

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.07.2012

+ LPA 1044/2011

TOPS SECURITY LTD

..... Appellant

versus

SUBHASH CHANDER JHA

..... Respondent

AND

+ LPA 1045/2011

TOPS SECURITY LTD

..... Appellant

versus

PURUSHOTTAM CHAUDHARY

..... Respondent

Advocates who appeared in these cases:

For the Appellant : Mr. K.C. Dubey and Mr. Atul Tripathi

For the Respondents : Mr. Ashwini Kumar Sakhija and Mr. Prabhakar

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. These two appeals raise identical issues and involve virtually similar facts and are, therefore, being disposed of together. The appeals arises out of WP(C) No.6228/2011 and WP(C) No.6236/2011 in respect of which orders were passed by the learned Single Judge on 26th August, 2011 dismissing both the writ petitions filed on behalf of the appellant herein. For the sake of convenience, we shall refer only to the facts of LPA No.1044/2011 which arises out of WP(C) No.6228/2011 (Tops Security Limited v. Subhash Chander Jha).

2. The point in issue is whether the non-compliance of the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the said Act') would ipso facto mean that an order of dismissal passed by the employer would be ineffective? The additional question is whether the employee, in such a circumstance, would be required to file an application under Section 33A of the said Act for having the said order of dismissal being declared as void ab initio?

3. The facts of LPA No.1044/2011 are that an industrial dispute namely ID No.43/2008 was pending before the Industrial Tribunal and had arisen out of reference order of F.24(1154)/06/Lab./2547-51 dated 28.02.2008 between the

said workman and the management of Tops Security Limited. During the pendency of the said industrial dispute, the services of the workman were terminated w.e.f. 26th November, 2008. It is an admitted position that the provisions of Section 33(2)(b) of the said Act had not been complied with by the employer. This is so because the wages for one month which were required to be paid had not been paid at the time of discharge/dismissal but were only tendered much later. Apart from this, the employer had also not made an application to the Industrial Tribunal before which the said industrial dispute was pending for approval of the action of termination taken by the employer. Thus, on both counts, that is, on the ground of non-payment of one month's wages at the time of alleged termination and, secondly, because of the fact that no approval was sought from the Industrial Tribunal by the employer, the provisions of Section 33(2)(b) of the said Act had, admittedly, been contravened.

4. Since the mandatory provisions of Section 33(2)(b) of the said Act had been violated, the workman through his counsel, sent a demand notice dated 10th December, 2008 seeking reinstatement with full back wages. However, the management did not reply to the notice nor did it accept the demand made by the workman. It is in these circumstances that the workman, left with no other alternative, filed the complaint under Section 33A read with Section 33(2)(b) of the said Act before the Industrial Tribunal Number 1, Karkardooma Courts, Delhi

where its earlier industrial dispute was pending. We may point out that although the workman had taken the point that his dismissal from service was itself in violation of the various principles such as non-issue of charge-sheet, not holding of any domestic enquiry etc, the workman had, alternatively, taken the plea that the management had not complied with the provisions of Section 33(2)(b) of the said Act and therefore, the termination had become void ab initio or, in other words, the termination has not at all taken effect. Before the said Industrial Tribunal, the workman had taken support from the decision of the Supreme Court in the case of **Jaipur Z.S.B.Bank Ltd. v. Shri Ram Gopal Sharma and Anr** : **AIR 2002 Supreme Court 643.**

5. Thereafter, the Industrial Tribunal considered the complaint filed under Section 33A of the said Act and came to the conclusion that the management had, indeed, contravened the provisions of Section 33 (2)(b) of the said Act and, as a consequence, without going into the merits of the termination of service itself, on account of the fact of contravention of the mandatory provisions of Section 33(2)(b) of the said Act, directed that the workman be reinstated with 50% back wages from the date of his dismissal from service.

6. Being aggrieved by the said award dated 22nd March, 2011 passed by the said Industrial Tribunal, the appellant herein filed a Writ Petition being WP (C)

No. 6228/2011. A similar writ petition was filed in respect of the Industrial Tribunal Award dated 23rd February, 2011 which resulted in filing of the other writ petition namely WP (C) No. 6236/2011 which has given rise to LPA No. 1045/2011.

7. By virtue of the impugned orders dated 26th August, 2011 in both the writ petitions, the learned Single Judge of this Court dismissed both writ petitions and, after following the decision of the Supreme Court in the case of **Jaipur Z.S.B.V. Bank (Supra)**, came to the conclusion that there was no requirement for the Tribunal to direct the management to prove its conduct in a Section 33A proceedings after it was found that the mandatory requirement of Section 33(2)(b) of the said Act had not been complied with.

