M.D., Tamil Nadu State Transport ... vs Neethivilangan, Kumbakonam on 4 May, 2001

Equivalent citations: AIR 2001 SUPREME COURT 2309, 2001 (9) SCC 99, 2001 AIR SCW 2023, 2001 LAB. I. C. 1801, 2001 (3) SERVLJ 99 SC, 2001 (1) JT (SUPP) 394, 2001 (3) SCALE 702, 2001 (3) LRI 79, 2001 LAB LR 539, 2001 (6) SRJ 81, (2001) 3 SERVLJ 99, 2002 SCC (L&S) 40, (2001) 98 FJR 764, (2001) 90 FACLR 27, (2001) 1 LABLJ 1706, (2001) 3 LAB LN 34, (2001) 3 MAHLR 535, (2001) 2 SCT 1118, (2001) 3 SCJ 250, (2001) 4 SERVLR 599, (2001) 3 ANDHLD 135, (2001) 4 SUPREME 91, (2001) 3 SCALE 702, (2001) 2 CURLR 779

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Bench: D.P. Mohapatra, Shivaraj V. Patil

CASE NO.:
Appeal (civil) 3593 of 2001

PETITIONER:
M.D., TAMIL NADU STATE TRANSPORT CORPORATION

Vs.

RESPONDENT:
NEETHIVILANGAN, KUMBAKONAM

DATE OF JUDGMENT: 04/05/2001

BENCH:
D.P. Mohapatra & Shivaraj V. Patil

JUDGMENT:

D.P.MOHAPATRA,J.

Leave granted.

L...I...T.....T.....T.....T.....T.....T.....T..J The core question that arises for determination in this case is what is the right of a workman after the application filed by the employer for approval of the order for his dismissal/discharge from service is refused by the Tribunal and what is the remedy

open to the workman in such a situation?

The facts of the case may be shortly stated thus : the appellant, Tamil Nadu State Transport Corporation, (Kumbakonam Division I) Ltd., Kumbakonam initiated a departmental inquiry against the respondent Neethivilangan who was a Junior Superintendent in the Head Office at Kumbakonam. The charges having been established in the departmental inquiry an order for dismissing the respondent from service was passed on 5th March, 1984. Thereafter an application was made by the appellant for accord of approval under section 33(2)(b) of the Industrial Disputes Act, 1947, (for short the Act) before the Tribunal. The Tribunal rejected the prayer for approval on merit vide the order dated 30.7.1984. The appellant filed Writ Petition No.8849/84 challenging the order passed by the Tribunal which was dismissed by the High Court by the judgment dated18.12.1987. Writ Appeal No.321/88 filed against the said judgment was dismissed. The appellant filed special leave petition No.12350/88 in this Court which was also dismissed. Even after it failed to obtain approval of the Tribunal for the order of removal of the respondent the appellant neither reinstated him in service nor paid him wages. The resultant position was that the respondent remained without work and without wages though he was ready and willing to render service in the establishment. Under the impelling circumstances as noted above the respondent filed the Writ Petition No.1498/99 for reinstatement in service, for payment of wages and other consequential benefits. A single Judge of the High Court by the judgment dated 4.11.1999 allowed the writ petition on the following terms : In the result, all the points (A) to (D) are answered in favour of the petitioner and against the respondent. This Court further holds that the petitioner is deemed to have been in service continuously since 5.3.1984 onwards and deemed to be discharging his functions as an employee of the respondent and he is entitled to all arrears of salary with annual increments and all attendant and concomitant benefits for the said period and till date of reinstatement. There will be a direction directing the respondent to work out the money value of the same and pay the arrears within 12 weeks from today.

In the circumstances, there will be a further direction directing the respondent to forthwith reinstate the petitioner in service with all attendant and consequential benefits. However, at the same time as criminal prosecution is pending against the writ petitioner, liberty is given to the respondent to place the petitioner under suspension subject to payment of full salary at the present rate of scales payable.

Further liberty is given to the writ petitioners to institute appropriate proceedings before a competent court or forums or file a writ petition for damages after termination of the pending criminal prosecution and work out his remedies.

The writ petition is allowed with costs of Rs.3,500/-. Consequently, W.M.P. No.2118 of 1999 is closed.

The writ appeal No.157/2000 filed by the appellant against the said judgment was dismissed by the Division Bench by the judgment dated 9.2.2000.

Hence this appeal by the employer by special leave.

