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HIGH COURT OF GUJARAT *(D.B.)*

R BALASUBRAMANIAN
V/S
CARBORUNDUM UNIVERSAL LIMITED

Date of Decision: 20 August 1975

Citation: 1975 LawSuit(Guj) 80

Hon'ble Judges: J B Mehta, P D Desai

Eq. Citations: 1976 GLR 787, 1978 (1) LLJ 432, 1977 LabIC 826

Case Type: Special Civil Application

Case No: 1066 of 1973

Subject: Labour and Industrial

Acts Referred:
Industrial Disputes Act, 1947 Sec 33(4), Sec 33(3)
Industrial Disputes (Bombay) Rules, 1957 R 66(2), R 66(1)

Final Decision: Petition allowed

Advocates: H M Mehta,K S Nanavati, I M Nanavati

Reference Cases:
Cases Cited in (+): **9**
Cases Referred in (+): **5**

Judgement Text:-

J B Mehta, J

[1] The three petitioners workmen challenge in this petition the order of the Industrial Tribunal, dated April 30, 1978, holding that their complaint under sec. 33A was not tenable because they were not proved to be protected workmen at the time when the order of dismissal was passed on the morning of November, 28, 1972 and, therefore, there was no contravention of sec. 33(3) of the Industrial Disputes Act, 1947, hereinafter referred to as 'the Act.'

[2] The three petitioners were the of fice-bearers viz. President, Vice-President and treasurer respectively of the concerned union which was the sole union at the time in this company. This trade union viz. Carborundum universal union, okha, came in existence since November 1970. For the previous year, these three petitioners were recognised as protected workmen as per the decision of the conciliation of ficer, dated December, 23, 1971. For the year in question, before the requisite time of 30th September 1972, i. e. On September 25, 1972, the union communicated to the company the names of five of ficers of the trade union who were employed in this company's establishment and who should be recognised as protected workmen under sec. 33(3) read with rule 66. This application was received by the company on September, 29, 1972 and within the prescribed period of 15 days from the receipt of that letter the company failed to give any reply or to recognise the list of the five workmen submitted by the concerned trade union. In fact, this was the same list except for a change of one of the of fice-bearers as in the previous year's list which was duly recognised. Thereafter, the union approached the conciliation of ficer by the letter, dated October 28, 1972 as the company had failed to declare the names of the protected workmen. Even the conciliator passed an order on November, 28, 1972, that the five persons mentioned in the Union's Application dated December 25, 1972 were recognised as protected workmen. This order was passed on the same day on which the matter was heard on November 28, 1972. The company passed its dismissal order of these three main of fice-bearers in the morning of November 28, 1972 and, therefore, the three petitioners had filed the present complaint under sec. 33A, as admittedly, reference I.T. No. 44 of 1972 was pending before this tribunal. That complaint having been dismissed on the aforesaid preliminary point, the petitioners have challenged the order of the tribunal.

[3] The material sec. 33 runs as under :-

"33 (1) during the pendency of any conciliation proceeding a before a

conciliation of ficer 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 proceedings in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workmen concerned in such dispute, or where there are no such standing orders in accordance with the provisions 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, the 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-sec. (3), no employer shall

during the pendency of 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 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 of fice 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 purposes of sub-sec. (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 rule 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 of ficer, Board (an arbitrator) a Labour Court. Tribunal or National Tribunal under the proviso to sub-sec. (3) for approval of the Action taken by him, the authority concerned shall, without delay, hear such application and pass, expeditiously as possible such order in relation thereto as it deems fit.

