
(1999) 06 BOM CK 0047

Bombay High Court

Case No: Notice of Motion No. 124 of 1999 in Writ Petition No. 2547 of 1998

Air India Limited

APPELLANT

Vs

P.K. Upadhaya and
another

RESPONDENT

Date of Decision: June 29, 1999

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 17, 2

Citation: (1999) 4 ALLMR 84 : (1999) 4 BomCR 427 : (1999) 3 BOMLR 142 : (1999) 3 MhLj 265

Hon'ble Judges: A.P. Shah, J

Bench: Single Bench

Advocate: E.P. Bharucha and Z. Kamdin, instructed by Mulla and Mulla, for the Appellant;
Ashok D. Shetty, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

A.P. Shah, J.

The question that arises for consideration in this case is whether the provisions contained in section 17-B of the Industrial Disputes Act, 1947 could be invoked by a workman and proceeding initiated by the employer challenging the order of the National Industrial Tribunal refusing to approve u/s 33(2)(b) of the said Act the action taken against the workman.

2. The 1st respondent Mr. P.K. Upadhaya is employed as a cleaner with the petitioner Air India Limited. He was been subjected to an enquiry on the ground of failure to maintain integrity, fraud, breach of rules and regulations and commission of acts of subversion and disobedience etc. He has been found guilty of the charges levelled against him and ordered to be dismissed from service with effect from 20-4-1995. Since, however, above

action is sought to be taken against the workman and as there are proceedings pending as contemplated u/s 33(1) of the Act, petitioner invoked section 33(2)(b) and sought approval of its action by the competent authority. The Industrial Court has, however, in proceeding u/s 33(2)(b) of the Act rejected the application of the petitioner for approval to the order of dismissal by its order dated 20-1-1998. The petitioner has moved this Court under Article 226 of the Constitution of India. By order dated 24-12-1998 rule-nisi has been issued and stay of the order of the Industrial Court has been granted subject to the petitioner depositing the entire arrears of wages in Court. Liberty is given to the workman to withdraw 50% of the amount subject to furnishing the security. The workman has taken out this notice of motion for wages u/s 17-B of the Act.

3. Mr. Bharucha the learned Counsel appearing for the petitioner opposed the prayer of the workman. According to Mr. Bharucha section 17-B of the Act provides for interim payment of wages when an award directing reinstatement is challenged by the employer in any proceedings before the High Court or the Supreme Court. Mr. Bharucha submitted that the order passed by the Tribunal is neither an award nor an order for reinstatement. Therefore Mr. Bharucha submitted that the workman is not entitled to the wages u/s 17-B of the Act.

4. On the other hand Mr. Shetty learned Counsel appearing for the workman submitted that the order refusing to grant approval clearly amounts to an award within the meaning of the provisions of the said Act inasmuch as the effect of such refusal is to render the order of dismissal null and void and the workman is restored to his original position. Thus the order must be deemed to be an award of reinstatement for the purpose of section 17-B of the Act and the workman is entitled to wages in terms of the said section.

5. Several decisions have been cited by both the parties. In Bata India Ltd. v. Seventh Industrial Tribunal, W.R. and others 1994(11) C.L.R. 326 the Calcutta High Court has taken the following view :

"...if a liberal interpretation is given to section 17-B for the purpose of giving effect to the beneficial object which it seeks to achieve, there will be no difficulty in extending the benefit of the said section even in such a case where the employer challenges an order passed by the Tribunal disapproving an order of dismissal u/s 33(2)(b) of the Industrial Disputes Act before the High Court or the Supreme Court."

and accordingly concluded:-

"...The decision of the Industrial Court u/s 33(2)(b) of the Industrial Disputes Act disapproving the order of dismissal, is certainly a matter relating to employment or non employment of the workman and is certainly a determination by the Tribunal in respect thereto. Such a decision is certainly a determination that the dismissal in question is invalid and therefore cannot be approved. There is no reason therefore, as to why giving a liberal interpretation to the provision of section 17-B of the said Act, such a decision of

the Industrial Tribunal u/s 33(2)(b) of the said Act cannot be termed as an award within the meaning of section 17-B of the said Act."

The above decision of the Calcutta High Court is based upon an earlier decision of the same Court in the case of Samser Ali (Sk) v. Kesoram Industries and Cotton Mills Ltd. and another, reported in 1988(1) C.L.R. 60 wherein it was held that the order made u/s 33(2)(b) of the said Act can be enforced in an application u/s 17-B of the said Act having regard to the definition of "Award" and the definition of "Industrial Dispute".

6. The Division Bench of the Andhra Pradesh High Court in the case of V. John v. Singareni Collieries Co. Ltd. Manuguru and another, reported in 1996(1) C.L.R. 43 has followed the decision of the Calcutta High Court in the case of Bata India Limited (supra) and held that the order of the Labour Court disapproving order of dismissal of appellant workman amounts to award within the meaning of section 17-B of the Act. Similar is the view taken by a Single Judge of the Gujarat High Court in the case of Kirtiben B. Amin v. Matatlal Apparels, reported in 1995(II) C.L.R. 1065.

