
(2008) 06 BOM CK 0145

In the Bombay High Court

Case No : Writ Petition No. 1317 of 2005

Brajesh Kumar Sharma

APPELLANT

Vs

Novarties India Ltd.

RESPONDENT

Date of Decision : 10-06-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10(1), 12(5), 31(1), 33, 33(1)

Citation : (2008) 6 BomCR 93

Hon'ble Judges : Dharmadhikari S.C., J

Bench : Single Bench

Advocate : N.D. Buch and Shailesh More, for the Appellant; J.D. Cama and R.J. Cama, Pallavi Dedhia, instructed by S. Udeshi and Co., for the Respondent

Judgement

Dharmadhikari S.C., J.—This petition was admitted on 27th June 2005 and the hearing was expedited. Accordingly, it was placed for hearing and final disposal before me.

2. By this petition under Article 226 of the Constitution of India, the petitioner is challenging the judgment/award dated 23rd November, 2004 delivered by Member Industrial Tribunal, Mumbai in Complaint (I.T.) No. 2 of 1996. The complaint was filed by the petitioner in the Industrial Tribunal invoking jurisdiction of the said Tribunal u/s 33-A of the Industrial Disputes Act, 1947 (I.D. Act for short).

3. The petitioner is original complainant and the predecessor of the respondent before this Court, M/s. Sandoz (India) Ltd. was the original respondent/opponent.

4. In the complaint, the petitioner alleged that he is an employee of the company since 1983. He is working as Medical Representative at Agra. He was working at that location for several years.

5. In para 2 of the complaint, it is stated that the petitioner is a member of the Association of Chemical Workers (A.C.W.), a Trade Union registered under the

Trade Unions Act, 1926 having its registered office at Mumbai. It is an Association representing the workmen of the company at its factory at Kolshet, Thane and its head office at Worli for past several years. It has entered into long term settlements governing the terms and conditions of the workmen as well as medical representatives. It is stated by the petitioner that he is governed by the terms and conditions of the last settlement dated 8th August, 1990. Though the settlement expired on 30th June 1992, the company refused to negotiate and settle the charter of demands submitted on behalf of the medical representatives, by A.C.W. Instead, it demanded that the medical representatives first resign from this association and accept unilateral service conditions which would be imposed by the company. That converted the employment into contractual service.

6. It is stated in para 3 that when the charter of demands were not being negotiated and settled, ultimately, the association called for intervention of Labour Commissioner, Mumbai. The office of Commissioner of Labour called parties with a view to settle the demands amicably but due to the approach of the company, no settlement could be arrived at. A failure report was thus forwarded by the Conciliation Officer to the Government. As a result of the failure report, by an order dated 25th September 1995, the Government of Maharashtra referred for adjudication the demands which have been raised by the Association.

7. It is pertinent to mention that this complaint u/s 33-A of I.D. Act was filed by the petitioner in Ref. I.T. No. 55 of 1995. A copy of the order/terms of reference is annexed to this petition. The terms clearly record that the Government of Maharashtra after considering the report of the Conciliation Officer is satisfied that a case is made out for referring the dispute to an Industrial Tribunal in exercise of powers conferred by Section 10(1)(d) of the I.D. Act read with Section 12(5) thereof. Thus, the Government referred the dispute for adjudication to the Industrial Tribunal. The order of reference has a schedule appended to it which contains the demands. The demands are on behalf of the Sales or Medical Representatives and they claim permanency, wage scale adjustments, service enactments, D.A., leave benefits, paid holidays, H.R.A. and other allowances so also benefits etc. Demand No. 20 refers to Transfers. The same is reproduced hereinbelow:

Demand No. 20. Transfers:- Except mutual transfers with consent of concerned sales and medical representatives, no other transfers shall be done.

7. It is this demand which is referred to in para 3 of the complaint of petitioner and he states that this is how he is concerned with the said reference.

8. The complaint then alleges that the company on noticing that the demands are likely to be referred for adjudication exercised pressure on the medical/sales representatives to resign from the Association and sign unilateral terms and conditions prepared by the company. Since the terms are unilateral so also detrimental to the interest of workmen, majority refused to sign them. Those

who refused to sign them were subjected to either transfer or termination. Petitioner complainant also refused to accept this condition of service and it is alleged that he was issued an order of transfer dated 26th September 1995. He received the same on 6th October, 1995. The transfer order directed him to report at the place of transfer on 9th October, 1995. His services were transferred from Agra in State of U.P. to Bettiah in the State of Bihar. On receipt of the transfer order, the petitioner complainant requested the company to withdraw the same but the company instead of complying with this request relieved the petitioner from the present posting with effect from 26th September, 1995. Copies of the above letters are annexed to the complaint.

9. In para 7 of the complaint, it is alleged that the company by a letter dated 1st November 1995 terminated the service of the petitioner complainant on the ground that he failed to honour and comply with a contractual obligation. However, it is stated that the termination is illegal and wrongful as it is in contravention of the provisions of I.D. Act. The termination during the pendency of the reference without complying with the statutory mandate is wrongful and illegal and that is how the petitioner prayed that the said order be quashed and set aside and the petitioner be reinstated in the services and posted at the present location. This complaint was filed on 25th November 1995.

