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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.07.2021

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THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.NO.1526 OF 2017

AND

WMP.NO.1432 OF 2017

Tamil Nadu State Transport
Corporation (Kumbakonam)Limited
Rep.by its Managing Director
New Railway Station Road,
Kumbakkonam - 612 001.

... Petitioner

-vs-

1. The Special Deputy Commissioner of Labour
DMS Campus, Anna Salai,
Chennai.

2. R.S.Pandiyan

... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus call for the records pertaining to the order dated 03.06.2016 passed by the 1st respondent in Approval Petition No.247 of 2014 and quash the same, consequently direct the 1st respondent to approve the order of the petitioner dated 18.09.2014 dismissing the 2nd respondent from service.

For Petitioner : M/s.D.Venkatachalam

For Respondents : Mr.M.Ravi for R2

O R D E R

This Writ Petition has been filed, challenging the order dated 18.09.2014, passed by the 1st Respondent in Approval Petition No.247 of 2014, by which approval was not granted for dismissal of the Employee / 2nd Respondent herein.



2. Learned counsel for the Management submitted that the Employee frequently absented himself from duty on several occasions, inspite of warnings and it is incorrect to state that he was not given any opportunity to defend his case, as the punishment for the gravity of the misconduct was imposed after getting an explanation from the petitioner. Since the explanation offered by him was not satisfactory, it was decided to accept the findings of the Enquiry Officer and the order of dismissal was passed thereafter. The Authority concerned had not taken note of the past records of the Employee and had refused to grant approval for dismissal of the Employee, which calls for any interference by this Court.

3. Per contra, learned counsel for the Employee contended that the Employee joined the services of the Petitioner / Management as Driver on 27.04.1994 and he was issued with a Charge Memo on certain misconducts. It is further case of the Employee that the Enquiry Officer submitted a report on 26.10.2012 without following the principles of natural justice and based on the report, he was dismissed from service. When a Petition was filed before the Authority for approval of the action of the Management, the Authority concerned has rightly considered the delay aspect and declined to grant approval. Therefore, it is prayed that the Writ Petition is liable to be dismissed in limine.

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

5. The Authority has observed in Paragraph No.3 of the order that it is a case of victimisation and that the Management has not adduced any documents to justify their action. Though the plea of short fall in payment of monthly wages was raised on the side of the Employee, the subsequent revision of wages, granting Dearness Allowance retrospectively would be naturally paid with arrears subsequently. Hence, the ground of short fall will not hold good. However, the argument advanced in respect of delay of 98 days in filing the Approval Petition appears to be sound. Section 33(2)(b) of the I.D.Act, 1947 stipulates the condition that the employee must be paid one month wages last drawn and application has got to be made before the Authority before which the proceeding is pending for approval of the action of the employer that was taken against the employee. Similarly, Rule 64 (2) of the Tamil Nadu Industrial Disputes Rules, 1958 mandates filing of an application to the Conciliation Officer, Board, Labour Court or Industrial Tribunal under Section 33, which reads as follows:

“(2) An employer seeking the approval of the Conciliation Officer, Board, Labour Court or Tribunal,



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as the case may be, of any action taken by him under clause (a) or clause (b) of sub-section (2) of section 33 shall present an application in Form "T" in duplicate to such Conciliation Officer, Board, Labour Court or Tribunal either personally or by registered post with acknowledgment due. A copy of it shall also be served simultaneously either personally or by registered post acknowledgment due on the workman or workmen concerned and the fact indicated on the copies of the application presented to the Conciliation Officer, Board, Labour Court or Tribunal, as the case may be."