7. Per contra the Division Bench of the Orissa High Court in the case of M/s I.D.L. Chemicals Ltd. v. S.R. Tamma and another, reported in 1989(58) page (sic) has held that the section 17-B has no application to the order passed u/s 33(2)(b) of the said Act. The Bench observed

"The Legislature were aware of the distinction between an award and an order passed u/s 33. Therefore, when it used the expression "award" in section 17-B, it is reasonable to infer that the provision was intended only to apply to awards."

I may hasten to add that the Bench held that in such a situation the workman is not without any remedy. Even before section 17-B was incorporated with effect from 21-8-1984, the courts were in their discretion awarding wages to workman whenever they found that the facts and circumstances justified grant of wages. While granting stay of reinstatement under the award, they were modulating the relief by directing payment of wages to the workman who but for the order of stay would have been reinstated and received wages. Therefore even if section 17-B does not apply, the Court can in its discretion while granting stay of operation of the order passed u/s 33(2)(b) in appropriate cases direct payment of wages.

8. A Single Judge of the Madras High Court in the case of Pallavan Transport Corporation Ltd. v. M. Mujthuchezian and another, reported in 1986 Lab.I.C. 1541 has also taken a view that such an order cannot be treated as an award as defined u/s 17-B of the said Act. The learned Single Judge held:

"A refusal to approve dismissal of workman u/s 33(2)(b) which is challenged in the instant writ petition, cannot be treated as a award as defined u/s 2(b). It cannot be treated as any question relating to an interim or final determination of an industrial dispute. The result of such an order is that the workman continues to be in service. As for the directive relating

to reinstatement which is part of the impugned order, it is redundant and it being not an order of reinstatement."

9. My attention is also drawn to a recent decision of the Division Bench of the Calcutta High Court in the case of *Westinghouse Sazby Farmer Ltd. v. State of West Bengal & others*, reported in 1998(1) C.L.R. 81 wherein it has been held that the order dismissing an application u/s 33(2)(b) of the Industrial Disputes Act is not an "award" directing "reinstatement" within the meaning of the phrase u/s 17-B of the Act. The Division Bench has disagreed with the view taken by the earlier Benches of the Calcutta High Court in *Bata India Limited* and *Samser Ali (Sk)* and has referred the issue to the larger Bench.

10. The two sections of the Act which are relevant are sections 33(2)(b) and section 17-B. Let us consider section 33(2)(b). Relevant portion of section 33(2)(b) reads thus:

"33(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)

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."

11. The expression "such proceedings" is referable to the proceeding as envisaged u/s 33(1) of the said Act i.e. (a) any conciliation proceedings before a Conciliation Officer or Board, and (b) any proceeding before the Arbitrator or Labour Court, or Tribunal or National Tribunal in respect of industrial dispute. "Any misconduct not covered with the dispute" in Clause (b) above is referable to Clause (b) in sub-section (1) of section 33 wherein it is stated

"for any misconduct connected with dispute, discharge or punish whether by dismissal or otherwise any workman concerned in such dispute, save with express permission in writing of the authority before which the proceeding is pending."

12. In *Punjab National Bank v. I.P.N.B.E. Federation* AIR 1980 S.C. 160 the Supreme Court has held that where an application is made by the employer for requisite permission u/s 33 of the said Act the jurisdiction of the Tribunal in dealing with such an application is limited. It has to consider whether a prima facie case has been made out by the employer

for dismissal of the employee in question. If the employer has held a proper enquiry into the alleged misconduct of the employee and if it does not appear that the proposed dismissal of the employee amounts victimisation or unfair labour practice, the tribunal has to limit its enquiry only to the question as to whether a prima facie case has been made out or not. In these proceedings it is not open to the tribunal to consider whether the order proposed to be passed by the employer is proper or adequate or whether it errs on the side of excessive severity, nor can the tribunal grant permission subject to certain conditions which it may deem to be fair. It has merely to consider the prima facie aspect of the matter and either grant the permission or refuse it according as it holds that a prima facie case is or is not made out by the employer.

13. In [The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others](#), in the context of section 33 the Supreme Court has observed as under:

"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 victimisation 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 the 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 the ban by the granting of express permission in writing in appropriate cases by the authority mentioned therein. The purpose of those 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 1953(1) Lab.L.J. 85 which was a case u/s 33 of the 1947 Act. Even a cursory perusal of section 33 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."

14. In the case of [Testeels Ltd. Vs. N.M. Desai and Another](#), and (upheld by the Supreme Court in [N.M. Desai Vs. The Testeels Ltd. and Another](#), it was observed :

"Now, where an application is made by the employer, for the requisite approval u/s 33(2)(b) what the conciliation officer would have to consider is whether a prima facie case has been made out by the employer for discharge of the employee in question. If the employer has held a proper enquiry into the alleged misconduct of the employee and if it does not appear that the proposed discharge of the employee amounts to victimisation or

unfair labour practice, the conciliation officer would have to limit his enquiry only to the question whether a prima facie case has been made out or not. If he comes to the conclusion that a prima facie case is made out, he would have to grant approval to be employer."

