

IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.3684 of 2014

***The Management of M/s.
Steel Authority of India Ltd.
Rourkela, Sundargarh***

.....

Petitioner
Mr. D.Pr. Nanda, Adv.

-Versus-

***Presiding Officer Industrial
Tribunal, Rourkela, Sundargarh
& Another***

.....

Opp. Parties
Mr. K. Ray, Adv.

**CORAM:
JUSTICE S. TALAPATRA
JUSTICE M.S. SAHOO**

**ORDER
12.09.2022**

Order No.

06.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).
2. By means of this petition, the Management of Steel Authority of India has challenged the order dated 28.01.2014 [which was received by them on 03.02.2014] delivered in M.C. No.15 of 2005 which was a proceeding under Section 33 (2) (b) of the Industrial Disputes Act, 1947 (the I.D. Act in short).
3. Briefly stated the facts leading to the impugned order are that the petitioner is a company and the Opposite Party No.2 had been working as the operator in Coke Oven (Opn.) Department of the petitioner. According to the petitioner, the workman had committed misconduct by absenting from the duty without leave for a period of 52 days between September, 2004 and December, 2004.

4. The conduct of habitual absence falls within misconduct, in terms of Clause 28 (iv) of the Certified Standing Orders of the company. He was charge-sheeted and asked to file his reply within 8 days from the date of receipt. It has been stated that the Opposite Party No.2, received the charge sheet on 09.03.2005 but the Opposite Party No.2 did not submit any reply, neither within the scheduled time nor even thereafter. As a result, an Enquiry Committee was constituted to enquire into the charges leveled against the Opposite Party No.2.

5. Despite due notice for attending and participating in the enquiry, Opposite Party No.2 did not attend the enquiry. Consequently, the enquiry was carried out ex parte and the Enquiry Officer submitted the enquiry report to the disciplinary authority. A copy of the said enquiry report had been furnished to the Opposite Party No.2 alongwith the communication dated 06.08.2005. After carefully going through the enquiry report, by the order dated 25.10.2005, the disciplinary authority observed that the Opposite Party No.2 deserved to be dismissed from the services of the company. It has been averred in the writ petition that taking into consideration extenuating circumstances, it had been noted by the petitioner that in the CCRs for the year 2003-04, the Opposite Party No.2 secured poor assessment so far his attendance is concerned and adverse remarks had been recorded in CCRs.

6. In Para 3.8, it has been asserted as follows:

“Since on the date of removal from service of Sri Panda I.D. Case No.7 of 1997 was pending before the learned Industrial Tribunal, Rourkela and Sri Panda was a concerned

workman in the said case, the petitioner management filed an application U/s.33(2)(b) of the I.D. Act before the Presiding Officer, Industrial Tribunal, Rourkela seeking approval of such removal of Mr. Panda.”

7. It has been also stated that while filing the said application under Section 33 (2) (b) of the I.D. Act, one month's wage was remitted to the Opposite Party No.2 in compliance of the said provision. In the said application filed under Section 33 (2) (b) of the I.D. Act, the petitioner had categorically asserted that the fairness was all through maintained in the procedure of domestic enquiry. Even in the impugned order, the Presiding Officer, Industrial Tribunal, Rourkela has observed as under:

- (i) The domestic enquiry is fair and proper.
- (ii) A prima facie case has been made out against the Opposite Party workman.
- (iii) On the date of removal one month's basic wages was paid to the O.P. No.2 and simultaneously Sec.33(2)(b)-application was filed..

8. But by the impugned order, the Presiding Judge, Industrial Tribunal, Rourkela did not approve the said order dated 25.10.2005 as delivered in M.C. No.15 of 2005.

9. Mr. D.Pr. Nanda, learned counsel appearing for the petitioner has clearly submitted that the order dated 28.01.2014 (Annexure 1 to the writ petition) is illegal and arbitrary and without application of the judicial mind. Such denial betrays the provision of Section 33(2) (b) of the I.D. Act.

10. According to Mr. Nanda, learned counsel, the ambit of Section 33 (2) (b) of the I.D. Act is to check:

- (a) Whether there was domestic enquiry or not and if yes, whether such enquiry was done fairly and properly?
- (b) Whether there is any error in passing the order of removal?
- (c) Whether the one month wage had been paid to the workmen or not? And finally
- (d) Whether the action is taken malafide or it is an act of victimization?