6. From the above, it is clear that the application seeking approval has got to be served simultaneously either personally or by way of Registered Post with acknowledgment due, on the Employee and copies have to be marked to the Authorities concerned. The Employee's contention is supported by the decision rendered by this Court in the case of State Express Transport Corporation Tamil Nadu Limited vs. The Joint Commissioner of Labour (Conciliation) [W.P.No.20466 of 2007 dated 11.01.2012], reported in MANU/TN/0156/2012, wherein it was held as follows:

"7. The Supreme Court vide its judgment in Strawboard Manufacturing Company Vs. Gobind reported in MANU/SC/0298/1962 : 1962 Vol (I) LLJ 420 = AIR 1962 SC 1500 had an occasion to consider the scope of Section 33(2)(b) of the Industrial Disputes Act, 1947. The Supreme Court had explained the proviso to Section 33(2)(b) of the Act. In pages 425 and 426 of the Report it was observed as follows:-

The next question is as to when should an application be made. In this connection, our attention was drawn to Section 33A of the Act which gives a right to the employer to apply for redress in case an employer contravenes the provision of S.33 and there is no doubt that the proviso to Section 33(2)(b) should be so interpreted as not to whittle down the protection provided by S.33A. As we read the proviso, we are of opinion that it contemplates the three things mentioned therein, namely,

- (i) dismissal or discharge;
 - (ii) payment of wages; and
 - (iii) making of an application for approval,
- to be simultaneous and to be part of the same transaction, so that the employer when he takes action under Section 33(2) by dismissing or discharging an employee, should immediately pay him or offer to pay



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him wages for one month and also makes an application to the tribunal for approval at the same time. When, however, we say that the employer must take action simultaneously or immediately, we do not mean that literally, for when three things are to be done, they cannot be done simultaneously but can only be done one after the other. What we mean is that the employer's conduct should show that the three things contemplated under the proviso, namely,

- (i) dismissal or discharge;
- (ii) payment of wages; and
- (iii) making of the application

are parts of the same transaction. If that is done, there will be no occasion to fear that the employee's right under S.33A would be affected. The question whether the application was made as part of the same transaction, or at the same time when the action was taken, would be a question of fact and will depend upon the circumstances of each case.

We may now refer to certain cases which have been relied upon by either side. The main case on which learned counsel for the respondents relies is Premier Automobiles Limited Vs. Ramachandra Bhimayya Polkam and another (MANU/MH/0229/1959 : 1960 I LLJ 443). In that case, the Bombay High Court held that the application should be made before the action has been taken by the employer and that it was not correct to infer from the use of the word "approval" in the proviso that the legislature intended that such an application should be made after the action had been taken. The High Court has pointed out that there is apparent conflict between the first and last part of the proviso and the view it took was with the object of harmonizing the two parts. This view has been followed by the Gujarat High Court in Indian Extractions (Private) Limited Vs. A.V. Vyas, Conciliation Officer (AIR (1961) Guj. 22) though with some hesitation. With respect we feel that it is not necessary to read the words "action taken" in the proviso as equal to "action proposed to be taken" as the Bombay High Court has done and that the apparent conflict between the two parts of the proviso can be harmonized, as we have indicated above, leaving it open to the employer to dismiss or discharge the employee and at the same time pay him the necessary wages and make an application to the authority concerned for approval of the action taken. The contrary view has been taken by the Calcutta High



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Court in Metal Press Works Limited Vs. Deb(N.R) and others (MANU/WB/0221/1961 : 1962 I LLJ 75) where it has been held that payment of wages and the making of the application should be simultaneous with the order of discharge or dismissal. It has further been pointed out that the word "simultaneously" must of course be taken reasonably and a motion of split-second timing should not be imported. It should be done at once and without delay.

and it will depend upon the facts of each case whether the application had been made at once or without delay. This, we think, is the correct view to take.

Let us, therefore, see what has happened in this case. The appellant concern is situate at Saharanpur while one tribunal was at Meerut and the other at Allahabad. What the appellant did was to pass an order of dismissal on 1 February 1960. On the same day, he sent two applications by post addressed to the two tribunals. The application at Meerut was received on 3 February and the application at Allahabad on 4 February 1960. In these circumstances, we are of opinion that the appellant had made the application to the tribunal simultaneously and without delay on its passing the order of dismissal and its action was, therefore, in accordance with the proviso. The view taken by the labour Court that the application must be made before dismissing the respondent, is not correct. The appellant in this case had complied with the proviso to Section 33(2)(b) when it dismissed the workman, paid him or offered to pay the necessary wages and at the same time sent the application by post to the tribunal concerned for approval of the action taken by it.

