

**(2018) 04 MP CK 0110**  
**In the Madhya Pradesh High Court**  
**Case No : W.P. No.10442 OF 2017**

Motilal @ Munna Sen And Ors

APPELLANT

Vs

Brigadier, Mahar Regiment Center & Another

RESPONDENT

**Date of Decision :** 19-04-2018

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 10, 12, 20(2), 33, 33(A), 33(1), 33(1)(a), 33(2)(b)

**Citation :** (2018) 3 MPLJ 606

**Hon'ble Judges :** SUJOY PAUL, J

**Bench :** Single Bench

**Advocate :** Suyash Thakur, Kanak Gaharwar

**Final Decision :** Allowed

## Judgement

These matters were analogously heard on the joint request of the parties.

2. W.P. No.10442/2017 assails the interlocutory order dated 14.02.2017 passed by Central Government Industrial Tribunal-cumLabour Court.

3. In short, the relevant facts about this case are that the petitioner filed an application under Section 10/12 of Industrial Disputes Act, 1947 for

initiation of conciliation proceedings. The conciliation proceedings commenced and employer was put to notice. At this stage, the workman filed an

application under Section 33 of Industrial Disputes Act, 1947. The Conciliation Officer by order dated 25.01.2016 invoked Section 33 of the said Act

and protected the workmen. The conciliation proceedings ended with failure report dated 23.02.2016. After receiving the report, the Central

Government sent the terms of reference dated 02.06.2016 for its adjudication to the Industrial Tribunal. The workman along with his statement of

claim filed an application under Section 33 of Industrial Disputes Act before the

Tribunal. The Tribunal issued notices to the employer. In spite of receiving notices, the employer did not turn up before the Tribunal on 03.08.2016 and, therefore, the Tribunal heard workman and passed a detailed order dated 03.08.2016 (Annexure-P-5). The management was directed not to obstruct workman from performing duties of Barber until further orders. The management subsequently filed its reply to the statement of claim. Thereafter, the Industrial Tribunal by order dated 14.02.2017, the earlier order for maintaining status quo was rejected.

4. Criticizing this order, Shri Suyash Thakur, learned counsel for the petitioner contended that a conjoint reading of Section 10, 12 and 33 of Industrial Disputes Act, makes it clear that intention of legislature was to protect the workmen during pendency of an industrial dispute. Industrial dispute remained pending from the date of application for initiation of conciliation proceedings was filed till the date the Tribunal passed the order dated 14.02.2017. The legislative intent is clear whereby the employer cannot be permitted to alter the service condition of workman connected with the dispute during pendency of conciliation proceedings or the proceedings before the Tribunal. Reliance is placed on a Full Bench Judgment of Supreme Court reported in 2002(2) SCC 244 (Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others).

5. Shri Thakur submits that the impugned order suffers from a procedural impropriety because the earlier order dated 03.08.2016 was passed after putting the other side to notice and no application seeking review of the said order was filed. Employer did not challenge the earlier order dated 03.08.2016 before a higher forum. Thus, the Tribunal has erred in deviating from its earlier order for no valid reason. In nutshell, the learned counsel for the petitioner submits that the impugned order dated 14.02.2017 suffers from a manifest procedural impropriety and illegality. Illegality, because the order passed, runs contrary to statutory mandate ingrained in Section 33(1)(a) of the Industrial Disputes Act, 1947. In support of his argument, Shri Thakur placed reliance on 1960 1 SCR 473 (Kamarhatty Co. Ltd. Vs. Shri Ushnath Prakash), AIR 1962 SC 1500 (The Straw Board Manufacturing Co. Ltd. Saharanpur Vs. Govind), AIR 1969 MP 200 (Sital Sukhram Vs. Central Government Industrial Tribunal-cum Labour Court, Jabalpur and others), 1977 (2) SCC 350 (The Bhavnagar Municipality Vs. Alibhai

Karimbhai and others), 1978 (2) SCC 144 (M/s. Punjab Beverages

Pvt. Ltd. Chandigarh Vs. Suresh Chand and another), 1985(4) SCC 71 (Workmen of American Express International Banking Corporation Vs.

