
(2003) 11 DEL CK 0152
In the Delhi High Court
Case No : CW 1879 of 2003

Desein Private Limited

APPELLANT

Vs

Industrial Tribunal III and Others

RESPONDENT

Date of Decision : 24-11-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Industrial Disputes Act, 1947 — Section 24, 27, 33, 33(2), 33A

Citation : (2004) 72 DRJ 365

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : Vinay Bhasin and Amit Bhasin, for the Appellant; F.S. Chauhan, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—By the impugned order dated 12th September 2002 the Industrial Tribunal dismissed the application filed by the management/petitioner for staying the proceedings initiated by respondent No. 2/workman u/s 33 of the Industrial Disputes Act filed by the respondent by holding that Section 33 can not be said to be inapplicable merely because a plea was raised about the lack of competence of the original reference i.e. ID 27 of 1992.

2. The main plea raised by the learned senior counsel for the petitioner, Shri Vinay Bhasin, is that Section 33 of the Industrial Disputes Act (hereinafter referred to as the Act) was inapplicable on account of the plea of this invalidity of reference taken by the petitioner in the reply to the statement of claim filed by the workman in the Industrial Tribunal in the pending reference I.D. 27 of 1992. He has submitted that since as per his plea the reference made and pending was without jurisdiction and incompetent, the bar contemplated by Section 33 did not come into play. He has referred to the following position of law laid down by the learned single Judge of this Court in Chandermani v. Shri P.K. Jain & Others reported as 2003 FLR 351 following a judgment of the Mysore High Court in

Gowrishankar Oil Mills v. Industrial Tribunal & others. The relevant portion of the Chandramani case (supra) reads as under:

"..... If there is no reference pending or if the reference made by the appropriate Government has been declared to be invalid and quashed it cannot, in my view, be said that section 33(2) of the Act is attracted. Therefore, the result is that in a case where the main reference u/s 10(1) of the act has been quashed or declared invalid, by no means it can be said that a proceeding is pending before the Tribunal as contemplated by Section 33(2) of the Act and, Therefore, an employee cannot invoke section 33A of the Act."

3. In my view the reference was held incompetent in the above decision on the basis of an adjudication resulting in an award which had been quashed or declared invalid and such a finding having attained finality. The above judgment in my view cannot support the proposition that a plea raised in reply to the statement of claim by respondent No. 2 to the effect that the reference is incompetent, can bar the operation of Section 33 of the Act. In Chandermani (supra) case it has also been observed that Section 33(2) of the Act is not attracted if reference has been declared to be invalid and quashed. In the present case the reference No. 27/92 has neither been declared to be invalid nor quashed in any proceedings and in my view the mere raising of the plea by a party that the reference is incompetent cannot ipso facto bar the operation of Section 33 of the Act. Learned counsel for the respondent/ workman, Shri F.S. Chauhan, has submitted that there is no substantial plea of the invalidity of the reference in paragraph 3 of the reply. In any case he has stated that an application u/s 33(2)(b) of the Act had been made by the petitioner in respect of another employee during the pendency of the aforesaid reference. He has by relying on the provisions of Section 33(2)(b) submitted that such an application u/s 33(2)(b) by the petitioner presupposes the pendency and existence of a valid industrial dispute and estoppels the petitioner from questioning the validity of the reference. In particular he has relied on paragraph 12 of the judgment of Hon'ble Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, , which reads as under:

"..... The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them 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."

4. Learned counsel for the respondent has further stated that while construing the impact of Section 24 of the Act the Hon"ble Supreme Court in *Raja Kulkarni v. State of Bombay* reported as 1954(1) LLJ 306, wherein it has been held that :

"it is contended that Section 24 contemplates the pendency of a valid and competent appeal, but as no valid or competent appeal under the law was pending, the appellants committed no offence u/s 27. We are unable to accept this contention. Section 24 on a plain and natural construction requires for its application no more than that an appeal should be pending and there is nothing in the language to justify the introduction of the qualification that it should be valid or competent. Whether the appeal is valid or competent is a question entirely for the Appellate Court before whom the appeal is filed to determine and this determination is possible only after the appeal is heard, but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent e.g. When it is held to be barred by limitation or that it does not lie before that Court or is concluded by a finding of fact u/s 100 of the Civil Procedure Code. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court."

