



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 30.10.2018
Pronounced on: 04.12.2018
CORAM

WEB COPY

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

W.P. (MD) No.18821 of 2015

C.M.Pichaimani

... Petitioner

-vs-

The Management of Tamil Nadu State
Transport Corporation (Madurai) Ltd.,
Dindigul Region,
Rep. by its Managing Director,
Dindigul.

... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Mandamus, directing the respondent to reinstate the petitioner with continuity of service, back wages and all other attendant benefits as per the order dated 03.11.2014 of the Special Deputy Commissioner of Labour, Chennai passed under Section 33(2) (b) of I.D.Act in Approval Application A.P.No.117 of 2013 and thus render justice.

For Petitioner : Mr.M.Pounraj

For Respondent : Mr.A.Jeyaram

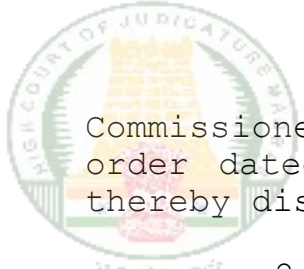
O R D E R

This petition has been filed, seeking a direction to the respondent to reinstate the petitioner with continuity of service, back wages and all other attendant benefits as per the order dated 03.11.2014 of the Special Deputy Commissioner of Labour, Chennai passed under Section 33(2) (b) of the Industrial Disputes Act (in short the "I.D.Act") in Approval Application A.P.No.117 of 2013.

Brief Facts:

2. The case of the petitioner was that he was employed as Driver by the respondent from 07.09.2008 and had rendered unblemished service in the respondent Transport Corporation. The respondent had initiated disciplinary proceedings against him for his absence from duty from 25.03.2012 to 24.05.2012 and after conclusion of the enquiry proceedings, he was dismissed from service by an order dated 19.03.2013.

2.1. It was the further case of the petitioner that pursuant to the pendency of industrial dispute regarding revision of wages and other benefits of the employees of the State Transport Corporations before the Joint Commissioner of Labour, Chennai, the respondent sought approval for dismissal of the petitioner under Section 33(2) (b) of the I.D.Act, which was taken on file in Application No.117 of 2013. Thereafter, the Special Deputy



Commissioner of Labour, after hearing either side, had passed an order dated 03.11.2014, rejecting the approval for his dismissal, thereby dismissed the application of the respondent.

2.3. It was submitted that on account of dismissal of the application filed by the respondent, he is deemed to have been in service, thereby he is entitled to all benefits. But, the respondent has not complied with the order, despite receipt of notice sent his Counsel and letter dated 15.08.2015 written by the petitioner, seeking compliance of the order. Having left with no other efficacious remedy, the petitioner is before this Court, seeking for the above direction.

3. The respondent has filed a counter affidavit, wherein it has been *inter alia* stated as follows:

i) The petitioner, who worked as Driver, remained absent from 25.03.2012 to 24.05.2012 for 61 days without any intimation, which necessitated the respondent to issue a charge memo dated 26.06.2012 to him and due to his failure in submitting his explanation, an enquiry was conducted. The petitioner, inspite of repeated enquiry notices sent to him through registered post on 08.11.2012, 27.10.2012 and 20.11.2012, had not chosen to appear for enquiry, pursuant to which, the Enquiry Officer had submitted an exparte report, holding that the charges framed against him were proved on the basis of evidence and documents.

ii) Though yet another notice dated 28.01.2013 was served on the petitioner, asking as to why the exparte report should not be accepted, the said notice was returned unclaimed and after following all the legal formalities, the petitioner was dismissed from service on 19.03.2013 under Section 16(7) of the Standing Order proviso of Respondent Corporation. The respondent has filed an Approval Petition No.117 of 2013 before the Special Deputy Commissioner of Labour, Chennai for approval of his dismissal, the application was dismissed without affording any opportunity to submit the charge memo copies and other relevant documents.

iii) It was stated in the counter that the application was dismissed on the following grounds:

"a) It is not known that the domestic enquiry was conducted by adopting principles of natural justice as the Transport Corporation could not file the charge memo copies and return to sender postal receipts.

b) It is not known that the *prima facie* case has not been proved with evidence and witness as the Transport Corporation could not file the charge memo copies and return to sender postal receipts.

c) It is not known that the action taken against the worker was felon as the Transport Corporation could not file the charge memo copies and return to sender postal receipts.



d) It is not known that the approval petition has been filed within the short period or it is the part of the action taken against the employee."

iv) It was further stated that aggrieved by the order dated 03.11.2014, the respondent has filed a writ petition in W.P.(MD) No.5231 of 2016 before this Court and the same is still pending. Narrating the above circumstances, the respondent sought for dismissal of this writ petition.

