National Machinery Manufacturers, Ltd. Vs Vyas (P.D.) and Another

Court: Bombay High Court

Date of Decision: April 20, 1961

Acts Referred: Industrial Disputes Act, 1947 â€" Section 33A

Citation: (1961) 2 LLJ 274

Hon'ble Judges: Mody, J

Bench: Single Bench

Judgement

Mody, J.
This is a petition for a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, direction or order under

Article 226 of the Constitution against respondent who is the industrial tribunal under the Industrial Disputes Act, 1947 (hereinafter referred to as

the said Act), calling for the records of the case relating to the award dated 25 August 1960 and for quashing the said award. The-petitioner is a

company which manufactures machinery required for the textile Industry. Respondent 2 was in the employment of the petitioner as a watchman ac

the petitioner''s factory.

2. On or about 5 December 1959 the petitioner served upon respondent 2 a chargesheet charging him with misconduct under model standing

Order 22(d) which reads as follows:

theft, fraud or dishonesty in connexion with the employer''s business or property.

The works manager of the petitioner, one J. W. Small, thereafter held an inquiry in respect of the said charge against respondent 2. The inquiry

was over on 24 December 1959 and the said Small concluded it with the remarks:

the entire evidence and the examination and cross-examination of the witnesses is now over and the decision would be communicated to the

person concerned shortly.

One would expect that thereafter in normal course the decision of the inquiry would be communicated to respondent 2. No decision was however

communicated to respondent 2. The petitioner thereafter addressed its letter dated 2 January 1960, a copy whereof is part of Ex. A to the petition,

whereby the petitioner intimated to respondent 2 that the said charge sheet issued against respondent 2 was cancelled.

3. The petitioner also addressed to respondent 2 another letter of the same date, a copy whereof is also annexed as part of Ex. A to the petition.

By that letter the petitioner wrote that in accordance with the provision of model standing Order 21(1) respondent 2 was informed by that letter

that his services would stand terminated with effect from 3 January 1960 for the reason ""loss of confidence"" and that respondent 2 would be paid

one month''s wages in lieu of notice and wages in ilea of leave due to respondent 2. The reason why the said inquiry officer did not come to any

decision and why the petitioner addressed this second letter to respondent 2 has been stated in the petition, the same being that after the evidence

had been taken the inquiry officer intimated to the management that the evidence would not be sufficient or strong enough to Justify the conclusion

of guilt as having been established beyond doubt and to the hilt so as to justify dismissal with the sigma of theft against respondent 2 and that in the

circumstances and on the evidence, however, the management felt that there was a very strong suspicion or doubt against respondent 2 which

would make it Impossible for the management to have any confidence in respondent 2 particularly as he was a member of the watch and ward staff

and in charge of expensive and extremely valuable properties of the company with access to various departments of the factory. It is further stated

that the management felt that it was impossible to continue to keep respondent 2 in the said position any longer and the petitioner, therefore,

decided in the circumstances to terminate the employment of respondent 2 under the contract and the model standing orders which were

applicable being standing Order 21(1).

4. Thereupon respondent 2 filed a complaint before respondent 1 who, as already stated, constituted the industrial tribunal. That complaint was

filed under the provisions of Section 33A of the said Act. The complaint alleges that the termination of respondent 2''s services was in fact a

dismissal under the garb of termination and was merely an attempt to camouflage the dismissal order, that the dismissal was Illegal, that the

petitioner was under an obligation to have made an application to the tribunal u/s 33(2) of the said Act, that inasmuch as no such application for

approval had been made, there had been a violation of the provisions of the said Act and that, therefore, the petitioner was bound to reinstate

respondent 2 with all back-wages, continuity of service and suitable compensation for effecting the said illegal dismissal. A copy of the said

complaint is annexed as Ex. B to the petition. It is common ground, though it is not specifically stated in the petition itself, that the proceeding, being

Ref. (IT) No. 253 of 1959 in respect of an industrial dispute was pending between the petitioner and its workmen including respondent 2 at the

date of the petitioner''s said letter dated 2 January 1959 terminating respondent 2''s services as the watchman of the petitioner.