10. After a copy of the complaint was duly served and received by the company which was by then known as Novartis (India) Ltd., a reply/written statement was filed. The first contention raised was that the pending Reference No. 55 of 1995 is limited to the territorial jurisdiction and that is Metropolitan area of Greater Mumbai only. Therefore, the reference would govern employees in the category of Medical Representatives, employed and working within the territorial jurisdiction of Metropolitan area of Gr. Mumbai only. It would not govern employees who are employed and working outside territorial jurisdiction of this Metropolitan area.

11. The next contention is that the petitioner has been employed and posted so also working at Agra. The area is outside the territorial jurisdiction of the Tribunal. The petitioner complainant, therefore, is not entitled to nor he can be permitted to invoke the provisions of Section 33-A of I.D. Act and seek any relief. The petitioner complainant is not employed nor is he working within the metropolitan area. On this ground alone, the complaint be dismissed.

12. It was also contended that transfer clause is a term of employment of each and every employee in the category of Medical Representatives. The express transfer clause contained in the contract of each and every employee specifically states that the employee is liable to be transferred anywhere in India. Consistent with the transfer policy, the company used to transfer its employees from time to time. The complainant petitioner before this Court came to be transferred in consonance with its contractual term. He has failed and neglected to adhere to the transfer order. He has disobeyed a lawful and reasonable instruction of his superiors by refusing to adhere to and comply with the order of transfer. It is in

these circumstances that his contract for employment was terminated with effect from 1st November 1995. Justifying the transfer order and the term in the contract enabling the employer to do so, it was contended that the petitioner, therefore, cannot invoke Section 33-A of the I.D. Act. The issue of jurisdiction was raised and it was prayed that the same be treated as preliminary issue before entertaining the complaint on merits. This is a reply filed on 4th June 2003 by the respondent company.

13. It appears that in the meanwhile one Mr. Sarabjeet Singh who was employed as Medical/Sales Representatives by respondent on 29th August 1985 and posted at New Delhi came to be transferred similarly from New Delhi to Ratlam. He did not accept the order of transfer. On the very date with effect from which the petitioner's services were terminated, respondent terminated Sarabjeet as well. He instituted a complaint u/s 33-A of the I.D. Act. His complaint came to be dismissed by the Industrial Tribunal and that is how he approached this Court in a Writ Petition being W.P. No. 523 of 2005. It further appears from the record of the present case that the petitioner before me filed purshis Exh. U-15 stating that the evidence recorded in the complaint (I.T.) No. 1 of 1996 filed by Sarabjeet be allowed to be treated as evidence in the complaint filed by the petitioner. It appears that the respondent company opposed this request but the petitioner complainant before me did not lead any oral evidence. He relied upon the purshis which was filed. That is how the petitioner did not lead any oral evidence. However, on behalf of respondent one Ravindra Kumar Sagar, National Sales Manager, entered witness box. His deposition was recorded (Exh. 20). Thereafter, the Industrial Tribunal heard the arguments and by the impugned award proceeded to dismiss the complaint.

14. The dismissal is on the ground that considering the objections raised by the employer and the controversy involved, the petitioner should have brought some material on record. He has failed to bring any evidence on record. The argument that the petitioner was not required to lead any oral evidence was rejected. However, the Industrial Court observed that the petitioner complainant has failed to bring anything on record to establish that he was also covered under Reference (I.T.) No. 55 of 1995. In the opinion of the learned Member of the Industrial Tribunal, this was the basic requirement for invoking its jurisdiction u/s 33-A of I.D. Act. This basic and fundamental aspect has not been established. Further, there is no iota of evidence, according to learned Member to show that the petitioner was member of Association (A.C.W.) or his service conditions were governed and covered under Reference (I.T.) No. 55 of 1995. In such circumstances and relying upon the testimony of the witness examined by the respondent that the learned Judge proceeded to answer the issue No. 1 against the petitioner.

15. The complaint was also dismissed on the ground that the acts complained of by the present petitioner were committed at Agra in North Zone. Therefore, the Industrial Tribunal at Mumbai will have no territorial jurisdiction to entertain and

try the complaint. The third reason assigned by the learned Judge is that the complaint of Sarabjeet Singh has been dismissed after trial. Since that complaint was dismissed and present petitioner being unable to prove that the respondent has committed any illegality, that the final order of dismissal came to be rendered. It is this judgement and award which is the subject-matter of challenge in this petition.

