A S. GANAPATHY AND ORS.

v.

AIR INDIA AND ANR.

JUNE 16, 1993

B [MADAN MOHAN PUNCHHI AND S.C. AGRAWAL, JJ.]

Industrial Disputes Act, 1947 :

Section 33(2)(b) read with Section 2(rr)—Statutory wage— Computation of amount of one month's wages to be paid to discharged/dismissed C *workmen—Whether employer justified in reducing the amount by statutory tax deductions—Whether approval applications liable to be rejected on ground that deduction of tax resulted in payment of less than one month's wages—Order of discharge/termination requiring approval of competent authority—Nature and effect of order till approval.*

D **The appellants, employees of the respondent - Air India, who were awarded penalties of removal or dismissal by the respondent, as a result of the disciplinary proceedings, were paid one month's salary or wages, reducing it by a sum of Rs. 10 or 15, as deductible on account of monthly payment of tax on employment, imposed on salary and wage earners, under the provisions of** E **the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979. The respondent - Air India sought approval of its action from the National Industrial Tribunal, under Section 33(2) (b) of the Industrial Disputes Act, which was opposed by the appellants on the ground that there was short payment and accordingly it was not in terms of the mandatory provisions of Section 33(2) (b) of the Act. The Tribunal upheld the objection** F **and rejected the approval applications.**

In writ petitions preferred by the respondents, a Single Judge of the High Court held that the Tribunal was in error in refusing approval on the ground of short payment and remanded the matter to the Tribunal for decision on merits. Letters Patent Appeals preferred by the appellants were G **dismissed by a Division Bench of the High Court affirming the view of the Single Judge.**

In the appeals preferred by the employees, on behalf of the appellants it H **was contended that one month's wage statutorily required to be paid in terms**

of Section 33(2) (b) was a payment which did not partake the character of salary or wage, as the appellants were not salary or wage earners while getting that one month's wage, and therefore, not being salary or wage earners in that month, order of dismissal or termination of service having been passed against them, they were not in employment and hence not liable to pay tax, that the very basis of tax stood displaced and hence the deduction of tax at the snapped source rendered the payment or deposit of one month's wage deficient, contravening the mandatory provisions of Section 33(2) (b) of the Act.

It was contended on behalf of the respondent - Air India that the statutory deduction of tax payable under the Tax Act inhered in the payment of one month's wage, and in any case, the difference had been tendered before the Tribunal for payment to the workman, on objection raised, during the pendency of the approval proceedings.

Dismissing the appeals, this Court

HELD : 1. When an order of discharge or dismissal of a workman is incomplete and inchoate until its approval is obtained from the Tribunal, there is no effective termination of the relationship of the employer and the employee. Not only in a limited way that the relationship is snapped factually and one month's wage is given to the employee to soften the rigour of his factual unemployment, but the content and character of the wage would extendedly tend to remain the same so far as subjection to statutory tax deduction is concerned, being remuneration paid as understood in Section 2 (rr) of the Industrial Disputes Act, on the supposition that the terms of employment, expressed or implied, were fulfilled and the same was due as wages payable to the workman in respect of his employment, or of work done in such employment, even though he was not put to work.

2.1. Bare-facedly the inclusions and exclusions provided in Section 2(rr) do not refer to tax dues. Rather the provision is silent about statutory tax deductions. But it goes without saying; if there is a statutory compulsion to deduct, that compulsion would have an intrusive role to play, getting a proper fitment, as the law may warrant its effect, Section 33(2) (b) apart. The matter has to be viewed in this light.

2.2. In the instant case, the appellants were salary or wage earners, getting salaries or wages per month and from their wages, prior to their order

A of removal or dismissal, tax deductions under the West Bengal State Tax on Professions, Trades, Ceilings and Employments Act, 1979, were being made. It was the employer's liability to deduct and pay the tax on behalf of the employee under Section 4 of the Act. Failure to comply with the provisions of the Section exposed the respondent to penalties and prosecution under other provisions of the Act.