5. The petitioner filed before respondent 1 its written statement of defence against the said complaint. By that written statement the petitioner

denied that respondent had in fact been dismissed but under the garb of termination of his services. The petitioner reiterated that the petitioner had

lost confidence in respondent 2 and that it had terminated respondent 2''s services on that ground that it was discharge simpliciter, that the

provisions of Section 33(2)(6) of the said Act were therefore not applicable and that, therefore, the said complaint filed by respondent 2 u/s 33A

was not maintainable and respondent 1 had no jurisdiction in the matter.

6. In the matter of respondent 2''s said complaint respondent 1 have a hearing to the parties. At the said hearing also the petitioner pressed its

contention that respondent 1 had no jurisdiction because of the petitioner''s said contention that the termination of respondent 2''s services

amounted to a discharge simpliciter that, therefore, the petitioner was not required to apply for approval u/s 33(2)(b) of the said Act, that there

was no breach u/s 33, that, therefore, there was no complaint u/s 33A and that respondent 1 had no jurisdiction. Respondent 1 thereafter made his

award dated 25 August 1960, a copy whereof is annexed as Ex. D to the petition. Respondent 1 came to the conclusion that it was difficult to hold

that the said termination of respondent 2''s services was a simpliciter termination of services made bona fide in the petitioner''s ordinary course of

business. Respondent 1 held that the said action of the petitioner in terminating respondent 2''s services was nothing but an attempt to circumvent

the provisions contained in Section 33(2)(b) of the said Act, that the said action had originated on a charge of misconduct which had actually been

inquired into and that respondent 2 stood discharged by way of a punishment, whatever be the form or language in which the ultimate order of the

petitioner is couched. Respondent 1 came to the conclusion that the said action taken by the petitioner against respondent 2 was in reality by way

of a punishment for the alleged misconduct, that, therefore, It attracted the provision regarding approval laid down in Section 33(2)(b) of the sal

Act, and respondent 1 then proceeded to consider the matter of the Bald complaint on the basis that he did have jurisdiction to do BO.

Respondent 1 then came to the conclusion that not only had no case been established in respect of the said charge which had been levelled by the

petitioner against respondent 2 but that there was no room for any suspicion--much less for a reasonable suspicion--against him. Respondent 1

came to the further conclusion that there was nothing to justify the so-called loss of confidence alleged in the said discharge order and that

therefore the action taken could not be upheld and that respondent 2 was entitled to succeed. In the result respondent 1 by his said award directed

the petitioner to reinstate respondent 2 in his original post with all back-wages. Thereafter the petitioner filed this petition for quashing the said

award and this Court issued a rule in terms of prayer (a) of the petition.

7. At the hearing of the petition Mr. Phadke, the learned Counsel for the petitioner, on the basis of the averments contained in the petition, urged

three contentions:

(1) that the tribunal conferred jurisdiction upon itself by making an erroneous findings of a question of law, viz, whether the termination of

respondent 2"s services amounted to punishment for misconduct.

(2) while doing so, instead of requiring respondent 2, if he BO desired, to prove mala fides on the part of the petitioner, the tribunal proceeded on

the footing that it was the petitioner"s fluty to positively disprove mala fides, and

(3) that there is no clear finding of mala fides on the pare of the petitioner and such finding as has been made is based on no evidence whatsoever.

Mr. Phadke also urged another contention, viz., that there has been a re-appreciation on the part of the tribunal of the evidence before the inquiry

officer so as to arrive at the conclusion that there is no room for a suspicion--much less a reasonable suspicion--against the workman so as to

justify the loss of confidence. AS regards this last contention, Mr. Kamerkar, the learned Counsel for respondent 2, stated that this point has not

been taken in the petition and raised a preliminary objection that he would be prejudiced if the contention was allowed to be urged because on the

basis of the contentions contained in the petition his client decided not to file an affidavit in reply to the(petition. He stated that if this present

contention of Mr. Phadke had been incorporated in the petition, his client may have decided to file an affidavit in reply setting out therein all facts

which may be necessary or relevant to this contention. He pointed out, by way of an example, that his client would have pointed out that it was the

petitioner himself who invited the tribunal to look into the notes of the inquiry proceedings and urged that on the basis of that fact his client could

have urged that under those circumstances the present contention of Mr. Phadke is not open to the petitioner. It may, however, be stated that in

view of the conclusions which I have arrived at it will not be necessary to deal with any of these contentions of Mr. Phadke or the said preliminary

objection of Mr. Samerkar.