Thereafter sec. 3A provides that where an employer contravenes the provisions of sec. 33 during the pendency of proceedings before the tribunal,

any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner to such tribunal and on receipt of such a complaint that tribunal 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 its award to the appropriate Government and the provisions of the Act shall apply accordingly. The scheme underlying these to provisions has now been finally examined in their Lordships' decision in Air India Corporation v. V. A. Rebellow, 1972 (1) L. L. J. 501, at page 507, and it has been poin-ted out as under:-

"The basic object of these two sections broadly speaking appears to be to protect the workmen concerned in the disputes which form the subject-matter of pending conciliation proceedings or proceedings by way of reference under sec. 10 of the Act, against victimisation by the employer on account of raising or continuing such pending disputes and to ensure that those pending proceedings are brought to expeditious termination in a peaceful atmosphere, undisturbed by any subsequent cause tending to further exacerbate the already strained relations between the employer and the workmen. To achieve this objective a ban, subject to certain conditions, has been imposed by sec. 33 on the ordinary right of the employer to alter the terms of his employees' services under the general law governing contract of employment and sec. 33A provides for relief against contravention of sec. 33, by way of adjudication of the complaints by aggrieved workmen considering them to be disputes referred or pending in accordance with the provisions of the Act. This ban, however, is designed to restrict interference with the general rights and liabilities of the parties under the ordinary law within the limits truly necessary for accomplishing the above object. The employer is accordingly left free to deal with the employees when the Action concerned is not punitive or mala fide or does not amount to victimisation or unfair labour practice. The anxiety of the legislature to effectively achieve the object of duly protecting the workmen against victimisation or unfair labour practices consistently with the preservation of the employer's bona fide right to maintain discipline and efficiency in the industry for securing the maximum production in a peaceful harmonious-atmosphere is obvious from the overall scheme of those sections. Turning first to sec. 33, sub-sec. (1) of this section deals with the case of a workman

concerned in a pending dispute who has been prejudicially affected by an Action in regard to a matter connected with such pending dispute and sub-sec. (2) similarly deals with workmen concerned in regard to matters unconnected with such pending disputes. Sub-sec. (1) bans alteration to the prejudice of the workman concerned in the conditions of service applicable to him immediately before the commencement of the proceedings and discharge punishment whether by dismissal or otherwise of the workman concerned for misconduct connected with the dispute without the express permission in writing of the authority dealing with the pending proceeding. Sub-sec. (2) places a similar ban in regard to matters not connected with the pending dispute but the employer is free to discharge or dismiss the workman by paying wages for one month provided he applies to the authority dealing with the pending proceeding for approval of the Action taken. In the case before us we are concerned only with the ban imposed against orders of discharge or punishment as contemplated by clause (b) of the two sub-sections. There are no allegations of alteration of the complainant's terms of service. It is not necessary for us to decide whether the present case is governed by sub-sec. (1) of sub-sec. (2) because the relevant clause in both the sub-sections is couched in similar language and we do not find any difference in the essential scope and purpose of these two sub-sections as far as the controversy before us is concerned. It is noteworthy that the ban is imposed only in regard to Action taken for misconduct whether connected or unconnected with the dispute. The employer is, therefore, free to take Action against his workmen if it is not based on any misconduct on their part. In this connection reference by way of contrast may be made to sub-sec. (3) of sec 33 which imposes an unqualified ban on the employer in regard to Action by discharging or punishing the workmen whether by dismissal or otherwise. In this sub-section we do not find any restriction such as is contained in clause (b) of sub-sec. (1) and (2). Sub-sec. (3) protects "protected workmen" and the reason is obvious for the blanket protection of such a workman. The legislature in his case appears to be anxious for the interest of healthy growth and development of trade union movement to ensure for him complete protection against every kind of order of discharge or punishment because of his special position as an of ficer of a registered trade union recognised as such in accordance with the rules made in that behalf. This explains the restricted protection in sub-sees (1) and (2)."

It is in the light of this benevolent scheme of this blanket protection which has been extended by the legislature to protected workmen that we have to examine the relevant rule 66 which lays down only the procedure for recognising such protected workmen. The legislature having disclosed its anxiety in the interest of healthy growth and development of trade union movement to ensure complete protection against every kind of order of discharge or punishment because of his special position to such protected of fice-bearer of a registered trade union recognised as such in accordance with this rule 66, the said procedural rule will have to be broadly interpreted so as to carry out the benevolent purpose of this legislative scheme and not to frustrate the same. The relevant rule 66 runs as under-

"66. Protected workmen -(1) a every trade union connected with an industrial establishment to which the Act applies, shall communicate to the employer before the 30th September every year, the names and addresses of such of the of ficers of the trade union who are employed in that establishment and who, in the opinion of the trade union, should be recognised as protected workmen. Any change in the incumbency of any such of ficer shall be communicated to the employer by the trade union within fifteen days of such change.

