

(1966) 10 PAT CK 0001

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No"s. 1014 and 1020 of 1965

Khandelwal Glass Works

APPELLANT

Vs

S.C. Prasad and Another

RESPONDENT

Date of Decision : 11-10-1966

Acts Referred:

Industrial Disputes Act, 1947 — Section 33(2), 33A

Citation : AIR 1967 Patna 400

Hon'ble Judges : S.N.P. Singh, J;N.L. Untwalia, J

Bench : Division Bench

Advocate : M.K. Varma, in C.W.J.C. 1014 and 1020/65, for the Appellant; S. Sarwar Ali, for C.W.J.C. 1014 and 1020/65 and Dinesh Charan, for C.W.J.C. 1020/65, for the Respondent

Final Decision : Allowed

Judgement

N.L. Untwalia, J.—During the pendency of an adjudication of an industrial dispute in Reference No. 12 of 1964 before the Industrial Tribunal, Patna, Messrs. Khandelwal Glass Works, Ambona, District Dhanbad, the petitioners in these two writ applications, dismissed two of their workmen, one Shri R. D. Sharma, respondent No. 2 in C.W.J.C. No. 1014 of 1965, and the other Shri Phool Singh, respondent No. 2 in C.W.J.C. No 1020 of 1966, in exercise of its power u/s 33(2) (b) of the Industrial Disputes Act, 1947 (Central Act 14 of 1947), hereinafter called the Act R.D. Sharma was dismissed by an order of the petitioners made on the 26th October, 1964, after holding a proper domestic enquiry, with effect from the 27th October, 1964. On the same day, an application was sent to the Industrial Tribunal by Registered post under the proviso to Clause (b) of Sub-section (2) of Section 33 of the Act for approval of the action taken by the employer. Contained in the order of dismissal, communicated to respondent No. 2 in C.W.J.C. No 1014 were the following words to tender wages for one month in fulfilment of the other condition of the proviso:--

"Accordingly, you are dismissed from the service of the concern with immediate

effect You are also directed to collect all your legal dues on 27-10-1964, during the working hours of the office

Please make over charge of all the factory records, papers and materials in your possession to Sri Nanhoo Mal Jain, Munim, immediately, and vacate the factory quarters within three days.

All concerned to note."

According to the case of the employer (petitioner). R.D. Sharma, the workman concerned, wrote a letter on the 28th October, 1964, refusing to accept any money as tendered to him in the manner aforesaid. R.D. Sharma made an application u/s 88A of the Act to the Industrial Tribunal seeking the reliefs stated by him in his application.

2. The order of dismissal against the other workman, Phool Singh, was made on the 23rd December. 1964, and we are informed that the said order was to take effect from the 24th December, 1964, and the date mentioned in the decision of the Tribunal as being the 11th November. 1964, is a mistake. In regard to him also, on the same date, an application was sent by post to the Industrial Tribunal, Patna, under the same proviso to Clause (b) of sub Section (2) of Section 33 of the Act. To him also the tender of one month's wages was made out in a different language The relevant words in his case are:--

"You are also directed to collect all your legal dues on 26-12-1964 during the working hours of the office after submitting a dues clearance certificate from all the concerned in-charges."

This workman also filed an application u/s 33A of the Act seeking the reliefs stated in his application.

3. The two applications filed by the employer under the proviso to Section 33(2) (b) against R.D. Sharma and Phool Singh were respectively numbered as Miscellaneous Case No. 31 of 1964 and Miscellaneous Case No. 38 of 1964. The two applications filed by the said two workmen u/s 33A were respectively numbered as Miscellaneous Case No, 31A of 1964 and Miscellaneous Case No. 39 of of 1964. All these four cases were heard together by Shri Shib Chandra Prasad. Presiding Officer of the Industrial Tribunal, Patna. He has disposed of the four cases by a common judgment and order, calling it an award. He has held in relation to the cases of both the employees that the orders of dismissal are justified as they were made after a proper domestic enquiry In regard to the case of R.D. Sharma, however, he has held that neither of the two mandatory requirements of the proviso in question was fulfilled by the employer. Hence, the approval could not be accorded

In regard to the case of Phool Singh, however, the learned Presiding Officer has said that the requirement for making the application for approval of the order of dismissal had been fulfilled but the other requirement of payment of wages for one month had not been fulfilled. In that view of the matter, the approval to the

order of dismissal in his case also has been withheld by dismissing the application of the employer made u/s 33(2)(b) of the Act. In regard to the applications of the workmen concerned made u/s 33A of the Act, he has merely said that the two miscellaneous cases u/s 33A are allowed. He has not indicated in what respect they are allowed, what is awarded, whether he has directed their reinstatement, if so, with what amount of back wages and the like.