8. Only Sub-sections (1), (2) and (3) of Section 33 of the said Act are relevant and the same are as under:

33.(1) During the pendency of any conciliation proceedings before a conciliation officer or a board or of any proceeding before a labour court or

tribunal or national tribunal in respect of an industrial dispute, no employer shall--

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute the conditions of service

applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such

dispute, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceedings in respect of an industrial dispute, the employer may, in accordance with the standing orders

applicable to a workman concerned in such dispute,

(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 proceedings, or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, the 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.

(3) Notwithstanding anything contained in Sub-section (2), 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.

Explanation:--For the purposes of this Sub-section a ""protected workman"" in relation to an establishment means a workman, who, being an officer

of a registered trade union connected with the establishment, is recognized as such in accordance with rules made in this behalf.

Section 33A of the said Act provides as under:

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.

Respondent 1 made his Impugned award on the said complaint filed by respondent 2 u/s 33A. u/s 33A it would have been competent for

respondent 2 to file the complaint and respondent 1 would have had jurisdiction to entertain it only if on the facts of this case the petitioner had

contravened the provisions of Section 33. The provisions of Section 33 can apply only when conciliation proceedings in respect of an industrial

dispute are pending and it is common ground that such proceedings were pending in this case and that respondent 2 was a party to the same. It is

common ground and it is clear that Sub-section (1) did not apply because there was no alteration in the conditions of service of respondent 2 and,

therefore, Clause (a) did not apply and though there was a discharge or punishment the disputed question as to which of the two it was need not at

present be considered. It was not for any misconduct connected with the dispute because whatever be meant by "" misconduct "" the alleged

misconduct was not connected with the dispute and therefore Clause (b) also did not apply. Next it is common ground that what is relevant in this

case is the provision of Sub-section (2). It is again common ground and it is clear that Clause (a) thereof did not apply because there was no

alteration in the conditions of service of respondent 2. That leaves for consideration Clause lb) of Sub-section (2). If respondent 2 asserts that the.

provision of Clause (b) did not apply on the facts of this case and it has been so found in the impugned award, whereas on the other hand the

petitioner denies it. But before dealing with that controversy, it is clear--""and it is also common ground--that the proviso appearing after Clause (6)

in Sub-section (2) goes only with Clause (6) and not with Clause (a), because the proviso deals with the discharge or dismissal of a workman,

which can be only under Clause (6) and not under Clause (a). Therefore, Clause (h) has to be read together with a proviso. Now, Sub-section (2)

contains an enabling provision. It permits the employer to take certain action against his workmen. Each of Clauses (a) and (b) contemplates the

case of a workman who is a party to an industrial dispute in respect of with conciliation proceedings are pending. Clause (a) permits the employer

to alter the conditions of service of such a workman, provided it is in regard to a matter not connected with the dispute; Clause (6) permits an

employer to discharge or punish, whether by dismissal or otherwise such ft workman far any misconduct not connected with the dispute. That

permission contained in Clause (b) however is circumscribed by the proviso, which provides that if the action taken by the employer under Clause

(b) be by way of a discharge or dismissal but not any other action or punishment, the two conditions mentioned in the proviso must have been

complied with.

9. Now, the real point for determination in this petition is whether respondent 1, i.e., the tribunal, did or did not have jurisdiction, or in other words,

was there or was there not a contravention of Clause (b) read with the proviso of Sub-section (2). Respondent has held that he had jurisdiction on

the ground that there was violation of the second condition of the proviso as there was no approval and that approval was necessary as in reality

there was punishment for misconduct although it purported to be a discharge simpliciter. Mr. Kamerkar has, however, urged before me that

respondent 1 did have jurisdiction and that there has been violation of the said condition about approval not only on the said ground upheld by

respondent 1 but also on the ground that even if the be a discharge simpliciter, such approval was a necessary condition under Clause (6) read

with the proviso. Under the circumstances, I will first proceed to consider whether on a true construction the conditions mentioned in the proviso

apply to a case of discharge simpliciter, i.e., a discharge which is not by way of punishment for misconduct.

10. The said Clause (b) reads as follows:

for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, the workman.

