
Statesman Limited and Another Vs First Industrial Tribunal and Others

Writ Petition No. 1372 of 1999

Court: Calcutta High Court

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 of 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. Balasubramanian 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 observed 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 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 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.