CALCUTTA HIGH COURT

Alkali and Chemical Corporation of India Ltd

Vs.

Seventh Industrial Tribunal

Matter No. 280 of 1963

(B.N. Banerjee, J.)

14.08.1964

ORDER

1. The point for my consideration in this Rule is short but interesting. That point is whether an Industrial Tribunal retains its jurisdiction to deal with an application for approval of penal action taken by an employer against an employee after the Tribunal has made its award on the industrial dispute referred to it. The provision of law, that is relevant for consideration in this context, is Section 33 of the Industrial Disputes Act to which I shall refer later on.

2. The circumstances in which the point arises for my consideration are hereinafter stated in brief. The petitioner company is a manufacturing concern and employs a large number of workmen. The company had dismissed a workman of the name of Satya Ranjan Banerjee for absenteeism. That dismissal gave rise to an industrial dispute, which was referred by the respondent State Government to the Seventh Industrial Tribunal on October 26, 1961, for adjudication. While that reference was pending, the petitioner company dismissed the second, third and fourth respondents workmen for misconduct. Since the workmen were dismissed during the pendency of a proceeding before an Industrial Tribunal, the petitioner company made an application before the Tribunal, on March 20, 1962, for approval of the action taken against the three workmen, under the provisions of Section 33(2)(b) proviso of the Industrial Disputes Act. Before that application was disposed of, the Tribunal made its award on the main reference and the award was published in the Calcutta Gazette on September 7, 1962.

3. On March 15, 1963, the petitioner company filed an application before the Tribunal taking up the stand that the Tribunal had no further jurisdiction to deal with the application made under Section 33(2)(b) proviso. The material portion of the said application reads as follows :

> "(2) The industrial dispute between the company and the Union has since been disposed of by this Hon'ble Tribunal by its award dated 10th August 1963 (Ext. A) and the said award has been published by the Government of West Bengal. Labour Department, under their Order No. 3743-TR-11L-233 (B)/61 dated the 24th August 1962 (Ext B). It has been published in the Calcutta Gazette Extraordinary dated 7th September 1962.

(3) The company respectfully submits that this Hon'ble Tribunal having given its award in the industrial dispute referred to it by the Government of West Bengal, Labour Department, the proceedings before the Tribunal should be deemed to have been concluded under Section 20(3) of the Industrial Disputes Act and the pendency of proceedings in regard to this dispute which had given this Hon'ble Tribunal the jurisdiction to consider the company's application under Section 33(2)(b) of the said Act no longer exists. In the circumstances the company submits that the Hon'ble Tribunal has no jurisdiction to dispose of the application filed before it under Section 33(2)(b) of the Industrial Disputes Act on 20th March 1962."

4. By an order dated May 2, 1963, the Tribunal rejected the application and fixed a date of hearing of the application for approval. The reasons which weighed with the Tribunal are hereinafter stated :

"In my view, the contentions raised by the company to the effect that this Tribunal has lost all jurisdiction in regard to the present application under the proviso to Section 33(2)(b) simply because the adjudication proceedings in regard to the main dispute with reference to which the present application was made have been concluded and this Tribunal has become functus officio with regard to the said dispute is not tenable and acceptable. This contention proceeds upon the assumption that the Tribunal's jurisdiction in regard to the present application is absolutely dependent upon and co-extensive with the jurisdiction in regard to the main dispute. This assumption is not correct. The main dispute which was under adjudication when the dismissal of the employees covered by the present application was made provided the occasion for making the present application which became obligatory upon the company in law. In a case of dismissal falling within the provisions of Section 33(2)(b), the employer must comply with the requirements of the proviso thereto which includes the making of an application to the Tribunal before which the adjudication proceedings in respect of the main dispute are pending for approval of the action taken by the employer. The employer has no choice in the matter and unless the approval is given by the competent Tribunal, the legal position would be that the dismissal had never taken place and the workmen purported to have been dismissed is to be deemed to be in the service of the employer with consequent benefits to him. This principle was clearly laid down by the Supreme Court in the case of *Straw Board Manufacturing Co. Ltd. v. Govind*[1], All that is required for assumption of jurisdiction by the Tribunal before which the main dispute is pending for adjudication in regard to an application under the proviso to Section 33(2)(b) I. D. Act in that the dismissal or discharge or the concerned workman must have been made during the pendency of the adjudication proceedings relating to the main dispute and for some misconduct not connected with the .said dispute. It is also well settled that the employer may pass an order of dismissal or discharge before obtaining the approval of the competent Tribunal and at die same time, make an application for approval of the action taken by him. But the application must he there and once the application is made before the competent Tribunal,