16. Ms. Buch, learned Counsel appearing for petitioner submitted that the Court below has adopted a hyper-technical approach. The Court below has missed the issue and the aspect which goes to the root of the complaint of the petitioner. Inviting my attention to the terms of reference I.T. No. 55 of 1995, she submits that there are documents annexed to the complaint. The petitioner complainant has set out the basic and necessary ingredients for invoking the jurisdiction of the Industrial Court. She submits that the Court below should have been aware of the statutory mandate. Inviting my attention to Section 33 of the I.D. Act, she submits that during the pendency of any conciliation proceedings before the Conciliation Officer or a Board or any proceeding before an Arbitrator or a Labour Court or Tribunal in respect of industrial dispute, Sub-section (1) of Section 33 mandates that the conditions of service, applicable to the workmen, before the commencement of the proceedings should not be altered to their prejudice nor they should be discharged or punished whether by dismissal or otherwise for any misconduct connected with the dispute save and except with the express permission in writing of the authority before whom the proceeding is pending. Sub-section (2), requires that before the employer discharges or dismisses the workman concerned with the dispute he has to pay him wages for one month and an application has to be made before the authority where the proceedings are pending for approval of the action taken by the employer. She submits that the pleading is clear. The specific case of the petitioner complainant is that he is a workman concerned with the dispute. The dispute pertains to the Medical and Sales Representatives of the respondent. These persons had submitted their charter of demands after the earlier settlement expired and these persons were desirous of negotiating and settling the same. The demands of these persons were not accepted and that is how the matter went before the Conciliation Officer and upon submission of failure report, subsequently referred for adjudication before Tribunal. These basic facts have been averred with precision and clarity. Further, the petitioner has pointed out that during the pendency of such a reference and with which he has been concerned, firstly he came to be transferred and subsequently terminated. In such circumstances and when mandate of Section 33(2)(b) proviso has not been adhered to, then, the termination is illegal. She submits that a Constitution Bench of the Hon'ble Supreme Court in the case of (Jaipur Zilla Sahakari v. Ramgopal Sharma and Ors.) reported in 2002 D.L.S 64 : 2002(1) C.L.R. 789 has settled the legal position.

17. Alternatively, she submits that the petitioner had filed purshis stating that the evidence recorded in Complaint (I.T.) No. 1 of 1996 between Sarabjeet and

Sandoz may be allowed to be treated as evidence in the matter on behalf of complainant. While it is true that the final order in Sarabjeet's case is of dismissal of the complaint, yet, Sarabjeet challenged that order by filing W.P. No. 523 of 2005. That petition was placed before learned Single Judge of this Court on 4th March, 2005. By consent of parties, the following order was passed:

P.C.:— After the petition has been argued, Counsel appearing on behalf of the petitioner and for the respondent are agreed that the following order may be passed without the Court being required to record any further reasons:

(i) The impugned order of the Industrial Tribunal dated 25th February 2004 is quashed and set aside;

(ii) The Tribunal is directed to reconsider the Complaint (I.T.) No. 1 of 1995 in Reference (I.T.) 55 of 1995 after hearing the parties. All the questions are kept open to be urged before and decided by the Tribunal including in particular the question as to whether the petitioner is a workman concerned in Reference (I.T.) No. 55 of 1995 having regard to the provisions of law as contained in Section 33(2)(b) read with 33-A of the I.D. Act;

(iii) The petitioner would be at liberty to prove his case in the application u/s 33-A of the Industrial Disputes Act, 1947 either by leading evidence or by producing relevant documentary material before the Industrial Tribunal;

18. She submits that even in the case of Sarabjeet, the Tribunal had proceeded to dismiss the complaint on the ground that there is no material to show that Sarabjeet was concerned with the reference. However, that conclusion was assailed in the above petition and by consent an order was passed remanding the matter to the Tribunal. In such circumstances and when, thereafter, Sarabjeet got an opportunity to place the material before the Court below, then, similar opportunity may be granted to the petitioner. It is not as if that the outcome in that case and the present case would be identical. It cannot be straight away said that the final order in Sarabjeet's case would apply to the facts of the petitioner's case as well. Similarly, the fate of Sarabjeet's complaint and the challenge to the order passed by the Court below in his case is of no consequence as the petitioner had pointed out to the Court below that the termination is contrary to the mandatory provisions of law. He is liable to be reinstated in services on account of non compliance with the law laid down by the Supreme Court. Presently, the petitioner is not asking this Court to go into the rival pleas as far as merits are concerned but even on merits the petitioner has a strong case and he is likely to succeed in the light of the law laid down by the Supreme Court. Therefore, assuming that the Court is not required to go into all aspects at this stage, still a case for remand of the matter back to the Industrial Court is made out. She submits that remand is necessary because, the Court below itself has observed that the admitted position was that the petitioner was working as medical sales representatives and he was transferred by a transfer order. The Court below has noted other contentions also in the impugned

order. The contentions which have been raised by the respondent with regard to maintainability of the complaint on the ground that the petitioner is not a workman, that the Industrial Tribunal has no jurisdiction and lastly that no dispute is pending inasmuch as Reference (I.T.) No. 55 of 1995 cannot be said to be covering the petitioner are noted. She submits that all these grounds in addition to the one that petitioner has not led any evidence were canvassed on behalf of respondents. Further, the attention of the Court below was specifically invited to the judgement of the Constitution Bench of the Supreme Court. However, without rendering any findings as to whether the petitioner is concerned with the dispute or not but merely referring to the material, the Court below has proceeded to pass order against the petitioner on the ground of territorial jurisdiction. She submits that on the aspect of territorial jurisdiction the Court below has rendered a finding without referring to the contents of the admitted documents. She submits that each of the annexures to the complaint would show that the Industrial Tribunal had the territorial jurisdiction to entertain and try the claim. She submits that the correspondence which has been exchanged between the parties is from Mumbai, copies thereof are marked to the respective administrative heads/branch offices. She has invited my attention to the order of transfer and order of termination in this behalf. She submits that the law laid down by this Court in the case of (Glaxo Smithklyine Laboratories Ltd. v. Abhay Raj Jain and Ors.) reported in 2002(Supp. 2) Bom.C.R. 157 : 2002(II) C.L.R. 1051 squarely applies and has been wrongfully distinguished by the Industrial Court. Thus, the findings of the industrial Court rest on the issue of jurisdiction and as far as the claim of petitioner is concerned the complaint is dismissed on the ground that no evidence was led by him. She submits that in the interest of justice this is a fit case where this Court should intervene in writ jurisdiction and pass appropriate orders.

