
(2010) 04 DEL CK 0187
In the Delhi High Court
Case No : Writ Petition (C) No. 503 of 1999

Ram Shankar

APPELLANT

Vs

Industrial Tribunal No. II and Another

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 33, 33(2), 33A

Citation : (2010) 3 LLJ 752

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : M.N. Singh, for the Appellant;

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The challenge by the workman in this writ petition is to the order dated August 22, 1998 of the Industrial Tribunal dismissing the complaint of the petitioner workman u/s 33A of the Industrial Disputes Act. Notice of the writ petition was issued on the argument of the counsel for the petitioner that] though in the impugned order titled "Award", six issues are stated to have been framed during the course of the complaint proceedings, but the Tribunal has answered only issues No. 1 & 5. Rule was issued in the petition on February 21, 2000. The respondent in spite of opportunity did not file the counter affidavit. None appeared for the respondents for the last few dates and today also. The counsel for the petitioner has been heard.

2. Section 33A entitles an employee, aggrieved by a contravention by the employer of the provisions of Section 33 of the Act, to make a complaint of the same. Section 33 prohibits an employer from inter alia terminating the service of an employee during the pendency of conciliation proceedings or proceedings before a Labour Court or a Tribunal in respect of an industrial dispute.

3. The complaint dated March 23, 1987 of the petitioner workman before the Industrial Tribunal was that, he had been working with the respondent No. 2 D.D.

Gears Pvt. Ltd./employer since May 17, 1981 that Industrial Dispute No. 14 of 1987 was pending before the Tribunal before which the complaint aforesaid was made between the respondent No. 2 employer and its workmen; that though the employer had after the reference of the industrial dispute entered into settlement with the workmen but the employer had not decided other issues like the night allowance; that the employer had issued a concocted charge sheet and suspended the petitioner and after a farcical inquiry terminated his services; that the action of the employer amounted to victimization and the said action was illegal since the employer had not filed any application u/s 33(2)(b) seeking approval of the Tribunal to terminate the services of the petitioner during the pendency of the Industrial Dispute No. 4 of 1987. It is significant that in the complaint no date on which the services of the petitioner have been terminated was stated.

4. The employer filed a reply dated May 20, 1987 to the aforesaid complaint stating that the Industrial Dispute No. 4 of 1987 had already been settled before the Conciliation Officer on December 5, 1986 and in terms of Clause 19 of the said Settlement the dispute relating to night shift allowance was also settled; that the copy of the said Settlement had also been filed before the Tribunal in the Industrial Dispute No. 4 of 1987. It was thus stated that the complaint u/s 33A was not maintainable.

5. The petitioner workman filed a rejoinder to the aforesaid reply contending that the complaint u/s 33A was filed much before the Settlement agreement was filed in the Industrial Dispute No. 4 of 1987.

6. The petitioner workman filed an affidavit by way of examination in chief in the aforesaid complaint proceedings reiterating that at the time of his dismissal the Industrial Dispute No. 4 of 1987 was pending. Even in the said affidavit the date of his dismissal from service was not stated. However in his cross examination it has come out that his services were terminated on February 2, 1987. The respondent No. 2 employer in its evidence reiterated that the Industrial Dispute No. 4 of 1987 was settled as per agreement dated December 5, 1986.

7. The Tribunal in the impugned order dismissing the complaint has held that the petitioner had not proved any copy of reference order in respect of Industrial Dispute No. 4 of 1987 and thus it could not be determined whether the petitioner was a workman concerned with the said dispute and/or with the subject matter of Industrial Dispute No. 4 of 1987. It was further held that the petitioner had not even pleaded or proved the date of his dismissal. Accordingly the complaint u/s 33A was dismissed.

8. The petitioner in the writ petition before this Court has filed a Gazette Notification dated December 31, 1987 in which the award dated October 27, 1987 in Industrial Dispute No. 4 of 1987 was published. From the said award it transpires that the reference dated August 21, 1986 in the said industrial dispute was "whether the workmen are entitled to night allowance, if so, what directions

are necessary in this respect." The award records that the case was finally fixed for September 9, 1987 when the representative of the management appeared and none appeared for the workman despite service. The Tribunal accordingly treated the case as one in which no dispute survived for adjudication and further observed that the workmen appeared to be satisfied with the state of things as then existing regarding their employment.

9. The counsel for the petitioner has contended that since the petitioner's dismissal was on February 2, 1987 and the Industrial Dispute No. 4 of 1987 was disposed of vide award dated October 27, 1987 and thus the contravention of Section 33 is clearly made out.