8. According to the learned counsel for the appellant, once an application had been filed under Section 33A of the said Act then it had to be treated as a full-fledged industrial dispute and the same had to be adjudicated as if it was a dispute referred to or pending before it in accordance with the provisions of the said Act and that a full-fledged award ought to have been passed and presented to the appropriate Government. According to the learned counsel for the appellant, since the Industrial Tribunal only examined the aspect as to whether there was compliance with the provisions of Section 33(2)(b) of the said Act and did not

further examine the merits behind the termination order, the requirement of Section 33A had not been met as there was no full-fledged adjudication and, therefore, the awards passed by the Industrial Tribunal were liable to set-aside. The learned counsel for the appellant submitted that there was a distinction between the violation of the provisions of Section 33(2) (b) of the said Act and an adjudication under Section 33A and this had been clearly brought out by the decision of the Division Bench of the Bombay High Court in the case of **Batuk K. Vyas v. Surat Borough Municipality and others :1952 II L.L.J. 178** as also by the decision of the Supreme Court in the case of **Punjab National Bank Ltd. v. All India Punjab National Bank Employees' Federation and Another :AIR 1960 SC 160** and **The Hindustan General Electrical Corporation Ltd. v. Bishwanath Prasad And Another :1971 (2) SCC 605**. He submitted that under Section 33A, the substantive dispute with regard to the dismissal/termination had to be adjudicated by the Industrial Tribunal. It was not sufficient for the Industrial Tribunal to only come to the conclusion that the provisions of Section 33(2)(b) of the said Act had been contravened but, to also enter upon an adjudication with regard to the substantive dispute qua dismissal/termination.

9. The learned counsel appearing on behalf of the workmen, in these appeals, submitted that the issues stood closed by virtue of the decision of a Constitution Bench of the Supreme Court in the case of **Jaipur Z.S.B.V. Bank (Supra)**. It was

contended by the learned counsel for the respondents that once there was a violation of the provisions of Section 33(2)(b) of the said Act, it would amount to the termination not taking affect at all. In other words, it would have to be construed as if the termination order had not been passed at all. That being the position, there was no requirement for a further adjudication to declare the termination as being null and void. According to the learned counsel for the respondent, the non-compliance of the mandatory provisions of Section 33(2)(b) of the said Act, by itself, would render the termination void *ab initio*. He also submitted that the decision of the Constitution Bench of the Supreme Court in the case of **Jaipur Z.S.B.V. Bank** (*Supra*) was clear on this point.

10. The relevant provisions of Section 33 and 33A are set out here in below:-

“33 Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings:-

(1) xxxx xxxx xxxx xxxx

(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.

XXXX XXXX XXXX XXXX XXXX”

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

- (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 as 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.”

11. A plain reading of Section 33(2) (b) would suggest that during the pendency of any proceeding in respect of an industrial dispute, the employer has been permitted under certain circumstances, to discharge or punish, whether by dismissal or otherwise, the workman with whom there is a pending dispute.

However, there is a proviso attached to the same. The said proviso requires 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.

12. As pointed out earlier, it is an admitted position that the conditions stipulated in the said proviso have not been complied with by the appellants herein. In other words, the wages for one month had not been paid along with the termination order nor did the employer (i.e. appellant herein) make any application seeking approval of the action taken by it, before the Industrial Tribunal, where another industrial dispute was pending between the parties. There is obviously no question of any approval having been granted or refused by the Industrial Tribunal inasmuch as the appellants did not even seek any such approval of the Industrial Tribunal by making an application.

13. Section 33A which has been set out above makes it clear that where an employer contravenes the provisions of Section 33, which also include the mandatory provisions of Section 33(2) (b) of the said Act, in the course of the pendency of proceedings before the Industrial Tribunal, the aggrieved employee may make complaint in writing to the Industrial Tribunal and on the receipt of

such a complaint, the said Tribunal is required to adjudicate the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of the said Act and is required to submit its award to the appropriate Government. The provisions of the said Act as would be applicable for an industrial dispute would apply accordingly. In other words, Section 33A provides a short-cut or a summary procedure insofar as an aggrieved employee is concerned. Instead of the employee taking the normal route of Section 10 of the said Act, requiring the appropriate Government to make a reference, the employee can straightaway file a complaint before the Industrial Tribunal before which there is another pending industrial dispute between him and the employer. When such a complaint is made, the Industrial Tribunal is to treat it as a dispute referred to it or pending before it and is required to adjudicate upon the same. The question that arises is- what does the Industrial Tribunal adjudicate upon? In the backdrop of the factual position of the present case, does the Industrial Tribunal adjudicate upon the merits of the dismissal/termination itself or does it merely adjudicate upon the question as to whether there has or has not been a contravention of the provisions of Section 33(2)(b) of the said Act?

