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# General Industrial Society Ltd. Vs Eighth Industrial Tribunal and Others

**Court:** Calcutta High Court

**Date of Decision:** Feb. 14, 1978

**Acts Referred:** Industrial Disputes Act, 1947 â€" Section 32, 33, 33A

**Citation:** 82 CWN 722 : (1978) 2 LLJ 384

**Hon'ble Judges:** M.N. Roy, J

**Bench:** Single Bench

## Judgement

M.N. Roy, J.
In this Rule, the petitioner, a company incorporated under the Companies Act and which owns and have several factories

registered under the Factories Act, has impeached an award dated December 16, 1974, made by the respondent Eighth Industrial Tribunal, West

Bengal, in an application u/s 33A of the Industrial Disputes Act, 1947 (hereinafter referred to as the said Act), filed by Shri Bhawami Singh,

respondent No. 2 (hereinafter referred to as the said respondent).

2. The said respondent at the material time was employed in the petitioner''s Jute Mill at Gondalpara. The petitioner has stated that the terms of

service and conditions of its employees at all material time and still to-day, are governed by a set of rules as incorporated in its standing orders duly

framed and certified, It has been stated that Clause 9 of the said standing orders and more particularly Sub-clause (b) thereunder, lays down that if

a workman after proceeding in leave deserves an extension, he should apply through the head of the department to the Manager who shall send a

written reply either granting or refusing the same on merit to the workman, if his address is available and if such reply is likely to reach him before

the expiry of the leave originally granted. It appears that under Sub-clause (c) of Clause 9 of the said standing orders, if the workman concerned

do not explain satisfactorily, over staying on leave, if any, he would lose lien on his service and would be kept in the list of Badlies and Clause 14C

(V) of the same, which deals with habitual absence, lays down that absence without leave for more than 10 days would expose him to the charge

of misconduct for which appropriate actions including an order for dismissal may be passed.

3. The said respondent admittedly made an application for leave for eight weeks between the period from April 3,1972 to May 28,1972 and such

leave was granted on the assurance given by him that he would not have such leave extended further. Such assurance was taken as during the

period when the leave was asked for the petitioner generally suffered from dearth of employees, There is also no dispute that subsequent to the

expiry of the sanctioned leave, the said respondent did not report for duty but asked for extension of the same on some grounds which has been

alleged by the petitioner to be not bona fide, but wrongful and not genuine. It has also been contended that the said respondent did not act in terms

of his assurance. The petitioner has stated that such extension of leave was not granted, and ultimately the petitioner treated him to be not

interested in his employment. As such on June 15, 1972, the said respondent was informed that due to his continuous overstay on the expiry of

sanctioned leave, and as a consequence of his unauthorised absence, necessary consequences under the standing order would follow and

thereafter, on appropriate consideration of the matter, the service of the said respondent was terminated. The petitioner has contended that such

action was due and proper and was taken in accordance with the provisions of the standing orders, particulars whereof have been mentioned

hereinbefore and more particularly when in terms of the standing orders, the services of the said respondent stood automatically terminated.

4. Since on the date as aforesaid a reference under the provisions of the said Act was pending adjudication before the respondent-Tribunal, the

said respondent filed an application u/s 33A of the said Act, contending inter alia amongst others that the petitioner violated the provisions of

Section 33 of the said Act. In the said application it has been stated that the said respondent duly applied for extension of the sanctioned leave on

expiry, but ignoring the same or without duly disposing of the same the petitioner found him guilty of misconduct under Clause 14C (V) of the

standing orders and dismissed him summarily with effect from June 29, 1972. It was also contended that under Clause 9(b) of the standing order,

the Manager of the petitioner was required to send written reply to him either refusing or granting leave and furthermore he could not be dismissed

without due opportunities to explain the charges. The dismissal, in the instant case, which was without enquiry has been contended to be invalid

and inoperative and such dismissal was also contended to be bad and void as the same was contended to be in contravention of the procedure as

laid down in the standing orders, apart from being in violation of principles of natural justice. In view of the above the said respondent alleged

violations of Section 33 of the said Act by the petitioner.

5. The petitioner first filed a preliminary written statement, which was followed by a supplementary written statement and contended inter alia

amongst others that the application u/s 33A of the said Act was not maintainable. It was also contended that in the facts of the case, there was no

violation of the provisions of Section 33 of the said Act, the action as taken was in terms of the standing orders and as such neither the provisions

of Section 33(2)(a) nor 33(2)(b), were attracted. It was further contended that owing to long overstay of authorised leave, by the said respondent,

he should be deemed to have abandoned his employment and as such no enquiry was needed. It was contended further that since there was no

violation of Section 33 of the said Act, neither the respondent-Tribunal has jurisdiction to entertain the applications nor the same was maintainable.