8. The Supreme Court, once again, considered the scope of proviso to Section 33(2)(b) of the Act in the judgment in Calcutta State Transport Corporation Vs. Md. Noor Alam reported in MANU/SC/0267/1973 : AIR 1973 SC 1404. In that case, the Court also referred to Strawboard Manufacturing Company Vs. Gobind reported in MANU/SC/0298/1962 : 1962 I LLJ 420 and in paragraph 4, it was observed as follows:-

4.....The employer's conduct should show that the three things contemplated under the proviso are parts of the same transaction. (See Strawboard Manufacturing Co. Vs. Gobind MANU/SC/0298/1962 : (1962) Supp 3 SCC 618 : (AIR



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1962 SC 1500) In P.H. Kalyani Vs. M/s. Air France, Calcutta, MANU/SC/0137/1963 : (1964) 2 SCR 104 : (AIR 1963 SC 1756) the order of dismissal was passed on May 28, 1960 and was communicated to the employee on May 30, 1960. The wages were offered to him at the same time when the order was communicated. An application was made under S.33(2)(b) on the same day. It was held that the application was in accordance with the proviso to S.33(2)(b). This decision shows that similar action has to be taken in these matters but that does not mean that all the three things mentioned before should be done on the same day. It is the conduct of the employer that has to be considered from the point of view of finding out whether the dismissal or discharge, payment of wages and making of the application for approval form a part of the same transaction. A difference of a day in doing one thing or the other may not be of materials consequence so long as it is clear that the employer meant to do all the three things as part of one and the same transaction. No hard and fast rule can be laid down in these matters. Each case must be decided on its own facts.

(Emphasis added)"

9. The Supreme Court in the judgments cited have considered as to what was meant by the "same transaction" and held it has to be seen in the facts and circumstances of each case. In the case of Calcutta State Transport Corporation Vs. Md. Noor Alam reported in MANU/SC/0267/1973 : AIR 1973 SC 1404, the Supreme Court held that a day's delay cannot be said to be material consequence so long as it was clear that the employer had meant to do all the three things as part of one and the same transaction. In the case of Strawboard Manufacturing Company Vs. Gobind reported in MANU/SC/0298/1962 : 1962 I LLJ 420, the Supreme Court rejected the argument that approval should be obtained before dismissal. The Supreme Court had held that the word "simultaneously" must of course be taken reasonably and a motion of split-second timing should not be imported. It should be done at once and without delay. In the present case, the Authority had categorically held that 23 days delay was unexplained and therefore, the time gap is too large.



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10. In the light of the principles enunciated in the above decisions of the Supreme Court holding that action should be taken at the same transaction, the writ stands dismissed. Consequently, connected miscellaneous petitions are closed."

7. It is seen that there is no plea taken by the Management that the Approval Petition has been despatched immediately by Registered Post, as admittedly, it has reached the Authority concerned belatedly. That apart, there is no evidence to show as to whether the Petition was physically submitted, as it is permissible to file a Petition to the Authority in-person, by simultaneously despatching a copy of it to the concerned Employee by Registered Post or vice versa. Therefore, there is no perversity in the order of the Authority, warranting interference by this Court, as there is no explanation forthcoming on the side of the Management, as to the delay of 98 days.

8. In the result, finding much substance in the argument of the Employee, this Writ Petition is dismissed. The Management is directed to extend all the monetary benefits due to the Employee, if not already given, after adjusting the amount already paid, including the wages paid under Section 17-B of the I.D.Act, 1947, if any, together with continuity of service, consequential and all other benefits, including pension (if eligible and attained superannuation), within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

dpq

To:

The Special Deputy Commissioner of Labour
DMS Campus, Anna Salai,
Chennai.

W.P.No.1526 of 2017

PL(CO)
RLP(07/12/2021)