(2) the employer shall, subject to the provisions of sub-sec. (4) of sec. 33 recognise such workmen to be protected workmen for the purposes of sub-sec. (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) that list of workmen recognized as protected workmen.

(3) where the total member of names received by the employer under sub-rule (1) exceeds the maximum number of protected workmen admissible for the establishment under sub-sec. (4) of sec. 33, the employer shall recognise as protected workmen only such maximum number of workmen :

Provided that, where there is more than one 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 each union the number of protected workmen allotted to it :

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

(4) When a dispute arises between an employer and any trade union in any matter connected with the recognition or protected workmen under this rule, dispute shall be referred to the conciliation of ficer concerned, whose decision thereon shall be final."

Under the explanation to sec. 33, for the purpose of sec. 33(3), a "protected workman" has been defined as a workman, who being a member of the executive or other of fice bearer of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf i. e. Rule 66. Under sec. 33(4) the number to be recognised as protected workmen for this sec. 33(3) is prescribed as 1% of the total number of workmen employed therein subject to a minimum of 5 protected workmen and maximum number of 100 protected workmen. In case of a number of trade unions connected with the establishment, the distribution of such protected workmen who are to be recognised as such protected workmen has to be as per the relevant rule 66.

[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 30th September, every year, names and addresses of the of ficers employed in the establishment whom it chooses for being recognised as such protected workmen.

Thereafter if there is any change in incumbency of such of ficer, 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 a choice to the union to select of ficers who should be recognised as protected workmen and cast an obligation on the trade union that before 30th September every year the names and addresses of these of ficers 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 sec. 33(3), of course, subject to the provisions of sec. 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 of ficers who to be recognised as protected workmen has been left to the concerned trade union as it alone can determine which of ficers need this statutory protection contemplated under sec. 33(3). Once this communication of the union's choice before the requisite date of 30th September every year is sent to the employer, rule 66 casts a mandatory obligation that the employer shall recognise these workmen as projected workmen, subject to the statutory provision made in sec. 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 sec. 33(4) in sec. 33(4) a provision is made that the recognition shall be of persons who are executive members or other of fice bearers, to the extent of only of 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 sec. 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, only the limited statutory right which the employer has, when the demand in case of a single trade union is for protection of only of fice-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 under sec. 33(4). The other right that the employer has is in cases, where there are more than one trade unions 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 to 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 of ficers of the union seeking

protection, the union shall be entitled to select its of ficers 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 per. One who were admittedly of fice-bearers, and the number did not exceed the statutory maximum provided under sec. 33(4). Therefore, none of the statutory grounds 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 sec. 33(4) being not attracted to the present case, the employer under rule 66(3) had the mandatory obligation to recognise these five of fice-bearers whom the union had selected and he was bound to communicate recognition of these of ficers as protected workmen within 15 days period from the date of the receipt of the present application on September 29, 1972.

[6] It is true that if the employer refuses to recognise on the relevant ground falling under sec. 33(4) and if a dispute arises, the statutory dispute has to be resolved under rule 66(4) by reference to the conciliation of ficer concerned, whose decision is made final. This statutory reference is in the widest terms in respect of any dispute which may arise between the employer and any trade union in the matter connected with recognition of protected workmen under rule 66. This dispute had even been resolved on the earlier occasion. The employer in the present case had, however, failed to carry out the mandatory obligation under rule 66(2) without any reason whatsoever and without giving any reply in that connection. The averments in para 8 of the petition are categorical that the employer never questioned the proposal of the union nor had raised any dispute within 15 days of the communication sent by the union; nor even thereafter at any time even before the conciliation of ficer. It is also categorically stated that there was no dispute which called for the decision of the conciliation of ficer and the petitioners ought to have been considered to have been recognised as protected workmen. These allegations were not controverted by any affidavit-in-reply. In fact, as earlier pointed out, there was nothing in the present case which could enable the employer to raise any such statutory ground of exception by recourse to the relevant provision of sec. 33 (4), because this was a case of a single union which was claiming protection for only the maximum number of five persons who were admittedly of fice-bearers. Therefore, there was no scope whatsoever for any dispute arising on the present facts and the employer was bound to give recognition to these five of ficers who were entitled to be recognised as protected workmen.

