IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 31.12.2018

CORAM

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

W.P.No.34648 of 2018 &
W.M.P. No.40173 of 2018

Garment and Fashion Workers Union (Reg.No.3317/CNI)
Represented by its General Secretary,
Elizabeth Rani, F/48 years,
D/o.Late Savarimuthu,
51/5 Ground Floor, Yadaval Street,
Kalakalchavadi, Chrompet,
Chennai - 600 047. .. Petitioner

vs.

1. The Assistant Commissioner of Labour (Conciliation)-I,
SIPCOT Office Complex,
Irungattukkottai,
Sriperumbudur Taluk,
Kanchipuram District.

2. Celebrity Fashions Limited,
SDF-IV & C2, 3rd Main Road,
MEPZ/SEZ, Tambaram,
Chennai - 600 045. .. Respondents

Writ Petition has been filed under Article 226 of the Constitution of India to issue a Writ of Mandamus, to forbear the second respondent from taking any disciplinary action against members of the Petitioner Union included in the Annexure herewith or altering their service conditions in violation of Sec. 33 of the Industrial Disputes Act, till the disposal of conciliation proceedings in disputes referred under ID Nos.659 and 23 of 2017 pending before the first respondent.

For Petitioner : Ms.D.Geetha

For Respondents : Mr.D.Surya Narayanan
Additional Government Pleader

O R D E R

The petitioner has come forward with this Writ Petition to forbear the second respondent from taking any disciplinary action against the members of the Petitioner Union included in the Annexure herewith or altering their service conditions in violation of Section 33 of the Industrial Disputes Act, till the disposal of conciliation proceedings in disputes referred to under ID Nos.659 and 23 of 2017, pending before the first respondent.

2. According to the learned counsel for the petitioner, there is a dispute pending and that the Petitioner has to comply with Section 33(1) of the Industrial Disputes Act.

3. For the sake of convenience, Section 33 of the Industrial Disputes Act, 1947, is extracted hereunder:

> 33. 1 Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.
>
> (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [2] an arbitrator or] 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 proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [2] 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, or 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."

4. If the relief sought by the petitioner is granted, it is like putting the Cart before the horse. This Court cannot issue a direction as to to how the employer has to act. If there is any illegality, remedy is available to the petitioner as per the principles laid down by the Apex Court in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. V. Ram Gopal Sharma reported in 2002 (2) Supreme Court Cases 244, relevant paragraphs of which, read as under:

"13. The proviso to Section 33(2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further, any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs 1000 or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33 (2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed

on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained. An employer cannot be permitted to use the provision of Section 33 (2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 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 never had 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 his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure 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. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of the statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative

because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceedings by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial

dispute so that an employee can be saved from hardship of unemployment."

5. Though, the decision of the Apex Court in Jaipur Zila case (cited supra) has been rendered under the context of violation of Section 33(2)(b), the same principle will apply to cases falling under Section 33(1).

6. At this juncture, it is worth referring to the Apex Court decision in the case of Fabril Gasosa Vs. Labour Commissioner, reported in (1997) 3 SCC 150, relevant portion of which, reads as under:

"19. Section 33-C is in the nature of execution proceedings designed to recover the dues to the workmen. Vide Sections 33-C(1) and (2), the legislature has provided a speedy remedy to the workmen to have the benefits of a settlement or award which are due to them and are capable of being computed in terms of money, be recovered through the proceedings under those sub-sections. The distinction between sub-section (1) and sub-section (2) of Section 33-C lies mainly in the procedural aspect and not with any substantive rights of workmen as conferred by these two sub-sections. Sub-section (1) comes into play when on the application of a workman himself or any other person assigned by him in writing in this behalf or his assignee or heirs in case of his death, the appropriate Government is satisfied that the amounts so claimed are due and payable to that workman. On that satisfaction being arrived at, the Government can initiate action under this sub-section for recovery of the amount provided the amount is a determined one and requires no "adjudication". The appropriate Government does not have the power to determine the amount due to any workman under sub-section (1) and that determination can only be done by the labour court under sub-section (2) or in a reference under Section 10 (1) of the Act. Even after the determination is made by the labour court under sub-section (2) the amount so determined by the labour court, can be recovered through the summary and speedy procedure provided by sub-section (1). Sub-section (1) does not control or affect the ambit and operation of sub-section (2) which is wider in scope than sub-section (1). Besides

