

(2006) 08 DEL CK 0086
In the Delhi High Court
Case No : LPA 1630 of 2005

D.T.C.	Vs	APPELLANT
Jag Bhushan Lal and Others		RESPONDENT

Date of Decision : 21-08-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 — Regulation 15(2)
Essential Services Maintenance Act, 1981 — Section 3(1), 4
Industrial Disputes Act, 1947 — Section 12, 22, 23, 26, 33
Payment of Wages Act, 1936 — Section 9(2)

Citation : (2006) 132 DLT 384 : (2007) 112 FLR 57 : (2007) 2 LLJ 322

Hon'ble Judges : Mukul Mudgal, J;Dr. S. Muralidhar, J

Bench : Division Bench

Advocate : Vibhu Shankar and J.S. Bhasin, in LPA No. 1128/200, for the Appellant; A.K. Bajpai, B.K. Prasad, Puneet Gupta and Gaurav Malhotra, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—These appeals are directed against the common judgment and order dated 3.2.2005 of the learned Single Judge of this Court in a batch of writ petitions filed by the appellant assailing the award dated 6.3.2000 by the Industrial Tribunal (for short "the Tribunal"). The Tribunal, while allowing applications filed by the respondent-workmen u/s 33-A of the Industrial Disputes Act (for short "the I.D. Act"), held that the dismissal of the workmen from services was illegal and granted reinstatement with full back wages.

2. The facts leading to the present appeals may be recounted. The employees of the Appellant, the Delhi Transport Corporation, had been demanding revision of their pay scales on the lines of the recommendations of the Fourth Pay Commission. Since the revision of pay-scales was not implemented in relation to all the employees, five unions of the appellant served a notice stating that if their

demands were not met by 16.3.1988, the employees would go on an indefinite strike. On 11.3.1988, a notification u/s 3(1) of the Essential Services Maintenance Act, 1981 read with Essential Services Maintenance (Amendment) Act, 1985 (for short "the ESMA") was issued whereby it was directed that any strike commenced or declared before or after the issuance of the said order by a person employed in the essential services, shall be illegal. Despite this notification, the employees went on strike on 17.3.1988. Since the ensuing conciliation proceedings failed, the dispute whether the workmen were entitled to the benefits of the Fourth Pay Commission, and if so from which date, was referred to the Industrial Tribunal, Delhi.

3. The strike continued thereafter. The appellant invoked its powers under proviso (ii) to Clause 15(2)(c) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 (for short "the Regulations") on the ground that it was not possible to hold an enquiry. It accordingly decided to waive the procedure outlined under Regulation 15(2)(c). The workmen were dismissed from their services on 24.3.1988. Aggrieved by the said dismissal order, appeals were filed by the workmen before the Chairman-cum-Managing Director of the appellant and these too were rejected. The writ petitions filed by the workmen challenging the order of their dismissal and the validity of proviso (ii) to Clause 15(2)(c) of the Regulations were decided by a Division Bench of this Court in Ramesh Chander v. Delhi Transport Corporation 1989 (1) DL 23. The Court, while granting partial relief to the workmen, upheld the validity of proviso (ii) to Clause 15(2)(c) of the Regulations as well as the notification issued under the ESMA. However it permitted the workmen to pursue their remedies u/s 33A, I.D. Act for the contravention of the provisions of Section 33 of the same Act. The Court further directed the Appellate Authority of the DTC to either hold an enquiry itself or to direct such an enquiry be held in accordance with the provisions of Clause 15(2)(c) of the Regulations and pass appropriate orders.

4. During the pendency of the proceedings before the Appellate Authority, the workmen filed an application u/s 33-A of the I.D. Act on 1.9.1989 before the Tribunal challenging the termination order dated 24.3.1988. By the award dated 6.3.2000, the Tribunal held that the appellant had failed to lead evidence to support the allegations of misconduct against the workmen. The Tribunal further held that the management had, by not seeking prior approval of the Tribunal, failed to comply with the provisions of Section 33(1)(b) of the I.D. Act. Accordingly, the termination was held to be illegal. The workmen were granted the relief of reinstatement with full back wages.

5. The above award dated 6.3.2000 of the Tribunal was challenged in writ petitions filed by the appellant which were dismissed by the learned Single Judge by the impugned judgment dated 3.2.2005, giving rise to the present appeals.

