P. D. Sharma

Vs

State Bank of India

Civil Appeal No. 785 of 1966

(G. K. Mitter, K. S. Hegde JJ)

07.02.1968

JUDGMENT

HEGDE, J.

In the aforementioned appeal by special leave, the point for consideration is whether the Labour Court, Lucknow was right in its conclusion that it was not competent to deal with Misc. Case No. 22/63 on its file, an application under s. 33(3) of the Industrial Disputes Act, 1947.

In 1961, the appellant was a clerk working in the Dehradun branch of the State Bank of India, the respondent herein. In connection with certain alleged misconduct the respondent held a departmental enquiry against him; came to the conclusion that he was guilty of the charge levelled against him and for the said offence it proposed to dismiss him from its service. But as at that time an industrial dispute between the respondent and its workmen was pending before the National Industrial Tribunal in Ref. No. 1 of 1960 (which will hereinafter be referred to as the industrial dispute), and the appellant being one of the office bearers of a recognized trade union connected with the respondent and consequently a 'protected workman', it applied on April 27, 1962 under s. 33(3) to the National Industrial Tribunal for permission to discharge him from service. On the authority of an order made by the Central Government on 23rd December, 1960 under sub-s. 2 of s. 33 B, the National Industrial Tribunal, Bombay transferred the said application to the Labour Court, Delhi. The National Industrial Tribunal Bombay, made its award in the aforementioned Reference on June 7, 1962. The same was published in the official gazette on June 13, 1962 and it came into force on July 31, 1962. Thereafter on February 23, 1963 the Government of India transferred the respondent's application under s. 33(3) pending before the Labour Court, Delhi, to the Labour Court, Lucknow. That court dropped the said proceedings as per its order dated 10th February, 1965 holding that in view of the award in the Reference in question it had no competence to deal with that application. This order of the Labour Court was challenged by the appellant in Civil Misc. Writ Petition No. 619 of 1965 on the fire of the Allahabad High Court. That petition was summarily dismissed. Thereafter he applied to that court for a certificate under Articles 132(1) and 133(1)(C) of the Constitution. During the pendency of that application, he moved this Court on July 17, 1965 for special leave under Art. 136 of the Constitution to appeal against the order of the Tribunal. Special leave was granted by this Court on September 8, 1965. The application for certificate made before the Allahabad High Court was rejected by that court by its order dated September 13, 1965. No application for special leave under Art. 136 was filed against that order.

When this appeal came up for hearing on a previous occasion. learned counsel for the respondent urged that the special leave granted should be revoked as the appellant had not appealed against the order made by the Allahabad High Court in his writ petition. Thereafter, the appellant moved this

Court for special leave against the order of the Allahabad High Court rejecting his writ petition. He also filed an application for condonation of the delay in submitting that special leave application.

We are not satisfied that there is any force in the preliminary objection taken by the learned Solicitor General on behalf of the respondent. This case does not fall within the rule laid down by this Court in Daryao and others v. State U.P. and Others [[1962] 1 S.C.R. 574.]. As seen earlier, the High Court summarily dismissed the writ petition filed by the appellant. The order dismissing the writ petition was not a speaking order. Hence no question of res judicata arises. The learned Solicitor General did not try to bring the present case within the rule laid down in Daryao's case [[1962] 1 S.C.R. 574.]. His contention was that the order of the High Court not having been appealed against the same has become final and therefore it would be inappropriate for this Court to grant the relief prayed for by the appellant. According to him, if the present appeal is allowed there will be two conflicting final orders. We are unable to accept this contention as correct. The scope of an appeal under Art. 136 is much wider than a petition under Art. 226. In an appeal under Art. 136 this Court can go into questions of facts as well as law whereas the High Court in the writ petition could have only considered questions which would have been strictly relevant in an application for a writ of certiorari. From the order of the High Court it is not possible to find out the reason or reasons that persuaded it to reject the appellant's petition. An appeal under Art. 136 against an order can succeed even if no case is made out to issue a writ of certiorari.

