Fakirbhai Fulabhai Solanki

Vs

The Presiding Officer and Another

Civil Appeals Nos. 545-546(Nl) of 1986

(E. S. Venkataramiah, Sabyasachi Mukharji JJ)

08.05.1986

JUDGMENT

VENKATARAMIAH, J. –

1. These two appeals by special leave are filed under Article 136 of the Constitution of India against the order/award dated August 5, 1985 in Application (IT) No. 88 of 1979 and Complaint (IT) No. 124 of 1979 in Reference (IT) No. 434 of 1978 on the file of the Industrial Tribunal, Gujarat by the appellant Fakirbhai Fulabhai Solanki against the management of the Alembic Chemical Works Co. Ltd., Baroda.

2. During the pendency of a reference made under the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') to the Industrial Tribunal, Gujarat the management served a charge-sheet on the appellant who was one of the workmen working in the factory belonging to the management of the Alembic Chemical Works Co. Ltd., Baroda asking him to show cause why disciplinary action should not be taken against him for an alleged act of misconduct said to have been committed by him on July 12, 1979. The act of misconduct attributed to the appellant was that he was playing cards along with two other workmen during the working hours of the factory. It was alleged that the appellant had given a letter addressed to Shri R.A. Desai, Manager, Industrial Relations, Alembic Chemical Works Co. Ltd. admitting his guilt and tendering apology. The disciplinary enquiry was held against all the three workmen including the appellant. At the conclusion of the enquiry the appellant was found guilty of the act of misconduct alleged to have been committed by him by the Inquiry Officer Shri J. N. Patel, Director (Manufacturing) of the Alembic Chemical Works Co. Ltd. and it was decided by the management to dismiss him but because the appellant was a protected workman as defined in the Explanation to sub-section (3) of Section 33 of the Act and the permission of the Tribunal had to be obtained before dismissing him as required by sub-section (3) of Section 33 of the Act, the management made an Application (IT) No. 88 of 1979 before the Tribunal for such permission. The appellant was, however, suspended from service with effect from August 13, 1979 pending disposal of the application before the Tribunal after he had been found guilty at the domestic enquiry but without any wages or allowances. The appellant also filed an application before the Tribunal under Section 33-A of the Act complaining violation of Section 33 of the Act by the management. The complaint of the appellant was registered as Complaint (IT) No. 124 of 1979 in Reference (IT) No. 434 of 1978. Both, the application under Section 33(3) of the Act and the complaint under Section 33-A of the Act, were filed in the year 1979. The Tribunal was able to dispose of them finally only on August 5, 1985. The Tribunal granted permission to the management to dismiss the appellant and rejected the complaint filed by him. Aggrieved by the said decision, of the Tribunal the appellant has filed these two appeals.

3. In the standing orders governing the appellant there was no provision for payment of any subsistence allowance (either the whole of the allowance which the workman was entitled to draw or a part thereof) during the pendency of an application made by the management under Section 33(3) of the Act for permission to dismiss a protected workman. Admittedly the appellant was not paid any allowance from August 13, 1979 to August 5, 1985 on which date the Tribunal accorded its permission to the management to dismiss him from service.

4. In these appeals the learned counsel for the appellant has confined his submission to the effect of non-payment of any subsistence allowance on the decision of the Tribunal under Section 33(3) of the Act. It is urged by the learned counsel for the appellant that since the appellant was denied the subsistence allowance it was not possible for him to defend himself effectively before the Tribunal in the proceedings relating to the permission prayed for by the management under Section 33(3) of the Act and, therefore, the permission accorded by the Tribunal was vitiated. In support of his case he has relied upon the decision of this Court in State of Maharashtra v. Chandrabhan Tale ((1983) 3 SCC 387 : 1983 SCC (Cri) 667 : 1983 SCC (L&S) 391). In that case the respondent Chandrabhan Tale was a government servant. He was convicted and sentenced to imprisonment by the trial court in a criminal case. He filed an appeal against his conviction and sentence and remained on bail throughout without undergoing the sentence of imprisonment. He was, however, kept under suspension pending trial of the criminal case and was paid normal subsistence allowance under the main Rule 21 of the Bombay Civil Services Rules, 1959 from the date of his suspension until the date on which he was convicted and sentenced to imprisonment by the trial court. But from the date of his conviction the subsistence allowance was reduced to the nominal sum of Re 1 per month under the second proviso to Rule 15(1)(ii)(b) of the Bombay Civil Services Rules, 1959. The order reducing his subsistence allowance was questioned in this Court in the above case. The court held that the second proviso to Rule 15(1)(ii)(b) of the Bombay Civil Services Rules, 1959 which directed the reduction of the subsistence allowance to Re 1 per month was unreasonable and void. The court further held that a civil servant under suspension was entitled to the normal subsistence allowance even after his conviction by the trial court pending consideration of his appeal filed against his conviction until the appeal was disposed of finally one way or the other, whether he was on bail or lodged in prison on conviction by the trial court. Relying upon the above decision the learned counsel for the appellant contended that there was denial of reasonable opportunity to the appellant to defend himself before the Tribunal in the proceedings initiated by the application made under Section 33(3) of the Act.

