



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.12.2019

CORAM:

THE HONOURABLE **MR. JUSTICE M.S.RAMESH**

W.P. (MD) No.23931 of 2016

V.Manickam

... Petitioner

/Vs./

1.The Management Tamil Nadu State Transport Corporation
(Madurai Division-II) Limited,
19, Trivandrum Road, Vannarpet Post,
Tirunelveli-627 003.

2.The General Manager (Disciplinary Action),
Tamil Nadu State Transport Corporation Ltd.,
19, Trivandrum Road,
Vannarpet Post, Tirunelveli-3

3.The Presiding Officer,
Labour Court, Tirunelveli.

... Respondents

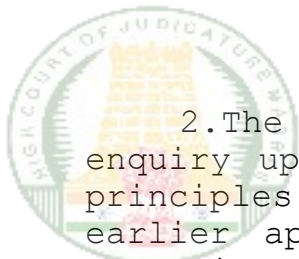
PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, calling for the records pertaining to the impugned order of dismissal in ID.No.69 of 2013 dated 13.11.2014 on the file of the third respondent and quash the same as illegal, and consequently to direct the respondents 1 and 2 to reinstate the petitioner in the post of Technical Assistant with all consequential benefits, within the time stipulated by this Court.

For Petitioner : Mr.T.Aswin Rajasimman for
Mr.T.Lajapathi Roy

For Respondents: Mr.A.Sathiya Singh
Standing Counsel (for R1 & R2)

ORDER

The petitioner herein, who served as a Technical Assistant under the Tamil Nadu State Transport Corporation from 24.01.1992 onwards, was issued with a charge memo dated 11.02.2004 for unauthorised absence for a period between 02.02.2004 to 09.02.2004. Pursuant to the enquiry conducted, the punishment of dismissal from service was imposed on 27.04.2005. When an application under Section 33(2)(b) of the Industrial Dispute Act, 1947 was made before the second respondent herein in an Approval Petition No.64 of 2005, the same came to be rejected by a reasoned order dated 29.01.2007, thereby, setting aside the order of termination. However, further opportunity to establish the charges against the petitioner was made in the said order. In this background, after the approval petition came to be closed, the same authority had chose to grant approval of the dismissal order of the petitioner through an order, dated 08.05.2009. Thereafter, the petitioner had raised a dispute in I.D.No.69 of 2013, before the Labour Court, Tirunelveli, challenging his order of dismissal and by an award dated 13.11.2014, the dispute in ID.No.69 of 2013 came to be dismissed. The said dismissal award is under challenge in the present writ petition.



2.The learned counsel for the petitioner would submit that the enquiry upon the second charge memo was done without adhering the principles of natural justice. He would also submit that when an earlier approval petition came to be rejected, the second order approving the dismissal order is not appropriate.

3.The learned Standing Counsel for the respondents on the other hand would submit that the petitioner is a habitual absentee and that he was earlier imposed with 29 penalties prior to the order of dismissal, out of which, 15 punishment were imposed for his unauthorised absence. He also submitted that in view of such precedents, there was no infirmity in imposing the maximum punishment of dismissal from service, since the petitioner had absented himself without any prior permission.

4.I have carefully considered the submissions made by the respective counsels.

5.One glaring infirmity noticed in the entire proceedings is that, when the petitioner was imposed with the punishment of dismissal from his service on 26.02.2004, the first respondent herein had filed an application in Approval Petition No.64 of 2005, seeking for approval of the punishment imposed. By an order, dated 29.01.2007, the Joint Commission of Labour (Conciliation), Chennai had found that the findings of the Enquiry Officer were perverse and that he would be justified in refusing the approval of the dismissal order. However, he had chosen to give an opportunity to the authorities to establish the charges framed against the petitioner by way of an observation made in that order.

6.A bare perusal of the said order, dated 29.01.2007 reveals that the Joint Commissioner had gone into the merits of the case and found that the findings are perverse in nature. While that being so, giving an opportunity to the authorities to establish the charges once again and reopening the same Approval Petition later is impermissible, in view of the provisions of Section 33 (2) (b) of the Industrial Dispute Act.

7.Section 33 (2) (b) of the Industrial Dispute Act is as follows:-

'.....

(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,

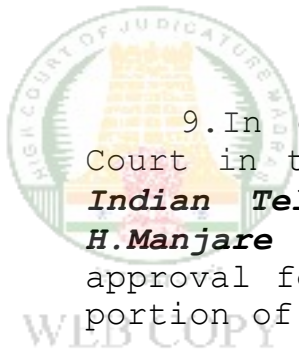
unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer. '

8.The scope of the authorities dealing with an Approval Petition under Section 33 (2) (b) is very limited. Whenever such an application is made, the authority has to examine whether the order of dismissal was *bonafide* or whether it was by way of unfair



practice or whether the conditions contained in the proviso were complied with or not. This proposition has been reiterated in various decisions of the Hon'ble Apex Court including the decisions of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd., Vs. Shri Ram Gopal Sharma and others** reported in **AIR 2002 SC 643**. The Act does not empower the authority to dispose of an application under Section 33 (2) (b) of the Industrial Dispute Act and thereafter, reopen the same, after affording further opportunity to the employer to conduct an additional enquiry. In the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd., Vs. Shri Ram Gopal Sharma and others** (referred to Supra), the Hon'ble Supreme Court had indicated that the second order under Section 33 (2) (b) cannot be sustained, in the following words:-

'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 33A, 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 33A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A 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. '



9. In connection with the same proposition, the Hon'ble Apex Court in the decision reported in **AIR 2003 SC 195** in the case of **Indian Telephone Industries Limited and another Vs., Prabhakar H. Manjare and another** had held that the second application seeking approval for the order of dismissal is impermissible. The relevant portion of the order reads as follows:-

