Supreme Court of India
Mahendra Singh Dhantwal vs Hindustan Motors Ltd. & Ors on 7 May, 1976
Equivalent citations: 1976 AIR 2062, 1976 SCR 635
Author: P Goswami
Bench: Goswami, P.K.

PETITIONER:
MAHENDRA SINGH DHANTWAL

Vs.

RESPONDENT:
HINDUSTAN MOTORS LTD. & ORS.

DATE OF JUDGMENT07/05/1976

BENCH:
GOSWAMI, P.K.
BENCH:
GOSWAMI, P.K.
KHANNA, HANS RAJ
KRISHNAIYER, V.R.

CITATION:
1976 AIR 2062 1976 SCR 635
1976 SCC (4) 606
CITATOR INFO :
R 1984 SC 505 (23)
RF 1984 SC1673 (1)

ACT:
Industrial Disputes Act. 1947-Ss. 33(2)(b) and 33A-Scope of.
Misconduct not mentioned in standing Orders-Standing Orders, if exhaustive of all kinds of misconduct.
Constitution of India, Art. 226-Scope of jurisdiction in industrial disputes.

HEADNOTE:
The respondent terminated the appellant's services on the ground of habitual absence which is a misconduct under the company's standing orders. Although there was a dispute pending before the Tribunal, the respondent did not make an application under s. 33(2)(b) of the Industrial Disputes Act for its approval. On an application by the appellant under s. 33A of the Act, the Tribunal ordered his reinstatement. A few months after the appellant rejoined duty the respondent terminated his services purporting to act under the agreement of service with him. On a complaint by the appellant under s. 33A, the Tribunal ordered his

reinstatement. A single Judge of the High Court dismissed the writ petition of the respondent holding that the discharge was nothing but dismissal for misconduct. On appeal, the Division Bench held that since the employer invoked the terms of the agreement, it was not a case of discharge for misconduct and as such the Tribunal had no jurisdiction to entertain the complaint under s. 33A.

Allowing the appeal.

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HELD: The Tribunal has not committed any error of law or of jurisdiction in entertaining the application under s. 33A and the Single Judge was right in not interfering with the award under Article 226 of the Constitution and the Division Bench was wrong in doing so. [641H; 641E]

(a) The Tribunal has found as a fact that the termination was on account of misconduct of the employee. It is, therefore, difficult to hold that there was any manifest error of law committed by the Tribunal in reaching that conclusion only because the misconduct, as found, was not within the four corners of the various misconducts mentioned in the standing orders. [641H]

(b) Standing orders only describe certain cases of misconduct and they cannot be exhaustive of all the species of misconduct. Even though a given conduct may not come within the specific terms of misconduct described in the standing orders, it may still be a misconduct in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. [641F]

(c) Termination simpliciter under the conditions of service or under the standing orders is outside the scope of s. 33 of the Act. This does not mean that the employer has the last word about the termination of service of an employee. It is also not a correct proposition of law that in case of a complaint under s. 33A, the Tribunal would be debarred from going into the question whether notwithstanding the form of the order. in substance, it is an action of dismissal for misconduct and not termination simpliciter. [642-A-B]

Management of Murgan Mills Ltd. v. Industrial Tribunal, Madras and Another [1965] 2 SCR 148, held inapplicable.

Air India Corporation, Bombay v. V. A. Rebellow & Anr . [1972] 3 S.C.R. 606, referred to.

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Shyamala Studios v. Kannu Devar (S.S .) and Others, [1966] 2 LLJ 428 and Sri Rama Machinery Corporation (P) Limited, Madras v. Murthi (N.R.) and Others, [1966] 2 LLJ 899, partly approved.

(d) Section 33(2)(b) makes it obligatory upon the employer to make an application to the Tribunal under the proviso when he discharges or dismisses the workman for misconduct. From the provisions of s. 33 , it is manifest that punitive action of the employer in whatever form it may be passed, is permissible against an ordinary workman as

distinguished from a protected workman even during the pendency of proceedings before the Tribunal provided that the employer pays one month's wages and also applies to the concerned Tribunal for approval of his action. Since the action is punitive, namely, dismissal or discharge for misconduct, the Tribunal has to oversee the action to guarantee that no unfair labour practice or victimisation has been practised. If the procedure of fair hearing has been observed, the Tribunal has to find in an application under s. 33 that a prima facie case is made out for dismissal. If, on the other hand, there is violation of the principles of natural justice in the enquiry, the Tribunal can go into the whole question relating to the misconduct and come to its own conclusion whether the same is established. [641E; 640H]

(e) In the instant case even though the employer invoked the agreement for terminating the service of the employee it was open to the Tribunal to pierce the veil of the order and have a closes look at the circumstance and come to a decision whether the order was passed on account of certain misconduct. This is a finding of fact which could not be interfered with under Art. 226 of the Constitution unless the conclusion is perverse. [643F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2574 of 1972.

