

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05-11-2019

Coram

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.22108 of 2013

And

M.P.No.1 of 2013

The Superintending Engineer,
Tamil Nadu Generation and Distribution
Corporation Limited,
Villupuram Electricity Distribution Circle,
Villupuram. .. Petitioner

vs.

1.G.Duraimurugan

2.The Presiding Officer,
Labour Court,
Cuddalore. .. Respondents

PRAYER : Writ Petition filed under Article 226 of the
Constitution of India praying for issuance of a Writ of
Certiorari, calling for the records relating to the orders
passed by the second respondent made in Claim Petition No.103 of
2008 dated 02.06.2011 and quash the same

For Petitioner : Mr.Anand Gopalan for
M/s.T.S.Gopalan and Co.

For Respondent-1 : Mr.R.D.Ashok Kumar for
Mr.S.N.Ravichandran

For Respondent-2 : Labour Court

ORDER

The order of the second respondent dated 02.06.2011
made in Claim Petition No.103 of 2008, is under challenge in the
present writ petition.

2. The writ petitioner is the Tamil Nadu Electricity
Board.

3. The learned counsel appearing on behalf of the writ
petitioner states that the Tamil Nadu Electricity Board brought

out a scheme for payment of ex-gratia in the wage revision talks held with the writ petitioner-Board and the Trade Unions. Accordingly, the writ petitioner-Board issued the proceedings on 13.12.1996. As per the scheme, the contract labourers, who have completed 5 years of regular service as on 31.03.1996 or 31.03.1997 and have worked for 30 days in a year is entitled to claim ex-gratia. Pursuant to the orders of the writ petitioner-Board, the officials of the writ petitioner-Electricity Board identified the contract labourers engaged by them for the purpose of payment of ex-gratia to the eligible contract labourers.

4. The learned counsel for the writ petitioner further states that the first respondent was not engaged as a contract labourer by the writ petitioner-Board and his claim for payment of ex-gratia as set out in the claim petition cannot be maintained. The first respondent was not an identified contract labourer by the officers of the writ petitioner-Board in compliance with the terms and conditions stipulated in the writ petitioner-Board proceedings dated 13.12.1996. Even as per the Certificates issued by the officials of the writ petitioner-Board, which were marked as Exs.P-18 to P-42, the first respondent was not engaged by the writ petitioner-Board directly. The Certificates are issued to the effect that the first respondent was engaged by a Contractor, with whom the writ petitioner-Board had entered into a contract, for performance of a particular job for a specified sum. Thus, the first respondent has not produced any documents to establish that he fulfilled the terms and conditions stipulated in the writ petitioner-Board proceedings for the grant of ex-gratia payment and therefore, the Labour Court's Award is perverse and is not in consonance with the terms and conditions of the proceedings issued by the Tamil Nadu Electricity Board for payment of ex-gratia.

5. The learned counsel for the writ petitioner further reiterated that the first respondent has not even produced any documents to establish that he is entitled for ex-gratia payment and further he failed to prove that he had a pre-existing right, so as to maintain the petition filed under Section 33-C(2) of the Industrial Disputes Act, 1947. In other words, it is stated that in the absence of any pre-existing or an Award or an order of Settlement under Section 12(3), no petition under Section 33-C(2) can be entertained by the Labour Court and the Labour Court has committed an error in ordering the claim petition without even adjudicating the fact that the first respondent-employee had established the pre-existing right.

6. The learned counsel for the writ petitioner-Board further contended that the Labour Court had miserably failed in considering the terms and conditions stipulated in the writ

petitioner-Board proceedings for the grant of ex-gratia payment. The first aspect is to be considered whether the employee concerned is eligible for ex-gratia payment or not. In the event of establishing the fact that the employee is entitled for ex-gratia payment with reference to the scheme, then alone the petition under Section 33-C(2) can be maintained and not otherwise. Thus, the order of the Labour Court in this regard is absent and accordingly liable to be scrapped.

7. The learned counsel appearing on behalf of the first respondent-workman disputed the contentions by stating that the first respondent was working as a contract labourer from the years 1996-1997 to 2005-2006. Thus, the first respondent had served more than 5 years as a contract labourer with the writ petitioner-Tamil Nadu Electricity Board. The first respondent-workman was continuously working as a contract labourer to that effect that he has submitted the other Certificates issued by the authorities of the writ petitioner-Tamil Nadu Electricity Board and all those documents were considered by the Labour Court in right perspective and accordingly the claim petition was allowed and there is no infirmity as such.