11. According to Mr. Nanda, learned counsel, the order that has been passed by the Presiding Judge, Industrial Tribunal is completely beyond the scope and ambit of Section 33(2)(b) of the I.D. Act and hence, intervention of this court is essentially required. In support of his contention, Mr. Nanda, learned counsel has referred a few decisions of the Apex Court and this High Court. In **Lalla Ram Vs. Management of D. C. M. Chemical Works Ltd and another.** reported in 1978 LAB. I. C. 716, the Apex Court while discussing the law in respect of the scope of Section 33(2)(b) of the I.D. Act has noticed and approvingly quoted the ratio of **Lord Krishna Textiles Mills Vs. Its Workmen: AIR 1961 SC 860.** The relevant part as reproduced in the said report is extracted hereunder:

"Therefore, putting it negatively the jurisdiction of the appropriate industrial authority in holding an enquiry under s. 33 (2) (b) cannot be wider and is, if at all, more limited, than that permitted under s. 33(1), and in exercising its powers under s. 33(2) the appropriate authority must bear in mind the departure deliberately

made by the Legislature in separating the two classes of cases falling under the two sub-sections, and in providing for express permission in one case and only approval in the other. It is true that it would be competent to the authority in a proper case to refuse to give approval, for section 33(5) expressly empowers the authority to pass such order in relation to the application made before it under the proviso to s. 33(2)(b) as it may deem fit; it may either approve or refuse to approve; it can, however, impose no conditions and pass no conditional order. In view of the limited nature and extent of the enquiry permissible under s. 33(2)(b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by s. 33(2)(b) and the proviso are satisfied or not. Do the standing orders justify the order of dismissal?

Do the standing orders justify the order of dismissal? The authority before which the main industrial dispute was pending for approval was quite rigid in observance of the prescribed process.

12. For purpose of reference, we may reproduce the provision of Section 33 (2) (b):

“[Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.....

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in as such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman].-

(b) for any misconduct not connected with the dispute, or 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.”

13. Mr. Nanda, learned counsel has further contended that in **Lalla Ram** (supra) the Apex Court, having placed their reliance on **Tata Engineering & Locomotive Co. Ltd. Vs. S. C. Prasad**, reported in (1969) 2 Lab LJ 799 (SC) and **Hamdard Dawakhana Wakf Vs. Its workmen**: (1962) 2 Lab LJ 772 (SC) has observed under:

“Thus the jurisdiction of the Industrial Tribunal being a limited one, as stated above and all the essential

requisites of the proviso to Section 33 (2) (b) of the Act being present in the instant case, the Industrial Tribunal was not, in our opinion, justified in withholding its approval and the High Court was perfectly right in passing the impugned judgment and order.”

14. Mr. Nanda, learned counsel has also placed a reference on a decision of this Court in **Niranjan Das Vrs. Assistant General Manager Traffic and Raw Material Dept., Rourkela Steel Plant: 100 (2005) CLT 193**. It has been held in *Niranjan Das (supra)* that the jurisdiction of the Tribunal under the proviso to Section 33(2)(b) of the Act has been elaborately discussed in the cases of the **Lord Krishna Textile Mills v. Its workmen**, AIR 1961 SC 860; **The Bata Shoe Co. (P) Ltd. v. D.N. Ganguly and Ors.**, AIR 1961 SC 1158 and **The Straw Board Manufacturing Co. Ltd., Saharanpur v. Govind**, AIR 1962 SC 1500. It has been consistently held that the proviso to Section 33(2)(b) requires three things, namely (i) dismissal or discharge, (ii) payment of wages and (iii) making of an application for approval, simultaneous and to be part of the same transaction. It has been held by the Apex Court in the above cited decisions that the employer's conduct should show that three things contemplated under the proviso, are parts of the same transaction. In the case of **The Lord Krishan Textile Mills** (supra), the Apex Court has observed as follows:

"The jurisdiction of the appropriate industrial authority in holding an enquiry under Section 33(2)(b) cannot be wider and is, if at all, more

limited, than that permitted under Section 33(1). In view of the limited nature and extent of the enquiry permissible under Section 33(2)(b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by Section 33(2)(b) and the proviso are satisfied or not. The approving authority has to consider only (a) whether the standing orders justify the order of dismissal, (b) whether an enquiry has been held as provided by the standing order, (c) whether the wages for the month have been paid as required by the proviso, and (d) whether an application has been made as prescribed by the proviso. And when all these conditions have been fulfilled by the employer the tribunal is not justified in refusing to accord approval to the action taken by the employer. Nor is it justified while holding the enquiry to assume powers of an Appellate Court which alone is entitled to go into all questions of fact. The question about the adequacy of evidence or its sufficiency or satisfactory character can be raised in a Court of facts and may fall to be considered by an Appellate

Court which is entitled to consider facts; but these considerations are irrelevant where the jurisdiction of the Court is limited as under Section 33(2)(b)."

15. In **Lalla Ram** (supra), the Apex Court had occasion to observe that it is a settled position that the award of punishment for misconduct under the relevant rules/orders, is a matter for the Management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe, yet an inference of mala fide may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment. The Tribunal has to further find out as to whether the employer has paid or offered to pay wages for one month to the employee.

16. Having observed this, the Tribunal has declined to approve the action of the management. Mr. Ray, learned counsel for the Opposite Party No.2 has placed his reliance on a very recent decision of the Apex Court in **Union of India & Another Vs. R.K. Sharma** (Judgment dated 30.06.2022 delivered in Civil Appeal No.4059/2015) where it has been observed that

*“on numerous occasion in the past, such as **Hind Construction & Engineering v. Their Workmen and Management of the Federation of Indian Chambers of Commerce v. Their workmen** to ensure that the punishment meted out to a public sector employee for a violation of the applicable service laws/rules is not disproportionate to the infraction that he/she has committed. The*

doctrine of proportionality is employed to examine whether the penalty that is imposed upon is congruent with the charges brought against the delinquent employee.”

17. In order to repel the submission of Mr. Nanda, Mr. K. Ray, learned counsel appearing for the Opposite Party No.2 has submitted that the impugned order dated 28.01.2014 does not suffer from jurisdictional impropriety of the court.

18. Mr. Ray, learned counsel has submitted that absence of 52 days from the duty, even if admitted, removal from the service is harsh, unconscionable and disproportionate. There is no denial that the entire enquiry proceeding went ex parte. Before the Tribunal, the workman had raised a plea that he was not given his exact monthly wages on the date of his removal. In support of his aforesaid claim, he has filed the copy of his pay slip for the month of February, 2005 (Ext.6). He has stated that he has not received the pay slip for the month of October, 2005 in which month he was removed from the service.

19. But that plea was not accepted by the Industrial Tribunal. The said finding has not been challenged by the workman. According to the Industrial Tribunal, all the principles of natural justice were followed in conducting the enquiry. Therefore, no benefit can be churned out by raising the plea of denial of principles of natural justice. But it has been observed by the Industrial Tribunal as follows:

“On the other hand, the representative of the management has submitted that an application under Section 33-2(b) cannot wait for an appellate order, otherwise for non filing of an application on

the date of removal and non compliance of proviso to section 33-2(b) simultaneously would invite compliant under Section 33-A for violation of Section 33 which is bad in law. This Tribunal fully agree with the submission of the representative of the management that an application under Section 33-2(b) cannot wait for an appellate order otherwise for non-filing of application on the date of removal it will be bad in law. But his submission that pendency of appeal against punishment order is not relevant consideration under Section 33-2(b) is not acceptable because as per the provision of certified standing order an appeal is to be heard and disposed of by the appellate authority within 30 days of filing of the appeal petition. But in the instance case, for the reason best known to them the management has not disposed of the appeal petition of the workman within 30 days of its filing and even till date though in the meantime 8 years have been elapsed. If the appellate authority would have disposed of the same in favour of the O.P. workman by providing him some minor punishment then this application of the management for approval of its action of termination of service would have been infructuous or the management would have withdrawn its application for approval of its action of removal. Since the appeal petition of the O.P. workman is still pending with the

appellate authority of the management and against the order of the appellate authority there is also scope for the O.P. workman to file a review petition before the highest authority and those two stages have not yet been exhausted, this Tribunal does not feel it proper to approve the action of termination order of the workman because if it is approved, then appeal petition of the workman pending before the appellate authority would automatically be infructuous and the provision of appeal and review made in the certified standing order shall be nullified.”