[7] Mr. Nanavati, however, vehemently relied on the decision in P. H. Kalyani v. M/s Air France, Calcutta. A. I. R 1963 S.C. 1756, in the context of west Bengal rule 71 which was almost in similar language, except for the fact that there was one clause which required that copies of communication under sub-rule (1) and (2) by the trade union and the employer shall also be sent to the labour Commissioner and the conciliation of ficer concerned. In that case their lordships pointed out that the mere fact that a letter was written to the manager of the company mentioning the names of the of ficebearers who should be recognised as protected workmen would not be enough. Their lordships in terms referred to the relevant fact in that case that the company had replied to that letter pointing out certain legal defects therein and there was no evidence to show what happened thereafter. In view of these facts, the Labour Court had held that according to the rules framed by the Government of west Bengal as to the recognition of the protected workmen, there must be some positive Action on the part of the employer with regard to the recognition of the employers as protected workmen before they could claim to be protected workmen under sec. 33. As nothing was shown to their lordships against this view, in absence of any further evidence as to recognition, it was held that the Labour Court was right in holding that the person concerned was not protected workman and, therefore, no previous permission under sec. 33(3) was necessary before his dismissal. That ratio clearly proceeds on the special facts that as the company had in its reply clearly pointed out legal defects and had therefore raised a question of statutory exception under sec. 33(4), unless these legal defects were duly remedied, there would be no question of recognition. In such context the labour court was right in insisting on the recognition in such case by some further positive Action of the employer and as there was no evidence to show what had happened after this letter of the employer, the decision of the labour court was upheld. That ratio could never apply to the facts of the present case where on admitted facts, there is no ground whatsoever on which the recognition could be disputed the case was of a single trade union where his employer had no right to allot the number and the recognition having been claimed of the minimum number of the five of ficers as per statutory limits in sec. 33(4), the employer had no right whatever to refuse to give recognition, once the choice was duly exercised by the concerned trade union in such a context there was no question of any dispute being raised because there was no statutory ground which would justify the employer in refusing recognition to these of ficers as claimed by the concerned trade union under rule 66(1). The employer had, therefore, no option but to send its recognition as per the mandatory requirement of rule 66(2) within 15 days period. In such a context even if the employer fails to perform the statutory duty of sending recognition, by such a default or from the fact of complete absence of reply by the

employer, there could be no inference of non-recognition as vehemently contended by Mr. Nanavati. The recognition can be express or may be necessarily implied from the admitted facts, where there would be no statutory ground whatsoever for refusing this recognition, so that any question of a dispute could arise. The dispute in the present context of rule 66(4) can only be a bona fide dispute as per the relevant provision and, therefore, such a dispute can only arise when the employer after receiving the choice of the trade union under rule 66(1) raises in its reply any of the relevant statutory grounds open to it under sec. 33(4). If no such grounds are indicated and even they did not exist, there would be no question of any bona fide dispute within the meaning of rule 66(4). In such a case the employer can never by his mere failure to reply or to carry out the mandatory obligation of rule 66(2) escape the statutory obligation which would arise in such a case. There being no objection whatever which could come under sec. 33(4), the employer being under a statutory obligation to give recognition as per the union's list of the minimum number of five of ficers under rule 66(1), even in the absence of any express recognition, the recognition would have to be necessarily presumed. Any other construction of this rule would require us to presume that the employer was committing a default in his statutory obligation, and by his default he cannot set at naught the salutary protection which is sought to be conferred by the legislature to these protected workmen.

