**(2013) 10 MAD CK 0096**

**Madras High Court**

**Case No:** W.A. (MD) . No. 1056 of 2013

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| Tamil Nadu State Transport Corporation (Madurai) Limited | | APPELLANT |
| | Vs | |
| The Joint Commissioner of Labour (Conciliation) Office of the Commissioner of Labour and A. Audhinarayanan | | RESPONDENT |

**Date of Decision:** Oct. 9, 2013

**Citation:** (2014) LabIC 466

**Hon'ble Judges:** M. Venugopal, J; M. Jaichandren, J

**Bench:** Division Bench

**Advocate:** A.P. Muthu Pandian, for the Appellant; M. Govindan, Spl. G.P for R. 1 and Mr. A. Rahul for R. 2, for the Respondent

**Final Decision:** Dismissed

**Judgement**

M. Venugopal, J.

The Appellant/Tamil Nadu State Transport Corporation (Madurai) Limited, has preferred the instant Writ Appeal as against the Order dated 7/2/2012 in W.P. (MD) No. 39008 of 2004 passed by the Learned Single Judge in dismissing the Writ Petition. The Learned Single Judge, while passing the order in W.P. (MD) No. 39008 of 2004 (filed by the Second Respondent/Petitioner) on 7/2/2012 has inter alia observed that

Though the 1st respondent held that the enquiry was held fairly and properly and that the charges have been proved, the 1st respondent was right in rejecting the approval petition on the ground that Section 33(2)(b) of the Act was not complied with.

and found no infirmity in the order of the First Respondent dated 12/4/2004 in Approval Petition No. 180 of 2003 and resultantly, dismissed the Writ Petition.

2. The Learned Counsel for the Appellant/Transport Corporation, Virudhunagar contends that the Learned Single Judge had failed to appreciate that the First Respondent/Joint Commissioner of Labour (Conciliation), Chennai, has no wider jurisdiction u/s 33(2)(b) of the Industrial Disputes Act, 1947 to reappraise the evidence recorded in the ''Domestic Enquiry'' to find out whether the charges against the Second Respondent/Employee were proved with sufficient evidence or not.

3. According to the Learned Counsel for the Appellant, the Appellant paid one month''s wages to the Second Respondent based on the wages paid to him immediately prior to his dismissal and as such, there was no compliance of the ingredients of Section 33(2)(b) of the Industrial Disputes Act, 1947.

4. The stand taken on behalf of the Appellant Corporation is that the Second Respondent was dismissed from service on 3/2/2003 by the Appellant/Transport Corporation after conducting a fair and proper ''Domestic Enquiry''. Further, the revised Dearness Allowance was to be paid to the Second Respondent with effect from 1/1/2003 viz., prior to the date of his dismissal. Also that as per the calculation, the Appellant/Transport Corporation had correctly paid one month''s salary of Rs. 7,661.90 to the Second Respondent. However, this vital aspect of the matter was not looked into not only by the First Respondent and also by the Learned Single Judge at the time of passing of the orders.

5. Per contra, the Learned Counsel for the Second Respondent submits that the First Respondent through his Order dated 12/4/2004 in A.P. No. 180 of 2013 has rightly rejected the application for approval on the ground that the Appellant/Transport Corporation had not complied with mandatory conditions of Section 33(2)(b) of the Industrial Disputes Act and further held that in the enquiry into the charges framed against the Second Respondent, a prima facie case was not made out.

6. Further, the Learned Counsel for the Second Respondent contends that the Learned Single Judge while dismissing the Writ Petition No. 39008 of 2004 on 7/2/2012 (filed by the Appellant/Transport Corporation) has rightly held that ''there is no infirmity in the order of the First Respondent, warranting interference at the hands of this Court and consequently, dismissed the Writ petition, which need not be interfered with by this Court at this distance point of time''.

7. It is not in dispute that the Second Respondent worked as a Conductor under the Appellant/Tamil Nadu State Transport Corporation (Madurai) Limited. The case of the Appellant/Transport Corporation is that on 11/5/2000, at about 9.50 a.m., the Second Respondent, prevented another Driver from attending to the duty and also took away his keys of T.V.S. Moped and also threatened him to go back to his house. On such allegation, a charge memo was issued to the Second Respondent, who denied the same. An enquiry was ordered and the Enquiry Officer conducted the enquiry against the Second Respondent/delinquent and found him guilty of the

charges and also came to the conclusion that the charges were proved against him. Furthermore, a second show cause notice was issued to the Second Respondent. The Second Respondent submitted his explanation to the second show cause notice and ultimately, the Appellant/Transport Corporation passed an order dismissing the Second Respondent from service on 3/2/2003.

8. The Appellant/Transport Corporation filed Approval Petition No. 180 of 2003 on the file of the First Respondent/Joint Commissioner of Labour (Conciliation), Chennai and the First Respondent, on 12/4/2004, rejected the Approval Petition filed by the Appellant/Transport Corporation among other things observing that ''the Appellant had not complied with mandatory conditions of Section 33(2)(b) of the Industrial Disputes Act, 1947 and also on the ground that in an inquiry into the charges framed against the Second Respondent, a prima facie case was made out by the Appellant.

9. At this stage, this Court makes an useful reference to Section 33(2)(b) of the Industrial Disputes Act, 1947 which runs as follows:-

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 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

(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.

