D.KRISHNAN & ANR. A

v.

SPECIAL OFFICER, VELLORE CO-OPERATIVE SUGAR MILL & ANR.

(Civil Appeal No.3619 of 2008)

MAY 16, 2008 B

(TARUN CHATTERJEE AND HARJIT SINGH BEDI, JJ.)

Industrial Disputes Act, 1947 – s. 33 C(2) – Applicability of – Held: Proceedings u/s 33 C(2) are in nature of execution C *proceedings – Such proceedings presupposes some adjudication leading to determination of right, which has to be enforced – On facts, application u/s 33 C(2) filed for claiming overtime wages – There was no adjudication – Workman relied on documentary evidence consisting of punch time cards* D *and the same not supported by oral evidence by workmen – Claimants were prima-facie, Managers, thus, Labour Court had no jurisdiction in the matter – Claim u/s. 59 of Factories Act also not tenable as claimants were not authorized to work overtime by overtime slip – More so, order granting benefit of* E *overtime wages to identically placed employee not applicable – Thus, application u/s 33 C(2) not maintainable – Factories Act,1948 – s. 59.*

Appellants were appointed with the respondent's mill. They were put in charge of the employees canteen F **for different periods. Appellant claimed overtime wages for certain period as they had put in overtime work. Another employee J also raised a similar claim and the Labour Court allowed the same. However, the Labour Court did not give benefit to the appellants as given to J,** G **even though it had given an assurance to make payment. Aggrieved, appellants filed application u/s. 33C(2) of the Industrial Disputes Act,1947 for claiming overtime wages. The Labour Court allowed the application. It held that**

 H

A though an application u/s 33 C(2) of the Act was in the nature of an execution and a claim could not be determined thereunder, but could be determined u/s. 59 of the Factories Act 1948 which visualized payment of overtime wages; that the documents on record had proved the per-
B formance of overtime work; and that the award in the case of J had become final. Respondent-Management filed writ petition. High Court upheld the award of the Labour Court. In writ appeal, the High Court held that the reliance on documentary evidence by the Labour Court was not ten-
C able; that the punch time cards did not constitute proof as the burden of proof rested on the person claiming overtime; that it was the specific stand of the respondent that the workmen had never been authorized by anybody to work overtime; that proceedings u/s 33C(2) of the Act being in the nature of execution proceedings, could only
D be effective in case of a pre-existing right and as the claim of the respondent workmen was disputed, this was not a matter for decision under the said provision. The Writ appeal was allowed and the order of the Single Judge and the award of the Labour Court were quashed. Hence the
E present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The fact that proceedings under section 33 C(2) of the Industrial Disputes Act, 1947 are in the na-
F ture of execution proceedings is in no doubt, and such proceedings presuppose some adjudication leading to the determination of a right, which has to be enforced. Concededly there has been no such adjudication in the instant case. It will be seen that the reliance of the appel-
G lant-workmen is exclusively on documentary evidence placed on record which consisted primarily of the punch time cards and the representations that had been filed from time to time before the respondents. [Para 5] [1246-d,e]

1.2 The claim by the appellants has been disputed
H

by the respondents from the beginning and that the documents filed by the appellants themselves suggest that they were unsure of their own status. The representations filed as additional documents have been perused. A perusal of the letter from SKP-Special Officer shows that the first appellant was being posted as a Canteen Manager. The subsequent letters were all written by the first appellant identifying his post as that of Manager of the canteen and in the body of the last letter, a specific plea was made that amongst the several duties entrusted to him, he had to instruct 4 workers to come in the morning, to prepare breakfast and a complaint that on one particular day, a Clerk working under him had refused to follow his orders. Similar letters were written by the second appellant and they too are on the record as additional documents. Therefore, in the light of the categorical statements time and again in the very documents relied upon by the appellants in support of their case, that they were, prima-facie, Managers and it would, therefore, be beyond the jurisdiction of the Labour Court to determine their status in proceedings u/s. 33 C(2) of the Act. [Para 5] [1247-A-E]

1.3 The submission by the appellants that a pre-existing right could also emanate from a statute, in this case from s. 59 of the Factories Act, which provided for the payment of overtime wages and in this view of the matter, all that the Labour Court was called upon to do was to make a calculation of the amounts due to the appellants, cannot be accepted. The facts of the case are, however, not as clear cut and dried, as contended. The Division Bench observed that though section 59 of the Factories Act undoubtedly provides for extra payment as overtime wages, but according to Rule 78B of the Tamil Nadu Factories Rule, 1950, only an employee authorized to work overtime by an overtime slip would be entitled to claim an overtime allowance. The specific case of the respondent-Management is that no such slips had ever been issued.