8. The learned counsel for the first respondent reiterated that as per the scheme, the ex-gratia payment has been granted. Thus, there is a pre-existing right and further, the writ petitioner-Board had not denied the right of the first respondent-workman for receiving the ex-gratia payment. In the absence of any specific denial from the Labour Court, now the writ petitioner cannot come forward and make a submission that the first respondent is not entitled for the ex-gratia payment. In the absence of any pleadings to that effect, now the said grounds raised cannot be considered.

9. While narrating the scope of the judicial review under Article 226 of the Constitution of India, the learned counsel for the first respondent is of an opinion that the Labour Court has rightly considered the issues with reference to the documents filed by the workman concerned and there is no infirmity and on the other ground regarding the eligibility and entitlement, which was not denied before the Labour Court, cannot be raised by the writ petitioner-Electricity Board in this writ petition and the judicial review against such pleadings cannot be exercised.

10. The learned counsel for the first respondent-workman pleaded that the principles laid down by the Supreme Court in the case of State of U.P and Another vs. Brijpal Singh [(2005) 8 SCC 58], is not applicable as far as the facts and circumstances of the case on hand is concerned. Here the right of an employee is established and therefore, the said principles

have no applicability in the present case.

11. The learned counsel for the first respondent-workman cited a judgment of the Division Bench of this Court in the case of Superintending Engineer, Vellore Electricity Distribution Circle vs. Presiding Officer, Labour Court, Vellore [decided on 16.11.2006 in WP Nos.9030 to 9033 of 2001 batch of cases] wherein similar cases were considered. The said judgment passed by the Division Bench states that "learned Senior Counsel appearing for the petitioners submits that the order of the Labour Court has been complied with and the second respondent in all these writ petitions have agreed for the amount as computed by the Labour Court and they have been paid the ex-gratia amount".

12. As far as the abovesaid judgment of the Division Bench of this Court is concerned, this Court is of an opinion that the learned Senior Counsel, who was appearing on behalf of the Tamil Nadu Electricity Board, cited the pre-existing right of the workmen concerned. In other words, the learned Senior Counsel for the writ petitioner-Board states that the order of the Labour Court was implemented and the ex-gratia payment was already paid to the workmen. Thus, the right of those workmen with reference to the criterias fixed in the Board's proceedings were accepted and accordingly payments were made. Therefore the abovesaid judgment of the Division Bench of this Court cannot have any application as far as the first respondent-workman is concerned, the eligibility of the first respondent is disputed by the Tamil Nadu Electricity Board. Contrarily, the eligibility of those workmen were not disputed before the Division Bench. This being the difference, the abovesaid Division Bench judgment of this Court is of no avail to the first respondent-workman.

13. The learned counsel for the first respondent-workman cited a judgment of the Supreme Court in the case of Maharaj Krishan Bhatt and Another vs. State of Jammu and Kashmir and Others [(2008) 9 SCC 24] and established that even in case of a wrong order, if the said erroneous order had been implemented in respect of one set of employees, the said benefit cannot be denied to other similarly placed persons. This Court is of an opinion that the said principle settled by the Supreme Court in the abovesaid judgment is of no avail to the first respondent-workman in view of the fact that the implementation in respect of ex-gratia payment was done only with reference to the eligible persons and not with reference to the ineligible persons.

14. Thus, the eligibility criteria fixed under the scheme is of paramount importance and based on which the

revision of the workmen are to be decided. The pre-existing right is to be decided with reference to the eligibility criteria fixed under the scheme of ex-gratia payment. Once an employee, who is otherwise in accordance with the scheme, then the other person, who is also eligible cannot be denied ex-gratia payment. This being the spirit of the scheme, this Court is of an opinion that the learned counsel for the first respondent by citing the judgment cannot claim that the pre-existing right, which was honoured in respect of the other employees, should be granted to the first respondent also.

15. In reply, the learned counsel for the writ petitioner-Board reiterated the legal principles in this regard are settled even by the Division Bench of this Court in the case of The Director of Sericulture Department Salem and others vs. K.Kumar and others [2015 (4) CTC 241]. The Courts have consistently taken a view that a wrong precedent or an illegality would not be a ground to continue the same or grant the relief in subsequent cases. Once the Courts have identified the illegality or errors in certain orders, then it is not necessary that such orders should be extended to in other cases also. Thus, the illegality cannot be followed in perpetuity and as far as the present case is concerned, there is no illegality as the case was to be established with reference to the scheme itself and the eligibility is to be decided with reference to the terms and conditions stipulated in the scheme. Therefore, these general principles now placed before this Court by the learned counsel for the first respondent-workman has no applicability and accordingly, the said judgments cannot be the basis for claiming the relief by the first respondent-workman.