6. We have heard the submissions of Mr. Vibhu Shankar, learned Counsel for the appellant. Mr. A.K. Bajpai, Mr. B.K. Prasad and Mr. Puneet Gupta, learned Counsel for the respondents have also been heard.

7. Learned Counsel for the appellant submitted that it was not obligatory upon the appellant to seek prior permission and/or approval u/s 33(1)(b) and 33(2)(b) of the I.D. Act in view of the overriding effect of Section 4 read with Section 12 of the ESMA. In other words, it was contended that the invocation by the appellant of proviso (ii) to Regulation 15(2)(c) of the Regulations for dismissing the respondents workmen without an enquiry was consistent with Section 4 read with Section 12 of the ESMA. Consequently, there was no need at all for the appellant to seek prior approval of the Tribunal in terms of Section 33(1)(b) I.D. Act. It was further contended that consequent upon the decision of this Court in Ramesh Chander (supra), the appellant had held an enquiry as directed and Therefore, there adequate opportunities had been given to the workmen to defend themselves against the charges of misconduct.

8. The earlier judgment of this Court in Ramesh Chander (supra), contemplated that further proceedings would take place before the Tribunal u/s 33-A of the I.D. Act. Even while this Court upheld the virus of Clause (ii) of the Regulation 15(2) (c) of the Regulations (on a reading down of the said provision), it did not foreclose the remedy available to the workmen under the I.D. Act. This is evident from the para 44 of the said judgment which reads as under:

44. We cannot consider the effect of the legality of the action u/s 33 de-hors the provisions of Section 33A. The question for consideration is not of striking down an illegal under but the consequences that may follow. As their Lordships in Punjab National Bank's case (supra) had said that each case must be considered on its own merits and in reaching the final decision an attempt must be made to reconcile the conflicting claims made by the employee and the employer. The employee is entitled to security of service and should be protected against wrongful dismissal and so the normal rule should be reinstatement in such cases. Nevertheless in unusual and exceptional cases, the tribunal may have to consider whether in the interest of the industry itself, it would be desirable or expedient not to direct reinstatement. As in many other matters arising before the Industrial Courts for their decisions, this question has also to be decided after balancing the relevant factors and without adopting any legalistic or doctrinaire approach. This Court cannot order the reinstatement of the workmen with full back wages as that is not the scope of the jurisdiction under Article 226 of the Constitution. The foundation of the jurisdiction u/s 33A of the I.D. Act is the contravention of Section 33. If the contravention of Section 33 is established, the next question would be whether the dismissal of the employee passed by the management is justified on merits. If the Tribunal does not uphold the order, then the question of relief will have to be determined in the light of facts and circumstances of each case. We would, Therefore, leave the petitioners to pursue their remedies u/s 33A.

9. Further in the operative portion at para 52, it was held as under:

52 As a result of the above discussion, the batch of the writ petitions are disposed of in these terms:

(a) We uphold the virus of proviso (ii) to Clause 15(2)(c) of the DRTA Regulations, 1952 by reading down the expression "exceptional cases" to cover cases "where it is not reasonably practicable in comply with all or any of the provisions of the main clause;

(b) The exercise of the power that it was not reasonably practicable to hold the disciplinary enquiry was bona fide and for relevant and germane reasons and we uphold it;

(c) We leave the petitioners to pursue their remedies for the contravention of the provisions of Section 33 of the I.D. Act, if they so desire, under the provisions of Section 33A of I.D. Act.

(d) We hereby quash the orders by the Appellate Authority in whichever cases they have been passed wherein it declined to go into the question of each of the dismissed employee's participation and his instigating and inciting other loyal workers and direct that the Appellate Authority and hold the enquiry itself or direct that such enquiry be held in accordance with the provisions of Clause 15(2) (c) and then pass such orders as it deem fit;

(e) The petitioners who have not preferred the appeals under Clause 15(3), may do so within the same prescribed period commencing from today and those appeals will also be determined in the similar manner as indicated above;

(f) The parties are left to bear their own costs on the facts and circumstances of the case.

10. Thus it is clear from the decision in Ramesh Chander (supra), the provisions of the I.D. Act, far from being shut out, were in fact directed to be invoked by the workmen. Mr. Vibhu Shanker, learned Counsel appearing for the appellant fairly stated that the appellant did not further challenge the decision of the Ramesh Chander (supra) that the same is accordingly final and binding upon the appellant. We are Therefore unable to accept the submission of the learned Counsel for the appellant that the action of the appellant could not have been questioned by the workmen in proceedings before the Tribunal u/s 33-A of the I.D. Act.