the Tribunal must dispose of it according to law, notwithstanding that the adjudication proceedings in respect of the main

[1]1962-1 Lab LJ 420 : AIR 1962 SC 1500

dispute have in the meantime been concluded and the Tribunal has become functus officious in regard to it."

5. Aggrieved by the order, the petitioner company moved this court, under Article 226 of the Constitution, for a Writ of Certiorari for the quashing of the order and for a Writ of Prohibition restraining the Tribunal from hearing the approval case and obtained this Rule.

6. Section 33 has, since its incorporation in the Industrial Disputes Act, undergone several legislative changes. The section as it originally stood was couched in the following language :

"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 proceedings, nor, save with the express permission in writing of the conciliation officer, hoard or tribunal, as the case may be shall during the pendency of such proceedings, discharge, dismiss, or otherwise punish any such workmen, except for misconduct not connected with the dispute."

7. The above quoted section required express permission of the conciliator or the adjudicator for –

(a) Prejudicial alteration of conditions of service of workman connected with the dispute;
(2) penalization of such workmen, except for misconduct not connected with the dispute, during the pendency of conciliation or adjudication of industrial disputes. The express permission was a condition precedent to alterations of conditions of service or of penalization.

8. The section was amended by Act 48 of 1950 and the amended section was as herein-below quoted :

"During the pendency of any conciliation proceeding or proceedings before a Tribunal in respect or any 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 proceeding; or
(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
(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 workmen concerned

in such dispute,

(a) after 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 the dispute, discharge or punish, whether by dismissal or otherwise that workman;

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.

(3) * * *

(4) * * *

(5) Where an employer makes an application to a conciliation officer, board, Labor Court, Tribunal or National Tribunal under the proviso to Sub-Section (2) for approval for the action taken by him, the authority concerned shall, without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it deems fit."

9. The amendment, inter alia, brought penalty for misconduct not connected with the dispute within the purview of Section 33 but provided for a new procedure in such cases, namely, instead of express permission in writing, as in case of misconduct connected with the dispute, permitted such action being taken with subsequent approval of the authority mentioned in le proviso to Section 33(2).

10. The object with which Section 33 was incorporated in the Industrial Disputes Act, observed the Supreme Court in *Automobile Products of India Ltd. v. Rakmaji Bala*[2], at pp. 265 and 266, was :

> "The object of Section 22 of the 1950 Act like that of Section 33 of the 1947 Act as amended is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimization by the employer on account of their having raised industrial disputes or their continuing the pending proceedings. It is further the object of the two sections to ensure - that proceedings in connection with industrial disputes already pending should be brought to a determination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned in me sections which may give rise to fresh disputes likely to further exacerbate the already strained relation between the employer and the workmen.

To achieve this object a ban has been imposed upon the ordinary right which the employer has under the ordinary law governing a contract of employment. Section 22 of the 1950 Act and Section 33 of the 1947 Act which impose the ban also provide for the removal of that ban by the granting of express permission in writing in appropriate cases by the authority mentioned therein. The purpose of these two sections being to determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under these sections is to accord or withhold permission. and so it has been held - we think rightly - by the Labour Appellate

Tribunal in - *"Carlsbad" Mineral Water Mfg. Co. Ltd. v. Their Workmen*[3], which was a case

[2] AIR 1955 SC 258 [3]1953-1 Lab LJ 85 (LATI-Cal)

under Section 33 of the 1947 Act. Even a cursory perusal of S. S3 of the 1947 Act will make it clear that the purpose of that section was not to confer any general power of adjudication of disputes.