The main thrust of the contentions raised by Shri S. Sivasubramaniam learned senior counsel for the appellant is that the respondent is not entitled as of right to claim reinstatement on the ground that the application for approval under section 33(2) (b) of the Act filed by the management has been rejected by the Tribunal. It is his submission that the respondent has to approach the Tribunal for enforcement of his right and is entitled to such relief as the Tribunal decides.

Per contra Shri K.V.Vishwanathan learned counsel appearing for the respondent supported the judgment of the single Judge which was confirmed by the Division Bench of the High Court. It is his submission that on rejection of the employers prayer for approval of the order of removal of the workman the punishment order becomes void and unenforceable; indeed it is non est in the eye of the law. Therefore, the High Court rightly directed reinstatement of the respondent with back-wages. On the rival contentions raised by the counsel for the parties the question formulated earlier arises for consideration.

Section 33 of the Act makes provision for insuring that the conditions of service remain unchanged during pendency of certain proceedings. In sub-section(1) is incorporated the bar that no employer shall during pendency of any conciliation proceeding before a conciliation officer or a Board or any proceeding before an arbitrator or labour court or Tribunal in respect of an industrial dispute, in regard to any matter connected with the dispute, alter to the prejudice of the workman concerned with such dispute, conditions of service applicable to them immediately before commencement of the proceedings; or for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise any workman concerned with such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

The purpose of the prohibitions contained in Section 33 is two-fold. On the one hand, they are designed to protect the workmen concerned during the course of industrial conciliation, arbitration and adjudication, against employers harassment and victimisation, on account of their having raised the industrial dispute or their continuing the pending proceedings, on the other they seek to maintain status quo by prescribing management conduct which may give rise to "fresh disputes which further exacerbate the already strained relations between the employer and the workmen. However, the section recognises the right of the employer to take necessary action like the discharge or dismissal on justified grounds. To achieve this object, a ban has been imposed upon the employer exercising his common law, statutory or contractual right to terminate the services of his employees according to the contract or the provisions of law governing such service. The ordinary right of the employer to alter the terms of his employees services to their prejudice or to terminate their services under the general law governing the contract of employment has been banned subject to certain conditions.

Sub-section (2) deals with alteration in the conditions of service or the discharge or punishment by dismissal or otherwise of the workman concerned in the pending dispute but in regard to any matter not connected with such pending dispute. Though this provision also places a ban in regard to matters not connected with the pending dispute, it leaves the employer free to discharge or dismiss a workman by paying wages for one month and making an application to the authority dealing with the pending proceedings for its approval of the action taken. There is a distinction between matters

connected with the industrial dispute and those unconnected with it. Thus, a balance between the interests of the workmen and the employer is sought to be maintained in the provisions of Section 33. The action taken under Section 33(2) will become effective only if approval is granted. If the approval is refused, the order of dismissal will be invalid and inoperative in law. In other words, the order of dismissal has to be treated as non est and the workman will be taken never to have been dismissed.

Considering the scheme of section 33 this Court, in the case of Strawboard Manufacturing Co. Vs. Gobind (1962 (Suppl.) 3 SCR 618), observed :

> Thus sub-s.(1) lays down that if an employer proposes to discharge a workman in relation to a matter connected with the dispute which might be pending before a tribunal the employer must put such proposal before the tribunal and obtain its express permission in writing before carrying out the proposal whether it be for alteration of any conditions of service or for punishment or discharge of a workman by dismissal or otherwise.
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> Sub-section(2)(a) on the other hand gives power to the employer to alter any conditions of service not connected with the dispute and this the employer can do without approaching at all the tribunal where the dispute may be pending. It further permits the employer to discharge or punish, whether by dismissal or otherwise, any workman where this may be on account of any matters unconnected with the dispute pending before the tribunal; but such discharge or dismissal is subject to the proviso, which imposes certain conditions on it. The intention behind enacting sub-s.(2) obviously was to free the employer from the fetter which was put on him under s.33 as it was before the amendment in 1956 with respect to action for matters not connected with a dispute pending before a tribunal. So far as conditions of service were concerned, if they were unconnected with matters in dispute the employer was given complete freedom to change them, but so far as discharge or dismissal of workmen was concerned, though the employer was given freedom, it was not complete and he could only exercise the power of discharge or dismissal subject to the conditions laid down in the proviso. Even so, these conditions in the proviso cannot be so interpreted, unless of course the words are absolutely clear, as to require that the employer must first obtain approval of the tribunal where a dispute may be pending before passing the order of discharge or dismissal of a workman, for on this interpretation there will be no difference between s. 33(1) (b) and s.33(2)(b) and the purpose of the amendment of 1956 may be lost.
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> (emphasis supplied) A Bench of three learned Judges of this Court, in the case of Punjab Beverages Pvt. Ltd. Chandigarh vs. Suresh Chand and anr. (1978 (3) SCR 370) held, inter alia, that the object of the legislature in enacting section 33 clearly appears to be to protect the workman concerned in the dispute which forms the subject matter of pending conciliation or adjudication proceedings against victimisation by the employer. But at the same time it recognises that occasions may arise when the

