

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17-09-2019

Coram

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.1359 of 2018

And

W.M.P.No.1729 of 2018

The Management of

Toll (India) Logistics Pvt. Limited,

Represented by Managing Director,

9-A, Puzhal, Ambattur Road,

Puzhal,

Chennai-600 066.

..

Petitioner

vs.

1.The Presiding Officer,
II Additional Labour Court,
Chennai.

2.Mr.G.Baskar

... 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 connected with the order dated 31.07.2017 in C.P.No.420 of 2010 on the file of the first respondent II Additional Labour Court, Chennai and quash the same.

For Petitioner : Mr.Sai Raaj for M/s.Sai Raaj Associates.

For Respondent-1: Labour Court

For Respondent-2: No Appearance

O R D E R

The order of the II Additional Labour Court, Chennai dated 31.07.2017 passed in CP No.420 of 2010 is under challenge in the present writ petition.

2. The writ petitioner is the management of Toll (India) Logistics Pvt. Limited. The writ petitioner-management is engaged in providing logistic Services. The second

respondent-workman was employed as a Driver of the Heavy Vehicle. On account of transfer to some other Station, the second respondent-workman refused to join in the transferred place and challenged the said order of transfer. However, the transfer order issued by the writ petitioner-management was upheld and the second respondent-workman was terminated from service on account of the fact that the second respondent-workman failed to join in the transferred place.

3. The dispute raised by the second respondent-workman, challenging an order of termination was also dismissed by the Labour Court and the termination became final. Apart from challenging the order of termination, the second respondent-workman filed claim petition under Section 33-C(2) of the Industrial Disputes Act, 1947 before the II Additional Labour Court, Chennai, claiming the benefit of dearness allowance, personal leave arrears and overtime arrears.

4. The learned counsel appearing on behalf of the writ petitioner-management states that the entitlement of the second respondent-workman was not even crystallized and the benefits including dearness allowance, personal leave arrears and overtime arrears were not provided under 12(3) Settlement, in view of the fact that such benefits were not accorded to the second respondent-workman under 12(3) Settlement. If at all any such claim is made, then an adjudication is a precondition for entertaining a petition under Section 33-C(2) of the Industrial Disputes Act, 1947. In other words, the second respondent-workman failed to establish any pre-existing right, so as to entertain the claim petition filed under Section 33-C(2) of the Industrial Disputes Act.

5. Contrarily, the Labour Court proceeded with an adjudication and itself arrived a conclusion that the second respondent-workman is entitled for the benefits of dearness allowance, personal leave arrears and overtime arrears. Such a finding of the Labour Court given independently without establishing any pre-existing right of the second respondent-workman is not only untenable but also in violation of the legal principles established by the Apex Court as well as by various High Courts.

6. The very maintainability of the claim petition is questioned by the writ petitioner-management on the ground that in the absence of establishing any pre-existing or prior adjudication of the issues or crystallizing the rights of the second respondent-workman, no claim petition can be entertained by the Labour Court under Section 33-C(2) of the Industrial Disputes Act. To substantiate the abovesaid ground, the learned counsel for the writ petitioner-management solicited the attention of this Court regarding the determination of award by

the High Courts and the Hon'ble Supreme Court.

7. In the case of Municipal Corporation of Delhi vs. Ganesh Razak and Another [(1995) 1 LLJ 395 (SC)], decided on 20.10.1994, the Hon'ble Supreme Court held in paragraph 12 which reads as under:-

"12.
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."

8. In the case of State Bank of India vs. Ram Chandra Dubey and Others [MANU/SC/0687/2000] decided on 14.11.2000, the Hon'ble Supreme Court reiterated the principles and the relevant paragraph 9 which reads as under:-

"Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under Section 33-C(2) of the Act. The benefit sought to be enforced under Section 33-C(2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33-C(2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the

reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not granted necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made. To state that merely upon reinstatement, a workman would be entitled, under the terms of award, to all his arrears of pay and allowances would be incorrect because several factors will have to be considered, as stated earlier, to find out whether the workman is entitled to back wages at all and to what extent. Therefore, we are of the view that the High Court ought not to have presumed that the award of the Labour Court for grant of back wages is implied in the relief of reinstatement or that the award of reinstatement itself conferred right for claim of back wages."

9. In respect of overtime wages, this Court decided a case in K.S.Natarajan vs. The Presiding Officer, Principal Labour Court and Ananda Vikadan Vasan Publication Ltd [W.P.No.23929 of 2006 on 09.02.2010 [MANU/TN/0179/2010] and the relevant paragraphs 19 and 20 are extracted as under:-

"19. There is nothing shown by the petitioner in support of his claim for overtime wages. It is clear that the petitioner had not raised the issue regarding the payment of overtime wages, during his service from the year, 1978, till he had submitted his resignation from service. Such a claim having been made, belatedly, after more than 2 decades, cannot be countenanced. The first respondent labour Court had rightly held that the petition filed by the petitioner, under Section 33(C) (2) of the Industrial Disputes Act, 1947, cannot be maintained, unless there was a pre-existing right or entitlement in favour of the petitioner. Further, the petitioner had not been in a position to show that he was a workman, within the meaning of Section

2(s) of the the Industrial Disputes Act, 1947.

20. It is also clear that the petitioner had requested for voluntary retirement from his service, even before he had attained the age of 58 years. Merely for the reason that the second respondent Management had accepted the request of the petitioner, as though it was resignation from service, since there was no scheme of voluntary retirement for the employee, it cannot be held that the petitioner would be entitled to the reliefs, as sought for by him. As such, the writ petition is liable to be dismissed, as being devoid of merits. Hence, it stands dismissed. No costs."