19. On the other hand, Mr. Cama, learned Senior Counsel for respondent submits that the petitioner's claim needs to be rejected. It is submitted that the petition challenges the order passed on the complaint made by the petitioner. Despite several opportunities, the petitioner complainant did not step into the witness box and chose to adopt different course of action willingly. He had specifically urged before the Court below that he does not wish to lead oral evidence but is desirous of adopting the evidence led in Sarabjeet's complaint. Therefore, there is no material absolutely to show that the ingredients of Section 33-A are attracted. That apart, it is contended that the petitioner has failed to show that he is concerned with the dispute. It is urged by Mr. Cama that merely because the petitioner was a member of A.C.W. that is not enough to invoke Section 33-A. He must be substantially concerned with the dispute and the award that to be rendered therein, if (I.T. No. 55 of 1995), should affect him. In this case, there is material enough to show that the Union (A.C.W.) lost its support and, therefore, was not espousing the cause of Medical and Sales Representatives any further. The Union did not have any membership or support. In fact, the petitioner and similarly situated people resigned from the membership of the Union and entered

into individual contracts with the respondents. Such individual contracts, therefore, governed their rights. In such individual contracts, there is a specific clause permitting transfers. In such circumstances, when individual contracts were placed on record, the finding rendered by the Tribunal that petitioner is not concerned with the reference cannot be said to be vitiated by any error apparent or perverse in the least so as to call for interference in writ jurisdiction. He has invited my attention to the findings rendered by the Industrial Court on the issue of territorial jurisdiction as well. While not disputing that the order of termination is issued from Mumbai and to that extent the respondent may not be correct in raising the objection, yet, it is his plea that the reference concerns Medical and Sales Representatives within the territorial region of the respondent's office/premises at Mumbai. Those posted and working continuously outside the region and State had no concern with the dispute in any event. The dispute, thus, is restricted to Medical and Sales Representatives within the territorial limits and in any event, Mumbai region. Therefore, by remote possibility also the petitioner who on his own showing has been posted and working at Agra through out cannot be said to be concerned with the dispute. In this behalf, he has placed reliance upon several decisions of the Hon'ble Supreme Court and that of Calcutta High Court.

20. Mr. Cama took me through the pleadings and more particularly the complaint preferred by the petitioner and urged that there is no specific plea as to how the petitioner is concerned with the dispute. The only sentence in the entire complaint is not enough. Ultimately, the petitioner is alleging an illegality on the part of the respondent in not adhering to the Statutory Mandate. If the statutory mandate has to be fulfilled by the respondents, according to petitioner, then, the requisite preconditions must be set out and it has to be shown as to how they are satisfied, for alleging such violation or illegality. That being not specifically alleged, the complaint need not be entertained and tried at all. Precisely, that has been done by the Court below and, therefore, no fault could be found with its approach. In this behalf, he has relied upon a decision of the Hon'ble Supreme Court wherein it is observed that rules of pleadings would be squarely applicable to the Industrial Court adjudication also. No amount of evidence without a pleading would assist the petitioner or complainant, according to the Hon'ble Supreme Court. The evidence must be in consonance with the pleadings and once there is no pleading, then, there is no question of granting any opportunity. Therefore, alternate plea that the matter should be remanded back to the Industrial Court must also not be accepted.

21. Mr. Cama submits that there is one more reason for not granting any reliefs to the petitioner. He submits that after remand complaint of Sarabjeet was allowed but the respondent questioned the order/award of the Industrial Court by filing W.P. 2757 of 2005. He submits that the said petition was placed before a learned Single Judge of this Court (Dr. D.Y. Chandrachud, J.) and by his judgement and order dated 21st December 2006 the petition came to be allowed. While allowing the same, the learned Judge has specifically observed

that when the Union (A.C.W.) which had espoused the industrial dispute lost its membership of entire body of the workmen whose cause was sought to be represented and the workers themselves have formed a new union which resulted in a settlement with the Management, then, it cannot be said that such workmen are concerned with the dispute. He has invited my attention to paras 8 and 11 of the said judgement and contended that consistent with this reasoning, the learned Single Judge set aside the Award by holding that the finding of Industrial Court that there was breach of Section 33(2)(b) of the I.D. Act was wholly unwarranted and, therefore, requires interference.

22. He further submits that Sarabjeet challenged the judgement and order of the learned Single Judge by filing an appeal being Appeal Lod. No. 221 of 2007. At the stage of admission the Division Bench heard the matter and after referring to the undisputed facts so also the further development that by an Award dated 5th July 2005, the Reference (I.T.) No. 55 of 1995 itself has been disposed of observed that nothing survives for adjudication. He has also invited my attention to the findings of the Division Bench with regard to the workmen ceasing to be members of the Union and, therefore, the Union having lost its authority to represent them. Further, the conduct of the said Sarabjeet has also been commented upon by the Division Bench. He has not complied with the order of transfer nor has he challenged it. In such circumstances, the punishment of termination of service could have been properly imposed and it, therefore, needs to be upheld. Such an employee, according to Mr. Cama, does not deserve any equitable and discretionary reliefs, much less, reinstatement in service with full backwages.