Additionally, in the absence of any supporting oral evidence by the workmen which would also result in their cross-examination, a mere reliance on the documents filed by them is insufficient for determining the factual basis of the issues involved, in proceedings under Section 33-C(2) of the Act. [Para 7] [1249-B-F]

1.4 The submission that an order made by a Court in case of workman J was required to be made applicable to all those similarly circumstanced and as J, who was identically placed, had been granted the benefit of overtime wages by the Labour Court, the appellants too were entitled to the same relief can not be accepted on account of the lack of particulars with respect to J's matter. Thus, it is not possible to evaluate the matter as being identical on facts. [Para 8] [1249-G,H, 1250-A]

Chief Mining Engineer East India Coal Co. Ltd. vs. Rameshwar & Ors. **(1968) 1 SCR 140;** *Municipal Corporation of Delhi vs. Ganesh Razak & Anr.* **(1995) 1 SCC 235** *and State of U.P. & Anr. vs. Brijpal Singh* **(2005) 8 SCC 58;** *Damodar Valley Corporation vs. Workmen* **(1974) 3 SCC 57;** *State of Karnataka & Ors. vs. C. Lalitha* **(2006) 2 SCC 747 – referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3619 of 2008

From the final Judgment and Order dated 2.03.2005 of the High Court of Judicature at Madras in Writ Appeal Nos. 897 & 898 of 2004

Colin Gonsalves, Puja Sharma, Jyoti Mendiratta and Aagney Sail for the Appellants.

Dayan Krishnan, Nikhil Nayyar, Gautam Narayan and Samrat Singh for the Respondents.

HARJIT SINGH BEDI, J. 1. Leave granted.

2. Appellant Nos. 1 and 2 were appointed to the respon-

dent mill vide orders dated 4th April 1977 and 19th February 1979 respectively. Both were promoted to various posts in the course of their service and appellant No.2 was put in charge of the employees canteen in the year 1991 whereas appellant No.1 given the same charge in February 1996. The appellants claimed that as they had put in overtime work for a specific number of hours each day, they were entitled to overtime wages for the said period. They repeatedly made representations to the Labour Welfare Officer and to the employers claiming payment, and though an assurance was held out to them that as a similar claim by another employee, one Jayavelu, was pending before the Labour Court, the decision in that case would also be made applicable to their case. It appears that the Labour Court, in the meanwhile, rendered its decision in favour of Jayavelu and he was ordered to be paid his overtime wages which were in fact defrayed. Frustrated in their efforts to get the benefits given to Jayavelu, the appellants filed an application under section 33 C(2) of the Industrial Disputes Act, 1947 (hereinafter called the "Act") making a claim for overtime wages. The respondent submitted its counter and took a specific plea that the appellants had not been directed to do any overtime work and as a matter of fact they had never done so. It was also pleaded that Jayavelu's case had no similarity vis-à-vis the case of the appellants and that proceedings under section 33 C(2) being in the nature of execution proceedings, the Labour Court could not have, under this jurisdiction, determined the rights of the parties, as was required in the present case. In the written submissions filed on behalf of the respondents, a specific plea was also taken that the appellants were, in fact, Managers and not workmen as the salary that they were drawing was more than the limit prescribed under section 2(a) of the Act and the Labour Court for this additional reason as well, had no jurisdiction in the matter. The Labour Court in its award dated 24th May 2002 observed that only documentary evidence had been submitted by the parties and on an examination of the various documents on record, in particular the time cards produced by the appellants and the various representations made by them calling for

A overtime wages, held that the appellants had indeed worked overtime and were entitled to payment accordingly. The plea of the respondent Management that the appellants were, Managers and not workmen was repelled by observing that as the plea had not been taken in the written statement and only in the
B written submissions, it did not warrant acceptance. The Court also held that though an application under section 33 C(2) of the Act was in the nature of an execution and a determination of a claim could not be made thereunder, but as section 59 of the Factories Act 1948 provided for the payment of overtime wages
C and as the documents on record had proved the performance of overtime work, the behaviour of the Management was "reprehensible and was liable to be punished", more particularly, as the award in the case of Jayavelu had become final and had not been challenged. The application was accordingly allowed. The
D respondent Management thereupon challenged the award in the Madras High Court. The High Court in its judgment dated 8th December 2003, dismissed the writ petition thereby confirming the award of the Labour Court. The judgment of the learned Single Judge was challenged by way of a writ appeal before the Division Bench of the High Court. The High Court in
E its impugned judgment dated 2nd March 2005, observed that the reliance of the Labour Court on documentary evidence alone, and that too in a case of claim of overtime wages, was not tenable and that it was unusual on the part of the respondents (appellants herein), being workmen not to enter the witness box to
F substantiate their claim. The Division Bench also held that the punch time cards which formed the basis of their case did not constitute sufficient proof, as the burden of proof in such a matter rested on the person claiming overtime. The Division Bench also observed that the specific stand of the respondent was
G that the workmen had never been authorized by anybody to work overtime and for this additional reason, the claim must fail. The Court finally concluded that in the light of the settled position of law, proceedings under section 33 C(2) of the Act could only be effective in case of a pre-existing right and as the claim of
H the respondent workmen was disputed, this was not a matter

