

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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WP(C) No.8372/2003

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Date of decision: 8th March, 2010

BA SECURITY AGENTS EMPLOYEES UNION PETITIONER

Through: Mr. Divjyot Singh with Mr. Gurpreet
Singh, Advocates

Versus

REGIONAL LABOUR COMMISSIONER & ORS. RESPONDENTS

Through: Mr. Dinesh Madan & Mr. B.B. Mahajan,
Advocates for Respondent No.2.
Mr. Jatan Singh & Ms. Megha Bharara,
Advocates for UOI.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported
in the Digest? | YES |

RAJIV SAHAI ENDLAW, J.

1. The petitioner union seeks a writ of mandamus directing the respondent No.1 to make a complaint under Section 34 of the Industrial Disputes Act, 1974 to the Court of the Metropolitan Magistrate, against the respondent No.2 British Airways and its officials impleaded as respondents 3 to 5 of offences allegedly committed by them under Section 31 of the Act i.e. of violation of the provisions of Section 33 of the Act.

2. The relevant part of Section 33 is as under:-

“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings. – (1)
During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before [an

arbitrator or] a Labour court or Tribunal or National Tribunal in respect of an 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 workman 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 standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman]
 - (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
 - (b) for any misconduct not connected with 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) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-
 - (a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceeding; or

- (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation - For the purposes of this sub-section, a “protected workman”, in relation to an establishment, means a workman who, being [a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognized as such in accordance with rules made in this behalf.

3. It is the case of the petitioner union that the workmen represented by the petitioner union are all workmen of the respondent no.2 British Airways, having been employed as Security Agents since 1st October, 2000; however, the respondent no.2 had been appointing the said workmen as Security Agents vide contracts of employment initially from 1st October, 2000 to 30th September, 2001 and subsequently extended by another year; that the said workmen were employed at a consolidated amount of Rs.10,000/- per month and provident fund was deducted from the amounts so payable to them. It is the case of the petitioner union that its members are in fact full time employees of the respondent no.2, the jobs being performed by them being of perennial nature on which regular employees have to be employed; that the respondent no.2 by devising the nomenclature of “Security Agents” is depriving the workmen of their pay, perks and status which they are otherwise entitled to. It is further the case that the petitioner union and / or its members on 6th September, 2002 raised an industrial dispute for their regularization by filing a claim before the conciliation officer and on 27th September, 2002 preferred a writ petition in this Court being Civil Writ Petition No.6210/2002 of which notice was issued on 27th September, 2002 and in which on the same day an interim order restraining the respondent no.2 herein from dispensing with the services of the members of the petitioner was also granted. The said writ petition was finally disposed of vide order dated 15th January, 2003 with the direction to the conciliation officer to deal with the claims of the members of the petitioner union.

4. As aforesaid, the contract of the members of the petitioner union with the respondent no.2 was till 30th September, 2002 only. However, in view of the

order of this Court in the writ petition aforesaid restraining the respondent no.2 from dispensing with the services of the workmen, the members of the petitioner union under the protection of the interim order continued with the respondent no.2 till 15th January, 2003 when the writ petition was disposed of as aforesaid and when the interim order in the writ petition also came to an end. The respondent no.2 vide letter dated 17th January, 2003 informed the members of the petitioner union as under:-

“Dear Sir,

17th January, 2003

Re: Letter of discharge.

You were taken on fixed term employment in terms of contracts dated 30th September, 2000 & 28th August, 2001 i.e. from 1st September, 2000 to 30th September, 2002.

You were to be relieved from your services on 30th September, 2002.

In terms of Order dated 27th September, 2002 and subsequent Orders of the Hon’ble High Court of Delhi in Civil Writ petition No.6210 of 2002, you were kept on the rolls and paid accordingly.

Your above stated Writ Petition was disposed of vide order dated 15th January, 2003.

You are accordingly relieved from services.

You were on fixed term employment. Even though you are not entitled, however, we are providing you a cheque of Rs.17,810/- (Rupees Seventeen Thousand Eight Hundred and Ten Only) dated 17th January, 2003 drawn on Citibank which is equal to 15 days wages for every year of completed service as well as an amount equal to one month’s salary in lieu of notice period after tax deduction at source. You may leave your personal address for future correspondence, if any. You are requested to return your Identity Card, Airport Pass and uniforms.”

