

M/S. Filmistan (P) Ltd.

Vs

Balkrishna Bhiwa and Another

Civil Appeal No. 2422 of 1966

(G.K. Mitter, C.A. Vaidialingam, P. Jagmohan Reddy JJ)

11.08.1971

JUDGMENT

VAIDIALINGAM, J. -

1. The short question that arises for consideration in this appeal by special leave, is whether the High Court in this case while exercising jurisdiction under Article 227 was justified in reversing the order of the Industrial Tribunal granting approval under the proviso to Section 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter to be referred as the Act).
2. The workman concerned though served has not appeared before us in these proceedings, but Mr. S. V. Gupte, learned Counsel appearing for the appellant has quite fairly placed before us all aspects of the case.
3. The workman concerned was employed in the appellant Company as an unskilled worker in the General Department and is termed as a helper. On a prior occasion, in view of complaints received against him the appellant administered to the workman a warning on April 9, 1963. But later on again, in view of his unsatisfactory conduct charges were framed on April 12, 1963, and duly served on the workman and an inquiry, after due notice to the workman, was conducted by the management on April 17, 1963. The workman was found guilty by the management in the said inquiry. The finding in the inquiry was that the workman was guilty of the charge of refusal to carry out the lawful orders of his superiors in charge. Accordingly on April 19, 1963, a memo was issued to the workman regarding the inquiry conducted against him as well as the finding of guilt recorded therein. It was also stated that he was found guilty of similar offences in the past and that he was let off with a warning on his tendering an apology and undertaking to behave properly in future. The memo winds up by saying that the workman is dismissed with immediate effect. The memo also informed the workman to collect his salary up to date as well as one month's wage from the Accountant of the Company. This order of dismissal was served on the workman only on April 24, 1963, as he was not available till then. April 25, 1963, was a holiday and on April 26, 1963, the management entrusted the necessary papers to their Legal Adviser to prepare an application to be filed before the Industrial Tribunal for approval under Section 33(2)(b) proviso of the Act. The application was got ready on April 27, 1963, and the next day being Sunday, it was filed before the Industrial Tribunal, Maharashtra on April 29, 1963.
4. On receipt of the order of dismissal, the workman sent a reply on May 8, 1963, stating that he will be accepting whatever amount is offered to him without prejudice to his claims and contentions. He again sent a communication on May 9, 1963, that he presented himself for receiving the amount on May 7, 1963, and that he had not been paid the amount as it was represented by the Accountant

that the file relating to his case is with the Head Office. Ultimately, the workman received the amount on May 17, 1963, by which the application, as we have already mentioned, had been filed before the Industrial Tribunal on April 29, 1963.

5. In the application filed by the management, they have set out the circumstances leading up to the passing of the order of dismissal and also to his having collected his dues from the Company. The reasons for passing the order of dismissal were also mentioned in the said application.

6. The workman filed a written statement opposing the application filed by the management for grant of approval under Section 33(2)(b) proviso. In particular in paragraph 3 of his counter-affidavit he had stated that he was served with the order of dismissal on April 24, 1963, and that he was required to collect his salary as well as one month's wages. According to him the Accountant has delayed paying the amount and the same was ultimately given to him on May 7, 1963, although his dismissal has made effective from April 19, 1963. He has further referred to the fact that the application before the Industrial Tribunal has been made only on April 29, 1963. On these facts he has taken a plea that the management has given no explanation for the delay in filing the application for approval. According to him, the order of dismissal has been passed in contravention of Section 33 (2)(b) of the Act. He has also taken various pleas regarding the allegations made against him in respect of which inquiry was held by the management.

7. The workman was represented by a counsel before the Industrial Tribunal. The latter by its order, dated July 29, 1963, after setting out the facts and the contentions has ultimately rejected the plea of the workman that his dismissal was not proper. In the end the Tribunal held "there is a clear prima facie case against the opponent. The approval sought is therefore granted". A perusal of the order of the Industrial Tribunal shows that though the workman had specifically raised in his written statement that there has been a violation of Section 33(2)(b), when the appellant passed the order of dismissal, this plea was not at all agitated before the Tribunal. In fact there is no discussion in the order of the Tribunal on this aspect. The only contention that appears to have been pressed before the Tribunal by the workman, who was represented by a lawyer was that he has not disobeyed any orders of the management. He has further pleaded that it was not a part of his duties to help the gardener. In view of this defence, he urged that the order dismissal was improper. That is why the Industrial Tribunal considered only this aspect and came to the conclusion that the workman's plea is not true and that approval has to be granted.

8. The workman filed before the High Court of Bombay Special Civil Application No. 1838 of 1963 under Article 227 of the Constitution. After raising various grounds of attack against the order of the Industrial Tribunal granting approval, he pleaded that the order dismissal has been passed in contravention of Section 33(2)(b) of the Act and, therefore, the Industrial Tribunal was not justified in granting approval asked for by the management.

9. It is significant to note that there is no averment in the writ petition that the Industrial Tribunal did not consider the plea of contravention of Section 33(2)(b) though it was raised and argued before it. It is also significant that the same lawyer who represented the workman before the Industrial Tribunal appeared for him before the High Court in the Writ Petition. The appellant contended that the Industrial Tribunal, after a consideration of the material on record was satisfied that a prima facie case has been made out for the grant of approval and that it is on that basis that the order of the Industrial Tribunal came to be passed. It was further pleaded that the Industrial Tribunal's finding being on facts, there was no scope for interfering under Article 227.