> Provided * * * *"

There is no reason to think that the Legislature by a side wind as it were, vested in the conciliation officer and the Board the jurisdiction and power of adjudicating upon disputes which they normally do not possess and which they may mil be competent or qualified to exercise. Further, if the purpose of the section was to invest all the authorities named therein with power to decide industrial disputes one would have expected some provision enabling them to make and submit an award to which the provisions of the Act would apply such as is provided in Section 33-A of the 1947 Act or Section 23 of the 1950 Act. There is no machinery provided in Section 33 of the 1947 Act or Section 23 of the 1950 Act for enforcing the decision of the authority named in those sections. This also indicates that those sections only impose a ban on the right of the employer and the only thing that the authority is called upon to do is to grant or withhold the permission, i.e., to lift or maintain the ban."

11. The same view was expressed by the Supreme Court in *Rohtas Industries Ltd. v. Brijnandan Pandey*[4] and in *Banaras Ice Factory Ltd. v. Its Workmen*[5],

12. Bearing in mind the observations quoted above, I have now to consider the argument advanced by Mr. Ginwalla learned Advocate for the petitioner company, that after the making of the award the Industrial Tribunal lost jurisdiction to deal with the application for approval under the provisions of the proviso to section 33(2)(b) of the Act.

13. Section 20(3) of the Act is indicative of the commencement and conclusion of an industrial proceeding and reads as follows :

> "Proceedings before an arbitrator under Section 10-A or before the Labor Court, Tribunal or National Tribunal shall be deemed to have commenced on the date of the reference of the dispute for arbitration or adjudication, as the case may be and such proceedings shall be deemed to have concluded on the date on which the award becomes enforceable under Section 17-A."

14. The material portion of Section 17-A, to which reference is made in Section 20(3), reads as follows :

> "17-A (1) An award including an arbitration award shall become enforceable on the expiry of 30 days from the date of its publication under section :
> Provided * * * *"

15. Therefore, after an adjudication concludes, a Tribunal has no further seisin over the dispute

referred to it and becomes functus officio. Does the Tribunal still retain jurisdiction to decide an application for approval of a penal order made before the making

[4] AIR 1957 SC 1
[5] AIR 1957 SC 168

of the award, even after the expiry of 30 days from the date of the award ? In order to find out an answer to this question, I need at first refer to the language of Section 33. There are internal indications in the section which go to show that an application for approval must be disposed of during the pendency of the adjudication proceeding. Those indications are :

(a) Under Sub-Section (2) an employer is debarred from penalizing a worker during the pendency of industrial conciliation or adjudication, except with the approval of the authority before which the proceeding is pending;

(b) Under Sub-Section (5) "the authority concerned" shall, without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it thinks fit;

(c) The words "authority concerned" must be the authority before which the application for approval was made, namely, "authority before which the proceeding is pending" as in Sub-Section (2).

16. Now, if the authority concerned is the authority before which the proceeding in respect of an industrial dispute is pending and if that authority is to bear the application for approval without delay and also to pass an order expeditiously, it is reasonable to think that the authority concerned must dispose of the application for approval within the time during which it has seisin over the dispute and before it becomes functus officio. If the intention was to invest jurisdiction in the authority concerned to dispose of an approval application even after the making of the award, then one would have expected a different language in Sub-Section (5), namely, instead of the words "authority concerned", the words "authority concerned" before which such dispute is or was pending". This is all the more so, because the object of the section, as pointed out by the Supreme Court in Automobile Products of India Ltd., AIR 1955 Supreme Court 258 (Supra) is, inter alia, to ensure that pending industrial disputes be brought to a determination in peaceful atmosphere and that during such pendency no action be taken which may give rise to further disputes likely to exacerbate the already strained relationship between the employer and the workmen. This view finds support from a judgment of the Mysore High Court in *T.A. Shah v. State of Mysore*[6], in which Somnath Ayyar and Kalagate, JJ. Observed :