11. As far as the submission of the learned Counsel for the appellant about the overriding effect to the provisions of Section 4 read with Section 12 of the ESMA is concerned, it requires to be noticed that those provisions of ESMA do not exclude the applicability of the provisions of the I.D. Act. On the contrary, it contemplates the applicability of the provisions of law which govern disciplinary proceedings. This is clear from a reading of Sections 4 and 12 of the ESMA:

Section 4 Dismissal of employees participating in illegal strikes - Any person -

(a) who commences a strike which is illegal under this Act or goes or remains on or otherwise takes part in, any such strike; or

(b) who instigates or incites other persons to commence, or go or remain on, or

otherwise takes part in, any such strike;

shall be liable to disciplinary action (including dismissal) in accordance with the same provisions as are applicable for the purpose of taking such disciplinary action (including dismissal) on any other ground under the terms and conditions of service applicable to him in relation to his employment.

Section 12 Act to override other laws: The provisions of this Act and or any Order issued there under shall have effect notwithstanding anything inconsistent therewith contained in the Industrial Disputes Act, 1947, or in any other law for the time being in force.

12. The learned Single Judge, while dealing with the above submissions, held as under:

Section 4 of ESMA certainly empowers the authority to dismiss a person who commences a strike which is illegal under the Act or remains on such strike. Even instigating other persons to commence or remain on strike would be a conduct which would invite the punishment of dismissal. Section 4 thus provides for grounds on which in addition to other laws even penalty of dismissal could be imposed for the misconduct stated under these provisions. The second part of the Section deals with the procedure which has to be adopted for imposition of the penalty. An employee shall be liable for disciplinary action including the penalty of dismissal for the stated misconduct but it has to be "in accordance with the same provisions as are applicable for the purposes of taking such disciplinary action on any ground under the terms and conditions of service applicable to him in relation to his employment". In other words, the workman could be dismissed for going on or continuing with, an illegal strike. However, such disciplinary action against the employee would have to be taken in consonance with the provisions otherwise applicable to him. In the present case, these are the DRTA Regulations and the provisions of Industrial Disputes Act. Thus, there is no conflict between the provisions of these two statutes and in fact on their plain reading they are complementary to each other for completion of a disciplinary action which may be taken by the Management against its employees. The provisions of the Act have to be read together and harmoniously to achieve the object of both the special legislations without unnecessarily undermining the role of one statute in the process of disciplinary action. The provisions of both these Acts operate in different situations. They must be permitted to operate in their own field without in any way intermingling the postulated action and consequences thereof. This point of view can also be elucidated by reference to the provisions of Sections 22 and 23 of the Industrial Disputes Act wherein no person employed in a public utility service could go on strike without complying with the conditions stated therein including service of a notice. Even u/s 23 of the Act no person who is employed in an industrial establishment could go on strike during the proceeding and stages referred to in that section. In the event these provisions are violated Section 26 of the Act provides for the punishment which could be imposed upon the defaulting

workman that too in accordance with law. In contra-distinction to these provisions the advantage of invoking the provisions of the ESMA by the appropriate Government in favor of the employer is to waive of the conditions stipulated under Sections 22 and 23 of the Act and a workman would violate the provisions of the notification if he goes on strike which have been notified to be illegal in terms of provisions of ESMA. The workman would straightway be liable to be proceed against and punished including the penalty of dismissal, for violating Section 4 of the ESMA and such provisions would take precedence over the provisions of the Industrial Disputes Act. This advantage provided by the non obstinate clause of Section 12 of the ESMA is a legislative mandate and must prevail.