employer may be justified in discharging or punishing by dismissal his employee and so it allows the employer to take such action, subject to the condition that in the one case before doing so, he must obtain the express permission in writing of the Tribunal before which the proceeding is pending and in the other, he must immediately apply to the Tribunal for approval of the action taken by him. Thereunder this Court further held that the only scope of the inquiry before the Tribunal exercising jurisdiction under section 33 is to decide whether the ban imposed on the employer by this section should be lifted or maintained by granting or refusing the permission or approval asked for by the employer. If the permission or approval is refused by the Tribunal, the employer would be precluded from discharging or punishing the workman by way of dismissal and the action of discharge or dismissal already taken would be void.

(emphasis supplied) This Court also observed that section 33 in both its limbs undoubtedly uses language which is mandatory in terms. In this connection this Court specifically observed : (at p.385) Where the Tribunal entertains an application for approval under section 33(2) (b) on merits, it applies its mind and considers whether the dismissal of the workman amounts to victimisation or unfair labour practice and whether a prima facie case has been made out by the employer for the dismissal of the workman. If the Tribunal finds that either no prima facie case has been made out or there is victimisation or unfair labour practice, it would refuse to grant approval and reject the application on merits. Then of course the dismissal of the workman would be void and inoperative, but that would be because the Tribunal having held that no prima facie case has been made out by the employer or there is victimisation or unfair labour practice, it has refused to lift the ban.

(emphasis supplied) In the case of Tata Iron and Steel Co. Ltd. vs. S.N. Modak (1965(3) SCR 411, a Bench of three learned Judges of this Court, considered the effect of an order of the Tribunal refusing to accord approval to the order of dismissal or discharge of the workman and held : (at p.418) But it cannot be overlooked that for the period between the date on which the appellant passed its order in question against the respondent, and the date when the ban was lifted by the final determination of the main dispute, the order cannot be said to be valid unless it receives the approval of the Tribunal. In other words, the order being incomplete and inchoate until the approval is obtained, cannot effectively terminate the relationship of the employer and the employee between the appellant and the respondent; and so, 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 respondents service. 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.

> From the conspectus of the views taken in the decisions referred to above the position is manifest that while the employer has the discretion to initiate a departmental inquiry and pass an order of dismissal or discharge against the workman the order remains in an inchoate state till the employer obtains order of approval from the Tribunal. By passing the order of discharge or dismissal de facto relationship of employer and employee may be ended but not the de jure relationship for that could happen only when the Tribunal accords its approval. The relationship of employer and employee is not legally terminated till approval of discharge or dismissal is given by the Tribunal. In a case where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition filed under section 33 (2)(b) of the Act on merit the employer is bound to treat the employee as continuing in service and give him all the consequential benefits. If the employer refuses to grant the benefits to the employer the latter is entitled to have his right enforced by filing a petition under Article 226 of the Constitution. There is no rational basis for holding that even after the order of dismissal or discharge has been rendered invalid on the Tribunals rejection of the prayer for approval the workman should suffer the consequences of such invalid order of dismissal or discharge till the matter is decided by the Tribunal again in an industrial dispute. Accepting this contention would render the bar contained in section 33(1) irrelevant. In the present case as noted earlier the Tribunal on consideration of the matter held that the employer had failed to establish a prima facie case for dismissal/discharge of the workman, and therefore, dismissed the application filed by the employer on merit. The inevitable consequence of this would be that the employer was duty bound to treat the employee as continuing in service and pay him his wages for the period, even though he may be subsequently placed under suspension and an enquiry initiated against him.

In the facts and circumstances of the case it is our view that the High Court committed no illegality in issuing a direction to the appellant for reinstating the respondent and pay him the back wages.

The appeal, being devoid of merit, is dismissed with costs, which is assessed at Rs.10,000/-.