Appeal from the Judgment and Order dated the 2nd June, 1965 of the Calcutta High Court in Appeal from Original Order No. 287 of 1964.

Naunit Lal and (Miss) Lalita Kohli for the Appellant. B. Sen, M. Mookherjee, Sardar Bahadur Saharya and Vishnu Bahadur Saharya for Respondent No. 1.

The Judgment of the Court was delivered by GOSWAMI, J. This is an appeal at the instance of the workman on certificate of the Calcutta High Court from the decision of the Division Bench reversing the earlier judgment and order of the learned single Judge in an application under article 226 of the Constitution directed against the award of the First Industrial Tribunal, West Bengal, made under section 33A of the Industrial Disputes Act.

The appellant (hereinafter to be described as the workman) was employed by M/s Hindustan Motors Ltd. (hereinafter to be described as the company) since August 3, 1949. On August 3, 1956, the workman entered into an agreement of service with the company wherein the first clause reads as follows:-

> "The Employer agrees to and does hereby engage the services of the employee for a period of 5 years beginning with 1-6-56 and thereafter until this agreement shall be

> determined by either party hereto giving to the other 3 months' notice in writing of such intended termination.
>
> Provided that in case Employer finds the employee's work satisfactory, Employer shall have the option to extend the period of service by a further term of 3 years".

The workman went on two months' leave to Banaras for a change some time in 1960. He requested for extension of leave for one month on medical grounds. He actually sent an application on August 8, 1960, along with a medical certificate praying for extension of his leave. The company asked the workman to get himself examined by the company's medical officer within ten days. As the workman was lying ill at Banaras, he could not comply with the directions of the company. On September 5, 1960, he sent another telegram followed by a formal application enclosing a medical certificate for extension of his leave. On September 15, 1960, the company sent a letter to him terminating his services on the ground of habitual absence which is a misconduct under the company's standing orders.

At the time of this termination there was an industrial dispute pending between the company and its workmen. Since the company did not ask for approval of its order from the Industrial Tribunal the workman made a complaint to the Tribunal under section 33A of the Industrial Disputes Act (briefly the Act). The company contested the application. The Tribunal made its award on September 27, 1962, ordering reinstatement of the workman with 50% of his back wages for the period of his forced unemployment as compensation. The Tribunal directed that the award should be given effect to not later than one month of the publication of the award which was on October 26, 1962.

After a little over two months of the publication of the award, to be precise, on February 4, 1963, the company intimated to the workman to rejoin his service. The workman reported for duty the following day on February 5, 1963. On February 16, 1963, the company invoked clause (1) of the agreement which we have set out earlier and terminated the services of the workman by paying three months' salary in lieu of notice.

This is the second round of litigation with which we are concerned in this appeal. Since an industrial dispute was pending even on this date of termination of his service and the company did not apply to the Tribunal for approval of the order, the workman made a complaint to the Tribunal, as on the previous occasion, under section 33A of the Act. The Tribunal accepted the complaint and held as follows:-

> "In my opinion, the company has really dismissed the petitioner for a piece of conduct which must have appeared as misconduct in the eye of the company".

The Tribunal observed that the company in substance dismissed the workman for misconduct since the workman became "odious to the company" on account of his earlier success before the Tribunal in his application under section 33A of the Act. The Tribunal, therefore, ordered his reinstatement with full back wages for the period of his forced unemployment as compensation. This time the company did not accept the award although on the earlier occasion the company did not choose to

litigate and reinstated him as ordered by the Tribunal.

The company moved the Calcutta High Court under article 226 of the Constitution to quash the award. The learned single Judge refused to interfere with the award holding that "the reason might have been the old reason of dismissal....". The learned Judge further observed that "the circumstances relied on by the Tribunal are not wholly irrelevant and the inference drawn by the Tribunal cannot be characterised as unreasonable".

