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Calcutta High Court

Case No: Writ Petition No. 1372 of 1999

Statesman Limited and Another		APPELLANT
	Vs	
First Industrial Tribunal and Others		RESPONDENT

Date of Decision: April 25, 2003

Acts Referred:

- Industrial Disputes Act, 1947 - Section 33, 33(2), 33(3)
- West Bengal Industrial Disputes Rules, 1958 - Rule 71

Citation: (2004) 1 LLJ 307

Hon'ble Judges: Pranab Kumar Chattopadhyay, J

Bench: Single Bench

Advocate: Abhijeet Chatterjee, for the Appellant;Bikash Ranjan Bhattacharjee, Joydeep Kar and Nabanita Roy, for the Respondent

Final Decision: Dismissed

Judgement

Pranab Kumar Chattopadhyay, J.

This writ petition has been filed by the employer challenging the validity and/or legality of the order passed by the learned Tribunal in respect of the workman who was considered by the learned Tribunal as ''protected workman''. By the said impugned order, learned Judge of the Tribunal also held that the employer is guilty of doing unfair labour practice within the meaning of the 5th Schedule of the Industrial Disputes Act for which the employer can be penalised under the provisions of the Industrial Disputes Act.

2. The brief facts material for this petition are mentioned hereinafter: The Government of West Bengal (Labour Department) referred one industrial dispute for adjudication by the First Industrial Tribunal vide Order No. 1648-IR dated December 15, 1998 u/s 10 of the Industrial Disputes Act concerning the workmen including the

respondent No. 2 herein. The said reference is still pending for adjudication. During pendency of the said reference, the Statesman Limited dismissed the respondent No. 2, Sri" Arani Mukhopadhyay along with one fellow employee, namely, Sri Santosh Kumar Das. The said Sri Arani Mukhopadhyay is the Vice-President of the Statesman Clerical Staff Union whereas the said Sri Santosh Kumar Das is the President of the said Union.

3. The employer company filed an application u/s 33(2)(b) of the I.D. Act before the Tribunal for approval of the dismissal order in respect of the respondent No. 2 herein. The said application filed by the employer company was dismissed by the learned Judge, First Industrial Tribunal, West Bengal. While dismissing the said application of the petitioner company, the learned Judge of the Tribunal held that the respondent No. 2 herein is a protected workman within the meaning of the Industrial Disputes Act and rules framed thereunder and as such prior approval of the Tribunal was required to be obtained u/s 33(3) of the Industrial Disputes Act and no order of dismissal can be passed without obtaining such prior approval.

4. It has been urged on behalf of the Statesman Limited, the employer of the respondent No. 2 that the concerned workman namely, the respondent No. 2 herein is not a protected workman within the meaning of the Industrial Disputes Act, 1947 and as such it cannot be said that the mandatory provision of Section 33(3)(b) of the Industrial Disputes Act was violated at the instance of the petitioner company herein.

5. Before proceeding further, provision of Section 33 of the Industrial Disputes Act and Rule 71 of the West Bengal Industrial Disputes Rules, 1958 are set out hereunder:

"Section 33. Conditions of service, etc. to remain unchanged under certain circumstances during pendency of proceedings. -(1) During 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 workmen 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 proceedings; 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 recognised as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purpose of sub-section(3) shall be one percent of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, [an arbitrator], a Labour Court or National Tribunal under the proviso to Sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:

[Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further

period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]"

"Rule 71. Protected workmen.-(1) Every registered trade union connected with an industrial establishment to which the Act applied, shall communicate to the employer, before September 30, every year, the names and addresses of such of the officers of the union who are employed in that establishment and who, in the opinion of the union, should be recognised as ''protected workmen''. Any change in the incumbency of any such officer shall be communicated to the employer by the union within 15 days of such change.

(2) The employer shall, subject to Section 33, Sub-section (4) recognise such workmen to be ''protected workmen'' for the purposes of Sub-section (3) of the said Section and communicate to the union in writing within fifteen days of the receipt of the names and addresses under Sub-rule (1), the list of workmen recognised as ''protected workmen''.