> "In support of the criticism made by Sri Ramachar of the order made by the labour court, he asks our attention to the provisions of Sub-Section (5) of Section 33 which directs the authorities specified in that sub-section to dispose of an application presented under the proviso to Sub-Section (2)(b) without delay and as expeditiously as possible. Sri Ramachar points out that there is no reference in this sub-section to the pendency of the main proceeding m which the application is presented under the proviso to Section 33(2)(b) and therefore, asks us to take the view that since Sub-Section (5) is what confers jurisdiction and power on the authority to make an order on that application, no limitations should be placed upon that power not expressly stated in that Sub-Section.

The essential weakness of this argument is that, although Sub-Section (5) of section 33 does not in terms refer to any pending proceeding such reference to a pending proceeding

[6](1964) 1 Lab LJ 237 : (AIR 1963 Mys 241)

is plainly implicit in the provisions of that Sub-Section which directs the "authority concerned" to dispose of an application presented under the proviso to Sub-Section (2)(b) of Section 33 in manner specified. The question is, which is the 'authority concerned' referred to in that Sub-Section. In order to identify the 'authority concerned' referred to in the sub-section, one must necessarily look into the provisions of Sub-Section (2), the opening words of which are during the pendency of any such proceeding in respect of an industrial dispute. What is of greater importance is that the approval required by the proviso to Section 33(2)(b) is the approval of 'the authority before which the proceeding is pending'. It is manifest, although there is no reference in Sub-Section (5) to the authority before which a proceeding is pending, that the 'authority concerned' referred to in Sub-Section (5) is no other than the 'authority before which the proceeding is pending' and the 'proceeding' referred to in this expression is again no other than the proceeding 'in respect of au industrial dispute' referred to in the opening protion of Sub-Section (2). What is therefore, incontrovertible is that the only authority which may make an order under Sub-Section (5) is the authority before which a proceeding in respect of which an industrial dispute is pending. It is the approval of the authority which is relevant for the purpose of the proviso to Section 33(2)(b) which, if accorded, gives recognition to the action taken by the employer, and, which if refused, destroyes it. If no proceeding is pending before the authority when it takes up the application for approval or disposal, it is no longer an authority before which a proceeding in respect of an industrial dispute is pending, which is the only authority which can make an order under Sub-Section (5)."

Sri Ramachar asked us to take the view that the pendency of a proceeding in respect of an industrial dispute is not a condition precedent for the exercise of power under Sub-Section (b). It seems to me that that view which was pressed upon us clearly overlooks the plain language and theory of Section 33, particularly of the proviso to Sub-Section (2)(b) and of Sub-Section (5). It is abundantly clear from the provisions of Section 33 that what is ensured by that section is the continuance of the conditions of service and employment of an employee during the pendency of the proceedings referred to in that section, so that no unfair labour practice or victimization may be possible by an employer by way of reprisal against his employee. That vigilance which has to be exercised by the concerned authority during the pendency of a proceeding before it, it is plain, becomes quite unnecessary and purposeless the moment the proceedings during the pendency of which there should be no change either in the condition of service or in the continuance of employment except either with the express permission in writing or by approval comes to an end. On the contrary, the provisions of Sub-Section (5) which direct the concerned authority to deal with an application expeditiously and without delay do afford an unmistakable indication that such expeditious disposal is directed for the plain reason that the adjudication on the application becomes impossible, the moment the industrial dispute itself comes to an end.

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That view which, in my opinion, we should take is reinforced by the provisions of Section 33A of the Act which directs that a complaint against a contravention of the provisions of Section 33 should be adjudicated upon as if it were a dispute referred to or pending before the authority referred to in it. The contrast between Section 33A and Sub-Section (5) of Section 33 is so manifest that it does not enable Sri Ramachar to present the argument that an application

presented under the proviso to Sub-Section (2)(b) of Section 33 is some kind of an independent dispute upon which an adjudication is possible even after the disposal of the industrial dispute during the pendency of which that application was presented.'