B

3.1. The proviso to Section 33(2) (b) mandates two steps, that unless the workman is paid wages for one month and an application as contemplated is made by the employer to the Tribunal for approval of his action, no such workman can be discharged or dismissed. The intention of the legislature in providing for such a contingency was to soften the rigour of unemployment C that will face the workman, against whom an order of discharge or dismissal has been passed.

3.2. By passing the order of discharge or dismissal *de-facto* relationship of employer and employee is ended, but not *de-jure*, for that could happen D when the Tribunal accords its approval. The employee thus gets factually unemployed from the date of the approval application in the sense that he is not called to work and is paid only a month's wage representing the succeeding month of his unemployment. The relationship of employer and employee is legally not terminated till approval of discharge or dismissal is given by the Tribunal. And this state of affairs was required to be ended within a period E of three months from the date of receipt of such application in terms of subsection (5) of Section 33, though the lapse of such period would not end the proceeding and such time was extendable by the Tribunal for reasons to be recorded in writing.

F 3.3. In this fluid state of affairs, the legal character of one month's wage would undergo a change depending on the result of the approval application. If the Tribunal were to refuse the approval, the inchoate and incomplete order of discharge or dismissal would end and the legal character of one month's wages would transform to be the same as before, from which statutory tax deduction could legitimately be made by the employer. In the event of G approval of the application by the Tribunal, the legal character of one month's wage would, on the other hand, be a wage without employment. In the given situation, if the Tribunal were to refuse approval solely on the ground that statutory tax deduction stands in its way to the grant of approval, it could legitimately make its order conditional on making good such pay- H ment. This is a field in which the interest of both parties has to be kept in view,

for the situation would be precarious for the employer if he were not to deduct tax under section 4 of the Tax Act and exposing him to the dangers of penalties and prosecution. If approval was to be rejected on merit and otherwise to be rejected for not making complete payment of one month wage, it would thus be just and proper to let the employer deduct the statutory tax deduction from that one month wage, since the relationship of employer and an employee has effectively not been terminated, to meet the eventuality, lest the approval application be dismissed on merit. On the other hand, it would be just and proper either for the employer on his own or on the asking of the Tribunal to let the sum representing statutory tax deduction be deposited in the Tribunal for payment to the workman in the event of the approval application being allowed. If these two situations can be saved in this manner there would, in no event, be a dismissal of the approval application for payment of wage subjected to statutory tax deduction.

3.4 Distinction would have to be drawn between statutory deductions like tax deductions and other deductions which the employer considers he can make. In either event, he takes the risk when making a deduction. In the case of statutory tax deductions, his justificatory burden is less, for he has the shelter of the tax law. The case of the other deductions would obviously be on different footing for he may not have any thrust of law. Those may purely be contractual. Those deductions may not be compulsive under any law. The employer makes the deduction in such cases at his peril.

3.5 In the instant case, there definitely arose a genuine claim to make the tax deduction and doing so the employer projected its case before the Tribunal in that angle. Not a paisa otherwise was kept back. Thus, in the facts and circumstances of the case the respondent was able to establish that its deliberate deduction representing the tax from one month's wage was not to shorten the wage and cause infraction of Section 33 (2) (b), but a compulsive deduction to fulfil a statutory obligation by the thrust of the Tax Act.

Syndicate Bank Ltd. v. *Ram Nath Bhat*, (1967-68) (XXXII) F.J.R. 490; *Tata Iron and Steel Co. Ltd.* v. *S.N. Modak*, [1963] 3 S.C.R. 411 and *Bharat Electronics Ltd., Bangalore* v. *Industrial Tribunal, Karnatak, Bangalore and Anr.*, [1990] 1 S.C.R. 971, relied on.