The argument put forward by the learned Counsel appearing for the Corporation can hardly be justified on any known can one of statutory interpretation. Once the special Act (ESMA) itself directs that the disciplinary authority shall take an action in consonance with the provisions of the law and terms and conditions of service applicable to the employee, there could be no way as to why the employer must not resort to the said procedure of law. The provisions of the DRTA Regulations and the provisions of Section 33A are no way derogatory or in conflict with these provisions. In fact, in terms of the legislative mandate it would be obligatory on the part of the employer to take recourse to these two provisions and satisfy the Tribunal of their bonafide act. No reason much less any plausible reason has been advanced on behalf of the Corporation to justify or explain why they did not approach the Tribunal under the provisions of Section 33(1)(b) and/or Section 33(2)(b). The provisions of Section 33 castes upon the employer obligation to approach the Tribunal for approval of its action already taken or seek its permission for its action including dismissal/discharge of an employee. The intent of this provision is to ensure that at least a prima facie case is established against the workman, it is shown that enquiry was conducted in a fair manner and the employee had misconducted himself which justify passing of the order of dismissal. Thus, this entire action of the Management is subject to judicial scrutiny by the Tribunal, of course, within a limited compass. To be more specific, it is not the decision or the final order but even fairness in the process or enquiry held for arriving at the decision, is subject to the above referred scrutiny. The Corporation could have easily filed a petition under provisions of Section 33(2)(b) before the Industrial Tribunal immediately after passing of the orders of the dismissal, orders of the Appellate Authority or even after the pronouncement of the judgment of the Division Bench of the High Court. The Corporation on the strength of the judgment of the Division Bench could have satisfied the Tribunal that it was not possible to hold an enquiry and the order of the authorities under Regulation 15(2) was proper and the enquiry as was just, fair and the department was entitled to impose the punishment and give effect to order of dismissal from service in the facts and circumstances of the case. Despite the fact that the Division Bench has granted liberty to the workman to approach the Tribunal for violation of provisions of Section 33 u/s

33A of the Act was an indication enough for the Corporation to act in conformity with law and adopt the procedure indicated in Section 4 of ESMA without unnecessary delay.

The provisions of Section 33 contemplates and imposes both obligations upon the Corporation that is permission pre-order if the alleged misconduct of the employee was connected with the dispute pending before any of the authorities specified in that provision and post order approval of the Tribunal if the misconduct was not connected with the dispute pending in the authorities. In the present case, there is no challenge to the fact that the reference of a dispute between the parties referred by the appropriate Government to the Industrial Tribunal on 17.3.1988 was pending before the Tribunal when the alleged misconduct is attributed to the workman. The order of dismissal was passed on 24.3.1988 and by the Appellate Authority subsequent thereto, still the Corporation despite these facts had neither sought permission of the Tribunal u/s 33(1)(b) nor approval u/s 33(2)(b) of the Act. It is an admitted case of the parties that no applications whatsoever were filed by the Corporation under these provisions at any stage. Reference was also made on behalf of the workman to the judgment of the Andhra Pradesh in the case of G.Y.N. Chainulu and Others Vs. The Depot Manager, A.P.S.R.T.C., Amalapuram and Another, where the Court took the view that once strike is declared to be illegal by operation of notification issued u/s 33 of the ESMA a notice u/s 22 of the Industrial Disputes Act is not a due notice as contemplated under proviso to sub-Section 2 of Section 9 of the payment of wages act. This reasoning is obviously based upon the legislative mandate that provisions of ESMA shall have the overriding effect. Thus, there is apparent violation of provisions of Section 33 and the complaint of the employee has rightly been entertained and decided by the Tribunal u/s 33A of the Act.

13. We are in full agreement with the above observations made by the learned Single Judge. Learned Counsel for the appellant has been unable to point out any infirmity in the above statement of that law warrants an interference by us in these appeals.

14. The decision of the Hon"ble Supreme Court in Harishchandra Hegde Vs. State of Karnataka and Others, , relied upon by the learned Counsel for the appellant, reiterates the settled position of law regarding non-obstante clause. There can be no doubt about the above settled legal position. However, the wording of the statutory provisions in the instant case does not permit Section 4 read with Section 12 of the ESMA to be interpreted in a manner that would override the provisions of the I.D. Act.

15. For all the above reasons, these appeals are dismissed.

CM No 10867/2006 in LPA No 515/2006

Time for complying with the order dated 7.7.2006 with respect to deposit of the amount covered by the impugned recovery notice dated 9.3.2006 and warrant of attachment dated 19.6.2006 is extended up to six weeks from today.

Application stands disposed of LPA No 1128/2006

This appeal is directed against the judgment and order dated 28.10.2005 passed by the learned Single Judge in Writ Petition (C) 4941/1999. The facts in this case are more or less identical to the facts in the above appeals. Here again, learned Single Judge has, while dismissing the writ petition filed by the appellant, held that the appellant failed to prove its case before the Tribunal that the workman was guilty of misconduct. This appeal is also accordingly, dismissed in terms of judgment in the above appeals.