[8] Mr. Nanavati vehemently argued that the recognition has to be done by a positive Act of the employer and, therefore, the employer has a right to consider the choice of the individuals. This construction of the aforesaid statutory scheme by Mr. Nanavali would completely frustrate this salutary object. The statutory obligation under rule 66 is subject to the relevant provision of only sec. 33(4), where the objection can be as to the person not being such of fice bearer or as regards the number being not as required by this statutory provision of sec. 33(4), or that the employer has a right of allotment of the number to the rival trade union under that provision read with rule 66(3). Therefore, the entire right which the employer has by refusing his concurrence to the union's choice under rule 66(1) is only as regards the number and it had no role whatever to play in the selection of the individuals. Therefore, once the case is found to be of a single trade union and the protection is claimed for the minimum number of five of ficebearers within the statutory limits of sec. 33(4), the employer would have no discretion whatsoever to refuse recognition on any statutory ground and, therefore, in such a case, rule 66(2) would clearly lay down the mandatory obligation on the employer to communicate to the union within 15 days of the receipt of the union's communication under rule 66(1), the recognition of the said list, for the simple reason that in such a case no dispute whatever

can be raised by the employer, except one which is frivolous and mala fide to deprive the concerned protected workmen of their statutory protection. In such a case the recognition would have to be necessarily inferred even when the employer remains silent and commits default by not communicating to the union within 15 days period the list which he had recognised. This necessary inference would have to be raised because in such a question no bona fide dispute can ever arise for resolution under rule 66(4).

[9] Mr. Nanavati next argued that the contravention of this relevant rule would make the employer liable for the penalty under rule 89, or if the employer contravenes sec. 33 by discharging or dismissing such a protected workman, he would be liable for the penalty under sec. 31. Mr. Nanavati, accordingly argued, that this was, therefore, a penal provision which must be construed strictly according to its plain language. If the employer committed default of any mandatory obligation laid down by rule 66, the penal consequence in rule 89 would be necessarily attracted. Merely because the penal consequence is attracted, we cannot make this mandatory rule a directory rule so that the employer has no obligation whatever. The employer cannot at its sweet will choose to deprive the concerned workmen of their statutory protection and in such a context we can never make this benevolent provision a dead letter merely because the employer mala fide or dishonestly without any statutory ground coming within sec. 33(4) fails to recognise such workmen as protected workmen. The employer must be presumed to be law abiding and the construction will have to be put on the plain language of the relevant statutory scheme so that its benevolent purpose is not frustrated but is clearly advanced by securing such statutory protection. In Mate of Bihar v. A. K. Mukerjee, A.I.R. 1975 S. C. 192 at page 196, while construing the relevant statutory in rules, their lordships took a clue from the salutary observations of denning L. J. In Seaford Court Estates Ltd. v. Asher, (1949) 2 A. I. R. 155 at para 164 as under :-

> "When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of parliament and then he must supplement the written words so as to give force and life to the intention of legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this truck in the texture of it, they would have straightened it out ? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

In the present case even on a plain reading of the statutory language of rule 66(2), the employer has a mandatory obligation to recognise and communicate to the union in writing within 15 days of the receipt of the union communication a list of workmen recognised by him as protected workmen, unless he can plead that the statutory limits or constitutions under sec. 33(4) are not observed. Unless that exception is made out by the plea being raised in reply to the union's communication, the employer cannot escape its mandatory obligation to recognise the list of protected workmen submitted by the union as per its own choice. When the statutory limits under sec. 33(4) have been fully observed by the union and the recognition is claimed in a single union factory of only the minimum number of five persons who are admitted of ficers, even on the plain literal construction of this procedural rule 66(2) it could never be urged that the employer has any discretion left to refuse such recognition, in such a case even if the employer fails to reply, there can be no question of any bona fide dispute which would have to be resolved under rule 66(4) merely because the employer fails to carry out his statutory obligation under rule 66(2), by not sending the express recognition. In such a case even if the express recognition is not there, such recognition would have to be necessarily implied because any other construction would enable the employer to escape statutory obligation by his own default and would frustrate the very purpose of this benevolent scheme of widest statutory protection to such protected workmen. The matter can be also examined from another angle. In the present case, even the Conciliation of ficer has resolved the dispute, if any, after hearing the employer by the order passed on November 28, 1972. Mr. Mehta, therefore, sought to invoke the doctrine of relation back by contending that this order of November 28 1972 must have statutory effect once the dispute was now finally resolve from the date when these workmen were entitled to be recognised as such on the receipt of the application by the employer. The whole scheme of the benevolent protection envisaged by the legislature would remain a dead letter if it is sought to be interpreted by holding that the recognn takes effect only from the date of the decision of the conciliation of ficer rule 66(1) contemplates such recognition every year and some time is bound to elapse between the communication by the union of choice of its protected workmen under rule 66(1) and the resolution of such a dispute under rule 66(4). Even the same workmen, who have been recognised as protected workmen even