10. The award, copy of which has been filed before this Court was apparently not placed before the Tribunal and has been filed before this Court for the first time. The Tribunal found that the petitioner workman had not proved the necessary ingredients of the complaint u/s 33A. The petitioner workman cannot be permitted to fill up the lacuna in the writ proceedings.

11. Be that as it may, what emerges is that though a dispute between the respondent employer and its workmen as to the payment of night shift allowance had been referred to the Tribunal as Industrial Dispute No. 4 of 1987 but a settlement agreement was arrived at between the respondent No. 2 employer and its workmen on December 5, 1986. This fact is not disputed. It thus appears that after the reference, the settlement agreement was arrived at before the Conciliation Officer and for this reason the workmen of respondent No. 2 did not appear in the industrial dispute before the Tribunal and which was finally disposed of on October 27, 1987.

12. What follows from the above is that though technically a proceeding was pending before the Tribunal on the date of dismissal of the petitioner workman but the said proceeding, as on February 2, 1987 i.e. the date of dismissal cannot be said to be "in respect of an industrial dispute" since the dispute came to an end with the settlement agreement of December 5, 1986. Section 33 is not attracted by the mere pendency of a proceeding before the Tribunal. Such proceeding has to be "in respect of an industrial dispute." If the dispute has been settled, merely because the parties have not informed the Tribunal of such settlement and the proceedings remain pending before the Tribunal, the proceedings cannot be said to be "in respect of an industrial dispute."

13. Section 33A is a penal provision and has to be construed strictly. Once the respondent No. 2 employer had entered into a settlement with its workman on December 5, 1986 no mens rea or intent to breach the provisions of Section 33 of the I.D. Act can be attributed to the respondent No. 2 employer.

14. In B.P.L. Ltd. and Others Vs. R. Sudhakar and Others, there was a stay by the court of the operation of: the order of the industrial reference. The Supreme Court held that the effect of the said stay was that the Industrial Tribunal could not take up the reference for adjudication and consequently no action based on

such reference could be taken by the Tribunal including grant or refusal of approval to the disciplinary action u/s 33(2) of the Act. It was held that the employer thus could not have approached the Tribunal for seeking approval to its disciplinary action so long as the order of reference remained stayed by the order of the High Court. The industrial reference, it was held stood revived only when the writ petition against the industrial reference was finally" disposed of by the High Court and the stay of reference vacated. It was held that if the order of dismissal of workmen was during the time when the reference had been made but was stayed by the High Court, the provisions of Section 33 were not attracted. It will thus be seen that though technically the proceedings were pending before the Tribunal, but since effectively there was a stay by the High Court. Section 33 was held not to apply.

15. Similarly, in *Management, Essorpe Mills Ltd. Vs. Presiding Officer, Labour Court and Others*, the test applied was of pendency of proceedings "in the eye of law." In that case, though conciliation proceedings were pending before the Conciliation Officer but since the same were held to have been not initiated by following the prescribed procedure, it was held) that the order of the employer dismissing the workmen did not attract Section 33.

16. Thus on merits also I am satisfied that there was no contravention of Section 33.

17. As far as the plea as aforesaid on the basis whereof, notice of this petition was issued is concerned, I do not find any merit therein also. In the complaint u/s 33A the Tribunal was concerned only with whether provisions of Section 33 had been violated or not. The Supreme Court in *Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another*, has held that before introduction of Section 33A, the only remedy of a workman against breach of Section 33 was to raise an industrial dispute u/s 10 and which entailed delay. Section 33A was introduced to enable the workman to, in the event of breach of Section 33 by the employer, directly approach the Tribunal/Labour Court. It was further held that the foundation of a complaint u/s 33A is contravention of Section 33 and if the workman is unable to show that the employer has contravened Section 33 in making the order of dismissal, the complaint would be liable to be rejected. Only if contravention of Section 33 is established, does the next question of, whether such dismissal is justified on merits or not arises. If the order of dismissal is upheld on merits, the breach of Section 33 would be treated as a mere technical breach. The issues 2 to 4 framed by the Tribunal as to the validity of order of dismissal of the petitioner appear to have been framed in the light of judgment in. *Punjab Beverages Pvt. Ltd. v. Suresh Chand* (supra). However, the occasion for decision thereof did not arise because no violation of Section 33 was established. I may however notice that *Punjab Beverages Pvt. Ltd. v. Suresh Chand* (supra) has been overruled in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others*, to the extent that it permitted inquiry into validity of dismissal, in a Section 33A proceeding, even after contravention of

Section 33 was established. There is thus no error in the order of the Tribunal in not deciding the said issues.

18. The petition is accordingly dismissed. No order as to costs.