

(2010) 04 DEL CK 0288
In the Delhi High Court
Case No : WP (C) No. 15211 of 2004

All India Women's Conference

APPELLANT

Vs

Sh. Raj Karan and Another

RESPONDENT

Date of Decision : 05-04-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 17A, 19(4), 2, 23

Citation : (2010) 170 DLT 314 : (2010) 126 FLR 858 : (2010) 4 LLJ 467 :
(2010) 3 SLR 252

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Sudhir Sharma, for the Appellant; Sanjeev Kohli, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—Both these writ petitions raise a common question of law i.e. whether the provisions of Section 33 of the I.D. Act prohibiting the employer "During the pendency of any conciliation proceedings before a Conciliation Officer or a Board or of any proceeding before an Arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute" from discharging or dismissing a workman save with the express permission/approval of the Conciliation Officer or Arbitrator or Labour court or Tribunal before whom the proceedings are pending, apply to a proceeding u/s 36A of the Act.

2. The respondents workmen in both these writ petitions were employed with the petitioner "All India Women's Conference". Both the workmen were discharged after holding disciplinary proceedings. On dispute being raised by both workmen, the same was referred to the Labour Court. The Labour Court vide award dated 12th January, 2004, on identical terms, in both the cases, answered the reference by holding that the termination of service of workmen in both the cases is illegal for the reason of the same being without obtaining the permission u/s 33(2)(b) of the Act.

3. The Labour Court in both the awards has merely mentioned that ID. No. 483/1998 between the petitioner and its workmen was pending at the time when

the order of dismissal of workmen was made. The award does not discuss the nature of the said ID. No. 483/1998. The petitioner has in the writ petitions filed before this Court stated that ID. No. 483/1998 was in fact not an industrial dispute but a reference u/s 36A of the Act. It is the contention of the petitioner that the petitioner was not required to obtain approval u/s 33(2)(b) of its action of dismissal/discharge of workmen in both the cases for the reason of pendency of reference aforesaid u/s 36A of the Act numbered as I.D. No. 483/1998. Reliance in this regard is placed on a Division Bench judgment of the Patna High Court in Management of Sendra Bansjora Colliery Co. (Pr.) Ltd. Vs. Shantilal M. Bhatt and Another, holding that a reference made u/s 36A of the Act is not a proceeding "in respect of an industrial dispute" within the meaning of Section 33(1) or Section 33(3) of the Act. It was further held that the legal test for judging whether a reference is "in respect of an industrial dispute" is whether the reference is substantially or in its true nature and character a reference with regard to an industrial dispute." The reference u/s 36A in that case as to the interpretation of the award was held to be not an industrial dispute. The counsel for the petitioner has rested his case solely on the said judgment.

4. The respondent workman in WP(C) No. 15211/2004 died during the pendency of the writ petition before this Court and his legal heirs were substituted. The counsel appearing for the legal heirs in the said writ petition and for the workman in WP(C) No. 15223/2004 at the time of hearing stated that he had no instructions and did not address any arguments on the writ petitions. Order was reserved after hearing the counsel for the petitioner only.

5. Section 36A enables the Appropriate Government to, if of the opinion that any difficulty or doubt arises as to the interpretation of any provision of an award or settlement, refer the question to such Labour Court, Tribunal or National Tribunal as it may think fit. Such Labour Court/Tribunal to which the question is referred is mandated to, after giving the parties an opportunity of being heard, decide such question and its decision is final and binding on all such parties.

6. The prohibition in Section 33, as aforesaid is only attracted when a proceeding "in respect of an industrial dispute" is pending. "Industrial dispute" is defined in Section 2(k) of the Act as meaning, "any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

7. The counsel for the petitioner has handed over a copy of the award dated 21st February, 2007 in I.D. No. 483/1998 (supra) which is informed to have been re-numbered as I.D. No. 319/06/98. A perusal of the same shows that the reference u/s 36A there-under was as under:

Whether the workmen are entitled to 10% of the basic pay as special pay every year or it is to be given only once and thereafter 10% of the Special pay only in

terms of stipulation of Clause 1(a) of the settlement dated 24.10.97 and what directions are necessary in this respect?

The said award further records, that in 1997 workers in the service of the petitioner had made certain demands regarding their conditions of service and filed a statement of claim before the Conciliation Officer; during the course of conciliation proceedings, a settlement dated 24th October, 1997 was arrived at and under which the petitioner agreed to pay to each workman a special pay equal to 10% of the basic pay w.e.f. 1st April, 1997 onwards and to treat such special pay as basic pay for the purpose of calculating allowances etc; though consequently the petitioner gave effect to the said settlement, however its workers sought to place a different interpretation on the said settlement and which placed a heavy burden on the petitioner and which the petitioner was unwilling to bear; the said difference between the petitioner and its workmen led to the reference u/s 36A being made. The said award further records that though the workmen had filed their affidavits but the petitioner failed to cross examine them. The Labour Court after hearing the counsel for both the parties, gave its interpretation of the settlement agreement.