by a resolution of the dispute of the earlier year may remain without protection till the dispute is resolved next year. Such an interpretation of creating an interregnum so that the protected workmen without any protection would completely frustrate the salute behind this scheme of complete blanket protection in widest them. Therefore, in such cases, in any event, even the doctrine of relation back must be invoked this doctrine is not something strange in the labour field in the same decision in P. H. Kalyani v. M/s Air France A.I.R. 1963 S.C. 1756, their lordships had considered this doctrine of relation back in the context as to when the approval granted by the Labour Court in case of a defective enquiry which was allowed to be supplemented could take effect.

[10] Their lordships held that if an enquiry was defective for a son, the labour court would also have to consider for itself on the evidence adduced before it that the dismissal was justified. However if the conclusion that on its own appreciation evidence adduced before it that the dismissal was justified, its approval of the order of dismissal made by the employer in a defective enquiry would still relate back to the date when the order was made. Mr. Nanavati could never therefore the employer would be prejudiced in any manner by invocation f principle of relation back. If the employer remains negligent and does not exercise due vigilence as required by law and suffers by reasons of his own default, he takes knowingly a calculated risk. That would be no reason not to give back effect to such an order which alone would carry out the purpose of this salutary blanket prohibiyion as per the intention of the legislature.

[11] We may, of -course, mention that Mr. Nanavati had pressed aid certain illustrations to show hardship to the employer which was more imaginary than real in cases where more than one trade unions were connected with the establishment. Mr. Nanavati argued that if the application was made by one trade union much earlier in about August or it had given a list in excess of the maximum and if all such rival unions adopted the same method, from mere employer's silence, no such recognition of number in excess of maximum could be inferred. In these illustrations Mr. Nanavati ignores the legal defect in the application which is made for recognition of more than maximum persons or when the employer is entitled to make allotment of number of such protected workmen to various unions as per the relevant statutory provision. These are the cases where application would not be capable of being granted as such and some positive Action on the part of the employer would be clearly necessary. If however, the employer

has made a statutory allotment as per the relevant provision of the number of protected workmen between the various unions and the applications are made for recognition, of the number so allotted, the case would be clearly appropriate in the present context because such applications would have to be granted as of right. If, therefore, the employer in such cases fails to reply in the prescribed time, the conclusion would be inescapable that the employer's default was from oblique considerations and his failure to communicate the list of the recognition of the protected workmen would lead to the necessary inference of recognition. There could be no bona fide dispute to be resolved in such cases. Therefore, on such imaginary ground of hardship arising out of the employer's own default or failure to give a reply due to the oblique considerations, the plain language of the salutary scheme could not be strained so as to defeat its benevolent purpose and deprive these protected workmen of their statutory rights.

[12] In that view of the matter the entire order of the tribunal was totally perverse and under a complete misconception of the true scheme underlying recognition of the protected workmen. In the present case, the application was for recognition of the minimum 5 admitted of fice-bearers workmen in case of a single trade union and, therefore, the application had to be granted as of -course and in such a case the necessary inference of recognition could be drawn even from the mere failure to reply by sending communication of the recognition within 15 days period. In any event, on the doctrine of relation back, the order which had sought to resolve the dispute, if any, and which was passed on November 28, 1972, would clearly take effect from the date of the receipt of this application by the employer on September 29, 1972. In that view of the matter, the dismissal orders which were passed against the petitioners without the express permission of the tribunal would clearly contravene the provision of sec. 33(3) and that preliminary point having been wrongly answered, this petition must be allowed and the matter shall now go back on this finding on the preliminary question to the tribunal for further disposal of the complaint under sec. 33A in accordance with law on the merits, as expeditiously as possible, within a period of two months from to-day. Rule is accordingly made absolute with costs.

Petition allowed.

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