23. For the above reasons and the petitioner's case being identical with that of Sarabjeet, Mr. Cama prays that even after remand the fate would be the same. In these circumstances, no useful purpose will be served by going into the matter in detail.

24. Ms. Buch appearing for petitioner countered the above submissions and pointed out that a SLP has been preferred by Sarabjeet against the order of Division Bench and notice has been issued by the Hon'ble Supreme Court. The matter is posted for hearing and final disposal. In any event, she submits that after Sarabjeet got an opportunity to adduce evidence and, thereafter, a trial on merits, no prejudice will be caused to the respondents if such a course is adopted. Ultimately, the law laid down by the Constitution Bench of the Supreme Court governs the field and it is on the touch stone of the principles laid down therein that the matter must be decided. It is not so decided and, therefore, a remand of the matter would be in the interest of justice.

25. For properly appreciating the contentions, it would be necessary to refer to Section 33 of I.D. Act, which reads thus:

33. 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 [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 [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, 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.

(3) Notwithstanding anything contained in Sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute:

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.- For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of Sub-section (3) shall be one per cent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected

workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator, a) Labour Court, Tribunal or National Tribunal under the proviso to Sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

[Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this subsection had expired without such proceedings being completed.]

26. A bare perusal of the same would indicate that though they fall in Chapter VII entitled "Miscellaneous", they cover an important aspect. Considering the object and purpose of I.D. Act, the Legislature has provided the safeguards. Therefore, when proceedings are pending before the Conciliation Officer or the Authorities mentioned in Sub-section (1) of Section 33, then, save and except with the express term in writing of the authority before whom they are pending, the employer, shall in regard to any matter connected with the dispute, not alter, to the prejudice of the workmen, any such dispute, the conditions of service applicable to them, immediately before commencement of such proceedings, nor shall he punish the workmen or discharge them. Sub-section (2) is in furtherance of Sub-section (1) and provides that during pendency of the proceedings in respect of industrial dispute the employer may in accordance with Standing Orders applicable to a workman concerned in such dispute or where there are no such Standing Orders in accordance with terms of such contract, express or implied, between him and the workman alter the conditions of service applicable to that workman immediately before commencement of such proceedings in regard to any matter not connected with the dispute or for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise that workman. Proviso, however, is important and must be borne in mind.

27. The Hon"ble Supreme Court in the case of Jaipur Zilla (supra) was concerned with an order of reference. That order of reference was passed to refer the matter to the Five (5) Judge Bench because there was conflict between the view taken in two decisions more particularly referred to in paras 3 and 4 of the Judgement of the Constitution Bench. It is in that light that the question for consideration was framed and i.e., if approval is not granted u/s 33(2)(b) of the

I.D. Act, whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under the above provision would not render the order of dismissal inoperative?

28. The Supreme Court thereafter reproduced the provisions and referred to a decision of the Constitution Bench in *P.H. Kalyani Vs. Air France Calcutta*, . It also referred to the facts in the case of *Punjab Breweries* and ultimately in paras 13 to 15 the Supreme Court observes thus:

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 u/s 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 other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed u/s 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 victimisation and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them are 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 u/s 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 victimisation 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 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 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 u/s 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 u/s 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside u/s 33-A and that till such time he should suffer misery of unemployment in spite of 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 withdraw, 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 u/s 33-A, cannot be accepted. In our view, not making an application u/s 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 u/s 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 withdraws before any other is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside u/s 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint u/s 33-A or to raise another industrial dispute or to make a complaint u/s 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimisation, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.

29. The law laid down, therefore, is very clear. The object and purpose has been noticed and it is held that the language of proviso to Section 33(2)(b) is mandatory. The employer cannot disobey the mandatory provisions and then say that the order of discharge or dismissal made in contravention of the same, is not void or inoperative. He cannot be permitted to take advantage of his own wrong. Now, the employer in the instant case has not made any application contemplated by the proviso to Section 33(2)(b). However, the case pleaded was that the workman is not concerned with the dispute. That is in answer to the plea raised in the petitioner -complainant that he is a medical- sales representative, governed by the terms and conditions of the last settlement and considering the charter of demands which are raised and referred for adjudication to the Tribunal is very much concerned in the said reference. He is concerned with Demand No. 20 as well, which is reproduced in the complaint. The case of the respondent was as above.

30. While it is true that the petitioner has not led any evidence and had chosen to adopt the evidence led in Complaint I.T. No. 1 of 1996 filed by Sarabjeet, yet, the fact remains that Sarabjeet was faced with more or less identical order. Sarabjeet came to this Court challenging that order and by consent of parties, remand was ordered. It is upon remand that the complaint of Sarabjeet was retried and a decision on merits came to be rendered. It may be true that the said decision which was in favour of Sarabjeet ultimately was set aside by this Court in the petition of the respondent employer. However, I cannot today presume that the petitioner's fate would be identical. There are number of pleas raised as is clear from the reading of impugned judgement and award. The complaint has been dismissed by holding that the petitioner complainant has failed to adduce any evidence. Obviously, when this finding was rendered, the Industrial Tribunal did not have the benefit of the award in favour of Sarabjeet nor the order passed by this Court in the petition filed by Sarabjeet earlier. It is

pertinent to note that the impugned award was rendered on 23rd November 2004. The remand in case of Sarabjeet came to be ordered on 4th March 2005. The order in the case of Sarabjeet which was impugned in Petition No. 523 of 2005 is dated 25th February 2004. That apart, after remand the Court by consent of parties directed that the complaint filed by Sarabjeet be reconsidered and all questions were kept open for being urged and decided, including whether the petitioner is a workman concerned in Reference I.T. 55 of 1995. A specific liberty was granted to Sarabjeet to prove his case in the complaint/ application either by leading evidence or by producing relevant documentary material.