4. The employer by filing one application in C.W.J.C 1014 has challenged the order and the award of the Tribunal both in Miscellaneous Cases Nos. 31 and 31A of 1964 and similarly by filing a single application in C.W.J.C No. 1020 the employer has challenged the order and the award made by the Tribunal in Miscellaneous Cases Nos. 38 and 39 of 1964. In my opinion, the proceedings and the cases under Sections 33(2)(b) and 33A of the Act were distinct and separate. By one writ application both could not be challenged. This view of mine will find support from the observations made by a Bench of this Court to which I was a party in *Ram Nandan Singh Vs. Ramadhar Singh and Others*, as also the observations of the Supreme Court in *Management of Delhi Transport Undertaking Vs. Industrial Tribunal, Delhi and Another*,

It is to be noticed that the employer merely seeks an order of approval of the action taken by him in dismissing the workman under Clause (b) of Sub-section (2) of Section 33 of the Act; while u/s 33A of the Act the employee aggrieved by the contravention of the provisions of Section 33 during the pendency of the proceedings before the Tribunal makes a complaint in writing to the Tribunal for adjudicating upon the complaint as if it were a dispute referred to or pending before it in accordance with the provisions of the Act. The Tribunal in such a case is required to submit its award to the Govt. and the other provisions of the Act shall apply to such an award. The order made u/s 33(2)(b) and the award made u/s 33A cannot be challenged by one single writ application. In that view of the matter, we asked Mr. M.K. Varma, learned Advocate, for the petitioners, to elect in both the cases as to whether he would confine his challenge to the order made u/s 33(2)(b) or the award made u/s 33A of the Act. He elected in both the cases to confine the challenge to the awards, that is to say, these writ applications must be deemed to be applications for quashing the awards made u/s 33A on the applications of the two workmen concerned in Miscellaneous Cases Nos. 31A and 39 of 1964.

5. The first submission made on behalf of the petitioner is that a composite order or award u/s 33(2)(b) or u/s 33A ought not to have been made. I do not find any substance in this argument. The Tribunal, by saying in the last paragraph of its decision that it is giving its award accordingly seems to suggest that in both the proceedings an award had to be and was being made. That is not so. As I have indicated above, in effect the proceeding u/s 33(2)(b) had to conclude by an order either approving the action taken by the employer or not approving it: and u/s 33A an award had got to be made. In *The Punjab National Bank Ltd. Vs. Its Workmen*, , it was pointed out by P.B. Gajendragadkar, J. (as he then was), that

Section 33A was enacted in 1950 for making a special provision for adjudication as to whether Section 33 had been contravened. This section enables an employee aggrieved by such contravention to make a complaint in writing in the prescribed manner to the Tribunal. The scope of such an enquiry is to find out in the first instance as to whether there has been a contravention as alleged. At page 172, column 2, his Lordship has further observed.

"After such contravention is proved it would still be open to the employer to justify the impugned dismissal on the merits. That is a part of the dispute which the Tribunal has to consider because the complaint made by the employee is treated as an industrial dispute and all the relevant aspects of the said dispute fall to be considered u/s 33A. Therefore, we cannot accede to the argument that the enquiry u/s 33A is confined only to the determination of the question as to whether the alleged contravention by the employer of the provisions of Section 33 has been proved or not."

It may also be emphasised that the enquiry u/s 33(2)(b) will embrace within its scope not only as to whether the requirements of Section 33 had been fulfilled or not but also as to whether the action taken by the employer should be approved or not on merits in the sense, such as, holding of a fair domestic enquiry or whether the order of dismissal is by way of victimisation or for unfair labour practice or the like. I may also indicate here that, in *Strawboard Manufacturing Co. Vs. Gobind, Wanchoo. J.*, has observed at page 1504, column 2:

"If the Tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fall and thereupon the workman would be deemed never to have been dismissed or discharged and would remain in the service of the employer. In such a case no specific provision as to reinstatement is necessary and by the very fact of the Tribunal not approving the action of the employer, the dismissal or discharge of the workman would be of no effect and the workman concerned would continue to be in service as if there never was any dismissal or discharge by the employer."

6. In view of the observations of the Supreme Court in the case of *The Punjab National Bank Ltd. Vs. Its Workmen*, and In the case of *Strawboard Manufacturing Co. Vs. Gobind*, a difficulty arose in the *Mahabit Mallah and Another Vs. Sone Valley Portland Cement Co. Ltd. and Another*, The award made by the Labour Court u/s 33A of the Act was set aside by this Court, while in the circumstances stated in the judgment of that case, the order made on the application of the employer filed under the proviso to Clause (b) of Sub-section (2) of Section 38 of the Act refusing to accord approval could not be and was not interfered with in such circumstances, as to what would be the effect of the order withholding the approval was left open I am making reference to these matters at this stage not only for the purpose of deciding that one application challenging the order u/s 33(2)(b) and the award u/s 33A is not maintainable but also for the purpose of drawing the attention of the Industrial Tribunal. Patna, to enable it to make awards in the two cases in the light of these observations made and also

the observations to be made hereinafter as the two cases u/s 33A are being remitted back to it for the making of proper awards.