15. It is in this background of settled law section 17-B must be read and construed. Section 17-B was enacted as a remedial measure, as a piece of beneficial social welfare legislation aiming at alleviating the hardship of the workman who despite the decision of the Labour Court or tribunal was kept out of employment and deprived of earning pursuant to the employer obtaining an order of restrain or stay from the High Court. The legislature therefore intervened and declared that where the workman has obtained an award for reinstatement and the employer has preferred proceedings before the High Court or Supreme Court, the employer shall be liable to pay the workman during the pendency of the proceeding full wages etc. last drawn by him. If he has not been employed in any establishment during that period, the benefit to the aforesaid effect is availed by the workman.

16. If the intention of the Parliament was to treat the decision u/s 33(5) as an award there was nothing to stop it from expressly saying so. The word used is "order" and not "award". Apart from the plain words of the section the definition of the word "award" in section 2(b) is also indicative of the fact that an award is passed only upon an adjudication. Section 2(b) defines award as under:

"2(b) "award" means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial or National Industrial Tribunal and includes an arbitration award made u/s 10-A."

The "determination" contemplated by the definition is of the industrial dispute or a question relating thereto, finally on merits. An order refusing to approve u/s 33(2)(b) cannot be treated as an award, as defined u/s 2(b). It cannot be treated as any question relating to an interim or final determination of an industrial dispute. Section 17 provides that an award of a Labour Court shall be published within a period of 30 days from the date of its receipt by the appropriate Government as provided for. Section 17-A1 and (2) deals with the enforceability of such an award. Section 19(3) deals with the period of operation of award whereas, in section 33(2)(b) the expression used is only "order". It is not the case of the learned Counsel for the respondent that the order u/s 33(5) is required to be and was in fact published.

17. In Punjab National Bank's case (supra) it is pointed out by the Supreme Court that even if the requisite permission is granted to the employer u/s 33, that would not be the end of the matter. It is not as if the permission granted u/s 33 validates the order of dismissal. It merely removes the ban; and so the validity of the order of dismissal still can be challenged by the workman or the Union by raising an industrial dispute in that behalf. Thus it is clear that the order u/s 33(5) is not a final determination of an industrial dispute

and cannot itself be an award.

18. It is also pertinent to note that u/s 33(2)(b) the Tribunal cannot direct reinstatement although the consequence of a refusal to grant approval may render the order of dismissal void. Even if an employer contravenes section 33(2)(b) the employee cannot claim reinstatement. He must invoke section 33-A of the Act. The language of section 33-A makes it clear that a contravention of section 33 by the employer does not ipso facto mean that an employee is entitled to continue in service. He can make such a claim only after there is an adjudication on a dispute raised by him either u/s 10 or 33-A when the employer would be entitled to justify the impugned dismissal on merits. See [Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another](#), and Punjab National Bank's case (supra).

19. In view of the foregoing discussion it is clear that an order rejecting an application u/s 33(2)(b) is not an award for the purpose of section 17-B. The only effect of such an order is that the order of dismissal is rendered invalid. Furthermore, it is not as if section 17-B. is the only provision under which an employee can ask for payment of arrears and current wages. It is open for him to seek such other remedy as are available under the Act, for instance, as application u/s 33(C)(2) or the workman may resort to the remedy under the Payment of Wages Act, 1986 See [Punjab Beverages Pvt. Ltd., Chandigarh Vs. Suresh Chand and Another](#), . In the circumstances, it is not possible to agree with the view taken by Calcutta High Court in Bata India Ltd. and Sameer Ali (Sk) as well as that taken by the Andhra Pradesh High Court and Gujarat High Court in V. John v. Singareni Collieries and Kirtiben B. Amen v. Mafatlal Apparels. I am in respectful agreement with the view expressed by the Orissa and Madras High Court in the cases discussed earlier.

20. Even though section 17-B. is not applicable to the present case even then in my view the workman is entitled to claim reliefs for wages. The High Court in exercise of its jurisdiction which is invoked by the employer under Article 226 of the Constitution of India challenging such order by the Tribunal u/s 33(2)(b) is fully competent to direct payment of such wages of the workman concerned See Dena Bank v. K.T. Patel 1998 C.R. 191. Under the interim order the workman was allowed to withdraw the arrears of wages on furnishing security. It seems that the workman is not in a position to furnish security and therefore he is unable to withdraw the said amount. The workman is not expected to starve during the pendency of the proceeding. He is thus entitled to wages on the basis of last drawn wage from month to month pending the hearing and final disposal of the above petition.

21. Accordingly the petitioner is directed to pay to the workman wages at the rate of Rs. 4818.65 per month from the date of the petition till disposal of the writ petition. Arrears to be paid within six weeks from today. Notice of motion stands disposal of accordingly.

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