(3) Copies of communication under sub-rules (1) and (2) shall also be sent to the Labour Commissioner and the Conciliation Officer concerned.

(4) Where the total number of names received by the employer under Sub-rule (1) exceeds the maximum number of the protected workmen, admissible for the establishment, u/s 33, Sub-section (4), the employer shall recognise as protected workmen only such maximum number of workmen:

Provided that where there is more than one registered trade union in the establishment, the maximum number shall be so distributed by the employer among the unions that the numbers of recognised protected workmen in individual unions bear roughly the same proportion to one another as the membership figures of the unions. The employer shall in that case intimate in writing to the President or the Secretary of the union the number of protected workmen allotted to it. A copy of this letter shall also be sent to the Labour Commissioner:

Provided further that where the number of protected workmen allotted to a union under this sub-rule, falls short of the number of officers of the union seeking protection, the union shall be entitled to select the officers to be recognised as protected workmen. Such selection shall be made by the union and communicated to the employer within 5 days of the receipt of the employer''s letter.

(5) When a dispute arises between an employer and any registered trade union whether a particular workman should be recognised as a ''protected workman'' or not, the dispute shall be referred to the Labour Commissioner whose decision thereon shall be final."

6. Now, it is to be examined whether the learned Judge of the Tribunal rightly held that the workman concerned, namely, the respondent No. 2 is a protected workman within the meaning of Rule 71 of the West Bengal Industrial Disputes Rules and the said workman is entitled to enjoy the benefit of the protection of Section 33(3)(b) of the Industrial Disputes Act.

7. On behalf of the petitioner company it was specifically contended that the workman concerned, namely, the respondent No. 2 herein cannot be said to be a protected workman within the meaning of Industrial Disputes Act and rules framed thereunder as the petitioner company never recognised the said workman as protected workman.

8. Mr. Abhijeet Chatterjee, learned counsel of the petitioner company submits that the petitioner company as employer never recognised the respondent No. 2 as a protected workman. According to Mr, Chatterjee, mere communication of the names and addresses of the office bearers of the union to the employer in compliance with Rule 71(1) of the West Bengal Industrial Disputes Rules, 1958 is not sufficient and there must be some positive action on the part of the employer in respect of grant of recognition to an employee as a protected workman.

9. The learned counsel of the petitioner company referred to and relied upon the following decisions in support of his aforesaid contentions:

1) P.H. Kalyani Vs. Air France Calcutta, .

2) Tamil Nadu Civil Supplies Corporation Modern Rice Mill Engineering Section Employees Union Vs. Tamil Nadu Civil Supplies Corporation and Another, .

10. Mr. Chatterjee further contended on behalf of the petitioner company that if the employer remains silent regarding grant of recognition to the list of workmen submitted by the union under Rule 71(1) as ''protected workmen'' within the requisite time period, even then, it cannot be said that those workmen would automatically become ''protected workmen''.

11. Mr. Chatterjee also submitted that under Rule 71(5) the workmen can always approach the Labour Commissioner for resolving the dispute in case the employer arbitrarily and illegally refuses to recognise the list of workmen submitted by the union as ''protected workmen''. Mr. Chatterjee further submits that although the workmen concerned have specific remedy under the statute in the aforesaid circumstances under Rule 71(5) but such remedy has not been availed of by the workmen concerned in the present case.

12. Learned counsel of the respondents however, submits that complete silence of the employer cannot suggest non-recognition and in such circumstances recognition should be presumed. Mr. Bikash Ranjan Bhattacharjee, learned senior counsel or the respondent workmen submits that employer by his default cannot set at naught the statutory protection given to the protected workmen. According to

Mr. Bhattacharjee, Section 33(3) of the Industrial Disputes Act provides a blanket protection to a protected workman and ensures complete protection against any kind of order of discharge or punishment because of his special position as an officer of a registered trade union.