16. This Court has already decided this issue in WP No.22183 to 22187 of 2005 dated 27.09.2019, wherein this Court held that the workmen have to establish the pre-existing right, so as to maintain a petition under Section 33-C(2) of the Industrial Disputes Act, 1947.

17. When the learned counsel for the first respondent-workman made a submission that the facts of the present case are different, this Court heard elaborately and now found that the first respondent-workman had not established or produced any documents to prove that he worked continuously for a period of five years of regular service as on 31.03.1996 and the particulars for the years 1995-1996 were not sent within a month from the date of receipt of the proceedings. In other words, in the absence of establishing that the first respondent is eligible as per the scheme, the Labour Court cannot adjudicate the documents regarding the eligibility and allow the claim petition filed under Section 33-C(2) of the Industrial Disputes Act, 1947. The disputed facts cannot be adjudicated as the pre-

existing right is the pre-condition for entertaining the petition by the Labour Court, more specifically, under Section 33-C(2) of the Industrial Disputes Act, 1947. The relevant paragraphs 2 to 6 of the abovesaid order of this Court, are extracted hereunder:-

"2. The writ petitioner is the Tamil Nadu Electricity Board, filed the present writ petitions on the ground that the claim petitions were allowed based on the orders of the Tamil Nadu Electricity Board issued in memo dated 13.12.1996. The benefit of ex-gratia payment granted to the contract labourers are not based on the settlement. Contrarily, the ex-gratia payments were granted based on the request made by the Union. While extending the benefit of ex-gratia payment, certain conditions were imposed and paragraph 4 of the memo dated 13.12.1996 reads as under:

"4. Based on the above decision, all officers of the Board are requested to identify the Contract Labourers who have completed 5(Five) years of regular service as on 31.3.96 and send the above particulars for the year 1995-96 within a month from the date of receipt of this memo."

After verifying all the records and identifying the Contract Labourers who have completed 5(Five) years of regular service as on 31.3.96, a list showing the particulars of Contract Labourers as prescribed and enclosed along with this Memo, should be prepared and ensured and certified by the Officers concerned that the Contract Labourers have served in Tamil Nadu Electricity Board regularly and contemplated 5(Five) years of service as on 31.3.96.

3. The learned counsel for the writ petitioner states that there is no pre-existing right in respect of the benefit of ex-gratia payment. Ex-gratia payment does not fall under the terms and conditions of the 12 (3) Settlement. This being the factum, an adjudication is mandatory. This apart, the contract labourers were engaged by the Private contractors with whom the Tamil Nadu Electricity Board entered into an agreement. Thus, these contract labourers were not the direct employees of the Tamil Nadu

Electricity Board and there was no employer-employee relationship existed in respect of these contract labourers. Thus, the memo issued by the Tamil Nadu Electricity Board cannot have direct implications in respect of the payment of ex-gratia benefit to the contract labourers.

4. The learned counsel for the petitioner states that there was no pre-existing right, enabling the Labour Court to entertain a claim petition under Section 33 (C) (2) of the Industrial Disputes Act. Even in case, where the benefit of ex-gratia payment, claimed by the contract labourers, have to adjudicate the matter and establish that they are entitled for ex-gratia payment with reference to the conditions stipulated in the order issued by the Board on 13.12.1996.

5. This Court also considered the scope of entertaining a claim petition under Section 33(C) (2) of the Industrial Disputes Act, a claim petition can be entertained, only if there is a pre-existing right or the rights of the workman are already crystallized. In the absence of any such right, no petition under Section 33(C) (2) can be entertained by the Labour Court.

6. This Court passed an order dated 09.09.2019 in W.P.No.1611 of 2015 and the relevant paragraphs are extracted hereunder:

"6. In respect of maintainability of the computation petition before the Labour Court under Section 33C(2) of the Industrial Disputes Act, 1947, the same is to be construed as a preliminary issue in the present writ petition. Learned counsel for the writ petitioner-Corporation contended that the other points raised in the impugned CP order cannot be taken into consideration in view of the fact that there was no pre-existing right for the purpose of filing the CP before the Labour Court under Section 33C(2) of the Industrial Disputes Act. The entire adjudication of the merits cannot be undertaken in

the petition filed under Section 33C (2) of the Industrial Disputes Act. The very section stipulates that "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".