20. Therefore, it is apparent that only on the basis that the appeal that was filed by the Opposite Party No.2 since was pending the Industrial Tribunal refused to grant approval of the punitive action as taken by the petitioner i.e. removal of the Opposite Party No.2 from his service, on the charge of unauthorized absence which, according to them, is a misconduct under the Certified Standing Orders.

21. Having appreciated the rival contentions as raised by the counsel for the parties, the summary that falls for consideration whether the Presiding Judge, Industrial Tribunal, Rourkela had committed any error in observing that as the appeal filed by the workman (the Opposite Party No.2) was pending for decision by the appellate authority is paramount. The action of the management by removing the workman from the service service w.e.f. 25.10.2005 has not been approved.

22. From reading of the Judgment, it appears to the court that the Presiding Judge, Industrial Tribunal, Rourkela did not reject the

prayer for approval but it withholds the approval since the appeal was pending. It is apparent on the face of the order dated 28.01.2014 (Annexure-1 to the writ petition) that the Industrial Tribunal held that so far the enquiry proceeding is concerned, there is no infirmity. Objections raised by the Opposite Party No.2 in that regard has been discarded, observing that as the Opposite Party No.2-workman, despite providing opportunities to defend him against the charges and as he has not participated in the proceeding, he cannot raise any objection regarding the fairness of domestic enquiry.

23. The counsel for the petitioner has quite categorically stated that since 3 requirements of Proviso to Section 33(2)(b) of the I.D. Act has been conformed, withholding of the approval by the Industrial Tribunal is unsustainable and perverse.

24. On the other hand, the counsel for the Opposite Party No.2 has raised an ancillary objection before this court that the penalty that has been awarded is grossly disproportionate. We discard his contention as it was nobody's case before the Industrial Tribunal. To respond to the question that has been formulated, we should revisit the Section 33 and its relevant Sub-Section and Clause, based on which the petitioner had approached for approval of their action against the Opposite Party No.2.

25. Section 33 is concerned with conditions of service etc., to remain unchanged under certain circumstances viz. during pendency of the proceedings. Sub-Section 1 of Section 33 sheds lights in respect of what would mean by the words *during pendency* of the proceeding. It would mean in terms of Sub-Section 1 of Section 33 that during the pendency of any conciliation proceeding before a Conciliation Officer or a board or any proceeding before an arbitrator

or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute. No employer shall in regard to any matter connected with the dispute alter to the prejudice to the workmen concerned in such dispute, the condition of service applicable to them immediately before the commencement of such proceeding or for any misconduct connected with the dispute, discharge or punishment whether by dismissal or otherwise any such dispute save with the express permission in writing before which the proceeding is pending. Subsection (2) Section 33 of the Industrial Disputes Act, 1947 provides *“during the pendency of the any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing order applicable to a workman concerned in such dispute or, whether there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman:*

- (a) *★ alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or*
- (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.”

26. Sub-Section (3) of Section 33 provides further that notwithstanding anything contained in Sub-Section (2), no employer

shall during the pendency of any such proceeding in respect of an industrial dispute take any action against any protected workman concerned in such dispute. Since, we are not concerned with Sub-Section (3) as the Opposite Party No.2 has not claimed to be a protected workman.

27. There is no dispute that the appeal filed by the Opposite Party No.2 is pending before the appellate authority. A decision of the Apex Court in this regard has been placed before us. In **Syndicate Bank Ltd. Vs. K.R.V. Bhat** it has been held that the finding of the industrial tribunal, that the dismissal of the respondent became effective only after the working committee disposed of the appeal and as during this period an industrial dispute was pending, the management was bound to comply with the proviso to Section 33(2)(b) of the I.D. Act. The said finding has been affirmed by the Apex Court. It has been observed in **Syndicate Bank Ltd. Vs. K.R.V. Bhat** (supra) as under:

“In this case, if the contention of the respondent is accepted, it will lead to very anomalous results, and the time when a management has to comply with the proviso to s. 33(2)(b), will radically differ. For example, according to the respondent, the management, in this case, will have to wait for the minimum period of 45 days, which is the time given for the respondent, to file an appeal. If an appeal is filed, according to the respondent, the management will have to wait further, and await the disposal of the appeal. That means, in such a case, the proviso will come into effect only at the time when the appeal is disposed of. On the other hand,

if, after the expiry of 45 days, the workman concerned does not file an appeal, the management, according to the respondent, will have to comply with the proviso immediately after the period of limitation is over. That is, the point of time when the proviso to s. 33(2)(b) will have to be complied with, by the management, will depend upon the filing or non-filing of an appeal, by the workman concerned. Further, if at the time, when the original order of dismissal is passed, there is no dispute pending, and when the appeal against the order of dismissal is pending, a dispute is referred for adjudication, it will be open to the management to prolong its decision, in the appeal till after the Industrial dispute has come to an end. It cannot be the intention of the Legislature that such variable and indeterminate periods are contemplated in construing the proviso to s. 33(2)(b). The natural and reasonable interpretation, to be placed on s. 33, is, in our opinion, that the order of discharge or dismissal, is the original or the very first order passed by the management, which in this case is the one passed by the Managing Director, on November 12, 1963. It follows that on that date, I. D. No. 4 of 1964. had not even been referred for adjudication, which, as we have already indicated was by an order of Government, dated January 8, 1964. Hence, there is no contravention of s. 33, in this case."

28. It has been further observed in **Syndicate Bank Ltd.** (supra) having referred **The Management of Hotel Imperial V. Hotel Workers' Union (1) and Collector of Customs. Calcutta v. East India Commercial Co. Ltd.(2)** AIR 1968 SC231 by the Apex Court that in the first decision if the master had held a proper enquiry and come to the conclusion that the servant should be dismissed, and in consequence, suspended him, pending the permission, required under S. 33 of the Act, he had the power to order suspension, thus suspending the contract of employment temporarily, so that there is no obligation on him to pay wages, and no obligation on the servant, to work. In the second decision, the Apex Court held that in cases where an authority reverses the order under appeal, or, modifies or merely dismisses the appeal and thus confirms the order appealed against without any modification, the operative order is the order of the appellate authority.

29. There cannot be any amount of doubt, a conundrum has been created for absence of any specific provision under Section 33 of the I.D. Act as regards the proviso below Sub-Section (2). On cumulative reading of the provisions of Section 33, as relevant in the context and the decisions of the Apex Court as referred above, what can be called out is that after the disciplinary authority passed the order, there shall be simultaneous compliance of payment of one month's wage or salary and there shall be a action for approval under Section 33(2)(b), read with the proviso below.

30. Decision of the Apex Court is very clear and harmonious except one aspect. Three conditions as noted above have to be conformed. One ancillary condition as surfaced is that where the

entire action is mala fide or can also be seen by the Industrial Tribunal or the Labour Court can interfere. But ordinarily the proportionality stage cannot be examined.

31. Since the appeal is pending, the said application cannot be said to be ex facie unsustainable. In the circumstances, withholding of approval by the Industrial Tribunal is not justified. The Industrial Tribunal would have approved the action of the petitioner with a rider that this approval will be subject to the outcome of the appeal. During this period, the petitioner was not under any obligation to pay the wages. But, we cannot be oblivious that following the Certified Standing Order, the Opposite Party No.2 has filed an appeal which is still pending for adjudication, as reported by the counsel for both the parties. It is really unfortunate an appeal filed in the year, 2014 to the appellate authority under the provisions of Certified Standing Orders is still pending, if the instruction in this regard is correct.

32. As such, this court would clarify the plea as raised by the petitioner is sustainable and the approval ought to have been given by the Industrial Tribunal. Hence, we set aside the order of the Tribunal partly. The approval be deemed to have been granted subject to the rider that the operation would be subject to the final outcome of the appeal.

33. It is made absolutely clear that if the appellate authority reverses the finding of the disciplinary authority in part or in full, this approval will lose its force.

34. Having observed thus, we direct the appellate authority to dispose of the appeal within 30 days after considering all the aspects

including the proportionality of the penalty. It is needless to say, if the workman is affected any way by the appellate order, he will have the right to approach the appropriate forum for remedy.

35. Hence, this petition is partly allowed.

36. There shall be no order as to costs.

Rati Ranjan



(S. Talapatra)
Judge

(M.S. Sahoo)
Judge