

(1998) 01 BOM CK 0044

Bombay High Court

Case No: Writ Petition No. 1996 of 1997

The Indian Smelting and
Refining Co. Ltd.

APPELLANT

Vs

Shri Subhash Vishnu Patil and
another

RESPONDENT

Date of Decision: Jan. 22, 1998

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- Industrial Disputes Act, 1947 - Section 10(1), 17

Citation: (1998) 3 ALLMR 831 : (1998) 3 BomCR 201

Hon'ble Judges: R.M. Lodha, J

Bench: Single Bench

Advocate: P.K. Rele, Ms. Nayana Dhutiya and J.S. Balia, instructed by Piyush Shah, for the
Appellant; N.M. Ganguli, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

R.M. Lodha, J.

Rule. Returnable forthwith. Mr. Ganguli waives service for respondent No. 1. Service of respondent No. 2 is dispensed with. Heard finally at this stage by consent of the learned Counsel for the parties.

2. This writ petition under Article 226 of the Constitution of India is filed by the Indian Smelting & Refining Co. Ltd. (for short "the employer") aggrieved by the order dated September 3, 1997 passed by the Industrial Tribunal, Mumbai, whereby the said Tribunal rejected the application made by the employer for deciding the issues relating to maintainability of the complaint as preliminary issues.

3. The brief facts essential for the disposal of the writ petition and the contentions advanced by the learned Counsel for the parties are : Shri Subhash Vishnu Patil (for

short "the workman") - the 1st respondent herein - was employed by the employer in the year 1978 as Shell Mould Cum ore Maker. The workman is an active member of a union, namely, the Association of Engineering Workers. The Association of Engineering Workers, which according to the employer, is not a recognised union, submitted a charter of demands in or about the year 1984 to the employer. The said charter of demands was referred for adjudication to the Industrial Tribunal, Mumbai, which Registered the said reference as Reference (IT) No. 204 of 1984. The employer says that before the said reference was made, there was already an existing award dated 28-4-1980 in terms of the settlement dated 19-3-1980 with the recognised union, namely, Sarva Shramik Sangh and upon the objection raised by the employer about the competence and maintainability of reference the said Reference (IT) No. 204 of 1984 was rejected as not maintainable by the Industrial Tribunal on 26-7-1988. The workman is alleged to have indulged in misconduct and accordingly he was dismissed from service by the employer vide order dated 11-8-1988. The workman filed a complaint u/s 33-A of the Industrial Disputes Act, 1947 (for short "I.D. Act") on 29-12-1988 on various grounds including breach of provisions of section 33 of I.D. Act. The employer contested the said complaint by filing written statement on 9-6-1989. The employer, inter alia, raised the plea that the complaint was not maintainable since no proceedings were pending as contemplated u/s 33-A at the time of passing of the order of dismissal on 1-8-1988. The concerned Industrial Tribunal framed issues on 21-6-1990 including the two issues, namely:-

(1) Is it proved that there was an industrial dispute pending before Court on the date of order of dismissal?

and

(2) Is the complaint maintainable in view of the order passed on 26th July 1988?

It appears that proceedings continued and no substantial progress was made for number of years. On 8-2-1995, the employer made a specific application that issue No. 2 relating to the maintainability of the complaint which is purely based on uncontested facts and is an issue of law should be decided as preliminary issue. The said application was contested by the workman. The workman as well as the employer submitted their written arguments before the Industrial Court and by the impugned order dated 3-9-1997 the Industrial Tribunal rejected the application made by the employer for deciding the issue relating to maintainability of the complaint as preliminary issue.

4. Mr. Refe, the learned Counsel for the petitioner strenuously urged that admittedly the reference made at the instance of the Association of Engineering Workers registered as Reference (IT) No. 204 of 1984 was rejected as not maintainable by the Industrial Tribunal on 26-7-1988. The workman was dismissed on 1-8-1988 and, therefore, apparently no proceedings as contemplated u/s 33-A were pending when

the alleged contravention by the employer is said to have been made. He, therefore, submitted that the condition precedent for valid complaint u/s 33-A was lacking and the complaint being not maintainable on its face, the issue relating to maintainability of complaint deserved to be decided as preliminary issue. In support of his contention, Mr. Rele relied upon the decision of the Apex Court in Punjab Beverages Pvt. Ltd. v. Jagadish Singh and another (1978) X L.L.J. 1. Mr. Ganguli, the learned Counsel for the workman responding to the contention of the learned Counsel for the employer, vehemently contended that the relevant date for conclusion of reference proceedings is the date on which the award becomes enforceable u/s 17-A of the I.D. Act and one month thereafter. In the present case, Mr. Ganguli, submitted that though he is not able to give specific date on which award was notified in the official gazette but he submits that there is no dispute that till the month of October 1988 the award was not published in the official gazette. Thus, Mr. Ganguli with reference to section 20 read with section 17-A of I.D. Act submitted that the proceedings of the reference would be deemed to be pending till the month of October 1988 and since the service of the workman was terminated on 11-8-1988 which is in contravention of provisions of section 33(2)(b) of I.D. Act and, therefore, the complaint was maintainable u/s 33-A. In this fact situation, Mr. Ganguli urged that the Industrial Tribunal did not erred in refusing to decide the issue relating to maintainability of complaint as preliminary issue.