7. The second submission on behalf of the petitioners was that the Tribunal has taken an erroneous view of the law interpreting the proviso to Clause (b) of Sub-section (2) of Section 33 of the Act. The contention is well founded and must be accepted as correct. It is not necessary that the application under the proviso should be made to the Tribunal before the taking of the action as seems to be its view based upon the decision of the Bombay High Court in *Premier Automobiles Ltd. Vs. Ramachandra Bhimayya Polkam*, The law laid down by the Bombay High Court was held to be bad by the Supreme Court in the case of *Strawboard Manufacturing Co. Vs. Gobind*, The Tribunal does not seem to have pointed its attention to this case. It was clearly pointed out by Wanchoo, J., in that case.

"There can therefore be no doubt that Sub-section (2) (b) read together with the proviso contemplates that the employer may pass an order of dismissal or discharge before obtaining the approval of the authority concerned and at the same time make an application for approval of the action taken by him."

This view has been reiterated in several decisions of the Supreme Court, vide *P.H. Kalyani Vs. Air France Calcutta*, *State Bank of Bikaner Vs. Balai Chander Sen*, and *Management of Delhi Transport Undertaking Vs. Industrial Tribunal, Delhi and Another*, by the Patna High Court in *Mahabit Mallah and Another Vs. Sone Valley Portland Cement Co. Ltd. and Another*,

8. In regard to the requirement of the proviso for paying to the dismissed workman wages for one month also, the Tribunal has taken an erroneous view when it says that actual payment has to be made to the workmen concerned. That is not so. A valid tender is sufficient. This has been clearly pointed out in the decision of the Supreme Court in the case of *Management of Delhi Transport Undertaking Vs. Industrial Tribunal, Delhi and Another*, referred to above.

9. Coming to the facts of the two cases, however, it will be noticed that tender of wages made to R.D. Sharma by asking him to collect all his legal dues which on the facts of this case mean the wages for one month, on the 27th October 1964, during the working hours of the office was an unconditional and valid tender. Coupled with that his letter, dated the 28th October, 1964, will further strengthen this view, although this letter does not find mention in the decision of the Tribunal, because it seems that this letter was filed during the course of the argument before the Tribunal with the petition filed on the 24th April, 1965, before the impugned orders and awards were made. This letter could not be filed with the application sent by post on the 26th October, 1964, as by that time this letter had not been written to and received by the employer. It would thus be seen that in the case of R.D. Sharma both the conditions were fulfilled and there was no contravention of the proviso to Section 33(2)(b) of the Act by the employer. Yet, I am unable for the reasons already stated to interfere with the order of the Tribunal withholding the approval and rejecting the application of the

employee u/s 33(2)(b).

The views in this regard have to be expressed for the purpose of finding out as to whether the allowing of the application made by R.D. Sharma u/s 33A of the Act is justified or not. It is not justified on the ground it has been made. But, yet, the case has to go back to the Tribunal on remand because I am unable to interfere with the order made u/s 33(2)(b) in which order it has been decided by the Tribunal that there has been a contravention of the provisions of Section 33(2). The decision, although erroneous in my view, cannot be interfered with. That being so for the purposes of the application u/s 33A, on the principles of res judicata, it has got to be said that there was a contravention of the provisions of Section 33A of the Act. Yet it will be for the consideration of the Tribunal as to whether on the facts and in the circumstances of this case including the one that the order of dismissal has been upheld by the Tribunal on merits it will make any award in favour of the workman concerned in view of the observations of the Supreme Court in the case of The Punjab National Bank Ltd. Vs. Its Workmen, and in view of the letter which I have referred to above on the point of contravention of Section 33(2).

10. The case of Phool Singh is on a different footing. Although the reasons for holding that the application for approval of the order of dismissal was made in time is not quite correct in view of the law discussed by me above the point has been decided by the Tribunal in favour of the employer. The point that there was no payment of wages to Phool Singh in accordance with the requirement of the proviso has again been wrongly decided in favour of the employee on the ground that actual payment was necessary but the decision in this regard in relation to the case of this workman is correct and has got to be upheld. The payment to this workman was not unconditional. He was asked to collect all his legal dues on the 26th December 1964 during the working hours of the office after submitting a dues clearance certificate from all the concerned incharges. Supposing an incharge of the employer refused to give a certificate rightly or wrongly, the workman could not have got the wages of one month in that event which he was entitled to without any condition under the proviso to Section 33(2)(b) of the Act. That being so, in the case of Phool Singh, there was a contravention of the provisions of Section 33 to the extent indicated above. The question in his case also arises as to whether his application u/s 33A should be allowed and, if so, what award should be made in his favour. As I have stated above, the Tribunal has merely said that the application is allowed and the award is made accordingly without specifying the terms of the award. The award is too vague and indefinite to be upheld. The case of this workman also goes back to the Tribunal. It will be open to this Tribunal to consider the observations of the Supreme Court to which its attention has been drawn above and to make such award as it thinks fit and proper in his case.

11. For the reasons stated above, both the applications are allowed and in exercise of the authority vested in this Court under Article 227 of the

Constitution I set aside the award made by the Tribunal in Miscellaneous Cases Nos. 33A and 39 of 1964 and send those cases back to it for a fresh decision in the light of the observations made and after taking into consideration the letter, dated the 28th October, 1964, said to have been written by R.D. Sharma to the employer. I would make no order as to costs in either of the cases.

S.N.P. Singh, J.

12. I agree.