6. On the pleadings as aforesaid, the respondent-Tribunal held that it was required to be decided whether there has been any violation of the

provisions of Section 33 to attract the provisions of Section 33A of the said Act and to what relief, the said respondent was entitled to in law.

7. By the impugned award in Annexure "X" to the affidavit-in-opposition of the said respondent, the respondent-Tribunal has found the application

u/s 33A to be maintainable and the dismissal of the said respondent to be improper and was made in violation of the provisions of Section 33 of

the said Act and those of the provisions in the company"s standing orders and the principles of natural justice. In view of such findings, the

respondent-Tribunal directed reinstatement of the said respondent in service without full wages.

8. Such determination has been made, as the respondent-Tribunal has held that since the said respondent went on authorised leave first and then

applied for extension for his further illness, the petitioner was under the obligation under Clause 9(b) of the standing orders to inform him either

allowing or refusing such prayer of extension and such information not having been admittedly given, the petitioner acted contrary to its standing

orders. It was also observed that the said respondent was entitled to have a charge sheet for his unauthorised absence, if any, and corresponding

opportunities to establish and explain his conduct and such opportunities not having been admittedly provided, there was violation of principles of

natural justice. In view of the above and also in view of the fact that the petitioner did not make an application for approval of the action as taken,

u/s 33 of the said Act, it was held that the application u/s 33A of the said Act was maintainable and consequently the award as aforesaid, viz.,

reinstatement of the said respondent with full back wages was made.

9. Mr. Mookherjee, appearing in support of the Rule, contended firstly, that since there was no due and appropriate extension of the sanctioned

leave, the said respondent, in terms of the standing orders, was deemed to have left his service and the more so when he has not admittedly come

back after the expiry of the authorised leave and as such the application in question u/s 33A was not maintainable as there was no violation of the

provisions of Section 33 and more particularly when the petitioner was entitled to take action u/s 33(2)(b) of the said Act and the more so when

no misconduct connected with the dispute was involved. In short, it was submitted by Dr. Mookherjee that when the said respondent''s services

was not terminated for any misconduct, but such action was taken in terms of the standing orders and for the wilful act of the said respondent,

there could not be any infraction of the provisions of either Section 32(20)(a) or 33(2)(b) of the said Act or non-compliance therewith, which

could entitle the said respondent to maintain his application u/s 33A. Dr. Mookherjee argued secondly that when admittedly the impugned action

had to be taken for the laches and negligent conduct of the said respondent, in not having his sanctioned leave extended, so the respondent-

Tribunal was wrong in directing his reinstatement and that too with full back wages. It was also submitted by him that when the said respondent,

has by his conduct relinquished his service or his right to continue in the same, the respondent-Tribunal should not have directed his reinstatement

or payment of full back wages to him. Dr. Mookherjee thirdly argued that the year of birth of the said respondent being 1910 he was due to retire

in 1968 and in fact when after some extension he has admittedly retired in 1972, the order for his reinstatement or payment of full back wages to

him should not have been made by the impugned award, which was made on December 16, 1974.

10. The last arguments of Dr. Mookherjee cannot be allowed to be argued at this stage and in this proceeding, when the relevant facts were not

duly put forward before the respondent-Tribunal and the more so when the date of birth of the said respondent and as given by the petitioner now,

has been severely contradicted and denied. Furthermore, such argument being dependent on the determination of certain facts and not on law,

cannot now be allowed to be agitated, The second argument of Dr. Mookherjee is really dependent on the first because the entitlement of the said

respondent to his back wages would arise only when and if he succeeds in establishing the application u/s 33A of the. said Act to be maintainable.

In fact, if it is found as contended by Dr. Mookherjee, that the application u/s 33A itself was not maintainable, then the directions of the

respondent-Tribunal to pay him his back wages and also to reinstate him would fail automatically.

11. In order to maintain an application u/s 33A the first and foremost requirement amongst others would be the pendency of a proceeding before a

Labour Court, Tribunal or National Tribunal, then contravention of Section 33 of the said Act by the employer during such pendency and a

complaint in writing in the prescribed manner by the employee concerned to the authority against such contravention. It is not every contravention

of Section 33 which would be within the scope of Section 33A, For maintaining an application u/s 33A, it must be established that the

contravention complained of happened during the pendency of proceeding before any of the authorities as mentioned above. So it is necessary and

desirable that before the authorities as mentioned hereinbefore could adjudicate upon a complaint u/s 33A, they should record a positive finding

that there was or has been a proceeding pending before it in respect of an industrial dispute. So far as the second limb or requirement as referred

to hereinbefore there is no dispute that a reference was pending before the respondent-Tribunal, so such requirement has been satisfied in the

instant case. This fact was of course contradicted by Dr. Mookherjee and such submissions, in my view, are without any substance. The third limb

or requirement for maintaining an application has also been satisfied in the instant case, as the application u/s 33A was duly made and was in force.