The company appealed to the Division Bench of the High Court and the appeal was accepted. The Division Bench held as follows:-

> "It may be that having regard to the sequence of events that took place in this case the termination of service of the respondent No. 1 by the letter of 16th February 1963 may be regarded as a colourable exercise of the power under the contract of employment or may even be regarded as one of unfair labour practice or mala fide, but the discharge cannot be said to be for any misconduct. There is no evidence for discharge on any specific misconduct. The definite case of the respondent No.1 has been that it was by way of retaliatory measure that his services were terminated. This may be true and may show that the action on the part of the appellant company was mala fide. But until it is established that there has been a contravention of section 33 of the Act which would create jurisdiction in the Industrial Tribunal to entertain an application under section 33A, or in other words, unless it is established that there has been dischrge for misconduct, the Tribunal had no jurisdiction to set aside the order of termination in an application under section 33A".

On the application of the workman the High Court granted a certificate to him under article 133(1)(c) of the Constitution. That is how this matter has come before us for a decision.

We should at the outset observe that this is not an appeal against the award of the Industrial Tribunal but is only directed against the judgment of the High Court under article 226 of the Constitution. In an application under article 226 of the Constitution the High Court was concerned only with the question of jurisdiction of the Tribunal in entertaining the application under section 33A of the Act. The question of jurisdiction again was intimately connected with the question whether the termination of service was for misconduct of the workmen. The learned single Judge accepted the finding of the Tribunal when it held that the discharge was nothing but dismissal for misconduct and in that view of the matter did not find any justification for interfering with the award. According to the learned Judge, therefore, no question of lack of jurisdiction of the Tribunal arose to merit interference with the award under article 226 of the Constitution.

The Division Bench, however, looked at the matter from a different viewpoint. It assumed that the action of the management was even mala fide and so it could be wrongful and in an appropriate reference under section 10 of the Act the workman might be able to get proper relief. The High Court, however, came to the conclusion that since clause (1) of the agreement was invoked by the employer it was not a case of discharge for misconduct and that being the position the Tribunal had

no jurisdiction to entertain the complaint under section 33A even though the action of the company might be as a result of unfair labour practice.

Mr. Naunit Lal on behalf of the workman has assailed the conclusion of the Division Bench while Mr. Sen submits that the decision is legally unquestionable.

The question that arises for consideration in this appeal relates to the applicability of the proviso to section 33(2) (b) of the Act as amended in 1956. Section 33(2)(b) at the material time reads as follows:-

> "33(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 such dispute.
>
> (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".

We may also read section 33A of the Act as that is the section under which the complaint was originally made by the workman to the Industrial Tribunal.

33A: "Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner to such Labour Court, Tribunal or National Tribunal and on receipt of such complaint that Labour Court, Tribunal or National Tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its award to the appropriate Government and the provisions of this Act shall apply accordingly".

It is clear that the foundation of jurisdiction of the Tribunal to entertain a complaint under section 33A is the contravention of section 33 of the Act.

Section 33 may be contravened in a variety of ways. We are concerned in this appeal only with one type of contravention, namely, that the employer did not make any application to the Tribunal for approval of the order of termination of service of the workman. There is no dispute between the parties in this appeal that there was an industrial dispute pending before the Tribunal in which the workman was concerned and that the particular termination had nothing to do with that dispute. The only point on which the parties differ is as to the nature of the order of termination of service. The employer claims it to be a termination simpliciter in exercise of its right under a written contract of service entered between the parties in August 1956. The workman on the other hand

contends that termination of his service was meted out as a punishment for avenging the defeat of the employer in an earlier litigation under section 33A at the instance of the workmen. In other words the workman contends that the order although purported, ex facie, to be a termination under the terms of the agreement, is in truth and reality an order of dismissal for misconduct.