7. Thus, there must be an entitlement before entertaining a petition under Section 33C(2) of the Industrial Disputes Act. In other words, there must be a pre-existing right which is a precondition for entertaining a petition under Section 33C(2) of the Industrial Disputes Act. In the absence of any such right or entitlement, no petition can be entertained for the purpose of computing the monetary value or benefits.

8. It is further to be construed that by way of fresh adjudication, monetary benefits cannot be computed. The merits and the demerits of the issues raised cannot be adjudicated in a petition filed under Section 33C(2) of the Industrial Disputes Act. All such adjudications are to be done in the manner prescribed before the Competent Court of Law and only if the rights and entitlements are crystallised, then alone a petition under Section 33C(2) can be entertained and not otherwise. The petition under Section 33C(2) is more or less like an execution petition and therefore, the petition under Section 33C(2) of the Act cannot be entertained for the purpose of complete adjudication of the issues. The very scheme of the Industrial Disputes Act is constituted in such a manner that there must be an adjudication, which resulted in establishing a right and only after

establishing the right or entitlement, a petition can be filed for computation or claiming the benefits. When the initial Sections of the Act enumerates for adjudication of the issues, then the adjudication of the disputed issues are to be undertaken at the first instance and only thereafter, a petition for claim or computation can be filed.

9. This being the legal principles to be followed, admittedly, there was no such adjudication. In the present case, the writ petitioner-Corporation has disputed the issues. The writ petitioner-Corporation even disputed the eligibility of the workman for the rest salary. Under those circumstances, the factual aspects as well as the relevant Rules are to be adjudicated and only after such process, the claim petition can be entertained and not otherwise.

10. In this regard, it is relevant to cite a judgment of the three Judges Bench of the Hon'ble Supreme Court of India in the case of State of U.P and Another vs. Brijpal Singh [2005-III-LLJ 1003]. The relevant paragraphs-10 and 12 of the judgment cited supra are extracted as under:

"10. 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. v. Suresh Chand [(1978) 2 SCC 144 : 1978 SCC (L&S) 165] 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. This Court further held as follows: (SCC p. 150, para 4)

"It is not competent to the Labour Court exercising jurisdiction under Section 33-C(2) to arrogate to itself the functions of an Industrial Tribunal and entertain a claim which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under Section 10 of the Act."

In the case of Municipal Corp'n. of Delhi v. Ganesh Razak [(1995) 1 SCC 235 : 1995 SCC (L&S) 296 : (1995) 29 ATC 93] this Court held as under: (SCC pp. 241-42, paras 12-13)

"12. The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workmen to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under Section 33-C(2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33-C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognised by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity

requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33-C(2) like that of the executing court's power to interpret the decree for the purpose of its execution.

13. In these matters, the claim of the respondent workmen who were all daily-rated/casual 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."

12. Thus, it is clear from the principle enunciated in the above decisions that the appropriate forum where question of back wages could be decided is only in a proceeding before a forum to whom a reference under Section 10 of the Act is made. Thereafter, the Labour Court, in the instant case, cannot arrogate to itself the functions of an Industrial Tribunal and entertain the claim made by the respondent herein which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under Section 10 of the ID Act. Therefore, the Labour Court had no jurisdiction to adjudicate the claim made by the respondent herein under Section 33-C(2) of the ID Act in an undetermined claim and until such adjudication is made by the appropriate forum, the respondent workman cannot ask the Labour Court in an application under Section 33-C(2) of the ID Act to disregard his dismissal as wrongful and on that basis to compute his wages. It is, therefore, impossible for us to accept the arguments of Mrs Shyamla Pappu that the respondent workman can file application under Section 33-C(2) for determination and payment of wages on the basis that he continues to be in service pursuant to the said order passed by the High Court in Writ Petition No. 15172 of 1987 dated 28-10-1987. The argument by the learned counsel for the workman has no force and is unacceptable. The Labour Court, in our opinion, has erred in allowing the application filed under Section 33-C(2) of the ID Act and ordering payment of not only the salary but also bonus to the workman although he has not attended the office of the appellants after the stay order obtained by him. The Labour Court has committed a manifest error of law in passing the order in question which was rightly impugned before the High Court and erroneously dismissed by the High Court. The High Court has also equally committed a manifest error in not considering the scope of Section 33-C(2) of the ID Act. We, therefore, have no hesitation

in setting aside the order passed by the Labour Court in Misc. Case No. 11 of 1993 dated 23-8-1995 and the order dated 9-1-2002 passed by the High Court in CMWP No. 36406 of 1995 as illegal and uncalled for. We do so accordingly."