Mr. Kamerkar urged that the words are ""discharge or punish,"" whether by dismissal or otherwise"" He urged--and quite rightly--that ""discharge

can be one of the model of punishment and would, therefore, be covered by the, words"" otherwise punish."" He further urged--and again quite

rightly--that as the word ""discharge"" has been used separately and is followed by the disjunctive or,"" the word ""discharge"" as used here must be

construed to cover cases of discharge which are not by way of punishment, as otherwise no separate meaning would be given to the word

discharge"" which has been specifically used and that word would be rendered redundant and superfluous. He argued that, therefore, Clause (b)

covers cases of discharge which may be otherwise than as punishment, including a case like the present one of discharge in exercise of the

employer''s contractual right of terminating the workman''s service which, of course, must be in accordance with the provisions of the relevant

standing orders. I will, however, ignore the latter aspect altogether as it is common ground in this case that there has been no non-compliance with

any standing order. Now, Mr. Phadke urged that Clause (b) permits an employer to discharge or punish the workman only "" for easy misconduct.

He urged that because a discharge under Clause (b) can be only for misconduct, ""discharge"" under that clause can mean only that which is by way

of punishment and not otherwise. He further urged--and it is indeed a well-recognized canon of construction of statutes--that the same word must

be given the same meaning in the same section and even in the same statute unless there is a compelling reason to the contrary. He urged that,

therefore, ""discharge"" as mentioned in the proviso must be construed to have the same meaning as in Clause (b), viz., discharge by way of

punishment and not otherwise.

11. Now, the said Clause (b) is not easy to construe. I will first examine Mr. Kamerkar''s contentions as regards its construction. Clause (b)

contemplates two types of action which the employer can take against his workman. He may either discharge him or he may punish him, the

punishment being dismissal or something otherwise than dismissal. Punishment otherwise than by dismissal would include discharge. If ""discharge

would be included in ""punish, whether by dismissal or otherwise ""why has"" discharge"" been separately used in Clause (b)1 The disjunctive ""or"" has

been used between the two categories, viz, ""discharge"" and punish, whether by dismissal or otherwise"" which in the context indicates that the two

are intended to be alternatives and mutually exclusive. It is a well-known canon of construction of statutes that a provision in a statute should be so

construed as not to render any word or phrase redundant or superfluous. Therefore, Clause (b) cannot be construed to as to render ""discharge

as a separate category redundant; nor is it even necessary to do so because there can be a ""discharge,"" e.g., in exercise of the contractual right of

terminating the workman''s services, which is not by way of punishment. Therefore, a discharge which is by way of punishment would fall under the

second category, viz., that of punishment, and a discharge which is otherwise than by way of punishment would fall under the first category, viz.,

that of discharge simpliciter. Let me now turn to Mr. Phadke''s contentions. He contended that inasmuch as under Clause (b) the discharge can be

only for misconduct, discharge must mean the same thing as removal from service as a punishment for misconduct, its effect being only less severe

than dismissal. According to him, as in Clause (6) ""discharge"" is correlated to misconduct it must necessarily import into it the elements of

punishment. In my opinion, this contention is unsound. Such a construction would render the word ""discharge"" redundant and such a construction

should, as far as possible, be avoided and it 1B possible to avoid rendering the word, ""discharge"" redundant and that too without rendering the

phrase ""for any misconduct"" redundant or superfluous. Mr. Phadke''s argument presupposes that for every misconduct of the workman any action

which his employer can and would take against him would be by way of punishment only. That presupposition is not justified. ""Misconduct"" in the

context of Clause (b) and with reference to the relationship between employer and workman means wrong or improper conduct or behaviour.

Why must the employer''s action in relation to his workman be only that of punishment and none other? For every misconduct of the workman the

employer need not or may not punish the workman. He may take such other action as may be open to him, as for example, by discharging him in

exercise of his contractual right to terminate his services. Therefore, though under Clause (b) ""discharge"" 1B to be for misconduct, ""discharge"" can

be otherwise than for punishment and it is in that sense that that word has been specifically used in Clause (b). So construed, no word or phrase in

Clause (6) is rendered redundant or superfluous and proper meaning given to the clause and all the words used therein.

12. Turning now to the proviso, the words used therein are ""discharged or dismissed."" Mr. Phadke has contended-and quite rightly--that the word

discharge"" here should not be given a meaning other than that given to it in Clause (b). On interpreting Clause (b) as before mentioned, it is clear

that the word ""discharge"" is being given the same meaning in the proviso as in Clause (b). Clause (b) covers, as already seen, both categories of

discharge. If ""discharge"" is by way of punishment, the same would fall under the words ""punish, whether by dismissal or otherwise,"" and if it is a

discharge otherwise than as punishment, it would fall under the first category, viz., discharge simpliciter. ""Discharge"" as used in the proviso has the

same meaning and covers both the said categories of discharges.