Originally when the Act was passed in 1947 (Act 14 of 1947) section 33 imposed a ban on the employer against discharge, dismissal or punishment of a workman during the pendency of proceedings before the Tribunal and other specified authorities "except for misconduct not connected with the dispute." The section underwent a vital change for the employer when the Industrial Disputes (Appellate Tribunal) Act 1950 (Act 48 of 1950) was passed and section 33 was substituted and a total ban imposed against discharge, dismissal or any punishment of a workman during the pendency of proceedings before the Tribunal and other specified authorities. The reservation of the right to the employer to take action even in case of misconduct, which was there in the original Act, was withdrawn. As time passed, in view of representations from employers, the Parliament became alive to the question of discipline in the industry and reintroduced in an altered form the said right of the employer to take action during the pendency of proceedings before the Tribunal when the Act was amended by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 (Act 36 of 1956). We have already set out the material provision of section 33(2) (b) at the out set which has since restored to the employer the right to take punitive action under specified conditions.

To complete the picture we may note in passing that the section was further amended by the Industrial Disputes (Amendment) Act (Act 36 of 1964) with effect from December 19, 1964, whereby some words were inserted in sub-section (2) of section 33 with which we are not concerned in this appeal.

From the provisions of section 33 it is manifest that punitive action by the employer in whatever form it may be passed is permissible against an ordinary workman, as distinguished from a protected workman even during the pendency of proceedings before the Tribunal provided that the employer pays one month's wages and also applies to the concerned Tribunal for approval of his action. Since the action is punitive, namely, dismissal or discharge for misconduct, the Tribunal has to oversee the action to guarantee that no unfair labour practice or victimisation has been practised thereby. If the procedure of fair hearing has been observed the Tribunal has to find in an application under section 33 that a prima facie case is made out for dismissal. If, on the other hand, there is violation of the principles of natural justice in the enquiry, the Tribunal can go into the whole question relating to the misconduct and come to its own conclusion whether the same is established.

The submission of the employer is that since the termination of the workman is in exercise of the right under the written agreement it was not a case of discharge or dismissal for misconduct and there was, therefore, no obligation on the employer to make an application under section 33 of the Act and hence section 33 has not been contravened and the application under section 33A is not maintainable.

The question that arises for decision in this appeal is whether if a particular order of termination of service is not on account of misconduct and is merely a termination simpliciter the employer is still required to make an application under section 33 of the Act.

We have no doubt in our mind that section 33(2)(b) makes it obligatory upon the employer to make an application to the Tribunal under the proviso only when he discharges or dismisses a workman for misconduct.

It is submitted by Mr. Sen that misconduct contemplated in section 33(2)(b) must be a misconduct enumerated in the standing orders of the company. We are unable to accept this submission.

Standing orders of a company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct which a workman may commit. Even though a given conduct may not come within the specific terms of misconduct described in the standing orders, it may still be a misconduct, in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. Ordinarily, the standing orders may limit the concept but not invariably so.

When, therefore, the Tribunal has found as a fact after taking note of the history and the entire circumstances of the case that the termination was on account of misconduct of the employee it is difficult to hold that there is any manifest error of law committed by the Tribunal in reaching that conclusion only because the misconduct, as found, is not within the four corners of the description of the various misconducts mentioned in the company's standing orders. It is not possible, therefore, to accept the submission that the Tribunal committed an error of law or of jurisdiction in entertaining the application under section 33A.

Termination simpliciter or automatic termination of service under the conditions of service or under the standing orders is outside the scope of section 33 of the Act. This does not mean that the employer has the last word about the termination of service of an employee and can get away with it by describing it to be a simple termination in his letter of discharge addressed to the employee. It is also not a correct proposition of law that in case of a complaint under section 33A the Tribunal would be debarred from going into the question whether, notwithstanding the form of the order in sub-stance, it is an action of dismissal for misconduct and not termination simpliciter.

The possibility that in an appeal against the award of the Tribunal this Court may have taken a different view about the termination does not affect the present issue.

Mr. Naunit Lal relies upon a decision of this Court in the Management of Murugan Mills Ltd. v. Industrial Tribunal Madras and Another in support of his contention that even termination simpliciter is within the sweep of section 33. That was a case where the workman's services were terminated "because he deliberately adopted go-slow and was negligent in the discharge of his duty". The Supreme Court in that case observed thus:

> "His services were therefore terminated for dereliction of duty and go-slow in his work. This clearly amounted to punishment for misconduct and therefore to pass an order under cl. 17(a) of the Standing Orders in such circumstances was clearly a colourable exercise of the power to terminate the services of a workman under the provision of the Standing Orders".

The Supreme Court further observed:

> "In these circumstances the case was clearly covered by cl.(b) of s. 33(3) of the Act as the services of the respondent were dispensed with during the pendency of a dispute by meeting out the punishment of discharge to him for misconduct".