5. Sub-section (3) of Section 33 of the Act provides that notwithstanding anything contained in sub-section (2) thereof 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 - (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or (b) by discharging or punishing whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. It follows from the provisions of sub-section (3) of Section 33 of the Act that the workman does not cease to be a workman until the Tribunal grants permission to dismiss the workman and the management dismisses the workman pursuant to such permission. An order of suspension by itself does not put an end to the employment. The workman continues to be an employee during the period of suspension and it is for this reason ordinarily the various standing orders in force in several factories and industrial establishments provide for payment of subsistence allowance which is normally less than the usual salary and allowance that are paid to the workman concerned. An order of suspension no doubt prevents the employee from rendering his service but it does not put an end to the relationship of

master and servant between the management and the workman. When an application is made under Section 33(3) of the Act the workman is entitled to defend himself before the Tribunal. In those proceedings it is open to him to show that the domestic enquiry held against him was not in accordance with law and principles of natural justice and the action proposed to be taken against him by the management is unjust and should not be permitted. Sometimes it may be necessary to either of the parties to lead evidence even before the Tribunal. The proceedings before the Tribunal very often take a long time to come to an end. In this very case the proceedings were pending before the Tribunal for nearly six years. Most of the workman are not in a position to maintain themselves and the members of their families during the pendency of such proceedings. In addition to the cost of maintenance of his family the workman has to find money to meet the expenses that he has to incur in connection with the proceedings pending before the Tribunal. In this case the appellant was in receipt of salary and allowances till the end of the disciplinary enquiry. But from August 13, 1979 he was not paid even the barest subsistence allowance till August 5, 1985 when the Tribunal passed its order/award on the application of the management and the complaint of the appellant. It is true that in the instant case the Tribunal granted the application of the management and rejected the complaint of the appellant. It was also quite possible that the Tribunal could have rejected the application of the management and upheld the complaint of the appellant in which case the appellant would have been entitled to continue to be an employee under the management of the factory and the disciplinary enquiry held against him would have had no effect at all. Because it is difficult to anticipate the result of the application made before the Tribunal it is reasonable to hold that the workman against whom the application is made should be paid some amount by way of subsistence allowance to enable him to maintain himself and the members of his family and also to meet the expenses of the litigation before the Tribunal. And if no amount is paid during the pendency of such an application it has to be held that the workman concerned has been denied a reasonable opportunity to defend himself in the proceedings before the Tribunal. Such denials leads to violation of principles of natural justice and consequently vitiates the proceedings before the Tribunal under sub-section (3) of Section 33 of the Act and any decision given in those proceedings against the workman concerned. No material has been placed before us in this case to show that the appellant had sufficient means to defend himself before the Tribunal.