for decision under this provision. The writ appeal was accordingly allowed and the judgment of the learned Single Judge and the award of the Labour Court were quashed. The present appeal has been filed against this order of the High Court.

3. Mr. Colin Gonsalves, the learned senior counsel for the workmen-appellants, has submitted that though proceedings under Section 33 C(2) of the Act were indeed in the nature of execution proceedings but this provision also visualized some enquiry, be it a casual one, and as the Labour Court and the learned Single Judge of the High Court had taken a particular view on the evidence, the Division Bench ought to have stayed its hands and not taken a different view. It has been pleaded that there was a difference between the terminology of Sections 33 C(1) and section 33 C(2) inasmuch as section 33 C(1) dealt with money due to a workman from an employer under a settlement or award etc., whereas section 33 C(2) was much wider in its application and visualized an entitlement with respect to money even if a pre-existing right was created by a Statute and as in the present case, section 59 of the Factories Act visualized payment of overtime wages, a simple enquiry under section 33 C(2) was fully justified. In this connection, the learned counsel has placed reliance on *Chief Mining Engineer East India Coal Co.Ltd. vs. Rameshwar & Ors.* (1968) 1 SCR 140. He has also pleaded, that even assuming for a moment, that there was some evidence to raise a suspicion that the appellants were Managers and not workmen, the dominant purpose of their employment had to be seen and the dominant purpose being that of workmen, even if they were delegated some minor managerial activities, would not change the nature of their appointment. It was also submitted that all the judgments cited by the Division Bench pertained to cases where the workmen claimed "equal pay for equal work" and which did involve the determination of a right, but in the present case, keeping in view the provisions of Section 59 of the Factories Act, and the dominant purpose of the employment of the appellants, the aforesaid judgments were not applicable.

A 4. Mr. Dayan Krishnan, the learned counsel for the respondents has, however, disputed the claim of the appellants and has referred to the counter affidavit and the written submissions filed before the Labour Court. It has been contended that in order to raise a claim for overtime wages, it was essential that
B the overtime work should be authorized by a competent authority and no such authorization being on record, the claim under section 59 of the Factories Act was not tenable. It has also been pleaded that the proceedings under section 33 C(2) were in the nature of execution proceedings and no determination of a
C right could be made and for this submission the learned counsel has placed reliance on *Municipal Corporation of Delhi vs. Ganesh Razak & Anr. (1995) 1 SCC 235* and *State of U.P. & Anr. Vs. Brijpal Singh (2005) 8 SCC 58.*

5. We have considered the arguments advanced by the
D learned counsel for the parties. The fact that proceedings under Section 33 C(2) are in the nature of execution proceedings is in no doubt, and such proceedings presuppose some adjudication leading to the determination of a right, which has to be enforced. Concededly there has been no such adjudication in
E the present case. It will be seen that the reliance of the appellant-workmen is exclusively on documentary evidence placed on record which consisted primarily of the punch time cards and the representations that had been filed from time to time before the respondents. It is also true that the claim raised by
F the appellants had been hotly disputed by the respondents. The question that arises in this situation is whether reliance only on the documentary evidence was sufficient to prove the case. We are of the opinion that the reference to *Municipal Corporation's case (supra)* is completely misplaced as in that matter, the fact
G that different categories of workers were doing identical kind of work was virtually admitted but different scales of pay were nevertheless being paid to them. It is also relevant that oral evidence had been adduced by the workmen to supplement the documentary evidence and it was in that situation that the Court felt that an application under section 33 C(2) was maintainable.
H