14. It is in this regard that various decisions have been cited by the learned counsel for the parties. We may point out that the decisions cited by the learned counsel for the appellant do tend to support his contention that although there

may be contravention of the mandatory provisions of Section 33(2)(b) of the said Act, there is still the requirement of the Industrial Tribunal to decide the dispute in totality and to go into the merits of the substantive dispute between the employee and the employer in so far as the question of termination/dismissal is concerned. For example, in **Batuk K. Vyas (Supra)**, the Division Bench of the Bombay High Court observed as under:-

“It seems to us difficult in the language used by section 33A to hold that the ambit and scope of the inquiry to be held by the tribunal is as limited as Mr. Phadke would suggest. If the intention of the legislature was that all that the tribunal could do under section 33A was merely to determine the simple question whether a change to the prejudice of the workman had been brought about by the employer without the express permission in writing of the tribunal, and if that decision was against the employer, the only power that the tribunal had was to restore the status quo, it seems to us that the language used by the legislature in section 33A would have been very different from the language it has actually used. The very fact that the legislature treats the complaint as if it were a dispute referred to or pending before it, goes to show that the jurisdiction of the tribunal was not limited merely to consider the question of contravention of section 33 but to decide on the substantive dispute between the employer and the workman with regard to the change in the conditions of service or the discharge of the employee by the employer.”

15. In **Punjab National Bank Ltd.(Supra)**, a Bench comprising of three Hon’ble Judges of the Supreme Court observed as under:-

“(32) After this section was thus enacted the scope of the enquiry contemplated by it became the subject matter

of controversy between the employers and the employees. This Court had occasion to deal with this controversy in the case of the Automobile Products of India, Ltd., 1955-1 SCR 1241: ((S) AIR 1955 SC 258) (supra). Das J., as he then was, who delivered the judgment of the Court construed S. 33A of the Act and the corresponding S. 23 of Act 48 of 1950 which applied to the Labour Appellate Tribunal then in existence, and observed that

“the scheme of the section clearly indicates that the authority to whom the complaint is made is to decide both the issues, viz., (1) the effect of contravention, and (2) the merits of the act or order of the employer.” “The provision in the section that the complaint shall be dealt with by the tribunal as if it were a dispute referred to or pending before it quite clearly indicates”, said the learned Judge, “that the jurisdiction of the authority is not only to decide whether there has been a failure on the part of the employer to obtain the permission of the authority before taking action but also to go into the merits of the complaint and grant appropriate reliefs (p. 1253)”.

It was urged before this Court that in holding an enquiry under S. 33A the tribunal’s duty was only to find out whether there had been a contravention of S.33, and if it found that there was such a contravention to make a declaration to that effect. The argument was that no further question can or should be considered in such an enquiry. This contention was, however, rejected.”

16. Finally, in another decision of three Hon’ble Judges of the Supreme Court in the case of **The Hindustan General Electrical Corporation Ltd.** (Supra), it was once again observed as under:-

“The scope of Section 33 and 33-A was examined by this Court in several cases to some of which we shall presently refer. Section 33(1) has obviously no application to the facts of this case. Section 33(2) relates to the dismissal, discharge, etc., of a workman for any misconduct not

connected with an industrial dispute during the pendency of any conciliation proceeding before a conciliation officer or a Board etc. unless he had 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. Section 33-A enables a workman who has been punished by dismissal or discharge etc. to make a complaint in writing to a Labour court, Tribunal or National Tribunal when an employer contravenes the provisions of Section 33 during the pendency of proceeding before Labour Court, Tribunal or National Tribunal etc. If such a complaint is made, the Labour court, Tribunal etc. is to adjudicate upon the complaint as if it were a dispute referred to or pending before it and in accordance with the provisions of the Act submit its award to the appropriate Government. In other words, when the conditions laid down in Section 33-A apply a workman who is punished as mentioned therein does not have to wait for a reference of an industrial dispute by an appropriate authority under Section 10 of the Act for adjudication of the dispute but can himself prefer his complaint which is to be treated in the same way as a dispute under Section 10. These sections do not lend themselves to the construction that as soon as the Labour Court, Tribunal etc. finds that there has been a violation of Section 33 it should award reinstatement. It must go through the proceedings which would have to be taken under Section 10 and it would be the duty of the Labour Court etc. to examine the merits of the case in the light of the principles formulated in the *Indian Iron and Steel Co's case* (supra).”