The decision is, therefore, not an authority for the extreme proposition advanced by Mr. Naunit Lal.

Mr. Naunit Lal also drew our attention to two decisions of the Madras High Court in Shyamala Studios v. Kannu Devar (S.S.) and others and Sri Rama Machinery Corporation (Private) Limited, Madras v. Murthi (N.R.) and others in support of the above submission. Although the decision of the Supreme Court in Murugan Mills' case (supra) was noticed by the Madras High Court it does not appear to have correctly appreciated the ratio decidedi of that judgment. We are unable to hold that the Supreme Court in Murugan Mills' case (supra) went to the extent of re-writing section 33 by completely obliterating the concept of misconduct of a workman for which alone in a limited way the right of action for the employer is preserved during the span of pendency of proceedings before the Tribunal in the interest of discipline. To the extent the Madras decisions state that termination of services need not be for misconduct of the workman in order to attract section 33(2)(b), we cannot agree.

If the Tribunal finds that a particular termination of service of a workman is in truth and substance innocuous or in exercise of a bona fide right under the contract, section 33(2)(b) will not be applicable and necessarily there will be no contravention of section 33A of the Act.

In Air India Corporation, Bombay v. V. A. Rebellow & Anr.(1) this Court had to deal with the validity of an award made under section 33A although the Labour Court in that case had held that the workman was guilty of misconduct and that his services were terminated for that reason. This Court did not agree with the aforesaid conclusion and dismissed the workman's petition under section 33A of the Act. In doing so this Court observed as follows:-

> "It is noteworthy that the ban is imposed only in regard to action taken for misconduct whether connected or unconnected with the dispute. The employer is, therefore free to take action against his workmen if it is not based on any misconduct on their part".

We are, therefore, clearly of opinion that the single Judge is right in not interfering with the award under article 226 of the Constitution and the Division Bench is wrong in doing so.

It is true that on the face of the order of termination the company invoked clause (1) of the agreement and even so it was open to the Tribunal to pierce the veil of the order and have a close look at all the circumstances and come to a decision whether the order was passed on account of certain misconduct. This is a finding of fact which could not be interfered with under article 226 of the Constitution unless the conclusion is perverse, that is to say, based on no evidence whatsoever. We are, however, unable to say so having regard to the facts and circumstances described by the Tribunal in its order.

It is, however, unexceptionable that if an employer passes an order of termination of service in exercise of his right under a contract or in accordance with the provision of the standing orders and the Tribunal finds that the order is not on account of any misconduct, the question of violation of section 33 would not arise.

There remains, however another aspect to which the Tribunal did not properly address. The workman in this case had a contract of employment only for 8 years at the most. The reinstatement in his case, therefore, cannot extend beyond a period of eight years from June 1, 1956 and the contract of employment would have automatically terminated on May 31, 1964. The Tribunal awarded reinstatement on March 24, 1964, when even the employer did not bring it to its notice that the contract of employment would terminate in May 1964.

Mr. Sen, however, during the course of the argument" hinted at another round of litigation under section 33C of the Act to contest the claim to reinstatement ordered by the Tribunal.

We cannot be oblivious to the plight of this workman in his unequal fight with a big company. He was serving the company since 1949 for about eleven years when he was first dismissed in 1960. He has been involved in litigation since 1960 uptill today except for a lull for eleven days on his reinstatement after the first award. Eleven years in actual service and sixteen years in litigation is a doleful tale by itself.

We, therefore, feel that, in the interest of industrial peace and above all to draw a final curtain to this unhappy litigation, we would be justified in quantifying the compensation payable to the workman in this case to a sum of Rs. 20,000/- only in lieu of reinstatement with full back wages as ordered by the Tribunal, which we accordingly order. We may also observe that Mr. Sen, fairly enough had made it clear before us in the course of hearing that even if the company succeeded in this Court it would be prepared to pay to the workman a sum of Rs. 10,000/- on compassionate grounds.

In the result the judgment of the Division Bench of the High Court is set aside. The award of the Tribunal is varied as stated above. The appeal is allowed accordingly with no order as to costs.

CMC. No. 6664 of 1976 on behalf of the company for urging additional grounds is dismissed as not pressed.

P.B.R. Appeal Allowed.