Management of American Express International Banking Corporation), Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and

others decided on 17.01.2002, 1972 AIR 1343 (Air India Corporation, Bombay Vs. V.A. Rebellow and another) & 2005 (3) L.L.N. 690 (General

Manager, Indian Overseas Bank Vs. Presiding Officer, Industrial Tribunal).

6. Per contra, Ms. Kanak Gaharwar, learned counsel for the employer submits that the fact narrated by the petitioner shows that the ALCs protective

order was passed on 25.01.2016 (Annexure-P-8). The failure of conciliation report (FOC) was sent on 23.02.2016, whereas reference was made on

02.06.2016. In the meantime, the services of workmen were discontinued on completion of their contractual period automatically w.e.f. 01.04.2016.

This date, as per Ms. Gaharwar is crucial because on this date i.e. 01.04.2016, the dispute was neither pending before the Conciliation Officer nor it

was received by the Industrial Tribunal. Thus, petitioner is not covered under the protective umbrella of Section 33(1) of Industrial Disputes Act, 1974.

She submits that even otherwise, the employer has not terminated the services of the workman indeed, the workman was discontinued because of

afflux of time and non-renewal of the contract. She submits that workman is not employee of the present employer. He was a contractual worker of a

contractor.Â Â

7. In rejoinder submissions, Shri Suyash Thakur submits that the terms of reference are wide enough to include the aspect of right of a contractual

worker if the contract itself a sham contract. These aspects are required to be looked into by the Tribunal in appropriate stage.

8. M.P. Nos.601/2017, 602/2017, 603/2017, 605/2017, 606/2017, 607/2017, 608/2017, 609/2017 and 610/2017. These matters spring out of the same

industrial dispute between the parties. After passing of aforesaid order dated 14.02.2017 by the Tribunal, the employer issued an advertisement in

order to fill up the posts of Barber and other posts through direct recruitment. The workman filed another application under Section 33-A of Industrial

Disputes Act before the Tribunal praying for restraining the employer to proceed with advertisement in view of Section 33-A of the Industrial

Disputes Act. The Tribunal after hearing the workman, passed the order dated 21.04.2017 and management was directed not to complete selection

process till the next date of hearing. Assailing this order, Ms. Kanak Gaharwar, learned counsel for the employer submits that this order dated

21.04.2017 runs contrary of the earlier finding given by the Tribunal in order dated 14.02.2017 (Annexure-P-7) (in W.P. No.10442/2017). She further

submits that earlier a contractual arrangement existed between the employer and the contractor because of which Barbers were being provided by the

contractor to the employer but because of order of the Government, the said arrangement has been discontinued because of which the employer is

unable to engage the Barbers by out sourcing and on regular recruitment, an interim order is operating because of which there are serious

administrative problems with the employer. She submits that the claim of the petitioner is not covered under Section 33(1)(a) of the Act, and therefore,

Tribunal had erred in protecting the petitioner by earlier order dated 03.08.2016. She further submits that in the reply filed before Tribunal, the

employer prayed for vacation of the earlier order and, therefore, there is no procedural impropriety in the order dated 14.02.2017.Â

9. No other point is pressed by learned counsel for the parties.

10. I have heard the parties at length and perused the record.

11. Before dealing with the rival contentions, it is apposite to quote relevant portion of Section 33 of the Industrial Disputes Act, 1947, which reads as

under:-

â??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 proceedings; orâ??

[Emphasis Supplied]

12. It is also apposite to reproduce the terms of reference which reads as under:

## The Schedule

Whether Sh. Pran Singh Sen S/o Hazarilal Sen, who is working as Barber in Mahar Regimental Centre, Sagar for the last 15 years is entitled for

regularization with Mahar Regimental Centre, Sagar as Barber or not ? If not to what relief the workman is entitled. 2. Whether Sh. Pran Singh Sen is

working as Barber under Mahar Regimental Centre, Sagar directly or not and Whether the contract labour system existing at present with M/s Talwar

& Co. is sham or not? If it is sham to what relief the workman is entitled to ? 3. Whether the action of the Mahar Regimental Centre, Sagar in

publishing paper advertisement and trying to recruit regular Barbers without regularizing the services of Sh. Pran Singh Sen amounted to unfair labour

practice or not ? If yes to what relief the workman is entitled to ?