Muzaffarpur Electric Supply Co. v. *S.K. Dutta*, (1970) LLJ Vol.2 p.547; *Dinesh Khare* v. *Industrial Tribunal, Rajasthan*, (1982) LAB I.C. 517 and *Balmer Lawrie and Co. Ltd.* v. *Waman B. More*, [1981] 42 F.L.R. 272, distinguished.

A CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3134-36 of 1993.

From the Judgment and Order dated 12.7.91 of the Bombay High Court in Appeal Nos. 1308, 1309 and 1311 of 1987.

B M.K. Ramamurthy, Ms. Chandan Ramamurthi and M.A. Krishna Moorthy for the Appellants.

F.S. Nariman, Arun Jaitly, Lalit Bhasin, J.K. Das, Viplay Sharma and Vineet Kumar for the Respondents.

C The Judgment of the Court was delivered by

PUNCHHI, J. Leave to appeal granted.

The question which falls for determination in these appeals is whether in computing the amount of one month's wages, to be paid under section 33(2) (b) D of the Industrial Disputes Act, 1947, (hereafter referred to as the 'Act') the employer is justified in reducing the amount by statutory tax deductions?

The three appellants herein, in the period 1979-80 were in the employment of the respondent-Air India, and stationed at Calcutta. They individually suffered E disciplinary proceedings on the charges of some mis-conducts and having been found guilty were awarded penalties of removal or dismissal by the Air India, as due to each. It is common ground that the respondent-Air India, statutorily bound, applied to the National Industrial Tribunal, Bombay by means of separate approval applications under section 33(2) (b) of the Act to have its action approved. In terms of the said provision it paid to the appellants one month's salary or wages, reducing F it by sum of Rs. 10 or 15, as deductible on account of monthly payment of tax on employment, imposed on salary and wage earners, under the provisions of the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979 (hereafter referred to as 'the Tax Act'). The approval sought by the respondent-management was opposed by the appellants before the Tribunal, and though initially not part of the defence taken in the written statement, defence was G later set up by them that they had not been paid wages in terms of the mandatory provisions of section 33(2) (b) of the Act, as there was short payment. This put the respondent-management to alert and it laid before the Tribunal account which had gone on to work out the month's wages. It is common ground that the payment otherwise was proper but since it was short by 10 or 15 rupees, as respectively due H on account of tax payable under the Tax Act, the payment was termed as invalid.

The Tribunal sustaining the objection rejected the approval applications on that score alone and not on merits. In separate writ petitions by the respondents, the Bombay High Court interfered in the matter taking the view that the Tribunal was in error in refusing approval on the ground of the suggested short payment and hence breach of section 33 (2) (b) of the Act. The matter could not be finalised by the learned Single Judge and remand to the Tribunal was made for decision on merits. Letters Patent Appeals preferred by the respective appellants were dismissed by a division bench of the Bombay High Court affirming the view of the learned Single Judge. That is why the instant appeals.

The issue, on the face of it, is extremely narrow. But before we get into grips with it, let us take stock of the statutory provisions which come into action leading to the answer. The first in priority are the two provisions of the Act being section 2 (rr) defining 'wages' and section 33(2) (b) imposing the discipline, which are reproduced hereafter:

> "2. IN THIS ACT, UNLESS THERE IS ANYTHING REPUGNANT IN THE SUBJECT OR CONTEXT, -
>
> (rr) '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;
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> (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 foodgrains or other articles;
>
> (iii) any travelling concession;
>
> (iv) any commission payable on the promotion of sales or business or both;
>
> but does not include-
>
> (a) any bonus;

A (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"

B "SECTION 33 - CONDITIONS OF SERVICE, ETC. TO REMAIN UNCHANGED UNDER CERTAIN CIRCUMSTANCES DURING PENDENCY OF PROCEEDINGS

(1) xxxxxxxxxxx

C (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 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, -

D (a) xxxxxxxxx

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

E 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."