We find that the claim by the appellants herein has been disputed from the beginning and that the documents filed by the appellants themselves suggest that they were unsure of their own status. We have also perused the representations which have been filed as additional documents. A perusal of the letter dated 10th February 1996 from S.Karuthiah Pandian, Special Officer shows that the appellant D.Krishnan was being posted as a Canteen Manager. The subsequent letters dated 20th May 1996, 20th January 1997, 20th February 1997, 15th April 1998 and 6th August 1998 were all written by the appellant D.Krishnan identifying his post as that of Manager of the canteen and in the body of the last letter, a specific plea has been made that amongst the several duties entrusted to him, he had to instruct 4 workers to come in the morning, to prepare breakfast and a complaint that on one particular day, one C. Uttharakumar, a Clerk working under him had refused to follow his orders. We also find similar letters written by the second appellant, K. Shanmugam and they too are on the record as additional documents. We are, therefore, of the opinion that in the light of the categorical statements time and again in the very documents relied upon by the appellants in support of their case, that they were, prima-facie, Managers and it would, therefore, be beyond the jurisdiction of the Labour Court to determine their status in proceedings under Section 33 C(2) of the Act.

6. In this view of the matter, we find that the judgment reported in *Municipal Corporation's case (supra)* was clearly applicable to the facts of the present case. In this case, it was observed that:

> "In these matters, the claim of the respondent-workmen who were all daily-rated/causal workers, to be paid wages at the same rate as the regular workers, had not been earlier settled by adjudication or recognition by the employer without which the stage for computation of that benefit could not reach. The workmen's claim of doing the same kind of work and their entitlement to be paid wages at the same rate as the regular workmen on the

principle of "equal pay for equal work" being disputed, without an adjudication of their dispute resulting in acceptance of their claim to this effect, there could be no occasion for computation of the benefit on that basis to attract Section 33-C(2). The mere fact that some other workmen are alleged to have made a similar claim by filing writ petitions under Article 32 of the Constitution is indicative of the need for adjudication of the claim of entitlement to the benefit before computation of such a benefit could be sought. Respondents' claim is not based on a prior adjudication made in the writ petitions filed by some other workmen upholding a similar claim which could be relied on as an adjudication enuring to the benefit of these respondents as well. The writ petitions by some other workmen to which some reference was casually made, particulars of which are not available in these matters, have, therefore, no relevance for the present purpose. It must, therefore, be held that the Labour Court as well as the High Court were in error in treating as maintainable the applications made under Section 33-C(2) of the Act by these respondents.

In *Brijpal Singh's case (supra),* this is what the Court had to say:

"It is well settled that the workman can proceed under Section 33-C(2) only after the Tribunal has adjudicated on a complaint under Section 33-A or on a reference under Section 10 that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman. This Court in the case of Punjab Beverages (P) Ltd. vs. Suresh Chand held that a proceeding under Section 33-C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. Proceeding further,

this Court held that the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer." A B

7. Mr. Gonsalves, has, however urged that a pre-existing right could also emanate from a statute, in this case from Section 59 of the Factories Act, which provided for the payment of overtime wages and in this view of the matter, all that the Labour Court was called upon to do was to make a calculation of the amounts due to the appellants. The facts of the case are, however, not as clear cut and dried, as has been contended. The Division Bench has observed that though section 59 of the Factories Act undoubtedly provided for extra payment as overtime wages, but according to Rule 78B of the Tamil Nadu Factories Rule, 1950, only an employee authorized to work overtime by an overtime slip would be entitled to claim an overtime allowance. The specific case of the respondent-Management, which has not been contested by the appellants even during the course of the arguments before us, is that no such slips had ever been issued. Additionally, we are of the opinion that in the absence of any supporting oral evidence by the workmen which would also result in their cross-examination, a mere reliance on the documents filed by them is insufficient for determining the factual basis of the issues involved, in proceedings under Section 33-C(2) of the Act. In this view of the matter, Mr. Gonsalves's argument based on *Rameshwar's case (supra)* or the scope and ambit of Section 33 C(1) vis-à-vis Section 33 C(2), is also unacceptable. C D E F

8. Mr. Gonsalves has finally submitted that in the light of the judgment of this Court in *Damodar Valley Corporation vs. Workmen (1974) 3 SCC 57* and *State of Karnataka & Ors. vs. C.Lalitha (2006) 2 SCC 747,* an order made by a Court was required to be made applicable to all those similarly circumstanced and as Jayavelu, who was identically placed, had been G H

A granted the benefit of overtime wages by the Labour Court, the appellants too were entitled to the same relief. This submission is however not acceptable on account of the lack of particulars with respect to Jayavelu's matter. It is, thus, not possible to evaluate the matter as being identical on facts. We, B thus, find no merit in the appeal. It is accordingly dismissed, with no order as to costs.

N.J. Appeal dismissed