6. Mr. Rele, the learned Counsel for the employer in rejoinder joined issue with the learned Counsel for the workman and submitted that the reference is held incompetent, invalid and not maintainable in the eve of law it would be deemed that no such proceedings were pending. In support of his contention Mr. Rele relied upon the Division Bench judgment of the Assam High Court in The Management of Pheros & Co. P. Ltd. v. The Presiding Officer. Labour Court, Assam and others, 1971(I) L.L.J. 608, a Division Bench judgment of the Mysore High Court in Madras Bangalore Transport Co. v. Labour Court, Bangalore and others 25 F.J.R 244, a Division Bench judgment of the Calcutta High Court in Shalimar Paints Ltd. v. Third Industrial Tribunal, 1974 L.I.C.213 and the judgment of the Madras High Court in K.S. Marti tyer and others v. Bombay Anand Bhavan, Coimbatore and another, 23F.J.R. 541.

7. Section 33-A reads thus:

"33-A. Special provision for adjudication as to whether conditions of service etc., changed during pendency of proceedings:- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal, or National Tribunal any employee aggrieved by such contravention, may make a complaint in writing.

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of such industrial dispute; and

(b) to such arbitrator, Labour Court, Tribunal or National tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint if it were a dispute referred to or pending before it, in accordance, with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly."

8. A bare reading of section 33-A would indicate that an aggrieved employee is provided with the quick, expeditious and summary remedy of making complaint in writing to conciliation officer or Board for mediating in the industrial dispute or to arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, for adjudication of the dispute where the employer has contravened the provisions of section 33 during the pendency of such proceeding. It would thus be seen that foundation of making complaint by the aggrieved employee u/s 33-A is contravention of provisions of section 33 by the employer during the pendency of the proceedings. If on the basis of the facts available on record it is shown that no proceedings as contemplated u/s 33-A were pending when the alleged contravention of section 33 is said to have taken place, obviously such complaint could not proceed further. However, converse of it would not entitle the aggrieved employee to the relief because even if it is held that there was contravention of section 33 before adjudicating the complaint, the Tribunal shall be required to go into further question whether the order of discharge or dismissal passed by the employer was justified on merits. In other words, the conclusion by the Tribunal that the contravention of section 33 took place shall not render ipso facto the order of discharge or dismissal bad and of no effect. This legal position is clearly spelt out from the judgment of the Apex Court in Punjab Beverages Pvt. Ltd.. In this judgment the Apex Court held thus :

"It will, therefore, be seen that the first issue which is required to be decided in a complaint filed by an aggrieved workman u/s 33-A is whether the order of discharge or dismissal made by the employer is in contravention of section 33. The foundation of the complaint u/s 33-A is contravention of section 33 and if the workman is unable to show that the employer has contravened section 33 in making the order of discharge or dismissal the complaint would be liable to be rejected. But if the contravention of section 33 is established, the next question would be whether the order of discharge or dismissal passed by the employer is justified on merits. The Tribunal would have to go into this question and decide whether, on the merits, the order of discharge or dismissal passed by the employer is justified and if is, the tribunal would sustain order, treating the breach of section 33 as a mere technical breach. Since, in such a case the original order of discharge or dismissal would stand justified, it would not be open to the Tribunal, unless there are compelling circumstances, to make any substantial order of compensation in favour of the workmen."

9. The Apex Court also highlighted that the question whether there was contravention of section 33 or not should be decided as first issue.

10. The Assam High Court in *The Management of Pheros Co. P. Ltd. Bamunlmaice Gauhat* held that once the Court decided that the main reference was incompetent since there was no industrial dispute, it lost its jurisdiction to do anything further.

11. In *Madras Bangalore Transport Co.* the Division Bench of the Mysore High Court held that the words "during the pendency of any such proceeding" in sub-section (2) of section 33 of the I.D. Act, 1947, have a clear reference to the proceeding referred to in sub-section (1) of the section, i.e. "any proceeding before a conciliation officer or a Board or of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute". Two conditions have, therefore, to be fulfilled in order that sub-section (2) may apply, viz., (i) there must be a proceeding before one of the authorities mentioned therein in respect of an industrial dispute, and (ii) that proceeding must be pending. The Division Bench thus held that where a Labour Court comes to the conclusion that a reference made to it u/s 10 of the Act was incompetent and invalid, whatever proceedings commenced before the Labour Court as a consequence of that reference are not proceedings under the Act but only proceedings masquerading as such and there cannot be any contravention of section 33(2) in respect of such a proceeding.