F Bare-facedly the inclusions and exclusions provided in section 2(rr) do not refer to tax dues. Rather the provision is silent about statutory tax deductions. But it goes without saying, if there is a statutory compulsion to deduct, that compulsion would have an intrusive role to play getting a proper fitment, as the law may warrant its effect, section 33 (2) (b) apart. The matter has to be viewed in this light.

G That the appellants were salary or wage earners, getting salaries or wages per month is not in dispute. It is also not in dispute that from their wages, prior to their order of removal or dismissal, tax deductions under the Tax Act were being made. There was no objection by the appellants to such deductions at that point of time. That it was the employers liability to deduct and pay the tax on behalf of the H employee under section 4 of the Act is also beyond dispute. Section 4 of the Tax

Act pointedly enjoins upon the employer to deduct the tax payable under the Act from the salary or wages payable to any person earning a salary or wage, before such salary or wage is paid to him and the employer has also been foisted with the liability to pay tax on behalf of salary or wage earner irrespective of the fact whether such deduction has been made or not when the salary or wage was paid to such person. In other words, the tax payable by the wage earner is deductible from his wage irrespective of the fact whether such deduction has been made or not, but the liability to pay tax is on the employer. Thus it cannot be denied that while the appellants were salary or wage earners, their wages or salary had to suffer & deduction of payment of tax at the hands of the respondent-employer. Failure to comply the provisions of section 4 of the Tax Act exposed the respondent to penalties and prosecution under other provisions of the Act, details of which need not be brought herein.

It was canvassed on behalf of the appellants that one month's wage statutorily required to be paid in terms of section 33(2) (b) is a payment which does not partake the character of salary or wage, as the appellants were not salary or age earners while getting that one month's wage Sequelly it was canvassed that not being salary or wage earners in that month, orders of dismissal or termination of service having been passed against them, they were not in employment and hence not liable to pay tax. It was asserted that the very basis of tax stood displaced and hence the deduction of tax at the snapped source rendered the payment or deposit of one month's wage deficient, contravening the mandatory provisions of section 33(2) (b) of the Act. On the other hand, it was contended *inter alia* on behalf of the respondent that the statutory deduction of tax payable under the Tax Act inhered in the payment of one month's wage, and in any case the difference had been tendered before the Tribunal for payment to the workmen, on objection raised, during the pendency of the approval proceedings. These are the contours of the dispute.

The proviso to section 33(2) (b) mandates two steps, that unless the workman is paid wages for one month and an application as contemplated is made by the employer to the Tribunal for approval of his action, no such workman can be discharged or dismissed. The intention of the legislature in providing for such a contingency is not far to seek and as was pointed out by this Court in the case of *Syndicate Bank Limited* v. *Ram Nath Bhat* [1967-68] (XXXII) FJR 490 at 497 was "to soften the rigour of unemployment that will face the workman, against whom an order of discharge or dismissal has been passed."

A three-judge bench decision, authored by Gajendragadkar, C.J. of this Court in *Tata Iron and Steel Co. Ltd.* v. *S.N. Modak* [1963] 3 SCR 411 at page 418,

A had the occasion to spell out the nature of the order of discharge or dismissal. It was ruled that such order being incomplete and inchoate until the approval is obtained, could not effectively terminate the relationship of the employer and the employee, as the question of the validity of the order would have to be gone into, and if approval is not accorded by the Tribunal the employer would be bound to treat the workmen concerned as its employee and pay him all the wages for the period even B though the employer subsequently could proceed to terminate the employee's services. Thus this Court's view always has been that relationship of employer and employee is not effectively terminated by the passing of the order of discharge or dismissal until approval thereto in terms of section 33(2) (b) is accorded by the Tribunal.