5. It has further been contended that by the same analogy once the reference is pending then by mere terming such reference as incompetent in pleadings does not make it so unless and until so found by judicial determination or operation of law. Mr. Bhasin, the learned senior counsel for the petitioner in reply has submitted that Section 33 of the Act is an extra ordinary remedy and the appropriate remedy for the petitioner is to raise another industrial dispute challenging his termination of services. Section 33 and Section 33A of the Act read as follows:

"33. Conditions of service etc. to remain unchanged under certain circumstances during pendency of proceedings - (1) 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, 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 any 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 order, 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 proceedings; 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, as 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.

33A. Special provision for adjudication as to whether conditions of service etc., changed during pendency of proceedings. -- Where an employer contravenes the provisions of section 33 during the pendency of proceedings [before a conciliation officer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal] any employee aggrieved by such contravention, may make a complaint in writing, [in the prescribed manner, -

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and

(b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate government and the provisions of this Act shall apply accordingly]"

6. In my view the plea advanced by the petitioner cannot be accepted because it would lead to an unjust and incongruous situation where an employer in order to avoid the impact of Section 33 of the Act merely raises a plea that the reference of Industrial Dispute is incompetent and, Therefore, no industrial dispute exists. This would led to a totally uncalled for situation where on a mere plea of invalidity of the reference raised by a party, the statutory impact of section 33 gets stalled. This would amount to giving primacy to the plea of an interested party over the legislative intent expressed in Section 33 of the Act. In my view the proper course for the petitioner in the present case would have been to adopt the route indicated in Section 33(2)(b) of the Act by seeking permission of the Tribunal to dispense with the services of respondent No. 2. This is clearly indicated by the position of law laid down by Hon''ble Supreme Court in J.Z.S.V. Bank (supra). Insofar as the plea raised by the learned senior counsel for the petitioner that Section Section 33 of the Act is an extra ordinary remedy and the appropriate remedy for the petitioner is to raise a fresh industrial dispute is concerned, this plea if upheld would lead to series of successive disputes in respect of the same employee. Every time a dispute relating to a party is pending before the Court and the employer terminates the service of the employee contrary to the legislative mandate expressed through S. 33 of the Act if the employee is compelled to resort to seeking a reference for the termination of services during the pendency of the dispute it would lead to a vicious circle thereby rendering nugatory and otiose the protection afforded by Section 33 of the Act. The principles laid down in JZSV Bank (supra) to the effect that protection is afforded u/s 33(2)(b) of the Act to the workman to safeguard his intend and afford him protection during the pendency of the industrial dispute where relations are already strained, also apply with equal force to the present case. In view of the above position of law, if the plea of Shri Bhasin is accepted, on a mere plea of the reference being invalid, the employee will be in a position to discharge or dismiss the workman with impunity and such an interpretation will defeat rather than advance the legislative intent. Similarly the judgment of the Hon''ble Supreme Court in Raja Kulkarni's case (supra) laying down that Section 24 of the Industrial Disputes Act contemplates the pendency of an appeal and its validity or competence is of no consequence in construing the effect of Section 24 of the Act, clearly applies in the facts of the present case as Section 33 of the Act merely requires the pendency of an industrial dispute between the parties and terming of the references as invalid and incompetent by one of the parties cannot bar the import and effect of the statutory provisions of Section 33 of the Act meant to provide protection to a workman from victimization and

unfair labour practice on behalf of the management.

7. Accordingly there is no merit in the writ petition and the same is dismissed.