31. It cannot be presumed by me that despite the above developments the petitioner complainant would still adopt the same course of action. Similarly the Industrial Court in the present case has referred to the rival contentions but has chosen to rest its findings only on the technical ground of the petitioner failing to produce any material. It faulted the petitioner for not filing a copy of the evidence in Complaint No. I.T. 1 of 1996. The Court below has merely reproduced the evidence of the witness examined by the respondent. It has relied upon the statement in his deposition that the petitioner complainant was not member of any union and his service conditions were governed on the basis of individual contract for employment.

32. Now applying the same test as is urged by Mr. Cama, if one peruses the written statement of the respondent in the present complaint, it is clear that there is no plea raised therein of the nature which has been spoken by the witness. I have perused the reply that is filed by the respondent. The reply is only on the preliminary contention of jurisdiction. It is also raising a plea that transfer is express term of employment and if it is contained in the contract of employment of each and every employee, then, the transfer is in consonance therewith and the policy of the respondent. The complaint was, therefore, not maintainable, according to respondents. Paras 4 and 5 of the reply filed by the respondent before the Industrial Court read thus:

4. That, for the reasons aforesaid, in the humble submission of the intended opponent herein, this Hon"ble Tribunal in the pending reference will have no jurisdiction to entertain and determine the purported complaint preferred by the intended complaint herein, hence on this ground also the intended complaint is liable to be and ought to be rejected in limine with costs and that therefore, this Hon"ble Tribunal be pleased to reject the intended complaint with cost.

5. The intended opponents state and submit that as the preliminary issue raised by the intended opponents go to the very root as to the tenability, maintainability and competence of the intended complaint, the preliminary issues raised and urged by the intended opponents may please be tried and decided as preliminary points before entertaining the intended complaint on its merits.

33. Therefore, the request was to reject the complaint in limine. Yet, the deposition of the witness came to be recorded and he has deposed about several

aspects touching the merits. The learned Member has also taken note of one of the statement of the witness that no reference is pending for revision of wages or service conditions of the concerned complainant. The learned Member was aware of the law laid down in the Constitution Bench decision (supra). A reading of the entire judgement would reveal that the learned Judge has merely quoted some portions of the decisions brought to his notice and in para 15 referred to the contentions of the petitioner complainant. He has faulted the petitioner complainant for failing to bring anything on record to establish that he was covered under Reference No. I.T. 55 of 1995. The basic requirements for filing the complaint thus was not established according to learned Member. At the same time he faults the petitioner for not producing any material to show that he was member of ACW or his service conditions were governed and covered under the reference. It is in such circumstances and holding that it has no territorial jurisdiction that the complaint has been dismissed.

34. Once the Court below was of the opinion that a preliminary objection was raised with regard to its jurisdiction, the reply was only filed on that basis and it has accepted that objection by distinguishing the judgement of this Court, then, all other aspects on merits were not at all necessary to be gone into. However, the decision is rendered without taking into consideration the pleadings in the complaint of the petitioner and the documents referred therein. Assuming that the petitioner had not led any evidence, yet, prima facie, it is clear that none of the documents have been disputed. They are nothing but orders issued by the respondent of transfer and dismissal. There is correspondence with regard to transfer. It is nowhere observed by the learned Judge that though these documents were annexed to the complaint and, their contents were not disputed, yet, they are not enough to show that the petitioner complainant was concerned with the reference. He has not adverted to them at all. Therefore, there is substance in the criticism of Ms. Buch that the learned Judge has dismissed the complaint without adverting to any of the documentary materials produced. Once the charter of demands referred to in the order of adjudication has been produced along with order of reference, then, when their contents were not disputed, it was incumbent upon the learned Judge to have rendered proper findings as to whether despite the same, the petitioner cannot be said to be concerned with the dispute.

35. Learned Judge has not at all rendered his findings on the basis of the Union having lost its authority. Both sides have taken me through the award impugned before me extensively and they do not dispute that this aspect has not been touched upon.