13. Mr. Bhattacharjee further contended that the employer cannot at its sweet will choose to deprive the concerned workmen of their statutory protection. According to Mr. Bhattacharjee, the petitioner company could refuse to accord recognition to the respondent workman as ''protected workman'' only on the ground that by granting such recognition total number of ''protected workmen'' in the establishment would exceed the prescribed number of protected workmen admissible for the said establishment u/s 33(4) of the Industrial Disputes Act.

14. Mr. Bhattacharjee specifically urged before this Court that the company has no other option but to comply with the mandatory provisions of the Industrial Disputes Act and rules framed thereunder. Mr. Bhattacharjee farther contended that who should be recognised as ''protected workmen'' has been left to the choice of the concerned trade union and not with the employer under the Industrial Disputes Act and West Bengal Industrial Disputes Rules, 1958. According to the learned counsel of the respondent workman, employer cannot remain silent upon receipt of the communication under Rule 71(1) of the West Bengal Industrial Disputes Rules, 1958 from the concerned union. Learned counsel of the workmen further submitted that silence on the part of the employer will bring into play the mandatory provisions of the statute and the list of workmen forwarded by the union should be deemed to be ''protected workmen''.

15. Mr. Bhattacharjee specifically urged that the employer cannot make the provisions relating to grant of recognition to the protected workmen nugatory by merely refusing to respond to the communication of the union made under Rule 71(1). Learned counsel of the workmen referred to and relied upon a decision of the Gujarat High Court reported in R. Balasubmmanian and Ors. v. Carborundum Universal Ltd. 1977 Lab. I.C. 826 in this regard.

16. Rule 71(1) empowers the union to select the office bearers who should be recognised as protected workmen and the names and addresses of such officers of the union who are employed in the establishment should be communicated to the employer by the concerned union before September 30, every year. Sub-rule (2) of Rule 71 casts an obligation on the employer to recognise such workmen to be protected workmen subject to condition as mentioned in Section 33(4) of the Industrial Disputes Act.

17. Rule 71(2) does not empower the employer unfettered power regarding selection and recognition of protected workmen. If the concerned trade union complies with the provision of Sub-rule (1) of Rule 71 then, under Sub-rule (2) employer is duty bound to recognise the workmen whose names have been

forwarded by the concerned union under Sub-rule (1) to be protected workmen unless the total number of such office bearers forwarded by the concerned union exceeds the maximum number of protected workmen admissible for the establishment u/s 33(4) of the Industrial Disputes Act.

18. The Division Bench of the Gujarat High Court in the case of R. Balasubramanian and Ors. (supra) considered an identical issue under similar circumstances and bserved as hereunder:

"4. A bare perusal of Rule 66 shows that under Clause (1) every trade union connected with the establishment to which this Act applies has to communicate before September 30, every year, names and addresses of its officers employed in the establishment whom it chooses for being recognised as such protected workmen. Thereafter, if there is any change in incumbency of such officer, the employer has to be communicated this fact within 10 days of the change by the trade union. Therefore, Sub-clause (1) of Rule 66 gives 1 a choice to the union to select officers who should be recognised as protected workmen and casts an obligation on the trade union that before September 30, every year the names and addresses of these officers shall be communicated to the employer. Rule 66(2) then provides a duty on the employer to recognise such workmen as protected workmen for the purpose of Section 33(3), of course, subject to the provisions of Section 33(4), and the employer is required to communicate to the union in writing the list of such recognised protected workmen within 15 days of the receipt of the names and addresses from the trade union under Rule 66(1)."