4. Learned counsel for the petitioner has strenuously contended that the petitioner should have been reinstated in service immediately after the dismissal of the application and the respondent, without doing so, has been adopting dilatory tactics in his reinstatement, which is against the provisions of Article 21 of the Constitution of India. He has further contended that pursuant to dismissal of the application, the petitioner is deemed to be in service and in the absence of stay granted by this Court, he should have been reinstated in service with immediate effect, taking into account his indigent circumstances.

5. Per contra, learned Standing Counsel for the respondent has stated that before passing an order of dismissal, all the legal formalities have been followed and the Special Deputy Commissioner of Labour, Chennai, without providing sufficient time to the respondent to defend their case, has rejected the application, which was filed for grant of approval of dismissal of the petitioner. The petitioner, purposely evading the receipt of notices sent by the respondent Corporation, cannot be granted the relief sought for in this petition. Therefore, it was vehemently argued that this petition is liable to be dismissed.

6. Heard the learned counsel on either side and perused the material documents available on record.

7. It is seen that the petitioner / workman has the benefit of the order of the concerned authority, namely, Special Deputy Commissioner of Labour, Chennai dated 03.11.2014, passed under the I.D.Act, by which the Approval Petition filed by the respondent was rejected and the respondent / Management has challenged the said order before this Court. It was brought to the notice of this Court that the said writ petition was dismissed by this Court on 12.02.2018 itself, against which, no appeal has been preferred so far. Therefore, the petitioner has approached this Court with a plea of reinstatement in service with all benefits.

8. In this case, the petitioner has indirectly sought for implementation of the order. The Hon'ble Supreme Court in the case of **Jaipur Zila Sahakari Boomi Vikas Bank Ltd vs. Ram Gopal Sharma and others**, reported in **(2002) 2 SCC 244** held that in case the employer failed to comply with the mandatory provisions of the Industrial Disputes Act, more particularly, either seeking approval of their action or permission, depending upon facts and

circumstances of the case, the employee need not knock at the doors of the Court to get illegal order set aside and that the employee is deemed to be in service. The relevant portions of the said judgment reads as follows:

"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.



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 33A and that till such time he should suffer misery of unemployment in spite of the 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



"4.....Actually the legal position is this. The employer passes an order dispensing with the services of an employee. That order is carried on appeal to a higher authority. That authority reverses the decision of the employer and the result is that the order of the employer is



set aside. It is no longer in existence. It follows that the effect of the original order of the employer also disappears and it is as if the order is non-est. Though, therefore, it may not be quite accurate to say that the employee will be entitled to reinstatement in service, yet the result of the order of the appellate authority is virtually the same. Probably, the result of the appellate order is even better than an order of reinstatement. It is as if the employee had never been properly dismissed from service."

Once an order of dismissal is set aside by the Appellate Authority, reinstatement is in-built in the said order.

11. In this case, the petitioner has the benefit of order and no writ petition is pending as of now and therefore, the respondent Transport Corporation is directed to reinstate the petitioner with continuity of service and all other attendant benefits, considering the fact that the order of dismissal is *non-est* in law and the workman is deemed in service. The petitioner/workman shall be reinstated in service within a period of one month from the date of receipt of a copy of this order and the entire arrears will have to be paid to the petitioner within a period of two months from the date of receipt of a copy of this order, by calculating the arrears from the date of dismissal.

12. It is made clear that if the wages are not paid within the stipulated period stated supra, the same shall carry interest @ 12% p.a. and the interest portion shall be recovered from the Officials, who are responsible for not paying the amount and they, including the Managing Director and the Secretary to Government, Transport Department, Chennai shall not draw the salary till the arrears are paid.

13. It is pertinent to mention here that this Court, by means of a separate order dated 30.10.2018, passed in the Miscellaneous Petition, had declined to grant wages to the petitioner under Section 17-B of the I.D.Act, on the ground that it is not applicable to the present case, as the wages under Section 17-B could be granted, only if a writ petition is filed by the Management, challenging the Award of the Labour Court or Tribunal that grants reinstatement and such question does not arise in this case, as it was admitted that the writ petition filed by the Management against the dismissal of Approval Petition, came to be dismissed by this Court and as of now, no writ petition is pending.

14. In fine, this Writ Petition is allowed on the above terms. No costs.

Sd/-

Assistant Registrar(CO)



To

The Management of Tamil Nadu State
Tamil Nadu State Transport Corporation
(Madurai) Ltd,
Dindigul Region,
Rep by its Managing Director, Dindigul.

Copy to:

The Chief Secretary to Government of TamilNadu
Transport Department, Chennai 600 009.

+1cc to MR.M.Pounraj, Advocate Sr.No.99011

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KM/BK/SAR2/21.12.2018/8P/4C

**PRE-DELIVERY ORDER IN
W.P. (MD) No.18821 of 2015
04.12.2018**