6. The learned counsel for the management however relied upon the decision of this Court in the Management of Hotel Imperial, New Delhi v. Hotel Workers' Union (1960) 1 SCR 476 : AIR 1959 SC 1342 : (1959) 2 Lab LJ 544). In that case this Court was mainly concerned with the right of the management to suspend a workman where the management had taken a decision to dismiss him but could not immediately give effect to such decision owing to the restriction, imposed by Section 33(1) of the Act which required the management to obtain the permission of the Tribunal when a reference was pending adjudication before it. In that case this Court observed at pp. 485, 488-489 thus :

> We have, therefore, to see whether it would be reasonable for an Industrial Tribunal where it is dealing with a case to which Section 33 of the Act applies, to imply a term in the contract giving power to the master to suspend a servant when the master has come to the conclusion after necessary enquiry that the servant has committed misconduct and ought to be dismissed, but cannot do so because of Section 33. It is urged on behalf of the respondents that there is nothing in the language of Section 33 to warrant the conclusion that when an employer has to apply under it for permission he can suspend the workmen concerned. This argument, however, begs the question because if there were any such provision in Section 33, it would be an express provision in the statute authorising such suspension and no further question of an

> implied term would arise. What we have to see is whether in the absence of an express provision to that effect in Section 33, it will be reasonable for an Industrial Tribunal in these extraordinary circumstances arising out of the effect of Section 33 to imply a term in the contract giving power to the employer to suspend the contract of employment, thus relieving himself of the obligation to pay wages and relieving the servant of the corresponding obligation to render service. We are of opinion that in the peculiar circumstances which have arisen on account of the enactment of Section 33, it is but just and fair that Industrial Tribunals should imply such a term in the contract of employment.....

We are, therefore, of opinion that the ordinary law of master and servant as to suspension can be and should be held to have been modified in view of the fundamental change introduced by Section 33 in that law and a term should be implied by Industrial Tribunals in the contract of employment that if the master has held a proper enquiry and come to the conclusion that the servant should be dismissed and in consequence suspends him pending the permission required under Section 33 he has the power to order such suspension, thus suspending the contract of employment temporarily, so that here is no obligation to him to pay wages and no obligation on the servant to work. In dealing with this point the basic and decisive consideration introduced by Section 33 must be borne in mind. The undisputed common law right of the master to dismiss his servant for proper cause has been subjected by Section 33 to a ban; and that in fairness must mean that, pending the removal of the said statutory ban, the master can after holding a proper enquiry temporarily terminate the relationship of master and servant by suspending his employee pending proceedings under Section 33. It follows therefore that if the tribunal grants permission, the suspended contract would come to an end and there will be no further obligation to pay any wages after the date of suspension. If, on the other hand, the permission is refused, the suspension would be wrong and the workmen would be entitled to all his wages from the date of suspension.

7. In the decision it was laid down that the management should be deemed to possess the power to suspend an employee in respect of whom a decision had been taken to dismiss him but an application for permission had to be filed until the application for permission was decided. The court in giving the above decision also relied on an earlier decision of the court in Ranipur Colliery v. Bhuban Singh ((1959) 2 LLJ 231 : 1959 Supp 2 SCR 719 : AIR 1959 SC 833). In that case it was pointed out that but for the ban on the employer by Section 33(1) the employer would have been entitled to dismiss the employee immediately after the completion of his enquiry on coming to the conclusion that the employee was guilty of misconduct but Section 33 stepped in and stopped the employer from dismissing the employee immediately on the conclusion of his enquiry and compelled him to seek permission of the Tribunal. It was, therefore, held that it was reasonable that the employer having done all that he could do to bring the contract of service to an end should not be expected to continue paying the employee thereafter. It was pointed out that in such a case the employer would be justified in suspending the employee without pay as the time taken by the Tribunal to accord permission under Section 33 of the Act was beyond the control of the employer. Lastly, it was observed that this would not cause any hardship to the employee for if the Tribunal granted permission the employee would not get anything from the date of his suspension without pay while if the permission was refused he would be entitled to his back wages from such date.

8. But in neither of the above two decisions the court considered the question from the angle from which we have approached the problem. In neither of them the court had the occasion to consider whether the denial of payment of subsistence allowance during the pendency of the proceedings under Section 33(3) of the Act would amount to violation of principles of natural justice. They

approached the question from the angle of the common law right of a master to keep a workman under suspension either during the pendency of a domestic enquiry into an act of misconduct alleged to have been committed by a workman or during the pendency of an application under Section 33 of the Act. These were perhaps halcyon days when such applications were being disposed of quickly. If the Court had realised that such applications would take nearly six years as it has happened in this case their view would have been different. An unscrupulous management may by all possible means delay the proceedings so that the workman may be driven to accept its terms instead of defending himself in the proceedings under Section 33(3) of the Act. To expect an ordinary workman to wait for such a long time in these days is to expect something which is very unusual to happen. Denial of payment of at least a small amount by way of subsistence allowance would amount to gross unfairness.