"5. If these two clauses in Rule 66 are read together the whole scheme becomes abundantly clear that the choice of the individual officers who are to be recognised as protected workmen has been left to the concerned trade union as it alone can determine which officers need this statutory protection contemplated under Section. 33(3). Once this communication of the union''s choice before the requisite date of September 30, every year is sent to the employer Rule 66 casts a mandatory obligation that the employer shall recognise these workmen as protected workmen, subject to the statutory provision made in Section 33(4). In view of the mandatory language of Rule 66(2), the employer can refuse to recognise these protected workmen only if he can bring the case within the statutory grounds provided in Section 33(4). In Section 33(4) a provision is made that the recognition shall be of persons who are executive members or other office bearers, to the extent of only one percent of the total number of workmen employed, subject to the minimum of five protected workmen and the maximum number of 100 protected workmen. Another requirement of Section 33(4) is that when there are various trade unions, the employer has a right of distribution and allotment of the number of protected workmen as provided in Rule 66(3). Therefore, the only limited statutory right which the employer has, when the demand in case of a single trade union is for protection of its office bearers, is that if it is in excess of the maximum under Rule 66(3), the

employer shall recognise only the maximum of such protected number of workmen as provided u/s 33(4). The other right that the employer has is in cases where there are more than one trade union in the establishments, as the employer has a right to allot the number of protected workmen in the same proportion as of the membership of the concerned unions, and he has to intimate in writing to the President or Secretary of each union as the number which has been allotted to the particular trade union. There is further provision in Rule 66(3) that if the number of the protected workmen allotted by the employer in such case falls short of the number of the officers of the union seeking protection, the union shall be entitled to select its officers to be recognised as protected workmen and in that event, such selection by the union shall be communicated to the employer within 15 days of the receipt of the employer''s letter. That contingency did not arise in the present case because admittedly, this was the only union. Similarly, the recognition was claimed only for five persons who were admittedly, office bearers, and the number did not exceed the statutory maximum provided u/s 33(4). Therefore, none of the statutory rounds on which, the employer could object to the choice exercised by the concerned trade union existed in the present case and, therefore, the exception of Section 33(4) being not attracted to the present case, the employer under Rule 66(3) had the mandatory obligation to recognise these five office bearers whom the union had selected and he was bound to communicate recognition of these officers as protected workmen within 15 days period from the date of the receipt of the present application on September 29, 1972."
19. Rule 66 of the Industrial Disputes (Bombay) Rules, 1957, which has been considered in the aforesaid judgment by the Gujarat High Court is similar to Rule 71 of the West Bengal Industrial Disputes Rules, 1958 which is applicable in the present case.

20. The decision of the Supreme Court in the case of P.M. Kalyani v. Air France, Calcutta (supra), is clearly distinguishable in the facts of the present case. In the aforesaid decision, admittedly, the employer company had replied to the letter of the union pointing out certain legal defects. Relevant portion from the said judgment is quoted hereunder P.H. Kalyani Vs. Air France Calcutta, :

"............... The company had replied to that letter pointing out certain legal defects therein and there was no evidence to show what happened thereafter............."

But in the present case, the petitioner company never replied to the union upon receipt of the list of workmen to be recognised as protected workmen under Rule 71(1) of the West Bengal Industrial Disputes Rules, 1958. Accordingly, the aforesaid decision of the Supreme Court cannot be made applicable in the facts of the present case at all.

21. For the aforementioned reasons, I am of the view that the learned Judge of the Tribunal has rightly held that present workman, who is the respondent No. 2 herein,

is a ''protected workman'' within the meaning of Rule 71 of the West Bengal Industrial Disputes Rules, 1958 and as such he will have the benefit of statutory protection u/s 33(3)(b) of the Industrial Disputes Act.

22. Learned counsel of the petitioner company also urged before this Court that the Tribunal could not decide the issue relating to the ''protected workman'' as the respondent workman in his pleadings never raised the said issue.

23. The learned counsel of the workmen however, submitted that whether the workman is a ''protected workman'' or not is a question of law and the same can be raised even at the stage of, argument in absence of pleadings. However, from the records it appears that in the instant case the issue was duly raised at the time of hearing of the application u/s 33(2)(b) of the Industrial Disputes Act. From Order No. 3 dated April 29, 1999 passed by the learned Judge of the Tribunal it appears that I the workman concerned claimed himself as a ''protected workman'' within the meaning of Rule 71 of the West Bengal Industrial Disputes Rules, 1958, and the learned Judge granted opportunity to the petitioner company to deal, with the said claim of the workman concerned by submitting a written objection to that effect.