The decision of this Court in Management of Hindustan Commercial Bank Ltd., Kanpur v. Bhagwan Dass [A.I.R. 1965 S.C. 1142.] to which reference was made by the learned Solicitor General does not bear on the question under consideration. There the appellant had applied to the High Court for the issue of a certificate under Art. 132 against its under but without pursuing that application he applied for and obtained from this Court special leave to appeal against the very same order and that without obtaining exemption from compliance with r. 2 of O.13 of the rules of this Court. It was under those circumstances this Court held that special leave granted should be revoked.

The learned Solicitor General in support of his preliminary objection placed a great deal of reliance on the decision of this Court in Chandi Prasad Chokhani v. State of Bihar [[1962] 2 S.C.R. 276.]. That was a case under the Bihar Sales Tax Act. The appellant's claim of certain deductions had been disallowed by the department. He went up in revision to the Board of Revenue. The Board of Revenue dismissed his revision petition. Thereafter under s. 25(1) of the Bihar Sales Tax Act, he applied to the Board of Revenue by means of three different applications to state a case to the High Court of Patna in each of those petitions on questions of law formulated by him in his applications. But those applications were rejected. The appellant then moved the High Court to call upon the Board to submit to it for its opinions the questions of law set out by him in his applications. The High Court dismissed his applications in respect of the first two periods of assessment but by its order dated November 17, 1954 it directed the Board to state a case in regard to the third period on one of the questions of law mentioned in the petition which alone in its opinion arose for consideration. By its judgment dated January 21, 1957 the High Court answered that question against the appellant. On February 17, 1955 the appellant made applications to this Court for special leave to appeal against the order of the Board of Revenue referred to earlier. The leave prayed for was granted. When the appeals came up for hearing, objection was raised as to their maintainability. This Court held that though the words of Art. 136 are wide this Court has uniformly held as a rule of practice that there must be exceptional and special circumstances to justify the exercise of the discretion under that article. In the circumstances of that case the Court opined that the appellant was not entitled to obtain special leave against the orders of the Board of Revenue and thus bypass

the orders of the High Court. In the course of the judgment this Court observed :

> "The question before us is not whether we have the power; undoubtedly, we have the power, but the questions is whether in the circumstances under present consideration, it is a proper exercise of discretion to allow the appellant to have resort to the power of this Court under Art. 136. That question must be decided on the facts of each case, having regard to the practice of this Court and the limitations which this Court itself has laid down with regard to the exercise of its discretion under Art. 136."

The reasons that persuaded this Court to revoke the special leave granted in those appeals are not available in this case.

This takes up to the question whether a case is made out to revoke the special leave granted. We shall presently see that an important question of law arises for decision in this case. The High Court summarily rejected the appellant's application under Art. 226. At the time the appellant approached this Court for special leave, his application under Articles 132 and 133(1)(C) was pending in the High Court. Though in his special leave application the appellant mentioned the fact that this his application under Art. 226 had been dismissed by the High Court, he failed to mention the fact that his application for a certificate under Articles 132 and 133 was pending before the High Court. We were assured by Mr. A. K. Sen learned counsel for the appellant that this omission was due to an erroneous impression of the law on the part of the Advocate on record and there was no intention to keep back that fact from this Court. As seen earlier the fact that the appellant's application under Art. 226 had been dismissed was mentioned in the special leave application. Hence the omission in question cannot be considered as a deliberate suppression of a fact. Under these circumstances, we do not think that a case is made out to revoke the special leave granted.

We now come to the merits of the appeal. As seen earlier the tribunal had concluded that it had no competence to pass orders on the application made by the respondent under s. 33(3) as the industrial dispute had come to an end because of the award made by the National Tribunal. According to Mr. Sen the tribunal erred in taking that view. He urged that once an application under s. 33(3) is validly made, the tribunal must decide whether the permission sought for should be granted of refused even though the industrial dispute had been decided during the pendency of that application. His contention was that if an application under sub-ss. 1, 2 or 3 of s. 33 is made during the pendency of an industrial dispute, the tribunal which considers that application has to make an order one way or the other. In support of this contention he placed strong reliance on the decision of this Court in Tata Iron and Steel Co. Ltd. v. S. N. Modak [[1965] 3 S.C.R. 411.]. That was a case arising under s. 33(2)(b). The question that arose for decision therein was whether a proceeding validly commenced under that provision would automatically come to an end merely because the industrial dispute had in the meanwhile been finally determined. This Court upheld the view taken by the tribunal that such an application would not automatically come to an end. It was held therein that an application under s. 33(2)(b) is an independent proceeding and not an interlocutory proceeding; it is a proceeding between an employer and his employee who was doubt concerned with the industrial dispute along with the other employees; but it is nevertheless a proceeding between two parties in respect of a matter not covered by that dispute. It was further laid down therein that the order for the approval of which the application had been made would remain inchoate until the tribunal accords its approval; the said order cannot effectively terminate the relationship of the employer and the employee until an approval for that order is obtained from the tribunal. If the approval is not accorded, the employer would be bound to treat the workman as his employee and pay him full wages for the period even though the employer may subsequently proceed to terminate the