the rights conferred under Section 33-C(2) exist in addition to any other mode of recovery which the workman has under the law. An analysis of the scheme of Sections 33-C(1) and 33-C(2) shows that the difference between the two sub-sections is quite obvious. While the former sub-section deals with cases where money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A or V-B, sub-section (2) deals with cases where a workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money. Thus, where the amount due to the workmen, flowing from the obligations under a settlement, is predetermined and ascertained or can be arrived at by any arithmetical calculation or simpliciter verification and the only inquiry that is required to be made is whether it is due to the workmen or not, recourse to the summary proceedings under Section 33-C(1) of the Act is not only appropriate but also desirable to prevent harassment to the workmen. Sub-section (1) of Section 33-C entitles the workmen to apply to the appropriate Government for issuance of a certificate of recovery for any money due to them under an award or a settlement or under the provisions of Chapter V-A and the Government, if satisfied, that a specific sum is due to the workmen, is obliged to issue a certificate for the recovery of the amount due. After the requisite certificate is issued by the Government to the Collector, the Collector is under a statutory duty to recover the amounts due under the certificate issued to him. The procedure is aimed at providing a speedy, cheap and summary manner of recovery of the amount due, which the employer has wrongfully withheld. It, therefore, follows that where money due is on the basis of some amount predetermined like the VDA, the rate of which stands determined in terms of the settlement, an award or under Chapter V-A or V-B, and the period for which the arrears are claimed is also known, the case would be covered by sub-section (1) as only a calculation of the amount is required to be made.

22. The Division Bench of the Bombay High Court was therefore, right in holding that the recovery certificates issued by the Labour Commissioner for recovery of the amounts claimed by the workmen in the proceedings under Section 33-C(1) of the Act were perfectly valid, legally sound and suffered from no infirmity whatsoever. We do not find any merit in these appeals and consequently dismiss the same with costs. One set of fee only in the two appeals.

23. Before parting with the judgment, we would, however, like to clarify that the application which has been filed by the employees' union before the labour court under Section 33-C(2) of the Act for recovery of benefits/amounts, other than those claimed in their application under Section 33-C(1) of the Act shall be decided by the labour court on its own merits and the findings recorded by us hereinabove shall be considered as confined only to the recovery certificates issued by the Labour Commissioner under Section 33-C(1) of the Act, which are the subject-matter of the appeals hereby disposed of by us."

7. In a similar circumstance, this Court, by an order dated 29.12.2016 in W.P.No.44768 of 2016 in the case of Puthiya Jananayaga Thozilalar Munnani vs. Government of Tamil Nadu, has dismissed the said Writ Petition. Relevant paragraphs of the said decision are extracted hereunder:

"10. In view of the disputed question of fact, the remedy available to the workman is only before the Industrial Forum. Section 33 (1) of the I.D. Act deals with the conditions of service that no employer shall 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 proceedings. Apart from that, it also clearly states that for any misconduct connected with the dispute, the employer shall not, without permission, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute.

11. Section 33(2) of the I.D. Act also contemplates that the employer during the pendency of the Industrial dispute may, in accordance with the standing orders or if there are no standing orders in terms of contract whether express or implied, alter the service conditions of the workman in regard to any other matter not connected with the dispute, immediately before the commencement of the proceedings. It also contemplates that for any misconduct not connected with the dispute, 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.

12. A conjoint reading of both the above said provisions makes it clear that it is independent of each other, which clearly stipulates that, in case, the employer violates the mandatory provisions, then the employee can seek the relief. The employees cannot presume that the employer is going to violate the provisions and seek for an injunction restraining the Management from proceeding further or a direction not to alter the service conditions or to direct the Management to comply with the provisions of the Act. If there is no compliance by the employer, the rights are protected not only in terms of the I.D. Act, but also in view of the Constitution Bench decision in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (cited supra).

13. Section 33(3) of the I.D. Act clearly states that 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, by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings or by discharging or punishing, whether by dismissal or otherwise, such

protected workman, with the express permission in writing of the authority before which the proceeding is pending.