24. The company admittedly, contested the issue by filing a written objection and never raised any objection before the Tribunal for entertaining the said issue. The learned Judge of the Tribunal upon hearing the arguments of the respective parties accepted the claim of the workman concerned and treated the workman as a ''protected workman''.

25. Thus, in the present case, the petitioner company herein was well aware of the claim of the workman concerned for the status of ''protected workman'' and the learned Judge of the Tribunal also granted adequate opportunity to the petitioner company to deal with the said claim of the workman concerned by filing a written objection and admittedly, after filing of written objections by the petitioner company, learned Judge of the Tribunal decided the said issue. Accordingly, the petitioner company cannot raise any further objection before this Court against determination of the aforesaid issue by the Tribunal on the ground that the said issue was not expressly taken in the pleadings.

26. Chief Justice GAJENDRAGADKAR in the case of Bhagwati Prasad Vs. Shri Chandramaul, , observed as hereunder:

"10. .... If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence

27. Furthermore, in terms of Section 33(2)(b), the Tribunal is required to consider whether the prima facie case for according approval is made out and whether the

conditions prescribed u/s 33(2)(b) and the proviso are satisfied or not. In doing so the Tribunal is also required to satisfy itself that there is no statutory violation of any provision of the Act. Section 33(3) of the Industrial Disputes Act, 1947, prohibits the employer from taking any action against any protected workman during the pendency of any proceeding. This provision is notwithstanding the provision contained in Sub-section (2) of Section 33 of the Industrial Disputes Act. In other words, in arriving at its conclusion, the: Tribunal is required to go into the issue as to whether a workman is a protected workman and satisfy itself before according approval in terms of Section 33(2) of the Industrial Disputes Act. In other words, the provisions; contained in Sections 33(2) and 33(3) of the Industrial Disputes Act are required to be read in conjunction and the requirement of Section 33(3) has to be satisfied before the Tribunal could accord its approval u/s 33(2)(b). Therefore, the Tribunal was within its'' right to go into this question and the Tribunal has not committed illegality or irregularity in framing the said issue and going into the same or deciding the same. Moreover, the issue having been decided upon notice to the respective parties and also after affording full opportunity to all the parties, it is no longer open to the writ petitioner to raise the said issue again in this petition.

28. It was also urged before this Court by the learned counsel of the petitioner company that the petitioner company never received any written communication from the union under Rule 71(1) of the West Bengal Industrial Disputes Rules, 1958 and the signature appearing in the Peon Book regarding acceptance of the alleged communication of the said union under Rule 71(1) being disputed, the Tribunal could not have come to a conclusion that the notice as required under Rule 71(1) of the West Bengal Industrial Disputes Rules was duly received by the company.

29. In my view, the aforesaid question cannot be agitated in the instant writ petition as there is a clear finding of fact by the Tribunal to the following effect and specifically mentioned in the Order No. 7 dated May 19, 1999 passed by the learned Judge of the said Tribunal:

"It is also admitted position of both the I parties that following the provisions of Rule 71(1) of the W.B.I.D. Rules the said union informed the names of the Office Bearers and the names of the protected persons vide letter dated May 30, 1998. The company duly received such letter putting signature in the Peon Book but the company has not made any communication to the union following the provisions of Rule 71(2) of the W.B.I.D. Rules."

30. After admitting the position before the Tribunal, the petitioner company cannot re-open the issue before this Court in the present writ petition.

31. For the aforementioned reasons, I find no infirmity and/or irregularity in the impugned decision of the learned Judge of the Tribunal and therefore, I am not inclined to interfere with the said impugned order passed by the learned Judge of the Tribunal. In my view, this writ petition is devoid of any merit and accordingly, the

same is dismissed.

32. There will be, however, no order as to costs.

33. The parties are directed to act on the basis of the operative portion of the signed copy of the minutes of this order on the usual undertaking.