17. I have quoted somewhat a long extract from the judgment of the Mysore High Court. I have done so with a purpose. The reasonings given by their Lordships of the Mysore High Court are in substance similar to the view that I have expressed. Since, as I have presently indicated there is a conflict of opinion amongst different High Courts on this point I have deliberately quoted the passage above so as to show that I am not alone in the view expressed by me. The Madras High Court also has expressed a similar view in *Mettur Industries Ltd. v. Sundara Naidu*[7]*,*

18. The High Court of Kerala appears to have taken a different view in *Kanan Devan Hill Produce Co. Ltd. v. Miss Aleyamma Varughese*[8]*,* in which Vaidialingam, J. observed as follows :

> "Mr. M.M. Chariyan, learned counsel for contesting respondent, in particular relied upon the observations of their Lordships of the Supreme Court in the recent judgment in 1962-1 Lab LJ 420 at p. 425 : (AIR 1962 Supreme Court 1500 at pp. 1504-1506) to the effect :

If the tribunal does not approve of the action taken by the employer, the result would be that the action taken by him would fail 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 us if there never was any dismissal or discharge by the employer. In that sense, the order of discharge or dismissal passed by the employer does not become final and conclusive until it is approved by the tribunal under Section 33(2)."

Learned counsel placed considerable reliance upon these observations of their Lordships of the Supreme Court that unless the order of discharge or dismissal which has been passed by the employer during the pendency of an industrial dispute has been approved by the tribunal, it does not become final and conclusive and therefore the learned counsel urged that inasmuch as the approval of an action taken by the management is absolutely essential and necessary, the jurisdiction of the tribunal concerned cannot be considered to have been taken away simply because it has become functus officio so far as the main award is concerned. In my view, these observations do lend considerable support to the contentions of the learned Government pleader as well as of Mr. M.M. Cheriyan. These observations also clearly show that the action taken by the management by way of discharge or dismissal under Section 33(2) does not take effect though the action itself have been taken unless that action is approved by the tribunal, under Section 33(2)(b) proviso and the result also is that if the tribunal does not approve of the action taken by the employer, the action taken by the management would fail and the workman concerned should be deemed never to have been dismissed or discharged at all. Certainly, the position would be anomalous if the contention of Mr. P.K. Kurien, learned counsel for the

[7]1963-2 Lab LJ 303 (Mad)

[8]1962-2 Lab LJ 158 : (AIR 1963 Ker 44)

petitioner, is accepted that the tribunal has no jurisdiction. That there must be an adjudication by the tribunal concerned is clear from the observations of their Lordships of the Supreme Court quoted above. I may also say that the statute also emphasises this aspect also when it says that the

application filed under Sub-Section (2) of Section 33 must be heard and disposed of by the tribunal as early as possible. The emphasis is not very much that they must be heard and disposed of. But it does say that there must be consideration and adjudication by the industrial tribunal in respect of an application. In the absence of any such application, the position as laid down by their Lordships of the Supreme Court in the observations referred to above will be as if no action has been taken and the workman will continue to be in the employ. Therefore, to avoid all those anomalies a resasonable interpretation to be placed upon Section 33(2)(b) read with Section 33(5) is that the jurisdiction of the tribunal is in no manner affected to deal with applications filed for approval under Section 33(2)(b) proviso by the fact that it has become functus officio in respect of the main dispute. The fact that it has become functus officio so far as the main dispute is concerned, has no relevancy or bearing in considering its jurisdiction."