So the question remains for determination, on the arguments as advanced is, whether the application in question was not maintainable as there was

no violation of the provisions of Section 33 as alleged.

12. The first and foremost consideration by the authorities as mentioned hereinbefore, on the question of maintainability of an application u/s 33A,

is whether there has been a contravention of the provisions of Section 33 by the employer. It is only when the determination has been made on the

affirmative, those authorities get jurisdiction to enter into the merits of the case. Thus violation or contravention of the provisions of Section 33

would be without any doubt the justification for the authorities concerned to entertain an application u/s 33A, Such view finds support in the

determinations of the Supreme Court, amongst others in the case of Syndicate Bank Ltd. v. Ram Nath v. Bhat 1967 I L.L.J 745. In fact, if the

determination is made against the employee, the authorities concerned, as also determined in the above mentioned case amounts other and at least

upto the determination of the Supreme Court in the case of Air-India Corporation, Bombay Vs. V.A. Rebellow and Another, ; would have no

jurisdiction to interfere an application u/s 33A and in fact such application, as observed in the case of Upper Ganges Valley Electric Supply Co.

Ltd. v. G.S. Srivastav 1963 II L.L.J. 237; would also become incompetent and not maintainable.

13. The necessary contravention for the maintainability of an application u/s 33A occurs where during the pendency of an industrial dispute before

the authorities as aforesaid, the employer :

(1) alters the conditions of service of a workman in contravention of Section 33(1)(a) or alters the conditions of service of a " protected workman"

in contravention of Section 33(3)(a) ;

(2) discharges or punishes a workman, by dismissal or otherwise, or a misconduct connected with the pending dispute without obtaining prior

express permission in writing of the appropriate authority as required by Section 33(1)(b);

(3) discharges or punishes a "protected workman", by dismissal or otherwise, for a misconduct even not connected with the pending dispute,

without obtaining prior express permission in writing of the authority as required by Section 33(3)(b) read with Section 33(1)(b) ; and (4)

discharges or punishes a workman by dismissal or otherwise, for a misconduct not connected with the pending dispute, without complying with the

requirements of the proviso to Section 33(2)(b).

14. A discharge simpliciter which is not connected with a pending dispute, would not in terms of the determination of the Supreme Court in the

case of Air India Corporation v. V.A. Rebellow (supra), contravene the provisions of Section 33, In terms of the decision of the Supreme Court in

the case of Assam Oil Company Vs. Its Workmen, ; amongst others, if such discharge is punitive or mala fide, the same would no doubt constitute

contravention of section. The question whether a discharge of an employee in a given case is a discharge simpliciter or punitive or mala fide, would

be a question of fact and when the Tribunal comes to a conclusion on such aspect, after consideration of the relevant evidence, the Court would

not have ordinarily any jurisdiction to interfere. Where the termination of the service of a workman is automatic and as a result of the employee"s

own act, such as abandoning the job or overstay in the sanctioned leave resulting in termination of service under the standing orders, in terms of the

determination of the Supreme Court in the case of National, Engineering Industries Limited v. Hanuman 1967 2 L.L.J. 883, there would be no

contravention of Section 33. That apart, if the workman who makes the complaint u/s 33A is not a workman concerned in the dispute. There

would also be no case of contravention and contravention cannot also take place when the complaint u/s 33A is not by a workman concerned in

the dispute and furthermore there would be no contravention in terms of the observation of this Court in the case of Mcleod and Co. Vs. Sixth

Industrial Tribunal, West Bengal and Others, and also of the Supreme Court in the case of Digwadih Collieries v. Ranjit Singh 1964 II L.L.J. 143,

when, there is no pendency of a proceeding before the concerned authority at the time of the alleged contravention. As stated hereinbefore, the

complaint in the instant case was filed duly and in form and the said respondent was also a workman concerned in the dispute. So the application

was maintainable and entertainable on those grounds and in entertaining the same, the respondent-Tribunal, has not gone wrong or has done

anything, which is contrary to its jurisdiction and authority.