8. The question thus for consideration is, whether the proceedings aforesaid before the Labour Court, admittedly pending on the date of discharge/dismissal of workmen, were a proceeding in respect of an "industrial dispute" within the meaning of Section 33 of the Act. If they were, then approval u/s 33(2)(b) having admittedly not been taken, the effect thereof on the industrial dispute referred in each case, will have to be seen. However, if this Court finds that the proceedings u/s 36A were not in respect of an industrial dispute and Section 33 was not attracted, then the award will have to be quashed and it will have to be remanded to the Labour Court for adjudication of the dispute of termination.

9. The reference u/s 36A has to arise out of a difference, difficulty or doubt which may exist as to the interpretation of an award or settlement. Such difference, difficulty or doubt as to the interpretation of an award or settlement has to necessarily emanate from a difference between the parties thereto. The Appropriate Government has not been empowered to interpret the award or settlement, save u/s 17A & Section 19(4) and both of which are neither attracted nor result in a reference u/s 36A. Thus, there is no possibility of a reference u/s 36A suo moto by the Appropriate Government. Such reference has necessarily to be at the instance of differing parties to the award or settlement. Such difference or difficulty or doubt as to the interpretation of an award or settlement would be an industrial dispute within the meaning of Section 2(k) of the Act. It is thus difficult to fathom as to how a proceeding before the Labour Court, on a reference u/s 36A, cannot be "in respect of an industrial dispute." Whenever a dispute or a difference arises between an employer and an employee, the same upon failure of the conciliation is required to be referred for adjudication u/s 10 of the Act. However when such dispute or difference emanates as to the interpretation of an award or a settlement, the mechanism provided, instead of

Section 10, is of Section 36A. The question which arises is as to whether there is any rationale for excluding the applicability of Section 33 from a proceeding u/s 36A of the Act. I am unable to find any and, with respect am unable to agree with the Division Bench of the Patna High Court.

10. Further research shows that a five Judge Bench of the Supreme Court in *The Central Bank of India Ltd. Vs. P.S. Rajagopalan etc.*, held that generally the power u/s 36A is invoked when the employer and his employee are not agreed as to the interpretation of any award or settlement and the Appropriate Government is satisfied that a difficulty or doubt has arisen in regard to any provision in the award or settlement. It was further clarified that Section 36A is not concerned with implementation or execution of the award and Section 36A deals merely with a question of interpretation of the award where "a dispute arises in that behalf between the workmen and the employer and the Appropriate Government is satisfied that the dispute deserves to be resolved by reference u/s 36A." What follows from this judgment also is that a reference u/s 36A is essentially in respect of an industrial dispute.

11. The scope of Section 36A was also gone into *The Kirloskar Oil Engines Ltd., Kirkee, Poona Vs. The Workmen and Others*, . It was held that a claim for modification of the award is outside the ambit of Section 36A. A proceeding contemplated by Section 36A was held to be not a proceeding intended to enable the Tribunal to review or modify its own orders but intended to enable the Tribunal only to clarify the provisions of its award where a difficulty or doubt arises about the interpretation of the provisions.

12. Yet again in *Ballarpur Collieries Co. Vs. The Presiding Officer, C.G.I.T., Dhanbad and Another*, the question was of the applicability of Section 23(b) of the Act during the pendency of a proceeding u/s 36A of the Act. Section 23(b) prohibits the workmen from going on strike in breach of a contract, "during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal". The Supreme Court held that the proceeding u/s 36A for removing difficulties or doubts that have arisen as to the interpretation of any provision of the award must be construed to have the effect of "reviving those earlier proceedings for the limited purpose of considering the removal of such difficulty or doubt." It was held that it is only by virtually reopening the proceedings of the earlier reference that the purpose and object of correct interpretation of that Award and of the removal of difficulties or doubts arising therefrom could be achieved. The legal effect of reference u/s 36A was held to be to reopen the earlier reference proceedings which culminated in the Award, though only for the limited purpose of the interpretation of the provisions of that Award in respect of such difficulties or doubts as required removal. Holding such to be the scope of Section 36A, it was held that a proceeding u/s 36A is a continuation of the proceedings culminating in the award and that being so, the bar of Section 23(b) was held to be attracted.