5. It is the case of the petitioner that the aforesaid action of the respondent no.2 is violative of Section 33 of the Act and which violation is an offence under Section 31 of the Act, punishable with imprisonment for a term which may extend to six months, or with fine which may extend to Rs.1,000/-, or with both. However, since under Section 34 of the Act, cognizance of any such offence can be taken only on the complaint by/or under the authority of the appropriate

government, the petitioner approached the respondent no.1 for filing a complaint against the respondent no.2 British Airways and its officials respondents 2 to 5. Upon the inaction of the respondent no.1, the present petition seeking a writ of mandamus was filed.

6. Needless to state that the conciliation proceedings aforesaid failed and ultimately the following reference was made to the Labour Court:-

“Whether the action of the management of British Airways in terminating the eight workmen (as per list) from services with effect from 17.01.2003 and not regularizing their services is just and fair? If not, to what relief are the workmen entitled and from what date?”

The said reference was decided by the Labour Court on 30th March, 2006 by holding that the action of respondent no.2 herein in terminating the workmen from services w.e.f. 17th January, 2003 and not regularizing their services as neither absolutely just nor absolutely fair; while some of the workmen who in the interregnum had been gainfully employed were directed to be paid compensation of Rs.3,00,000/- each, others who were not gainfully employed were directed to be paid compensation of Rs.5,00,000/- each. The respondent no.2 British Airways has challenged the said award in this Court by preferring WP(C) No.14149/2006 and vide order dated 8th September, 2006 therein, the operation of the award has been stayed. The said writ petition is still pending.

7. This writ petition was taken up for hearing first on 2nd March, 2010. On a bare reading of the language of Section 33, it was put to the counsel for the petitioner as to how, when the dispute itself raised was as to the right to regularization, could section 33 prohibit the employer from terminating the employment of the employees even before being directed to regularize? Would it not amount to granting relief to the workmen before decision on the same by the Labour Court? It was further felt that when the employment is contractual with the contract coming to an end shortly after the dispute is raised, how could the act of the employer of not renewing the contract or not giving duty to the workmen after the expiry of the contract period be regarded as altering the conditions of services within the meaning of Section 33(1)(a) or discharge or

dismissal owing to misconduct within the meaning of Section 33(1)(b) of the Act. Both counsels had attempted to canvas their respective cases on the basis of the bare language of the Section. However, being unsatisfied, this Court called upon them to examine as to how the courts have dealt with the said provision.

8. The counsel for the petitioner on the next day i.e. 3rd March, 2010 contended that the question is no longer res integra and has been considered by a Division Bench of the Orissa High Court in ***Orissa Oil India Mazdoor Union Vs. Union of India*** MANU/OR/0082/1989. In that case also the employment was temporary, terminable at any time without assigning any reason and for a fixed time spell; dispute of regularization was raised on 28th February, 1989 and in accordance with the contract termination effected on 21st March, 1989. A writ petition was filed with a prayer for declaring the termination to be illegal and for a direction to the employer to regularize their services. The termination was assailed on the ground that during pendency of conciliation proceedings, it was not open to the employer to pass any order of termination. Reliance was placed also on Section 33(1) of the Act. The Division bench of the Orissa High Court held that Section 33 (1) places a complete ban on the alteration to the prejudice of the workman concerned, of any conditions of service applicable to him without express permission in writing of the authority dealing with the pending proceeding. The argument that appointment being for a fixed time spell, Section 33 has no application was held to be without any substance. It was held that there was no exception provided in Section 33 in respect of time-spell employments and therefore the action of the employer in terminating the workmen concerned was held to be not sustainable and quashed and the workmen were directed to be treated to be continuing in service and being entitled to all service entitlements.

9. The counsel for the petitioner also invited attention to ***Lokmat Newspapers Pvt. Ltd. v. Shankarprasad*** (1999) 6 SCC 275 to contend that once the conciliation proceedings had been initiated, Section 33(1) comes into play and on ***Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma*** (2002) 2 SCC 244 to contend that Section 33(1) is mandatory in nature. It is

contended that the respondent no.1, without giving any reason has failed to lodge a complaint of the offences committed by the respondents 2 to 5.