10. Also this Court makes a pertinent reference to the term ''wages'' defined in Section 2(rr) of the Industrial Disputes Act, 1947 which enjoins thus:-

Wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes -

(i). Such allowances (including dearness allowance) as the workman is for the time being entitled to:

(ii). the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grams or other articles;

(iii). any travelling concession;

(iv). any commission payable on the promotion of sale or business or both;

but does not include -

(a). any bonus;

(b). any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c). any gratuity payable on the termination of his service.

11. It is to be borne in mind that the term ''Dearness Allowance'' includes all allowances including Dearness Allowance to which a particular workman is entitled to receive at the relevant point of time. After all, ''Dearness Allowance'' is linked with price rise and at best, it is only an endeavour to compensate the loss in real wages, in the considered opinion of this Court. To put it differently, the term ''Dearness Allowance'' is an extra for additional payment made by an Employer to his Employees with a view to compensate them to a limited extent for the increase in cost of living, as opined by this Court.

12. It cannot be forgotten that in the present case that the Appellant/Employer ought to have paid a sum of Rs. 7,703.30 (Rupees Seven Thousand Seven Hundred and Three and paise Thirty only) as wages for one month to the Second Respondent when it dismissed him from service. Also that the Second Respondent was paid a sum of Rs. 7,661.90 (Rupees Seven Thousand Six Hundred and Sixty one and paise Ninety only) only through cheque, it was less than one month''s salary/wages payable to him. As such, it is crystal clear that the Appellant had not satisfied the essential condition of Section 33(2)(b) of the Industrial Disputes Act, at the time of dismissal of the Second Respondent.

13. It cannot be gain said that proviso to Section 33(2)(b) of the Industrial Disputes Act, 1947 is mandatory in character.

14. Per contra, the ingredients of Section 33(2)(b) of the Industrial Disputes Act are not directory in nature. Added further, the conditions specified in Section 33(2)(b) of the Industrial Disputes Act are to be essentially complied with. The penal provision is mandatory and the same admits of no exception in the considered opinion of this Court.

15. In this connection, this Court worth recalls and recollects the decision of the Honourable Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram

Gopal Sharma and Others, , wherein it is held as follows:-

Where an application is made u/s 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer, has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if the order of discharge or dismissal had never been continues to be in service as if the order of discharge or dismissal had never been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of the dismissal or discharge but that order remains incomplete and inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end dejure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed.

16. Also, in the decision Mahalakshmi Fibres and Industrial Ltd. Vs. Presiding Officer, Labour Court and Another, , it is observed and held as follows:-

Petition company impugned in this petition an order of the Labour Court which held its dismissal of respondent-workman not in conformity with the proviso to Section 33(2)(b) of the Industrial Disputes Act, 1947 and accordingly, refused to grant the approval sought by the petitioner under the said proviso. Petitioner''s challenge to the said order was threefold. First was the proviso did not require the dismissal, payment of one month wages and filing of approval application need not be simultaneous or part of the same transaction. The High Court observed the three things had to be part of the same transaction and the above contention of the petitioner was not tenable. The second was that the impugned order was perverse in holding that there was violation of principles of natural justice. The High Court pointed out this was a finding of fact made by the Labour Court and under Article 227 of the Constitution of India, the High Court could not upset pure findings of facts. Rejecting also the third contention of the petitioner, the High Court held the Labour Court could not in this case be said to have exceeded its jurisdiction u/s 33(2)(b).

17. Besides the above, in the decision of the Honourable Supreme Court in Cholan Roadways Limited Vs. G. Thirugnanasambandam, , it is laid down as follows:-

The jurisdiction of Industrial Tribunal u/s 33(2)(b) of the Industrial Disputes Act is a limited one and it cannot be concluded with the vast powers u/s 10 of the Industrial Disputes Act.

18. On a careful consideration of respective contentions and also this Court taking note of the facts and attendant circumstances of the present case, in right earnest

comes to an irresistible and inescapable conclusion that the two conditions of proviso to Clause (b) of Section 33(2) of the Industrial Disputes Act are to be satisfied by a party viz.,

(i). that the workman was paid one month''s wages

(ii). that the employer made an application for approval of his action to the appropriate authority.

19. However, in the instant case on hand, both the First Respondent and the Learned Single Judge, wile passing the orders in Approval Petition No. 180 of 2003 dated 12/4/2004 in the Order dated 7/2/2012 had come to a resultant conclusion that the ingredients of Section 33(2)(b) of the Industrial Disputes Act (in regard to the payment of one month wages) was not complied with by the Appellant. Also that, the Learned Single Judge in the Order dated 7/2/2012 in the Writ Petition had also observed that ''though the First Respondent held that the enquiry was held fairly and properly and the charges have been proved, the First Respondent was right in rejecting the Approval Petition on the ground that Section 33(2)(b) of the Act was not complied with. In effect, both the First Respondent as well as the Learned Single Judge had concurrently held that the ingredients of Section 33(2)(b) of the Industrial Disputes Act were not complied with. The said concurrent finding of fact arrived at by the First Respondent as well as the Learned Single Judge which in the considered opinion of this Court do not suffer from impropriety, material irregularity or patent illegality in the eye of law. Resultantly, the Writ Appeal fails. In the result, the Writ Appeal is dismissed, leaving the parties to bear their own costs. Consequently, the connected Miscellaneous Petition is also dismissed.