13. The first contention of Shri Thakur is that in absence of any application seeking review of earlier interim order dated 14.02.2007 or interference by

higher Court, the Tribunal was not justified in discontinuing the protection. I do not see any merit in the said contention for the simple reason that in

Para 9 of the reply to the application filed by petitioner against the application under Section 33 of ID Act, the employer has prayed for recalling and

vacation of order dated 03.08.2016. The initial order was granted without hearing the employer although the employer was put to notice. The earlier

order dated 03.02.2016 cannot be said to be a bi-party order. Thus, employer had every right to seek vacation of that order. The form of application

is not material or decisive when petitioner properly understood the impact of such reply and contested the prayer for vacation of stay by advancing

arguments. This is trite law that strict principle of Code of Civil Procedure and Evidence Act are not applicable in adjudication under industrial

jurisprudence. Even in the cases arising out of Code of Civil Procedure, it was held that rules of procedure are hand made of justice. The form of

application for vacation of stay or reply is in the realm of procedural law.

14. In (1975 (1) SCC 774, Sushil Kumar Sen Vs. State of Bihar, the Apex Court opined that the mortality of justice at the hands of law troubles a

judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower

substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels

consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is

the goal of jurisprudence - processual, as much as substantive. In (1976) 1 SCC 719 *State of Punjab Vs. Shamlal Murari*, the Apex Court held that

processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the

mistress, a lubricant, not a resistant in the administration of justice. In (1984) 3 SCC 46 *Ghanshyam Dass Vs. Domiknion of India*, the Apex Court

reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of

justice rather than to defeat it as all the laws of procedure are based on this principle. In (2005) 4 SCC 480, *Kailash Vs. Nanhku and others*, the Apex

Court held that the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless

to meet extraordinary situations in the ends of justice.

15. Thus, in the light of aforesaid analysis, the said technical objection raised by Shri Thakur must fail.

16. The bone of contention of Shri Thakur is that the petitioners were protected under Section 33(1)(a) of the ID Act and the Tribunal has erred in

taking away the said protective umbrella.Â In support of this contention, he placed reliance on various judgments. So far judgment of M/s. Punjab

Beverages Pvt. Ltd. (supra) andÂ The Straw Board Manufacturing Co. Ltd. Saharanpur (supra) are concerned, suffice it to say that in the light ofÂ

constitution bench judgment in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra), it can be safely concluded that the purposive

interpretation to the extent indicated in Para 13 of the said judgment is acceptable and permissible. In the said case, the constitution bench was mainly

interpreting and examining the impact of Section 33 (2)(b) of the Act whereas in the instant case, this Court is concerned with the impact of Section

33(1)(a).Â Shri Thakur placed reliance on the judgment of constitution Bench to bolster his submission beneficiary legislation like ID Act should

receive a liberal construction and it must cover the action of employer which has taken place even when conciliation proceedings were not pending

nor any reference was received by the Industrial Tribunal.Â As per his contention, Section 33(1)(a) should be given widest possible meaning in order

to cover those action of employer also which had taken place after termination of conciliation proceeding and before initiation of proceeding before the

Labour Court. This argument on the first blush appears to be attractive but on a deeper scrutiny loses its shine in view of judgment of Supreme Court

in the case of The Bhavnagar Municipality (supra).Â In this authoritative pronouncement, the Apex Court opined as under:

â??10. In order to attract Section 33 (1)(a), the following features must be present:

(1) There is a proceeding in respect of an industrial dispute pending before the Tribunal.