C

A three-judge bench of this Court in *Bharat Electronic Limited, Bangalore* v. *Industrial Tribunal, Karnatak, Bangalore and another*, [1990] 1 SCR 971 at pages 976-977 observed as follows :

> "One month's wages as thought and provided to be given are D conceptually for the month to follow, the month of unemployment and in the context wages for the month following the date of dismissal and not a repetitive wage of the month previous to the date of dismissal. If the converse is read in the context of the proviso to section 32(b), it inevitably would have to be read as double the wages earned in the month previous to the date of dismissal and that E would, in our view be, reading in the provision something which is not there, either expressly or impliedly."

Bharat Electronics was a case in which wages had been paid or offered to the workman in terms of section 33(2) (b), short of the night shift allowance, and this F Court took the view that from the date of dismissal or removal (factual though), the occasion to earn night shift allowance could not and did not arise. In order to earn night shift allowance the workman had to actually work in the night shift and for the purpose had to report for duty on being put to that shift. It was in this situation held that night shift allowance automatically did not form part of his wage as it was not such an allowance which flowed to him as entitlement not restricted to his G service.

In this extreme situation, the employee, in one sense, gets unemployed as he stands deprived of work with effect from the date of the application for approval, on which date his discharge of dismissal is factually effective. He stands paid his H month's wage from such date and this is a wage conceptually for the month

following, not double the wage for the month previous to the date of the application. This is the dicta of *Bharat Electronics* case (supra). In the other sense the order of discharge or dismissal is incomplete and inchoate, unless approved by the Tribunal and till approval is granted there is no effective break of the employer and employee relationship. This is the dictum of *Tata Iron & Steel Company's* case. So, if these two features are grasped, appreciated and blended, it would lead us to the understanding that by passing the order of discharge or dismissal *de-facto* relationship of employer and employee is ended, but not *de-jure*, for that could happen when the Tribunal accords its approval. The employee thus gets factually unemployed from the date of the approval application in the sense that he is not called to work and is paid only a month's wage representing the succeeding month of his unemployment. The relationship of employer and employee is legally not terminated till approval of discharge or dismissal is given by the Tribunal. And this state of affairs was required to be ended within a period of three months from the date of receipt of such application in terms of sub-section (5) of section 33, though the lapse of such period would not and the proceeding and such time was extendable by the Tribunal for reasons to be recorded in writing. Now in this fluid state of affairs, the legal character of one month's wage would undergo a change depending on the result of the approval application. If the Tribunal were to refuse the approval, the inchoate and incomplete order of discharge or dismissal would end and the legal character of one month's wages would transform to be the same as before, from which statutory tax deduction could legitimately be made by the *employer*. In the event of approval of the application by the Tribunal, the legal character of one month's wage would on the other hand be a wage without employment. In the given situation, if the Tribunal were to refuse approval solely on the ground that statutory tax deduction stands in its way to the grant of approval, it could legitimately make its order conditional on making good such payment. This is a field in which the interest of both parties has to be kept in view, for the situation would be precarious for the employer if he were not to deduct tax under section 4 of the Tax Act and exposing him to the dangers of penalties and prosecution. If approval was to be rejected on merit and otherwise to be rejected for not making complete payment of one month wage, it would thus be just and proper to let the employer deduct the statutory tax deduction from that one month wage, since the relationship of employer and an employee has effectively not been terminated, to meet the eventuality, lest the approval application be dismissed on merit. On the other hand it would be just and proper either for the employer on his own or on the asking of the Tribunal to let the sum representing statutory tax deduction be deposited in the Tribunal for payment to the workman in the event of the approval application being allowed. If these two situations can be saved in this manner there would, in no event be a dismissal of the approval application for payment of wage subjected to statutory tax deduction. Taken in this light one is to