employee's service. In that case this Court confined its attention to the scope of s. 33(2)(b). It did not address itself to s. 33(3). Hence Mr. Sen is not right in his contention that the rule laid down in that decision governs the controversy before us.

Alternatively, Mr. Sen contended that the ratio of that decision at any rate would support his contention. To find out whether the ratio of that decision has any bearing on the question that is before us, we have to examine sub-ss. (2) and (3) of s. 33. They read :

> "(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, or, where there are no such standing orders, 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 proceeding; or (b) for any misconduct not connected with dispute, discharge or punish, whether by dismissal or otherwise, that workman;
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> 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.
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> (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.
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> Explanation. - For the purposes of this sub-section, a 'protected workman' in relation to an establishment, means a workman who, being an officer of a registered trade union connected with the establishment is recognised as such in accordance with rules made in this behalf."

One common condition precedent for an application to be made under both those provisions is the pendency of any conciliation proceedings before a conciliation officer or a board or any proceeding before an arbitrator or a labour court or a tribunal or National Tribunal in respect of an industrial dispute. That apart the two provisions deal with different situations. Sub-s. 2 of s. 33 concerns itself with actions that may be taken by an employer against his employees in respect of matters not connected with the industrial dispute. In those cases though the employer can take any of the actions mentioned in that provision in accordance with the standing orders or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman, on his own authority, he must, in the case of discharging or punishing whether by dismissal or otherwise, a workman, pay him wages for one month and must also make an application to the authority before which the industrial dispute is pending for approval of the action taken by him. Sub-s. 3 of s. 33 deals with 'protected workman' which expression in relation to an establishment means a workman who being an officer of a registered trade union connected with

the establishment, is recognized as such in accordance with the rules made in that behalf. If the employer wants to take any action prejudicial to a protected workman concerned in an industrial dispute pending before one of the authorities mentioned earlier he can do so only with the "express permission in writing of the authority before which the proceeding is pending". On a comparison of sub-Ss. (2) & (3) of s. 33 it will be seen that the scope of the two provisions are wholly different. Taking the case of a worker's discharge or punishment by dismissal or otherwise. In the former the previous permission of the authority before which the industrial dispute is pending is necessary but under the latter only a subsequent approval from a competent authority is needed. Though the application under that provision should be made to the authority before which the industrial dispute is pending the approval to be obtained need not be from that authority. Once approval is given it goes back to the date on which the order in question was made. If the approval asked for is not accorded then the action taken by the employer becomes ab initio void and the employee will continue in service and his conditions of service will also continue without any break as if the order in question had not been made at all. Hence we are unable to accept the contention of Mr. Sen that the decision of this Court in Tata Iron and Steel Company's case [[1965] 3 S.C.R. 411.] has any bearing on the question to be decided in this case.

The purpose of those two sub-sections are wholly different. This will be further clear if we refer to the history of s. 33. That section, since its incorporation in the Act in 1947, as undergone several legislative changes. As it stood originally it read :

> "No employer shall during the pendency of any conciliation proceeding or proceedings before a tribunal in respect of any industrial 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, nor save with the express permission in writing of the conciliation officer, board or tribunal, as the case may be shall he during the pendency of such proceedings, discharge, dismiss, or otherwise punish any such workman, except for misconduct not connected with the dispute."

The section was amended by Act 48 of 1950. The amended section read :

> "During the pendency of any conciliation proceedings or proceedings before a tribunal in respect of any industrial dispute, no employer shall (a) 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; (b) discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute;
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> save with the express permission in writing of the conciliation officer, board or tribunal, as the case may be."