14. Section 33(4) of the I.D. Act deals with number of workmen to be recognised as protected workmen in every establishment. In case, the employer violates the mandatory provisions of Section 33, the Supreme Court in the case of Punjab Beverages (P) Ltd. Vs. Suresh Chand (1978 (2) SCC 144) has categorically held that if an employer contravenes the provisions, the employee can approach the forum by filing a petition under Section 33-A, and the authority will take up the complaint under Section 33-A as if it is an industrial dispute, and pass a final award. But the Supreme Court has watered down the said judgment in the case of Punjab Beverages (P) Ltd. (cited supra) and held that it is bad in law after 25 years in the year 2002, in the case of Jaipur Zila Sahakari Boomi Vikas Bank Ltd. (cited supra), wherein, it has been held that if the employer violates the mandatory provisions and passes any order, the employee need not approach the Labour forum, to get an illegal order set aside to get the benefits, as there would be no such order passed by the employer in the eye of law. When such wide protection is given by the Apex Court, which is still a law of the land, the employees, cannot by-pass the remedy available under the Industrial Disputes Act and seek the present prayer and this Court cannot direct the Management to comply with the provisions of the Industrial Disputes Act. The rights of the employees are protected under Section 33 and if there are any violations by an employer, it is open for the employees to approach the Industrial Forum.

15. As already observed, the issue in this case is a still-born-child. There is no guarantee about the nature of punishment that may be imposed, if the charges are established and it is also not sure as to whether the disciplinary action would be continued.

16. Apart from the fact that the Writ Petition is against the private Management, there is no iota of evidence that there is an imminent danger or the situation is monstrous that there is violation of statutory provisions of the Act driving the petitioner-Union to invoke the Writ Jurisdiction of this Court under Article 226 of the Constitution of India.

17. The contention of the petitioner-Union is that the employees have not been given an opportunity to defend in the enquiry, and even though the said request of opportunity is raised, the members of the petitioner-Union had not been given a fair chance cannot be gone into in the present Writ Petition.

18. Moreover, in this case, the employees concerned are facing charges and it appears from the records that an industrial dispute had been raised only after issuance of the charge-sheet and in order to defeat that, one can say that industrial dispute had been raised. In any event, even assuming that the industrial dispute is raised earlier or subsequently, it is open for the third respondent-Management to take appropriate action. Nothing prevented the petitioner-Union from raising an industrial dispute at any time and nothing prevented the employer to proceed against the employees at any point of time. Whether the Management has complied with the mandatory provisions of the Act or not, is a matter to be decided only in the said industrial dispute and this aspect of the matter cannot be gone into the Writ Petition under Article 226 of the Constitution of India. As disputed questions of fact are involved in this Writ Petition, and as the employees concerned are already facing charges, apart from the fact that they have been issued with charge-sheet and only subsequently, they have raised the industrial dispute, the Writ Petition is liable to be dismissed."

8. Now, Section 33-C has been amended, vesting the powers of recovery with the respective Labour Courts.

9. Under the guise of seeking the above relief, the petitioner is trying to stall the entire proceedings. Once the dispute is pending, the employer has to comply with Section 33 of the Industrial Disputes Act, 1947 and it is for the employer to decide as to how the provisions should be followed and he will be taking the risk of not following the provisions. The Court cannot give directions like the one sought for in this Writ Petition, as the workers are armed with the ratio laid down in the decisions rendered by the Apex Court in the cases of Jaipur Zila and Fabril Gasosa (cited supra).

10. If this kind of prayer is allowed, no employer would be allowed to proceed with departmental proceedings against the employee and everyone will approach the Conciliation Officer stating that the employer will have to comply with the provisions of Section 33 of the Industrial Disputes Act. Hence, if there is any illegality, it is open to the petitioner to proceed in accordance with law.

11. Registry is directed to mark a copy of this order to the Principal Secretary to Government, Labour and Employment Department, Chennai and to all the Labour Courts and Industrial Tribunals in the State of Tamil Nadu.

12. The Principal Secretary to Government, Labour and Employment Department, Chennai, is expected to circulate a copy of this order to all the Labour Officers/Deputy Commissioners of Labour/Joint Commissioners of Labour, who are dealing with disputes under the Industrial Disputes Act, 1947.

This Writ Petition is dismissed with the above directions and observations. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Deputy Registrar

//True copy//

Sub Assistant Registrar

vrc/aeb

To:

1. The Principal Secretary to Government,
   Labour & Employment Department,
   Fort ST George, Chennai - 9. (To take necessary steps)

2.The Assistant Commissioner of Labour (Conciliation)-I,
SIPCOT Office Complex,
Irungattukkottai,
Sriperumbudur Taluk,
Kanchipuram District.

Copy To : The Court Manager, High Court, Madras
(To take necessary steps)

+1cc to Mrs.D.Geetha, Advocate SR.No.434

W.P. No.34648 of 2018

EV(CO)
GMY(21/01/2019)