19. The same view was expressed by the Punjab High Court in *Om Prakash Sharma v. Industrial Tribunal, Punjab*[9], in which D.K. Mahajan J. observed :

> "It will be noticed that a clear distinction is maintained between the disputes arising out of the reference and disputes which have nothing to do with the reference. The pendency of a reference merely puts an embargo on the powers of the management to dismiss or discharge its employees. Therefore, the seeking of approval under Section 33(2) for dismissal or discharge of an employee has nothing to do with a reference which is pending otherwise before the tribunal. * * * Mr. Bhagirath Das, learned counsel for the management, draws attention to Sections 20 and 33A for the contention that the application under Section 33(2) would come to an end the moment the reference comes to an end in accordance with Section 20. I am unable to agree with the contention. It is no doubt true that an industrial dispute which is referred to a tribunal comes to an end when the tribunal makes its award and that award becomes final. Once the award has become final, the tribunal becomes functus officio and has no jurisdiction to deal with any matter arising out of or connected with the reference but that will not put an end to all application under Section 33(2) because that application has no connection whatever with the dispute nor does it arise out of that dispute. It is totally an independent proceeding arising under Section 33(2). It will not the with the death of the reference or its culmination."

I have again quoted long extracts from the judgments of the Kerala and the Punjab High Courts which take a different view. I have done so with a purpose, because I have to meet the reasons given by their Lordships for coming to a different conclusion. I am unable to agree with the view expressed by their Lordships of the Kerala High Court because of the reason which I shall presently state. In Straw Board Manufacturing Co., 1902-1 Lab LJ 420 : AIR 1962 Supreme Court 1500 (supra) their Lordships of the Supreme Court had no occasion to express any view upon the point which I am called upon to decide in this Rule. Their Lordships merely expressed the opinion that unless approved, a penal order

[9]1962-2 Lab LJ 272 (Punj)

imposed during the pendency of a dispute, does not become effective and the employee would be deemed to continue in service despite penalty. This must be the law, in my opinion, so long as the industrial dispute lasts before a tribunal or the other authorities mentioned in Section 33. But when that tribunal or other authorities has or have disposed of the disputes, which formed the

subject-matter of the reference, in a peaceful atmosphere not aggravated by any subsequent dispute and has or have become functus officio, it or they loses or lose the jurisdiction for dealing with an application for approval and the application lapses. As a consequence thereof, the penal order becomes effective even without approval. But this may form the subject-matter of a fresh industrial dispute. The judgment of the Kerala High Court underestimated the words used in Sub-Sections (2) and (5) of Section 33, which were meant to maintain the status quo during the pendency of an industrial conciliation or industrial adjudication. Further, the inference drawn by their Lordships from the judgment of the Supreme Court in Straw Board Manufacturing Co.'s case, 1962-1 Lab LJ 420 : AIR 1962 Supreme Court 1500 (supra) in my opinion, was not justified regard being had, firstly to the context in which their Lordships of the Supreme Court made the observations and, secondly, because of the express language used in Sub-Sections (2) and (5) of Section 33. I also respectfully dissent from the view expressed by the Punjab High Court in so far as D.K. Mahajan J., held that an application for approval was an independent proceeding within Section 33(2), which would not terminate with the culmination of the reference. The proceeding may be an independent proceeding in the sense that it is a separate proceeding. But the jurisdiction of the authority concerned to dispose of such separate proceeding lasts only so long as the conciliation or the adjudication proceeding remains pending and lapses thereafter. Such a proceeding is not so far independent as to survive the conciliation or the adjudication proceeding.

20. The right of an employer to penalize a delinquent employee for misconduct under the ordinary law of employment or standing orders of the employer has been curtailed under Section 33 only for a time, namely, the time occupied by the pendency of the industrial conciliation or adjudication proceeding, for a particular purpose as pointed out by the Supreme Court in the case of Automobile Production of India, AIR 1955 Supreme Court 1500 (supra), from which I have heretobefore quoted the relevant passage. When that purpose is served, there is no use of continuing; the curtailment or limitation on the powers of the employer.

21. In the view I take I hold that the respondent industrial tribunal was wrong in assuming jurisdiction over the approval application after the making of the award. I, therefore, quash that order. Let a Writ of Certiorari according issue. There will be no order as to costs.

22. I make it dear that nothing herein contained will prevent the workman from raising a fresh industrial dispute on the penal action taken against the employees, for which the approval of the industrial tribunal was sought for.
Petition allowed.