The amended section dropped the exception made in respect of misconduct not connected with the dispute. This change in the law prevented the employers from discharging or punishing their employees even in respect of a misconduct not connected with the industrial dispute. That was a serious inroad into the disciplinary jurisdiction of the employer. It is possibly with a view to avoid unnecessary interference with the rights of the employers the section was amended by Act 36 of 1956.

In Strawboard Manufacturing Co. v. Govind [[1962] Supp. 3 S.C.R. 618, 623.] this Court observed :

> "The plain object of the section was to maintain the status quo as far as possible during the pendency of any industrial dispute before a tribunal. But it seems to have been felt that s. 33, as it stood before the amendment of 1956, was too stringent for it completely took away the right of the employer to make any alteration in the conditions of service or to make any order of discharge or dismissal without making any distinction as to whether such alteration or such an order of discharge or dismissal was in any manner connected with the dispute pending before an industrial authority. It seems to have been felt therefore that the stringency of the provision should be softened and the employer should be permitted to make changes in conditions of service etc. which were not connected with the dispute pending before an industrial tribunal. For the same reason it was felt that the authority of the employer to dismiss or discharge a workman should not be completely taken away where the dismissal or discharge was dependent on the matters unconnected with the dispute pending before any tribunal. At the same time it seems to have been felt that some safeguards should be provided for a workman who may be discharged or dismissed during the pendency of a dispute on account of some matter unconnected with the dispute. Consequently s. 33 was re-drafted in 1956 and considerably expanded."

By enacting s. 33 the Parliament wanted to ensure a fair and satisfactory of an industries dispute undisturbed by any action on the part of the employer which could create fresh cause for disharmony between him and his employees. The object of s. 33 is that during the pendency of an industries dispute status quo should be maintained and no further element of discord should be introduced. But then distinction was made between matters connected with the industrial dispute and those unconnected with it.

While construing the scope of sub-s. of s. 33 we have to bear in mind the fact that under the common law the employer has a right ti punish his employee for misconduct. Therefore all that we have to see is, to what extent that right is taken away by sub-s. 3 of s. 33. There is no doubt that at the time the application in question was made, an industrial dispute was pending between the respondent and its employees. It is admitted that the appellant is a 'protected workman'. He had not been discharged or punished before the industrial dispute was decided, though no doubt the respondent had proposed to dismiss him after obtaining the necessary permission from the tribunal. The application for permission to dismiss him was made during the pendency of the principal dispute. No such permission would have been necessary if no industrial dispute between the respondent and its employees was pending. Hence, the sole reasons for that application was the pendency of the industrial dispute. Once the industrial dispute was decided, the ban placed on the common law, statutory or contractual rights of the respondent stood removed and it was free to exercise those rights. Thereafter there was no need to take anybody's permission to exercise its rights. In other words, the limitation placed on the respondent's rights by sub-s. 3 of s. 33 disappeared the movement the industrial dispute was decided. We are in agreement with the tribunal that it had no competence to consider the application made by the respondent after the industrial dispute was decided.

The learned Solicitor General tried to support the conclusion of the tribunal on yet another ground. His contention was that the permission sought for could have been granted only by the authority before which the industrial dispute was pending. In the instant case that dispute was pending before

the National Tribunal at Bombay. Therefore according to him, the permission asked for could not have been given either by the Labour Court at Delhi or by the Labour Court at Lucknow. The language of sub-s. 3 of s. 33 prima facie lends support to this contention. But in resisting that contention Mr. Sen relied on s. 33B which confers power on the government and under certain condition on the Tribunal or National Tribunal as the case may be to transfer any proceeding pending before them to a Labour Court. The language of this provision is not in harmony with that in sub-ss. (1) and (3) of s. 33. The learned Solicitor General urged that to harmoniously construe these provisions we must confine the operation of s. 33B only to cases falling under sub-s. 2 of s. 33. It is not necessary to decide this controversy in this case in view of our conclusion that the Labour Court at Lucknow was right in its conclusion that it had no competence to grant the permission prayed for as the industrial dispute had come to an end.

For the reasons mentioned above, the appeal is dismissed but there will be no order as to costs. The special have application as well as the civil miscellaneous petition have now become superfluous. They are accordingly dismissed without costs.

Appeal dismissed.##

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