10. The High Court, by its judgment and order dated February 11, 1965, held that the grant of approval by the Industrial Tribunal was not justified. The only question that has been considered by the High Court was whether there has been a violation by the management of Section 33(2)(b) of the Act. The High Court's view is that the appellant therein could have prepared the application for approval even on the date when the order of dismissal was passed, namely, April 19, 1963, and could have filed it immediately without waiting for the workman being served with the order of dismissal. On this basis the High Court ultimately held that there has been a delay of three days in making the application before the Industrial Tribunal and that delay has not been satisfactorily explained by the management. The High Court set aside the order passed by the Industrial Tribunal granting approval to the action taken by the appellant.

11. It is above order of the High Court that is challenged by Mr. S. V. Gupte, learned Counsel appearing for the appellant, in this appeal. Mr. Gupte raised three contentions (1) that the High Court had no jurisdiction under Article 227 to interfere with the finding of fact recorded by the Industrial Tribunal when it granted approval as asked for by the management, especially when there was no error apparent on the record; (2) that though the workman raised the plea of violation of Section 33(2)(b) in his written statement, that contention was not pursued before the Industrial Tribunal and therefore the High Court was not justified in entertaining that plea, specially when there was no averment by the workman in the writ petition that though the point was raised and argued, was not decided and adjudicated upon by the Industrial Tribunal; and (3) in any event the dates adverted to clearly show that the order of dismissal, the tender of wages and the application for approval have all been taken by the management simultaneously as a part of the same transaction and that there has been no delay, as wrongly assumed by the High Court.

12. We may deal with all the contentions together. The scope of Section 33(2)(b) proviso has been dealt with very elaborately by this Court in *Strawboard Manufacturing Co. v. Gobind.* (1962 Supp 3 SCR 618 : AIR 1962 SC 1500 : (1962) 1 Lab LJ 420) The principle laid down in that case is as follows :

"As we read the proviso, we are of opinion that it contemplates the three things mentioned therein, namely, (i) dismissal or discharge, (ii) payments 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 him wages for one month and also make 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 Section 33-A 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 circumstances of each case."

13. From the above extract it is clear that two principles emerge; (i) the employer's conduct should show that the things contemplated under proviso to Section 33(2)(b) have been done by him as part of the same transaction; and (ii) whether an application was made as part of the same transaction at

the same time when action was taken, is a question of fact depending upon the circumstances of each case. The principles laid down in the above decision have been quoted with approval by a Constitution Bench of this Court in *Kalyani (P. H.) v. Air France, Calcutta.* (1963-I LLJ 679 : (1964) 2 SCR 104 : AIR 1963 SC 1756)

14. In the case before us the management in its application before the Industrial Tribunal had given various dates as well as the reasons for filing the application on April 29, 1963. Apart from the fact that there were intervening holidays, they had also referred to the steps taken by them for the preparation of the application and to its being filed immediately thereafter. So far as we could see the workman excepting making a bald averment that there has been a violation of Section 33(2)(b) proviso has not controverted the truth of the averments made by the management. Over and above that he has not pursued this point before the Industrial Tribunal. If he had pressed this contention, the Industrial Tribunal would have gone into the matter and considered the same and expressed an opinion whether the appellant has taken action under Section 33(2)(b) proviso, as interpreted by this Court in *Strawboard Manufacturing Co. v. Gobind (supra)*. That decision was available when the Industrial Tribunal passed the order of approval on July 29, 1963.

15. We have already pointed out that even in the writ petition, the workman, who was represented by the same lawyer, who appeared for him before the Industrial Tribunal, did not make any grievance that the Industrial Tribunal omitted to consider his plea based upon the violation of Section 33(2)(b) proviso though it was argued before it. Under those circumstances, in our opinion, the High Court was not justified in allowing the workman to raise this plea which really requires an investigation into facts and consideration of the explanation that may offered by the management if there has been any delay.

16. The limits of the jurisdiction exercised by the High Court under Article 227 have been laid down by this Court in several cases. Some of the decisions bearing on the matter have been referred to by this Court in *Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi and Another.* ((1967) 3 SCR 774 : AIR 1968 SC 222 : (1968) 1 SCJ 789) There was no such error on the record in the case before us which justified interference by the High Court. We have already point out, by reference to the decision of this Court that the question whether an application for approval under Section 33(2)(b) proviso was made as part of the same transaction or at the same time when the action was taken, is a question of fact and will depend upon the circumstances of each case. The workman did not press the contention based upon Section 33(2)(b) proviso before the Industrial Tribunal and therefore he must be presumed to have abandoned that plea. In these circumstances there was absolutely no justification for the High Court under Article 227 to consider this plea requiring investigation of facts and adjudicate upon the same. Considering from any point of view, the High Court was not justified in setting aside the order of the Industrial Tribunal.

17. In the circumstances the judgment and order of the High Court dated February 11, 1965, are set aside and that of the Industrial Tribunal dated July 29, 1963, are restored. The appeal is allowed. As there has been no appearance for the respondent, there will be no order as to costs.

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