13. In my view the judgment of the Division bench of the Patna High Court with

which I have respectfully disagreed herein above, cannot also stand in the light of the judgment of the Supreme Court in Ballarpur Collieries Co. (supra). What has been held by the Supreme Court in Ballarpur Collieries Co. qua Section 23(b) of the Act, notwithstanding the difference in language u/s 33 and in Section 23(b), applies equally to Section 33 also. The scope of jurisdiction of the Tribunal u/s 33(2)(b) is only to oversee the dismissal to ensure that no unfair labour practice or victimization has been practiced. If the procedure of fair hearing has been observed and a prima facie case for dismissal is made out the approval has to be granted. The jurisdiction of the Tribunal/Labour Court u/s 33(2)(b) cannot be wider than this. Reference in this regard may be made to Lalla Ram Vs. Management of D.C.M. Chemical Works Ltd. and Another, and Cholan Roadways Limited Vs. G. Thirugnanasambandam, There is no rationale nexus for discriminating between disputes emanating from an award/settlement and other disputes and to provide protection of Section 33 to the workmen, disputes raised by whom do not emanate from an award or a settlement and to deprive the others whose dispute emanate from an award or settlement from the protection of Section 33.

14. It may also be noticed that a dispute arisen from an award or a settlement is really a fresh cause of action and is a new dispute. It is only for the sake of expedience that a different procedure has been prescribed therefor. In the present case also it will be seen that the parties were already before the Conciliation Officer when the settlement agreement was arrived at. It is only due to the said settlement agreement that no further steps were required before the Conciliation Officer. However, a dispute as to interpretation of a clause of settlement agreement having arisen, in terms of the judgment in Ballarpur Collieries Co., the conciliation proceedings stood revived and reference with respect whereto was made u/s 36A.

15. Though reference to the scope of Section 36A is also found in a recent judgment of the Division Bench of the Bombay High Court in Pioneer Embroideries Ltd. Vs. Prithvi Singh and Others, but the same does not take any different view from the judgment of the Supreme Court in Central Bank of India (supra).

16. I find that a Single Judge of the Punjab High Court in Rakesh Chander Vs. Union of India (UOI) and Others, has also taken a view that if there is a breach of the settlement or there is any disagreement/dispute regarding the interpretation of the settlement, the same has to be referred as industrial dispute u/s 36A of the Act.

17. I find that the Industrial Tribunal, Dhanbad has in Deodhari v. Chief Mining Engineer East Indian Coal Co. Ltd. 1963 (6) FLR 280 held that it cannot be said that with the making of the award or settlement the industrial dispute ends and therefore there can be no industrial dispute thereafter; Section 36A itself contemplates such a dispute which arises after the award or settlement. It was held that for deciding whether a proceeding u/s 36A is in respect of industrial

dispute or not, Section 10 is irrelevant. The reference u/s 36A was held to be an industrial dispute.

18. The provisions of Section 33 are thus found applicable to a proceeding u/s 36A of the Act. However, I am of the opinion that the matter will still have to be remanded to the Labour Court. The Labour Court has clearly erred in abruptly short circuiting the procedure merely for the reason of the provision of Section 33(2)(b) having not been obtained. The Labour Court, in a reference u/s 10, even if the permission u/s 33(2)(b) had not been taken, was required to adjudicate the dispute raised by workmen of the validity of the action of petitioner of dismissal of respondents workmen. The Supreme Court in Dharampal Vs. National Engg. Inds. Ltd. and Another, held that in a proceedings u/s 33(2)(b) only a prima facie view has to be taken and which would ordinarily not been interfered with in a writ proceeding and the appropriate course for the workman is to invoke Section 10 to work out his rights. The Labour court is still required to return a finding as to whether the respondents workmen were guilty of misconduct alleged and if so, whether the punishment meted out to them of dismissal was justified. The effect of non compliance of Section 33 would be but one facet of the decision. In this regard, I may notice that I have today in judgment in WP(C) 9632/2003 titled as DTC v. Rishi Prakash held that if an industrial dispute is raised by a workman of his dismissal, and the same is decided against him, he cannot make decision in such dispute redundant by contending that approval u/s 33(2)(b) was required to be taken and having not been taken, he continues to be in employment, relying on Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, . The Act provides consequences for such failure of the employer to take permission/approval u/s 33 and such consequences do not include the consequence of disposal of the reference on the dispute raise by workmen in such summary manner.

19. Thus while holding that the provisions of Section 33 are applicable to a proceedings u/s 36A of the Act, the writ petitions are disposed of by remanding the disputes to the Labour Court to answer the reference made to them on merits.

20. Considering that this Court has differed from the judgment of Division Bench of Patna High Court on the basis of which the petitioner may have been advised that approval u/s 33(2)(b) is not required and further finding that except for the Patna judgment there was no pronouncement of any High Court on the subject, liberty is also granted to the petitioner to apply now u/s 33(2)(b).

No order as to costs.