(2) Conditions of service of the workmen applicable immediately before the commencement of the Tribunal proceeding are altered.

(3) The alteration of the conditions of service is in regard to a matter connected with the pending industrial dispute.

(4) The workmen whose conditions of service are altered are concerned in the pending industrial dispute. (5) The alteration of the conditions of

service is to the prejudice of the workmen.â??

[Emphasis Supplied]

17. Aforesaid principles are consistently followed by the Courts till date. Clause 1 of Para 10 aforesaid, in no uncertain terms, makes it clear that

protective shield of Section 33 is available only when a proceeding is pending in respect of an industrial dispute before the Tribunal. Admittedly, in the

present case when services of the workmen were discontinued, neither conciliation proceedings were pending nor proceedings before the Tribunal

started. This Court in W.P. No.233/2016 decided on 13.11.2017 opined as under:

â??A microscopic reading of sub-section (1) of Section 33 makes it clear like noonday that protection is available to the workmen during the

pendency of (i) conciliation proceedings before a conciliation officer or a Board; (ii) or any proceeding before an Arbitrator (iii) or proceeding before

a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute.Â The Legislature in its wisdom did not include the â??appropriate

governmentâ? while bringing Section 33 in the Statute Book. Thus, Section 33 cannot be pressed into service in the present case because proceedings

were not pending before any such statutory authority mentioned hereinabove when transfer orders were issued.â??

18. In Lokmat Newspaper (P) Ltd. Vs. Shankarprasad (1999) 6 SCC 275, the Apex Court opined that on the date failure report is received by

appropriate Government, the conciliation proceeding comes to an end.Â The judgment is based on interpretation of Section 20(2) of ID Act, 1947.Â

The proceeding before the Industrial Tribunal commences only after receiving the terms of reference because the Tribunal itself assumes jurisdiction

when said terms of reference is received. Thus, it can be safely concluded that on the date petitioners were discontinued from service, they were not

protected under Section 33(1)(a) of the ID Act.Â There is no material on record to show that on 01.04.2016 when petitioner-workman was allegedly

discontinued, the industrial dispute was pending either before the Conciliation Officer or before the Tribunal. Thus, no fault can be found in the

impugned order of learned Tribunal dated 14.02.2017.

19. So far M.P No. 601/2017 and connected matters are concerned, as noticed, the impugned order therein is arising out of initiation of direct

recruitment process to fill up the post of Barber etc. The impugned order therein dated 21.04.2017 was passed on an application filed under Section

33-A of the ID Act.Â This section reads as under:

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, a Labour Court,

Tribunal or National Tribunal], (a) (b)Â 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 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.]

[Emphasis Supplied]

20. A cursory reading of Section 33-A of the Act shows that this special provision

can be invoked where employer contravenes the provisions of

Section 33 during the pendency of proceeding before the Board Arbitrator, Labour Court or Tribunal.Â As analyzed above, the employer has not

contravened the provisions of Section 33 of ID Act and, therefore, Section 33-A has no role to play in the present case. Section 33-A can be pressed

into service only when contravention of Section 33 is duly established.

21. In view of aforesaid analysis, the Tribunal has erred in passing the order dated 21.04.2017.Â Resultantly, the order dated 21.04.2017 is set aside.

Since the industrial dispute is pending before the Tribunal, this Court is not inclined to touch upon the merits of the case. The Tribunal is best suited to

decide the same in accordance with law.

22. Since the industrial dispute is admittedly pending before the Tribunal, it will be lawful for the employer to mention in the appointment orders (if any)

of the Barbers that their appointment shall remain subject to final adjudication of the instant industrial dispute pending before the CGIT.Â The

Tribunal shall expedite the hearing of all the matters and make endeavor to decide the same expeditiously preferably within three months from the

date it becomes functional again.

23. W.P. No.10442/2017 is dismissed, whereas M.P. Nos.601/2017, 602/2017, 603/2017, 605/2017, 606/2017, 607/2017, 608/2017, 609/2017 and

610/2017 are allowed to the extent indicated above.