17. As mentioned above while these decisions do tend to support the arguments advanced by the learned counsel for the appellants, but that would be of no use to him in view of the fact that a Constitution Bench of the Supreme Court in the case of *Jaipur Z.S.B.V. Bank* (Supra), has clearly held to the

contrary. In **Jaipur Z.S.B.V. Bank (Supra)**, the Supreme Court was considering the following question:-

“If the approval is not granted under Section 33(2)(b) of the Industrial Disputes Act, 1947 whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under Section 33(2)(b) would not render the order of dismissal inoperative?”

18. The above extract would reveal that there are essentially two questions rolled into one. The first question was with regard to the date from which the order of dismissal would become ineffective. Would it become ineffective from the date it was passed or from the date of non-approval of the order of dismissal. However, this question arises only in a situation where an approval which has been sought under Section 33(2)(b) of the said Act has not been granted or, to put it positively, has been rejected by the Tribunal. We are, however, concerned with the second question which deals with the issue of whether failure to make an application under Section 33(2)(b) would not render the order of dismissal inoperative? The Supreme Court has answered this question by holding that the failure to make an application under Section 33(2)(b) of the said Act would amount to non-compliance with the mandatory provisions of the said Act and that, by itself, would render the order of dismissal to be inoperative. In other words, if the mandatory conditions of Section 33(2)(b) of the said Act are

contravened, while passing the order of the dismissal, the same would have no effect in law.

19. The scope of Section 33(2)(b) as well as Section 33A of the said Act has been discussed in detail by the Supreme Court in paragraph 14, 15 & 16. The same reads as under:-

“14. Where an application is made under Section 33(2)(b), Proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employee and is intended to save his time and

trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a

system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33A notwithstanding the contravention of Section 33(2)(b), proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

16. Section 31 speaks of penalty in respect of the offences stated therein. This provision is not intended to give any remedy to an aggrieved employee. It is only to punish the offender. The argument that Section 31 provides a remedy to an employee for contravention of Section 33 is unacceptable. Merely because penal provision is available or a workman has a further remedy under Section 33A to challenge the approval granted, it cannot be said that the order of discharge or dismissal not become inoperative or invalid unless set aside under Section 33A. There is nothing in Section 31, 33 and 33A to suggest otherwise even reading them together in the context. These Sections are intended to serve different purposes.”

20. As would be noticed upon a reading of the above extract, the Supreme Court specifically provided that Section 33A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where an industrial dispute is already pending between the parties challenging the order of approval instead of making

efforts to raise an industrial dispute, get a reference and, thereafter, an adjudication. It is also clearly pointed out that the employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. As such, the Supreme Court came to the conclusion that the non-compliance of the mandatory provisions of Section 33(2)(b) of the said Act would by itself amount to the order of dismissal being void or inoperative. If this happens, it is not at all necessary for an employee to file a complaint under Section 33A to have the order of dismissal/termination set-aside following an adjudication on merits.

21. It is, therefore, abundantly clear that the employee may file a complaint with regard to the relief that is required to be given to the employee in respect of the contravention of the provisions of Section 33. In other words, where no application seeking an approval under Section 33(2)(b) of the said Act is made by the employer, the employee may yet make a complaint under Section 33A seeking relief of reinstatement and payment of back wages. It is that dispute which will be taken up by the Industrial Tribunal which will obviously go into the question as to whether there has been or there has not been compliance with the mandatory provisions of Section 33(2)(b) of the said Act. Once the Tribunal comes to the conclusion that the mandatory provisions have been contravened,

the only thing that needs to be done by the Tribunal is to direct that the employee be given an appropriate relief by way of reinstatement and by making an order with regard to back wages. The Tribunal is not required to go into the question of as to whether the dismissal was good or bad, on merits.

22. In view of the foregoing, we do not find any fault with the orders passed by the learned Single Judge as also the awards made by the Industrial Tribunal. Consequently, these appeals are dismissed. There shall be no order as to costs. The back wages which were deposited with the Registrar of this Court are directed to be released to the respondents within a week.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

JULY 16, 2012

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