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A view the deduction and the subsequent offer of the respondent to pay the tax deducted, and later deposited before the Tribunal, for payment to the workman. This payment was offered and deposited before the decision of the approval application at a time when the relationship of employer and employee had effectively not been terminated. Here distinction would have to be drawn between statutory deductions like tax deductions and other deductions which the employer B considers he can make. In either event, he takes the risk when making a deduction. In the case of statutory tax deductions, his justificatory burden is less, for he has the shelter of the tax law. The case of the other deductions would obviously be on different footing for he may not have any thrust of law. Those may purely be contractual. Those deductions may not be compulsive under any law. The employer makes the deduction in such cases at his peril. But here, in the present C situation, there definitely arose a genuine claim to make the tax deduction and doing so the employer projected its case before the Tribunal in that angle. Not a paisa otherwise was kept back. Thus in the facts and circumstances it appears to us that the respondent was able to establish that its deliberate deduction representing the tax from one month's wage was not to shorten the wage and cause infraction D of section 33(2) (b) but a compulsive deduction to fulfil a statutory obligation by the thrust of the Tax Act.

On this analysis and understanding the case of the Patna High Court in *Muzaffarpur Electric Supply Co.* v. *S.K. Dutta*, (1990) LLJ Vol.2 page 547 where when the loan and money-order commission was deducted from one month's E wages, it was held to be violative of section 33(2) (b) of the Act and the case of Rajasthan High Court in *Dinesh Khare* v. *Industrial Tribunal, Rajasthan*, (1982) LAB I.C. 517, decided by S.C. Agrawal, then on that bench, and who is happily now a member of this bench, disapproving the deduction of provident fund on the finding that those did not represent "emoluments earned by the workman concerned while on duty" within the meaning of section 2(rr) of the Employees F Provident Fund Act, being cases clearly distinguishable would not further the case of the appellants. Conversely a single bench decision of the Bombay High Court in *Balmer Lawrie and Co. Ltd.* v. *Waman B. More*, [1981] 42 F.L.R. 272 275 would also not further the case of the respondent because instantly no difficulty or inability to make the necessary calculations at a particular point of time arose which difficulty or inability get removed subsequently. The claim to tax deduction G was there to begin with and could subsist till the grant of the approval application, and such grant could be conditional on the payment back of the tax deduction. Adoption of this method should settle the question. We do not wish to enter upon other questions cropping up to determine the tax liability of the employer or the H employee in that period of one month.

At this juncture, it would add to our understanding if we reproduce a passage from *Bharat Electronics* case (supra). It is :

> "Before concluding the judgment the observations in *Syndicate Bank's* case, afore-quoted, are again to be borne in mind. In the facts and circumstances of this case the management paid to the workman a sum of Rs.607.90 as a month's salary "to soften the rigour of unemployment that will face the workman". How could a short payment of Rs. 12 be said to have lessened the softening of such rigour is thought stirring. Viewed in the context, there could genuinely be a dispute, as in the present case, as to whether a particular sum was due as wages. It is, of course, risky for the management to raise it as to pay even a paise less than the month's wages due under section 33(2) (b), would be fatal to its permission sought. But at the same time it needs to be clarified that it is for the management to establish, when questioned, that the sum paid to the workman under section 33(2) (b) represented full wages of the month following the date of discharge or dismissal, as conceived of in the provision and as interpreted by us in entwining the ratios in *Bennett Coleman's* case (supra) and *Dilbagh Rai Jarry's* case (supra) and adding something ourselves thereto."

Thus on principle and percept we go on to hold that when an order of discharge or dismissal of a workman is incomplete and inchoate until it's approval is obtained from the Tribunal, there is no effective termination of the relationship of the employer and the employee. Not only in a limited way that the relationship is snapped factually and one month's wage is given to the employee to soften the rigour of his factual unemployment, but the content and character of the wage would extendidly tend to remain the same so far as subjection to statutory tax deduction is concerned, being remuneration paid as understood in section 2(rr) of the Act, on the supposition that the terms of employment, expressed or implied, were fulfilled and the same was due as wages payable to the workman in respect of his employment, or of work done in such employment, even though he was not put to work.

Thus as a result, we find no cause to interfere in the judgment and order of the High Court. Accordingly we dismiss these appeals but leave the parties to bear their own costs.

N.P.V. Appeals dismissed.