10. The Kerala High Court also decided the issue in the case of K.V. Joseph vs. Pierce Leslie India Ltd and Others [(1995) III LLJ 391 Ker.] decided on 10.10.1991 and the observations of the Kerala High Court are extracted hereunder:-

"5. Even though there is no period of limitation under Section 33-C(2), the second respondent was justified in dismissing the stale claims of the petitioner. If stale claims are allowed, it would lead to undesirable results including financial anarchy and chaos in the industrial field. Unless there is a satisfactory explanation for the delay, the Labour Court is not expected to entertain petitions especially when it would have far-reaching pecuniary consequences on the employers. In the present case, the claims are made after a long lapse of time. Whether a claim has become stale or not depends upon facts of each case and hard and fast rule cannot be laid down one way or the other. In Inder Singh & Sons Ltd. v. Their Workmen 1961 II LLJ 89, the Supreme Court held:

"On the other hand, it is well-accepted principle of industrial adjudication that over-stale claims should not generally be encouraged or allowed, unless there is satisfactory explanation for the delay. Apart from the obvious risk to industrial peace from the entertainment of claims after a long lapse of time, it is necessary also to take into account the

unsettling effect this is likely to have on the employer's financial arrangements. Whether a claim has become too stale or not will depend on the circumstances of each case. While there is no absolute proposition of law that in no case relief could be granted for a period prior to the demand, the Industrial Tribunal ought to pay particular attention to the date on which the demand was first made."

11. In the case of The Special Officer, Vellore Co-operative Sugar Mills vs. The Presiding Officer, Labour Court, K.Shanmugam and D.Krishnan [MANU/TN/0295/2005], a Division Bench of this Court in paragraphs 7 and 8 observed as under:-

"7. We have carefully perused the order of the Labour Court dated 24.05.2002. It may be noted that no oral evidence was adduced on behalf of the claimants before the Labour Court and no exhibits were marked. In our opinion, whenever there is a claim overtime allowance, it is incumbent on the workmen concerned to, at least, come into the witness box and state on oath before the Labour Court that he/she worked overtime. When he/she does not even adduce his/her own oral evidence it is difficult to accept the claim for overtime allowance. In this case, the claimants/workmen never adduced any oral evidence before the Labour Court. Only claim petitions were filed, and the only material which has been relied upon is the time cards filed by the respondent/management (appellant in the present writ appeals). In our opinion, the time cards only reflect the time of entry of the workman into the factory and time of exit. In our opinion, the punch card by itself cannot substantiate a claim for overtime allowance, as it does not prove that in fact the workman concerned worked overtime. All that the time cards show is the time of entry into the factory and the time of exit. It is quite possible that even after the working hours of the workman concerned, he may be loitering around inside the factory

premises without being told to do more work.

8. Even in their claim petition before the Labour Court (which was not even supported by an affidavit) the workmen concerned did not mention who asked them to work overtime. In our opinion, it was incumbent upon the claimant for overtime allowance to mention which officer or supervisor asked him to work overtime, and when and where, but these details have not been given in the present cases. In our opinion, merely mentioning that the claimant worked overtime for a certain number of hours without clearly stating who ordered him to work overtime and without giving other details cannot sustain a claim for overtime allowance."

12. The Apex Court in the case of D.Krishnan and Another vs. Special Officer, Vellore Co-operative Sugar Mill and Another [(2008) 7 SCC 22] and the relevant paragraphs-12, 13 and 14 are extracted as under:-

"12. 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.

13. We are of the opinion that the reference to Municipal Corpn. case [(1995) 1 SCC 235 : 1995 SCC (L&S) 296 : (1995) 29 ATC 93] 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.

14. 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 10-2-1996 from S. Karuthiah Pandian, Special Officer shows that the appellant D. Krishnan was being posted as a Canteen Manager. The subsequent letters dated 20-5-1996, 20-1-1997, 20-2-1997, 15-4-1998 and 6-8-1998 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."

13. This Court also elaborately considered the issue regarding the maintainability of the claim petition under Section 33-C(2) of the Industrial Disputes Act in W.P.No.1611 of 2015 dated 09.09.2019 wherein the important case of Brijpal Singh [2005-III-LLJ 1003] was considered and this Court made the following observations in paragraphs 6 to 11 which are extracted as under:-

"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 Corpn. 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. In view of the fact that there is no pre-existing right which was established by the second respondent-workman before the Labour Court for the purpose of entertaining a claim petition under Section 33-C(2) of the Industrial Disputes Act, this Court is of the opinion that the first

respondent-Labour Court committed a patent error in entertaining the claim petition in respect of the claim of the second respondent-workman for grant of dearness allowance, personal leave arrears and overtime arrears.

15. Such allowances or monetary benefits are to be adjudicated at the first instance and only after crystallizing the rights of the second respondent-workman concerned, then alone the claim petition can be entertained by the Labour Court and not otherwise.

16. Thus, the Labour Court committed an error apparent in entertaining the claim petition without any pre-existing right, which is to be established by the second respondent-workman and in the absence of any specific 12(3) Settlement in respect of the benefits now sought to be granted. Consequently, the order of the Labour Court is perverse and not in consonance with the established principles of law. Thus, the order of the first respondent-Labour Court dated 31.07.2017 passed in C.P.No.420 of 2010 is quashed and consequently, the writ petition stands allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Svn
To

The Presiding Officer,
II Additional Labour Court,
Chennai.

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W.P.No.1359 of 2018

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