'8. The judgment dated 1.9.1987 given by the Tribunal had reached the finality inasmuch as it was not challenged by the petitioners any further. The respondents were not reinstated in service even thereafter. In the light of the Constitution Bench judgment aforementioned, the order refusing to give approval for dismissal on the ground of non-compliance with the proviso to Section 33(2)(b) rendered it void and inoperative and the respondent was deemed to have continued in service as if no order of dismissal was passed. Admittedly, no wages were paid to the respondent for the period between the first and second order of dismissal. The main question that came up for consideration in Tata Iron and Steel Co. (supra) was whether the proceeding validly commenced under Section 33(2)(b) would automatically come to an end merely because the main industrial dispute had meanwhile been finally determined. In the said case, it is held thus:-

"...even if the main industrial dispute is finally decided, the question about the validity of the order would still have to be tried and if the approval is not accorded by the Tribunal, the employer would be bound to treat the respondent as its employee and pay him his full wages for the period even though the appellant may subsequently proceed to terminate the respondent's services. Therefore, the argument that the proceedings if continued beyond the date of the final decision of the main industrial dispute would become futile and meaningless, cannot be accepted."

9. Having not challenged the earlier order dated 1.9.1987, it was not open to the petitioners to make a second application seeking approval for the order of dismissal of the respondent, that too without paying full wages. The Division Bench of the High Court has found that the second order of dismissal amounted to unfair labour practice and victimization. The Tribunal was not justified in allowing the second application seeking approval by ignoring the dismissal of the earlier application made by the management for non-compliance of the mandatory provisions of law. The Tribunal proceeded on the ground that the earlier application was not decided on merits and held that it



was open to the petitioners to file a second application. This is clearly contrary to decision of the Constitution Bench. It appears to us that the petitioners designed to defeat the claim of the respondents by making a second application when the order suffered by them on the first application had become final. Even as stated in the decision of Tata Iron & Steel Co. (supra) the petitioners failed to pay full wages to the respondents between the period of two dismissal orders. The case of Tata Iron & Steel Co. (supra) on facts of the present case does not help the petitioners. The question that was dealt in that case was altogether different.'

10. The learned Standing Counsel for the respondents Corporation would rely upon a decision of the learned Single Judge of this Court and submitted that a second order under Section 33 (2)(b) can be sustained. In the said judgment, in the case of **V.Manickam Vs. The Management, Tamil Nadu State Transport Corporation (TNSTC), (Madurai Division-II) Ltd.**, passed in **W.P(MD).No.14049 of 2019, dated 28.10.2011**, the High Court had referred to the decision of the Hon'ble Apex Court in **Indian Telephone Industries Limited & anr Vs., Prabhakar H.Manjare & Anr** (referred to supra) and came to the conclusion that the Judgment will not apply to their case on hand, since the present case involved therein was not a final order.

11. However, a perusal of the decision of the Hon'ble Apex Court in the case of **Indian Telephone Industries Limited** reveals that the Hon'ble Apex Court was of the clear opinion that a second application seeking approval for the order of dismissal cannot be sustained. When the Act does not contemplate the authorities to find the charges perverse and thereafter, keep the matter pending for recording fresh evidence, such an opportunity to the Management itself is improper. This aspect was also gone into by the High Court and by relying upon a decision of the Hon'ble Apex Court in **Divyash Pandit Vs., NCCBM** reported in **(2007) 15 SCC 787**, the Court felt that the procedure adopted by the Joint Commissioner in remitting back the matter for recording fresh evidences was impermissible. However, in the decision relied upon in the case of **Divyash Pandit** (referred to supra), the observation made by the Hon'ble Apex Court was on the facts of that case, which warranted the Labour Court to give one more opportunity to the respondent and not the authority under Section 33 (2)(b) of the Industrial Dispute Act.

12. As stated earlier, the scope and powers of under Section 33 (2)(b) of the Industrial Dispute Act, is very limited to the extent that either the application requires to be allowed or rejected. Since the procedure adopted by the Joint Commissioner itself is in contrary to the provisions of the Industrial Dispute Act, it can only be deemed that the subsequent approval of the dismissal order cannot be sustained. This would revert to the position of the petitioner being deemed to have been in service.



13.However, as rightly pointed out by the learned Standing Counsel for the respondents, the petitioner herein seems to be a habitual absentee, who has been imposed with various punishments for similar charges, at least on 15 occasions, out of the 29 punishments, he has suffered. When there are specific findings in the enquiry officer's report to the effect that the petitioner's absenteeism could be termed as habitual misconducts, this Court cannot loose sight of the same. Nevertheless, in view of the irregularity in dealing with the approval petition, if the punishment of dismissal from services is modified into one of compulsory retirement, the ends of justice could be secured.

14.For all the foregoing reasons, the impugned award of dismissal passed in ID.No.69 of 2013, dated 13.11.2014 by the Labour Court, Tirunelveli, insofar as it confirms the punishment of dismissal from service is set aside. Consequently, the petitioner's punishment of dismissal dated 26.02.2004 is modified to one of compulsory retirement and thereby, the petitioner would be entitled to all the benefits arising out of such punishment, if eligible. The respondents herein shall endeavour to disburse the pension and other monetary benefits accrued, in view of the present order passed and disburse the same as expeditiously as possible, in any event within a period of twelve weeks from the date of receipt of a copy of this order.

15.With the above observations, the Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

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/ /2020

Sub Assistant Registrar(CS)

Rmk

+1 CC to M/s.K.SATHIYA SINGH, Advocate (SR-103668[F]

+1 CC to M/s.T.LAJAPATHIROY, Advocate (SR-103763[F]

SMA/06/01/2020/6P/3C

Order made in
W.P.(MD)No.23931 of 2016

Dated:
05.12.2019