36. Once the above aspect also has not been touched upon so also the Court below did not have the benefit of orders passed in the case of Sarabjeet, then, accepting the request of Ms. Buch for remanding the matter by quashing and setting aside the impugned award would be reasonable, fair and proper. More so, when Mr. Cama has not supported the findings of Industrial Court on the issue of

territorial jurisdiction as far as issuance of the transfer and termination order. In all fairness, Mr. Cama stated before me that the order of termination has been issued from Mumbai and to that extent the Industrial Court was in error. However, he has raised an additional contention to support the ultimate award and judgement of the Court below. He submits that the dispute and demand which is the subject-matter of reference before the Industrial Tribunal, Mumbai concerns Medical and Sales Representatives within Mumbai region. In all fairness, it must be stated that Mr. Cama has relied upon several decisions of the Supreme Court to support this contention. Mr. Cama has invited my attention to the judgement of the Supreme Court reported in District Transport Manager (Admn.), O.S.R.T.C., Orissa Vs. Dilip Kumar Nayak and Another, . There Supreme Court was concerned with a case of a Conductor in the Services of Orissa State Road Transport Corporation. While he was posted in the Dist. of Baripada. He committed misconduct. Disciplinary enquiry was initiated against him and upon proof of his misconduct, he was dismissed from service. His Industrial Dispute u/s 10(1)(d) was pending decision. Respondent employee before the Supreme Court filed an application u/s 33-A contending that since the dispute relating to the employee in Bhadrak Zone was pending adjudication in the Industrial Tribunal and without leave of that Tribunal the services of respondent employee could not be terminated. The Tribunal dismissed the application but in the writ petition of the petitioner employee who was respondent before the Supreme Court, the Tribunal's decision was set aside. It was declared that the dismissal order is bad in law. Although, the respondent was reinstated in service, the Supreme Court considered the question of law and held that the subject corporation had created divisions/zones with regard to its area of operation under Motor Vehicles Act. The employee was working in Baripada zone while pending dispute relates to employees in Bhadrak Zone. Therefore, relying upon the test of functional integrality and independent Union, it was held by the Supreme Court that each zone is independent and that is how, there was no need for the management to take leave before dismissing the employee.

37. Before me, there is no material to show that such a plea was raised and considered, apart from the contentions which have been raised and considered. In fact, the contentions raised in the written statement/reply of the respondent. They are supporting the award on pleas which are orally raised before the Tribunal and reiterated before me. In fact, some of the pleas of Mr. Cama are based upon developments subsequent to the Award. Even they can be brought on record if remand is directed. Thus, for complete justice remand is necessary. Apart from urging that the contention was raised there is nothing before me which would enable me to take a view one way or the other. It would not be proper to render any conclusive findings as that would prejudice both sides. Upon remand, even this aspect is open for being agitated and considered. I am not closing doors for both sides. It is not as if the respondent would be prevented from raising this objection. Today, on mere reading of the complaint and without any specific objection, it would not be proper to conclude anything.

38. Once my attention is invited to the order of reference dated 25th September 1995, referring the demands for adjudication to Industrial Tribunal and Demand No. 20 relating to transfer, so also the preamble in the order of reference, it would not be proper on my part to uphold the objection of Mr. Cama. The objection proceeds on the basis that the Union A.C.W. and the Medical and Sales Representatives working with them are concerned only with the Mumbai region because the Union also has its office in Mumbai. It would not be fair and proper to uphold the objection by considering only the location of the Union.

39. Similarly, the impact of the judgement rendered in Sarabjeet's case by a Single Judge of this Court and that of the Appellate Bench also cannot be considered at this stage. It is worthwhile noting that the very same Judge who rendered a decision against Sarabjeet granted him liberty to lead evidence by setting aside an earlier award/order adverse to him. Sarabjeet was allowed to place the material before the Court below with regard to his being concerned with the reference. That was done by setting aside the order dated 25th February, 2004 passed by the Industrial Tribunal and remanding the matter back to it. It may be true that the order was by consent of parties and before me no such consent has been given by the respondents, yet, the fact remains that when the impugned award was rendered the Tribunal rested its conclusion on the earlier evidence of Sarabjeet, it did not have the advantage of referring to the additional and further materials placed by Sarabjeet in pursuance of the order of remand in his favour. Even after, remand Sarabjeet succeeded and that is not disputed before me.

40. It may be true that the Award in favour of Sarabjeet is set aside by a learned Single Judge and the said decision is upheld in appeal but that decision by itself does not mean that the petitioner before me would suffer the same fate. That he has nothing further and additional to add is something which I can not presume straight away. More so, when I am ordering a remand not just because in Sarabjeet's case parties consented to it. My reasons for ordering the remand have already been enlisted above. Sarabjeet's case is an additional ground and nothing more.

41. Ms. Buch is also right in her criticism that the judgement of Hon'ble Supreme Court and the provisions referred to therein have been brushed aside by the Industrial Court on the spacious plea that there is no evidence led by the petitioner complainant. On documents which were placed before the Court below and contents of which were not disputed, there is prima facie substance in this criticism. However, even this aspect need not be decided by me. The respondent should have such an opportunity to urge that even if contents of all documents are admitted and held to be proved, yet, the petitioner cannot be said to be concerned with the said dispute. It can urge that he is not concerned with the said dispute not only on the ground of existence of the Union or his disassociation therewith or his signing a fresh contract, but also because the reference was restricted to the employees in Mumbai region. All such pleas would

be available for being raised by the respondent. Therefore, I see no prejudice to them by an order of remand.