11. In the case of Tara and Others vs. Director, Social Welfare and Others [(1998) 8 SCC 671], the Hon'ble Supreme Court observed as follows:-

"2. There is no infirmity in the conclusion reached by the Labour Court on the basis of the decision of this Court in Ganesh Razak [(1995) 1 SCC 235 : 1995 SCC (L&S) 296 : (1995) 29 ATC 93] that the claim made by the appellants is not maintainable under Section 33-C(2) of the Act. This is obvious from the fact that the status and nature of employment of the appellants is itself disputed and unless there is a prior adjudication on merits of the status which is the foundation for making the claim for wages at the specified rates, the question of moving an application under Section 33-C(2) for computation of the wages does not arise. We find that the Labour Court has recorded some findings which may be relevant for the disputed status of the appellants as anganwadi workers/helpers even though it has rightly reached the conclusion that the applications do not lie under Section 33-C(2) of the Act. It is clear that the question of maintainability of the applications under Section 33-C(2) was required to be determined at the threshold and the question of examining the appellants' claim on merits relating to their status could have been gone into thereafter if the applications were held to be maintainable under Section 33-C(2). In view of the conclusion rightly reached by the Labour Court that the applications were not maintainable under Section 33-C(2), its other findings relating

to the status and nature of employment of the anganwadi workers/helpers were wholly uncalled for. All such findings are, therefore, not to be construed as deciding any point relating to the status of the appellants.

14. Thus, the petition under Section 33C(2), which is in the nature of execution proceedings, cannot be utilised for the purpose of adjudicating the disputed issues raised between the parties. In such an event, every such disputed facts were raised under the petition under Section 33C(2) and this will create an anomaly and further would be in violation of the very scheme of adjudication contemplated under the Industrial Disputes Act."

18. In view of the fact that the Labour Court has failed to consider the claim regarding the payment of ex-gratia as well as the eligibility criteria fixed for payment of ex-gratia, committed an error in coming to the conclusion that there is a pre-existing right so as to entertain the claim petition under Section 33-C(2) of the Industrial Disputes Act, 1947, the Labour Court was under the mistaken impression or construed that the scheme itself provides a right to the contract labourers to get ex-gratia payment.

19. Undoubtedly, the Scheme, which is beneficial, provides a right to all the employees, namely, the contract labourers. However, such a right is subject to the fulfilment of the criterias or the terms and conditions fixed in the scheme itself. Therefore, the two limbs are to be considered for the purpose of entertaining the claim petition. Firstly, the Labour Court ought to have considered whether the scheme of payment of ex-gratia was still in force or not. If the scheme was in force, then the first respondent is entitled to get the ex-gratia payments or not with reference to the terms and conditions stipulated under the Scheme itself. Thus, if these criterias are fulfilled, then the petition under Section 33-C(2) can be entertained and not otherwise.

20. This being the facts and circumstance, this Court has no hesitation in coming to the conclusion that the first respondent has not established the fact that he is qualified and eligible to receive the ex-gratia payment with reference to the terms and conditions stipulated under the scheme, despite the fact that the writ petitioner-Board has denied the eligibility of the first respondent-workman before the Labour Court. The Labour Court has failed to consider all these aspects with

reference to the documents filed by the first respondent-workman regarding the services rendered by him.

21. This being the factum, the order dated 02.06.2011 passed by the Labour Court in C.P. No.103 of 2008 is quashed and consequently, the writ petition stands allowed. However, there shall be no order as to costs. The connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(Insp.cell)

//True copy//

Sub Assistant Registrar

Svn

To

1.The Presiding Officer,
Labour Court,
Cuddalore.

2.The Superintending Engineer,
Tamil Nadu Generation and Distribution
Corporation Limited,
Villupuram Electricity Distribution Circle,
Villupuram.

+lcc to Mr.S.N.Ravichandran, Advocate SR.No.91742

WP No.22108 of 2013

RSV(CO)

GMV(21/11/2019)

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