13. It is also to be noted that the interpretation placed as above on the word ""discharge"" read with the words ""for any misconduct"" in Clause (b)

will apply equally to the said word ""discharge"" read together with the words"" for any misconduct"" as occurring in Clause. (b) of Sub-section (1),

the only difference between the two sub-section a being that under Sub-section (2) the misconduct must be "" not connected with the dispute,

whereas under Sub-section (1) the misconduct must be "" connected with the dispute."" It is quite clear, therefore, that there is no inconsistency as

between the two Sub-sections (1) and (2).

14. As regards the said interpretation put by me on Clause (b) of Sub-section (2), there is another point which is relevant and should be

considered. Section 33 of the said Act as reproduced above is in its present form, but before it was amended in 1956 it reads as follows:

33. During the pendency of any conciliation proceedings before a tribunal in respect of any industrial dispute, no employer shall--

(a) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them, immediately before the

commencement of such proceedings; or

(b) discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute;

save with the express permission in writing of the conciliation officer, board or tribunal, as the case may be.

The peculiar aspect of Sub-section (2) of the present Section 33 is that it is cast in a permissive form because, shortly stated, it provides that the

employer may alter the conditions of service, or for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or

otherwise, the workman. The rights and obligations of the employer and the workman being governed by the contract between them, unless there

was a statutory limitation or bar against the exercise of such contractual rights, the employer would be entitled to exercise the same. Normally it

would, therefore, be that an enactment like the Industrial Disputes Act would merely enact a restriction or bar against the exercise of such

contractual rights. Conversely, therefore, if there was no restriction or bar specifically enacted by a statute it would not be necessary affirmatively

to give the permission of the kind given by Sub-section (2) of the present Section 33. Of courser there is an imposition of certain conditions by the

proviso to Clause (6) of Sub-section (2) but that does not detract from the fact that the"" main provision of Sub-section (2) is cast in a permissive

form. The reason for the same, however appears to be the existence of very wide limitations put on the rights of the employer by the said original

Section 33. Inasmuch as there was a very wide restriction under the said original clause, the legislature may have perhaps thought it necessary to

enact the said Sub-section (2) in . the present form so as to make it clear what was open to the employer. Now, the old Section 33 on an analysis

thereof prohibits the employer from doing three things, viz.:

(1) altering the conditions of service,

(2) discharging the workman, and

(3) punishing whether by dismissal or otherwise the workman.

There being no provision like ""for any misconduct connected with the dispute ""or"" for any misconduct not connected with the dispute"" which is to

be found in the present Section 33, ""discharge"" as mentioned in the original Section 33, would not be correlated to any misconduct and would,

therefore, Incontrovertibly cover the case of a discharge simpliciter. So far as I can see, the action which an employer can take against a workman

can be:

(i) alterations of the conditions of service,

(ii) discharge, or

(iii) punishment,

and no other and all of them were provided for by the old Section 33. There appears to be no reason why even when the legislature cast Sub-

section (2) of the present Section 33 in its present form, the legislature can be attributed the intention to omit to provide for the case of a discharge

simpliciter and provide only for the other two cases. This consideration also confirms the interpretation already put by me on the said two Clauses

(b) of Sub-sections (1) and (2) respectively of the present Section 33.

15. Moreover, the provision of Sub-section (3) of the present Section 33 confirms, the above interpretation put by me on the said Clause (6). The

explanation to Sub-section (3) defines ""protected workman."" But for the provision of Sub-section (3) even protected workmen would fall under