42. Ms. Buch raised further submissions with regard to the correctness of the view taken by the learned Single Judge of this Court in Sarabjeet's case. In her submission, the pendency of the complaint is the real test. During the pendency of the reference/proceedings neither the service conditions can be altered nor the workman can be discharged or dismissed without complying with the mandatory provisions is her submission and she seeks support from the Constitution Bench decision. She submits that the Division Bench fell in clear error in holding that once the reference is disposed of, petitioner's complaint does not survive. In her submission, Section 33-A comes into operation when the discharge or dismissal is without following mandatory provisions [section 33(2) (b)] and proviso thereto. What happens to the reference subsequently is hardly of any consequence. The order of dismissal has to be decided in the light of the date of the pendency of the reference and the terms of reference and its nexus with the dismissal order, is her submission and she relies upon the Constitution Bench decision of the Supreme Court and other decisions. I need not go into these aspects.

43. Her further criticism of the view taken by the learned Single Judge and Division Bench is that they were impressed by the fact that the Association of Chemical Workers did not represent Medical and Sales representatives. She submits that when the demands were raised and when the reference was made, the Association was very much representing their cause. Subsequent developments leading to so called individual contracts is something which is not decisive, according to her. It is not whether the Union is existing or continues to enjoy support of the workmen which is relevant but what, according to her is relevant, is whether the workmen are concerned with the dispute or not. Once, the workmen are concerned with the dispute, then, whether they are represented by any Union or not is wholly irrelevant. Similarly, the conduct of the employee in not abiding by the transfer order is also of no consequence, as what is questioned in the complaint is, his dismissal.

45. It is contended by Ms. Buch that the special provision for adjudication as to whether conditions of service etc. are changed during pendency of proceedings, u/s 33-A is in furtherance of Section 33, which provides for the said conditions not to be changed and that they shall remain unchanged during the pendency of proceedings. They can be changed provided the mandatory conditions stipulated have been followed. She submits that Sub-section 2(33) which gives a protection as far as alterations of the conditions of service and also against discharge or punishment whether by way of dismissal or otherwise, for any misconduct not connected with the dispute, is a protection and security for a workman. It guarantees that the proceedings contemplated by Section 33(1) being taken to their logical end and not obstructed or interfered with by acts of employers stipulated therein. Sub-section (2) also, while not interfering with the right of the

employer, to alter the service conditions, in regard to any matter not connected with the dispute or for punishing or discharging the workman for any misconduct, balances the workman's right to agitate his demands and seek redressal of his grievances. He should not be discouraged or prevented from doing so. In this behalf, she places strong reliance upon the decisions of the Supreme Court reported in *The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others*, and *Strawboard Manufacturing Co. Vs. Gobind*,

46. She submits that the fight is between unequals. The workman is not equal to the employer in terms of bargaining power. The courts therefore should be sensitive and protect the workman. They should be impartial but not impassive. A protective and beneficial provision like this should receive an interpretation which will sub-serve the object and purpose of enacting it. This is what the Constitution Bench decision (*supra*) has done. Respondent has acted contrary to the same. Its attitude is clear in as much as, while consenting to remand of the matter in one employee's case, that concession is not forthcoming, where the petitioner is concerned. She submits that the attitude is therefore, unfair and is also vindictive. There is no prejudice which will be caused by remand. It is this attitude of the employer and the approach of the Industrial Court in the instant case, which does not further industrial peace, but, may be a cause for unnecessary confrontation. Public interest will also suffer in this process. Ultimately, she submits that the concept of equal opportunity and guarantee of justice, social, economic and political, in the preamble of Constitution of India should not remain a dream but become a reality. She has made a fervent plea that this feature of the Indian Constitution should not be lost sight of even by the courts. She submits that "socialism" is not a political thought but a constitutional goal and, therefore, concept of social justice should not be lost sight of in "Industrial Law". In this behalf, she relies upon the decision reported in *J.K. Cotton Spinning and Weaving Mills Co., Ltd. Vs. Badri Mali and Others*, .

47. It is not necessary to consider these aspects in details in the light of the view that I have taken. Even otherwise once the Supreme Court has laid down these principles then, it is not for me to say anything as far as this submission of Ms. Buch is concerned.

48. In my view, these submission will have to be gone into in an appropriate case and it is not for me, in the absence of complete and proper factual material, to render any opinion. Therefore, whether the view of the learned Judge and the Division Bench is not in keeping with the object and purpose of Section 33-A of I.D. Act, 1947 is something which cannot be decided in this petition. That may be gone into in an appropriate case. I need not express any opinion on this submission, more so, when the matter is pending before the Supreme Court.

49. For the reasons aforesaid, the petition succeeds to the extent that the impugned order is quashed and set aside. The complaint preferred by the petitioner being Complaint No. 2 of 1996 in Reference I.T. No. 55 of 1995 is remanded back to the Industrial Tribunal at Mumbai for being deciding afresh, in

the light of the observations made above and without being influenced by its earlier orders and directions or observations. Needless to state that it would be open for both sides to place such materials as are permissible in law in support of their contentions and also the contentions noted above. The Industrial Court to render a decision afresh in accordance with law as expeditiously as possible and considering that the complaint is fairly old, it should endeavour and dispose of the same latest by 31st December 2008. All the contentions of both sides on merits are expressly kept open. No opinion is expressed thereon. They are being considered for the limited purpose of remanding the matter for reconsideration. It is not as if the Industrial Court is bound to answer the reference in favour of the workman or the respondent. It must apply its mind to the material placed and decide the complaint in accordance with law.

50. In the view that I have taken, it is not necessary to make a detailed reference to all the decisions cited at the bar. Rule made absolute in the above terms. No costs.