9. Apart from the violation of the principle of natural justice, the very concept of the relationship of master and servant has undergone a sea-change since the date on which Hotel Imperial case ((1960) 1 SCR 476 : AIR 1959 SC 1342 : (1959) 2 Lab LJ 544) was decided. We have pointed out that in that case this Court recognised the power of suspension without pay vested in the management after it had decided to dismiss an employee where it had to make an application for permission under Section 33(1) of the Act. The case falling under Section 33(1) of the Act is not in any way different from a case falling under sub-section (3) of Section 33 and in both these cases previous permission of the authority concerned should be obtained before any action is taken against the workman concerned unlike a case falling under Section 33(2)(b) of the Act where only its approval to an action already taken is required to be sought. This Court further observed in the above decision that the management could relieve itself of the obligation to pay wages during the period of such suspension. Now what is the effect of suspension ? Does it put an end to the relationship of master and servant altogether ? It does not. This Court has in its subsequent decision in Khem Chand v. Union of India (1963 Supp 1 SCR 229 : AIR 1963 SC 687 : (1963) 1 Lab LJ 665) at pp. 236-237 observed thus :

> "An order of suspension of a government servant does not put an end to his service under the government. He continues to be a member of the service in spite of the order of suspension..... The real effect of the order of suspension is that though he continued to be a member of the government service he was not permitted to work, and further, during the period of his suspension he was paid only some allowance - generally called "subsistence allowance" - which is normally less than his salary - instead of the pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that the order of suspension affects a government servant injuriously. There is no basis for thinking however that because of the order of suspension he ceases to be a member of the service.

10. If the order passed at the conclusion of domestic enquiry is only one of suspension (even though the management has decided to dismiss him) where the workman has a chance of being reinstated with back wages on the permission being refused under Section 33(3) of the Act, it cannot be said that the workman is not entitled to any monetary relief at all. In such a case the right of the workman to receive some reasonable amount which may be fixed either by the standing orders or in the absence of any standing order by the authority before which the application is pending by way of subsistence allowance during the pendency of the application under Section 33(3) of the Act with effect from the date of suspension should be implied as a term of the contract of employment having regard to the observations made in Khem Chand's case (1963 Supp 1 SCR 229 : AIR 1963 SC 687 : (1963) 1 Lab LJ 665) In the two earlier decisions referred to above this aspect of the matter has not

been considered.

11. It is likely that in some cases filed under Section 33(1) or Section 33(3) of the Act (which are 'permission' clauses and not 'approval' clauses) pending before any authority, the management may not be paying any subsistence allowance to the workman concerned. We, therefore, clarify that in such cases it shall be open to the management to pay within a reasonable time to be fixed by the authority, the subsistence allowance for the period during which the workman is kept under suspension without wages and to continue the proceedings. Such subsistence allowance shall be the amount fixed under the standing orders, if any, which the management is liable to pay to the workman if he is kept under suspension during the pendency of such application or in the absence of any such standing order by the authority before which such application is pending. In a case where the proceedings are completed and the order of dismissal is successfully challenged on the ground of non-payment of subsistence allowance for the period of suspension during the pendency of the application under Section 33(1) or Section 33(3) of the Act it shall be open to the management to ask for the permission of the authority again under Section 33(1) or Section 33(3) of the Act after paying or offering to pay to the workman concerned within a reasonable time to be fixed by the authority concerned the arrears of subsistence allowance at the rate stated above. But in the instant case however having regard to the circumstances of this case we do not wish to grant any such opportunity to the management to apply for permission again under Section 33(3) of the Act. On facts we are of the view that the punishment of dismissal imposed in this case on the appellant appears to be excessive but our decision however is not based on this ground.

12. We, therefore, set aside the order/award of the Tribunal and dismiss the application made by the management under Section 33(3) of the Act. We accept the complaint filed by the appellant under Section 33-A of the Act. The management is directed to reinstate the appellant in its service and to pay him all the wages and allowances due to him from August 13, 1979 as if there was no break in the continuity of his service. The appeals are accordingly allowed with costs.

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