Sub-section (2). From the provision of Sub-section (3) it appears that the legislature intended to give protection to protected workmen which was

greater than that given to ordinary workmen by the two conditions laid down in the proviso to Clause (b) of Sub-section (2). Inasmuch as the

provision of Sub-section (3) was in that sense to be an exception to the permission granted by Sub-section (2), Sub-section (3) starts with the

words: ""Not with standing anything contained in Sub-section (2)."" It is, therefore, clear that the provision of Sub-section (3) is an exception to that

contained in Sub-section (2). Clause (6) of Sub-section (3) contains the provision about ""discharging or punishing, whether by dismissal or

otherwise "" which is the same as contained in Clause (b) of Sub-section (2). But Clause (6) of Sub-section (3) does not correlate such discharging

or punishing with any misconduct of the workman as is done in Clause (b) of Sub-section (2). Therefore, so far as Sub-section (3) is concerned,

discharging"" would unquestionably cover the case"" of discharge simpliciter, i.e., a discharge otherwise than by way of punishment. Unless

according to the legislature the case of such a discharge simpliciter was covered by Sub-section (2), there would not have been any necessity to

make an exception in Sub-section (3) in the case of a discharge simpliciter. The fact that an exception has been made by Sub-section (3) in the

case of a discharge simpliciter goes to suggest that the case of a discharge simpliciter was treated as falling under Sub-section (2). This

consideration by itself may perhaps not be sufficient for the purpose of construing that ""discharge simpliciter"" does fall under Sub-section (2) but it

certainly is a further factor to support that the above interpretation placed by me on Sub-section (2) is correct.

16. There is also yet another consideration Which supports the said conclusion that Sub-section (2) covers a case of discharge simpliciter. The two

conditions contained in the proviso to Sub-section (2) have to be fulfilled when a workman is discharged or dismissed. It is to be noted that

although Clause (b) of Sub-section (2) provides for punishment otherwise than by dismissal, no punishment other than dismissal, except of course

discharge, has been provided for by the proviso. The two cases for which the proviso does provide are cases of discharge and dismissal which

have one thing in common, viz., that both bring about a complete cessation of the relationship of employer and workman. It appears that even

though the legislature granted to the employer the permission provided for by Sub-section (2), the legislature intended that when such permission

was Utilized by the employer in a way which would bring about a complete cessation of the relationship of employer and workman, the two

conditions mentioned in the proviso ought to be fulfilled. If that was the intention of the legislature, as can be gathered from the said proviso, there

is no reason to suppose that a discharge simpliciter which also brings about a complete cessation of that nature was not intended to be included in

the proviso.

17. Now, the said various contentions urged by Mr. Phadke as set out by me in the beginning of my judgment were all based on the assumption

that Sub-section (2) of Section 33 does not apply to a case of discharge simpliciter but applies only in the case of discharge which is by way of

punishment. Inasmuch as I have reached the conclusion that Sub-section (2) covers also the case of a discharge simpliciter. It is now not necessary

for me to consider the said various contentions urged by Mr. Phadke or even the preliminary objection raised by Mr. Kamerkar. On the

interpretation placed by me on Clause (b) of Sub-section (2) and the proviso it is clear that the provisions of the proviso apply even to the case of

a discharge simpliciter and that it was therefore necessary for the petitioner as the employer to have applied for approval as mentioned in the

proviso. Inasmuch as such an applications or approval was admittedly not made, there was a contravention of the provisions of Section 33 and,

therefore, Section 33A applied and Respondent 1 had jurisdiction in the matter of the said complaint.

18. There was another contention which Mr. Phadke wanted to urge and that was Ã¯Â¿Â½hat respondent 1 has completely ignored material and

germane considerations when, deciding the question of relief to be granted to respondent 2, viz , in ordering the reinstatement of respondent 2. To

this contention Mr. Kamerkar raised a preliminary objection. Mr. Kamerkar pointed out that the petition does not set out what? were the material

and germane considerations referred to by Mr. Phadke, and that because of the absence of such an averment respondent 2 has not filed an

affidavit in reply to the petition. That objection of Mr. Kamerkar is true. But what is of greater importance is that in the very complaint which

respondent 2 filed before respondent 1, respondent 2 prayed for his reinstatement. The petitioner filed his written statement of defence before

respondent 1 wherein the petitioner challenged the jurisdiction of respondent 1 but never raised the contention that even if the tribunal came to the

conclusion that it did have jurisdiction the relief to be granted by it should not be by way of a reinstatement. As the petitioner did not agitate that

point before respondent 1 it self, in my opinion, it is not open to the petitioner to urge that contention at the stage of this petition.

19. Under the circumstances, I dismiss the petition and discharge the rule with costs, which in view of the fact that the hearing lasted for about 15

to 16 hours I affix at Rs. 550.