerned. The Industrial Tribunal or the Labour Court has to give reasons for its decision.

19. Mr. Mahadeshwar did not dispute the proposition laid down in **Bharat Heavy Electricals Ltd.** [supra]. He submitted that petitioner did not make any application seeking approval under Section 33(2) (b) of the Act and Labour Court was, therefore, justified in passing the impugned order.

20. Even if, I accept submission of Mr. Damle based on Section 11-A of the Act, none the less, it is not in dispute that petitioner did not make any application seeking approval under Section 33(2) (b) of the Act. In view thereof, no fault can be find with the impugned order passed by the Labour Court.

21. In view thereof, no case is made out for invoking powers under Article 227 of the Constitution of India. Petitions fail

and the same are dismissed. Rule is discharged with no order as to costs.

22. At this stage, Mr. Damle orally applies for stay of this order for a period of eight weeks from today. He assures that the petitioner will not seek further extension of interim order. Mr. Mahadeshwar opposes oral application on the ground that by the impugned Award, the Labour Court has ordered reinstatement and declined back wages.

23. Having regard to the fact that interim order is operating since 4th December, 2000 as also having due regard to the fact that the petitioner wants to challenge this order before the higher Court, I find that the request made by Mr. Damle is reasonable. Hence, notwithstanding dismissal of the Petitions, ad-interim order dated 4th December, 2000, which was confirmed on 27th February, 2001, shall remain in force for a period of eight weeks from today, with express understanding that no further application for extension of ad-interim order shall be made and entertained. Order accordingly.

[R.G. KETKAR, J.]