15. In this case the said respondent, because of his own action, suddenly exposed himself to great prejudice including the loss of his service for not

having his sanctioned leave extended. There was application made by the said respondent for extension of his sanctioned leave and admittedly on

receipt of such application there was no communication by the petitioner in terms of Clause 9(b) of the standing orders, either extending the leave

as asked for or refusing the same and on that basis the respondent-Tribunal has come to the conclusion that there was clear violation of the

mandatory provisions of the standing orders, in as much as the petitioner did not send a reply to the workman either allowing or refusing the leave

as asked for. In view of such infraction of the provisions of the standing orders, the respondent-Tribunal has observed the subsequent action as

taken by the petitioner as to be unauthorised. The respondent-Tribunal has opined that when the said respondent did not receive any

communication, the petitioner had not acted with justification in charging the said respondent for overstaying the leave. On this aspect, the

respondent-Tribunal has made reference to Clause 9(c) of the standing orders, which lays down the consequential effect of an employee not duly

explaining or when he has not complained satisfactorily such overstaying of leave. The said clause lays down that in such cases, the employee

concerned would lose lien of his service and would be kept in the list of Badlies. The Tribunal as has further observed that under cl, 9, there is no

provision for dismissal and as such it has further observed that if the charge is for overstaying of leave and not habitual absence, then the petitioner

could hardly take any action under Clause 14(c)(v) of the standing orders, which speaks of habitual absence without leave or absence without

leave for more than 10 days. It has also been indicated by the respondent-Tribunal that absence without leave and overstaying of leave is materially

different proposition and as such two different provisions have been made in Clauses 9 and 14(c)(v) respectively. In view of the above, it has been

observed by the respondent-Tribunal that the charge as levelled against the said respondent was bad according to the standing orders. It has

further been observed that when admittedly there has been no domestic enquiry on such charges as levelled, so in the instant case, there was

violation of the principles of natural justice and the action as taken would not be termed as a termination simpliciter of the services of the said

respondent and in fact such termination was a penal one and so the same came fully within the mischief of Section 33(2)(b) of the said Act and the

more so when admittedly a general reference case involving the workman of the petitioner was pending before the respondent-Tribunal. Thus the

respondent-Tribunal observed that the application u/s 33A was maintainable and there was violation of Section 33, as the petitioner failed and

neglected to seek approval for such dismissal of the said respondent. After the above findings, the respondent-Tribunal has gone into the merits of

the case as mentioned hereinbefore and directed reinstatement of the said respondent with full back wages,

16. The petitioner''s standing orders and more particularly Clause 9(b) of the same, authorises the employee concerned, who wants to have an

extension of his sanctioned leave extended, on due compliance with the provisions therein and filing of an application puts the petitioner under the

obligation to inform the workman concerned, whether his prayer has been allowed or rejected and if the employee concerned remains absent

beyond the period of the leave originally sanctioned, he would lose his lien on appointment, unless he (1) returns within eight days of the expiry of

the leave and (2) explains to the satisfaction of the manager, his inability to return before the expiry of his leave. It is also stipulated in the said

Clause 9(b) that in case the workman loses his lien on his appointment, he shall be entitled to be kept on the list of Badlies. Clause 14 of the

standing order lays down the different criterions for which an employee may be proceeded with for misconduct and sub(sic)) thereunder, defines

habitual absence without leave or absence without leave for more than 10 days, as misconduct. The said respondent was admittedly informed on

June 15, 1972 by the petitioner that since he was remaining absent from his duties from May 29, 1972 without permission, so he was guilty of

misconduct under the provisions of Clause 14C(v) of the standing orders. He was further asked to show cause within a specified date of receipt of

the letter as to why he should not be dismissed. It is also an admitted fact that thereafter, the said respondent duly showed cause which was

considered to be unsatisfactory and as such by an order dated June 29, 1972, the said respondent was held to be guilty of misconduct under the

aforesaid provisions of the standing orders and as such he was directed to be dismissed with immediate effect and was asked to collect his dues

from the Mill office on any working day on receipt of the said notice. So the action as taken in the instant case was not a case of termination

simpliciter as contended. It was in fact a dismissal after issuing a charge sheet but without a domestic enquiry and also without giving the said

respondent necessary opportunities of defending his case or to explain his conduct. In fact, the action as taken was a penal one and so there would

be no ground to differ from the findings of the respondent-Tribunal, viz., that there was violation of the provisions of Section 33(2)(b) of the said

Act. In fact, I am of the view that there was violation of the provisions of Section 33(2)(b) for the failure of the petitioner to comply with the

mandatory provisions as contained therein and the standing orders itself. Reinstatement with back wages, being ordinarily the appropriate relief,

which may be directed by the Tribunals in a case like this, I do not also find any justification to interfere with such findings. Although, I have not

considered the arguments of Dr. Mookherjee on the ground of the said respondent having retired in 1972, for the reasons as mentioned above, yet

for ends of justice I direct that in making the necessary payments in terms of the directions of the respondent-Tribunal, such fact should be taken

into consideration. It should also be noted that there is neither any exceptional circumstances pleaded nor proved, for which the said respondent

can be held to be disentitled to the ordinary relief of reinstatement and the consequential reliefs thereunder.

17. In view of the above, the applications fail, so also the Rule and the same is discharged. There will be no order for costs.

18. The prayer for stay of operation of this order is refused.