12. The Division Bench of the Calcutta High Court in *Shalimar Paints Ltd.* in paragraph 8 of the report held thus :

"The result therefore is that in a case such as this, where the main reference u/s 10(1) of the Act has been declared invalid and quashed, it can by no means be said that a proceeding is pending before the tribunal as contemplated by section 33(2) of the Act, and if that is the position, and I have no doubt that it is so, an employee cannot invoke section 33-A of the Act in order to get relief from a Tribunal. The mere fact that a reference u/s 10(1) of the Act was pending sometimes, does not by itself entitle an employee to claim relief u/s 33-A of the Act, since the main reference has been declared to be invalid and the reference itself has been quashed."

13. In *K.S. Mani Iyer*, the Madras High Court held that the foundation of the jurisdiction of a Labour Court to entertain an application u/s 33-A of the Industrial Disputes Act, 1947, and the cause of action of the aggrieved workman to prefer such an application is a contravention of the provisions of section 33 of the Act. According to the Madras High Court it is implicit in section 33 that the proceeding, the pendency of which is alleged to be a bar against the employer's act and conduct, must be a valid proceeding; the mere factual pendency of any proceeding before the Labour Court would not attract the application of section 33. It was thus held by the Madras High Court that where proceedings pending before a Labour Court have been held to be invalid by the High Court on the ground that there was no valid reference under the Act, the provisions of section 33 would not apply and no

application u/s 33-A would be maintainable.

14. The consensual legal position that emerges from the aforesaid judgments of various High Court to which I fully agree is that where the reference proceedings are held to be invalid, incompetent or not maintainable, it would be held that there was no valid reference. Resultantly, it would be deemed that no proceedings were pending because what is contemplated u/s 33-A is the pendency of a valid proceeding. In that situation obviously the provisions of section 33 would not be applicable and its consequences shall follow while considering the maintainability of the complaint u/s 33-A.

15. Turning to the present facts it would be seen that the Reference (IT) No. 204 of 1984 was admittedly rejected as not maintainable on 26-7-1988. There is also no dispute that the said award was not notified in the official gazette till the month of October 1988. In the meanwhile on 11-8-1988 the workman was dismissed without following the procedure contemplated u/s 33(2)(b), apparently because according to the employer on that date no proceedings were pending. On these admitted facts, the Industrial Tribunal ought to have decided following issues as preliminary issues :

(1) Is it proved that there was an Industrial dispute pending before Court on the date of order of dismissal?

and

(2) Is the complaint maintainable in view of the order passed on 26th July 1988?

The learned Counsel for the parties were at idem that for deciding these two issues no evidence is required to be led and on admitted facts the Industrial Tribunal must adjudicate the two issues.

16. Mr. Rele, the learned Counsel for the employer also made a statement after seeking instructions that in case the aforesaid two preliminary issues are decided against the employer, such order shall not be challenged by the employer, during the " pendency of the proceedings u/s 33-A but the employer shall challenge the said order in case the final order u/s 33-A is decided against the employer.

17. In view of the discussion aforesaid the writ petition is disposed of by the following order :

(i) The order dated 3-9-1997 passed by the Industrial Tribunal, Mumbai, rejecting the application made by the employer Exhibit C-7 is quashed and set aside.

(ii) The Industrial Tribunal shall decide the following two issues as preliminary issues:

(a) Is it proved that there was an industrial dispute pending before Court on the date of order of dismissal?

and

(b) Is the complaint maintainable in view of the order passed on 26th July 1988? The aforesaid preliminary issues shall be decided by Tribunal in accordance with law within three months from the date of production of the order of this Court.

iii) In case the two issues are decided against the workman, the proceedings before the Industrial Tribunal shall come to an end and it would be open to the aggrieved workman to challenge the same in accordance with law. On the other hand, in case the Industrial Tribunal holds the complaint maintainable, the said Court would proceed further in the complaint in accordance with law and it would be open to the employer to challenge the said order along with final order in case the complaint is ultimately decided against the employer.

(iv) In the event, the Industrial Tribunal decides the preliminary issue in favour of the workman and proceeds with the complaint further, it is expected of the Industrial Tribunal to hear and decide the complaint finally within six months from the date of the disposal of the preliminary issues.

v) No cost.

(vi) Needless to say that while deciding the preliminary issues, the Industrial Tribunal shall consider all the contentions of the parties in accordance with law.

(vii) Certified copy expedited.