10. However, my research finds this Court to have taken a view contrary to that of the Orissa High Court. Recently a Single Judge of this Court in ***Jai Pal Singh Vs. Delhi Development Authority*** MANU/DE/1718/2009 negated the argument of non compliance of Section 33(1) of the Act in the case of a Security Guard employed by the DDA on contract basis for a period of six months at a fixed salary with the period of employment coming to end on 30th April, 1991; the union, of which the said workman was a member, before that day filed a writ petition and in which the DDA was directed to maintain status quo; the writ petition was dismissed on 6th January, 1993 and the DDA dispensed with the services of the workman in terms of contract of employment w.e.f. 3rd March, 1993. Notwithstanding the pendency of an industrial dispute regarding regularization of contractual employees of DDA on that date, it was held that DDA was not required to obtain the permission of the authority before which the dispute was pending. In holding so, the Single Judge relied upon the judgment dated 6th January, 1993 of the Division Bench of this Court in CW(P) 1305/1991 titled ***Delhi Pradesh Rajdhani Mazdoor Union (Regd.) v. DDA***. I have called for a copy of the said unreported judgment of the Division Bench. In that case also the DDA had employed the members of the petitioner union as security guards on a term contract and the union had moved the Industrial Tribunal for regularization of their services. The union by way of the writ petition sought a direction from this Court that the services of its members be not terminated during the pendency of the dispute before the Industrial Tribunal as they were protected under Section 33 of the Act. The Division Bench of this Court held that the DDA in terminating the services in terms of the contract had not in any manner varied the terms of service of the members of the petitioner union in that case and therefore there was no question of seeking any express permission in writing of the authority before which the proceedings were pending, because the services got extinguished by efflux of time on the expiry of their contract. It was further held that if the DDA had tried to terminate the services before the contract was over then the workmen would have been protected under Section

33. It was further held that the question of regularization was already pending before the Labour Court.

11. The aforesaid dicta of the Division Bench of this court is fully applicable to the facts of the present case also.

12. Though in view of the above, need is not felt to record the arguments of the respondents 2 to 5 but to complete the record, it may be noticed that the counsel for the respondents 2 to 5 has contended: -

(a) That neither any industrial dispute nor any conciliation proceedings were pending on the date when the services of the members of the petitioner union in the present case were terminated. Reliance is placed on *The Secretary Indian Tea Association Vs. Ajit Kumar Barat* 2000 (1) SCALE 515 Para 11, as to when the industrial dispute comes into existence. It is disputed that any conciliation proceedings also were pending on that date. Though the petitioner has not filed any documents in this regard but the counsel for the petitioner in rejoinder points to the counter affidavit of the respondent no.1 admitting the claims having been preferred by the members of the petitioner union before the conciliation officer before the date of termination.

(b) Reliance is placed on *Mahendra Singh Dantwal Vs. Hindustan Motors Ltd.* (1976) II LLJ 259, Para 24 to contend that Section 33 comes into play only when punitive action is sought to be taken against the workmen and is not applicable when termination is not stigmatic. It is argued that the termination in the present case is not stigmatic.

(c) That the petitioner is an un-registered trade union and is not competent to raise the dispute. Reliance in this regard is placed on *National Organization of Bank Workers Federation of Trade Unions Vs. Union of India* (1993) 2 LLJ 537 (Bombay-DB) Para 4. It is contended that the petitioner is not a registered trade union within the meaning of Section 13 of the Trade Unions Act, 1926 and is not entitled to espouse the cause, if any, of the workmen. It is further urged

that neither any resolution of the petitioner union has been filed nor has it been disclosed as to who are its members.

(d) That in the award ultimately rendered also there is no finding that any conciliation proceedings were pending on the date of termination or that the termination of employment of any workmen was non-est owing to the provisions of Section 33 having not been complied with by the respondent no. 2.

(e) That no dispute of regularization was raised or referred by the petitioner or its members and the order of reference has attained finality.

(f) That the question of applicability of Section 33 does not arise when no industrial dispute is maintainable. Reliance in this regard is placed on *Pritam Singh Vs. Presiding Officer* 2006 (2) AD (Delhi) 207.

However it is not deemed expedient to deal with the aforesaid arguments, this Court having found no case of any offence under Section 33 having been committed by the respondents 2 to 5.

13. The writ petition therefore fails and is dismissed.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

March 08, 2010
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